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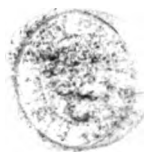
DECEMBER TERM, 1849, AND MARCH, MAY, SEPTEMBER, OCTOBER AND
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JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

Hon. JOHN BANNISTER GIBSON, *Chief Justice.*

Hon. MOLTON C. ROGERS,

Hon. RICHARD COULTER,

Hon. THOMAS S. BELL,

Hon. GEORGE CHAMBERS,

} *Justices.*

Commissioned 10th April, 1851, in the place of
the Hon. THOMAS BURNSIDE, dec'd.

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

Commissioned 28th April, 1851.

[The Hon. THOMAS BURNSIDE was indisposed during the latter part of the Session at Sunbury, and in the early part of the Session at Pittsburg. He died on Tuesday the 25th day of March, 1851. His death was announced in the Supreme Court, on Thursday 27th March, by CHARLES B. PENROSE, Esq., and in respect to his memory, the Court adjourned.]

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

~~~~~  
EASTERN DISTRICT—DECEMBER TERM 1849.

PHILADELPHIA.  
~~~~~

Wood *versus* Levis.

A sheriff has no right to impose terms of sale, on a *venditioni exponas*, different from those which the law imposes.

When, at such a sale, the sheriff declared that the purchaser would not have to pay more than the amount of his bid, when, in fact, a mortgage existed on the premises, which the sale would not discharge: *Held*, that the remedy of the purchaser was by application to the Court, after the return of the writ, and that he was not entitled to defend, on that account, on a proceeding on his bond for part of the purchase-money.

ERROR to the Common Pleas of *Chester county*.

Judgment entered September 18, 1847, on a single bill and warrant of attorney, dated December 5, 1846, for \$515. "For the use of Samuel Mercer."

December 16, 1847; on motion of *Mr. Darlington*, and affidavit filed, rule to show cause why judgment shall not be opened.

April 19, 1848; argued, and rule absolute.

June 21, 1848; plaintiff files his narr. in two counts, on the bond of William Levis, dated December 5, 1846, as set forth *infra*, assigning breaches in the non-payment of the purchase-money according to the conditions of sale, and the non-payment of the

[Wood v. Levis.]

difference or deficiency between the bid of the defendant at the first sale and the price the lot was sold at the second sale, with the interest, cost, and expenses consequent thereon.

June 29, 1848; defendant pleads payment, with leave, &c.

Wilson Pierce was the owner of several lots of land in Dilworthstown, Chester county. These lots were encumbered by a mortgage given by Cyrus Darlington, a former owner; by a judgment recovered against Cyrus Darlington and regularly revived; and by two other judgments recovered against Pierce. One of these last-mentioned judgments was in favor of William Levis, the defendant, the father-in-law and neighbor of Pierce, and was entered on bond and warrant of attorney to confess judgment for \$1050, Jan. 14, 1842. The other was in favor of Samuel Mercer, for \$1000, and was entered January 13, 1844, also on bond and warrant, &c.

William Levis, having issued a *scire facias* against Pierce, obtained judgment August 12, 1846, and issued his *feri facias* to October term, 1846. The real estate was levied on and condemned; and to January term, 1847, Levis issued a *venditioni exponas*.

On this writ the property was exposed to sale in five several lots, and sold. William Levis became the purchaser of three of the lots, including that on which a blacksmith shop was erected, and surety to the sheriff for the payment of the purchase-money by John Evans, the purchaser of a fourth lot.

Levis failed to pay the purchase-money at the return of the writ, and the sheriff returned that the property was fairly struck off to him at his bid, (as will be more particularly stated,) that he had failed to comply with the conditions of sale, and that therefore the property remained unsold.

Levis then caused an *alias venditioni exponas* to be issued, returnable to April term, 1847. The property was again sold. Levis became the purchaser of all the lots but one, and surety for the purchaser of that. The sheriff made return of all the property having been sold to Levis, and executed a deed to him in due form, which was acknowledged at the same term, April, 1847.

At the first sale, the property brought \$2362. At the second, \$1438.02. At the first sale the blacksmith shop and lot brought \$515. At the second, 288.68.

The sheriff took, at both sales, a bond from the purchaser for the purchase-money of each lot, binding him to pay the sum bid according to the conditions of sales. These bonds were accompanied by a warrant of attorney.

The conditions of sale, among other things, provided for the payment of the purchase-money on the return day of the writ, and bound the purchaser, on failure to comply, to pay the difference between that and a future sale.

[Wood v. Levis.]

September 1, 1847; the bonds against Levis were entered, and marked for the use of Samuel Mercer, a subsequent judgment creditor, as already stated.

The bond in this case was for \$515, the purchase-money of the blacksmith shop and lot.

The plaintiff took a rule to show cause why execution should not issue on this judgment. The defendant then filed an affidavit, setting forth that, "at the time of the sale, the purchasers were given to understand, that the said real estate was selling clear of encumbrances, and this understanding was obtained from the sheriff, or crier, or both, and was the clear understanding of all present; and the sums bid for said lots, and at which they were struck off, was the full value thereof free of encumbrances; that at that time the whole of said premises was subject to a mortgage of \$1000, and its interest, held by George S. Matlack, which was not noticed by the sheriff in his conditions of sale, or in any way made known to the bidders, &c.," and the Court opened the judgment.

The plaintiff then declared on his bond, and assigned as breaches, the non-payment of the purchase-money of the first sale, and also the non-payment of the difference between the first and second sales. The defendant pleaded payment with leave, &c.

On the trial, the plaintiff gave in evidence the Levis judgment against Pierce, together with the several executions issued thereon, and the returns made by the sheriff to the writs, the conditions of the two sales, Levis's acknowledgment of purchase and obligation as purchaser, and Samuel Mercer's judgment against Pierce.

The defendant offered to prove by sheriff, crier, and others, substantially the facts stated in his affidavit. The plaintiff objected; the Court overruled the objection, and the plaintiff excepted.

The evidence was then exhibited. The mortgage referred to in the affidavit was produced, and James B. Wood, the sheriff, testified that the conditions of sale of the first lot were read, and it was announced that the conditions of sale of all the lots were the same; that before the first lot was struck off, some person inquired whether the purchaser would have more to pay than the price bid. "If I replied," he said, "and I believe I did, I replied—the purchaser would have nothing more to pay." There was no inquiry made as to the other lots. The blacksmith shop, lot No. 4 in the writ, was sold last. *At the time of the sale the sheriff knew nothing of the existence of the mortgage.* Other testimony was given, tending to prove the question as stated by a bystander, and answer of the sheriff.

When the defendant closed, the plaintiff called witnesses, who gave testimony tending to prove that William Levis knew of the existence of the mortgage, and to disprove the fact as to the inquiry and sheriff's answer alleged by defendant.

The plaintiff filed three points, upon which he asked the court

[Wood v. Levis.]

to charge, in substance:—1. That this being a judicial sale, the rule of *caveat emptor* applied, and that the defendant is not excused from the fulfilment of his contract because of encumbrances of which he had no knowledge. 2. That the sheriff is not bound to give information of encumbrances, and that if he should answer inquiries relating to them, he is not responsible for the correctness of the answers. 3. If the defendant had any excuse to make for the non-fulfilment of his contract, he ought to have applied to the court to set aside the sale.

The court charged, *inter alia*, "If Levis purchased on the representations of the sheriff, as to the title, or in respect to the encumbrances, he would still be liable on his bond. The rule of *caveat emptor* applies with full force. But, if his contract was to pay \$515, and no more, then his bid was conditional; and if the sheriff chose to take his bid on such terms, he was not bound to comply with the conditions of sale, upon afterwards discovering that to retain the right of defendant he must pay off the mortgage. We submit the question of fact to you, whether the evidence shows that Levis was present at the sale, and whether he was told by the sheriff that he would have to pay no more than he bid, and thereupon became the purchaser. If you are satisfied of this, and that he afterwards became acquainted with the existence of the mortgage, the defendant is entitled to your verdict."

Verdict for defendant.

It was assigned for error, that,

1. The court erred in admitting the evidence stated on plaintiff's first bill of exceptions.

2. The court erred in their answer to the defendant's points, and in not answering them with sufficient precision.

3. The court erred in leaving it to the jury to determine whether the defendant's contract was to pay \$515 and no more.

4. The court erred in submitting it as a question of fact, whether the evidence showed that Levis was present at the sale, and whether he was told by the sheriff that he would have to pay no more than his bid, and thereupon became the purchaser; and in instructing them that if they were satisfied of this, and that he afterwards became acquainted with the existence of the mortgage, the defendant was entitled to their verdict.

5. The questions of fact were submitted to the jury, without evidence.

Lewis for plaintiff in error.—He contended that a sheriff, of himself, has no right to impose conditions of sale, which may alter the legal effect of his official acts. 6 *Watts* 144; *do.* 148; 8 *W. & S.* 259–399; *do.* 446; 8 *Watts* 48; 2 *Pa. Rep.* 840; 5 *Barr* 175; 10 *do.* 494.

[Wood v. Levis.]

W. Darlington, contra:—That chancery will relieve in case of fraud or defect of title, and that defendant should not be compelled to pay more than the amount of his bid. 5 *Bin.* 365; 2 *Watts* 257; 8 *Serg. & Rawle* 178; 1 *Story's Eq.* 164, &c.; 9 *Serg. & Rawle* 403; 2 *Pa. Rep.* 16.

The opinion of the court was delivered January 28, 1850, by COULTER, J.—The judgment in this case must be reversed. It is fit, and proper, and every way conduces to public advantage, that judicial sales should be subject only to the terms which the law imposes. Neither sheriffs, nor any other ministerial officers, have power to make terms different from those prescribed by law. It is not certain whether the sheriff replied to the interrogatory put in the crowd, or whether it was some other person. But, if he did, he had no authority to make his answer obligatory upon one party or the other. He probably answered to the best of his information. The conditions of sale were very clear and succinct, and they were those which the law sanctioned. It was the duty of the purchaser to inform himself of every fact which he deemed material.

The rule of law is *caveat emptor!* as applicable to law sales. If encumbrances exist, such as a mortgage, of which he had no notice at the sale, he is not thereby discharged from his liability; because everybody is supposed to know the law to be, that a sale on a junior judgment does not discharge the mortgage. It was the first and most obvious duty of the bidder to search the records for information on that subject. The sheriff, (if it was he who made the reply, that nothing but the amount of the bid would have to be paid,) meant, perhaps, that nothing but the amount of the bid would have to be paid to him, on that sale; or he may have been ignorant of the mortgage. He had no power or authority, whatever, to alter the terms of sale which the law provided. The defendant was bound to pay. If he had any excuse for not performing his contract, he ought to have applied at the return of the writ; perhaps the court would then have granted relief. The defendant is legally responsible for the difference between the first and second sale.

Judgment reversed and a *venire de novo* awarded.

Bisbing *versus* Graham.

The assignment of a promissory note *without recourse*, instead of merely endorsing it in blank, is not such a departure from the usual course of business, as to put the transferee on inquiry as to equities between the original parties.

The fact of the transferee being the son-in-law of the payee or endorser, is not sufficient to authorize a jury to presume fraud, as between the two.

The wife of the payee is a competent witness for a subsequent holder, *in support* of the note.

In the case of a note *lost* after suit brought upon it, it is not necessary for the plaintiff to give indemnity against it, before judgment; the court may, however, restrain the *execution*, till indemnity be given.

ERROR to the District Court, *Philadelphia*.

This was an action by Graham, as endorsee of Paynter *v.* Bisbing, the drawer of a promissory note, as follows :

March 11, 1843.

Four months after date, I promise to pay to David Paynter or to his order, three hundred and six dollars, for value received, without defalcation.

SAMUEL BISBING.

It was endorsed by Paynter, the payee, to the plaintiff, in these words :-

For value received, I assign to William Graham, or order, all my right, title and interest in the within note, without recourse.

DAVID PAYNTER.

Special pleas were filed.

The history of this suit was stated to be as follows :

The plaintiff in error, and Paynter, the endorser of the note on which suit is said to be brought, owned a vessel jointly together. A dispute about the possession was brought in the United States District Court. A settlement in writing finally took place, dated March 11th, 1843. The defendant gave a note for the balance ascertained, with the express agreement in writing, that if any other claims than those enumerated in said agreement, should be brought against the schooner mentioned in their agreement, they were to be paid by the plaintiff in error, and deducted from the amount of said note; and the plaintiff in error averred that such subsequent payment, to the amount of \$176.69 were presented, and \$146 of which were paid by him, and he was responsible for the balance of the said \$176, which should have been allowed him as a set-off on the trial below. And he further averred that the said note was fraudulently endorsed over to Graham, defendant in error, the son-in-law of Paynter, without consideration, to prevent said set-off: and the plaintiff in error also averred that Graham knew all the above facts at the time the note was endorsed over to him, and that he took it under suspicious circumstances, it being endorsed

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by Paynter without recourse, and that should have led him to inquiry.

Sarah Paynter, the wife of D. Paynter, was examined upon a rule, and her deposition read at the trial [although objected to], in which she stated that she was the owner of the one-half part of said schooner, and that she sold her note to Graham.

The note was not produced at the time of her examination before the magistrate under the rule to take her deposition, and although the objection was then taken by defendant, no proof was offered at that time of its being lost. Sarah Paynter did not pretend she had ever endorsed the note, although she alleged it was her's.

On the trial, the testimony of counsel was given, that the note was mislaid since suit brought; but no indemnity was offered against the note.

A nonsuit was moved for, on the ground that no recovery can be had upon a lost note without at least proffer of indemnity. The judge overruled the motion. No consideration was proved to have passed between endorser and endorsee, except what was contained in Sarah Paynter's deposition. Defendant's counsel insisted upon his equities of set-off between maker and payee, which was overruled by judge. Verdict for plaintiff below for \$389.38.

Assignment of errors :

1. That the judge charged that the plaintiff below might recover notwithstanding her note was mislaid.
2. That the judge charged that the plaintiff below might recover, notwithstanding the note was mislaid, if the jury were satisfied that the note was in existence and lost since the trial had been brought, even without indemnity offered.
3. That the judge told the jury that the plaintiff below might recover upon a lost note, not produced upon the trial, and without any indemnity offered at any time.
4. That the judge told the jury that the plaintiff below might recover upon a note lost or mislaid, if they were satisfied that the said note was in existence and lost since the suit was brought, without offering indemnity.
5. Because the judge told the jury that the plaintiff has a right to recover notwithstanding any equities between Paynter and Bisbing—Graham being son-in-law of Paynter—the note having been sold by Mrs. Paynter and endorsed by Paynter without recourse—which two latter facts, the jury were told by the judge below, were neither of them facts which ought to have put the plaintiff on inquiry, and although the plaintiff in error had called upon defendant in error before trial to prove consideration.
6. Because Sarah Paynter's deposition was admitted to be read to the jury.
7. Because no consideration was received for said note by Payn-

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ter, the endorser, nor proved to have been received by any one, except Sarah Paynter.

8. Because the testimony of John S. Burns was improperly excluded.

Error was also assigned to the admission of the testimony of counsel.

H. Hubbell and *W. Badger*, for plaintiff in error, that indemnity should be given when the note sued is lost: 7 *B. & Cress.* 90; 14 *E. C. L. R.* 20; 22 *do.* 372; 2 *Camp.* 211, 381; *Byle on Bills* 283-6; 4 *Esp. Rep.* 159; 3 *Yeates* 442; 16 *Vesey* 430; 1 *Nott's C. N. P.* 144; 6 *Esp. Rep.* 76; 6 *Serg. & Rawle* 537; 8 *do.* 328.

As to 5th assignment: 5 *Wend.* 20; 12 *Pick.* 545; 6 *Mass. Rep.* 46; 2 *Wash. C. C. R.* 152; 3 *Watts* 25; 4 *Bin.* 366.

E. D. Ingraham, for defendant, as to the matter of indemnity, and that it is in sufficient time, if given before taking out execution: 3 *Yeates* 442; 8 *Serg. & Rawle* 328; 2 *Camp.* 214; 4 *Bing.* 273; *Chitty on Bills* 290 *Ed.* of 1839; 16 *Vesey* 430.

As to admission of Sarah Paynter: 2 *Starkie's Rep.* 334; 1 *Miles* 204; 3 *Mass. Rep.* 225; 8 *Barr* 468.

The opinion of the Court was delivered, February 19, 1850, by

ROGERS, J.—Had suit been brought by Paynter, the payee of the note, it is beyond question, the maker would have been liable to set-off, under the agreement given in evidence. But the note being a negotiable instrument, the doubt is whether Graham, to whom it is endorsed, be a *bona fide* holder, without notice, and, as such, not affected by the equities duly existing between the original parties. That Graham knew of the agreement between Paynter and Bisbing was not pretended; at least, there is no proof of it; nor is there any proof from which fraud can be inferred. At the trial, the cause was not put on these grounds, but it was contended that, inasmuch as Graham, the endorser, was the son-in-law of Paynter, the payee, and the assignment was made out of the usual course of business, and without recourse, there was enough to put him on inquiry, and consequently he stood in no better position than the payee. If the premises are admitted, the conclusion is inevitable. But, taken separately, the objections, as will be shown hereafter, amount to nothing; nor are they more to be regarded when taken together; for, if you add nothing to nothing, *ad infinitum*, it is still nothing. The fact that Graham was the son-in-law of Paynter weighs nothing in the scale, because a son-in-law, as such, is not bound to know that his father-in-law meditates a fraud, by a plain and palpable violation of his agreement. Nor is the fact that the transfer of the note assumes the form of an ordi-

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nary assignment, such a departure from the usual course of business, as to put the endorsee on his guard against the endorser. Although a blank endorsement in our commercial towns is the usual mode, yet in the country it is so frequently otherwise that it seldom if ever provokes inquiry or observation. That it is made payable without recourse, produces no effect, is ruled in *Epler vs. Funk*, 8 *Barr* 468. In that the court properly ruled there was nothing proved in the case to put the endorser upon inquiry. That is the only question submitted to them on this head.

Exception is taken to the admission of Sarah Paynter, wife of, David Paynter, the payee's endorser, as a witness. She stands, as is conceded, in the same position with her husband. If he is competent, she is so also, and *vice versa*. That the husband is competent, is ruled in *Epler v. Funk*, 8 *Barr* 468; on the authority of *Barnes v. Ball*, 1 *Mass. Rep.* 73, and *Rice v. Stearns*, 3 *Mass. Rep.* 225. When an endorser is released, as here, he is competent, as is there expressly held, not to impeach, it is true, but to enforce payment of the note. For this purpose she was offered, and properly admitted. But was the court bound to non-suit the plaintiff on the ground that no action can be sustained against the maker of a lost note, without he proffers an indemnity? That the defendant is entitled to indemnity, before he can be compelled to pay, I have no doubt; for it may be, that the note was endorsed in blank by Graham, and is now in the hands of a holder for value. The time of the endorsement does not usually appear on the bill. This is a contingency against which the maker is entitled to indemnity. The maker ought not to encounter any risk, as he is in no default. The inconvenience, if any, is one to which the holder has exposed himself, arising, perhaps, from his own carelessness, or, as would appear, from the neglect of his agent. In this, all the authorities to which I refer generally agree. But the question recurs, is the failure to indemnify in bar of the action, or, is it a prerequisite merely to the execution to enforce payment of the judgment? In the absence of all direct authority, in this state at least, I incline to the latter view of the case. However the law may be, as to suit brought to recover on a lost note, (and I see no reason why there should be any difference,) we are of opinion that, when the note is lost after the commencement of the action, it is no objection to the rendition of judgment. Justice may be effectually administered by restraining the plaintiff from issuing his execution, without proper indemnity be given. This is an equitable power vested in the courts, which will take care to do equity, having a proper regard to all the circumstances of each case. It was formerly supposed the courts of this State could not do complete equity, having no power over the costs, which were in all cases to be determined by the event. But this was a narrow and contracted view of the law, long since exploded; and has now, happily, no

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place in our system of jurisprudence. In cases depending on principles of equity, the courts have, in substance, the powers of a Court of Chancery, to be administered with the machinery, (sometimes clumsy, it is true,) of common law forms.

The judgment is affirmed, the record remitted to the District Court, with directions to exact indemnity before execution is permitted to issue.

Scott versus Duffy.

Money, lent in Jersey to bet upon the presidential election, may be recovered in Pennsylvania.

ERROR to the District Court, *Philadelphia*.

This was an action of assumpsit by Duffy, against Scott, to recover \$300, alleged to have been lent to Scott in 1844. It appeared from the evidence, that the money was lent at Camden, New Jersey, and that Scott, at the time, said he wanted it to bet on the presidential election; it was to fill a bet. A witness said, "I can't say whether the bet was then made, but it was to stake for a bet on the presidential election. . . Scott gave no check or due bill; he said he would give a check, but Duffy said he need not give it then; they would settle it another time."

The court directed the jury, that if they believed that the money was lent for the purpose of being bet upon an election, and so applied, they should find for the plaintiff, subject to the opinion of the court on this point.

The jury found a verdict for plaintiff for \$363, subject to the opinion of the court on the above point.

Defendant moved for a new trial, and which rule was discharged, and judgment was entered for the plaintiff.

Error was assigned as to the charge and the entry of judgment.

J. A. Phillips, for plaintiff in error, contended that the transaction being an illegal one, the courts will not lend their aid to enforce the contract. 3 *B. & Ald.* 179; 3 *M. & W.* 434; 13 *Veasy* 313; 2 *B. & P.* 375; 5 *B. & Ald.* 335; 4 *Pet.* 410; 10 *Bing.* 110; 3 *Kelly's Geo. Rep.* 183.

McCall for defendant in error.—It was not proven on the trial that by the law of New Jersey the bet was illegal. But Duffy had no participation in the bet, and does not claim through any illegal act.

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He cited 4 *Burrowes* 2069; 3 *Term. Rep.* 419; 11 *Serg. & Rawle* 164; 5 *Barr* 71; 10 *Barr* 170; 11 *Wheaton* 258; *Carsan v. Rambert*, 2 *Bay*. 560; 2 *Strange* 1249; 2 *Wilson* 309; *Cowper* 341; 5 *Taunt.* 181.

COULTER, J., delivered the opinion of the court, March 19, 1850.

The plaintiff below loaned the money for which suit is brought, to the defendant, at Camden, in New Jersey, where persons were assembled to witness races.

Of that, there is no dispute. The defence is, that the plaintiff loaned the money with a knowledge that it was to be bet on the presidential election; and that, therefore, it is not recoverable. The law of the place where the contract was made, must furnish the rule for its interpretation, when it concerns personal property situated in the sovereignty where the parties are at the time, and where it is to be performed. Of course, the law of New Jersey, where the contract was made and the money loaned, is the rule of interpretation; but we have not been furnished with the statutes of that state, or any evidence of its laws on the subject of betting or wagering on elections; nor was the court below. The counsel for the plaintiff in error, however, thinks that unnecessary, and relies on the case of *Edgell v. McLaughlin*, 6 *Wharton* 176, which, he contends, settled the law that all wagers were against sound morals and contrary to law. That case only settled the law in Pennsylvania. But this is not an action to recover money won on a wager, nor to recover back money paid on a gaming contract. Wagers were not void at common law. Some were adjudged by the English courts to be so, on account of their tendency to indecency, as wagers concerning the sex of an individual. Others were adjudged void, as against public policy; such as wagers upon war or peace. Many statutes have been made against them in England, but some are still good there. The statute of 9 Anne, cap. 14, is very broad in its terms; and if such an one existed in New Jersey, it might, perhaps, help the plaintiff in error. It avoids all securities given for money won at play, or by gaming, or illegal bets, and prohibits the recovery of any money knowingly lent for such gaming or betting. Under this statute, it has been held that money knowingly lent to play at an illegal game, or to game with, could not be recovered. *McKinnell v. Robinson*, 3 *Meeson & Welsby* 434. But in 2 *Wilson* 36, it was adjudged, that the party on whose side the bet was made, must appear to have made it at a game, within the meaning of the act.

But we have no evidence of any such statute existing in New Jersey; therefore the decision of *McKinnell v. Robinson* is of no authority, nor have we any evidence that betting on elections is against the law of New Jersey. At common law, money loaned

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to be bet on a wager, may be recovered. In South Carolina, the value of a horse, lent to the defendant at a gaming table, and delivered over by him to the winner, was held to be recoverable by the lender, although lent for the purpose of being bet as a stake on the game, *Carson v. Rambert*, 2 Bay. 560; the court very justly observing that, where such contracts were void in England, it was under particular statutory provision. In England, since the statutes of 13 and 18 George II., regular racing on the turf is tolerated, and bets may be recovered.

The loan of the money, in this case, did not arise out of the bet, or any bet. It was not made to carry any specific bet into execution, but made on an assertion that it would be bet on the election. Honor, and good faith seem to require that it should be repaid, and we have not been informed of any statute in New Jersey which prevents it. As the loan was independent of any bet, and made before any bet was entered into, it was not necessary for the plaintiff, in any way, to aver or show to the Court below, that a bet was made. The test whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case: 11 *Serg. & Rawle* 155; 10 *Barr* 170. The plaintiff below requires no such aid. His case was complete without leaning on the bet, with which Duffy had no manner of connection.

Judgment affirmed.

Erb versus Scott.

Parts of a record attested and certified, may be attached together and attested and certified as a true copy and exemplification of the whole record, without recopying the same; and when certified by the clerk, to comprise full and perfect transcripts of all the records and judicial proceedings in the case, and the seal of the court annexed and certified by the judge, styling himself president judge of a judicial circuit, which circuit includes the county from which the record comes, and the presiding magistrate of the Court of Common Pleas for that county, contains every requisite of the act of Congress of 26th May, 1790.

The record of an action in a court founded on the common law, consists of the writ, declaration, pleas, and judgment; and an exemplification of these is sufficient on which to found an action of debt. An exemplification of the executions is not necessary. Per GIBSON, C. J.

This case was brought up from the Court of Nisi Prius. It was an action of debt, by David Erb and Jacob Erb, administrators, &c. of Christian Erb v. Freeman Scott, administrator, &c. of Henry Landis, on a judgment recovered in Ohio.

On the trial, before GIBSON, C. J., the following certificates, with other certificates, were offered in evidence and admitted.

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The State of Ohio, Clark County, ss.

I, James S. Halsey, clerk of the Court of Common Pleas, of the county aforesaid, do hereby certify that the copies of the several executions of *fi. fa.*, *et lev. fa.*, *venditioni exponas*, and second *venditioni exponas*, hereunto attached, and the appraisements also hereunto attached, which executions and appraisements are marked (A), (B), (C), (D), and the endorsements, sheriff's returns and advertisements thereon copied, are true copies of the original executions, appraisements, endorsements, sheriff's returns and advertisements on file in said case;—and further, that the same, namely, the copies immediately attached to this, my present certificate, together with the copies attached to my three preceding certificates, which are hereunto annexed, and are dated respectively the 6th of January, 1848, comprise full and perfect transcripts of all the records and judicial proceedings in the said case; and that I have carefully and repeatedly examined the said records and judicial proceedings, with a view to this and my three several preceding certificates, and that there are no other records or judicial proceedings therein whatsoever, save those above and herein transcribed and certified.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Springfield, this 6th day of January, A. D. 1848.

J. S. HALSEY, Clerk.

State of Ohio, Twelfth Judicial Circuit, ss.

I, James L. Torbert, President Judge of the Twelfth Judicial Circuit of the State of Ohio, which circuit includes Clark County, in said State, and the presiding magistrate of the Court of Common Pleas for Clark County, in the State of Ohio, do hereby certify that the last foregoing attestation of James S. Halsey, clerk of the Court of Common Pleas of said county of Clark, is in due form of law.

Given under my hand, the 17th day of January, A. D. 1848.

JAMES L. TORBERT, Prest. Judge.

[SEAL.] J. S. HALSEY, Clerk.

On the trial, GIBSON, C. J., delivered the following opinion, after argument, the plea of *nul tiel* record being filed.

GIBSON, C. J.—The record of an action in a State whose jurisprudence is founded on the common law, of which a court judicially takes notice without proof of the fact, consists of the writ, declaration, pleas, and judgment, and this, when properly authenticated, is sufficient to found an action of debt in a court of a sister State,

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with the effect not merely of a foreign judgment but of a judgment by a court in the same State. It was unnecessary, therefore, for the plaintiff to exhibit more, particularly an exemplification of the executions, or the marginal entries on the minutes of the bill and decree in equity. As the effect of the latter was to show the amount which had not been collected, it would be the business of the defendant to produce them, were not the credits admitted by the plaintiffs; and it is immaterial to the issue before me, therefore, whether they were authenticated according to the act of Congress or not. What we have to do with then, is the certificate to authenticate what is properly the record. The judge styles himself in it "the president judge of the twelfth judicial district of the State of Ohio; which district *includes* Clark county, in said State of Ohio;" and the objection is that he does not style himself president judge of the Court of Common Pleas of Clark county. It is true the act of Congress requires the certificate to be the act of the "judge, chief justice, or presiding magistrate, as the case may be," and consequently of the particular court in which the record is; but are we not to infer from this certificate that the judge was the presiding magistrate of all the courts which composed the district, and consequently of the Common Pleas of Clark county? If he was a president judge, it was of some court; and if not of each court in his district, of which court else? We are not to scrutinize the words of such a certificate as the words of an indictment, but to give them a reasonable construction, and above all, not to wrest them from their natural import. It is justly said by Professor Greenleaf, in his *Law of Evidence*, Part III. s. 504, that though the States of the Union are, in all things not surrendered to the general government, to be treated between themselves as foreign states, yet that "their domestic relations are rather those of domestic independence than of foreign alienation;" and we are consequently at liberty to look into the constitution and laws of a State for the structure of its judiciary, because its officers share, to the extent involved in the present question, in the distributive justice of the whole United States.

The courts of Common Pleas of Ohio are constructed on the model of the courts of Common Pleas of our own State; and what construction would we put on such a certificate by one of our own presidents? That the exact style of the office is not necessarily to be expressed, was determined in the *Commonwealth vs. Leib*, 1 *Watts & Serg.* 251, a case nearer to the present in principle, if not in circumstances, than any that has been quoted. By the constitution of Pennsylvania, judges of the Common Pleas are commissioned as such without any other official title; yet they are *virtute officii* judges of Oyer and Terminer, of Quarter Sessions, and of the Orphans' Court; yet it was held in that case, that an official bond which a statute required to be approved of by the judges of

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the Quarter Sessions, was good though it was approved of by the actual judges of the Quarter Sessions, styling themselves judges of the Common Pleas. On the same principle it was held in *Kean v. Franklin*, 5 *Serg. & Rawle* 154, that a recognizance to the president of the Orphans' Court was valid, though no judge is expressly so denominated in the constitution. But even without pretending to take judicial cognizance of the structure of the courts in Ohio, we would be led by a reasonable and fair interpretation of this certificate, to say that the certifying judge was the presiding magistrate of every court within his district, and of the Common Pleas of Clark county among the rest.

Let judgment be for the plaintiff.

The act of Congress, of May 26, 1790, § 1, provides: "That the records and judicial proceedings of the courts of any State, shall be proved or admitted, in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."

The constitution of the State of Ohio provides, that: "The several courts of Common Pleas shall consist of a president and associate judges. The State shall be divided into three circuits; there shall be appointed in each circuit a president of the courts, who, during his continuance in office, shall reside therein. The president and associate judges in their respective counties, any three of whom shall be a quorum, shall compose the court of Common Pleas.

It was assigned for error, that

1. The court erred in giving judgment for plaintiff on the plea of *nul tiel* record.
2. The court erred in deciding that the record offered by plaintiff was certified agreeably to the act of Congress.
3. The court erred in admitting the record in evidence.

The case was argued by *Perkins* for Scott, defendant in the action. The record offered purported to be the record of a judgment obtained in the Court of Common Pleas of Clark county, in Ohio. To this record there are no less than four attestations and four certificates. The objections to this mode of authentication, are:

1st. The act of Congress does not contemplate, nor provide for certifying the record in detached parts, but requires the record itself;—the whole record, as such, to be certified in the manner prescribed.

The first attestation is the one that addresses itself to what is properly the record, to wit: the writ, declaration, pleas, and judg-

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ment; and to that the certificate of the judge is defective. He styles himself "President Judge of the 12th Judicial Circuit of the State of Ohio, which circuit includes Clark county." But he does not profess to be either the judge, chief justice or presiding magistrate of *the court from which this record comes*.

This is essential. And certifying that he is anything else, more or less, is not sufficient. 3 *Bibb* 869; 3 *Barr* 483, *Lothrop v. Blake*; *Wal. C. C. R.* 162; 4 *Bin.* 113.

The second attestation only professes to attest certain copies of entries on the minutes, and says nothing about the record.

The third attestation only professes to attest certain entries on the execution docket, and says nothing about any record.

The fourth attestation is not an attestation of a record, but is an attestation or certificate that certain copies attached to it, together with copies attached to three preceding certificates annexed, comprise full and perfect transcripts of all the records and judicial proceedings in the case.

C. Ingersoll for plaintiffs in the action.—The Chief Justice decided the case in favor of the plaintiff below upon the ground, that the first attestation, which attests the record proper, was sufficient to warrant a judgment against defendant. Objection was early taken, that the attested copy obtained was imperfect; it contained only the record proper under the Ohio statutes, and did not contain copies of the executions and other matter, which is no part of a record in Ohio. *Swann's Statutes of Ohio*, 678. To obviate the objection, the plaintiff produced four distinct attestations:—1. An attestation of the mere record proper. 2. An attestation of certain minutes and statements, showing the actual present balance due on the judgment. 3. The execution entries. 4. The last attestation includes all matter comprised by the three former attestations, and covers matter, whether of record proper, or of judicial proceedings merely. The act of Congress uses the words "records and judicial proceedings of the courts of any State." The fourth attestation, covering all the records and judicial proceedings in the case, must needs comprise every thing which could legitimately come within the province of the clerk's attestation, and not more. If this be protected by a certificate of the president judge, the case is with the defendant on another ground besides that taken by the chief justice. He contended that the certificate was sufficient. That is not liable to the criticism upon the first certificate, for the judge who certifies is in the fourth certificate stated to be the "presiding magistrate of the court."

The opinion of the court was delivered, April 3d, 1850, by

COULTER, J.—It is not necessary to say any thing in relation to the first attestation of the clerk and certificate of the presiding

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magistrate; nor of any of them except the last, or what is called, in the errors assigned, the fourth. Because the judgment of this court is, that parts of a record may be attested and certified at the same time, as was the case here, and that those parts may, at the same time, be attached together, and attested and certified as a true copy and exemplification of the whole record, without recopying the same; and that the attestation of the clerk, as to the whole record attached, is full and sufficient; and the certificate of the presiding judge or magistrate entitled the record and judicial proceedings, attested and certified, to admission in evidence. In this attestation of the clerk and certificate of the presiding judge, every requisite of the act of Congress of 26th May, 1790, is fulfilled; and if something more than is strictly necessary be therein contained, that does not vitiate or destroy their validity.

Judgment affirmed.

(This case was argued at Harrisburg in 1850.)

Hoffman et al. *versus* Danner et al.

The quantity of land which passes by a sheriff's sale to the purchaser, is to be ascertained by the extent of the levy.

The right of construing the written return of the sheriff generally belongs to the court, and the quantum of estate conveyed by a sheriff's deed is usually referable to the court alone; but where, from the generality of the terms used, or from uncertainty of description, a doubt is raised as to the boundaries of the levy or the position or limits of the land sold, evidence *aliunde* may be resorted to; and, where such evidence is received, it is error for the court to direct peremptorily how the verdict is to be rendered.

ERROR to the Common Pleas of *York county*.

This was an ejectment by J. B. Hoffman and Barbe and wife v. Martin Danner and others, brought in October, 1846, for a piece of ground in that part of the Borough of York known as "Hays Addition," as lot No. 14, on the northerly side of Main street, beginning at the borough line, and extending in front westerly along said Main street 256 feet, and in length or depth northerly 226 feet to a twenty feet wide alley, bounded on the easterly side by land of Martin Danner, on the west by a lot in the possession of Elizabeth Wissenall, and on the south by said Main street, being a triangular lot of ground, containing two roods and twenty five perches.

Tried before the Hon. ELLIS LEWIS, on the 12th and 13th days of November, 1849.

Both parties claim under Barnhart Hoffman, deceased. The plaintiffs, Louisa and John, as his children and heirs at law; and

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the defendants under a sheriff's sale made in the year 1825, in pursuance of a judgment obtained in the Common Pleas of Dauphin county, in which Tschudy Minore was plaintiff, and Jacob Heilig, administrator of Barnhart Hoffman, deceased, defendant. A test *fi. fa.* was issued to York county, on which a levy was made in the following words:—"By virtue of the within writ of *fi. fa.* to me directed, I have seized and taken in execution, as the estate of Barnhart Hoffman, deceased, a certain lot of ground marked in the plan of "Hays Addition" to the Borough of York, No. 14, bounded east by Jonathan Jacobs' lot, north by an alley which separates it from Martin Danner's lot, west by lot No. 13, and south by the York and Susquehanna turnpike, containing in front on said turnpike 3 perches and 9 tenths." June the 7th, 1825. So answers Michael Doudel, sheriff.

On the trial of the cause the plaintiffs narrowed their claim so as to exclude so much of lot No. 14 as fronted on Main street 3 perches and 9 tenths, on which the building stood at the time of the levy, bounded by lot No. 13 on the west, that being the part of lot No. 14 which they conceived to be embraced in the levy, and passed by the sheriff's sale hereinafter mentioned.

From the record produced, it appeared that a *venditioni exponas* issued to York county, but that it was never returned. The sheriff's advertisement, as published in the York Gazette, described the premises as in the levy. The defendants gave in evidence, a sheriff's deed, dated December 10, 1825, conveying, in consideration of \$51, a certain lot of ground marked on the plan of Hays Addition, of the Borough of York, No. 14, bounded west by Jonathan Jacobs' lot, No. 13, on the north-east by an alley which separates it from Martin Danner's lot, on the south by the York and Susquehanna turnpike-road, containing in front on said turnpike 3 perches and 9 tenths. The plaintiffs objected to the admission of this evidence, because the deed did not correspond with the levy. The court admitted the evidence. By virtue of this levy, sale, and sheriff's deed and sundry deeds of conveyance from the purchaser at sheriff's sale, and those claiming under him to the defendants, they claim to hold the lot of ground for which this suit was brought, being *the whole of lot No. 14.*

On part of defendants there was given in evidence a deed from Jonathan Jacobs and wife to Hoffman, in 1818, conveying the *whole lot*, No. 14; and parol evidence was given of the situation of the property, at the time of the levy and sale. Objection on part of plaintiffs.

The plaintiff then gave as rebutting evidence, a deed from Jonathan Jacobs and wife to John Jacobs, dated in 1814, going to show that he had conveyed the western part of lot No. 14 *before* his conveyance to Hoffman; and also a deed from John Jacobs and wife, conveying the same premises to Hoffman by deed dated in

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1816. *The description of the premises in this last deed is the same as in the levy.* The plaintiffs also gave parol proof of the situation of the premises at the time of the levy and sale.

At the close of the trial the defendants' counsel asked the court to charge the jury, that on the whole evidence in the cause the defendants were entitled to a verdict, and the court accordingly instructed the jury, *that upon the whole evidence in the cause, the defendants were entitled to a verdict.*

Verdict for defendants.

Errors assigned :

1. The court erred in construing the levy to include the *whole* of lot No. 14.

2. The court erred in not leaving it to the jury to ascertain, from the evidence, whether the whole, or only a part of lot No. 14 was included in the levy, thereby withdrawing all the facts from the jury.

3. The court erred in charging the jury that, *on the whole evidence in the cause*, the defendants were entitled to a verdict.

Fisher and Potts, were for plaintiffs in error.—Had the levy been on lot No. 14 without any designation of boundaries to restrict it, the whole of lot No. 14 would have passed; but when the terms are restrictive and give a qualification, then they shall have effect in restraining the operation of the grant within the extent of the terms of restriction, if there be any parcels to answer the restrictive terms; if not, they are to be rejected as insensible. *Shepard's Touchstone* 247; 5 *Barr* 263.

Also that the evidence was contradictory, and that it should have been referred to the jury. 5 *Bin.* 503; 7 *Serg. & Rawle* 147; 12 *do.* 135; 4 *do.* 279; 3 *Watts* 51.

Campbell, and Evans, and Mayer, were for defendants.—That it appeared clearly by the testimony of the sheriff who held the sale, that the whole of lot No. 14 had been sold.

As to the construction of the levy, that the recital of boundaries was unnecessary and insensible. 4 *Wend.* 313; 3 *Greenleaf* 471; 10 *Watts* 100; 2 *Barr* 172; 5 *Serg. & Rawle* 259; 1 *W. & S.* 539.

The opinion of the court was delivered by

BELL, J.—The quantity of land which passed by the sheriff's sale to Franklin, under the defendant's claim, is to be ascertained by the extent of the levy. The case was, therefore, properly treated on the trial, as turning on that inquiry. As, at the date of the execution, the whole of the lot numbered 14 belonged to Hoffman, his creditor might have directed a levy and sale of the whole. Yet

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he was certainly at liberty, with the assent of the debtor, to embrace a less quantity, and if he did so, or permitted the sheriff, by the use of a limited and restricted description, to indicate an intent to take in execution a smaller portion than is contained within the original triangle, the purchaser, who claims only through the proceedings of the officer, will not be permitted to stretch his ownership beyond the designated boundaries; even though the sheriff's conveyance, by an extended description, might seem to afford warrant for such a pretension. *Streaper v. Fisher*, 1 *Rawle* 155; *Gruff v. Guilford*, 4 *Watts* 223; *McCormick v. Harvey*, 9 *Watts* 482; *Carpenter v. Cameron*, 7 *Watts* 51. In obedience to this principle, the jury was properly instructed that "the defendant's title depends on the question whether the description in the sheriff's levy includes the land in controversy." But conceiving that the return of levy in connection with the plan of "Hay's Addition," to which it referred, sufficiently proved an actual levy of the entire triangular piece, the court peremptorily directed that, under the evidence, the defendants were entitled to a verdict.

The construction of written instruments is undoubtedly the exclusive province of the court, and the *quantum* of estate conveyed by a deed is referrible to the judges alone. But where that estate is situate, what are its limits and contents must frequently depend upon evidence *dehors* the writing; and, thus, it is often a pure question of fact, or of law and fact compounded, upon which a jury must be called to pass: *Collins v. Rush*, 7 *Serg. & Rawle* 102. This is peculiarly true of loose written returns of writs of execution, which ignorance and carelessness combine to divest of every feature approaching to certainty. With us, inaccuracy of description in these inceptions of title is so often indulged, that it has been found necessary to make a liberal use of assisting evidence documentary and oral in correcting mistakes, explaining ambiguities, and applying indeterminate delineations to disputed localities. Where a return is intelligible in itself, and ascertains with reasonable precision the particular tract taken in execution, no room is afforded for the introduction of explanatory proof, and none will be received in contradiction of the official act. But where, either from the generality of the terms used, uncertainty of delineation, or seeming contradiction of description, a doubt is raised affecting the boundaries of the levy, its particular locality or extent, recourse is, necessarily, had to evidence *aliunde*. In many, perhaps most, of these instances, the difficulty proceeds from wide generalities of language, which fail to indicate any precise locality; though it also frequently springs from inability to fix a described line of division or boundary, without invoking the local knowledge of those acquainted with the subject of dispute. Where this happens, while the right of construing the written return must be conceded to the court, the position and limits of the land and the quantity intended

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to be sold, becomes a legitimate object of investigation for a jury. A judge who evades to declare the meaning of a deed or other writing commits an error, but if the instrument cannot be understood without reference to extraneous facts, the jury must judge of the whole. Instances of the application of this elementary principle to a levy, where the description of lands intended to be embraced by it lacked internal certainty, are furnished by *Scott v. Sheakly*, 3 *Watts* 50; *Swartz v. Moore*, 260; and *Hyskill v. Given*, 7 *Serg. & Rawle* 372; among many others.

In the case before us, the court seems to have proceeded upon the idea that the return of levy upon "a lot of ground marked in the plan of Hay's Addition in the Borough of York, No. 14," considered in connection with the plan itself, is so precisely descriptive of the triangular piece of ground then owned by Hoffman, that it is not to be controlled or restrained by the subsequent specifications of boundary. In this conclusion we have not been able entirely to concur. Had the levy been generally on lot No. 14, on the plan of Hay's Addition, doubtless the entire lot so numbered would have passed. But it is a cardinal rule of interpretation that effect is to be given to all the words of a written instrument; and another is, that when the terms used are restrictive and give a qualification, then they shall have effect in restraining the operation of the grant within the extent of the terms of restriction, if there be any parcels to answer the restrictive terms: *Sheppard's Touchstone* 247. It is true, the same author adds, "but if there be not any parcels to satisfy the terms of restriction, they shall be rejected as insensible;" or, as it is expressed in another place, "if there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant;" 7 *John. Rep.* 228; 4 *Wend.* 318-19; nor, it may be added, circumscribe it. Were it, then, manifest that the call for Jonathan Jacob's lot on the east, is insensible, or was inserted by mistake, the return ought, questionless, to be read as though the call had no place in the description of the land. But the question whether this be so offers one of those ambiguities which may depend for its exposition upon extraneous proof; and when recourse is had to this, the solution of the question must be referred to the jury, under the direction of the court. The inquiry is, then, reduced to this, whether there is any thing in the cause showing the sheriff might have had reference to a fact, line, or boundary, which reduced the lot he intended to take in execution, to the width of three perches and nine-tenths on its southern front? If so, the jury should have been called to aid its determination.

Looking to the evidence on this point, given on both sides, it is impossible to say, as matter of law, that there is nothing upon which the case I have referred to, can operate, or that it is alto-

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gether so void of meaning as to be deemed insensible. It is almost too plain for dispute that the description of the ground, contained in the levy, was copied from the deed of 1816, made by John Jacobs to Hoffman, and which, at the time of the levy, was of record. It established a line of division between the portion conveyed to Hoffman, containing, on the turnpike, three perches and nine-tenths, and the part then owned by Jonathan Jacobs; and it accordingly calls for Jonathan Jacobs' lot on the *east*. This but followed the prior conveyance from Jonathan to John Jacobs, in 1814. Here, then, was a boundary established by conveyances appertaining to the property in question. True, it was afterwards obliterated as a line of division, by the deed of 1818, from Jonathan Jacobs to Hoffman, in which the former assumes, untruly, to be the proprietor of the whole lot. But this by no means proves the sheriff did not adopt it, as bounding the extent of ground taken in execution. That he did so is further evidenced by the designation of the alley as the northern boundary, and the assertion that the front of the lot seized was but three perches and nine-tenths. It is true, the latter fact would weigh nothing, were the actual bounds undisputed; but when the very question is *as to these*, in reference to a town lot, which in a great measure depends for its value upon the extent of its front, the designated measure is not wholly to be disregarded. The plaintiff's hypothesis is assisted, too, by the oral evidence, that speaks of the existence of a separating fence on the line established in 1814, which, though contradicted, could not be wholly excluded from consideration. If the sheriff did so restrict his levy, the sale must have been made in pursuance of it, and it is no answer to suggest that the officer must have labored under a mistake. Admit that he did so, his blunder cannot work an enlargement of the levy beyond the actual fact, though it would have been good ground for setting aside the levy and sale—a course which was open to the plaintiff in the execution, if dissatisfied with the act of the officer, and perhaps to the purchaser: *Friedly v. Scheetz*, 9 *S. & R.* 156. Most of the cases which have arisen on this branch of the law, find their origin in similar mistakes, of which *Carpenter v. Cameron*, and *McCormick v. Harvey*, may be noticed as instances. The question is, what limits the officer had in his eye at the time of the levy, and what proportion of the land he actually levied on. If he took less than, in fact, belonged to the defendant in the execution, just so much passed, and no more. But this, in our case, is partly a question of fact, depending in some measure on oral proof. I repeat, it ought therefore to have been so put to the jury.

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

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

WESTERN DISTRICT—SEPTEMBER TERM 1850.
PITTSBURGH.

Wallingford *versus* Dunlap.

A special verdict should find the facts on which the court is to pronounce judgment. If the court state to the jury certain facts as *undisputed*, and direct a special verdict as to disputed facts, and the jury so return a verdict, it is error. The undisputed facts should be incorporated into the special verdict.

ERROR to the District Court of *Allegheny*.

This was an action on the case, brought by John Dunlap against Wallingford and others, for injuries alleged to have been done by defendants to two houses of the plaintiff, in Pittsburg, by undermining and otherwise injuring the same. The defendants in preparing a foundation for a house, which they were about to erect on ground adjoining, had ground alongside or near plaintiff's house dug away, and it was alleged that this was done without taking proper precautions, and that the houses of plaintiff were injured.

After the evidence was closed, LOWRIE, J., charged the jury.

He stated that the counsel have raised several points of law, which might possibly not arise at all, if the facts of the case were settled. That it was agreed that a special verdict be found on the disputed facts, and that the court shall enter such judgment there-

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on, and on the facts not disputed, as the law requires. He stated to the jury certain *undisputed* facts, and referred other alleged facts to the consideration of the jury, and directed them, that "If you should find that the plaintiff's wall was not built of proper materials, or in a workmanlike manner, and that it sunk from its own inherent defects, or that the plan adopted for the preservation of the wall was the result of the joint consultation of the plaintiff and defendants, or was in pursuance of the advice and direction of the plaintiff, and that the plan was carefully and skilfully executed, even though by a different plan the wall might have been saved; in either of these cases, you will find for the defendants. If on both of these points you should find for the plaintiff, then you will say what damages the plaintiff has sustained," &c.

The jury returned a negative answer to the first two questions submitted, assessed damages in favor of the plaintiff for \$433.75, and further found other facts.

A motion for a new trial was made, but judgment was entered for the plaintiff for the damages found by the jury.

It was assigned for error, that the court erred in entering judgment in favor of the plaintiff on the special verdict, for various reasons assigned.

The case was argued by *Thomas Williams*, with whom was *Kuhn*, for plaintiffs in error.

McCandless for defendant in error.

The opinion of the court was delivered Sept. 9, by

COULTER, J.—The judgment in the court below is founded partly on facts found by a special verdict, and partly on what the court say are undisputed facts. The court enumerates to the jury what are the undisputed facts, and directs them to find a special verdict on the disputed facts. The court say to the jury, "It is therefore agreed that you shall find a special verdict on the disputed facts, and that the court shall enter such judgment thereon, and on the facts not disputed, as the law requires." The paper book states that the jury returned negative answers to the two first points submitted to them, and then found specially, as to the disputed facts.

This proceeding is entirely anomalous. It is unknown, and unrecognised by the common law, or by the practice under the statute of Westminster the 2d, 13 Edw. 1, ch. 30, which in fact originated the special verdict, as it now exists. There did exist another species of special verdict, as where the jury returned a general verdict for the plaintiff, subject, nevertheless, to the opinion of the court, on a special case, stated by the counsel, on both sides, on a matter of law: 3 *Black.* 378. But this proceeding has gone

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out of practice, perhaps never existed in Pennsylvania, and is nothing like the present case. A special verdict is where the jury find the facts of the case, leaving the ultimate decision of the cause upon those facts, to the court, concluding conditionally, that if upon the whole matter thus found, the court should be of opinion that the plaintiff had a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant: 3 *Black* 378; *Boote on Suit at Law*, 158. It is of the very essence of a special verdict that the jury should find the facts, on which the court is to pronounce judgment according to law; 1 *East* 111; Lord Raymond 1581. And the court will not intend any thing, especially any fact not found by the jury; 1 *Wilson* 55; 1 *Caine* 60; 20 *Johns. Rep.* 294. An instance of which is found in 11 *Wheaton* 445, where the assent of an executor is necessary, if the jury find a special verdict stating facts from which they might have inferred such assent, but do not find it expressly, the court cannot intend it. I apprehend there is no reported case, of any authority, where the court have gone beyond the facts found in the special verdict; for it is the province of the jury to judge of and find the facts, and the province of the court to declare the law on the facts so found. The undisputed facts ought to have been incorporated into the special verdict. And if they had omitted them by mistake, the court might upon motion and full evidence, have amended the special verdict: *Strange* 514; 4 *Watts*. 259. But the court is confined to the facts found by the special verdict: 2 *Yeates* 543; 3 *Yeates* 373. And when a special verdict is given, the court ought to confine its judgment to that verdict.

As to what the jury intended by a negative answer to the two first points submitted to them, it is not permitted us to intend what they meant, as they have not expressly found. Nor can we predicate our judgment partly upon what the court below say were undisputed facts, and partly on the facts found.

The special verdict is defective. We have no power to amend it. It is the duty of the plaintiff's counsel to have the special verdict properly drawn up, settled and entered on the record: 1 *Johns. Cases* 393; *Coleman's Cases* 107. If the facts are reduced to writing at the time of the trial, and have the assent of the jury, the verdict may be moulded into form afterwards, with the approbation of the court.

But this special verdict is so defective and erroneous, and the judgment so anomalous in being entered partly on the verdict and partly on what are called undisputed facts, that we must do what has often been done before, reverse the judgment and send the case back for a new trial. If a special verdict is defective or uncertain, and cannot be amended, judgment ought not to be entered upon it. And when it is entered, the judgment must be reversed

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as erroneous: *Lord Ray*'d 1584; *Strange* 887-1124; 6 *Cranch* 268; 1 *East* 111.

Judgment reversed and *venire de novo* awarded.

Hopkins *versus* Forsyth, and Forsyth *versus* Hopkins.

1. In an action by a joint owner of a chattel against the sheriff for a portion of the balance of proceeds of sale of it, it being sold on an execution against some only of the joint owners, the averment of the sheriff in his return to the execution, that he had paid over the balance of proceeds to one of the owners and agent of the others, was not a legitimate part of the return, and did not stop the plaintiff from showing the truth. The remedy was not by action for a false return.

2. Though the captain of a boat has authority to sell all the shares of the owners in the same, the *sheriff*, on an execution against some only of the owners, the captain being one, can sell only *their* interests.

3. On an execution against some of the owners of a chattel, the sheriff can, in addition, sell the interests of any others of the owners, who agree that their shares be sold, and all such are entitled to claim out of the balance of the proceeds. Others of the owners, who were not defendants, and did not so agree, still retain their interests, and cannot claim any part of the proceeds.

4. The shareholders or joint owners of a steamboat are not necessarily *partners* in it. They are not so, where there is no other relation between them than that which arises from joint ownership.

5. The captain of a steamboat has no lien for advances; and the sheriff has no right to satisfy his claim out of the proceeds of sale.

6. If in an action trying, it be agreed that the court should decide the law on the *undisputed* facts, yet, if evidence offered by defendant be erroneously rejected, this court cannot say, had the disputed evidence been admitted, that it would not have been disputed, or the whole case submitted to the jury. Whether the court adjudicated on the excluded evidence or not, the judgment must be reversed.

ERROR to the District Court of *Allegheny* county.

This was an action of *assumpsit* by Hopkins *v.* Forsyth as sheriff, to recover the plaintiff's proportion of money, raised by a sale by defendant, of the interest of plaintiff in the steamboat *Circassian*, and which remained after payment of the execution, on which the sale was made.

Olipphant, Duncan, Hopkins, Cox, Gilbert, Troth, Reynolds, and Miller were owners of the steamboat, as tenants in common, having different interests in it. One Bennet recovered a judgment against Olipphant, Duncan, and Hopkins, for \$454.20 and costs. The suit was against the eight owners, but only three were served. The claim of Bennet was for wages, as captain of the boat. A *fi. fa.* issued, and on this writ the defendant, as sheriff, levied on the boat, and made sale for \$8100. The surplus the sheriff paid over to Olipphant, one of the owners. Hopkins claimed three tenth parts of the surplus, and the suit was brought to recover it.

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The sheriff stated in his return, levy made on steamboat Circassian, sale advertised and property sold to F. H. Oliphant for \$8100, which was applied to debt and interest, costs on the writ, and paid F. H. Oliphant, one of the owners and agent, \$7574.45.

On the part of the plaintiff, the sale was proved and other matters as to ownership, and proof was made of an order from plaintiff for his share presented to the defendant, which was refused.

Defendant's counsel asked the court to instruct the jury, that on the evidence, the plaintiff is not entitled to recover :

1. Because the plaintiff is a party to the suit given in evidence, and is concluded by the return that the balance has been paid over to the owner and agent.

2. The proper remedy is by action against the sheriff for a false return.

The court refused to do so, and defendant's counsel excepted.

On the part of the defendant it was proved, that when the owners built the Circassian, there was no particular contract as to how she was to be built, or to run. She was to run on the waters of the Ohio, Bennet to be captain. Oliphant purchased Bennet's share; he took the place of Bennet, and the control of the boat. There was an instrument of writing, giving Oliphant the control. It was as follows:—

"We, the undersigned, owners of the steamboat Circassian, agree to the following arrangement:—Said boat is now valued at \$10,000 by said owners, and that F. H. Oliphant is to take Isaac Bennet's interest of one-sixth, and to have control of the boat in future; a new set of books to be opened, and the old books to be settled up by some one of the owners, hereafter to be named, giving obligations for the debts due to individuals, on the best terms that can be agreed on. It is therefore understood, that said F. H. Oliphant is not to transfer his position, as controlling said boat, to any person, without consent of said owners."

The agreement was under seal, and signed by *six* of the owners, including Hopkins; dated 16th August, 1846.

A witness testified that Bennet had full power and control of the boat before that time: he had full power to sell. This was not in writing.

Defendant's counsel asked whether, at the time of the making of the instrument given in evidence, there was any power of sale of the boat given by the owners to Oliphant. Objected to, as tending to vary and explain the instrument. The objection sustained, and exception by defendant.

It was offered to prove that *these* owners had a meeting, and agreed that this sale would be the best disposition that could be made of the boat, and acquiesced in the sale as such, understanding it to be a sale of the whole boat, and that the boat was actually delivered to the purchaser.

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1. To prove that the sale was of all the interests in the boat.
2. And an acquiescence in such sale by all the parties concerned.

By the court.—The effect of the legal process cannot be altered by the act of third persons. The offer is overruled, and the defendant excepted.

Offer to show the value of the boat, for the purpose of showing that all the interests in the boat were intended to be sold by the sheriff's sale.

The offer is objected to as irrelevant, and as tending to alter the legal effect of the sheriff's return.

Offer overruled, and defendant excepted.

It was proved that the debt to Bennet, for which the boat was sold, was for wages as captain of the boat.—Exception to this by plaintiff.

The deposition of Cox was offered, to show that Oliphant, to whom the balance was paid, was invested with an unlimited control and discretion in regard thereto; that he was authorized to pay the debts, and that he did pay, before and after the sale, on account of the plaintiff and other owners, to the whole amount of the purchase-money which came to his hands.—It was objected to, as consisting of evidence to add to and vary the written arrangement given in evidence, and of declarations made at the time of the arrangement, and of evidence to show the state of the accounts between the owners, as partners, and that such evidence is incompetent in this action.—Objection sustained, and defendant excepted.

Defendant's counsel submitted points.

No facts being disputed, the parties agreed that the court shall direct such verdict as they think proper, subject to correction afterwards, the law of the case being reserved.—By the court, LOWRIE, J. :—The plaintiff was owner of one-eighth of the boat, and he can have but one-eighth of the balance, with interest, &c. He directed that the verdict be corrected accordingly.—Both sides excepted.

On the part of Hopkins, it was assigned for error,—1. That the court erred in entering judgment for the plaintiff below. 2. General errors.

On the part of Forsyth, it was assigned,—1. The court erred in entering judgment for the plaintiff below. 2. In rejecting the testimony offered by the defendant below, which is referred to in the bills of exceptions. 3. General errors.

The case was argued by *Shaler* and *McConnell*, for Hopkins.—On his part, it was claimed that the only interests in the boat sold were those of the three owners, against whom the execution issued; that the surplus money belonged to those three alone, and that he seeks to recover on that basis.

T. Williams, for Forsyth.—It was claimed, on his part, that the

[*Hopkins v. Forsyth, and Forsyth v. Hopkins.*]

interest in the boat, of all the owners, was sold, and that the surplus money belonged to all; and that it was offered to prove an acquiescence of some of the owners in the sale, as a sale of the whole boat. It was alleged, that the defendant's return on the execution, that he had paid over the money in question to Oliphant, one of the owners, and agent, was a defence to the action. That the court held that the interests of all the owners were sold, and that judgment was entered on that basis.

The opinion of the court was delivered, September 11th, by GIBSON, C. J.—It is proper to begin with the exceptions of the defendant below, against whom judgment was rendered.

The averment of the sheriff that he had paid over the money in contest, was not a response to the writ, or, consequently, a legitimate part of the return; and it did not estop the plaintiff from showing the truth. Even had it actually been mispaid, the fact would not have been a defence. For a similar reason, the remedy was not by action for a false return.

The next point to be noticed has been properly abandoned. Doubtless an action on a joint contract of sale, though the interests sold were several, must be brought by all the vendors; but the present action is founded on a contract implied from a consideration which is the ownership of the property sold; and if that be several, so must the contract be. The nature of the title will be considered presently.

The evidence, that the boat's husband had power to sell it, was properly excluded; not, however, because it would have impinged on his written appointment—for it went to an independent fact—but because the fact was immaterial. It would not follow that because he might have sold all the shares, the sheriff could do as much on an execution against him, separately or conjunctly, or sell more, by force of it, than his share as a part owner. The sheriff would not have the same power, because his writ gave him power to sell no more than the property of those who were parties to the judgment; not to execute a power given to another. But the evidence, that two who had not been served, agreed at the sale that the sheriff should sell the boat out and out, was erroneously rejected. Every shareholder whose property went to swell the surplus money, and none else, was entitled to share in the distribution of it. The shares of the parties to the judgment and execution—the plaintiffs among the rest—were sold, and the former owners of them were entitled to come in. Those who were not parties, but agreed that their shares should pass by the sheriff's sale, would be estopped from disputing the purchaser's title; and they also would be entitled to come in. But the two who were not parties, either to the judgment or the agreement, have their shares yet, and are not entitled to come in. The original writ issued

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[Hopkins v. Forsyth, and Forsyth v. Hopkins.]

against the eight, of whom four were served, and the offer was to prove that two who were not served, agreed that the sheriff should sell, not the shares, but the boat as an entire thing, and consequently, that the shares of the two, who were not bound either by the judgment or the agreement, were not sold; and that the owners of them had no claim to the money in the sheriff's hands. The evidence was offered to reduce the plaintiff's right from a fourth to a sixth, and it ought to have been received.

But it has been pressed on us, in the face of a hornbook principle, that the shareholders were partners; that the sale on the judgment against four of them passed the interests of all; and that all, whether parties to the agreement of sale or not, are entitled. A vessel may undoubtedly be brought into stock where the owners of it are in trade; but not where there is no other relation between them than that which arises from joint ownership. What other was there here? It does not appear that the interests of these owners were connected in any thing else than the boat itself. No one would suppose that a joint owner of a wagon and team, might not sell his moiety before the debts were got in and the expenses paid, or that joint creditors would have a preference, in respect to it, over separate creditors. Carriers may doubtless become partners; but not merely by becoming joint owners of a chattel and using it for a common purpose. And the principle is peculiarly applicable to ships or other craft, the exceptions to it in respect to them being always founded in very special circumstances. This boat appears not to have been a regular packet, but to have done such jobs as her husband could procure; and a partnership is usually formed on some plan of action. It is not to be doubted that one of these owners could not have affected the rest by the admission of a fact to their prejudice. A purchaser from him would have held his share in common with them, free from a lien for advances, and having an equal voice in respect to the employment of the boat or the choice of a husband for it. We are told that the contrary was incidentally ruled in *Burbridge v. Durvall*—a case like the present, except that the point was neither made nor ruled, incidentally or directly. That all the owners had not been served in the action which was the foundation of the demand in that case, was neither known nor suspected by the counsel, the trial court, or the court here; and it is not the practice of a court of error to reverse on points that were not ruled below.

The deposition of Cox, produced to show that the plaintiff was in arrear to Oliphant, the purchaser, for advances to the boat, was properly ruled out. The action was not against Oliphant, but against the sheriff, who had no right to retain for a debt due even to himself. *Irwin v. Workman*, 3 *Watts* 357, and *Chambers v. Miller*, 7 *Watts* 63, are direct to the point. A ship's husband has no lien for advances—as least none such as a sheriff may satisfy.

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He may compel part owners to contribute by action, but he has no other remedy. They resemble partners so far, that each is liable for the whole; but there the resemblance ends, for, as was ruled in *Jaggers v. Binnings*, 1 *Stark*. 64, the concession of one of them binds himself alone, and each of them may transfer his share at his pleasure. It is clear, therefore, that the sheriff could not involve the plaintiff in a settlement of the boat's accounts.

The exception in the plaintiff's writ of error, is, that he ought to have had judgment for a fourth, not merely for a sixth, of the surplus money; and on the undisputed facts arising from the evidence actually admitted, that conclusion would be inevitable—for the judgment, execution, and levy showed no more than that four shares were sold. But the defendant's evidence, to show that six of the eight shares were parted with and paid for, had been erroneously excluded; but had the plaintiff been allowed a sixth part of the surplus which arose from the price of them, it might perhaps have admitted of a doubt whether the errors would not have compensated each other. It is not our practice to reverse for such as do no mischief. But as the agreement was that the court should decide the law on the undisputed facts, we cannot say that the fact proposed in the defendant's offer would not have been disputed had the evidence been admitted, or that the whole case might not then have been put before the jury. Had the court adjudicated on the excluded evidence, as they have done without it, we would still have been bound to send the cause to another trial, in order that the jury might give the plaintiff a fourth or a sixth, or whatever his proportion of a share may be, as they should find the fact to be.

Judgment reversed and *venire de novo* awarded.

Hays versus The Commonwealth.

Where on the trial list, in the handwriting of the president judge, there is entered, in an action of debt pending, "*Judgment for plaintiff; sum to be liquidated by the prothonotary,*" it will be inferred that the court gave judgment after argument, or with the acquiescence of the parties.

ERROR to the Common Pleas of *Allegheny county*.

This was an action of debt. The Narr. set forth, that Jacob Hays and John Hays were summoned, &c., for that they, on the day of A. D. at the county aforesaid, by their writing obligatory, sealed with their seals, acknowledge themselves to be bound to the plaintiff in the sum of hundred dollars—upon condition that the said Hays should *not* well and truly do and

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perform all the duties of constable of Mifflin township, in the county aforesaid. Now the plaintiff avers that he, the said *Jacob Hays* has not performed the said duties of constable, but hath wholly neglected and refused so to do in the execution of certain process wherein, &c. Yet the said defendants, although often requested so to do, have not paid the said sum of *five* hundred dollars to the said plaintiff, or any part thereof, &c.

The plea was *nil debet* and payment, and afterwards, in December, 1841, an affidavit of defence was filed.

February 2, 1842, judgment for plaintiff, sum due to be liquidated by prothonotary. April 22, 1842, sum due liquidated at \$133.98. December 22, 1842, on motion, rule to show cause why execution should not be set aside and the judgment opened. April 20, 1848, rule discharged.

Fi. fa. to December term, 1842. *Sci. fa.* to March term, 1847, against *Jacob Hays* with notice to *Snodgrass*, administrator of the estate of *John*, with notice to heirs, &c. *Snodgrass* plead payment, &c. Subsequently affidavit of defence of *Jacob Hays* filed; and afterwards defendants plead *nul tiel* record and payment, with leave, &c.

April 18, 1848, tried by jury and verdict for plaintiff for \$182.12, judgment.

It was assigned for error,

1st. The narr. does not set forth either the date or amount of the bond on which suit is brought.

2d. The narr. avers no breach of the condition of the bond, nor does it set forth that *Hays* was a constable, nor the township or county for which he acted, nor what kind of process he failed to execute, nor which *Hays* was to perform the condition of the bond, both bondsmen being of the name of *Hays*, nor the time when the process was delivered.

3d. The judgment is not authorized by the record, nor was the defendant in default.

The case was argued by *Selden*, for plaintiff in error; *McCandless*, for defendant in error.

The opinion of the court was delivered, Sept. 7th, by

ROGERS, J.—Unless this be taken to be a judgment by confession, it is very clear it cannot be supported; for as a judgment by default, the objections are insurmountable. It appears to be the act of the court; for on the trial list, in the handwriting of the president judge, is the following entry: February 2, 1842, judgment for plaintiff, sum to be liquidated by the prothonotary. This was ascertained to be \$133.98. All things are presumed to be rightly done in a court of record, and we are bound by this maxim, as is ruled in *Sybert v. The Bank*, 5 *Watts* 305, to infer that the

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court gave judgment on an agreement, or with the acquiescence of the parties. And this is the natural presumption, as we are unwilling to attribute to the court the great absurdity of rendering judgment without the assent of the parties, or by default, under the circumstances disclosed by the record. And this view of the case is confirmed by the subsequent motion of the defendant to open the judgment, thereby admitting its regularity and questioning merely the amount of the judgment rendered. That this was the effect of the motion, which it is to be presumed they understood, cannot be denied. The rule is to show cause why the judgment should not be opened. If the defendant intended to dispute the regularity of the judgment, it ought to have been a rule to set it aside. It must not be forgotten, that opening a judgment is but a mode of allowing the defendant a hearing on the merits, the judgment remaining intact, a lien and security for the money afterwards ascertained to be due. This motion is addressed to the discretion of the court; and in this instance, for good and sufficient reasons, no doubt, which we cannot review, the rule was discharged. After that act, I cannot see how the validity of the judgment can be now questioned by the defendant. It must have been made appear to the court, that it was a judgment by confession, a judgment rendered with the assent and acquiescence of all the parties. And we are driven to this conclusion, unless we are prepared to stultify the court, and all the counsel, said to be five in number, engaged in the cause. In *Zenger v. Gonter*, 13 *Serg. & Rawle* 58, it is ruled that a judgment entered generally is not to be considered a judgment by confession. I am not disposed to dispute the authority of that case, although I am not willing to extend it to all cases. This case differs from that, in this, that in *Zenger v. Gonter*, it did not appear to be the act of the court; here it does. *Barde v. Farmer*, 3 *Yeates* 149, rules this case. It is there held that where defendant has appeared by attorney, and judgment is entered against him, it shall be taken to be a judgment by confession. Here every thing that appears on the record tends to show that the judgment was rendered with the assent and acquiescence of the defendant.

Judgment affirmed.

The judgment on the *scire facias* is also affirmed, depending altogether on the validity of the first judgment.

Schwartz's Estate.

1. The limitation, by the act of 24th February, 1834, of the lien of a decedent's debts to a period of five years, is extended to a period of ten years, by an action brought and judgment recovered against the personal representative alone, within the first period.

2. An action of debt, professedly based on the first judgment, but to which the heirs of the decedent are made parties, may be regarded as an original action, in which the parties are bound to set up every available defence, and a judgment recovered for want of a plea, will preclude them from afterwards averring payment before the second judgment, in a collateral proceeding.

3. The second action being brought within five years after the decedent's death, is of itself sufficient to continue the lien of his debts for the second period of five years.

4. A judgment creditor, who, as the agent of the widow, received rents to which she was entitled under the will of her husband, is not liable to account for them, by crediting them on his judgment.

5. A non-joinder of any of the heirs, must be taken advantage of by plea in abatement.

6. That a minor was *personally* summoned, constitutes no objection on the part of other defendants; and that the wife of the judgment creditor was not joined in the proceeding on the judgment, is not a ground of objection by the other heirs.

This was an appeal by Abraham Morrison, a judgment creditor of said estate, from a decree of the Orphans' Court of Allegheny county, made in relation to the distribution of the proceeds of sale of said estate.

George Schwartz, the decedent, died on or about the 26th day of February, A. D. 1888, having in his life-time made a last will and testament, dated 10th September, A. D. 1822, in which he devised and bequeathed all his estate, real and personal, to his wife Mary, for and during her natural life, but made no disposition of the same after her death, and appointed his wife sole executrix, in the following manner, to wit: I give and bequeath to my beloved wife, Mary Schwartz, all my estate, both real and personal, for and during her natural life; and I do hereby nominate and appoint her, my said wife, my whole and sole executrix of this, my will. Hereby revoking all former wills by me made, and declaring this to be my last will and testament. In witness whereof, &c.

The said will was duly proved after the said testator's death, and letters testamentary thereon granted to the said executrix. At the time of his death, the said George Schwartz was seized in fee, subject to a ground rent, of and in a certain lot of ground and house thereon erected, situate on Market street, in the city of Pittsburgh; and died, leaving a daughter *Mary*, then intermarried with Abraham Morrison, the appellant—a grand-son, George S. Schwartz, son of Josiah Schwartz, then deceased—a grand-daughter, Mary Schwartz, daughter of Horatio N. Schwartz, then de-

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ceased—the said George S. and Mary being then minors—and Mary his widow, as above stated.

On the 15th day of March, 1838, an amicable action of *debt* was entered in the *Common Pleas* of Allegheny county, No. 339, March T., 1838, and judgment therein confessed on the same day by Mary Schwartz, as executrix of George Schwartz, deceased, in favor of Abraham Morrison, the appellant, for the sum of nine hundred and ninety-four dollars, and costs of suit, &c.

On this judgment an *action of debt* was afterwards brought in the *District Court* of Allegheny county, in favor of Morrison *v.* Mary Schwartz, executrix, &c., Geo. S. Schwartz, a minor, Mary Schwartz, minor child of Horatio N. Schwartz, and McKeown, guardian of said Mary. The writ was issued Feb. 4, 1843, and returnable to the first Monday of March; and on the 17th day of March, 1843, judgment was entered for want of a plea, and the sum liquidated at \$1292.50.—In January, 1845, assigned by Morrison.—December 12, 1846, re-assigned to him.

Mary Schwartz, the widow, not long after the death of her husband, appointed Eichbaum her attorney to collect all money due and owing to her, in her own right or as executrix, and to collect the rents above referred to, and went to reside with Morrison, and resided there till her death in December, 1845.

In January, 1846, petition of Morrison and wife was presented to the Orphans' Court of Allegheny county, praying the court to award an inquest to make partition of the said premises. They were appraised, Eichbaum was appointed trustee to sell, and he sold to Morrison for \$5100. On 26th June, 1846, the sale was confirmed. On the 23d December, 1846, the court having granted leave to the trustee to file an additional return, *nunc pro tunc*, as an amendment of the return previously made, the trustee filed a return which stated, *inter alia*, that Morrison, the purchaser, was a lien creditor by virtue of the judgment hereinbefore referred to, and that he, (Eichbaum,) had taken the receipt of Morrison for \$1538.93, the amount of the judgment, and interest thereon till the day of sale, and costs.

Exceptions to this supplemental return were filed, one of which was, that the judgment of Morrison was not, at the time of the sale, a lien on the said real estate; that it was not owned by Morrison at the time of the sale.

The matters in dispute were referred to an auditor. He reported, *inter alia*, that the judgment was had against the personal representative in the Court of Common Pleas, and on account of a change in the jurisdiction of that court as to amount, instead of a *scire facias* in the Court of Common Pleas, an action of debt was brought in the District Court against the executor and heirs; and that, though the mode of procedure is by *scire facias*, yet, as the same notice was served and the same opportunity for defence given

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which the *scire facias* would have furnished, as those of the heirs who were of age accepted notice of the writ, and the guardian appeared in court and acknowledged the same, and as there is no defence to the claim, other than the departure from the literal course intimated above, he decided in favor of sustaining the appropriation by the trustee to the judgment. He also reported that the judgment had been re-assigned to Morrison at the time at which the trustee made his return.

Exceptions were filed to the report of the auditor, some of which were that Morrison had received the amount of the judgment out of the rents, and received other moneys which should be credited on it. The auditor reported that the rents were received by Morrison for the widow.

Exceptions were filed to the report of the auditor.

The Court, PATTON, J., decided that Morrison was bound to proceed on his judgment by *scire facias*; that he had his original judgment in the Common Pleas, and if there was a doubt as to the jurisdiction of that court, he should have proceeded in time and transferred his judgment by certificate to the District Court. He decided also that the judgment was no lien on the interest of the wife of Morrison in the land sold, as she was not made a party to the proceeding upon it.

It was decreed that the judgment be stricken out of the account. From the decree, Morrison appealed.

Errors assigned:

1st. That the court erred in over-ruling the decision of the auditor, allowing the judgment of A. Morrison, the appellant.

2d. The court erred in deciding that the said judgment was not a lien on the said real estate, at the time of the sale thereof.

3d. The court erred in ordering and decreeing that the said judgment be stricken out of the account, and that the account be corrected accordingly.

The case was argued by *Williams* and *Kuhn* for appellant.

By *Woods* for appellee.

The opinion of the court was delivered by

BELL, J.—Under the construction of the acts of 4th April, 1797, and 24th February, 1834, as ascertained by *Trevor v. Ellenberger*, 2 *Penn. Rep.* 95; *Penn v. Hamilton*, 2 *Watts* 53; *Duncan v. Clarke*, 7 *Watts* 225; *Benner v. Phillips*, 9 *Watts & Serg.* 13; *Bredin v. Agnew*, 8 *Barr* 233; and *Keenan v. Gibson*, 9 *Barr* 249, it would result that the lien of the debt due to Morrison was continued in full vigor against the land devised, up to the date of its sale, simply by the legal operation of the action instituted against the executrix, and the judgment confessed therein, on the 15th of

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March, 1838. The testator died on the 26th of February, 1838; consequently, the five years prescribed as the limitation of the common law lien, by the 24th section of the act of 1834, did not expire until February, 1843. But, according to the cases cited, the judgment recovered against the executrix extended the operation of the lien of the debt over an additional period of five years, the computation of which did not commence until immediately on the expiration of the first limitation of five years. This interpretation of the statutes, restraining the prior unlimited lien of decedent's debts, is distinctly announced by the three cases first cited; and though some general expressions made in the others, might seem to sanction the idea that the second period is to be computed from the rendition of the first judgment, in every instance, a careful examination of these adjudications will prove them to be in harmony, on this point, with the older decisions. The result is, that though the judgment against the personal representative of the deceased debtor was confessed in 1838, its effect was to continue the lien over a period of ten years from the death of the testator, and thus the creditor was in no danger of losing his grasp on the land until February, 1848. The non-joinder of the devisees, in the first action against the executrix, detracted nothing from the vigor of this extended lien; and Murphy's Appeal, 8 *Watts & Serg.* 165, approved in *Atherton v. Atherton*, 2 *Barr* 113, shows, that within the time which elapsed here, it is only necessary to call in the heirs or devisees of a decedent, in pursuance of the 34th section of the act, where the creditor proposes to take the land in execution, in payment of his debt. Where a sale is had under an order of the Orphans' Court, either for the payment of debts, or after proceedings in partition, the holder of the lien may call on the fund without a formal proceeding against the present holders of the estate. But, in that case, the latter are at liberty to impeach the validity of the claim, just as though no judgment had been recovered against the personal representative of the decedent. So far, therefore, as the mere continuation of lien is involved, the institution of the second action, in which the heirs were made parties, would seem to have been unnecessary. It is, consequently, immaterial to inquire whether the latter proceeding works the same legal effect as though a *scire facias* had regularly issued against the executrix and terre-tenants, in accordance with the practice sanctioned by our adjudications, in analogy with the process given by the act of 1798, for the revival of judgments *inter vivos*. In fact, in determining the respective rights of the parties litigant, the judgment of 1843 might, altogether, be put out of view, were it not for its legal operation, in circumscribing the limits within which inquiry is now permissible. In reference to this operation, the second suit may be properly regarded as a distinct and independent action, brought within five years from

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the death of the testator, and competent, *proprio vigore*, to prolog the lien of the original debt. Though, technically, based on the judgment rendered against the executrix alone, and professedly with the intent of enforcing it, it is not to be doubted it brought the owners of the land into court, and so afforded them an opportunity either to assail the regularity of the proceeding, or to set up any defence in bar of the action, which could have availed them in an original suit. The authorities already adverted to, prove this would have been their right, had the plaintiff proceeded by *scire facias*; and it is certain a mere change in the form of the process could not, possibly, work any change in the rights of the terretenants. Having thus a *status* in court, they were bound to answer, either in abatement of the action, or by objecting matter in bar of it. Of the latter species of defence, the most obvious was, perhaps, payment by the decedent, or by his executrix since his death. But the averment of satisfaction was wholly pretermitted. The party who now avers it, was silent when he might have spoken with effect. By suffering judgment to pass for want of a plea, he conceded he knew of none that could avail to defeat the plaintiff. I have reference to Mr. McKeown, guardian of Mary Schwartz, the only one who now offers to contest Morrison's claim, the other party in interest, who is of full age, conceding the creditor's right to recover.

What is the legal effect of the defendant's silence, and the judgment consequent upon it? Doubtless, to estop them from setting up, collaterally, any pretermitted defence they might, at the proper time, have averred. Of these, I have already said, payment prior to the rendition of the judgment is one. But the judgment, of itself, conclusively negatives such an allegation; and as it cannot be, indirectly, impeached in another tribunal, no evidence of payment, prior to March, 1843, can be, properly, listened to. If, indeed, the debt was satisfied before that time, the remedy is by an application upon proper ground laid, to set the judgment aside, or to open it for the purposes of a defence, *pro tanto*, an application which can only be addressed to the tribunal before which the judgment was recovered. These remarks might, perhaps, be accepted as a full answer to the allegation of payment; for I have failed to discover any, the slightest proof of sums received by Morrison, subsequent to March, 1843, sufficient to satisfy his judgment. What moneys, if any, were paid to him after that date by Eichbaum, the appellee has failed to show. It was his business to show it, and his omission to do so leaves him without ground to stand on.

But were the difficulties I have suggested as lying in the way of the appellee, waived and full effect given to all the evidence introduced to show payment, we do not perceive any thing in it sufficient to establish the asserted fact. With the exception of some insignificant items of personal property belonging, and of some

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small debts due to the estate of the testator, the avails of which appear to have been applied in payment of his debts, the sums received by Eichbaum, and by him paid to Morrison, were the rents and avails of the estate devised to the executrix, as widow. But she was not compellable to account for these rents, as assets in her hands, applicable in payment of the debts of the estate. Even rents received by an executrix or administratrix, as such, are not regarded as assets, but are held in trust for the heir or devisee: *McCoy v. Scott*, 2 *Rawle* 222; *Adams v. Adams*, 4 *Watts* 160; and so long as the estate descended or devised remains unconverted, the profits paid to the owner belong to him absolutely, though he be, also, executor or administrator of the devisor or ancestor. Of the property from whence sprung the money received, Mrs. Schwartz was tenant for life by force of her late husband's will. Now, even upon a direct application of the remainder men, chancery would have coerced her no further than to the payment of the yearly interest of the burdens upon the estate. Here, it appears, she has done much more. If those in remainder were not satisfied with this, they should have applied to the proper Orphans' Court for a compulsory order to sell the land devised, in payment of the debts due. But they did not choose to take this course, and, indeed, it is suggested it would, in the end, have been less advantageous for them than that actually pursued. As, then, there existed no pretence for compelling an application of the rents and profits in discharge of Morrison's debt, how can the appellee claim that the money received by him, as the mere agent of the tenant for life, shall be charged against him in payment of his demand? Under the circumstances, he would not have been permitted to retain it, as against his principal, in satisfaction; and unless it be shown he actually did so, of course he is not liable to answer for imaginary values. He was the mere conduit-pipe, for the transmission of the fund from Eichbaum to the tenant for life, and in the absence of contrary proof, it is to be presumed the transmission was faithfully performed. If he retained any portion of it, it should have been shown. - As agent, he was liable to account for the full amount received, and we must take it he did so account. Indeed, the recovery of a judgment for the value of this debt, so late as 1843, which until 1845, belonged, by transfer, to other persons, is pretty strong affirmative evidence of the fact. The irregularities pointed to as apparent on the face of the proceedings to April Term 1843, cannot be averred, collaterally, to defeat the legal effect of the judgment recovered. If the non-joinder of Mrs. Morrison, as one of the heirs of her late father, was objectionable, it should have been taken advantage of by plea in abatement, 2 *Saund. N.* 10, and the fact that George S. Schwartz was personally summoned, though a minor, constitutes no objection in the mouth of the other defendant, even on the concession that

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George himself might have made it an exception. But he appeared by guardian *ad litem*, and has ever since acquiesced in the validity of the proceeding. As to the non-joinder of Mrs. Morrison, it is in the power of the Orphans' Court to see that it inflicts no real injury upon the other parties in interest, and it appears, the auditor by his report, has sedulously guarded against such possibility.

There is, therefore, no room for regret that the appellee is precluded from, effectively, setting up the technical difficulties urged by him, and as he has shown none founded on the merits, which ought to bar the plaintiff of his debt, the decree of the Orphan's Court, denying the right, must be reversed.

And now, September 9, 1850, after hearing the parties and duly considering the same, It is ordered, that the decree of the said Orphan's Court, setting aside and disallowing the report of the said auditor, be reversed, and altogether annulled, and that the said report be confirmed. And it is further ordered, that legal interest up to this date be calculated upon, and added to, the balances found to be due from the said Morrison, and that he be charged with the aggregate sum so found to be due.

And now, October 11, 1850, It is ordered that the costs incurred in the said Orphans' Court, and in this court, be paid by the said Mary Schwartz out of the funds of her said ward.

Hays and Black *versus* Mouille & Co.

The right of stoppage *in transitu*, by the vendor, on the insolvency of the vendee, exists until the goods have arrived at the end of their destination, or into the possession or actual control of the vendee; and the delivery to a mercantile house, merely for transmission, by a forwarding house, to the vendee, does not amount to a delivery to the vendee.

The seizure of the goods under writs of foreign attachment, on their way to the vendee, does not prevent the vendors exercising their right of stoppage, through a writ of replevin.

It is not necessary that the charge or lien of the carriers, for freight, be paid before the writ of replevin *be issued*; it is sufficient if it be paid before the goods are taken from their possession.

The purchaser's notes given for the price of the goods, need not be tendered back, before stopping the goods *in transitu*.

ERROR to the District Court of *Allegheny county*.

This was an action of replevin in favor of M. Mouille & Co., the vendors, against Hays & Black, the agents of the carriers of the goods, for twenty-four boxes or packages of merchandise, in exercise of their right of stoppage *in transitu*, the goods having been sold by the plaintiffs to Rhodes, of Massillon, Ohio.

For further statement of facts, see opinion of his Honor Judge HEPBURN.

[Hays & Black v. Mouille & Co.]

On the trial, the counsel for the defendants requested the court to charge the jury as follows :

1st. That the goods for which the action is brought, being bound by the attachments of Wood & Sheldon, and Sheldon, Phelps & Co., and therefore in the custody of the law, were not repleviable, and therefore the present action cannot be maintained.

2d. That the defendants were entitled to a lien thereon for their freights, the antecedent tender or payment of which was essential in order to enable the plaintiffs to maintain this action.

3d. That the delivery of the goods to Atwood and Co. upon the order of the vendee's agent, and the shipment by them under his instructions, was such a delivery to the vendee as excluded any right of *stoppage in transitu* on the part of the vendors.

4th. That if the delivery of the goods at Philadelphia was not so complete as to exclude the right of stoppage, the interception of the same at Hollidaysburg, and the taking possession and remarking thereof, so as to change their destination, by the agent of the vendee, arrested the transitus, and operated as a complete delivery, so as to determine the rights of the vendor.

5th. That inasmuch as the right of stoppage could only arise upon the failure of the vendee, which did not occur until about a week after the goods were arrested at the suits of the attaching creditors, and before which, if not so arrested, they would have reached their final destination, the transitus was ended, and the rights of the vendor will be postponed to those of the attaching creditors.

6th. That if the goods were conveyed to Pittsburgh, where they were to be subject to the orders of the vendee as to their further transportation, the transitus was ended on their arrival at that place.

7th. That the plaintiffs, having taken the notes of the vendee in payment of the goods sold to him, could not exercise the right of stoppage, unless they had been previously dishonored or surrendered to the vendee.

The court, HEPBURN, J., instructed the jury as follows :—

This is an action of replevin brought by Mouille & Co. against Robert S. Hays and George Black, to recover the possession of certain boxes of merchandise in the possession of the defendants. It appears from the evidence that the defendants are mere stakeholders, being the agents of the forwarding house of D. Leech & Co. of this city, and have probably no interest in the questions on trial. The controversy arises between the plaintiffs, merchants, residing in Philadelphia, who sold the goods in question to Jesse Rhodes, of Massillon, Ohio, and certain New York creditors of the said Jesse Rhodes, who have issued foreign attachments against him, and attached the goods in the hands of Hays and Black, summoning them as garnishees. The right of these respective claimants it will become our duty to determine.

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The plaintiffs, it is conceded, were the original owners of the goods in question.

In May, 1847, Jesse Rhodes sent his agent, Absalom Baker, to Philadelphia, to buy goods on Rhodes' account. He did so, to the amount of some thousands of dollars, and gave them Jesse Rhodes' note at six months for the amount of the invoice. The goods were packed and directed to Jesse Rhodes, Massillon, Ohio. Thus marked, the goods, according to the usual course of business in this respect, were collected at one store, or by one of the persons who had sold goods to the purchaser, and by them delivered to the transportation office to be forwarded to Pittsburgh. This service was performed by Atwood & Co., no doubt under the direction of Mr. Baker, the agent of Rhodes. Atwood & Co. then shipped the goods by D. Leech & Co.'s line to Bagaley & Smith, a forwarding and commission house in this city.

After these goods had left Philadelphia, it appears that a portion of other purchases made by Baker, were attached at Philadelphia in the hands of J. Brown & Co., by certain New York creditors of Rhodes, and it seems to have been apprehended by some who had sold to Rhodes, that the residue of the goods would be attached in this city. Hence Ludwig, Kneedler & Co. were about to send a member of their firm to arrest their goods in Hollidaysburg. They agreed, however, with Baker, the agent, that he should go forward and stop the goods at that place, and not deliver them to Rhodes until he gave security for the amount of their bill; if he failed to do so, the goods were to be returned to them at Philadelphia.

The plaintiffs were no parties to this arrangement. But Baker proceed to Hollidaysburg, and there (by order of the carriers, Harris and Leech, it is said on the manifest) stopped the goods, erased the marks upon the boxes of those now in question, and remarked them with a private mark without any direction; but on the boat's manifest they were directed to be forwarded to the care of S. A. Wheeler, Akron, Ohio, which, it appears, is on the usual route of canal transportation to Massillon and Uhricksville. The goods being so marked, arrived in Pittsburg, and were attached by Wood and Sheldon and other creditors of Rhodes, and were replevied by Mouille & Co., the vendors. The question is, who shall hold the goods—the vendors or the attaching creditors?

The plaintiffs contend, that after the sale and shipment of these goods to Rhodes, and before he had received them, it was ascertained that he was insolvent, and that, consequently, they had a right to pursue and retake the goods at any time before they came to the actual or constructive possession of Rhodes, the vendee. When a vendor sells goods on credit to another, he has a right to resume the possession of the goods while they are in the hands of a carrier or middleman, in their transit to the consignee, or ven-

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dee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. This the law calls the right of stoppage *in transitu*, and it can only be exercised as between the vendor and vendee; and, as the property is vested in the vendee by the contract of sale, it can only be revested in the vendor, during its transit to the vendee under the existence of the above circumstances: 2 *Kent's Com.* 540; *Story on Sales* 257; *Smith's Mercantile Law* 547.

The insolvency of the vendee, Rhodes, is the groundwork of the plaintiffs' claim, and this is a fact for your decision, was Rhodes insolvent when these goods were replevied by the plaintiffs? It is not necessary, to prove insolvency, that he should have been declared a bankrupt or insolvent by a judicial tribunal, nor that he should have made an assignment of his property. If the fact exist, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more: *Story on Sales* 270. You have the testimony of Baker that Rhodes was indebted some \$60,000, and that his assets were but \$26,000, and that his creditors were watching for these goods on the line of transportation, and actually attached them before they reached Ohio, for debts which he was not able to pay—sufficient to satisfy you, I presume, of Rhodes's entire insolvency. The fact, however, is for you to determine.

The next question is, had the transit of these goods been determined before they were replevied?

The transitus of the goods, and consequently the right of stoppage, is determined by actual delivery to the vendee, or by circumstances which are equivalent to actual delivery: 2 *Kent's Com.* 543, and cases cited. It is not, however, every constructive delivery that will destroy the right in question. The delivery to a carrier or packer to and for the use of the vendee, or to a wharfinger, is a constructive delivery to the vendee, but it is not sufficient to defeat the right, even though the carrier be appointed by the vendee: 2 *Kent's Com.* 545. It will continue until the place of delivery be in fact the end of the journey of the goods, and they have arrived to the possession or under the direction of the vendee himself. It is also settled that the transitus is at an end if the goods have arrived at an intermediate place, where they are to remain stationary under the orders of the vendee, and until by his directions they are again put in motion for some new and ulterior destination. They are, however, to be deemed in transitus so long as they remain in possession of the carrier as such, even though such carrier may have been appointed by the consignee himself, and also while they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee: *Smith's Mercantile Law* 552; *Story on Sales*, sec. 335, 336, 337.

The cases upon the subject of constructive delivery abound in

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refined and subtle distinctions. Chancellor Kent seems to be of opinion that a solvent for the difficulty may be found in this rule: "That if the delivery to a carrier or agent of the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent, for safe custody, or for disposal on the part of the vendee, and the middleman is by assent converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage:" 2 *Kent's Com.* 545. The rule no doubt is entirely correct, with the exception of the case of goods delivered on board a ship belonging to or chartered by the vendee, which, in effect, is a delivery to the vendee himself: *Bolin v. Huffnagle*, 1 *Rawle Rep.* 9.

The goods in question had not arrived at the end of their journey, neither had they arrived into the possession or actual control of the vendee. But the defendants contend "that the delivery of the goods to Atwood & Co. upon the order of Baker, and their shipment by Atwood & Co. under his instructions, was such a delivery to the vendee as excludes any right of stoppage in transitu on the part of the vendor." But for what purpose were the goods delivered to Atwood & Co.? Was it for safe keeping or disposal? Certainly for neither. Then was it for transportation to the vendee? The testimony shows that they merely collected them for transportation, and the fact that they were immediately transmitted on their way to Ohio, is satisfactory that they were delivered for no other purpose, that they were still in *transitu*, and that the right of stoppage was not at an end.

Was the interception of the goods at Hollidaysburg, by Baker taking possession of them and remarking them, such a change of their destination by the assent of the vendee as to arrest the transitus, and operate as a complete delivery of the goods to him?

Doubtless if the vendee himself had intercepted the goods at that or any other point, and taken the actual possession of them as owner, the transitus would have been at an end; and in like manner, if his authorized agent had taken possession *on his account*, for the same purpose, it would have the same effect. But what authority had Baker to intercept the goods on Rhodes' account at that place? According to his own testimony he did it as the agent of certain creditors of Rhodes's, and for their benefit, so that in fact it may have been an exercise of the right of stoppage *in transitu* by the vendors, though I do not perceive that he made much effort for the protection of those by whose orders the stoppage was made.

The circumstance that he erased Rhodes' name and still forwarded the goods to Akron on their way to Massillon, appears to evince a desire to get them safely on their passage, and rather to facilitate than to intercept their transmission to their original destination—

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certainly Wheeler was not the owner, as Rhodes himself was in Pittsburgh on the arrival of the goods, endeavoring to obtain their liberation.

In *Story on Sales*, sec. 336, it is said if the agent hold them for the purpose of transmission to the vendee, the vendor's right of stoppage exists. And in *Whitehead v. Anderson*, 9 *Meeson & Welsby* 534, PARKE Baron observes: "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the mean time they have come into the actual or constructive possession of the vendee. A case of constructive possession is where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of *custody* on his account, and subject to some new and further order to be given to him. It appears to us very doubtful whether the act of marking, or taking samples, or the like, without any removal from the possession of the carrier, as though with the intention of taking possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep the goods in the character of an agent for custody:" 9 *M. & W.* 534. This case is cited with approval in *Donath v. Broomhead*, 7 *Barr* 304, by Judge ROGERS. I see nothing, therefore, in the transaction, to put an end to the transitus at that point.

It is also contended, that if the goods were consigned to Pittsburgh, where they were to be subject to the order of the vendee as to their further transportation, their transitus was ended on their arrival at this point.

If the facts were so, the law is correctly stated. The goods would then have arrived at the end of their journey. But they were consigned to Bagaley & Smith, and never reached their possession, but were arrested in the hands of the defendants, agents of Leech & Co., the first carriers. Neither is it certain that if they had been delivered to Bagaley & Smith, they were to be retained for further orders from the consignee or the person to whom directed. It is the duty of the forwarding house to expedite goods to their places of destination; and they would fail in that duty if they did not, as soon as practicable, send them as directed, without delay for any further order than that found in their manifest, or the directions on the goods themselves.

Nor do I think that the defendants' first point, the seizure under writs of foreign attachment, presents any difficulty in the way of the plaintiffs' recovery. The creditors of the consignee can obtain no greater right over the goods than the consignee himself had

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when the attachment was served. The right of stoppage *in transitu* is not defeated by the goods being attached by process of foreign attachment, any more than by the right of a carrier to retain for a general balance: 1 *Camp.* 248; 3 *T. R.* 464; 3 *B. & P.* 42; 15 *Wend.* 137; 17 *do.* 504; 23 *do.* 611; 8 *Pick.* 198.

The act of the 3d April, 1799, *Dunlop* 85, perhaps, occasions greater difficulty. But the object of that act was to prevent delay, and to protect the officers of the law from vexatious and protracted litigation, and not to deprive a third person of a valuable right; and, as far as I have been informed, has not been extended to cases of foreign attachment. The case in 1 *Miles Rep.* is an authority in support of this position.

The object of foreign attachment is to compel the appearance of the defendant, and for that purpose he is attached by his goods and chattels, &c. This is not such an absolute seizure of the goods as will prevent the issue of a replevin for the same goods; particularly so, when the plaintiff in replevin is a merchant, claiming the goods under his right of stoppage *in transitu*. The authorities are full that this right is superior to that of attaching creditors, and I think the right may be enforced by replevin.

The defendants also contend that they had a lien for freight, which should have been paid or tendered, before this suit can be maintained.

The carriers had a lien, and were entitled to payment of their freight, before the goods could be taken from their possession. But this does not prevent the claim of the vendor as against the vendee; and, in fact, the freight was paid before the actual seizure of the goods, and before they were removed from the defendants' possession. This would appear then, rather as a question of costs, than one affecting the result of the case between the real contending parties; and I am disposed to think that this matter is not put in issue by the pleadings. At all events, that the parties may have an opportunity of determining the merits of the case, and as the point is now unimportant to the litigant parties, it is answered in the negative. The purchaser's notes given for the price of the goods, need not be tendered back before stopping *in transitu*: *Smith's Merc. Law* 550; 2 *Meeson & Welsby* 364; *Abbott on Shipping* 408; 9 *Mass. Rep.* 72.

The defendants' seventh point is, therefore, answered in the negative.

Upon the whole case, then, I am of the opinion that the plaintiffs are entitled to a verdict.

The jury rendered a verdict in favor of the plaintiffs for six cents damages and six cents costs.

Whereupon, this writ of error was sued out, and the plaintiffs therein now assign for error:

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1st. That the court erred in their answers to the seven several propositions submitted by the counsel for the defendants; and

2d. That the court also erred in charging the jury that the vendee's agent, Baker, had no right to intercept the goods at Hollidaysburg; and that he did it as the agent of the creditors, without any evidence of such agency, and in direct contradiction of the fact that the plaintiffs were no parties to the arrangement testified to by him.

The case was argued by *Williams* and *Kuhn*, for plaintiffs in error.

Magraw and *Shaler*, for defendants.

The opinion of the court was delivered by

ROGERS, J.—After a careful examination of the exceptions taken on the argument, we are decidedly of the opinion the case is properly ruled, on all the points. As nothing occurs to my mind, calculated to throw additional light on the views, so well expressed by Judge HEPBURN, the judgment is affirmed, for the reasons given in the charge.

Judgment affirmed.

Morrison versus Hartman.

In a *scire facias* on a recognisance for stay of execution, the principal debtor is not a competent witness for the defendant who was surety in the same.

The surety in a recognisance for stay of execution, is not discharged merely by reason of a *fi. fa.* on the original judgment having been stayed by plaintiff's attorney before levy.

ERROR to the District Court of *Allegheny county*.

This was a *scire facias* on a recognisance issued in favor of Hartman and Hoge v. Morrison on his recognisance of bail for stay of execution, in a judgment obtained by plaintiffs against Hamnet and Schoyer.

On the judgment against Hamnet and Schoyer a *fi. fa.* had issued, which was stayed by order of plaintiff's attorney. No levy had been made upon it.

On the trial, the deposition of Hamnet was offered, on the part of defendant, to prove that an arrangement had been made between himself and Mr. Bigham, plaintiff's attorney, which discharged Morrison.

The deposition was rejected.

On same side, it was also offered to be proved by McMillan, that

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at the time the *fi. fa.* against Hamnet, one of the principal debtors, was in the hands of the sheriff, and which was stayed by order of plaintiff's attorney, that Hamnet had sufficient personal property in his possession to pay the debt.

The evidence was rejected.

Verdict for plaintiffs.

Errors assigned :

1. In rejecting the deposition of John Hamnet.
2. In rejecting the evidence of McMillan.

The case was argued by *Washington*, for plaintiff in error.

Magraw, for defendant in error.

PER CURIAM.—The witness would be liable, in any event, either to the plaintiff or to the defendant who is sued, as his surety. If the plaintiff fails, he may recover his debt from the witness with costs; but not the costs of this action. If he recovers, the defendant may recover from him his debt and the costs of both actions. The witness was consequently interested.

The other point also was properly ruled. A creditor who lets the means of satisfaction slip from his hands, discharges his debtor's surety; but he must have had the means actually in his hands, or at least a specific lien on it. Permissive supineness will not do it. In the *United States v. Simpson*, 3 *Penns. Rep.* 439, the surety was not discharged though the creditor had suffered the lien of a judgment against the principal to expire. That was thought to be a different thing from impairing a security by a positive act, the surety and the creditor standing in equal want of equity. Had the surety in this instance required the creditor to proceed on his execution, the case would have been different; but it was his business to look after his own interest. The very point seems to have been ruled at Harrisburg in *Cathcart's Appeal*, 1 *Har.* 416.

Judgment affirmed.

Calhoun and Lyon *versus* Mahon.

A claim filed November 6, 1847, stating the amount of it, for 16,836 brick, furnished within six months last past, for and about the erection and construction of a building, describing it, and appurtenances, and annexing a bill of particulars, with a single date, viz. 3d June, 1837, is sufficiently certain.

ERROR to the Common Pleas of *Allegheny county*.

This was a *scire facias* on a claim for materials, as follows :

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Richard Mahon, of the county aforesaid, brickmaker, files this, his claim for the payment of \$65.99, against all that certain three story brick dwelling-house, situate on the corner of Morgan and Cedar streets, in the Fourth Ward of Allegheny city, in the county aforesaid, being 16 feet in front by 18 feet in depth, and the lot or piece of ground appurtenant being 25 feet in front by——— in depth. The said sum of \$65.99 being a debt contracted for materials furnished, viz.: 16,836 brick, by the said Richard Mahon, within six months last past, for and about the erection and construction of said building and appurtenances of which the said Patrick Calhoun is the owner or reputed owner, and the said James Lyon is the contractor or architect. And the said Richard Mahon claims to have a lien on the said building and the lot of ground appurtenant to said building from the commencement thereof, for the sum aforesaid, according to the act of Assembly in such case made and provided. And said claimant hereto, annexes a bill of particulars of the amount of his said debt, showing the nature and kind of materials furnished, and the time when the said materials were furnished.

November 6, 1847.

WM. BOYD, Attorney for plaintiff.

Patrick Calhoun owner, and James Lyon contractor,

To Richard Mahon, Dr., to 16,836 brick at \$3.94 per 1000, the last of which were furnished 3d June, 1847. \$65.99.

Among defendant's pleas was the following one, viz.: "And for a further plea in this behalf, the said defendant pleads *nul tiel* record; and that there is no sufficient lien filed of record in the said court, in this case, containing and setting forth the correct dates, amounts, &c. of the items and particulars, as is required by the act of Assembly in such case made and provided," &c., &c.

On the trial it was objected to the lien, that the bill does not contain a statement of items, no dates, and is of too general a character.

The court overrule the objection.

Point submitted by defendant's counsel:

The lien and bill of particulars filed by plaintiff are defective and insufficient, the times at which the alleged materials were furnished not being set out therein, nor shown by proof on the trial.

PATTON, J., charged:

The lien and bill of items are sufficient.

If the materials were furnished on any other credit than that of the building itself, the plaintiff will not be entitled to recover. But if the materials were furnished to the building on the credit of the building, the plaintiff will be entitled to recover.

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To which charge the defendant's counsel excepts, and the exception is sealed.

Verdict for plaintiff.

Assignment of errors :

1. The court erred in overruling the objection to the lien and bill of particulars, and suffering the same to be read in evidence to the jury.

2. The court erred in their answer to defendant's point ; and in charging the jury that the lien and bill of items were sufficient.

3. General errors, &c.

The case was argued by *Burke*, for plaintiffs in error, and by *Marshall*, for defendant in error.

The opinion of the court was delivered by

BELL, J.—The single question in this cause, whether the time when the bricks were furnished by the plaintiff is sufficiently stated, on the face of the claim filed, or may with convenient certainty be collected from it, is, I should think, ruled by *Dreisbach v. Kellar*, 2 *Barr* 77 ; *Shaw v. Barnes*, 5 *Barr* 18 ; *Reichbaugh v. Dagan*, 7 *Barr* 394 ; and *Knabb's Appeal*, 10 *Barr* 186. All these cases settle that a substantial compliance with the requisites of the act of 1836, on the subject of the claim filed, is sufficient. Certainty to a common intent is all that is called for, and this is satisfied if those interested may ascertain the period during which the delivery of the materials was effected, or the work was done, so as to individuate the transaction. In the case last cited, where as here, the claim was for bricks furnished in the construction of a building, but a single date was given, and this was ruled to be sufficient, more especially as among brick makers, the habit is said to be to make the final charge after all the necessary bricks are furnished. In the instance before us, it appears to me, the claim filed is still more precise and satisfactory, in the particular under consideration. The date upon which the last delivery of bricks took place is given, to wit, June 3, 1847, and it is averred the whole number was furnished within six months prior to November 6th, 1847, the date of the claim filed. It results necessarily that the materials here sued for, must have been furnished between the 6th of May and the 3d of June, 1847. Now surely, under the authorities I have referred to, this is sufficiently certain, and particularly when it is recollected those who provide bricks for structures in process of erection, do not generally charge each load dispatched to the building, with the date when it was sent. It has been more than once said, we must not be hypercritical, when scanning this species of lien, and estimating its sufficiency. Such a practice must necessarily defeat a very large majority of them ; a result not to be desired

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where they furnish sufficient *data* to enable the parties subject to them, to ascertain all that is essential for them to know. Both upon authority and principle, then, we conceive the claim, in dispute here, well enough ascertains the time of delivery.

Judgment affirmed.

Mills *versus* Buchanan.

A party objecting to evidence, is to be confined to the ground of objection taken in the court below.

The declarations of a former owner of land, adjoining to that in dispute, made in the presence of his adjoiner at the time of the running of the line between their lands, that a certain tree was a corner between them, is evidence in an ejectment between the adjoiner and another.

In an action of ejectment, a former claimant and occupant, whose possession was necessary to make up the continuity of adverse possession for twenty-one years, is competent to show that he did not hold adversely to the adjoining owner of the land in dispute in the case.

A party is entitled to such an answer to a point, as is intelligible to the jury.

Where two marked trees exist, and the line from a known corner, by the course of the original survey, will not strike both of them, it is to be run diagonally between them.

ERROR to the District Court of *Allegheny county*.

This was an ejectment for seven acres fifteen and nine-tenths perches of land, by Buchanan v. Mills. Plea not guilty, verdict for plaintiff. The case was tried before LOWRIE, J. The land claimed by plaintiff had formerly belonged to George Wallace—that claimed by defendant had belonged to Charles Wallace.

After plaintiff had rested, defendant called Nathaniel Patterson. In 1843, I made a survey of this land. I commenced at a sugar tree, the corner between the land of Mr. G. Hawkins and Mr. Mills' land. Mills then claimed one part of the land, and Hawkins the other. The witness was asked as to the admissions of Hawkins and Mills at the time of the survey—that this sugar tree was a corner between them; the question was objected to as irrelevant. The objection was sustained, and defendant excepted.

Charles Wallace was sworn on the part of plaintiff. He stated he once owned defendant's land. The plaintiff offered to prove that up to 1824 or 1825, there was no line ascertained between the farms, and that there was no intention on the witness' part, of holding adversely to the former owner, but always intending to put their fences on the true line, when it should be ascertained.

Objected to. Objection overruled, and exception on part of defendant.

On the trial, the defendant presented the following, among other points :

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5. That if the jury believe that the W. O. is the corner of the Braddock's Field survey, and that the two blocked trees, as stated by Patterson, are line trees of the Braddock's Field survey, then the line is from the W. O. by those line trees; and if they are satisfied that the corner on the river is where defendant claims, then the line is to be ascertained by running the course with the proper variation, and the distance from the river comes thence by the next course with the proper variation, until the course intersects the line from the W. O. by the marked trees.

As to this point, the court answered—You may adopt the W. O. and the defendant's point on the river, and yet reject the line indicated by the two blocked trees; and then you may have a difficulty in dividing the surplus among those three lines. Under ordinary circumstances, it would seem to be fair to divide it proportionally among them. Perhaps you will think in this case, that the lower line has lost some by the washing of the river, and is entitled to no surplus. There may be other circumstances which would require some one line to have more than its proportion.

Errors were assigned, *inter alia*, as follows:

To the rejection of the evidence of Patterson, as to the declarations of Hawkins, and of Mills, the defendant, in 1843, as to the sugar tree being the corner between their lands.

That the court erred in admitting the evidence of Charles Wallace, the former owner of defendant's tract, for the purpose of proving that up to 1824 or 1825, there was no line ascertained between the farms; and that there was no intention on the witness' part, of holding adversely to the former owner, but always each intending to put their fences on the true line, when it should be ascertained.

6. That the court erred in answer to defendant's fifth point.

The case was argued by *Woods* and *Hawkins*, for plaintiff in error.

Shaler, for defendant in error.

The opinion of the court was delivered by

COULTER, J.—The first bill of exceptions is in these words:—"Mr. Woods now asks the witness as to the admissions of Mr. Hawkins and Mr. Mills, at the time of the survey, that this sugar tree was a corner between them, and the question is objected to as irrelevant, and the objection is sustained and defendant excepts, and at his instance I seal this bill." The question to be resolved then, is, whether or not the testimony was relevant to the issue; because we cannot go out of the bill of exceptions. We sit here to review the decisions of the court below, on the grounds submit-

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ted to it; and not to make a decision upon new and original ground, not suggested to the court below. In *Rowe v. Power*, *New Rep.* 36, and in 8 *East*. 281, it was resolved that a party objecting to evidence, must be confined to the objection taken at the trial; and in *Baring v. Shippen*, 2 *Binney* 168, it was decided that the general rule is, that the party is confined to the objection taken at the trial, and appearing on the face of the bill of exceptions, and the same point was ruled in *Farr v. Swan*, 2 *Barr* 245. In *Wolverton v. Commonwealth*, 7 *Serg. & Rawle* 277, the same point was under consideration, and it was ruled that a party may be called on to state the ground upon which he rests an objection to the competency of evidence, and if it fail him, that it was not error, although the evidence be incompetent on other grounds; and in *Milliken v. Barr*, 7 *Barr* 23, it was held, that a party will be confined to the ground of objection taken by him to evidence in the court below. In *Drexel v. Man*, 6 *Watts & Serg.* 386, it was held, that a plaintiff in error cannot take any other ground of objection to the competency of the witness, than that assigned in his bill of exceptions and appearing on the record. And the rule must operate with equal force on the other party, the reason being precisely the same, whether the objection to the evidence is made by the plaintiff in error or the defendant. That is, that this court can only decide upon what was ruled below, and not upon other matter not appearing on the record.

Now this sugar tree, according to the draft exhibited, was the corner between Hawkins and Mills at the opposite side of the tract from that where the disputed boundary between Buchanan and Mills is located; and the surveyor testifies that he ran from the sugar tree. Nothing is more common in ascertaining old lines than to start from a marked line or corner on the other end of the tract than that where the difficulty exists. It is sometimes the surest, and sometimes the only way in which a dispute can be accurately settled. There are many surveys in this commonwealth where only one line was run, and very many where a number of surveys have been protracted upon one. In such cases, the only way of ascertaining the locality of these chamber surveys, as they are called, is to commence where the marks of the hand of the surveyor are fixed and certain, and run off the courses and distances. But in all cases of disputed boundary, it is an excellent auxiliary to the surveyor, pertinent and german to the very question to be settled. It has been long practised in settling disputed boundaries by the most experienced surveyors. We cannot decide that the evidence proposed and rejected was irrelevant to the issue. It is true that the objection was enforced here on other grounds, such as, that Mills was interested, being a party, and that Hawkins would be benefited also, by having the disputed boundary settled upon the basis of the sugar tree being a corner, and that being declarations not on

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oath, they could not be admitted. But this cannot help the defendant in error. These are not taken as the objections on the bill of exceptions; and according to many adjudicated cases, we cannot now consider them. I may say, however, that declarations made on the ground that such and such tree was a corner or a line tree, have often been received in evidence in cases of disputed boundary when such person was dead. In *Caufman v. Cedar Spring*, 6 *Binn.* 59, it was held that what has been said by a deceased person in relation to a boundary is receivable as evidence; and the same thing was held in 11 *Serg. & Rawle* 149. And in *Hamilton v. Menor*, 2 *Serg. & Rawle* 70, it was decided that declarations of a person living and who might be produced, were not evidence; but whether Hawkins was living or dead does not appear, nor is it made the ground of objection in the bill of exceptions. If that exception had been taken below, possibly it might have been removed, from which it would perhaps be a reasonable inference that he was dead, as the whole objection was rested on the ground of the declarations being irrelevant.

Hawkins or his representatives could have no interest whatever in the verdict or event of the suit. He might have a remote, possible, contingent interest in the question. The objection, therefore, would be to his credibility, not to his competency: 6 *Binney* 319; 10 *Barr* 167. But the evidence offered was relevant to the issue, and therefore the rejection of it, on the ground of its being irrelevant, was erroneous.

There is no weight in the fourth error assigned. Wallace was one of the occupants whose possession was necessary to make up the continuity of adverse and hostile possession for 21 years. But he swears distinctly that he did not hold adversely to his brother, but that each occupied according to the fences, knowing that the line was then uncertain, and with a mutual understanding that when they should have the line fixed, that each should conform to it. This wears no color of an adverse hostile possession, but directly the contrary. It is of no consequence whether this mutual understanding was known to those who afterwards claimed the land. Because title could not be acquired without the existence of the fact upon which it must necessarily be founded. There is nothing in the second, third and fifth errors that requires any comment: they are overruled.

The sixth is more massive and is pregnant with matter bearing on the merits of the case. The counsel for the defendant submits to the court a plain point on which he requests the instruction of the court to the jury. He was entitled to a plain answer to that point, in a manner that would be intelligible to the jury. But it appears to me that he has not answered the important part of that point, *but* that the answer is confused, so that a jury could not make out its import. Indeed, the counsel for the defendant in

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error admits on his printed statement that the answer is obscurely expressed, but that it is sufficiently clear. That which is obscure may be sufficiently clear to learned and ingenious counsel who can extract from it something that answers their cause. But it ought to be so plain that plain men, such as jurors, would see no difficulty or obscurity in it, otherwise, instead of being a lamp to their feet and to their eyes, it may lead them astray. The point is as follows: "If the jury believe that the white oak is the corner of Braddock's Field survey, and that the two blocked trees, as stated by Patterson, are the lines of the Braddock's Field survey, then the line is from the white oak by those line trees; and if they are satisfied that the corner on the river is where the defendant claims, then the line is to be ascertained by running the course, with the proper variation and the distance from the river corner, thence by the next course, with the proper variation, until the course intersects the line from the white oak by the marked trees." Here is a very intelligible question, bearing directly on the merits of the controversy. To which the court answer to the jury: "You may adopt the W. O. and the defendant's point on the river, and yet reject the line indicated by the two blocked trees. And then you may have a difficulty in dividing the surplus among those three lines," and tells them that under ordinary circumstances it would be fair to divide it proportionably among them. This part is not an answer to any thing proposed in the defendant's point. By which, I suppose, the court meant that as there would be more distance between the river and the white oak than would fill up these courses, that they should divide that overplus distance *pro rata* among the three courses.

But although the court answers to something not asked, it does not answer the gist of the inquiry proposed. That is, whether, if the jury believe that the W. O. was the corner of the Braddock's Field survey, and the two blocked trees are the line trees of that survey, as stated by Patterson, then the line is from the W. O. by those blocked line trees, running the course and distance with the proper variation. The basis of the inquiry is, that if the blocked trees were the line marked by the surveyor, that then that line must prevail. It was earnestly contended, that the jury were the judges whether the marked trees were line trees or not, and so undoubtedly they were. But the instruction prayed for, is predicated on the fact of the jury believing them to be marked trees on the Braddock's Field; and if they should so believe, whether they ought not to be the true line and prevail over the course and distance returned. This is the real substantial inquiry, an inquiry which has often been answered in our books. But the court did not give the answer which the inquiry receives in our books. But they answer, you may adopt the white oak and the defendant's point on the river, and yet reject the line indicated by the blocked

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trees. That is, even although you should be of opinion that they are the line trees on the Braddock's Field survey. For that is the necessary implication and inference, because the question is, if the jury believe they are the line trees of the Braddock's Field survey, as testified by Patterson, whether they did not indicate the true line. The answer is, in effect, no: you may adopt the white oak and defendant's point on the river and reject those line trees, but he gives no reason for it.

These trees were marked at the same date that the white corner was marked in 1769, some eighty years ago, from which a strong inference would arise that they were marked by the same person at the same time, and were line trees, but that was for the jury. The court ought to have told the jury that if they believed those blocked and marked trees were lines of the Braddock's Field survey, that they indicated its location and were the real survey, and that they must prevail over the courses and distances returned. But that if they did not believe that they were marks of the survey made on the ground at the time, then they would reject them and adopt the returned survey. I may say that the circumstance of those marks being some distance from the geometrical lines, as claimed by the plaintiff or defendant, is of little consequence, because the rule is that the marked or artificial lines made by the surveyor constitute the true survey and must be followed. There would be no sense or reason in the rule, if the marks must be on the line returned. They must prevail *over* it. Taking a course between these *trees* diagonally, it seems there would be little variation and but a short distance from the line thus indicated. The courses and distances run on the ground are the true survey: 1 *Yeates* 28. Same point, 2 *Yeates* 311; 5 *Serg. & Rawle* 81, and 4 *Serg. & Rawle* 456. It is held that when the courses and distances expressed in a return of survey differ from the natural and artificial boundaries on the ground, the latter must prevail. This case has been followed by many others, which it is unnecessary to enumerate. It is the law. Then if the jury believed that these blocked and marked trees were the line of Braddock's Field survey, made by the surveyor at the time, the jury could not disregard them; they were the true line, and so the court ought to have told the jury.

I have known many surveys where the lines on the ground included from twenty to fifty acres more than the return called for.

Judgment reversed and *venire de novo* awarded.

McKinney *versus* Monongahela Navigation Company.

Where the legislature provides a specific remedy for the recovery of damage for injuries sustained by the construction of a work of internal improvement, by a corporation, a party injured cannot have recourse to a common law action.

ERROR to the District Court of *Allegheny county*.

In 1840–1 or '42, the defendants erected dams in the Monongahela river for its slack water. At that time, and for twelve or fifteen years before that, the plaintiff was owner, and has remained so since, of a tract of land on the Monongahela river, at the mouth of Turtle creek. Several acres of plaintiff's land, that he had been accustomed to cultivate previous to the erection of the dams, have been rendered useless since by being overflowed in freshets.

This was an action on the case brought in the District Court of Allegheny county for that injury.

On the trial, the court reserved the question of the propriety of the form of action, and the jury gave a verdict of one hundred dollars for plaintiff.

On the argument of the reserved question, the defendants' counsel contended that there was a special form of remedy provided by the charter of defendants, and its supplements, which excluded the common law form.

Mr. *Darragh*, counsel of plaintiff, contended that there was no special form of remedy provided for cases like this, and consequently that the common law form was proper.

The court set aside the verdict.

The court, *LOWRIE, J.*, charged *inter alia*, that here the remedy is special, and I think abundantly adequate, and therefore the common law remedies are entirely excluded: *Com. Dig. Action on Statutes, C*; *Act of 21st March, 1806, s. 18*; *Dunlop's Dig. 190*; and that the common law remedy is excluded by the very terms of the acts giving the special remedy.

The court set aside the verdict.

See *Pamph. Laws 1836, sec. 8, p. 267*; *id. 1839, p. 454*; *id. 1844, p. 390*; *id. 1848, p. 39*.

It was assigned for error:—The court erred in entering judgment for the defendant, *non obstante veredicto*.

The case was argued by

Hawkins for plaintiff in error, with whom was *Darragh*.

Williams for defendant in error, the company.

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The opinion of the court was delivered by

GIBSON, C. J.—A rule laid down in *Castle's Case*, *Cro. Jac.* 643, and followed in *Rex v. Robinson*, 2 *Burr.* 803, as well as in subsequent cases, is that where a statute has created a new offence by prohibiting a thing that was lawful before, and appointed a new remedy for it by a particular sanction and particular method of proceeding, that particular method must be followed, and no other. In delivering the opinion of the court in the latter case, Lord MANSFIELD added that where the offence was antecedently punishable by a common law proceeding, and a statute has prescribed a particular remedy for it by a summary proceeding, either method may be pursued because the sanction is cumulative. The propositions are convergent. They were predicated of remedies for public wrongs; but there is nothing peculiar in the subject matter of them to show that they are not equally predicable of remedies for private injuries. An indictment, as in the case of a forcible entry and detainer, is sometimes a substantive remedy for a civil tort; and there is no other means to compel a putative father to maintain his illegitimate child. If the provision of the statute which provides an indictment for fornication and bastardy were repealed, no lawyer would advise that the mother or the township could maintain an action for it. Why should not the same principle rule the case in hand? Against the state, being a sovereign power, no action lay at the common law. Whenever an action has been maintained against her, it has been by force of her express permission; as in the case of the Pennsylvania claimants of compensation for lands certified and ceded to Connecticut claimants in the seventeen townships in Luzerne county. The government is restrained by the constitution from taking private property for public purposes; but though a statute pretending to authorize a public agent to take it without compensation made or security given, would not protect him, the state herself could not be sued. Here the action is not for taking property, but for injuring it; and as an action lies not against the state for direct or consequential damage, it lies not against her *locum tenens*, clothed with her power and protected by her shield. She is not always in a condition to execute her works of public improvement with her own hand; and her prerogative would be useless did it not extend to the instruments with which she is compelled to work. Though corporations employed by her, have always been ordered to pay for damage to private property, they have not been subjected to prosecution by action for the consequences of acts permitted by the charter. A specific remedy has been provided, not only against such corporations, but against the state herself, where she was the immediate constructor; in which the compensation has been assessed by viewers or a court and jury on appeal from their award; in a common law action, never. No corporation would accept a charter on terms which

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would expose it to an interminable series of suits for continuance of nuisances. In *Thoburn v. The Schuylkill Navigation Company*, 7 *Serg. & Rawle* 411, it was held that the compensation awarded, is the price of a perpetual privilege, assessed once for all. The legislature, having obtained the defendant's leave to modify its charter, might have subjected the company to actions of nuisance had they seen fit; but the acts of 1844 and 1848, clearly did no more than enlarge the field of the specific remedy; and the plaintiff can have recourse to no other. Judgment affirmed.

Stephens versus Forsyth et al.

A court of chancery affects no superiority over a court of law, or its officers; and on appeal to this court from a decree, dismissing a bill, which prayed the court for an order on its sheriff to deliver a deed, this court will not interfere with the decree of the lower court.

APPEAL from the decree of the District Court of *Allegheny* county.

The bill of E. W. Stephens had been presented to the District Court sitting in chancery, against Forsyth, sheriff of Allegheny county, and William Nelson and others, heirs of Cornelia Stephens, daughter of Cornelia Stephens, which latter had been the wife of A. C. Stephens, and daughter of E. G. Nelson.

The plaintiff complained, in this case, that in 1830, E. G. Nelson died, leaving two children, William and Cornelia; William died in 1842, intestate and without issue; Cornelia married Allen Stephens. On 18th January, 1843, her husband and she mortgaged a lot of ground in Allegheny city, to plaintiff, and died 16th November, 1847, leaving a child which died an infant, leaving the defendants (except Forsyth) her heirs at law. Cornelia was born 8th June, 1822, and of course was under age when the mortgage was executed. *Sci. fa.* issued against Allen Stephens and the administrator of Cornelia on the mortgage No. 182, January, 1848, and judgment entered, and on *lev. fac.* the land was sold at sheriff's sale to complainant, for \$2000; that the sheriff made a deed to him, which was acknowledged 28th May, 1848; the sheriff's deed was not delivered, but the proceeds of sale were all coming to complainant; the costs were not paid, but that immediate application was twice made to sheriff for the delivery of the deed, and to pay the costs; the bill of the costs was not shown, because the costs, sheriff said, had not been taxed.

That the Nelsons, the defendants, on 28th September, 1848, obtained a rule to show cause why the sheriff's sale should not be set aside, and thereon the court ordered the sheriff to retain the deed till disposal of the rule, and on 16th October following,—

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Ordered the sheriff's deed to be cancelled, the acknowledgment rescinded, the sale to be set aside, and the judgment to be opened.

That this was without any issue granted, and after the term had gone by from the time of the acknowledgment of the sheriff's deed, and without allegation of fraud, and without any request on part of respondents to set the deed aside.

The defendants demurred to the bill.

Before the demurrer the bill was amended by consent, so as to assert that complainant was appointed on 28th September, 1840, by the Orphan's Court of Allegheny county, guardian of Cornelia, and knew, of course, that she was not of age when she executed the mortgage.

The prayer was, that Forsyth may be decreed to deliver said deed, or another made and lawfully acknowledged, to complainant; and that the District Court may be ordered to cause any such deed to be properly acknowledged.

The court, LOWRIE, J., dismissed the bill.

The question was, whether the District Court can cancel a sheriff's deed after acknowledgment, and after the term has passed, when there is no allegation of fraud.

The case was argued by *Dunlop*, for plaintiff in error.—He contended, that the District Court had no power, after acknowledgment, to set the deed and sale aside. It was too late, unless the sale and deed were assailed on the ground of fraud in themselves: 1 *Yeates* 40; 2 *Pa. Rep.* 231. After the term had passed, the court had no power to set aside the deed, or reverse their own decision: 12 *Peters* 488, 492; 1 *Bin.* 104.

T. Williams and Kuhn, for defendant in error.—In Pennsylvania, equity is law; the facts are for the jury; but whether, on any state of facts found by the jury, the party is entitled to equity, and the mode, manner, and extent of the relief, are for the court. No facts were in dispute; no issue was asked for: 16 *Serg. & Rawle* 278–9; *Story's Equity*, vol. ii., sects. 694–5, pp. 700, 702.

The objection, that the term had passed, is not fatal: 7 *Wend.* 88; 20 *Johns.* 50.

September 13, 1850.—*PER CURIAM*.—A decree in equity produces its effect by controlling the course of the person, not by controlling a court of law, or any part of its machinery. A party may proceed at law, in the face of an injunction, and the court of law will adjudicate, if he will brave the consequences of the contempt. A court of chancery affects no superiority over any court of law whatever, or its officers; and pretends not to review their proceedings: so that the court, from which process has issued, is the only one to which the sheriff is answerable for the execution of it.

Decree affirmed.

Seitz & Co. *versus* Buffum & Co.

Where on appeal from the judgment of a justice of the peace, in a suit against A. B. Seitz & Co., the court, before trial, gave leave to amend by substituting the trustee of defendants as party, such alteration is not erroneous.

The declaration being against the defendants in their partnership name, there is no such variance between the *narr.* and judgment, after amendment, as will be error. The amendment goes to the whole record. That it was not actually made in the declaration, is not material.

That the suit was against defendants, without naming the members of the firm, is cured by verdict.

ERROR to the Common Pleas of *Allegheny county*.

This case originated before a justice of the peace, brought by H. W. Buffum and J. H. Buffum, partners, doing business under the firm of Buffum & Co., against A. B. Seitz & Co., to recover a balance due on book account, for goods sold and delivered. Defendant appealed, and plaintiffs entered a rule and had arbitrators chosen, who awarded against them, on the ground that their action was brought against the wrong defendant. Plaintiffs appealed from the award, and obtained leave to amend by adding the name of Frederick Seitz, trustee of Anna Barbara Seitz & Co., defendant. The attorney of A. B. Seitz then withdrew his appearance, having no warrant or authority from the said Frederick to act for him in the matter. September 17, 1849—rule on defendant to plead on ten days notice, or judgment. September 22, 1849—the court order that the record be amended, so that the party defendant on the record shall be “Frederick Seitz, trustee of Anna Barbara Seitz & Co.” It was alleged, that this was the order intended to be made on the 8th instant, and omitted by a clerical mistake. It was alleged on the paper book on part of defendant, that this amendment was granted without any rule to show cause, without notice, and without argument.

October 4, 1849, judgment for want of a plea.

It was assigned for error,

1. The court erred in making the rule absolute, taken on the 7th of September, 1849, and permitting the plaintiffs to amend the record by adding the name of a new party.

2. The court erred in making the order of the 22d September, 1849, and permitting a further amendment, and the substitution of one party for another, the same having been done without notice, and after the attorney of A. B. Seitz had withdrawn his appearance.

3. The judgment is erroneous and void. The declaration sets out a cause of action against A. B. Seitz & Co., but none against Frederick Seitz, the person against whom the judgment is entered.

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4. The plaintiffs bring their suit against A. B. Seitz & Co., without setting out the names of the members of the firm.

Barton, for plaintiff in error, contended, *inter alia*, that the orders of the 8th and 22d September were not amendments, but an entire change of the parties. That the declaration was not amended.

Weaver, for defendant in error, contended, that the trustee of a trust fund may be added to the record, 9 *Barr* 316; 6 *do.* 496. That the suit, the declaration, and judgment, conformed: 10 *Serg. & Rawle* 257. That the amendment affected the whole record. It is not too late to make the amendment now: 4 *Yeates* 479; 2 *Whar.* 211; *Dun. Dig. new ed.* 240 note 3. If any other member of the firm was omitted, it should have been plead in abatement, 4 *Watts* 433; 10 *Serg. & Rawle* 257.

The opinion of the court was delivered by

ROGERS, J.—It is the ordinary and common practice of a court of chancery, to continue to add, on motion, parties to a proceeding in that court, until every person interested, or that may be in any way affected by the decree, are brought on the record. Indeed, a court of equity will refuse to proceed to a final disposition of the cause until all persons interested are made parties to the bill. This wise and beneficial practice, however, has never obtained a footing in a court, governed by the technical and narrow principles of the common law. The latter adhere strictly to mere technicalities, at the sacrifice frequently of the justice of the case; an acknowledged evil, which may in most cases be easily obviated by a simple amendment in matters of form, or substance, without injury to a single human being. Aware of the injustice which a too strict adherence to form is apt to produce, the legislature, and the courts following in their wake, are becoming more liberal on this head; particularly in proceedings commenced before justices of the peace, who for the most part are inobservant of all rules to guide them. The doctrine of amendments, however, although there is an increasing disposition to allow them, has not yet been carried to the extent of permitting an entirely new party to be added to the suit. The furthest we have yet gone, is, to allow a mistake in the christian, or surname, or in both, to be corrected on application to the court, as in *Harbach v. Knox, Boggs & Co.*, 6 *Barr* 377, and in a case not yet reported. But although a new party cannot as yet be added, yet we perceive no objection to an amendment adding a trustee, or legal owner, to the record. It is not in substance, the addition of a new party, but merely the insertion of the name of the person in whom is vested the legal title, held for the use of others beneficially interested in the cause; the

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matters in controversy remaining as before the amendment. But however this may be, the amendment here is not an error of which the defendant can with any propriety complain. For I cannot see any objection to the suit as originally instituted, nor do I perceive the necessity of any amendment whatever. The suit was brought before the justice against A. B. Seitz & Co., to recover a balance due on book account, for goods sold and delivered to their trustee by the plaintiffs. The only effect of the amendment is, to bring the trustee on the record, and give an opportunity to take defence for the beneficiaries. By the amendment then, if wrong, no injury is done to any person, and consequently the court will not reverse the judgment. As to the second exception: there is no such variance between the declaration and judgment as calls for the interposition of this court. The amendment goes to the whole record. That it was not actually made, is nothing. It is a principle of law well settled, that when leave is given to amend, the court considers the amendment as made. And indeed, if necessary to support the judgment, it would be no great stretch of power to allow the amendment to be now made.

The exception, that the defendant is sued as Seitz & Co., without naming the members of the firm, is cured by verdict. This is ruled in *Morse v. Chase & Co.*, 4 *Watts* 456, and *Porter v. Cresson*, 10 *Serg. & Rawle* 259. If a suit is in the firm name, as Seitz & Co., for example, the court will presume it after verdict to be the name of real persons, when the contrary does not appear. The courts make any reasonable presumptions to rid themselves of objections, which do not touch the merits.

Judgment affirmed.

Miltenberger et al. *versus* Commonwealth.

1. The limitation to an action against sureties of executors or administrators, prescribed by the proviso to the second section of the act of 4th April, 1797, (3 *Smith* 297,) is not applicable to an original administration bond taken by the register, but only to an additional bond given by order of the Orphans' Court.

2. In an action in the name of the Commonwealth for the use of the person aggrieved, on an official bond, the judgment is, by the act of 14th June, 1836, relative to official bonds, to be, first, for the Commonwealth for the amount of the penalty; and secondly, for the plaintiff in interest, in the amount of damages assessed by the jury.

3. Where the *narr.* in such an action, concludes to the damage of the plaintiff, this is merely the formal allegation of nominal damage, and not on account of the damages sustained by the party for whose use the action was brought.

4. As to the *narr.* in such an action, and the allegation of a devastavit, see this case.

WRIT of error to the District Court of *Allegheny county*, at the instance of George Miltenberger, et al. v. The Commonwealth of Pennsylvania for the use of John Sheriff.

[Miltenerberger et al. v. Commonwealth.]

This was an action of debt on the administration bond of M. B. Miltenerberger and William Graham, jr., administrators of Joseph Oliver, deceased, in the penalty of \$30,000, dated in 1833. This bond was taken by the register of Allegheny county, when letters of administration were granted by him to said administrators, and is in the usual and legal form. George Miltenerberger and Samuel Johnston were the securities in said bond. M. B. Miltenerberger, one of the administrators, died before the commencement of this suit. The plaintiff's declaration is in the usual form of a *narr.* in debt on a bond with a penalty conditioned for the performance of other acts than the payment of money. The *narr.* after the usual commencement, sets forth the bond and its condition, and after averring that a large amount of assets, amounting to \$3577.34, had come to the hands of said administrators, and that the same appeared by the account filed by William Graham, jr., surviving administrator, proceeds to set out the breach (after averment of sufficient assets.) Yet the said administrators did not nor would pay or cause to be paid unto the said John Sheriff, the amount of a certain debt due to him from the said administrators or administrator of said estate, by judgment rendered by M. B. Lowry, alderman, in and for the city of Pittsburgh, on the 11th of January, 1831, for the sum of fifty-six dollars and fifty-nine cents, with costs of suit, and the same to pay, (though often required so to do,) have hitherto wholly neglected and refused, and still neglect and refuse so to do. And the said plaintiff in fact, saith, that the said administrators have committed a devastavit in regard to the assets of the estate so come to their hands as aforesaid, and have wasted and misapplied the same. By reason of which said breach, the said writing obligatory became forfeited, and thereby an action hath accrued to the said plaintiff to demand and have, of and from the said defendants, the said penalty of \$30,000 above demanded. Yet the said defendants have not, nor hath either of them, paid the said sum of money above demanded, or any part thereof, to the said plaintiff; and to pay the same hitherto have wholly refused, and still do refuse, to the damage of the said plaintiff of fifty dollars, and therefore the said plaintiffs bring suit, &c.

To this defendants pleaded "payment with leave to plead any special matter of defence at large"—"Covenants performed, &c., with leave," &c., and also afterwards filed the special plea:

That defendants have received no notice that a return of *nulla bona* had been made to an execution against them; so that they might show goods or chattels, lands, &c., in some other county, which might have been seized and taken in execution by a *tes. fi. fa.* to satisfy said debt.

That no suit was brought against defendants within seven years from the date of said bond.

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The plaintiff traversed the defendant's first plea, joined issue on the second, and demurred to the third or special plea.

On the trial of the cause, in support of his *narr.* the plaintiff gave in evidence the bond, and after having proved that sufficient assets came to the hands of the administrators to pay the debt due to John Sheriff, proceeded to give in evidence, (without objection from the defendant,) in proof of the breach and devastavit alleged in the *narr.*, a judgment against said administrator in favor of John Sheriff—also an execution issued on said judgment and returned “*no goods*”—also the record of an action of debt, brought in the District Court of Allegheny county by John Sheriff against the said William Graham, jr., the surviving administrator, on the said judgment. In which action the plaintiff had declared in the usual form, suggesting and charging the administrator with a devastavit, and had obtained a judgment in favor of said John Sheriff, for the amount of his debt, against the said administrator *de bonis propriis*. He also gave in evidence without objection, an execution issued thereon and a return of “*nulla bona*” to the same.

The jury found for the plaintiff on the defendant's first and second pleas, for the penalty of the bond \$30,000, and assessed the damages or sum due to John Sheriff at \$112.98, subject to the opinion of the court on the demurrer and special plea. After argument, the court sustained the demurrer, and entered judgment for the plaintiff.

It was assigned for error :

1. That the court erred in entering judgment for the plaintiff, on the demurrer to the special plea.
2. That the judgment is erroneous, being for damages in an action of debt. There being no judgment for any debt, there can be no damages incurred where there was no debt due or detained.
3. The judgment and verdict were for a greater amount of damages than were claimed in the declaration—viz. for \$112.89, when only fifty dollars were claimed as damages in the declaration, being a surplus verdict of \$62.89 beyond the plaintiff's claim of damages.
4. The declaration exhibits no title in the plaintiffs to authorize the judgment, there being no evidence set forth of devastavit, such as is required by the laws of Pennsylvania; viz. by judgment against the administrators, and averment of return of *nulla bona* to execution thereon: *Commonwealth v. Wenrich*, 8 *Watts* 158; *Same v. Evans*, 1 *Watts* 437; *U. S. Dig. Exrs. & Admrs.* 1008, 1010, 1021, 1050, 1081, 1085, 1100, 1115.

The case was argued by *Craft*, for plaintiff in error. See his authorities as to fourth assignment, stated at the termination of that assignment.

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Williams and *Kuhn*, for defendant in error.

1. That notice to sureties in an original administration bond that a return of *nulla bona* had been made, is not necessary. It is required only in the case of sureties in an additional bond, given by order of Orphans' Court, under act of 4th April, 1797. The limitation to an action against sureties by the second section of the same act is applicable only to the additional bond: 8 *Watts* 515.

2. In an action on an official bond, the judgment is to be two-fold—first, for the Commonwealth, in the amount of the bond; second, for the party injured, “in the amount of damages assessed,” and costs. The short entry of judgment is equivalent to the entry of a formal judgment.

3. The damages claimed in the *narr.* are not the damages claimed by Sheriff, but by the Commonwealth for the non-payment of the penalty, and are merely nominal.

The opinion of the court was delivered September 13, by

COULTER, J.—The error assigned in relation to the matter contained in the special plea of defendant below, is fully and finally disposed of, by the case of *Commonwealth v. Patterson*, 8 *Watts* 515, in which it was ruled by this court, that the limitation to an action against sureties of administrators, contained in the 2d section of the act of 4th April, 1797, is not applicable to an original administration bond taken by the register, but only to an additional bond, given by the executor or administrator by order of the Orphan's Court. This suit being on the original administration bond taken by the register, is without and beyond the limitation, which has no application to it.

The statute, which regulates proceedings on bonds, such as this, given to the Commonwealth for the purpose of securing the faithful execution of the respective offices, employment or trust devolving on the persons who give such bonds, particularly regulates the mode of proceeding, and the manner in which judgment shall be entered on such bonds. And the provisions of the statute must be followed. The judgment in this case, in the particular in which it is complained of, is entirely in conformity with the statute: that is, for the Commonwealth in the amount of the obligation or bond; and secondly, for the plaintiff in the issue, (Sheriff,) in the amount of damages assessed by the jury. It is in vain to say that there ought to be a judgment for the debt found due to the plaintiff, and for the detention of that debt, inasmuch as it is an action of debt, because the statute enacts that the judgment for the *debt* sued for shall be in favor of the Commonwealth, that is, the amount of the bond; and secondly, for the plaintiff in such issue, that is, the person who is named on the record, as the individual for whose use the suit is instituted, *for the damages* assessed, and for the costs accrued between such plaintiff and the defendants. In *Carman v.*

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Noble, 9 Barr 372, it is said, that in such cases, according to the terms of the statute, there ought to be two judgments, one for the amount of the penalty of the bond, which would be cautionary, in favor of the Commonwealth, and the other for the plaintiff, as the *cestui que* use is denominated in the statute, for the amount of damage he should prove. In the same case it was ruled, that when the substantial elements of a valid judgment appeared on the record, this court would mould them into the form required by the statute. But this judgment might be supported under the English practice, under their statute, which regulated our practice, until our statutory regulations on the subject, superseded it. In England, at the trial, the jury found a verdict for the plaintiff, with fifteen shillings damages, and forty shillings costs, and also assessed the *damages* for the breaches; and then, on the return of the *postea*, the judgment is entered for the debt, which is the penalty of the bond, and one shilling damages, the latter being merely nominal; the real amount of the damages being that assessed by the jury, for the breaches assigned: 1 *Saunders* 58, N. 1.

The jury have found the breach assigned, and assessed damages for it. In that breach it is distinctly averred, that there was a debt due the plaintiff and unpaid, and which the administrator refused to pay; and the nature of the debt is distinctly set out. The jury also find in favor of the Commonwealth, for the penalty; the whole scope and intent of our statute is therefore fulfilled, in this particular.

There is nothing whatever in the error assigned, as to the damages laid in the declaration. These were not on account of the breaches, or for the amount of damages sustained by the plaintiff in consequence of the breaches; but merely the formal addition to the declaration of nominal damages. Although the bond was penal, it was unnecessary and mere surplusage, though it is often added to the *narr.* on penal bonds.

The *devastavit* is sufficiently alleged in the breach assigned to support the verdict found, and judgment rendered thereon. If any technical form was wanting in the setting out a *devastavit*, it appears to have been fully supplied by the evidence given by the plaintiff. After verdict, upon a full trial on the merits, we cannot disturb the judgment on this account.

Judgment affirmed.

Shields *versus* Miltenberger.

1. In the case of an appraisement of property by a jury of inquiry, notice by plaintiff to defendant of permission to take the property at the valuation, given several months after the holding of the inquisition, is merely irregular; and the defendant can take advantage of it only before the acknowledgment of the sheriff's deed for the property.

2. The signing of such a notice by the attorney of the plaintiff, instead of by the sheriff, is a substantial compliance with the provision of the act.

3. As to what defects may be cured by the acknowledgment of a sheriff's deed, see the opinion in this case.

ERROR to the District Court of *Allegheny county*.

This was an action of ejectment by Shields against George Miltenberger for a lot of ground in the city of Pittsburgh.

Shields claimed under a deed from Miltenberger, the defendant, who conveyed the lot to Shields, the plaintiff, on January 13, 1829, subject to annual ground rent of _____, and delivered to him the possession.

Defendant claimed under James S. Craft. The claim of the latter was under a sheriff's sale and deed for the lot in question, sold as the property of Shields, the present plaintiff. Miltenberger obtained judgment against Shields in a suit brought in 1839. *Fi. fa.* issued to November term 1840. The lot was levied on and extended at \$100 per annum.

A notice, dated August 28, 1841, and signed by plaintiff's attorney, was served upon Shields, stating that he was permitted to retain possession of the property extended at the valuation, and on failure, proceedings will be had for the sale of the premises levied on, &c.

On this notice was endorsed "Served by copy on defendant, September 14, 1841." "So answers, R. Lytle." "B. Weaver, Sheriff." The body of the endorsement was in the handwriting of Sheriff Weaver's clerk, and R. Lytle sometimes acted as his deputy. The signature of "B. Weaver, Sheriff," was added after this ejectment had been brought, and several years after the said B. Weaver's term of office had expired, and without leave of court. The notice was marked, "Filed January 4, 1842."

To the admission of this evidence plaintiff's counsel objected:

1. That the ten days after inquisition held had elapsed. 2. That the notice served on the defendant should have been signed by the sheriff, and not by plaintiff's attorney. 3. That the return was bad, not stating whether defendant had accepted said premises or neglected and refused so to do, within the time prescribed by law. That the signature of "B. Weaver, Sheriff," was a nullity, and that in the absence of a proper return of service by the sheriff, the

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service of the notice should be proved by the person alleged to have served the same.

The court admitted the evidence; plaintiff's counsel excepted.

Defendant then offered the *venditioni exponas* to January term 1842, in said case, with the return of sale of the lot of ground in dispute to James S. Craft, for \$20.00. He also offered the sheriff's deed to Craft.

It was objected that the issuing of the writ of *venditioni exponas* was illegal; and that the purchaser, Craft, took nothing by the deed. The evidence was admitted, and excepted to.

Plaintiff's counsel asked the court to charge that the evidence showed the sheriff's sale to be void, and that the verdict should be for the plaintiff.

The court refused to charge the jury, and charged that all the defects and irregularities subsequent to the writ of *feri facias* and inquisition, were cured by the acknowledgment of the sheriff's deed. That said sale and deed vested in James S. Craft, *under whom the defendant claimed*, a good title to the lot in question, and that their verdict should be for the defendant.

To this plaintiff's counsel excepted.

Verdict was rendered for the defendant.

It was assigned for error:

1st. The court erred in admitting the evidence mentioned in the first bill of exceptions.

2d. The court erred in admitting the evidence mentioned in the second bill of exceptions.

3d. The court erred in charging the jury that all the irregularities in said proceedings subsequent to the writ of *fi. fa.* and inquisition thereon, were cured by the acknowledgment of the sheriff's deed, and that by said sale and deed, a good title to said lot was vested in James S. Craft, the purchaser.

The case was argued by *Williams* and *Kuhn*, for plaintiff in error.

Craft, for defendant in error.

The opinion of the court was delivered by

BELL, J.—The second section of the act of October, 1840, gives a *venditioni exponas* for the sale of extended lands, when the execution creditor, *within ten days after inquisition found*, signifies his election to permit the defendant to retain the premises levied at the ascertained yearly rental, and the latter neglects or refuses for ten days thereafter to notify his acceptance of the offer. Whether the statute intended to prescribe an imperative observance of the period thus limited for notice, or regards it as simply directory, is the question presented by the first bill of exceptions. Did the case

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rest upon this alone, some difficulty might, perhaps, be experienced in solving the doubt, although I think much might be said in favor of the latter view, the importance of which is, however, very much lessened, if it be not altogether annulled, by the act of February, 1846, permitting notice at any time before a *levari facias*. But even in the present case, to which the latter act does not extend, it is scarce worth while to halt upon this inquiry, abstractedly considered, since the facts, subsequently disclosed by the evidence, give to the subject we are to discuss, a broader aspect, or at least, by presenting the first point in combination with other features, subject it to the domination of other and distinct principles. The additional facts are, that, after notice, of which the return made by the sheriff's deputy is competent evidence, unimpaired by the irregular attempt to add to it the sheriff's signature, long after he went out of office, a *venditioni exponas* issued, under which the premises were sold and conveyed by the proper officer, by deed duly acknowledged in open court.

What, then, is the legal effect properly ascribable to this judicial approval of the sheriff's sale and conveyance? Upon this point, different judges have vacillated between the doctrine declared in *Thompson v. Phillips*, 1 *Baldwin*, 246, that the act of a court in receiving the acknowledgment of a sheriff's deed, is a judicial act, which cures all defects in the process and its execution, upon which the court has power to act; and the opposite extreme, maintained by Justice HUSTON, in his dissenting opinion, delivered in *Braddee v. Brownfield*, 2 *W. & S.* 271, that no greater respect is due to the court's acceptance of a sheriff's acknowledgment, than may fairly be claimed for the similar act of a judge or justice of the peace, preparatory to the admission of a private deed upon the registry of the proper county. But I think neither of these opposite views finds support in any of the numerous adjudications upon this subject, which have emanated from this court. Most of them recognise the deliberative and judicial character of an acknowledgment taken in open court, founded upon the conceded right of all parties having an interest in the question, to appear and dispute the propriety or regularity of the official sale; and all of them, from *Murphy v. McCleary*, 3 *Yeates* 405, to *Dale v. Medcalf*, 9 *Barr* 108, distinguish between those objections, that touch the foundation of the proceeding, by impeaching the authority of the officer, or establishing the existence of fraud, and those which simply suggest irregularities in the process or sale. The absence of authority, or the presence of fraud, utterly frustrates the operation of the sale as a means of transmission of title, and avoids it from the beginning. Either may, therefore, be insisted on, even after the formal acknowledgment of the conveyance; but mere irregularities, whether of omission or commission, which do not render the officer powerless, or taint the transaction with turpitude, may be cured

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by the tacit acquiescence of those who ought to speak in time. This difference of effect, and consequent variance of right, is pointed out in *Vastine v. Fury*, 2 S. & R. 434, where it is said that "upon exceptions to a sheriff's sale, made on the offer of his deed for acknowledgment, the court will hear every thing that can be urged against the regularity of the proceedings and conduct of the sheriff, the plaintiff in the suit or the purchaser, and receive or refuse the acknowledgment of the deed, according to the proofs made before it. This is the proper period for persons interested in the sale, to take advantage of mere irregularity. But it has been decided more than once, that such persons are not concluded by the acknowledgment, where there is no judgment or execution whereon to ground the sale, or where there has been fraud or unfairness practised by the purchaser." The same doctrine is announced in *Murphy v. McCleary*, 3 Y. 405, and *McCormick v. Meason*, 1 S. & R. 101; and illustrated by *Dunning v. Washmudt*, 2 Y. 86, where an acknowledged deed was held to be worthless, without a prior judgment; *Porter v. Neelan*, 4 Y. 108, *Glancey v. Jones*, *id.* 212, in each of which the want of a *venditioni*, conferring power to sell, was held to be fatal, even after acknowledgment of deeds; *Burd v. Dansdale*, 2 Bin. 80, where the same effect was ascribed to the omission of a levy and inquisition of condemnation; *Dawson v. Morris*, 4 Yeates 341; *Riddle v. Murphy*, 7 S. & R. 230; *Gilbert v. Hoffman*, 2 Watts 66; *McKennon v. Pry*, 6 Watts 137; *Hoffman v. Strohecker*, 7 Watts 86; and *Smull v. Jones*, 1 W. & S. 128; in all of which the sheriff's sale was held impeachable, after delivery of the deeds, for fraud committed by the vendee or others. On the other hand, numerous cases, both in our own courts and those of our sister states, are cited by the defendant in error, which prove that simple irregularity or mistake committed in the course of the proceeding, is visited with no such fatal result, unless the exception be taken before the purchaser's title is perfected. Among these may be mentioned *Murphy v. McCleary*, *supra*; *Thompson v. Phillips*, *Bald.* 246; *Blair v. Greenway*, 1 *Browne* 219; and *Sumner v. Moon*, 2 *McLean* 50. In this enumeration of authorities, of course, it is not my intention to omit *Cash v. Tozer*, 1 W. & S. 519, and *Dale v. Medcalf*, 9 *Barr* 108. In both these instances, the sale was successfully impeached, after deeds acknowledged, because the sheriffs were not armed with process clothing them with the necessary power to proceed; they are, therefore, to be ranked with cases of defective authority. It must be confessed, however, that the reasoning of the Chief Justice, in the first of them, manifests a strong inclination to deny the application of the principle of *res judicata* to an acknowledgment of a sheriff's deed in any case. Yet I am authorized to say, he did not intend to divest it of a curative efficacy, or to repudiate its conclusive effect in every instance. This much, indeed, may be gathered from his concluding

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remarks, that he would not "say the acknowledgment may not raise even a conclusive presumption of compliance with the requisitions of the law in regard to things to be done in the sale itself; but it surely ought not to preclude an inquiry into the authority, which is the foundation of it. Here it turns out that the sheriff had, at the time of the sale, no authority in his hands at all; and no subsequent confirmation can validate an act which was utterly void." These latter reflections were strictly applicable to the case before him, and show that his attention was principally confined to instances of defective authority.

That we have conceded to the sheriff's acknowledgment, unobjectioned to, a curative power operating beyond mere defects in the things that strictly belong to the sale itself, is, I think, put out of contest by the recent decision of *Crowell v. Meconkey*, 5 *Barr* 168. The right of the plaintiff to recover land sold and conveyed by a sheriff, was resisted on the ground that the omission of an inquisition for the appraisement of the land in execution, prior to the sale, as stipulated by the act of 16th July, 1842, was fatal to the subsequent proceeding, upon an attempted analogy between such an appraisement and an inquisition of condemnation, directed by our statute regulating executions. But it was answered, that without the latter inquest there could be no *venditioni*, since the law only sanctioned such a writ after condemnation, without which the prothonotary has no power to issue it; while the omission of the appraisement was but an irregularity, unaffecting the authority of the process, and therefore must be obviated, if at all, before the acknowledgment of the sheriff's deed. It was added, the sheriff, consequently, had authority to sell, which was sufficient to protect the purchaser "in the same manner and for the same reason that he is protected in all other cases of irregularity or error in the process and judgment."

Now, what more can be said of the omission of the defendant in error to give the notice stipulated by the act of 1840, until ten days after inquisition had elapsed, than that it was an irregularity? The principal thing was notice, to give the defendant an opportunity of declaring whether he would keep the land at the rental fixed. That it was delayed beyond the statutory time, should scarcely constitute a fatal exception in the mouth of one favored by the delay, and certainly ought not where, as here, he must be taken to have acquiesced by his silence. Under the act of 1846, the course pursued by the execution creditor would be altogether unexceptionable, and I can perceive no sound reason for esteeming it other than merely irregular, under the prior statute. It touched not the authority of the officer, was not suggested by any fraudulent intent, and deprived the debtor of no right he might otherwise have enjoyed. The inquest was regularly held, notice of the plaintiff's election given, and a privilege thus extended to the debtor to

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accept the land at the yearly sum. But this was not done within a certain period. The notice was, then, irregularly given, yet it was not entirely void. Time is not always of the essence of an act directed, and its non-observance may, generally, be waived by the party to be affected by the act. Acquiescence always amounts to waiver, and acquiescence may be, and generally is, deduced from silence. This is especially so, where time is of subordinate importance, as it, perhaps, always is where its lapse may be compensated, or the non-observance of it implies no unattonable injury. Sound reason, operating through equitable maxims, has relaxed the rigidity of the ancient common law, which insisted upon time as an essential in all cases; and now, he who would object a disregard of it must, generally, do so at the earliest opportunity afforded. Such, we think, was the duty of the execution debtor, in this instance. The sale of his land was, at most, voidable, for the reason he now urges as rendering it wholly void. He was, therefore, bound to avoid it before the consummation of the sale by the acknowledgment of the sheriff's deed. His neglect to do so was a waiver, through which the acknowledgment in open court operates, effectually, to conclude him. The court below was, consequently, right in its instruction to the jury on this head, which embraces all the exceptions urged here.

It was slightly urged, on the argument, that notice of the creditor's election to permit his debtor to retain possession of the property levied, ought to have been given to the sheriff, and by him to the defendant, in the execution. But surely immediate notice from creditor to debtor, through the sheriff, ought to be accepted as a substantial compliance with the requirements of the statute. At all events, it is now too late to aver so slight a departure from the direction of the act, if it be one.

Judgment affirmed.

Allegheny City versus McClurkan & Co., and Campbell versus Same.

A municipal corporation is liable for the contracts of its officers, even when not expressly authorized, when such contracts were entered into publicly and in such a manner as to be within the knowledge of the corporators. The City of Allegheny is, therefore, liable for scrip under the denomination of five dollars, issued by its corporate officers, with twenty per cent. interest thereon, by the provisions of the act of 12th April, 1828, forbidding the circulation of small notes.

The act of 12th April, 1828, is not repealed by the resolution of 1st June, 1842: this latter merely increased the penalty for issuing such notes.

Municipal corporations are within the provisions of the act of 1828.

A suit against such a corporation, for issuing small notes, is not barred by the 6th section of the act of March 29, 1785, because not brought within two

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years after the issuing of the notes: the 20 per cent. is not a *forfeiture*, incurred at the time of issuing the notes.

Though the holders of such notes may have distinct remedies against the corporation and the officers who signed the notes and gave them currency by their names, they can have but one satisfaction.

THESE were writs of error to the District Court of *Allegheny county*.

These were two suits brought by McClurkan & Co., to the same term. Writs issued in August, 1849, the one against the mayor, aldermen, and citizens of Allegheny, for issuing the notes or city scrip in question; the other against Henry Campbell, for having, in his capacity of mayor, signed the notes on which the suits were founded.

The *narr.* contained a schedule of the notes, dated in 1847, 1848, and 1849, amounting in all to \$3942.

They were actions of debt for the sum of \$3942, for that amount of notes or city scrip, issued by the defendants, and held by the plaintiff; and also for 20 per cent. interest thereon, in pursuance of the act of Assembly, passed 12th April, 1828, forbidding the circulation of small notes under the denomination of five dollars.

And thereto the defendants pleaded that they had not issued and circulated the notes declared upon, and issue was joined thereon. And afterwards, on the 28th February, 1850, the same issue came on to be tried before Hon. WALTER H. LOWRIE, Assistant Judge of said court, and on the trial thereof, the plaintiffs, in order to maintain and prove the issue, gave in evidence certain ordinances of the Select and Common Councils of the City of Allegheny, authorizing the issue of said notes, and therefore a verdict was rendered in favor of the plaintiffs, and the following question was reserved by the court, viz.: Can the Select and Common Council of the City of Allegheny, a municipal corporation, subject their constituents to the penalty of the act of the 12th April, 1828, concerning small notes, &c., by creating a circulating medium of small notes, contrary to the provision of that law. If it be decided that the councils may thus bind their constituents, then judgment is to be entered for the plaintiffs for the amount of the notes declared upon, with 20 per cent. interest.

If otherwise, judgment is to be entered for the defendants, or for the plaintiffs for the amount of said notes, without interest, as the court shall adjudge.

Afterwards, on the 16th April, 1850, the said reserved question came on for hearing before the court, and was argued by counsel, and on consideration thereof, was decided in favor of the plaintiffs, and judgment was accordingly entered in their favor. And inasmuch as the said matters do not appear by the record aforesaid, the counsel for the defendants did then and there, except to the decision of the court on the said question.

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It was assigned for error, that the court erred :

- 1st. In sustaining the demurrer.
- 2d. In entering judgment, on the point reserved, in favor of the plaintiffs.
- 3d. In entering judgment for a greater sum than declared for.

The case was argued by *Geyer*, for plaintiffs in error.

Wills, for defendants in error.

The opinion of the court was delivered September 23d, by COULTER, J.—The charter or act of Assembly incorporating the city of Allegheny, was not produced or read on the argument; but I take it for granted that it contains no express authority to the corporation to issue such notes as those embraced in this action. But it does not follow that the corporators are therefore not answerable for them in their corporate capacity. They have received value for them in the various public works and improvements erected and made in the city, through their instrumentality, and it hardly comports well with fair dealing, that they should seek to exonerate themselves from a debt on this account, constructed by and through their accredited agents, and with their silent acquiescence. It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is power to contract, undoubtedly, and if a series of contracts have been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank which has long been in the habit of doing business of a particular description, would not be exonerated from liability, because such business was not expressly authorized in its charter.

The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, when these contracts, for a series of times, were entered into publicly, and in such a manner, as by necessary and irresistible implication to be within the knowledge of the corporators. It was the acquiescence of the corporators, and the habit and custom of business of the corporation, which induced the public to give credit to the scrip or notes, which was evidence of contract. But when to this circumstance we add that the corporators themselves received the value of these notes or contracts in the erection of improvements in the city, and enjoyed and still enjoy the value of them, the conclusion is irresistible that the corporators ought to pay them by the assessment of taxes on the corporators, if it has no other available means. The debt is due by positive engagement—it is

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due *ex equo et bono*—in the forum of conscience, and the forum of law. One rule of law is often met and counterchecked by another of equal force, so that although the corporators are in general protected from unauthorized acts of their agents, yet at the same time a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them. They adopt the act and are responsible to those who on the faith of such acquiescence and approbation trusted their agents. I speak now upon the basis of such contracts not being prohibited by statute. It is contended, however, that the issuing of such contracts were positively prohibited by the statute of the 12th of April, 1828. That act in the first section prohibits corporations from issuing such contracts or notes, as those embraced in this action, and the second section imposes a penalty of \$5 for so doing, so that according to the usual construction of such statutes, the notes would be void and irrecoverable, as the statute imposed a penalty on their issue, if there was not in the statute itself the seed and elements of a contrary conclusion. The third section, however, provides that no such notes or bills as described in the first section, shall be held or taken to be void or null by reason of the said statute, but that suit may be brought and sustained, notwithstanding any thing contained in the act, and a recovery be had for the principal sum due with interest, as provided in the fourth section, at the rate of 20 per cent. per annum from the date when such notes were issued.

If the first and second sections are the bane of the note-holders, the other sections are its antidote, and these remedial provisions are in accordance with the principle stated in the commencement of the opinion, to wit: That although the issuing of the notes may not be authorized, yet the corporation is bound, having received value, and deluded the public into a belief that they were good and valid. The great object of these remedial provisions was to protect the public, whilst the first and second sections of this act was to deter corporations from such contracts. The second contained a penalty *eo nomine*, but if, in defiance of that, the corporation issued the scrip, still they were held liable for the amount, with a large additional interest, and this was the true policy. For if the notes had been made utterly void and irrecoverable, the statute would have played into the hands of the corporators, and enabled them to accomplish the very object which it was the design of the legislature to prevent, that is, to defraud the public. The provisions of the statute are very plain, and intelligible. They announce two propositions: First, you violate the law, and incur a penalty if you issue small notes under five dollars, and put them in circulation currently; but if you will violate the law, and issue them and incur

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the penalty, you shall pay the holder the uttermost cent you engage to pay on their face, and in addition, if he is compelled to bring suit, you shall pay interest at the rate of 20 per cent. per annum. We endeavor, proclaims the sovereign authority of the State, to prevent you and save you, but if we cannot, still we will not assist in defrauding the public, you shall pay the innocent holder of your contracts every cent you promise, and if you put him to trouble, and the delay of a law suit, you shall pay in addition 20 per cent. interest. Any other course on the part of the legislature, would have been like a man flaggellating himself because he had received injury from another. The legislature did not choose to punish the public who had innocently received such notes, but endeavored to punish those who had unlawfully issued them, by compelling them to redeem their engagements with suitable interest; a very sensible and judicious policy, which we will endeavor fairly to carry out. The statute of 12th April, 1828, does not, therefore, make these bills or notes null and void in the hands of the holder, but, on the contrary, does expressly make them valid, and recoverable in the hands of the holder, and good against the corporation.

It is alleged, however, by the corporation, that the act of 1828 is repealed by the resolution of the legislature, passed on the 1st of June, 1842. This act, however, does nothing more than increase the penalty for issuing the notes. The penalty in the act of 1828 is \$5 for the issuing of every note—the penalty in the act of 1842 is \$50. It is admitted that a subsequent act, covering the whole subject matter of a former one, superseding and supplying it, does impliedly repeal the former. But implied or inferential repeals of former statutes are not adopted by the courts upon light grounds, because, if the legislature intended a repeal, nothing was more easy than to say it. It would be the most covert and most dangerous mode of judicial legislation, and the most susceptible of abuse. There is not a shadow of intent manifest in the act of 1842 to repeal the act of 1828; and what is decisive against its being a repeal by implication is, that it does not cover the whole ground, and therefore does not supply the act of 1828. It does not touch the remedial parts; it has no allusion to the validity or recoverability of the notes, worthless and valueless in the hands of the holders who had received them for value. It would have been a suicidal policy as it regarded the public, a wanton infraction of the remedial parts of the act of 1828, without motive, design, or effect, other than that of assisting the corporation to evade the liability imposed upon them by that act, on the faith of which the public had received such notes. It would have the effect of an *ex post facto* law in its most odious features, by rendering that invalid which was made of value by a previous law.

Whether the penalty in the act of 1842, which is its whole form and substance, absorbs the penalty in the second section of the act

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of 1828, I stop not to inquire. That is of no consequence in this proceeding. But it is very clear, and so ruled that it does not repeal or impair the remedial parts of the act in favor of note-holders nor touch their remedies. It alters or increases the penalty as a crime, making it indictable, but alters not the civil liability.

It is almost supererogatory to make any observation on the point which assumes that the act of 1828 does not reach or affect municipal corporations. Because, if we allow to the legislature of that year, any sense, any knowledge of the history of the times, we must be constrained to admit that municipal corporations were chiefly in the legislature's mind. There were previous enactments on the subject in relation to banks. But a flood of these small notes, poured out, before 1828, from almost every municipal corporation in the State, had fairly deluged the commonwealth. Every man's pocket had them, and every man's fingers were made greasy by them. We doubt not the intent of the legislature. The words of the act are ample to embrace them. The existing evil required them to be embraced, and if they had not been embraced, the legislature would have been totally defective. They were clearly within the mischief, and as clearly within the enactment.

The remaining point to be examined, is whether these suits are barred by any statute of limitations. It is not pretended that they are barred by the statute of limitations, properly so called, passed March 27, 1713. But it is contended that they are barred by the sixth section of the act of March 26, 1785, which provides that when a suit is brought to recover any forfeiture upon any penal act of Assembly, when the forfeiture is limited to the commonwealth only, it shall be brought within two years after the offence was committed, and when the forfeiture is limited to the commonwealth and to any one who shall prosecute in that behalf, such suits shall be brought within one year next after the offence was committed. This point assumes as a postulate, that the twenty per cent. is a forfeiture incurred when the offence was committed. But there was no forfeiture at the time of issuing the notes, except for the five dollar penalty, properly so called. The twenty per cent. would not accrue until time had run, and would never accrue if the notes had been honestly redeemed without suit. The act provides that in such suits or actions, (that is, those brought for the recovery of the bills,) if the same shall be determined in favor of the plaintiff, judgment shall be rendered for the principal sum due on such notes, together with interest, at the rate of twenty per cent., per annum. Here is no forfeiture, to the commonwealth alone, nor limited to the commonwealth and any person who shall prosecute for the forfeiture. The category of the statute of 1785 does not occur.

There is no forfeiture of any sum to the commonwealth or anybody and the commonwealth, except as to the five dollar penalty.

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The additional rates of interest is a subsequent matter to the commission of the offence of issuing the notes, and accrues only upon the suit brought for the notes, and judgment being entered for the plaintiff therein. By the act of 30th March, 1821, regulating bills of exchange, accumulated or increased interest or damage is given in certain cases of protested bills. Thus five per cent., when the bill is drawn upon persons in any other State than Louisiana, and protested, in addition to the common interest and costs and charges, is given, and when it is drawn on Louisiana, ten per cent., and so when drawn on various other quarters of the world, there is a gradation up to twenty-five per cent. Yet it has never been held that this was a penalty, and brought the limitations of 1785 down upon the holders of the protested note or bills. Like the case in hand, it is a civil not a penal remedy, or proceeding; such as a *qui tam* action for a future penalty. It is given as compensation to the holders of the notes in either case for additional trouble, not contemplated in the original contract. But admitting that the limitation of the act of 1785 does apply, (which, for myself, I very much doubt,) it is ruled by this court that it is a limitation for two years, and that saves all the notes embraced in this suit, inasmuch as this suit is not brought in the name of the commonwealth, for the use of any one who prosecutes for a forfeiture.

The limitation of one year in the act of 1785 cannot apply, unless we do violence to the words of the act, and substitute a phraseology of our own. But, instead of enlarging the construction, I would incline to the most rigid adherence of the words of the act. It was passed long before these exigencies had occurred, or were contemplated by the framers of our statutes, and if applied as contended for, would, in a great measure, frustrate the intents of the act of 1828. The limitation, therefore, of one year does not apply to these suits.

The plaintiffs in error might have avoided this accumulated or increased interest, if they had provided for the payment by suitable means or actually paid the notes, as it was their duty to do by the tenor of their engagements. But instead of doing that, they recklessly folded their arms, whilst many a poor and worthy man and woman suffered by their acts.

But having put on a bold and swashing defiance of the policy and laws of the State, and played their card, reckless as to who suffered, it remains for the man who has expended his toil and his sweat, and his means for these notes, to play his, and claim the benefit of the laws.

We cannot permit our mind to be swerved by any mystification of legal principles or any refined subtlety of distinction. The corporation is bound by law to pay these notes, and they are bound by law, when suit is brought and judgment rendered against them, to pay twenty per cent. interest.

[Allegheny City v. McClurkan & Co., and Campbell v. Same.]

I may add, however, that in the opinion of this court, although the plaintiffs are allowed by the act distinct remedies against those who issued their notes and gave them currency by their names, that, nevertheless, they are entitled to but one satisfaction—the face of the note and twenty per cent. interest, on the same principle that the endorser or holder of a negotiable note may bring an action against the maker and each of the endorsers, and recover against them severally, but can have only one satisfaction; and so as to joint trespassers, although a suit may be maintained against each trespasser, only one satisfaction can be recovered.

Judgment affirmed.

Stackhouse et al. *versus* O'Hara's Executors.

An attorney at law, without special authority, has no right to take land for the debt of his client; and an agreement by him with a debtor, to buy in the land mortgaged and release him from the debt, for which agreement no consideration was paid, and the declining to do which produced no injury to the debtor, is no defence, by the debtor, to the payment of the debt.

ERROR to the District Court of *Allegheny county*.

This was an action of debt on a bond, instituted in favor of Denny et al. Executors of the will of James O'Hara, deceased, v. Stackhouse and Tomlinson. Defendants plead release and payment with leave, &c.

On the trial, the defendants gave in evidence the proceedings in a *scire facias* on a mortgage, given to secure the payment of the bond in suit. It appeared that a judgment was entered in favor of the plaintiffs; that a *levari facias* issued, and that the land was sold to Charles B. Scully, the plaintiff's attorney, for sixty-five dollars, but the said sale was afterwards set aside; that an *alias levari facias* issued, and the land was sold to E. W. H. Schenley for \$9000.

Defendants then called Robinson, who testified that the defendant, M. Stackhouse, is considered insolvent; that before the first sale, he on behalf of Joseph Tomlinson, defendant, called on Mr. Scully, plaintiff's attorney, and it was then and there agreed and understood that Mr. Scully would buy in the property at the sale, for the plaintiffs, and release Mr. Tomlinson from all further liability on defendants' bond and mortgage.

And thereupon the plaintiff, to meet and rebut the evidence so given, called Charles B. Scully, who testified that he did make the arrangement proved by the witness; but that he had made it under an entire misapprehension as to his instructions and authority; that he had no authority to release Mr. Tomlinson from his liability, and that he, on ascertaining that he had exceeded his author-

[Stackhouse et al. v. O'Hara's Executors.]

ity, procured the sheriff's first sale to be set aside, and immediately and before issuing the second *levari facias*, informed Mr. Tomlinson of the mistake which he had made as to the character of his instructions and authority.

LOWRIE, J., instructed the jury that the arrangement testified to by Mr. Robinson was not of such a character as an attorney at law had, by virtue of his office, authority to make on behalf of his client, and that if they believed the testimony of Mr. Scully, the arrangement was afterwards effectually revoked and cancelled.

And thereupon verdict was rendered for the plaintiff.

To which instructions of the court the defendants' counsel excepted.

Error was assigned to the charge of the court.

The case was argued by *McCandless*, for plaintiff in error.

Hamilton, for defendant.

The opinion of the court was delivered by

COULTER, J.—As an attorney of the court, Scully had no authority whatever to enter into the arrangement or agreement, on which the defendant relies for protection; and it is not alleged that he had any other authority. It is a misapprehension, I conceive, to call the agreement an executed agreement. It was essentially an executory contract or arrangement. Mr. Scully agreed that he would buy in the property at the *first* sale, for the plaintiff, and release Tomlinson from the balance of the debt due on the bond and mortgage. But he did not release him. On the contrary, very soon after the sale, he found out that he had exceeded his authority, and gave notice to Tomlinson that he would not carry out the agreement, because he had surpassed his authority in making it; and for that reason he asked the court to set aside the sale, in order that Tomlinson might not be prejudiced by the small sum for which the property sold at the first sale, and thus retrieved his error in good faith. Tomlinson had given no consideration for the agreement, had parted with nothing, had made no corresponding or equivalent agreement, on which the other might rest, suffered no damage or harm by it. In short, it was a naked, unauthorized, invalid agreement, and therefore of no account in this proceeding.

An attorney at law in Pennsylvania has very extensive power in relation to conducting a suit, but after judgment this plenary power, in a great measure, ceases, excepting as to his power of receiving the amount of the judgment, and giving a receipt for it. The limitations, as to his authority, imposed on him by the law, relate generally to compromises, such as substituting one thing for another, as land for money, or to acts after judgment. These are

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without the range of that professional learning and skill which constituted, in fact, the ground-work of the relation of counsel and client. The attorney, here, in substance, agreed to take the real estate of the defendant, in full discharge and in lieu of the judgment of his principal, and for a less value than the amount of the judgment. But it was a clear excess of authority beyond the range of professional power, and therefore not binding on the client.

Judgment affirmed.

**Fulwood *versus* Bushfield.
McKinney's Administrators *versus* Same.**

A surety, who, after the discharge of his principal as a bankrupt, pays instalments of a debt of the principal, which became payable since the discharge, but for which the surety was bound before the application of the bankrupt, is not entitled to recover the same from his principal.

ERROR to the District Court of *Allegheny county*.

There were two suits: one by Fulwood *v.* Bushfield, and the other by McKinney's Administrators *v.* Bushfield. Bushfield was bound, in 1837, in a bond to Davidson, in which Fulwood and McKinney were bound as sureties. The bond was conditioned for the payment of \$3000 in instalments, one of which was payable on 1st April, 1843, and another payable on 1st April, 1844.

In October, 1842, Bushfield, the principal, was discharged as a bankrupt. After his discharge, Fulwood was compelled to pay a part of the two last instalments. The administrators of the estate of McKinney paid another part.

The material question was, whether they could recover from Bushfield, the principal, the amount paid by them.

The court below, HEPBURN, J., pronounced judgment for the defendant, which was assigned for error.

Argued by *McCandless*, for plaintiffs in error, and by *Williams*, for defendant in error.

The opinion of the court was delivered by

BELL, J.—*Cake v. Lewis*, 8 *Barr* 493, implicitly followed the prior determination in *McMillen v. The Bank of Penn Township*, 2 *Barr* 343, which ruled the very point. What is the proper construction of the fifth section of the late bankrupt law, in cases like the present, appears to have given rise to contrariety of decision in the State tribunals, some agreeing with the Pennsylvania cases, and others adopting an opposite view. It is, however, scarcely

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worth while to inquire, on original grounds, which is right, since the question has been recently directly determined by the court of the last resort, in *Mace v. Wells*, 7 *Howard* 272. It was there held, that a surety might prove against his bankrupt principal's estate, the debt for which he was bound, even before he had paid any part of it, and consequently, that the bankrupt himself was discharged, by his certificate, from all future liability. We think this determination is decisive of the present controversy; for the fact that, in our case, the instalments in question were not due until after the bankrupt's discharge, can work no essential difference in the operation of the section. As emanating from a court clothed with the power of authoritatively expounding the federal statutes, we are imperatively bound by its conclusion, to say nothing of the respect we entertain for it, as a judicial tribunal. This case must, consequently, be ruled in accordance with the governing decision.

Whether our adjudications can be sustained upon the difference between guarantors and sureties, strictly so called, it is unnecessary now to inquire; though, for myself, I may be permitted to say I see no reason for establishing a diversity, in this particular, between the two species of undertakings.

Judgment affirmed.

Harden *versus* Hays.

1. That a deed was rejected on a former trial between the same parties is no conclusive objection to its admission on a subsequent trial, especially where the evidence, as to its execution, is different and improved. And where its execution is proved by the subscribing witnesses, and also by the declarations of the grantor, and there is evidence of its being and having been in the possession of the grantee, though this be not conclusive, it is proper to submit the question of its delivery to the jury.

2. That the memory of a witness has been strengthened by time, may detract from its credit, but does not affect its competency.

3. Where the declarations of a grantor are offered to be proved, in order to show, that at the time of making them he was *non compos mentis*, and to raise the inference that he was insane about twelve years before, when a deed was executed, and the adverse party admits that the grantor was insane at the time he made the declarations, it is not error to reject the declarations: Besides, the declarations of one, admitted to be insane at one time, are no evidence that he had not, at a former time, executed the deed.

4. The order of evidence is within the discretion of the court, before which the cause is tried.

5. Where it was offered to be proved that a deed was executed in pursuance of a parol contract: *Held*, That there was no inconsistency between the claim of title by deed and the title by parol. If the first failed, the party had the right to rely on the other, if proved.

ERROR to the District Court of *Allegheny county*.

This was an ejectment by Jacob Hays v. *Thomas Harden*, for a

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tract of land in Allegheny county. Thomas Harden was the tenant of James Harden and wife, and Abraham Hays. Plaintiff and defendants claimed under John Hays. Jacob Hays, the plaintiff, claimed the whole land under a deed in his favor from John Hays, dated 1832, which deed was by others alleged to be void on account of insanity in John Hays. The defendants claimed two-fifths of the land, as heirs of John; Harden's wife being a sister, and Abraham being the brother of John. After the death of John Hays, James Harden and wife and Abraham Hays brought ejectment against Jacob Hays for two-fifths of the land, and recovered. The case was taken to the Supreme Court and the judgment was affirmed. See 6 *Barr* 368. Two wills of John Hays were also set up in another ejectment, but both were rejected. See 6 *Barr* 409.

On the trial of the ejectment by Harden and wife and Abraham Hays against Jacob Hays, on the part of Jacob Hays was produced the deed in his favor by John, above referred to. Charles Gibbs, a subscribing witness to it, was examined, but the deed was rejected on the ground that the execution of it was not proved.

On the trial of the present case, the same *subscribing witness* was examined. The deed was shown. He said, This is my signature as witness. * * I think I wrote John Hays' name to the deed, at that time. I have no recollection of writing it afterwards. I did not know what the paper was. Jacob and John said it was a contract. I asked John if he was satisfied; he said he was, it was a dealing between him and his brother. John Hays made *his mark*.

Cross-examined:—I saw him do it at that time, I think to both the deed and the receipt, &c.

The witness being referred to his former testimony, said: I was positive then as to his making his mark, but not as to both marks, &c.

The deed was offered, and objected to as not proved. The objection was overruled, and *defendants* except.

On the part of defendant, notes of the testimony of Charles Gibbs, the witness, were produced. See 6 *Barr* 368. In that testimony, Charles Gibbs says, that the mark John made, was the lower one,—the mark to the receipt on the deed.

On the part of defendant was given in evidence from the Common Pleas, commission et cetera, finding on the 5th December, 1844, John Hays a lunatic for forty years, with lucid intervals.

A witness was called, and after having testified to the general incapacity of John Hays, the defendant offered to prove the acts and declarations of John Hays, made at the time of the inquisition in 1844, for the purpose of shewing that he was then *non compos mentis*, and to raise the inference he was so in 1832. *The plaintiff admits his insanity in 1844.*

The evidence was objected to, and the objection sustained. Defendant excepted.

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Defendant, after testimony as to unsoundness of mind in John, offered to prove that in 1844, on the investigation before the jury, John, in answer to a question of Jacob, denied the deed. This to show his insanity at the time, and that he had not executed the deed in 1832. Evidence rejected, and defendant excepted.

After defendant had rested, plaintiff offered to prove that the deed, given in evidence, was made in pursuance of a *parol* contract, made long before, and that frequently, since the execution of the deed, John Hays acknowledged that he made it.

It was objected, that the *parol* agreement was merged in the deed, and that the second part is matter *in chief*.

The court (LOWRIE, J.) said the deed must be admitted to be valid before the objection is tenable; that the *parol* agreement was executed by it, and that the second is matter of order. The evidence was admitted, and defendant excepts.

Plaintiff afterwards offered to prove a *parol* contract, and possession delivered and improvements made, with the knowledge of John Hays. Objected to as irrelevant.

Verdict for plaintiff.

It was assigned for error, that the court erred in admitting in evidence the deed—the execution and delivery not being proved. In 6 *Barr*, on the testimony of the same witness, the deed was excluded.

2. The court erred in ruling out the offer to prove the acts and declarations of John Hays, made at the time of the inquisition in 1844, to show that he was then *non compos mentis*, and to raise the inference that he was in the same condition in 1832.

3. That the court erred in overruling the offer of defendant to show John Hays' declarations in 1844, that he had not made the deed.

4. That the court erred in permitting proof of valuable improvements on the property; and

5. That the court erred in their charge, various specifications being assigned.

The case was argued by *McCandless* and *Woods*, for plaintiff in error.

By *Williams* and *Selden*, for defendant in error.

The opinion of the court was delivered by

ROGERS, J.—It is said that on a former trial, reported in 6 *Barr* 368, between the same parties, and on the evidence of the same witnesses, the deed given in evidence in this case was excluded; but that is no reason for rejecting it now, as it is conceded that the evidence is materially different and decidedly improved. When the

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memory of a witness strengthens by time, that of itself detracts greatly from its credit, but its competency is not affected. The execution of the instrument was not only proved by the subscribing witnesses, but also by the repeated declarations of the grantor himself, subsequently and voluntarily made. There was also evidence of the delivery of the deed, for in addition to the proof already adverted to, it is in evidence, that it is now and ever has been since its execution, in the possession of the grantee; and, if the witnesses are believed, with the knowledge and acquiescence of the grantor. This, it is true, is not conclusive evidence of delivery, but it certainly is of such a nature as justifies the court in submitting the question of execution to the jury. Indeed, if, under such circumstances, the court withhold a deed from the jury, it is a palpable blunder.

The second and third errors may be considered together. The witnesses having testified as to the mental capacity of the grantor, the defendant offered to prove his acts and declarations at the time of the inquisition held in 1844, for the purpose of showing, as is stated in the bill, that he was then *non compos mentis*, and to raise the inference that he was so in 1832, the time of the execution of the deed. And further, in the third bill, he offered to prove that on the investigation before the jury, John Hays, in answer to a question of Jacob, denied the deed, viz.: Jacob called us back from the porch, said we had forgotten one thing. He went to the door and opened it, and asked John if he recollected signing a deed in that room, for one dollar. John jumped up, looked round and said it was all right; he remembered signing a refunding bond on constable business. This evidence was offered not only to prove the insanity of John at the time, but also to show he had not executed the deed. As one of the principal objects stated in both bills, was to prove the insanity of the grantor in 1844, that object was effectually obtained by the unqualified admission of that fact by the other party, and by inquisition found, pronouncing him to be a lunatic. But it was also offered in the first bill, to raise the inference that he was *non compos* in 1832. Now admitting that a legitimate inference could be drawn (which is by no means clear) that, because he was insane in 1844, he was so in 1832, yet the defendant had the same benefit of the inference, in the evidence already given. He was not only proved, but conceded to be *non compos*, and cumulative proof, multiplied to an indefinite extent, would have left the question where it found it. What additional strength would be derived from superadded proof of a fact, which no person ventured to dispute? But can it be that courts are bound to listen an indefinite time, at the pleasure of counsel, to evidence which cannot alter the result—to proof of facts already admitted to be true? This would be such a criminal waste of time, such imbecility in the judge, as would justify the legislature in

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removing him from office, which he disgraced. But it is said, in the third bill, that the evidence proves not only insanity, but that he did not execute the deed. There is nothing in the testimony whatever like a denial of, nor can I perceive any thing in the evidence offered, which has any bearing upon the deed. The most that can be made of it is, that John misapprehended Jacob's question, and under a mistake of his meaning, made a correct answer; for he recollected, as was the fact, that he executed a constable's bond, as Jacob's bail. This, so far from being an indication of an infirm mind, if it proves any thing, denotes intelligence and memory. But what tendency it has to prove he had not executed the deed in controversy, passes my comprehension. Can it be that the acts and declarations of an admitted madman can be admitted as evidence of his insanity twelve years before? Without intending the slightest disrespect to those who hold a different opinion, it strikes me the proposition involves a palpable absurdity.

The defendant further complains that under an offer of evidence, the plaintiff was permitted to give testimony of a title by parol, with possession, which the court afterwards left to the jury to determine, was sufficient to enable the plaintiff to recover. The defendant alleges it was admitted out of its proper order, it being evidence of two different titles, which ought to have been produced in the first instance, and not reserved by way of rebuttal. To this it is a sufficient answer, that the order of evidence is necessarily a matter resting in sound discretion. It is so peculiarly the province of the court which tries the issue, that we would not undertake to interfere with it, unless in an extreme case. They alone can determine when the justice of the case requires a relaxation of the general rules, by which the introduction of evidence is regulated. But independent of this view of the question, the truth is, that here the exception is founded on a misapprehension of the nature of the defence. It is a mistake to suppose the plaintiff relied on two titles; it was but one title under different phases. The plaintiff's title rested on an alleged contract between him and John Hays, of which the evidence was twofold: first, a legal title by deed, duly executed; and second, if that title failed in consequence of his inability to prove the execution and delivery of the deed, then an equitable title by proof of a parol contract, arising at the same time, and out of the same transaction, accompanied with delivery of the possession, valuable improvements made on the premises, under the eye, and with the full knowledge and acquiescence of the vendor; to which may be added, proof of repeated acknowledgments of the bargain, by the grantor. There is, therefore, nothing wrong in this part of the case; nor do I perceive any reason to complain of the charge in relation to the parol contract, which is as favorable to the defendant as he had any right to expect.

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There are some verbal criticisms on the charge, which it is not my intention to notice. These I dismiss with the remark, that if there be errors, they are of such a character as do not admit of redress in this court.

Judgment affirmed.

Forsyth versus Palmer.

In an action of trespass against a sheriff for selling the goods of A., on an execution against B., B. is a competent witness to prove that the goods belonged to A.

In such an action, the sheriff may show, in mitigation of damages, that the goods were bought in for the plaintiff *at an under price*. The measure of damages is the extent of the loss sustained by the plaintiff;—what it cost him to redeem them.

ERROR to the District Court of *Allegheny county*.

This was an action of trespass brought by Palmer against Forsyth, who was then sheriff of Allegheny county, for seizing in execution his goods and selling them as the property of Mrs. Rhodes, on an execution against her, though he was notified that the goods were the property of the plaintiff.

On the trial, the plaintiff offered Mrs. Rhodes as a witness to prove that the goods were the property of the plaintiff. She was objected to as incompetent. She was admitted, and defendant's counsel excepted.

Afterwards defendant's counsel offered to prove by Mrs. Rhodes, that a large portion of the goods seized and sold by the sheriff were purchased at said sale for Palmer, the plaintiff; this being offered in mitigation of damages.

This offer was objected to by plaintiff, the evidence rejected, and defendant's counsel excepted.

Verdict for plaintiff for \$783.00.

Error was assigned to the admission of the evidence of Mrs. Rhodes; and secondly, to the rejection of her testimony.

The case was argued by *Wills*, for plaintiff in error.
Austin was for defendant in error.

The opinion of the court was delivered by

GIBSON, C. J.—As defendant in the execution on which the goods were sold, the witness was clearly disinterested. In *Keymborg v. Burbridge*, 1 *Jones* 535, the plaintiff had sent the segars to Bollman, the witness for whose debt they were seized and sold,

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as a commission merchant accountable to him for the proceeds; from which accountability he was not discharged by the seizure and sale of them on Burbridge's execution; but he would have been discharged from it had Keymborg recovered satisfaction from Burbridge, and he was therefore an incompetent witness to enforce it. Here the creditor of the witness is not the party who sues, but the substantive party sued. In that case the witness was liable to the party who called him; in this, he had been discharged by the sheriff's return.

But the defendant ought to have been allowed to show, in mitigation of damages, that the plaintiff had bought in his goods at an under value. The measure was the actual, not the speculative loss. The primary end of damages is compensation; and not of every injurious consequence that may have been suffered, for a different rule would let in compensation for time, trouble, and counsel fees—but of what is accurately called in Mr. Sedgwick's valuable treatise on the *Measure of Damages*, page 31, the legal injury, which sets the machinery of the law in motion. That machinery is necessarily imperfect; for much suffering, vexation, and anxiety is often inflicted, which cannot be subjected to its action. But the rule in the English and American courts, subject to very special exceptions, is to give actual compensation, by graduating the amount of the damages exactly to the extent of the loss. It is peculiarly, but not exclusively applicable to damages for breach of contract. Thus, for not delivering a commodity purchased and paid for, the measure of damages is not the price given, but the market value at the time and place appointed for the delivery. The vendee can then sue; and his cause of action being complete, cannot be varied by the state of the market afterwards, else he might lie by for years, with a view to increase the damages. The vendee has a right to receive the thing bargained for, or an equivalent which will enable him to procure it from another; and when he has received the equivalent, it is the same to him as if he had received the article itself from the vendor. So much, therefore, he is entitled to recover by action. I am aware that the decisions are discrepant where the price has been prepaid; but I cannot conceive how the rule of compensation can be altered by it, or more just than when it gives the vendee a pecuniary equivalent for actual performance at the time appointed for it. When the market price happens to be the contract price, a vendee who has paid nothing, recovers nothing but nominal damages; because to execute the contract specifically, would take from him the contract price and give him nothing in return for it that he could not obtain for the same price. Where he has paid the contract price, he obtains the same result by getting it back; and so much he is entitled to demand by action. Where the market price has fallen below the contract price, he is entitled to recover back so much of what he

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has paid as is equal to the market price, because for so much he may purchase the article from another; where he has paid nothing, he will not be apt to sue for nominal damages, lest peradventure he might have the depreciated article forced on him at the contract price. When the market price has risen above the contract price, he is entitled to the difference in addition to what he has paid; if he has paid nothing, then to the difference only. Surely this gives the vendee just compensation by giving him the advantages he would have had from a specific execution of the contract at the day; and if that be so, it is impossible to see how payment of the contract price beforehand, being an accident which admits of remuneration, should involve the vendor in subsequent fluctuations of value; or why the vendee should be benefited by a rising market and not prejudiced by a falling one. This, however, is not the place to discuss the merits of the difference between the English and the Pennsylvania rule; nor, since the decision in *Smethurst v. Woolston*, 5 *Watts & Serg.* 106, is it open to discussion by us.

The rule which aims at actual compensation, is applicable to cases of involuntary escape from arrest on mesne process; to cases of conversion of choses in action; to cases of trespass to personal property; and to almost every other case of tort. On this rule was decided *Baker v. Freeman*, 9 *Wend.* 36, the counterpart of the case before us. What did the plaintiff below lose by the illegal seizure and sale of his goods? Just what it cost him to redeem them. He is not at liberty to turn the injury into a benefit, or his loss into gain; or to make profit of his goods at the defendant's expense by buying them back at a discount. A different question would have been presented, had the goods been sold at a sacrifice to a stranger. In *O'Conner v. Foster*, 10 *Watts* 418, it was said that the proper compensation to be made by a carrier prevented from transporting the goods, is the difference between the stipulated price and the price for which they might have been carried. Doubtless the consignor is bound, in such a case, to procure another carrier on reasonable terms, if he can. But was the plaintiff bound to redeem his goods with cash diverted from his business? Certainly not. But he did redeem them; and he is entitled only to the sum advanced by him, with interest.

Judgment reversed and *venire de novo* awarded.

Sowers *versus* Vie.

Leasehold property need not be sold *on the premises*.

A sheriff's deed for leasehold premises need not be acknowledged, nor is it necessary that there be a deed at all. His return is evidence of the sale of a chattel, whether real or personal.

ERROR to the District Court of *Allegheny county*.

This was an action of ejectment brought by Vie against Sowers and Sowers, to recover a leasehold property for a term of years, on Ohio street, in the city of Allegheny. The property had been sold at sheriff's sale. The plaintiff Vie claimed as assignee of the sheriff's vendee.

On the trial, there was offered, on the part of plaintiff, the sheriff's deed and the assignment of it to him. It was objected, by defendant's counsel, that the deed of the sheriff was not acknowledged in open court; secondly, that the sale took place at the court-house, and not at or near the premises, which is admitted. The objections were overruled and defendant's counsel excepted.

Verdict for plaintiff.

Error was assigned to the admission of the evidence.

Argued by *Stiker*, for plaintiff in error.—Cited 5 *Humphrey's Rep.* 577; *Gift v. Anderson*, *Kinne's Law Com. for 1847*, p. 243, that personal property sold by the sheriff or other officer, without such property being present at the time and place of sale, the sale is void, unless the execution debtor waive the necessity of its presence.

Mellon, in reply.

PER CURIAM.—There is no more reason that leasehold should be sold on the premises than that freehold should. It would frequently be difficult, and always unprofitable, to collect a crowd in a mine, or at a ferry, or on the shore of a fishery; for no man bids for either freehold or leasehold, without having investigated the qualities and value of the property. Better to have the sale where those who bid on the spur of the occasion usually congregate. As to the omission of the sheriff to acknowledge the deed in open court, it is sufficient to say there was no necessity for a deed at all. His return is evidence of the sale of a chattel, whether real or personal.

Judgment affirmed.

Forsyth *versus* Matthews.

1. This court will confine its attention to what is presented in the bill of exceptions, and its proper appendages.

2. A bill of exceptions may contain a recital *in extenso* of the evidence, or may consist of a condensed statement of such of the facts proved, or which the testimony tended to prove, as is necessary to comprehend the points ruled, and the instructions to the jury.

3. Where there is conflicting evidence as to a change of possession of personal property, after a sale of it, it should be referred to the jury.

4. Though actual possession be taken, yet if the sale were made to defraud creditors, it is void as to them; but whether this were so or not, is a fact for the jury.

5. The transfer by a son, in failing circumstances, of his personal property to his father, may excite suspicion of fraud; but it is not fraudulent *per se*. Whether fraudulent or not, is for the jury.

6. That personal property is transferred by a formal instrument of writing, is usually but a slight circumstance in the question, as to the existence of fraud in the transaction.

• ERROR to the District Court of *Allegheny county*.

This was an action of trespass brought by George Matthews against Forsyth, for levying, as sheriff, on certain personal property on an execution in favor of Weaver against Edwin C. Matthews, who was the son of plaintiff.

Edwin C. Matthews had been the sub-lessee of an eating-house, and whilst carrying it on, he contracted a debt with Weaver. To secure this claim and to enable him to get a further credit, he confessed a judgment in favor of Weaver for \$351, before a justice of the peace. The judgment was to be paid in instalments of thirty-five dollars every ten days. The first instalment came due on the 13th June, 1838. Execution issued, and was returned "no goods." About six days after the first instalment fell due, Edwin C. Matthews transferred by bill of sale to his father, the plaintiff in this suit, the leasehold, bar-fixtures, furniture, liquors, &c. It was alleged that there was no visible change of possession, the son continuing at the eating establishment as formerly, and carrying on the business. All the instalments having matured, a transcript of the judgment was filed in court, and in September, 1848, plaintiff was allowed to take out execution. An execution issued, and the personal property in the eating-house was sold. The plaintiff, George Matthews, claimed the property, and brought suit against Forsyth, the sheriff, for the seizure and sale.

Verdict for the plaintiff for four hundred dollars.

The bill of exceptions stated, *inter alia*:

[Forsyth v. Matthews.]

BILL OF EXCEPTIONS.

GEORGE MATTHEWS }
 v. } *In the District Court of Allegheny county.*
 JOHN FORSYTH. } No. 202, January Term 1849.

Be it remembered that in the January term, 1849, came the above named plaintiff and impleaded the above named defendant of a plea of trespass for wrongfully seizing and taking away the chattels of the said plaintiff, (*prout narr.*,) and thereto the defendant pleaded not guilty, and issue was joined thereon.

And afterwards, to wit, on the 21st of December, before Hon. Walter H. Lowrie, assistant judge of said court, the said issue came on to be tried by a jury, and the plaintiffs having then and there proved the fact of the trespass complained of, did further give evidence tending to show that on and before the 19th of June, 1848, the goods in controversy had belonged to one Edwin C. Matthews, and that on the said 19th of June, the said Edwin C. Matthews, by an agreement in writing, a copy whereof may be hereto annexed as part of this bill, sold and transferred the same to the plaintiff, George Matthews. And the said agreement was then and there produced and read in evidence to the jury.

And the plaintiff did then and there further give evidence, tending to show that the consideration of said agreement had been paid by the plaintiff; part of it in discharge of the debts of said Edwin, and that the possession of the said goods had been delivered to him at the date of said agreement. That the said goods consisted of the furniture and stock of an eating-house in Pittsburgh, and that the said Edwin was badly doing in management thereof, and that, after the said purchase, the whole business of said house had been conducted by the said plaintiff, in his own name. Whereupon the defendant, in order to meet and rebut the evidence so produced and given by the plaintiff, as to the title of said plaintiff to the goods in controversy, did call and produce witnesses, and by them gave evidence tending to show that there had been no open and manifest change of the possession, in pursuance of the sale by Edwin C. Matthews to George Matthews. Also showing that at the time of the said sale, the said Edwin C. Matthews was considerably in debt, and especially to Jacob Weaver, whose claim was ripe for execution. That the alleged trespass was committed as sheriff of Allegheny county, by seizing in execution the said goods as the property of the said Edwin C. Matthews, at the suit of the said Jacob Weaver, and that the said Edwin C. Matthews was the son of the said George Matthews. And hereupon the court instructed the jury, that an assignment of personal property, without an actual transfer of the possession thereof, gave no title to the assignee as against the creditors of the assignor. If, therefore, there was no such transfer, the plaintiff cannot recover.

[Forsyth v. Matthews.]

If there was such a transfer, and the said assignment was made for the purpose of defrauding the creditors of the assignor, and the assignor participated in such fraudulent purpose, then the plaintiff cannot recover. You are the judges, under the evidence, whether such fraudulent purpose existed.

An assignment of all a man's property, when he is largely in debt, naturally excites suspicion of fraud, and is therefore evidence of fraud. If there be a judgment just ripening for execution at the time of the assignment, this increases the suspicion, and adds weight to the evidence. That the transaction is between a father and son makes the transaction still more suspicious, because the father is supposed to be better acquainted than other people, with the embarrassed circumstances of his son. Yet you may think it not unreasonable, that a father should buy out a son who is succeeding badly in the business in which he was engaged, and apply the consideration of such purchase to pay the debt of said son.

Great stress has been laid upon the formal written character of this transfer, but you will not, perhaps, consider this as being of much importance. Perhaps all such transfers should be expected to be in writing.

The peculiarity of form depends upon the person who is employed to write the instrument. An old lawyer would write it one way, a young lawyer in another, and a merchant's clerk in another way. I cannot see that the form which one would adopt, should be more liable to the charge of fraud on its face, than the form adopted by any other:

To which instructions the defendant's counsel did then and there except, and a verdict was rendered in favor of the plaintiff.

And inasmuch as the said matters do not appear by the record of the verdict aforesaid, the counsel for the defendant proposed the said exception to the judge, and requested him to put his seal to the bill of exceptions, which is done accordingly, this day.

WALTER H. LOWRIE, Assistant Judge.

It was assigned for error:

1. The court erred in leaving the case, under the evidence, to the jury, and charging them that they were the judges, under the evidence, whether a fraudulent purpose existed.

2. In not charging the jury that, under the evidence, the sale and transfer of the property was made for the purpose of preventing the creditor from obtaining execution on his judgment, and that the sale was *mala fide*, and void, as against such creditor.

3. The court erred in not charging the jury, that a party claiming against such creditor, is bound to remove all doubt of the fairness of the transaction, even if possession has accompanied the transfer.

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4. The court erred in not charging the jury that, under the evidence, there was no transfer of the property, accompanied with a corresponding change of possession, and that the said sale was therefore void as against creditors.

5. The court erred in charging the jury, under the evidence, that it was not unreasonable a son should sell to his father.

6. The court erred in charging the jury, that the character of the paper, purporting to be a bill of sale of said property, was not of much importance.

The case was argued by *McCandless*, for plaintiff in error.

Geyer was for defendant, but the court declined to hear him.

The opinion of the court was delivered by

BELL, J.—In this case the writ of error brings up a formal bill of exceptions, duly sealed by the judge before whom the cause was tried. Were it not that the carelessness of practice in many of our judicial districts, and the loose manner in which records in error are made up, has almost banished the formal bill of exceptions, it would be scarcely necessary to remark, that in reviewing the action of the subordinate tribunal, a court of error is strictly to confine its attention to what is presented by the bill, and its proper appendages. It may contain a recital, *in extenso*, of the evidence given on the trial, or, as in this instance, it may consist of a condensed statement of such of the facts proved, or which the testimony tended to prove, as is necessary to the proper comprehension of the points ruled by the court, and the instructions given to the jury.

The bill before us, after stating the sale of the goods in question, by Edwin C. Matthews to the plaintiff below, and the consideration of the contract, avers that the evidence tended to show the possession of the goods sold had been delivered to the purchaser, at the date of the agreement of sale; after which the latter conducted the eating-house, in which they were found, in his own name. On the other hand, the defendant below gave evidence tending to show there had been no open and manifest change of possession, in pursuance of the sale. Here, then, was a conflict of testimony, which must necessarily be referred to the jury. This the court did, with the instruction that an assignment of personal property, without an actual transfer of the possession, gave no title to the assignee, as against the creditors of the assignor; and if there was no such transfer of possession, the plaintiff could not recover. This was certainly correct. Had there been no proof of a transfer of possession, correspondent with the sale, it would have been incumbent on the court to direct the jury, as matter of law, that as against creditors the sale was naught, and therefore the plaintiff could not recover: 2 *Watts & Serg.* 147. But under

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the contrariety of proof which appears to have been given here, whether there was an absolute change of possession or not, was a question for the jury. Had the court undertaken to assert, authoritatively, the presence of a legal fraud, it must have been an usurpation upon the other branch of the tribunal, and consequently error.

The instruction that if the sale and transfer of possession was made for the purpose of defrauding the creditors of the vendor, the plaintiff could not recover, was also unexceptionable. Such an intent imports actual fraud, destructive of a sale of goods, irrespective of the actual possession of them. Its existence or non-existence is a fact to be determined by the jury; and when it is found, the court declares its legal consequence. This, in effect, was the course pursued on the trial of the cause; of which the defendant below complains, apparently under the misapprehension that it was the duty of the judge to declare both the fact and the law, as the evidence stood there: a misapprehension, which is sufficiently refuted, by pointing it out.

The remaining portions of the charge, to which the assignments of error refer, are in strict accordance with settled principle. The transfer to a father of his child's personal property, when the latter is deeply indebted, and more especially, if he be in danger of an immediate execution, naturally arouses suspicion of fraud, and adds to the weight of other evidence, tending to prove it.

But such facts are not necessarily, *per se*, proof of fraud. They may be consistent with innocence, though deeply suspicious; and the effect legitimately to be inferred from them, it is the province of the jury to deduce. Upon this province, the learned judge below, did not seek to intrude.

What was said by him of the so called bill of sale, is but the expression of a sentiment, relative to matter of fact, which even if incorrect, is not the subject of error in this court. But I do not perceive any thing objectionable in the remarks submitted on this point. Such evidences of sale are common, and being usually prepared by attorneys or scriveners, naturally assume a technical form. I remember what is said in *Twyne's Case*, as to the inferences of fraud deducible from unusual pains and care taken in the preparation and conduct of a suspicious transaction; but I cannot see that it is fairly applicable here. Written transfers of personal chattels are frequently used, as an easy and convenient medium of proof; and it would be going very far to say, that much importance is due to their presence, as indicia of fraudulent motive. Still, under certain circumstances, such a precaution may weigh something in the scale of nearly balanced doubts, and the right of the jury to consider it, in this connection, is nowhere denied by the charge.

Judgment affirmed.

Hampton et al. *versus* Matthews and Shaw.

1. In a proceeding by *foreign attachment*, it is error for the jury to find against the garnishees for a definite sum, without also finding what goods or effects, if any, were in their hands, at the time the attachment was executed, or afterwards, and also the value thereof.

2. In an action in *assumpsit*, on book account, the plaintiff may take judgment at the third term, for default of appearance, in pursuance of the 53d section of the act of 13th June, 1836; and by the 73d rule of the District Court of Allegheny county, the prothonotary may liquidate the amount.

3. A clerk in a *retail* store has no right, without the assent of his employer, to sell the goods *by wholesale*, in payment of a debt of his principal, whether due or not due; and such a sale will not divest the title of the principal.

ERROR to the District Court of *Allegheny county*.

This was a writ of foreign attachment issued by Matthews and Shaw *v.* Hampton and others, partners under the firm of Hampton, Smith & Co., as garnishees of certain goods, alleged by the plaintiffs to belong to one Bergin, late a resident of Ohio, who, it was alleged, had absconded.

A *narr.* was filed in *assumpsit* against Bergin, and at the third term of the court, judgment was taken against Bergin for want of appearance, and on February 1, 1849, at the instance of plaintiffs' attorneys, the amount was liquidated at \$587.84.

On February 5, 1849, on the part of the garnishees a plea was filed: 1st. That they were creditors of Bergin, and had a prior attachment on the same goods. 2d. *Nulla bona*.

Plaintiffs replied to these pleas.

When the issues were trying, plaintiffs' counsel gave in evidence the deposition of Smith, which stated in substance that Bergin had gone away and left his store in his charge—between two and three thousand dollars' worth of goods. That he had been employed by Bergin as clerk. That he sold to Hampton, Smith & Co., goods, including two horses, to the amount of \$1068.25 in payment of a debt due them from Bergin. That Hampton took possession of the goods sold to Hampton, Smith & Co.

The inducement was to pay the debts as far as possible. The sale was not made by the knowledge or direction of Bergin, as he was absent.

Plaintiffs showed that the account of defendants against Bergin was not due at the time they got the goods from Smith.

Plaintiffs also gave in evidence the law of the State of Ohio, regulating writs of attachment, *Statutes of Ohio* 88; and proved the value of the goods attached in the hands of defendants. They offered in evidence the records of the District Court containing the proceedings and judgment against Bergin, for the purpose of showing the amount due to plaintiffs.

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Defendants' counsel objected to the admission of the record, because the amount had not been ascertained in pursuance of a writ of inquiry.

The court overruled the objection, and defendants' counsel excepted.

LOWRIE, J., in reply to a prayer by defendants' counsel, charged the jury that if Bergin had absconded from Ohio, and that this fact was known to the defendants and to Smith at the time of sale, the sale was unauthorized. And further, declined to charge on another point of defendants, that even if the sale were unauthorized, it was not totally void, but voidable only at the pleasure of Bergin, and cannot be treated so by his creditors; but they reserved the point.

Verdict was rendered for plaintiffs.

The court afterwards decided the last point in favor of the plaintiffs; and defendants' counsel excepted to the charge in both respects.

Errors were assigned to admitting the record of the original action against Bergin, as evidence of his indebtedness to plaintiffs below. To the answer of the court as first above referred to; also to their answer to the point reserved; and it was further assigned, that, the verdict and judgment are erroneous in this, that the jury did not find what goods or effects of S. S. Bergin were in the hands of the defendants at the time the attachment was executed or afterwards, and also the value.

The 73d rule of the District Court of Allegheny county provides, "*In all judgments by default*, where the plaintiff has filed an affidavit of the amount of his claim, the judgment shall be for that amount. *In other cases* the prothonotary shall liquidate the amount, where, from the nature of the action, it may be done without a jury of inquiry."

The case was argued by *Hamilton*, for plaintiff in error; by *Todd*, for defendant.

The opinion of the court was delivered by

ROGERS, J.—This is a proceeding against a garnishee, in which the jury rendered a verdict for the plaintiff, for \$617.84, without more, on which the court rendered judgment. This is palpably erroneous, disregarding, as it does, the plain directions of the act of June 13, 1836, relating to the commencement of actions. That act, 58th section, requires the jury to find what goods or effects, if any, were in the hands of the garnishee, at the time the attachment was executed, or afterwards, and also the value thereof. And this is not matter of form, but substance, as the garnishee may, in many cases, discharge himself by surrender of the pro-

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party, and is not in any case answerable beyond its value. The verdict, therefore, deprives the garnishees of a valuable right, having failed to ascertain what goods or effects, he had in his hands, and the value. *Non constat* that the goods might be surrendered, or that they were worth less than the amount of the verdict.

On the trial, the court permitted the plaintiffs to give in evidence the record containing the proceedings and judgment in the suit of the plaintiffs against S. S. Bergin, the original debtor. This was admitted for the purpose of showing the sum due. The admission of the evidence was excepted to, because the amount due on the judgment was improperly ascertained by the prothonotary. The argument is, that the action being in assumpsit on book account, it could only be liquidated by an inquest in pursuance of a writ of inquiry. And for this position plaintiffs in error rely on *Pancake v. Harris*, 10 *Serg. & Rawle*, 109. In that case, however, it will be remarked, there was no liquidation of damages whatever; nor was there any thing on the record, by which the debt could be ascertained. In that respect, it is distinguished from this case. The 53d section of the act of June, 1836, expressly authorizes the plaintiff to take judgment at the third term, for default of appearance. The judgment was rendered according to the directions of that act, and the sum due was ascertained by the prothonotary, in pursuance of the 73d rule of the District Court, which directs, that in all judgments by default, where the plaintiff has filed an affidavit of the amount of his claim, the judgment shall be for that amount. In other cases the prothonotary shall liquidate the amount, where, from the nature of the action, it may be done without a jury of inquiry. Although this is an action of assumpsit, the District Court, who are the best judges of their own rules, have decided that the debt is correctly ascertained by the prothonotary. This decision I am not inclined to overrule, in this stage of the proceedings, on an exception to evidence.

On the trial, it appeared, that Darwin Smith was a clerk in the employment of the debtor, Samuel S. Bergin, a retail merchant, doing business in Pomeroy, in the State of Ohio, and without any express authority, and in the absence of his principal, who had absconded to avoid his creditors, sold to the garnishees, Hampton, Smith & Co., goods, including two horses, in payment of a debt of his employer, which was not then due. The court instructed the jury, that if they believed that at the time of the purchase and sale, S. S. Bergin had absconded, and that this fact was known to the defendants and Darwin Smith at the time, the purchase and sale were entirely unauthorized. To this part of the charge we perceive no plausible objection, that can be made by the garnishees, although the plaintiffs might, with some show of reason, complain of it. We are of opinion it was an unjustifiable

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stretch of authority, without the aid of the circumstances on which the court rely. A clerk in a retail store has no authority to sell by wholesale, in payment of a debt due, and certainly not in payment of a debt not due. It is an elementary principle, that a special agent has no power to bind his principal by any act not within the scope of his authority. In such cases, the sale produces no effect on the title. It still remains the property of the principal. The case of *Beals v. Allen*, 18 *Johns. Rep.* 362, is, in almost every feature, like the present, and rules it. Chief Justice SPENCER (the facts and circumstances being almost identically the same) says, he (that is, the clerk who undertakes to sell,) was a clerk in his store, to keep his accounts and books, and to sell and retail his goods to his customers. He had no authority to sell goods by the quantity, or to deliver goods in payment or security for debts. It can never be considered an ordinary sale and delivery of goods. In one material respect, this is a stronger case than *Beals v. Allen*. Here the debt was not due. It is obvious that if a clerk has authority to apply any quantity of goods he may choose to the payment of a debt not due, he has power, in many cases, materially to injure, if not totally destroy his employer.

It is entirely useless to trouble ourselves with the question, whether Bergin would have the right to confirm the sale, as there is nothing in evidence on which such a point can be raised. There is no proof whatever of a confirmation of the sale by Bergin.

As this case goes down for another trial, it may be worthy of inquiry, what effect, supposing the property to be in Bergin notwithstanding the sale, the issue of the domestic attachment in Ohio may have on the title to the goods. As this point was not made on the first trial, we confine ourself to the remark, that it may hereafter be worthy of some consideration.

Judgment reversed and *venire de novo* awarded.

Wickersham versus Irwin.

One who has purchased the title of the tenant on ground-rent, which had been sold at sheriff's sale, but who has made a gift of the premises and delivered possession before the rent in arrear accrued, but who has not conveyed, and is the owner of the mere legal title, without possession or right of possession, or perception of profits, is not liable, in covenant or other action, to the ground landlord, for the ground-rent in arrear.

ERROR to the District Court of *Allegheny county*.

This was an action of covenant, brought by Irwin and wife against *Thomas Wickersham*, to recover \$569.33, being the amount of four years' ground-rent, from October 1, 1844, to October 1, 1848,

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charged upon a lot in Pittsburgh. The wife of Irwin claimed to be heir and devisee of Ewalt, who, by indenture of perpetual lease, dated March 9, 1813, conveyed part of the lot above referred to, to Isaac Wickersham, subject to an annual rent of \$142.83 $\frac{1}{2}$, payable in half-yearly instalments.

The title of Isaac Wickersham to the lot, under the lease, was divested by sheriff's sale; his interest was conveyed to Herr, who, with his wife, conveyed to Thomas Wickersham, the plaintiff in error, subject to the said annual ground-rent.

In June, 1843, Thomas Wickersham made a gift of the lot aforesaid to Isaac Wickersham, and delivered to him possession of it on the 1st July, 1843, since which time the lot has been in the possession of Isaac, and assessed and taxed in his name, as the owner. At the date of the gift, the plaintiff in error had paid the ground-rent on said lot in full to 1st April, 1843. After this, Isaac paid it till the 1st October, 1844, including the rent which accrued between the 1st April and 1st of July, 1843. After the 1st October, 1844, Isaac failed to pay, and this action of covenant was brought against Thomas Wickersham. At the institution of this suit, Thomas was the holder of the *legal* title to the lot, not having executed a conveyance of it to Isaac; and the only *written* evidence of the gift, was contained in certain letters written by the plaintiff in error, at or about the date of the gift.

The plaintiffs declared against the defendant, as the assignee of Isaac, under the deed of perpetual lease.

Defendant plead in bar of the action the several pleas of *non est factum*, covenants performed *absque hoc*, and specially, that he had transferred and assigned over his interest before any rent became due. And thereupon issue was joined.

On the trial, the defendant offered to prove the gift, and the delivery of possession on 1st July, 1843, and that the property has since been taxed in the name of Isaac; and that all rent, from April, 1843, to October, 1844, since paid, has been paid by Isaac; and also offered to prove the letters which passed between the defendant and the witness, Samuel M. Wickersham, in relation to said gift.

The court refused to admit the evidence; exception on part of defendant.

Defendant's counsel then requested the court to charge the jury that the plaintiffs are not entitled to recover against the defendant, because he is no party to the deed declared upon, and is declared against as the assignee of the covenantor.

The court reserved the point.—Verdict was rendered for plaintiffs, and the court afterwards decided the reserved point in favor of the plaintiffs.—Defendant's counsel excepted.

Error was assigned to the refusal to admit the evidence; and to

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the refusal to charge as requested; and in the answer to the point reserved.

The case was argued by *H. W. Williams*, for plaintiff in error. *Bigham*, for defendants in error.

The opinion of the court was delivered by

ROGERS, J.—This is an action of covenant to recover the arrears of ground-rent, due on an indenture of perpetual lease, by which Samuel Ewalt, deceased, conveyed part of lot 179, in the city of Pittsburgh, to Isaac Wickersham, subject to an annual rent, &c., payable in half-yearly instalments, to the said Ewalt, his heirs and assigns. The defendant, Thomas Wickersham, who was the assignee of the premises, among other matters, pleaded in bar of the action, that he had transferred and assigned over his interest, before any rent became due. On this, among other pleas, issue was joined. In support of this issue, the defendant offered to prove, that in June, 1843, he made a gift of the property to Isaac Wickersham; that he delivered to him full possession of the premises, in pursuance of the gift; that the property has ever since been taxed in his name, and that all the rent which has since been paid, was paid by the said Isaac, &c. To the evidence so offered, the plaintiff objected, contending that, admitting all to be true, as alleged, still the defendant, being the legal owner of the property, though in trust for Isaac Wickersham, is still liable to the plaintiff for the rent in arrear. And thereupon the court sustained the objection for the reason assigned, and rejected the evidence. From the bill of exceptions, which is our only guide, it distinctly appears, that the only question raised and point decided, in the District Court, was, that inasmuch as the defendant held the legal title, though in trust, he was liable for the ground-rent in arrear, notwithstanding he had previously to the time the rent accrued, conveyed, or what is the same thing, assigned, by way of gift, the equitable interest to another, who was in possession, and in the enjoyment of the property. Was the court right in rejecting the evidence on the exception, and for the reasons assigned, is the only question. I say this is the only question, because it does not appear, but the contrary is evident, that any exception was taken to the evidence, on the ground of the statute of frauds, which now the defendants in error press into the argument in support of the judgment. If the defendant is personally liable in the action, it is because of privity of contract or of estate, and as privity of contract cannot be pretended, the liability must be rested on privity of estate. What, then, is the privity of estate, which subjects a person to personal liability for arrears of ground-rent? And on this point we are at no loss for authority. The privity of estate which induces personal liability, is the actual or beneficial enjoy-

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ment of the premises, or the right of possession and enjoyment. When there is neither, no personal liability can arise. These principles are clearly recognised in *Woodfall's Landlord & Tenant*, 279; *Platt on Covenants*, 494; *Taylor v. Shum*, 1 *Bos. & Pul.* 24; *Weidner v. Foster*, 2 *Pa. Rep.* 25; *Eaton v. Jaques*, *Doug. Rep.* 445; *Thomas v. Connell*, 5 *Barr* 13, and *Berry v. McMullen*, 17 *Serg. & Rawle* 84. Thus, in *Taylor v. Shum*, BULLER, J., says, an assignee is only liable while he continues to be legal assignee, that is, while he is in the actual possession under the assignment. In *Weidner v. Foster* the court say, an assignee is only liable in respect of his possession, for he bears the burthen only while he enjoys the benefit. So in *Berry v. McMullen*, it is ruled, that one who owns the equitable interest in land, who is in the constructive possession, and may receive the income of it, is liable in covenant, as assignee, for a ground-rent charged thereon, although the legal title is in another, and no trust appears by deed. And in *Thomas v. Connell*, 5 *Barr* 13, it is said, the assignee is liable, personally, from privity of estate, that is, from its actual or beneficial enjoyment, or the right to enjoy it. He is not liable personally, unless he has the possession or right to the possession of the premises on which the rent is charged. The cases cited, and which might be multiplied to an indefinite extent, conclusively prove the persons who are liable, and the reasons on which they are liable, namely, those who have a beneficial interest in the estate; those who are in possession of it, enjoying the profits, or who are entitled to the possession and the enjoyment of it. Does, then, the defendant, the owner of the naked legal title, come within either the spirit or the words of the decision quoted? He is not in privity of estate with the ground landlord, for after the gift of the premises, and the delivery of the possession to the donee, he had neither actual or beneficial possession, nor had he any right to the possession or the enjoyment of the premises. What the defendant offered to prove, we are bound to take as true. There was, therefore, an actual transfer of the possession by the defendant to another, whether by gift or sale matters not, by which the equitable interest passed to the donee, leaving nothing in the donor, except the naked legal title. The idea that both are personally liable, viz. the owner of the legal and equitable title, is most fallacious. The reasons of the liability extend only to the owner of the equitable estate, who is considered in privity of estate with the ground landlord, because he is in possession, and in the enjoyment of the rents, issues, and profits, a reason which does not hold in respect to the owner of the legal title. In addition, it is proper to remark, that the decision of the court cannot well be reconciled with the cases of *Eaton v. Jaques*, *Doug. Rep.* 445; *Berry v. McMullen*, 17 *Serg. & Rawle* 84. In both the cases cited, it is evidently the opinion of the court, that to constitute a privity of estate, something more is required than

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the fact that the person attempted to be personally charged, is the owner of the legal estate.

It is very true, as was ruled in *Irish v. Johnson*, a case decided at the last term and not yet reported, an action of covenant is not the proper action in a case like the present. But since then, the legislature have passed an act giving to the plaintiff in this case, and in all others similarly situated, full and complete remedy by action of covenant. As the constitutional power of the legislature cannot be doubted, the act cures the error assigned.

Judgment reversed and a *venire de novo* awarded.

Kerr et al. *versus* Day. ✱

1. In the case of articles of agreement, leasing land with the right to purchase, though such right rests solely with the purchaser, it may be enforced by the purchaser, and such optional right may be transmitted to his vendee; notice of this right will be imputed to a second purchaser from the original vendor, by actual possession of the land agreed to be sold, which is consistent with the contract.

2. The right of the vendee of the purchaser to enforce the agreement, is not affected by the fact that he was one of the owners, who covenanted to convey, but who afterwards sold to his co-tenant, his interest in the premises.

ERROR to the District Court of *Allegheny county*.

This was an ejectment by Day v. Kerr, for a lot of ground in Allegheny county. Kerr was the tenant under Warden. Trunick was substituted as co-defendant; he was assignee of Warden, who was assignee of Cuddy. Warden and Alexander had been together seized of a piece of ground constituting the village of Temperanceville, of which the lot in dispute was a part. They made partition. The lot in question was conveyed and released by Warden to Alexander, deed dated July 1, 1847, and Alexander conveyed it to Day, the plaintiff, by deed dated August 9, 1847.

On the part of defendant, evidence was given of an agreement dated April 1, 1845, between Warden and Alexander, of the one part, and Cuddy, of the other part, by which Cuddy was to have the lot for three years at a certain rate, with the right to improve; and it was agreed that Cuddy should have the privilege of buying the said lot, at any time during the continuance of said term, at the price of twelve hundred dollars, in such payments as may be agreed upon, not exceeding ten years from the date of the lease.

There was also produced an assignment of the foregoing agreement, by Cuddy to Warden, dated 29th July, 1847, for the consideration of one hundred and fifteen dollars. This was before the deed from Alexander to Day. Also, a letter from Warden to Day, the plaintiff, dated February 13, 1848, giving Day notice that he had

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purchased the interest of Cuddy in said lot, and intended holding it as a purchaser, &c.

Warden assigned to Trunick all his right, &c., in the article of agreement between Warden, Alexander, and Cuddy, and to the lot. This assignment was dated the 22d day of August, 1849. It was proved by one Carnahan, that Cuddy had improved the lot; that *at the time of the sale by Alexander to Day, he, Carnahan, was in possession of the property as tenant, he having come in under a lease from Cuddy*; and during that summer, and after the assignment to Warden, he, Carnahan, paid rent to Warden, and that the defendant, Kerr, came into possession when he, the witness, left the premises.

On the part of the defendant, it was insisted that by virtue of the foregoing, an equitable title was vested in Trunick, as the assignee of Warden, who was assignee of Cuddy; and that under the circumstances stated by Carnahan, Day, the plaintiff, was chargeable with notice of the said equitable title.

The plaintiff's counsel insisted that the defendant took no interest in the premises under the assignment from Cuddy to Warden, (the residue of the lease excepted,) *either in law or in equity*; and even if they did, that the plaintiff is a *bona fide purchaser*, for a valuable consideration, without notice, and that the possession proved by Carnahan was not, under the circumstances, constructive notice of the interest claimed under the said agreement of 1845.

Whereupon, LOWRIE, J., instructed the jury as follows, to wit:

1st. That the facts set forth in the testimony of James Carnahan, do not amount to constructive notice of the title claimed by defendant, under the agreement of 1st of April, 1845.

2d. That an agreement to give a party an option of purchasing certain land, is a mere personal covenant or agreement, and not such an agreement as vests any interest, *legal or equitable*, in the land the subject of the contract; and that the defendant claiming under such agreement *alone*, without any act of election *previous to the sale to plaintiff*, has no such title to the land as furnishes the foundation of a defence to an action of ejectment.

To this charge the defendant's counsel excepted, and a bill of exceptions was sealed.

Verdict for plaintiff.

Errors assigned:

1. The court erred in the first part of their charge, on the question of constructive notice.

2. The court erred in the second part of their charge, on the construction of the agreement and defendant's rights under it.

The case was argued by *Woods*, for plaintiffs in error.

Watson, for defendant in error.

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The opinion of the court was delivered by

BELL, J.—The ground upon which a chancellor executes an executory contract for the sale of lands, is, that equity looks upon things agreed to be done, as actually performed; consequently, when an agreement is made for the sale of an estate, the vendor is considered as a trustee for the purchaser, of the estate sold, and the purchaser as a trustee of the purchase money for the vendor: *Green v. Smith*, 1 *Atk.* 572; *Craig v. Leslie*, 3 *Wheat.* 578. The vendee is, in contemplation of equity, actually seized of the estate, and is, therefore, subject to any loss which may happen to it between the agreement and the conveyance, and will enjoy any benefit which may accrue in the same interval. As a consequence, he may sell or charge the estate before conveyance executed; *Selon v. Slade*, 7 *Ves. Jr.* 265; 1 *Ves.* 220; 6 *Ves. Jr.* 352; and the death of either vendor or vendee, even before the time of completing the contract, is held to be entirely immaterial: *Winged v. Lofebury*, 2 *Eq. Ca. Abr.* 32, *pl.* 43; *Paul v. Wilkins*, *Tothill* 106; *Baker v. Hill*, 2 *Ch. R.* 113. As a result of this principle, which seems to be of general application, it is settled, that an estate under contract of sale is regarded as converted into personalty, from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and if the seller die before the election be exercised, the purchase money, when paid, will go to his executors as assets: *Sikes v. Lister*, 5 *Vin. Abr.* 561, *pl.* 28; *Baden v. Pembroke*, 2 *Vern.* 213. But if, from defect of title, insufficiency of contract, or other cause, the court should think the contract ought not to be carried into execution, a conversion is prevented, and the estate will go to the heir at law of the vendor, as though no contract had ever existed: *Lacon v. Waters*, 3 *Atk.* 1; *Buckmaster v. Harrop*, 7 *Ves. Jr.* 361; *Rose v. Conyngnam*, 11 *Ves. Jr.* 550. So also, if one covenant to lay out a sum of money in the purchase of land, generally, and devises his real estate before he has made the purchase, the money agreed to be laid out, will pass to the devisee, as representing land: *Green v. Smith*, 1 *Atk.* 573. These illustrations of the doctrine of conversion are familiar instances in which the rule that agreements to be performed are considered as performed, has been practically applied, and might, I think, without further aid, be accepted as decisive of the doctrine which the defendant below invoked as sufficient for his protection in this action. Upon the trial, however, it was distinctly made a question whether the option, vested in Cuddy, by the agreement of April 1, 1845, to purchase the property or not within a given period, does not distinguish this case from those I have adverted to; or, if not, then whether the plaintiff below can be considered as a *bona fide* purchaser, without notice of Cuddy's equity, and so relieved from the obligation to convey which vested in his vendor, Alexander? A little further examination will show both these points to be

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definitively settled against the plaintiff by a train of uncontroverted authority. These decide that equitable conversion takes place, although the election to purchase rests solely with the purchaser, whose optional right may be transmitted to his vendee; and that notice of this right will be imputed to a second purchaser from the original vendor through an actual possession of the land agreed to be sold, consistent with the contract.

The first instance in which, I believe, the principal question arose, was before Lord KENYON, at the Rolls, in 1785, and was singularly like the case in hand in its leading features. It is thus stated by Lord ELDON, in *Ripley v. Waterworth*, 7 *Ves.* 486, where, as well as in subsequent cases, it was approved and followed. Whitmore demised to Douglass, for seven years, with a covenant that if the tenant, after the 29th of September, 1761, and before the 29th of September, 1765, should choose to purchase the inheritance for £3000, Whitmore would convey to him. In 1761, before any election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally, as tenants in common. In 1765, before the time mentioned, Walter, *who purchased the lease and benefit of the agreement from Douglass*, called on Bennett to convey for £3000, which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the £3000 and interest, and it was decreed accordingly, and, added the chancellor, "though the testator could never have compelled the lessee to purchase, yet when the assignee made the election, it was held the personal estate of the testator, and not to belong to the devisee of the real estate." Another case, parallel in principle, is noticed as having been mentioned before Lord KENYON, of one, who having a timber estate, agreed to sell a given quantity *per annum*, to be chosen by the vendee. The owner died, and a vast deal of timber was cut after his death. That timber, though in the option of the buyer, was held to be the personal estate of the party to the contract. In *Townley v. Bedwell*, 14 *Ves.* 591, Lord ELDON again cited the first of these cases, as *Lawes v. Bennett*, and followed it as furnishing a governing rule. The principal case was this. A testator had executed a lease to one Townley, for thirty-three years, with a *proviso* that if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he should pay to the testator, his heirs or assigns, £600 for the purchase, upon having a good title made to him, (Townley,) his executors, administrators, or assigns. The testator died before the expiration of the six years, and within that period Townley declared his option to purchase, according to the *proviso*. The heir of the testator claimed the rents and purchase money, on the ground that until Townley declared his option, the estate continued to be realty, and the declaration being made after the death of the testator, it

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so descended, and, consequently, the price of it belonged to the heir. The case was ably argued by eminent counsel, for the heir at law and next of kin. After reflection, the Lord Chancellor adhered to *Lawes v. Bennett*, and though he gave the rents which accrued before Townley's declaration, to the heir, he decreed the price of the land to the next of kin, because, by relation, the election to purchase turned the estate into personalty, in the lifetime of the testator.

In *Daniels v. Davidson*, 16 *Ves.* 253, *Lawes v. Bennett* is again approvingly noticed, under the name of *Douglass v. Whiting*, and is said to have turned upon the doctrine that, when the lessee made his option to purchase, he was to be considered as the owner *ab initio*. Indeed, the determination can only be supported by attributing to the lessee an equitable estate in the land, under his covenant for an optional purchase, which passed to his alienee, vesting him with the right to call for a specific execution on declaring his election.

In *Daniels v. Davidson*, the bill for a specific execution stated an agreement by Davidson to sell to Daniels a public house, called The Plough, then in the occupation of Daniels, for the sum of £200, on or before the 25th of March next ensuing; that before the day the plaintiff tendered the purchase money and demanded a conveyance, but the defendant refused to perform the contract, and sold the premises to the other defendant Cole, and charging Cole with notice. No doubt was intimated of the equitable interest of Daniels, the only question being of the notice imputed to Cole, the second purchaser. And on the authority of *Taylor v. Stibbert*, 2 *Ves.* 437, it was ruled, in effect, that where a tenant for years agrees to purchase, his possession, though under the lease, is notice of his equitable interest as purchaser, to a subsequent purchaser, who is bound to inquire and inform himself of all the contents of the lease and the covenants contained in it, as well as of all the interests and estates claimed by the tenant. Having failed to do so, he will be decreed to convey to the first vendee, leaving the original seller and the second purchaser to settle their rights between themselves. In delivering the judgment, Lord ELDON took occasion to say, "Where there is a tenant in possession under a lease, or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession. If, for instance, he is occupying tenant under a lease for forty-five years, the purchaser is bound by the fact that he is entitled to that term, if he does not choose to inquire into the nature of his possession; the tenant being in no fault, but enjoying according to his title. Then if, in the instance of such a term, the tenant would be entitled against the purchaser, why is not his title good for a greater interest? In the case of *Douglass v. Whiting*, the tenant was not bound to know, and did not know, that it was necessary for him to make any com-

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munication of the option which he had by the contract with his landlord, to become the purchaser; and Lord KENYON held that there was nothing that could affect his conscience in favor of the purchaser, having no communication with him. My opinion, therefore, considering this as depending on notice, is, that this tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession." When the case came up again for a final decree, 17 *Ves.* 433, the same doctrine was repeated. "With regard," said the chancellor, "to the subsequent sale by the defendant, Davidson, to the other defendant, Cole, my notion is that the plaintiff has an equity to have a conveyance of the premises from Cole, upon the ground that Cole must be considered, in equity, as having notice of the plaintiff's equitable title under the agreement; that Cole was bound to inquire, and therefore, without going into the circumstances, to ascertain whether he had, or had not, actual notice, he is to be considered as a purchaser of the other defendant's title, subject to the equity of the plaintiff to have the premises conveyed to him at the price, which he had by the agreement, stipulated to pay to that defendant." I have cited these observations thus at length, because they furnish a full answer to the objection raised in our case, on the score of alleged want of notice to the plaintiff below. Carnahan's possession, as the tenant of Cuddy, is attended with the same effect in imposing the duty of inquiry upon Day, the second purchaser, as though Cuddy himself had been in possession; more especially as Carnahan had attorned to Warden, the assignee of Cuddy. The necessity of this inquiry is enforced by our own cases of *Jacques v. Weeks*, 7 *Watts* 261; *Lewis v. Bradford*, 10 *Watts* 67; *Boggs v. Varney*, 6 *Watts & Serg.* 474, and a case decided at the last term for this district, but not yet reported. As the case is then presented by the record, Warden, having purchased Cuddy's equitable interest, entitled himself to a conveyance of the land, by his notice of an election to purchase, within the time stipulated by the covenant. Day, the plaintiff below, having bought the legal title from Alexander, under notice of Cuddy's equity, stands in Alexander's place, in respect to the covenant of sale, is subject to the same duty, and is bound to perform all the person he represents would be bound to do, were the legal title yet in him: *Taylor v. Stibbet*, 2 *Ves.* 439; *Crofton v. Ormsby*, 2 *Scho. & Lef.* 583. If, in addition to the cases already cited, other authorities were necessary to show that Alexander's alienation to Day worked no effect upon the previous rights of Cuddy and his assignee, they may be found in *Eckliff v. Baldwin*, 1 *Ves.* 267, and *Curtis v. The Marquis of Buckingham*, 3 *Ves. & Beam* 168, recognising the chancellor's power to restrain a vendor from conveying the legal estate to a third person,

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because such a measure might put the purchaser to the expense of making another party to the suit.

It is scarcely necessary to add that whatever right may reside in Warden as vendee of Cuddy, is in no degree affected by the fact that he was one of the parties who, as owner, covenanted with Cuddy to convey, on a compliance by the latter with the stipulations of the agreement. By Warden's subsequent conveyance to Alexander of all his interest in the property, the duty of fulfilling the covenant of sale was cast upon the latter, as owner of the legal title. Considered, simply, as a covenant real, Warden became a stranger to it, and was, consequently, in a position, at the time of his purchase from Cuddy, to acquire the right to claim a conveyance from Alexander, or from his grantee, upon determining of the option given by the original agreement.

Upon the case, as it now stands, Kerr, as representing Warden, is entitled to retain the possession of the property. Should Warden, upon offer of a legal conveyance, fail to fulfil the stipulations on his part to be performed, of course the relative rights of the parties would undergo a change.

Upon both the points made below, the learned judge before whom the case was tried, fell into an error, attributable, no doubt, to the necessary rapidity of a trial at bar, and the consequent difficulty of looking into the books. In the argument submitted to us, the subject was very insufficiently explored, and we can, therefore, easily believe the District Court derived but little assistance from the research of counsel.

Judgment reversed and a *venire de novo* awarded.

Haworth et al. *versus* Wallace and Lyon.

1. On the trial of a *scire facias* on a mechanic's lien filed against the owner and two contractors, it is not competent for the owner and one of the contractors to release the other contractor from liability for costs, and render him a competent witness for the defence.

2. Buildings erected by a lessee for years, on the ground leased to him, are not subject to a mechanic's lien.

ERROR to the District Court of *Allegheny county*.

This was a *scire facias* on a mechanic's lien filed by Wallace and Lyon, against Haworth, owner, and McCutcheon and Griffith, contractors, for work and materials, &c. The erection of the buildings was commenced in the early part of the year 1848. The defendants pleaded that plaintiffs contracted to take other security for payment, and that the said reputed owner, Jehu Haworth, had, at the commencement of said buildings, and now has only a leasehold interest in the ground on which said buildings are erected,

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and which will expire on the 1st of September, 1858. The case was tried before HEPBURN, J.

To support the issue on their part:—"The defendants, Haworth and McCutcheon, offered to release the other defendant, Griffith, from all costs, and offered him as a witness. The owner also offered to release the witness from all costs and every claim for damages which he may have against the witness as one of the contractors, for omitting or for failure to comply with his contract in the erection of the buildings in controversy." Objected to; the court sustained the objection and rejected the witness. Defendants' counsel excepted.

It was admitted that Jehu Haworth, the reputed owner, leased the premises on which the buildings, described in the lien, are erected, from William H. Denny, attorney in fact of St. Clair Denny, by an agreement dated December 1, 1847, for the term of thirteen years, from the 1st of September, 1845, which agreement contains this clause: "Said Haworth to be entitled to the improvements at the end of the lease, unless paid for by the said Denny;" and it was not denied that the said Haworth entered into possession of the premises under said agreement, and contracted with said McCutcheon & Griffith to build the houses described in the lien, and furnish the material for the same, for which they have been fully paid.

His Honor, Judge HEPBURN, charged the jury as follows:

The defendants contend that inasmuch as Haworth, the reputed owner, was but a lessee of these premises, and had but eight years of his time yet remaining—that a mechanic's lien could not be entered against the property. His interest, say they, is but a chattel, and not the subject of a lien. But the act of April 28, 1840, sec. 24, settles the matter otherwise. The lien filed affects the interest of the tenant only, but it binds his interest, and on a judgment obtained on this lien the interest of the tenant may be sold. The defence set up has entirely failed, and your verdict should be for the plaintiffs for the amount of their claim, deducting such payments as the parties have agreed upon. To this charge defendants excepted.

It was assigned for error, that the court erred,

1st. In rejecting the witness "Griffith," under the circumstances.

2d. In charging the jury that the leasehold interest of Jehu Haworth, the reputed owner in the premises, was bound by the lien in this case.

3d. In charging the jury that the buildings in this case were subject to the lien.

The case was argued by *Geyer*, for plaintiffs in error; and by *Marshall*, for defendants in error.

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The opinion of the court was delivered by

GIBSON, C. J.—The defendants had not power to release their co-defendant from liability to the plaintiffs for the costs: an interest in the event, which disqualified him as a witness for them.

The other exception is better taken. The decision in *Church v. Griffith*, and *White's Appeal*, is in point, that a chattel real is not the subject of a mechanic's lien; and unless the meaning of the legislature was grossly perverted in those cases, they ought not to be overturned for any speculative error of construction. Except by the registry of a mortgage, a chattel real had not been the subject of a record lien; and the statute does not expressly make it so. It declares that a mechanic's lien "shall not be construed to extend to any other or greater estate in 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." It is thus expressly said, that no more than the estate of the tenant shall be bound; but it is not expressly said that it shall be bound at all events, and without regard to its quantity or quality, nor is it intimated by necessary implication. We are to consider the old law, the mischief, and the remedy. The old law subjected the reversion to the expense of improvements by the particular tenant, or the legal title to be sold for improvements, by a vendee; the mischief was the apparent injustice of it,—more apparent than real;—and the remedy was, to subject only the estate of the particular or the equitable tenant to execution. The object of it was to abridge the lien, not to extend it; to modify an existing lien, not to create a new one. Now it is a rule, that a statute is to be interpreted, as near as may be, to the common law; and consequently, that the remedy is not to be pushed beyond the immediate mischief. The legislature knew that a chattel real had not been a subject of record lien; and had there been a design to make it so, it surely would have been expressed. It was probably thought that such a lien would not be an available security, especially when fastened on the interest of a tenant at sufferance, or at will. A lessee seldom erects any thing more valuable than a temporary or removable building, as an appurtenance to his mansion, his manufactory, or his warehouse; and it would be so worthless, as a separate tenement, that a purchaser of it would scarce know what to do with it. In the usual course, the term would expire before he could get possession of it. In possession, he would be debtor for the rent, and he would have nothing for his money but the use of the improvements detached from the business they were intended to subserve. Should the legislature, however, think that such a lien would be worth the trouble of enforcing it, it will be easy for them to say so. In the mean time,

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let us not produce a conflict of decision for a doubtful interpretation. The judgment in *McClelland v. Herron*, 4 *Barr* 67, did not produce it, for no more was ruled than that a levy and sale of a term did not pass the fee. In the present case, there was no lien to remove.

Judgment reversed.

Warden and Alexander *versus* Eichbaum.

1. Under the 34th section of the act of 24th February, 1834, relating to executors and administrators, in order to divest the interest of heirs in real estate, by sheriff's sale, it is necessary to make them parties to the proceeding, even though the suit on which the sale took place was commenced against the administrator *before* that act was passed. The case is not within the exception in the 70th section of that act.

2. A committee of a lunatic may maintain ejectment in his own name, to recover the possession of the real estate of the lunatic.

3. The receipt, by the committee of a lunatic, of purchase-money of the interest of a lunatic in real estate, illegally sold at sheriff's sale, will not estop a future committee of the lunatic from recovering the possession of the property, even though valuable improvements have been made upon it since the sale.

ERROR to the District Court of *Allegheny county*.

This was an action of ejectment, brought by Eichbaum, committee of the person and estate of Matilda Elliott, a lunatic, Elizabeth Elliott, and James Elliott, heirs of West Elliott, deceased, *v.* Warden and Alexander, for ninety-six acres of land in St. Clair township, Allegheny county, on which the village of Temperanceville is now laid out.

The plaintiffs claimed as heirs at law of West Elliott, father of Matilda, Elizabeth, and James; also as heirs at law of their brothers, Daniel and Joseph, who died intestate, without issue, after the death of their father. West Elliott died seized of the land in dispute, the same being subject to a perpetual ground-rent of \$150 per annum. He died in July, 1828.

On 29th June, 1836, Matilda Elliott was by inquisition found to be a lunatic, with lucid intervals, and that she had been in the same state of mind for three years last past, and that she was entitled to the one undivided fourth part of her father's estate, &c., valued at \$2600. On the same day, Snowden was appointed committee of her person and estate. He gave bond, &c.

The defendants claimed title to the property through a judicial sale, and that a considerable part of the proceeds of the sale were, through an audit, appropriated to the heirs of West Elliott, deceased, and their vendees, and that the defendants, on payment of the money, had taken releases and conveyances of their interest in the property, viz., from Elizabeth Elliott, from Crawford as

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vendee of Joseph Elliott, from Dunlavy as vendee of James, from Harker as vendee of Daniel, and from Snowden as committee of Matilda Elliott, a release and conveyance of her interest.

It was alleged on their part that the land was well sold, &c., and that the share of Matilda was one undivided fifth part of the property at the time of the sale. The defendants have since laid out the village of Temperanceville on the property, sold lots, and a considerable number of houses and other improvements have been made on it.

The judicial proceeding under which they claimed was a suit by Snowden and wife, Daniel Elliott who sued by his guardian, and Mary Elliott who sued by her guardian against Daniel Frew, administrator of the estate of West Elliott. Summons in account render. Writ issued December 24, 1833; served. December 13, 1834, judgment for one hundred and one dollars.

On this judgment a *fi. fa.* issued, on May 7th, 1835, and a levy made on all the right, title, and interest of West Elliott, deceased, in the property in question. A *venditioni exponas* issued July 19, 1835, and the property sold to Alexander, Warden, and Craft, for \$5000. The sheriff returned *inter alia* that the purchasers have paid to the parties entitled to it the sum reported by the auditor to be due to them, except the amount appropriated to Daniel Elliott, amounting to \$955.74, which I have now in court, subject to the order of the court.

The defendants proved that Matilda Elliott, by her committee, received her share of the proceeds of the sheriff's sale; and it was alleged that said committee by his acts and declarations ratified and consented to the sale, and stood by and saw valuable improvements made, and large sums of money expended, without giving notice of any claim on behalf of Matilda Elliott. They gave in evidence the release by said committee.

The plaintiffs contended that the sheriff's sale was void as to the heirs, they never having been made parties to the suit. West Elliott died July 29, 1828; suit was brought against his administrator, December 24, 1833; judgment was obtained, December 13, 1834; *fi. fa.* was issued May 7, 1835; levy made, inquisition, and condemnation; *venditioni exponas* was issued July 19, 1835; property sold November 23, 1835, to defendants, and the act of 24th February, 1834, went into effect October 1, 1834, which was some nine months after suit brought, and three months before the judgment was had.

Snowden was discharged as committee, &c. of Matilda Elliott, and Eichbaum was appointed committee of her person and estate. Snowden was the same person who was one of the plaintiffs in the suit on which the property was sold by the sheriff.

The court was requested by counsel of defendant to charge the jury:

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1. That it was not necessary that the widow or heirs should be made parties, &c.

2. That the provisions of the thirty-fourth section of the act relating to executors and administrators, approved on the 24th day of February, 1834, were not applicable to the action on which this judgment was obtained, &c.

3. That Eichbaum, the plaintiff, was not entitled to recover, not having shown any title.

4. That if Matilda Elliott is a party to this suit, yet she will be estopped from recovering, if the jury are satisfied that her committee has received her share of the proceeds, &c., and by his acts and declarations ratified and consented to the same, &c.

5. That if the jury find the facts, as stated in the fourth point, then at least her committee would be estopped from a recovery, and that before suit the money received from the sale must be refunded or tendered.

The seventieth section of the act of 24th February, 1834, relating to executors and administrators, contains these words: "This act shall take effect from and after the first day of October next, and all such acts of Assembly as are hereby altered or supplied shall be and are hereby repealed, except so far as may be necessary to finish proceedings commenced," &c.

His Honor, Judge HEPBURN, answered the first and second points in the negative, but they were reserved for further consideration, and the negative answer given then *pro forma*. The other points were answered in the negative.

Verdict was rendered for Eichbaum, committee of the person and estate of Matilda Elliott, for the one undivided fifth part of the lands claimed in the writ, subject to the opinion of the court upon the point reserved, and for the defendants for the residue of the land claimed.

February 2, 1850. Judgment on the reserved point in favor of plaintiffs.

It was assigned for error:

The court erred in not charging the jury as requested by the defendants in their first, second, third, fourth, and fifth points, respectively, and in the answer they gave to each of said points.

The case was argued by *Woods*, for plaintiffs in error.—He contended, *inter alia*, that the case was within the exception in the seventieth section of the act of 24th February, 1834; that the proceedings were commenced before the passage of the act.

Eyster and Dunlop, for defendant in error.

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The opinion of the court was delivered by

BELL, J.—If any regard be due to legislative enactment and judicial decision, it is impossible to perceive how the plaintiffs in error can hope to evade the consequences resulting from the disregard of the statutory provision, calling for notice to heirs or devisees before lands descended or devised can be taken in execution for the debts of a decedent. The act of 1834 is imperative that “in all actions against the executors or administrators of a decedent, who shall have left real estate, when 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.” In *Benner v. Phillips*, 9 *Watts & Serg.* 13, this direction was held to be applicable to the estates of those who had died before it went into operation, and in *Keenan v. Gibson*, 9 *Barr* 249, it was ruled to be operative even where a suit was brought and a judgment recovered against the personal representative of the deceased before the passage of the act. In these cases, the court spoke, in general terms, of the observance of it as necessary to the continuance of lien against the land descended, without particularly adverting to it as an essential regulation irrespective of mere question of lien. The reason was, that though the leading inquiry was the privilege of the terre-tenants, the right of the respective creditors to levy on the descended lands was presented in intimate connection with the subject of lien, and as this was gone, in both instances, by lapse of time, before execution issued, we were not led to discriminate between the absence of lien and the simple invalidity of sale. But in *Atherton v. Atherton*, 2 *Barr* 112, where the lien of the debt due from the intestate was conceded to be in full effect, at the time of the levy made, under a judgment recovered against the administrator, the levy was, nevertheless, set aside, for the sole reason that the prior right of the creditor to take the land in execution was absolutely suspended by the statute until the owners were brought into court by legal process. In that instance, the point presented for adjudication was the naked right to take in execution unmixed with any doubt of lien. Such, too, is the inquiry in the case before us, for at the time of sale, in 1835, the lien of the debt for which the judgment was recovered against the administrator was, undoubtedly, unspent. It falls, therefore, directly under the ruling in *Atherton v. Atherton*, as well as the doctrine of the other cases, unless, indeed, there be something in the attempted distinction resting on the fact that the original action against Elliott’s administrators was pending when the act of 1834 went into effect. Having been commenced and proceeded in under the prior existing laws, it is insisted the action fell within the operation of the seventieth section of the new act, which exempted from repeal the former laws “so far as may be necessary to finish proceedings commenced, or to settle the

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estates of persons who may have died before that time." The same objection was raised in *Keenan v. Gibson*, but it was answered, that admitting the exception in the repealing clause had reference to suits at law brought by creditors, the proceeding was finished, within the meaning of the statute, by the recovery of a judgment. There, the rendition of the judgment was before the new enactment; here, it was after; a fact which, certainly, cannot be appealed to as conferring any superior privilege or immunity. Why should it? The act directs that after the first of October then next, the lands of a decedent should not be taken in execution for his debts, before calling in the terre-tenants. The suit instituted before that time was not consummated by a judgment till after. Had the creditor intended to pursue the personal assets in the hands of the administrator, it might be said the proceeding remained unfinished until execution satisfied. But as no such intent was entertained, the recovery of a judgment against an administrator alone must be regarded as the closing step of that action. When the plaintiff elected to pursue the land, a distinct proceeding pointing in a new direction became necessary, as was very clearly shown in *Atherton v. Atherton*, following in this particular *Murphy's Appeal*, 8 *Watts & Serg.* 171. It is true, these decisions were not pronounced until some time after the sheriff's sale of the land here in question. Yet they are but declaratory of the true meaning of the act which gives rise to this contest. The plaintiff in the execution may have been ignorant of the proper steps to be taken, and this ignorance may entail hardship on those who purchased, giving full credence to the regularity of his proceedings. But it is scarcely necessary to say such considerations are insufficient to justify disregard of a positive law, which for every practical purpose must be deemed as known to all liable to be affected by it. Indeed, it is somewhat difficult to believe the parties interested in the transaction acted under the misapprehension that the statute did not embrace the case. At first blush, some hesitancy might have been felt as to the mode of giving effect to its provisions. But it seems to me, this very difficulty would naturally direct to the employment of the writ of *scire facias*, so familiar in our practice for similar purposes; or if a literal compliance with the terms of the act was deemed essential, the expedient of another action could not have been overlooked. I know the latter course was adopted in several instances in the district where I practised, by discontinuing suits, pending when the act of 1834 went into effect.

But abandoning this branch of the case, the plaintiffs in error insist that by receiving the lunatic's share of the purchase money, and permitting, without objection, large improvements to be made by the purchasers, the committee ratified the sheriff's sale, and is now estopped to call it into question, either in his own person, or

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as representing the lunatic. This position is, I presume, based upon the principle applied in *Adlum v. Yard*, 1 *Rawle* 163; *Stroble v. Smith*, 8 *Watts* 280; *Wilson v. Bigger*, 7 *Watts & Serg.* 111, and other cases; that one who knowingly derives a benefit under an invalid deed, or a voidable transaction, cannot afterwards impeach it. And it would, perhaps, have been german here, had Matilda Elliott, being of full age and sound mind, with a full knowledge of all the facts, received her proportion of the avails of the sale, and suffered the vendee to improve without warning. But by what rule is she answerable for the acts or omissions of her committee? He was vested with no right to compromise her interest, nor clothed with power to alienate her estate. In *Wilson v. Bigger*, though the guardian of a minor ward had actively approved of the sale of the ward's estate, by an order of the Orphans' Court, the confirmation of the proceeding was not put upon that ground, but upon the subsequent acquiescence of the ward, after he had attained his majority. The relation of a committee to the lunatic's estate is strictly analagous. Though the law casts upon him the possession of it, it is, solely, for her benefit, and for the promotion of her welfare. The only way in which he can effect an alienation of her lands, is through the interposition of the proper Court of Common Pleas, and then only when the exigencies contemplated by the act of Assembly in that behalf occur. But it is suggested that as he might have dispensed with a *scire facias* on behalf of the lunatic, so he may waive any irregularity in the sale, for want of one. This is the same proposition as that just discussed, slightly modified. The answer is, that, as a general rule, a committee can waive nothing which the law stipulates for security of the party represented, and, particularly, in that relating to the freehold of the latter. But were this otherwise, in an ordinary case, it could never be permitted to one who is, at the same time, committee, and plaintiff in the execution under which the land is sold, to dispense with, as committee, what the law requires of him as party. This would be, frequently, to array interest against duty; a rivalry too menacing of the interests of the dependent person, to be hazarded. The very case before us seems to offer an illustration of the results to be apprehended from an admission of the principle contended for. A property worth, at least, \$5000, and which within a few years has quintupled in value, was sold by the sheriff to satisfy a judgment for \$101, the only encumbrance upon it. Every thing may have been fairly done, and the releases executed by the other parties in interest would seem to indicate such was the fact; but yet the facilities afforded for the practice of fraud are apparent, and admonish us that safety is only to be found in adherence to the requirements of a wholesome statute. The conclusion may affect the defendants below harshly, but the maxim *caveat emptor*, if it be sometimes a stern, is always a necessary one.

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The remaining exception is that this action is incorrectly brought in the name of the committee.

By the 14th section of the act of 1836, the court on the return of an inquisition ascertaining the lunacy of a party, is directed to commit the custody and care of the person and estate of the lunatic to suitable persons; and by the 20th section, the committee of the estate is vested with the management of the real and personal property of the lunatic, and the disposition of the income thereof, for the benefit of the lunatic and his family. The other provisions of the statute, regulating the subject, are in consonance with these, and all of them are borrowed from the rules and practice which obtain in the English chancery, in the exercise of this branch of its jurisdiction. Both statute and practice regard the committee as in the actual possession of the lunatic's estate, which, indeed, is essential to the due discharge of his office. Now, in Pennsylvania, to sustain the action of ejectment, it is only necessary to show the plaintiff has the right of possession, against the defendant. Most frequently, this right is established by the exhibition of a legal title to the land itself, but this is by no means essential. A present right of possession may exist independently of the legal estate, and this right may be vindicated in ejectment. Thus, with us, a *cestui que trust*, or the holder of a merely inchoate interest, may maintain it; and a mortgagor, who has but an equity of redemption, in legal contemplation, may, by means of it, oust a trespasser. For the same reason, it seems to us, the plaintiff may avail himself of this action to recover the possession the law awards to him, *ex officio*. It is not like a personal action, which must be prosecuted in the names of committee and lunatic. There, as it is said, the former must be joined, to manage the interests of one who is unable to protect himself, and the latter, because he may recover his understanding, and will be entitled not only to the beneficial interest in, but to the management of the judgment recovered: *Beale v. Coon*, 2 *Watts* 183. But in ejectment, the sole object of the judgment rendered is to transfer the possession, which, of course, enures to the benefit of the lunatic, whether he be restored to his mental capacity or not. The action is, therefore, well enough brought, though, doubtless, it might also have been correctly instituted in the name of the lunatic, as owner.

Judgment affirmed.

McKibbin *versus* Charlton.

Unimproved lots of ground separated by a sale by former owners from a larger piece of enclosed ground, but remaining enclosed with such other ground by an outside fence, and not separately enclosed, and cultivated before and after assessment, but not in cultivation when assessed, cannot legally be assessed as *unseated*, and sold for taxes.

ERROR to the District Court of *Allegheny county*.

These were actions of ejectment, brought by McKibbin to recover the possession of three lots of ground, in the city of Allegheny. The plaintiff claimed under a treasurer's deed to him, dated July 21, 1842, made in pursuance of a sale for taxes. The lots were assessed after 7th December, 1839, perhaps in January, February, or March, 1840. The Charltons had purchased about two acres of ground in 1837; they sold the lots in question out of it to Blakely, and conveyed them to him by deed, dated June 10, 1839. The lots in question were not cultivated in 1839, but they had been cultivated before, and were cultivated afterwards. The lots in controversy were enclosed by an outer fence, enclosing about two acres.

It was contended on the part of the plaintiff that this was not an enclosure of these particular lots: that they were separated from the general mass by a sale by the owners, and though included in the enclosure, that it was not sufficient to exempt them from the character of *unseated* lots.

The owners of the legal title at the time of the sale, took possession of the lots in 1844 at farthest, and held the possession till 1849, before plaintiff asserted his claim.

HEPBURN, J., instructed the jury, *inter alia*, that,

If the jury believe from the evidence that the lots in question were enclosed with a view to cultivation, and this was followed up by actual cultivation in the spring or summer following, or if the enclosure with a view to cultivation was begun at the time of the assessments and was continued until completed, and then, as soon after as the case admitted, the lots were actually cultivated, then the plaintiff is not entitled to recover, and your verdict should be in favor of defendants.

It was assigned for error, *inter alia*, that the court erred in charging the jury, that the original outside fence, enclosing the two-acre lot before its subdivision into town lots according to a recorded plan, and before the sale of the lots in question to Blakely, continued to be a legal enclosure of them, notwithstanding the dedication of the land to this new purpose, and the separation of the lots by a sale.

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The case was argued by *Wills*, for plaintiff in error.—9 *Barr* 71 was referred to in one of the exceptions.

Black and *Dunlop* were for defendants, whom the court declined to hear.

PER CURIAM.—This case is distinctly within the principle of *Harbison v. Jack*, 2 *Watts* 124, in which it was held that an accidental or temporary suspension of the actual occupancy of land does not make it unseated, and that where profits have been drawn from it, the owner can return it to the unproductive class only by abandonment, entire, unlimited, and intentional. This lot was in cultivation the year before the assessment and the year after it, the interruption having been occasioned by a sale of it for a building lot to one who was not prepared to make instant use of it. In the mean time it was not thrown out as a common, but suffered to remain enclosed, along with the vendor's unsold lots, by a common fence. He, or his vendee, was personally liable for the tax, and it could not be charged on the ground.

Judgment affirmed.

Porter et al. versus Hildebrand.

1. *Foreign attachment* will not lie upon a demand founded in *tort*. It will not lie to recover from common carriers, damages for the loss of a trunk, where the declaration is *in tort*, and not *in contract*.

2. A carpenter may recover from carriers, the value of tools contained, with clothing, in his trunk, which has been lost by the carriers, the jury having found that they were the reasonable tools of a carpenter.

3. The court may permit the Christian name of a defendant to be added, when he has been sued by his surname only.

ERROR to the District Court of *Allegheny county*.

This was a proceeding in foreign attachment instituted by Hildebrand against — Moore, — Porter, and others—under the name of the Ohio Stage Co., to recover the value of a trunk, and its contents, alleged to have been delivered by the plaintiff to the defendants, owners of a public stage, to carry from Pittsburgh to Wooster, Ohio.

The attachment was served on John Meskimen, the agent of the Ohio Stage Co. in Pittsburgh, and returned *nihil* as to the others. Upon the return of the writ, defendants' counsel moved to dissolve the attachment, on account of the omission of the Christian names of defendants, and because foreign attachment would not lie. When this motion came up for argument, the court permitted the

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Christian name of Porter, one of the defendants, to be supplied, by prefixing Kemble R. thereto, and dismissed the motion. A declaration was then filed, consisting of four counts, against "Kemble R. Porter and others."

The 1st count was against K. R. Porter and others, as the proprietors of a common stage coach for the conveyance of passengers, &c., and charged them with receiving plaintiff and his trunk, "to be carried, &c. safely," and set forth the breach as follows: "Yet the said defendants, &c., the plaintiff did not safely carry, &c., but so carelessly and negligently behaved, that by the negligence, &c. of said defendants, the trunk was lost," &c.

The 2d count was against defendants, "as common carriers of passengers, and their luggage, from Pittsburgh to Wooster, in said stage; and charged that, as common carriers, they received plaintiff and his trunk, &c., to be carried safely," &c., and laid the breach as follows: "Yet said defendants, not regarding their duty as common carriers, but intending to deceive, &c., did not safely carry, &c., but behaved themselves so negligently, &c., that by the negligence of the defendants, the said trunk, &c. was lost."

The 3d count, in which the receipt of the trunk, and an undertaking to carry it safely, was alleged, had been stricken out, on motion of plaintiff's counsel.

The 4th count was against defendants as depositors, and charged "the delivery of a trunk for safe keeping, and that through their negligence it was lost," &c.

The defendant, K. R. Porter, plead in abatement, that the undertakings, if any, were made with nine others, naming them. The defendant demurred to said plea, and plaintiff joined. The court overruled the plea, and entered judgment of *respondent ouster*.

The defendant, K. R. Porter, then plead "not guilty."

Upon the trial, it was proved or admitted, that plaintiff took his seat in the Ohio Stage Co.'s stage, and paid his fare. That a trunk of a passenger was put into the stage-boot, and that the stage drove round several squares for passengers, and when it returned, the trunk was missing. That it contained \$45 worth of clothing, and \$55 worth of carpenter's tools. That the plaintiff was a carpenter, moving to the State of Ohio, &c.

Defendants' counsel requested the court to charge the jury that plaintiff could not recover in foreign attachment. The court, LOWRIE, J., reserved the question, which, after verdict, was argued and decided in favor of plaintiff. Verdict was rendered for \$45 for clothing, and for \$55, value of tools, and that they were the reasonable tools of a carpenter.

Exceptions were taken:—1. The court erred in permitting the Christian name of Porter to be supplied. 2. In deciding that foreign attachment would lie in this case. 3. In deciding the

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plea in abatement against defendants. 4. In entering judgment for the tools, &c.

The case was argued by *Knox*, for plaintiff in error, and *Weaver*, for defendant.

The opinion of the court was delivered by

BELL, J.—In its origin, and under the acts of 1705, and 1789, the process of foreign attachment furnished a remedy, simply for the recovery of debts or damages, arising *ex contractu*. It is authoritatively said to be a means of securing the appearance of a non-resident debtor; *Fitch v. Ross*, 4 *Serg. & Rawle* 564, and in the only Pennsylvania cases in which the question has been made, it was denied that it lay to avenge injuries *ex delicto*. *Jacoby v. Gogell*, 5 *Serg. & Rawle* 450, *Piscataqua Bank v. Turnley*, 1 *Miles*, 312. Indeed, so far as I am informed, it has, at no time and nowhere been esteemed a mode of vindicating every wrong, which might be committed by a non-resident or his agent, and the impolicy of making it so is strongly intimated in *Jacoby v. Gogell*. As a peculiar remedy for enforcing payment of debts and other pecuniary obligations assumed by our neighbors or aliens, it has been found useful, though certainly not unattended with inconvenience; but I have heard no sufficient reason suggested for hazarding the doubtful experiment of conceding the extended efficacy, now, for the first time, claimed for it. If such reasons exist, they would be more properly addressed to the legislature, where alone resides the power of extending the sphere of its action, by specifically declaring the additional causes of complaint to which it should be applicable. An attempt by us to extend the circle of its operation, could only be effected by the declaration of a general rule, which would bring within its remedial power every species of tort, embracing every injury to persons, to property, and to reputation, including defamation, crim. con., assault and battery, and trespass *de bonis asportatis*; a stride which would be more apt to attract admiration of its boldness than commendation of its wisdom. The argument which favors it, rests principally, if not altogether, upon considerations of convenience and expediency, but these, addressed to a judicial tribunal, are wholly insufficient to warrant so large a departure from established understanding and settled practice, however potent they might be found in the ear of another branch of the government.

But it is said the legislature, by the 43d and succeeding sections of the act of 1836, relating to foreign attachments, intended to endow them with capacity for the redress of all personal injuries inflicted by non-residents. Such an intention is nowhere expressly set down in the statute, and I have been unable to extract from its provisions any, the slightest implication of it. On the contrary, a comparison of the new enactment with prior legislation

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and judicial determination, will show that the leading object was to digest and codify principles and rules before ascertained, and by reducing them to the form of a statute, to render them more accessible to inquiry and facile of application. There are, to be sure, some additions for the improvement of the system, but these obviously have no relation to the question now agitated. The only one to which we are referred as possibly importing an intent to enlarge the operation of the writ, is the section which prescribes its form. It is suggested the words, "so that he be and appear, &c., to answer of a plea, (setting forth the cause of complaint,)" are broad enough to comprise all complaints. And so they are. Yet the question recurs, were they used in a sense so comprehensive? That they were not, is indisputable, from the nature of the remedy, as understood before the act of 1836, and the absence of any direct expression to indicate an intended extension of it; an omission wholly irreconcilable with the imputed legislative design.

But admitting all this, it is urged the plaintiff finds a secure footing in the character of his suit. It is said that though in form sounding in tort, it springs, in truth, from contract; and is subject to all the incidents of actions so founded. The nature of the remedy against common carriers, and the rules by which it is governed, have undoubtedly given rise to much diversity of sentiment and some contrariety of decision; some judges have been disposed to treat it as *quasi ex contractu*, though founded on the custom, and laid in express *tort*; while others have classed it according to the form of declaration used by the plaintiff. As illustrative of the former inclination, I may refer to *Powell v. Layton*, 2 *N. R.* 356, where a defendant was allowed to plead in abatement the non-joinder of his partner, though the *narr.* averred tortious negligence alone. Sir JAMES MANSFIELD, before whom the action was tried, seemed to think the remedy was necessarily founded in contract, and referred for the source of his impression to an observation of Lord MANSFIELD, that if a common carrier accept goods to carry, and then die, an action will lie against his executor. And so it will; but this by no means proves the position assumed. Since then, the subject has been more fully examined, and is, consequently, better understood. All the cases which treat of it were reviewed by the Supreme Court of New York, in the *Orange Bank v. Brown*, 3 *Wend.* 158, and glanced at in our own cases of *Livingston v. Cox*, 6 *Barr* 362; *McCall v. Forsythe*, 4 *W. & S.* 179; and *Smith v. Seward*, 3 *Barr* 342. These, after referring to the right of the plaintiff to bring either assumpsit on the implied contract, or case for negligence, fully establish that the form of action selected is to be governed by the rules applicable to it, in all other instances. The difficulty frequently experienced had been in determining from the shape of the declaration, which form of remedy was adopted; but *Smith v. Seward*, following

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Corbett v. Parkington, 6 *Barn. & Cress.* 268, ascertain the criterion to be, not only in the absence or presence of an averment of *promise*, but of *consideration* also. Accordingly, in that case, a motion in arrest of judgment, because the jury had found against one of the defendants only, was overruled, on the ground that the declaration being for a *tort*, was both joint and several. So, in *McCall v. Forsythe*, a plea in abatement for *non-joinder*, failed of success, because the plaintiff had elected to sue for a *tort*, and not for a breach of contract. The very same thing was properly done, and for the same reason, in the case before us. That reason is conclusive, under the principles I have brought to view against the employment of a foreign attachment. Whether an action against a carrier upon his undertaking can be initiated by this process, it is unnecessary to say; certainly, one founded in pure *tort*, giving the plaintiff the advantage of suing a number less than all the persons associated in the business of carriers, cannot.

Another question disclosed by the record is, whether a recovery can be had for the value of the carpenters' tools, which the jury have found were a reasonable part of the plaintiff's baggage. In *Hawkins v. Hoffman*, 6 *Hill* 590, it is said that baggage is not strictly confined to clothing, but includes many other articles of comfort and convenience, as even a gun and fishing-tackle; and in *McGill v. Rowand*, 3 *Barr* 451, a recovery for the value of a wife's jewelry was permitted. Under the principles which seem to have governed in these cases, I do not perceive why the plaintiff may not call on the stage proprietors to make good the value of the tools lost, upon the special finding of the jury. The right to carry tools as baggage, is unquestionably open to abuse; but in the language of the court, in the case last cited, the correction is to be found in the intelligence and integrity of the jury called to determine, under the circumstances of each case. It is, it is said, a common thing for journeymen mechanics to carry in their trunks with clothing, a small and select portion of their tools. To this practice I see no such objection as ought to put this kind of property out of the protection afforded to the necessities a traveller is compelled, by legitimate considerations, to transport with his person. Upon this score, the judgment rendered below is, I think, unobjectionable.

The remaining inquiry, whether the court properly estimated the act of 16th February, 1846, in permitting the addition of the defendant's Christian name, is one of importance in practice, but happily without difficulty. Prior to the act, this court, for want of power, refused to sanction an amendment of the writ, by changing the averment of a defendant's name from John to James. To supply this defect, the statute confers the power to permit such amendments of the record, when it shall appear a mistake has been made in the Christian or surname of any party, plaintiff or defend-

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ant. In *Horbach v. Knox et al.*, 6 *Barr* 377, it was objected that the act did not sanction the change of a christian name, because the amendment contemplated was *in*, and not *of* the name. But this hypercriticism was properly put aside with the observation that the object was to remedy a defect in the administration of justice, and therefore a liberal interpretation should be awarded to the statute. Less than this would not only frustrate the legislative intent, but run in contradiction of the professional sentiment, which is fast learning to regard merely technical objections as entitled to little favor. Now what difference in principle is there between a total change of name and supplying an omitted one. The surname is correctly given; the conferred name omitted, because unknown. Why, under the act, should a plaintiff be denied the privilege to fill the blank, which he is admitted to *strike* out and supply? The one case is as much within the mischief felt, as the other, and both are equally within the equity of the remedy provided. To attempt a distinction in the splitting of such a hair as this, would indeed evidence a singular inclination to return to the nice subtleties which marked the early history of the common law. The only danger to be apprehended from a liberal construction is, of a mistake in the service of process; but this is always within the control of the proper tribunal. Such a mistake would always be committed in the service of a writ, without the insertion of *any* name. No one could possibly be summoned by the exhibition of process so emasculated.

The objection to the nature of the writ used, goes to the root of the action; but I have noticed the other errors assigned, in obedience to the act of Assembly, and because, should the action be renewed, a profitless contest upon indisputable points may be thus avoided.

Judgment reversed.

McClure et al. *versus* McClure.

1. A judgment in partition does not decide title, or create new title. It dissolves tenancy in common, but it does not divest title in common, until payment of the shares of the other owners.

2. A judgment of a court is not conclusive, unless it be upon the same subject matter; therefore, a judgment in partition is not conclusive in an action of ejectment, pending at the time of the judgment, between the same parties, to enforce the payment of the purchase money of part of the land, which was the subject of the partition.

ERROR to the District Court of *Allegheny county*.

This was an action of ejectment brought to enforce the payment of the balance of the purchase money due on an article of agree-

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ment, not under seal, dated April 10, 1819, by which Daniel McClure, the father of plaintiffs, agreed to sell to defendants his interest, as a devisee, in the real estate of their father, William McClure, deceased, for four hundred and fifty dollars.

At the same time that this action of ejectment was pending, an action of partition was pending in the same court, in which the defendants in the action of ejectment were plaintiffs, and the plaintiffs in the ejectment were defendants.

Judgment was rendered in the two actions on the same day, that in the action of ejectment being rendered *first*.

The judgment in ejectment was taken up by plaintiffs therein, as not having been rendered for a sufficient amount, and it was reversed. When tried again, the judgment in the action of partition and the proceedings therein were received in evidence on the part of the defendants. Plaintiffs' counsel, in order to rebut the evidence of title, proposed to prove the alleged agreement between Daniel McClure, the ancestor of plaintiffs, and William McClure, one of the defendants, and that part of the consideration money thereof remained unpaid. The evidence offered was overruled, and the proceedings in partition were held, by LOWRIE, J., to be conclusive of the title to said share, as between all parties to that suit. Plaintiffs' counsel excepted.

Error was assigned to the rejection of the evidence on the part of plaintiffs; and 2d, in holding the judgment in partition a conclusive bar against the right of the parties in this action, &c.

The case was argued by *Wills*, for plaintiffs in error; and by *Bigham* and *McCandless*, for defendants in error.

The opinion of the court was delivered by

COLLIER, J.—The case does not involve or permit the application of the principle of law, upon which the defendant below and the defendant in error rests his cause. There is no doubt whatever, that the judgment of a court of competent jurisdiction, directly on the point, is conclusive of it, where coming collaterally into contest, between the same parties, in a subsequent proceeding. But the point in contest here, was not ruled in the action of partition, and would not have been decided, even if the plaintiffs had attempted there to draw it into controversy. The ancestor of the plaintiffs, Daniel McClure, was tenant in common with the defendants, and other children of William McClure, deceased, each entitled to one-tenth of the tract, which had descended to them from the said William McClure. Daniel McClure, the father of the plaintiffs, by agreement in writing, not under seal, agreed to sell his share to the defendants; and the plaintiffs brought suit to recover the amount due on the said agreement, as the balance of

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the purchase money. The defendants resisted, but the plaintiffs recovered, not, however, as much as they alleged they were entitled to; and they brought their writ of error to this court, and the judgment was reversed, because the court below directed that the amount was to be abated by the *pro rata* share of Daniel McClure, in a certain old judgment against William McClure, deceased. The cause went back for trial, on a *venire de novo*.

Defendants had brought an action of partition which was pending at the same time, which finally resulted in awarding the share of Daniel to the defendants. The plaintiffs in this action made no resistance or objection to that decree; they claiming only the balance of purchase money due, and for which this action was then pending. And when this action came on to be tried, on the *venire de novo*, the defendants set up this action of partition, as a bar to recovery by the plaintiffs. They do not allege the payment of the money due on the agreement, nor any satisfaction of any kind, save only the judgment in partition, which they allege transferred all the right of the plaintiffs to them, and that therefore this action of ejectment, for the balance of purchase money, is extinguished. The flagrant injustice and enormity of a proceeding, by which a party would be stripped of a fair claim, never adjudicated against him, would be strong evidence that it had not the sanction of law. There is something in jurisprudence over and above mere technical inferences; but I do not admit that there is even technicality in favor of the defendant. There never was a decree of the Orphans' Court, on this subject matter; the cases of *Herr v. Herr*, 5 *Barr*, and *Painter v. Henderson*, 7 *Barr*, are therefore inoperative. A decree of the Orphans' Court upon a matter within its jurisdiction, is conclusive, and cannot be overhauled in a collateral proceeding, for mistake, nor for any thing but fraud. But the decree of the Orphans' Court, and the judgments of courts of common law jurisdiction, to be conclusive or operative, must have been made on the same subject matter. In the action of partition, this matter of the balance of purchase money was not adjudicated, and could not have been brought before the court. The defendants had been put into possession, under their agreement with Daniel, and his heirs claimed nothing but the balance of purchase money. Their right, then, could not be adjudicated in the action of partition, to a judgment in which they objected not. But what was the legal effect of that judgment? It did not determine *title* between tenants in common, who held by descent from a common parent. It decided only, that it should be parted and divided among them, or if that could not be done, that it, the land, should be disposed of, as the statute directs. It is the partition, which is to remain firm and stable. The parties acquire no new title. There is nothing but parting and dividing the old one among them, or, where that cannot be done, adjudging it to one or more, they paying or securing to

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the others their proportional purparts of the valuation. The only effect of the judgment in partition here, was, to transfer the part of the plaintiffs to the defendants, upon their paying, or securing to be paid, to the plaintiffs, their proportional purpart or share. A judgment in partition is conclusive, that the parties shall hold no longer in common, but in severalty. It affects not the title. It cannot transmute an equitable into a legal estate, nor can it extinguish the right of the tenants in common, by any rule in the law, to their respective shares of the valuation money. At the time of the partition, part of the purchase money was due the plaintiffs. The partition did not operate on that. If the defendants refuse to hold under the agreement, and elect to hold under the partition, then the whole of the purpart is due.

But it has been ruled by this court, that partition does not decide title, or create new title: 7 *Barr* 238. It dissolves tenancy in common. But to show that it creates no new estate, it is only necessary to say, that in partition, in the Orphans' Court, he who takes at the valuation, must pay the other parties their proportional parts, or give good security therefor by recognisance or otherwise, to the satisfaction of the court, for the payment, with legal interest, in a reasonable time; and when payment or satisfaction shall be made, that then, and not before, the party shall be forever barred of all right, &c. And by the act of 11th April, 1799, where partition is made in the common law courts, and one party takes at the valuation, and the sheriff is directed to make him a deed, it is subject to the payment of the respective purparts, which remain a lien until they are paid; and the direction of the act is, that the land shall be adjudged to the party electing to take, he or they paying or securing to be paid, to the other parties, their proportions of the appraised value, according to their respective rights.

The judgment in partition, therefore, does not even divest the title in common, until payment of the proportions of the other parties, according to their respective rights, be made; and the taker's title depends upon his making payment, *not* upon the judgment in partition.

It is not pretended that payment was made, or security given to the plaintiffs, for their proportion, at the time partition was adjudged. The defendants shielded themselves, then, by their article of agreement, and the title acquired under it, to prevent their giving security: and now they would shield themselves by the judgment *quod partitio fiat*, and the valuation and taking at the appraisement, without having paid or secured the plaintiffs for their proportional parts, in order to defeat their title, and holding under the agreement. We cannot shut our eyes to the real case. The rejection of the evidence offered by the plaintiff below, the evidence of the record of the court trying the cause, for the pur-

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pose of showing the true case, was all wrong. The evidence was competent and overwhelming.

The court also erred in ruling that the action of partition, or the judgment therein, was conclusive against the plaintiff below, and plaintiff in error.

Judgment reversed, and *venire de novo* awarded.

Allegheny City *versus* Allegheny Township.

A pauper gains a settlement in a district by residing therein, in one or more tenements, for one year, and, during that time, paying \$10 rent. Whether he paid all the rent which he contracted to pay, is not material.

CERTIORARI to the Quarter Sessions of *Allegheny county*, by the Mayor, &c. of the City of Allegheny, against the Township of Allegheny, in the County of Armstrong.

Sampson Shanor, a married man, became chargeable upon the poor fund of Allegheny city, on the 18th day of November, 1847. The directors of the poor of said city relieved him until they could obtain an order for his removal to Leechburgh, in Allegheny township, Armstrong county, the place of his former residence. The order of removal was granted, and defendants appealed to the Quarter Sessions, where the cause was tried by jury on the 23d day of May, 1850, who found for the defendants.

It was admitted that the pauper had gained a residence in Leechburgh, by renting and the payment of taxes in 1844 and 1845. On the part of the township, it was claimed that he had gained a residence in Allegheny city, by a compliance with the provisions of the 3d section of the act of Assembly of 1835, which said section is as follows:

“By any person who shall, *bona fide*, take a lease of any real estate of the yearly value of ten dollars, and shall dwell upon the same for one whole year, and pay the said rent.”

In support of this, they proved that he leased from George Galloway a room in a house in said city, by the month, at \$2 per month; that he entered in the month of July, 1846, and left on the 13th day of April, 1847; that he paid \$15, the rent in full to the 1st day of February, 1847, leaving two months and thirteen days' rent in arrear. That he then removed to a room in a house owned by Mr. Jones, and contracted to pay \$1.50 per month, and remained there until the month of August, 1847. Whether he paid the rent or not, did not appear. He then, on the 1st day of August, removed to another house, at a rent of one dollar per month, where he remained three months and eighteen days, when he became chargeable, paying the rent, \$3.50, in full.

On both sides, points were presented.

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McCLURE, J., charged, *inter alia*, that one whole year need not be spent in the same tenement, provided the whole year is spent in the district, and the rent paid in the district. It will answer, if he take a lease or leases in the same district, pay monthly, quarterly, or otherwise, rent or rents, amounting in the year to \$10. As to the payment of rent, he referred it to the jury.

Judgment was entered, on the verdict, in favor of the Township of Allegheny.

Error was assigned, on the part of the city, to the charge.

The case was submitted without argument, *Barton* being for plaintiff in error; *Black*, for defendant.

The opinion of the court was delivered by

ROGERS, J.—The third section of the act of 1835 provides, that any person who shall, *bona fide*, take a lease of any real estate of the yearly value of ten dollars, and shall dwell upon the same for one whole year, and pay the said rent, shall, by virtue thereof, be entitled to a settlement. The evidence proves, that the pauper resided in the City of Allegheny, as a housekeeper, for more than one year, and the jury have found he paid more than ten dollars rent. That the pauper resided in different tenements, we decided to be immaterial in a case ruled at Sunbury, at our last session, and not yet reported. Nor do we think it of any moment that he did not pay all the rent, according to contract. If he paid part, that is enough, provided the payment exceeded the sum required by the act. This is the reasonable construction of an act, always interpreted liberally, in favor of that unfortunate class. Suppose he had resided in a house, at a rent of \$500; would it be just, that he should be deprived of a settlement, because he had failed to pay the last instalment, or a less sum? In other words, having, in good faith, paid \$450, would it be right to deprive him of the support the law allows, because, through unavoidable misfortune, he was unable to discharge the residue of the rent remaining due?

Judgment affirmed.

Bokee & Co. *versus* Walker.

In an action on the case for a deceit in recommending one as responsible, who was not so, the suppression of the indebtedness of the individual, is not a legal fraud. It is evidence of actual fraud, but not conclusive; and actual fraud is necessary to maintain the action.

ERROR to the District Court of *Allegheny county*.

This was an action on the case by Bokee & Co. against John

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Walker, Jr., for a deceit, in recommending, by letter, *Samuel Walker*, the brother of defendant, to the plaintiffs, as "a responsible man," without any mention of his indebtedness, when there was a large amount of judgment existing against Samuel Walker at the date of the letter of recommendation. Part of the letter was as follows :

"Elizabeth, September 6th, 1847.

"The bearer, Mr. James A. Eakin, visits your city and Philadelphia, for the purpose of purchasing goods for my brother, Samuel Walker ; and as it is probable he will purchase his queensware in Baltimore, I have recommended him to call and examine your stock. Mr. S. Walker is a responsible man, and if you succeed in selling Mr. Eakin a bill for him, it will be good."

The plaintiffs proved that on the 15th September, 1847, they sold goods to Eakin for Samuel Walker amounting to \$162.95, that they were the first goods purchased by Eakin or Samuel Walker from them, and that they were sold on the faith of the letter. That shortly after the termination of the six months' credit, suit was brought against Samuel Walker for the account, judgment obtained and execution issued, without producing the money. A list of judgments, amounting to \$46,000, commencing on 3d October, 1842, and ending August 25, 1847, against Samuel Walker, was exhibited to the jury. The docket showed that John Walker, Jr., became bail, in 1843 and 1846, for stay of execution on judgments against Samuel Walker, for various sums, exceeding, in all, \$5000. That on the 15th September, 1847, the date of the delivery of the letter of credit, executions were out for an amount exceeding \$13,000. Also, that Samuel Walker's real estate was mortgaged to John Walker, Jr., in 1839, for \$11,000, and in 1843, for \$4000. That the real and personal estate of Samuel Walker had been sold and did not reach plaintiffs' judgment, by many thousand dollars. That defendant and Samuel Walker lived in the same town, and had frequent dealings together. That before September, 1847, it was generally known in the town that Samuel Walker was involved, and that judgments and executions existed against him. That on the 25th August, 1847, one Van Kirk obtained a judgment against Samuel Walker, and John Walker, Jr., as the bail of Samuel, for \$2700, and on the same day issued an execution, which was in the sheriff's hands until the 4th Monday of November, 1847.

On the part of defendant, Samuel Walker testified that he was in a large business prior to 1847, for several years ; that he bought largely in Philadelphia ; that at the time of the purchase from plaintiffs, he made purchases in Philadelphia, to the amount of four or five thousand dollars, and has paid for half of them ; that he got credit in Pittsburgh, and that various persons endorsed for him in

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1847, and that he has paid them, &c. Defendant also offered several other witnesses to prove that Samuel Walker was doing a large business prior to 1847, and that large sums of money were paid for work, &c.

Plaintiffs' counsel proposed the following point :

That the intentional suppression of his knowledge by John Walker, of judgments and executions in the sheriff's hands, at the date of his letter, was in itself sufficient evidence from which the jury might infer a fraudulent intent—without more—if the other parts of plaintiff's case were made out to the satisfaction of the jury—and base a verdict for plaintiff, if they thought proper.

LOWRIE, J., charged, *inter alia*, that every false representation of the credit of another will not render him who makes it, responsible. It must not only be false, but known by the party to be false, and done with the intention to deceive. To plaintiff's point, he said, "this is not the law. The plaintiff must further satisfy you, that this concealment was with the intention to deceive the plaintiffs as to the credit of Samuel Waker. * * He was not bound, in writing a letter of recommendation, to state the whole truth, if he believed Samuel Walker worthy of credit. * * The fact (if it be one) that John knew of judgments and executions, and concealed his knowledge, may go to some extent, with other proof of his fraudulent intent, to induce the jury to believe the existence of such intent—but is not of itself such proof thereof."

Verdict for defendant.

Error was assigned to the answer of the court to plaintiff's point, and to the charge.

The case was argued by *Knox*, for plaintiffs in error.—He referred to 1 *East* 329; 3 *Johns.* 281; 7 *Wend.* 25; 6 *Barr* 310–316; 3 *Term. Rep.* 51; 6 *Bing.* 369; 7 *id.* 105; 8 *id.* 33; 7 *Wend.* 9.

Hamilton, for defendant.

The opinion of the court was delivered, October 28th, by

GIBSON, C. J.—English decisions on motions for new trials, in cases such as this, give an indistinct view of the abstract principle, with which alone a court of error has to do. Being judge and jury, and exercising a discretionary power over the verdict, to attain the merits, those courts do not so studiously observe the line between the province of the judge and the province of the jury, as our courts do. Still, it has not been said by any English judge except Chief Justice TINDALL, that fraudulent misrepresentation of solvency is matter of legal inference. The present is an action on the case for deceit; but a constructive deceit is a new thing under the sun, and actual deceit is exclusively for the jury. In the

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celebrated case of *Chesterfield v. Jansen*, 2 *Vesey* 154, Lord HARDWICKE divided fraud into four classes: 1. *Dolus malus*, or actual: 2. Inequitable or unconscientious bargains: 3. Presumptive, arising from the circumstances and condition of the parties: 4. Imposition on third parties. To these may be added fraud on creditors or purchasers, by force of the statutes of Elizabeth. The fraud imputed in this case, is of the first class, for it is impossible to place it in any of the others. There can be no constructive *dolus malus*; for where there is actual fraud, there is no room for construction or legal direction. In an action for deceit, the jury have to deal with a question of good faith; and if they are satisfied the defendant believed his own story, it is their duty to find in his favor. Suppression of circumstances is evidence of insincerity, but by no means conclusive; for the most substantial men are sometimes embarrassed. On the other hand, if he asserted a fact of which he knew and believed nothing, though not to injure the seller, but to oblige the buyer, he is guilty of falsehood, and must bear all the consequences produced by it. A man who asserts what he does not know, is guilty of duplicity, though he happen to assert the truth; and whatever the motive, he is not the less dishonest. But a man who believes what he says, is not chargeable with bad faith; and the state of his belief is a fact for the jury. All the judges concurred in *Foster v. Charles*, 6 *Bingh.* 396, that sincerity is the test; yet when the cause came up again in 7 *Bingh.* 105, Chief Justice TINDALL said that confusion had arisen from not distinguishing between what is fraud *in law*, and the motive for actual fraud; and that if a party make representations which he knows to be false, and injury ensue, though the motive may not be *bad*, he commits *legal* fraud. No motive for a representation which is false and may be injurious, can be good; and a lie to help a friend, is not the less a lie because it is not designed to injure the person to whom it is told: it is enough to stamp it with the character of actual fraud, that it may lead him to a risk, which he would otherwise shun. To me, it appears that the confusion spoken of, has arisen from the gropings of the judicial mind after the very distinction which the chief justice attempted. Had the question always been left to turn on the narrow point of purity of purpose, instead of the supposed legal effect of particular circumstances, there would have been no room for confusion. Sincerity of belief, however apparently unfounded, is unmixed matter of fact; and if it were not the test, every recommendation would be a guaranty. The fraud imputed to this defendant, was in recommending a purchaser as a responsible man, knowing him to be deep in debt to execution creditors, and in representing him as being good for a bill of goods. The court refused to charge that the suppression of the fact of indebtedness was a legal fraud. It certainly was evidence of actual fraud, of which there is no rule to

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measure the force or determine the weight; but it was not conclusive. It mattered not how strong it was; it raised no legal or artificial presumption to make it a subject of legal direction. The judge put the fact to the jury on the evidence; and if in terms too favorable to the defendant, he committed no error that is examinable here.

Judgment affirmed.

ROGERS, J., was absent—and COULTER, J., dissented.

Remington *versus* Irwin.

1. In Pennsylvania, specific enforcement of a contract by ejectment depends upon the equity and justice of the case.

2. Though time may be made material by the express stipulation of the parties, even as to the payment of money, yet where no material change has taken place before tender of performance, as to the value of the property, or the condition of the parties, and where the time admits of compensation, the mere non-payment of the purchase money on the day fixed, and delay for a month, will not excuse the vendor from performing his contract.

3. Where the covenants are mutual, and to be performed at the same time, the vendor, desiring performance, must perform or tender performance of *his* part of the contract, at the time fixed; and if, on non-compliance by the vendee, the vendor desire to terminate the contract, he should then so notify the vendee. If he does not do so, the contract may be enforced by the vendee, notwithstanding the payment of the purchase money be, for a short time, delayed, no material change having taken place in the value of the property, or the condition of the parties.

ERROR to the District Court of *Allegheny county*.

This was an action of ejectment by Remington *v.* Irwin, to recover the possession of a tract of land in Allegheny county, containing 88 acres and 119 perches.

It was an action of ejectment in the nature of a bill in equity, to enforce the specific performance of the contract for the sale of the land. On the 4th of April, 1848, John Irwin, the defendant, entered into an agreement with Z. W. Remington, the plaintiff, to sell and convey to him the tract of land in dispute. In consideration of which, Remington agreed to pay to Irwin the sum of \$4,500, in five payments, viz.: \$1,500 on the first day of October, A. D. 1848; \$1000 on the first of October, 1849, and the balance in three equal annual payments on the first days of October, in the three following years. The said Irwin further agreed, that upon the payment to him of the said first instalment of \$1,500, and the remainder being secured by bond and mortgage on the premises, he would deliver to Remington the possession, and execute to him a deed in fee simple, with general warranty, and clear of all incumbrances.

At the time this agreement was entered into, M. Leech held a mortgage on the premises for the sum of \$1,500, which it is presumed was due and payable at or before the first instalment of

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the purchase money became payable. The mortgage itself was not given in evidence; but of this mortgage the vendee had full knowledge, for, about the time the agreement was executed, Remington called upon Mr. Leech upon the subject, and endeavored to obtain an extension of the time of payment, but it was refused; he called afterwards for the same purpose, but with no better success.

This agreement having been thus executed, the parties appear to have taken no notice of it, and done nothing under it on the first day of October, 1848, when the payment of \$1,500 became due, nor was it stated that any thing was said or done in regard to it for some four or five months after that date. In February or March afterwards, we are informed that the vendor procured a conveyance to be prepared, and the acknowledgment of himself and wife was duly taken and certified, for the purpose, as he said, of tendering it to Remington, and getting his money. He afterwards told the witness Ross, that he had shown Remington the deed, and that he wanted to take it and show to his counsel, but that he (Irwin) refused to let him have it until the money was paid and the securities delivered. When this tender of the deed was made, was not stated, but probably some time in the month of March, 1849. On the 11th of April following, the vendee tendered to Mr. Irwin \$1548.75, the amount of the first instalment with interest, and demanded a deed; but Irwin then refused to give it; said the contract was at an end, and not binding upon him. After this, Remington instituted the present action of ejectment, and on the trial, paid into court the sum of \$2,500, the amount of the first and second instalments, the second of \$1000 having become due since the suit was instituted. And in this ejectment, the plaintiff, the vendee, claims that he is entitled to a specific performance of the contract. On the trial, the facts not being disputed, the jury were directed to render their verdict in favor of the plaintiff, subject to the opinion of the court upon the question, whether, under all the circumstances of the case, the plaintiff was entitled to the relief sought for, or, the plaintiff, being in default on the 1st of October, and not having paid the first instalment subsequently in March, when the deed was tendered, whether he can now compel a specific performance.

HEPBURN, J., charged, *inter alia*, that the plaintiff has failed to show such a case as entitles him to a specific performance of the contract; and directed judgment for the defendant on the point reserved, *non obstante veredicto*.

To which opinion of the court, the counsel for the plaintiff excepted, and it was assigned for error.

The case was argued by *Dunlop* and *T. Williams*, for plaintiff in error.

By *Stanton*, for defendant.

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The opinion of the court was delivered by

COULTER, J.—This is an action of ejectment brought by the vendee to enforce the specific performance of the contract of sale by the vendor. The defence is that the plaintiff, or vendee, did not perform his part of the contract at the day, nor within a reasonable time after, and that time was of the essence of the contract, and that therefore the vendor was not bound to perform.

The mode by which specific execution of a contract is enforced in England, or in those States where chancery courts and chancery forms exist, is by a bill in chancery; but in this State, the same object is accomplished through the instrumentality of an action of ejectment, in which proceeding the question is, whether, under the circumstances, a chancellor would decree specific performance or not. In Pennsylvania, specific enforcement of a contract by ejectment depends upon the equity and justice of the case; and there might therefore be a case where the agreement was sound and good, and mutually obligatory upon the parties, and yet where specific performance would not be enforced. *Henderson v. Hays*, 2 *Watts* 148, where the vendor was habitually intemperate, to such a degree as to impair his intellect, and where specific execution would produce an injury beyond the price to be received, furnishes an example of such a case. But nothing of that kind exists here, and the question simply is, whether it is the ordinary case where specific execution would be decreed by a chancellor. The defendant contends that it is not, 1st, because time is of the essence of the contract, as stipulated by the parties; and 2d, that it is made so by the nature of the transaction and the accompanying circumstances. But I am unable to perceive that time is made of the essence, by the terms of the contract. The first instalment was, it is true, to be paid by the vendee on the 1st day of October, 1848, when a title free of encumbrances was to be made by the vendor. This, however, is nothing more than a naked covenant to pay money at a particular day; which, I apprehend, has never of itself been held to make time essential; for the plain reason that it admits of adequate compensation ascertained by law, in the payment of interest, the general rule being, that time is not material where its lapse admits of suitable compensation. And this, I apprehend, affords the reason why some of the early English chancellors said that time was never of the essence of the contract, speaking in reference to the covenant for the payment of money. And the law is pretty much the same even now, in Pennsylvania, with regard merely to lapse of time, as such, without other circumstances. Thus, in *Decamp v. Feay*, 5 *Serg. & Rawle* 328, it was held, that where time admits of compensation, as it almost always does where lapse of it arises from non-payment of money at the day, it is never an essential part of the agreement. But time becomes ma-

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terial when delay diminishes the value of the thing contracted for: *Bellas v. Hays*, 5 *Serg. & Rawle* 427. And so, by the operation of the same rule, it would be material when the subject of the contract greatly increased in value, or where, by the circumstances arising from delay, the parties are thrown into entirely different circumstances, so that they cannot be placed in the same situation by compensation, that they were in when the day stipulated for performance occurred.

But, I apprehend, that in regard to time being essential by stipulation, the intent of the parties affords the best indicia of construction, in this respect as well as in others; and that their own acts and conduct are the best exponent, in the absence of express covenant, of what their intention was. The covenants of the vendor and vendee were mutual, and to be performed on the same day. It behooved him, therefore, who would place himself in an attitude enabling him to demand execution of the contract from the other, to perform, or tender a performance of his part of the agreement. But the vendor did not offer to perform, on his part, on the 1st of October, 1848. About five months afterwards, however, to wit, in the month of March following, as the court below say, Irwin, the vendor, tendered a deed duly executed to Remington, the vendee, who asked liberty to take it and show it to his counsel. Irwin refused to give him the deed until the hand-money was paid and the security for the balance executed. At that time, then, both parties considered the agreement in full force; and even if there had been an express stipulation as to time, this would have been a waiver of it. But the acts of the parties sufficiently evinced that neither of them considered the 1st day of October, mentioned in the agreement, as material, or of the essence of the contract. Neither of them, then, in March, indicated any intention of rescinding or abrogating the contract, but both obviously contemplated it as continuing; Irwin refusing to give the deed until the hand-money was paid and the security executed, and Remington desiring to have the deed to show it to his counsel, a thing by no means unreasonable, as there is a covenant in the agreement that Irwin shall execute a deed and such assurance as Remington's counsel, learned in the law, shall advise or require. Irwin, in the performance of his covenant, might have gone with Remington to his counsel, or he might have given him the deed in presence of witnesses, who could testify that there was no absolute delivery, but merely a compliance with the covenant, to permit Remington to show it to his counsel, who could neither tell whether it was good nor whether he would advise other assurance, without seeing it. Although, then, I have no doubt whatever that time may be made material by the express stipulation of the parties, even as to payment of money, yet in this contract there is nothing beyond the usual stipulation in contracts for the payment of money, at a

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day mentioned, which, of itself, does not make payment at the day an essential part of the contract of bargain and sale of land, and that, on this ground, there is no objection to a decree for a specific performance.

It remains, then, to inquire whether, from the nature of the transaction, the conduct of the parties, or the attending circumstances, any obstacle would be opposed to a decree for a specific performance by a chancellor. The principal grounds on which the court below rests its opinion, are, the delay of the plaintiff, or vendee, to tender the money after March, when the deed was tendered, to wit, until the 11th of April thereafter, which may have been a month; and the circumstance that in their opinion it was a sale for the purpose of clearing off an incumbrance, to wit, a mortgage to Leech for \$1500, the precise amount of the first instalment. In relation to the first ground, we must observe that the contract was, by the admission of the parties themselves, good and mutually binding in March, 1849: the particular day we do not know. The delay, therefore, can be counted only from that time, and the court inquire, if a month is tolerated, why not years? The answer is obvious enough. A delay for years might be altogether unreasonable, when the delay of a month might be compatible with a sincere desire to perform the contract. It is the duty of courts to apply principles of law, not rigid and unyielding in themselves, to the circumstances and habits of business of the community. Now, the delay for a month after March, 1849, could not, by an *ex post facto* operation, make the 1st of October, 1848, material in the construction of the contract. And this month's delay can have no other operation than a delay of that time, beyond the day of payment fixed in the contract. That is, would a delay of a month after a day of payment fixed in a contract for the sale of land, abrogate the contract, and render it optional with the vendor to perform it or not? This would be entirely unsuitable to the course of contracts in this country, where an individual is very often unable to pay money at the day, although he is prompt, eager, and desirous of performing his contract, and has perfect ability to do it, with a little indulgence as to time. In the country and rural districts, where fiscal operations are not performed through the agency of banks, there must often be disappointment in collecting money, which good and solvent men do not think it necessary to keep always hoarded up in an iron chest. But did the vendor show himself anxious and desirous of bringing the performance of the contract to a point? He would not trust the deed to the vendee, to be exhibited to counsel, as he ought to have done, but intimated that he would deliver it when the first instalment was paid and the security executed. He did not say, or notify the vendee, that he would consider the contract at an end, and thus contributed to throw the vendee off his guard; and

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we may presume that Remington made every reasonable diligence to get the money, with the interest due. There is no evidence whatever, on the paper-book, that within this pregnant month any material change, or any change whatever, had occurred in the value of the property, or the condition of the parties. It was asserted at bar, that the charter of a railway company was procured in the spring of 1849, and the court below say something on that subject. But the evidence shows that the contract was entered into with a view to the making that railroad to coal-mines, either by incorporated or chartered company. At any rate, there is no evidence that it increased the value of the land, or whether it went through or near it, or would be accessible. These companies have been, and may be again, experiments which don't much enhance the value of land. When Remington tendered Irwin the money, he made no such allegation or excuse. The only reply was, that the contract was forfeited, and that he, Remington, knew that he, Irwin, could not make a deed, as the encumbrance was not removed yet. At the same time, Remington was pressing on his acceptance the amount that would have paid off the encumbrance. This delay of a month, then, we think, is no evidence that the 1st of October was of the essence of the contract, nor any such unreasonable delay, without excuse, on the part of Remington, as authorized Irwin to consider it at an end, and justified him in refusing to perform it.

As to the circumstance of this contract being made with a view to clear off the encumbrance, and that therefore time was of the essence of the contract, on which the court below lean strongly, I do not perceive much weight in it. We have no evidence that the contract was entered into with this design or object. It is not in the contract, and can be inferred only from the fact that the first gale is of the same amount as that of the mortgage. Now, if the contract was entered into with that view, why did not Irwin tender a deed at that day, so as to enable him to get the money to pay off the encumbrance; or why did he not accept the money when it was tendered, and he alleging that he could not make a deed on account of the encumbrance? I presume the reason was, that as he would get just as much interest from Remington as he had to pay the mortgagee, it was a matter of no great consequence. He then took just the same view of the subject which the law does; that is, the interest was a full compensation for the delay. The cases, which the learned court below cite to sustain their position, do not quite come up to the mark. Those cases, and the commentary of Mr. Sugden, establish that when the vendor has to pay a greater interest on the encumbrance than he receives from the vendee, time may be of the essence of the contract. The reason is plainly set forth, and is of sound good sense. Because, in such case, compensation cannot be made to the vendor, in the receipt

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of interest. On the whole, this court perceive nothing in the case to show that time was of the essence of the contract, either by express stipulation, or by the circumstances and exigencies attending and surrounding it, so as to show the intent of the parties. It appears not to be distinguished from the ordinary case of a neglect to pay money at the day, and a delay to pay it for a month after a tender of a deed, under the circumstances noticed, which did not leave the vendee without excuse for not paying at the time. We think the court below erred in entering judgment for the defendant, *non obstante veredicto*.

Judgment is therefore reversed and *venire de novo* awarded.

McTaggart et al. *versus* Thompson et al.

1. Where a testator has devised his real estate in fee, a mortgage afterwards executed by him to the devisee, upon the estate devised, payable after the death of the testator, is not an absolute revocation of the devise, but is a revocation merely *pro tanto*.

2. Declarations of a testator, though made after the execution of his will, are admissible as evidence of imbecility of mind.

3. It is not necessary, in order to set aside a will, that *derangement* of intellect be proved. Imbecility of mind, short of insanity, is sufficient for that purpose.

4. A will may be set aside for a less degree of insanity in the testator, than is necessary to be proved in order to acquit him of a crime or misdemeanor.

5. The subscribing witnesses to a will are not always the best to prove the sanity of the testator.

6. In a case involving a question of sanity or insanity in a testator, the facts in evidence ought not to be presented to the jury in an isolated manner, but should be submitted as a connected whole.

ERROR to the Common Pleas of *Allegheny county*.

This was a feigned issue directed by the Register's Court to the Court of Common Pleas of Allegheny county, to try the validity of the will of James Thompson. In the issue, James Thompson, and Robert Thompson, *who were in favor of the will*, were plaintiffs, and Elizabeth McTaggart and others, were defendants. The issue was tried before M'CLURE, J., and a verdict was rendered in favor of the plaintiffs.

On the trial, the will of James Thompson was read in evidence on the part of the plaintiffs. On the part of defendants below, the will was attempted to be invalidated on the grounds that the testator was not of sound and disposing mind, and, secondly, that the paper purporting to be the will was procured by duress and constraint. It was also insisted on that it was revoked by the execution, by testator, of certain mortgages to the devisees, on the two tracts of land devised to the plaintiffs in the issue, James and Robert Thomp-

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son, who were sons of the testator. It was insisted on the part of defendants below, that these mortgages were an implied revocation of the will. The will was dated on the 8th day of March, 1844. In it he stated, "As to my temporal personal property, I have none: age and misfortune have divested me of that species of property. With respect to my real estate, I order and direct that all my debts and legacies be paid out of the rents, issues and profits of my real estate." To his son, James Thompson, he devised "the tract of land on which he resided, &c., to him and his heirs forever, to have and to hold free and clear of all encumbrance, except my debts and legacies hereinafter bequeathed." To his son Robert, he devised another tract, "free, and clear of all encumbrance except my debts and bequests herein mentioned, and my funeral expenses, and whatever liabilities hereafter I may create by decease or privately. My liabilities, my funeral expenses, the costs of executing this my last will and testament, and the bequests, shall be paid by my sons, James Thompson and Robert Thompson, as tenants in common equal shares, share and share alike."

He devised small legacies to others of his children.

The defendants, to prove an implied revocation of said will, gave in evidence two mortgages on the two tracts devised to the plaintiffs, dated 17th of April, 1848, acknowledged the same day and recorded at the same time, in vol. xvi. p. 31, &c. One of the mortgages was given to James Thompson, one of the devisees, to secure payment of a penal bill of testator to devisee, of same date, conditioned for the payment of \$3160 one year after the death of the testator. The other was given to Robert, the other devisee, to secure the payment of a penal bill of testator to the said devisee, of same date, conditioned to pay said devisee \$2319 one year after the death of testator.

The proviso in the mortgage was as follows: "Provided always, nevertheless, that if the said James Thompson, sen., his heirs, executors, administrators and assigns, the aforesaid debt of (the sum) with interest on the same, on the day and time hereinbefore mentioned and appointed for payment thereof, to wit: in one year after the decease of the said James Thompson, sen., without any fraud, &c., "then," &c.

The defendants also proved that the testator died in August, 1848, seventy-five years of age, and that the plaintiffs and defendants were his children; that he had assigned to the plaintiffs before the date of his will, his large personal estate, and that the lands devised to the plaintiffs were worth about \$25,000.

There was no evidence as to duress, but after the paper purporting to be the will, as proved before the register and the probate, was read by plaintiffs, the defendants gave evidence, by witnesses, tending to prove the insanity of the testator as early as 1803, and of his being subject all his life to morbid violence of temper, and

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consequent melancholy, amounting to unsoundness of mind; that in the opinion of some he was never of sufficient soundness of mind to make a will, and of others that he was occasionally so; that he had unreasonable prejudices and dislikes, especially against his children, the defendants, and his wife, and that he labored under morbid delusions, and quarrelled without cause with his wife and daughters; his morbid irritability and singular habits, his transacting little or no business except through his sons, and his weeping without any adequate motive; that age and misfortunes had not deprived him of his personal property, as stated in his will, but that he had large real and personal property, and was always prosperous in his estate; that his wife was prudent, virtuous, and industrious; that his children, the defendants, were obedient, and had not displeased him; that they never had opposed him, &c.

To rebut the evidence on the part of defendants, evidence was given on the part of the plaintiffs.

During the progress of the trial, the defendants, for the purpose of showing the state of the testator's mind, offered to prove declarations of the testator as to the disposition of his property—that he had ruined his family, and that he had been deceived and imposed on by persons who had procured him to have his will made; and all this after the will had been executed.

The offer is overruled, to which appellant's counsel excepted.

On the part of the defendants below, a number of points were propounded to the court.

As to the evidence of sanity, the judge, in his charge, observed, *inter alia*: "If James Thompson were alive and on trial before you for a crime or misdemeanor, that perilled his liberty or life, under the testimony you have heard, would you acquit him upon the plea of insanity, or would you not?"

As to the testimony of the subscribing witnesses, he observed: "Do you believe the witnesses to the will, who are all alive, and whose testimony you have heard? Do you believe them, or do you not? If their testimony is uncontradicted, and their presence and demeanor demanded your respect and belief, then there is an end of the case again."

The judge also commented on a number of the facts, which were alleged, in connexion with each other, to evidence insanity or imbecility of mind in the testator.—See the opinion of his Honor Judge ROGERS.

A verdict was rendered for plaintiffs, as stated before.

Errors were assigned to the charge, some of which were:

That the execution of the mortgages by the testator was not an implied revocation of the will.

In the answer to several of the points.

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In not placing the question of law arising in the cause fairly and clearly before the jury.

In stating the law to the jury, that the degree of insanity which would acquit a culprit of a criminal charge, is the criterion of sanity in the testator.

In saying to the jury, that the only question is, was the testator crazy when he made his will.

That the testimony of the witnesses to the will is most to be relied on, as establishing testator's soundness of mind.

In rejecting the testimony as stated in the bill of exceptions of the defendants below.

The case was argued by *Dunlop*, for plaintiffs in error.
By *Hamilton*, for defendants in error.

The opinion of the court was delivered, October 14th, by ROGERS, J.—This is the case of a feigned issue, directed by the Register's Court to the Common Pleas of Allegheny county, to try the validity of the will of James Thompson.

The will is questioned on several grounds: That it is revoked by the execution of certain mortgages to two of the devisees; that the testator was not of sound disposing mind and memory; and that it was obtained by duress, coercion, or restraint. We are relieved from a consideration of the last exception, as it was neither insisted on in the Common Pleas, nor is it urged here. Our attention has been directed to the question of revocation, to the exclusion of certain testimony as to the capacity of the testator to make the will, and the charge of the court.

The question of revocation depends on the execution of certain mortgages by the testator to his devisees, James and Robert Thompson, to secure the payment of certain debts, payable one year after the death of the testator. This, it is contended, is a total revocation of the will; whilst, on the other hand, it is insisted to be at most but a revocation *pro tanto*, only. It is a rule of law too firmly settled to be now shaken, that when an estate has been altered, or new modelled since the execution of the will, it is a revocation, on the legal presumption that such was the intention. Nay, the direction has been carried to such an extent, as that not only conveyances, or contracts to convey, but inoperative conveyances will amount to a revocation of a devise, to the extent of the property intended to be affected, if there be evidence of an intention to convey, and thereby to revoke the will. But although this is the undoubted rule, yet the exception is equally well settled, that mortgages and charges on the estate are only a revocation in equity, *pro tanto*, or *quoad* the special purpose; they are taken out of the general rule, on the fact of being securities only. A mortgage, though in form purporting to be a conveyance of the

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estate, yet in equity always, and now at law, is regarded but as a security for a debt. It, therefore, does not contravene the general rule of revocation, it is not to be viewed as an alteration or change of the estate. It is but a revocation *pro tanto*, or, as Mr. Jarman chooses to say, an ademption, rather than a revocation of the will. And thus far the rule; and the exception, if not admitted, cannot be plausibly denied.

The defendant, however, contends that there is a distinction, where the mortgagee is the devisee, and where he is a stranger; that in the former case, it is a revocation *in toto*, in the latter, *pro tanto* only. For this distinction the defendant relies on Harkness v. Bayley, *Precedents in Chancery* 514, and the earlier elementary treatises. See 2 *Eq. Cas. Ab.* 772; *Cruise's Dig.* title *Devisees* 124; *Roper on Wills* 22; *Lovelass on Wills* 165; *Gilbert on Devisees* 111; 1 *Bacon's Ab.* title *Wills* 267, where the authority of Harkness v. Bayley is recognised or passed without question. The case, however, of Harkness v. Bayley, is expressly overruled in Baxter v. Dyer, 5 *Vesey, Jr.* 656, in which the distinction between a devisee and a stranger is expressly exploded. It is there decided, that a devise is not revoked by a mortgage in fee to the devisee. Indeed, it is difficult to perceive any principle on which the distinction is founded, inasmuch as the doctrine of revocation, as has been heretofore said, is based on the fact of the alteration of the estate, which is thought to be a legal indication of the intention of the testator to revoke the devise. But as it is, in equity, but a revocation *pro tanto*, in the one case, there is no reason that I can perceive, for holding it to be a total revocation in the other. Whatever it may have been formerly, when the case of Harkness v. Bayley was decided, a mortgage now is not, either in law or equity, any thing more than a security for a debt, which neither alters the estate, nor does it evince any intention to alter it. In Baxter v. Dyer, Lord ELDON says, that Harkness v. Bayley was not the case of a mortgage. If this be so, and we have no better authority than Lord ELDON, whose great accuracy and research is universally admitted, the distinction is not supported either on principle or authority. Nor is it perceived that the postponement of the payment until after the death of the testator, can make any difference. There is still no alteration of the estate or intention to alter, on which alone the doctrine of implied revocation depends. Although I agree with the decision of the court, it is not, as will be observed, for the reasons given by the judge. On this point, the law of England and this State, is, in principle, the same, with perhaps some modification of the English rule, which holds an act to be a revocation, when it was not so intended, and even when the intention was directly the contrary. These questions will be met and be decided, as they arise, untrammelled by express adjudications.

For the purpose of showing testator's state of mind, the defend-

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ants offered to prove declarations of the testator after execution of the will, as to the disposition of his property; that he had ruined his family, and that he had been deceived and imposed on by persons who procured him to make his will. It is expressly ruled in *Rambler v. Tryon*, 7 *Ser. & R.* 94, and in *Chess v. Chess*, 1 *Pa. Rep.* 16, that the declarations of a testator, although after the execution of the will, are evidence of imbecility of mind. Thus in *Rambler v. Tryon*, the party was permitted to prove declarations of the testator, that his wife and father plagued him to go to Lebanon; that they wanted him to give her all, or he would have no rest; that he did not want to go to Lebanon. This evidence was admitted, because, as the court say, it is evidence of weakness of mind, operated upon by excessive and undue influence. The court appear to have excluded the testimony, because they chose, contrary to the offer, to suppose it was designed to prove duress, for which purpose it would be clearly inadmissible. But the court had no right to act on the supposition that the testimony was proposed in bad faith. As it was offered for a legitimate purpose, for that purpose it ought to have been received. If attempted to be used for a different purpose, the correction was in their own hands; the counsel would subject themselves to the severest censure. If the facts were as represented, it is evidence of imbecility of intellect, amounting almost to fatuity. The remark of the court, when excluding the testimony, plainly shows this; as nothing can indicate more clearly weakness of mind, than complaining of that which he could so easily remedy by burning the will.

But the case ought not only to be reversed for the reasons already given, but because of several exceptionable points in the charge. From the remarks made by the court, the jury were induced to believe that unless they found the testator, in the language of the judge, "crazy," he had the requisite capacity to make a valid will. But it is not requisite that such derangement of intellect should be proved, to authorize the jury to set the will aside. Imbecility of intellect, though short of insanity, has been held sufficient for that purpose. This is a principle too plain to need the aid of authority.

The court put it to the jury to say, in the language of the judge, if James Thompson, the testator, was alive, and on trial before the jury for a crime or misdemeanor that perilled his liberty or life, under the testimony you have heard, would you acquit him on the plea of insanity, or not? That is certainly not the criterion; for less evidence would justify a jury in setting aside a will, than would be required to convict a person charged with murder or manslaughter: *Commonwealth v. Mosler*, 6 *Pa. Law Journal*, No. 11, p. 90, &c.

It will be readily conceded, that the testimony of the subscribing witnesses to the will is entitled to great respect, and, in the

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absence of countervailing proof, is decisive; but the court has attached rather more importance to the testimony here, than the facts warranted. As is said in *Irish v. Smith*, 8 Ser. & R. 581, and *Rambler v. Tryon*, 7 Ser. & R. 72, the subscribing witnesses are not always the best to prove the sanity of the testator. Of this, several striking cases are given in the cases cited.

In addition, the defendants have just reason to complain of the one-sided character of the charge. It is objectionable, because it resembles the argument of the advocate, rather than the impartial survey of the judge, presenting detached parts of the evidence to the jury, with ludicrous and unfavorable comments, instead of submitting the testimony to them as a connected whole. Although isolated facts may of themselves prove but little, yet, taken together, they sometimes present overwhelming evidence of imbecility and derangement of mind. Of the benefit of this, the defendants were deprived by the charge of the court.

Judgment reversed and *venire de novo* awarded.

Taggart versus McGinn.

1. Irregularities in the proceedings of arbitrators under the act of 1836, when apparent on the record, may be corrected by writ of error; but not those which are made apparent by *extrinsic proof*. They can be corrected only by the court below.

2. If more be awarded than is due, the remedy is an appeal; not a writ of error.

3. The eighth section of the act of April 25th, 1850, relative to actions for enforcing the payment of *ground-rent*, is constitutional as it respects actions then pending; because it operates on the *remedy*, not the *right*.

ERROR to the District Court of *Allegheny county*.

This was an action of covenant by McGinn against Taggart. McGinn, in January, 1839, leased a lot in Pittsburgh, on ground-rent to Morris; the rent to be paid semi-annually, on the first days of April and October. In July, 1847, all the estate and interest of Morris was assigned to Taggart. The breach alleged was the non-payment of the rent.

The defendant filed his affidavit of defence and pleaded at length on notice. In the plea, *inter alia*, it is denied that the first of July, 1849, was a day upon which by the deed and *narr.* any rent was due and payable, and that from the date of the assignment, (the 13th of July, 1847,) until the first of July, 1849, two years' rent was not due and payable. Further, that the said action of covenant will not lie against the defendant, he being the *assignee* of the lessee.

The plaintiff entered a rule to refer, and the award of arbitrators was filed on 27th November, 1849, finding for plaintiff,

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\$344.97, with interest from 1st July, 1849. Rule granted to show cause why award should not be set aside. Depositions filed. The rule was discharged on 28th December, 1849. January 14, 1850, writ of error filed.

The reasons filed on the above rule embraced substantially the following points:

The arbitrators did not hear the defendant on the day to which they adjourned, nor did they give any notice thereof, although they certify that the parties were heard.

The award was given for \$344.97, which is \$56 more than by the *narr.* and deed filed, could possibly have been due at the day of instituting this suit.

The award (and any judgment upon it) is illegal, because there is no cause of action in *covenant*.

One of the arbitrators, in the absence of the other two, made an interlineation in the award, (thereby altering and changing it,) and making it appear as if all of them had certified and approved of the said alteration and interlineation.

It does not appear that Stowe, as one of the arbitrators, was legally substituted.

The award exhibits erasure, and has this interlineation, do adjourn, ("to meet on Monday, the 26th inst., at which time *having further heard the parties, do award.*")

The plaintiff's bill awarded upon, claims ground-rent from the date of the assignment in July, 1847, until the first day of July, 1849.

At the session of 1850, an act was passed, (see pamphlet edition, p. 571,) the 8th section of which provides: In all cases now pending, or hereafter to be brought in any court of record in this Commonwealth, to enforce the payment of ground-rent due and owing upon lands or tenements, held by virtue of any lease for life, or a term of years, or in fee, the lessor, his heirs and assigns, shall have a full and complete remedy therefor by action of covenant against the lessee or lessees, his, her, or their heirs, executors, administrators, or assigns, whether the said premises out of which the rent issues, be held by deed poll or otherwise.

It was assigned for error:

1. The court erred, &c., in discharging the rule to set aside the award.
2. The court erred in not setting aside the judgment.
3. The judgment is erroneous, because it appears by the record that the plaintiff has no right to recover, and had no cause of action.
4. The judgment is erroneous, because it is for a larger amount than was due and payable by the deed and *narr.*, on the first of July, 1849.
5. The award is illegal and erroneous.

The case was argued by *P. C. Shannon*, for plaintiff in error.—

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That action of covenant would not lie against the assignee, he referred to *Irish v. Johnson*, not yet reported; 5 *Watts* 205; 4 *W. & Ser.* 232. Also, that the act of 1850 was retrospective, and a question existed as to its constitutionality.

C. W. Robb, for defendant.—The interlineation consisted in the number of days on which the parties sat. It was incorrect in stating that on the last day they heard the parties.

Oct. 28.—*PER CURIAM*.—Irregularities in appointing arbitrators under the act of 1836, or in their proceedings, when apparent on the record, may be corrected by writ of error; but not those which are made apparent by extrinsic proof. They can be corrected only by the court below. The fact that every part of this award had not received the assent of the arbitrators before it was filed, depends on parol proof, which is not a ground of adjudication here.

It is urged that more was awarded than could be due; the remedy was an appeal, not a writ of error.

It is further urged, that when this action of covenant was instituted, it did not lie against an assignee of a lessee for years; but the objection has been removed by a constitutional and beneficial act, at the last session of the legislature; constitutional in actions pending, because it operates on the remedy, not the right; and beneficial, because it saves circuity of action. The constitutionality of an act which gives a new, or legalizes an existing proceeding, has seldom been doubted.

Judgment affirmed.

Williams et al. *versus* Hazlep.

When all the costs taxed are paid on appeal from an award of arbitrators, the appeal is not to be struck off, because afterwards more costs appear to be due. The remedy is an order for payment, which the court may enforce by attachment.

ERROR to the Common Pleas of *Allegheny county*.

This was an action of debt on a lease, brought by Hazlep *vs.* Saunders and Williams, before a magistrate. Judgment was entered generally by the magistrate for the plaintiff on the 24th of April, 1848: afterwards, on the 23d of March, 1849, an *alias* summons issued *vs.* John Williams, one of the original defendants, and judgment entered against him by default. Appeal was entered to Court of Common Pleas—the plaintiff entered a rule of reference against both defendants. Afterwards an award was filed finding for plaintiff generally against both defendants. From this award defendants appealed. A motion was made before

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Judge PATTON to strike off the appeal, on the ground *that all the costs were not paid*, and he did so; after which this writ of error was sued out.

It was stated in the printed argument, that the clerk who entered the appeal, taxed the costs at the sum paid by the appellant.

It was assigned for error, that the court erred in dismissing the appeal.

Geo. S. Selden, for plaintiff in error.

J. S. Hamilton, for defendant.

The opinion of the court was delivered by

BURNSIDE, J.—It has been long settled that if the appellant pay the costs taxed by the prothonotary, the court will not strike off the appeal, although there afterwards appear to be more costs due: *McKeown v. Boudinot*, 1 *Brown* 150; *Fraley v. Nelson*, 5 *Ser. & R.* 234; *Stewart v. Jewell*, 11 *Ser. & R.* 359. The appeal was well entered by the payment of all costs taxed at that time; and being entered, the Common Pleas could not legally dismiss it. When the Common Pleas is satisfied that costs have been omitted, on an improper taxation, they make an order for payment, and enforce their order by attachment: 5 *Ser. & R.* 236.

Order of the court dismissing the appeal is reversed, and the appeal is reinstated.

Seidenstriker versus Buffum.

A recognisance of bail, on an appeal from the judgment of an alderman, in which the recognizor is "bound as absolute bail in the sum of twenty dollars, or such sum as may be necessary to pay all costs that have or may accrue in this case, in prosecuting this appeal," is sufficient. The recognisance was acknowledged since the act of 20th March, 1845.

ERROR to the Common Pleas of *Allegheny county*.

Buffum & Co., in May, 1849, brought suit against Hutchison before an alderman, from whose judgment defendant appealed to the Common Pleas, and plaintiff again procured a judgment on award of arbitrators. Plaintiff issued a *scire facias* against Seidenstriker, who was bail for Hutchison before the alderman. Defendant plead *nul tiel* record. May 19, 1850, after argument, judgment for plaintiff for twenty dollars, the penalty, to be released on payment of costs.

The proceedings, in part, were to the following effect:

June 1, plaintiff appears and claims \$42.11 for goods sold and

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delivered. Defendant not appearing, judgment publicly by default, in favor of plaintiff, for \$42.11, and costs. Same day, execution.

June 4, defendant appeals. "I, Frederick Seidenstriker, having been sworn and justified, am bound as absolute bail in the sum of twenty dollars, or such sum as may be necessary to pay all costs that have or may accrue in this case, in prosecuting this appeal.

Signed, FREDERICK SEIDENSTRIKER."

It was assigned for error, that the court below erred in entering judgment for the plaintiff on the plea of *nul tiel* record, and deciding that the above was evidence of a good and sufficient recognizance, under the act of Assembly.

The act of 20th March, 1845, provides that "the bail in cases of appeal from the judgments of aldermen and justices of the peace, and from the awards of arbitrators, shall be bail absolute, in double the probable amount of costs accrued, and likely to accrue, in such cases, with one or more sufficient sureties, conditioned for the payment of all costs accrued, or that may be legally recovered, in such cases, against the appellants."

The case was submitted by *Barton*, for plaintiff.—In his printed argument, reference was made to 2 *Watts* 103, for the position, that a recognizance, which omits the clause that the bail shall be exonerated on the defendant's paying the debt and costs, is bad; and that the defect may be taken advantage of on the plea of *nul tiel* record. In the recognizance in this case, Seidenstriker is bound to pay all costs, &c., no matter which party may be successful. The act of 1845 requires the condition to be for the payment of all costs accrued, or that may be legally recovered, and not, as in this one, that have or may accrue in prosecuting the appeal.

Weaver, for defendant, referred to 9 *Watts* & *Ser.* 142; 5 *Watts* 333; 2 *Ashmead* 122; 5 *Watts* & *Ser.* 333; 13 *Ser.* & *R.* 243; 10 *id.* 325.

Oct. 28.—*PER CURIAM*.—This recognizance is within the rule of the conservative decisions. It is a note of the substance, from which a formal recognizance may be made up, and supports the plaintiff's part of the issue, taken on the plea of *nul tiel* record.

Judgment affirmed.

Breidenthal et al. versus McKenna.

1. In an action of trespass against three, one of whom plead the general issue, but the others, though appearing to the suit, did not plead: the jury were sworn to try the issue joined, and a verdict was rendered for plaintiff. This is equivalent to the entry of a *nolle prosequi* as to those not pleading, or to a verdict in their favor; and an entry on the minutes of the court, stating that the jury were sworn in a suit against the defendant, who plead, and others, cannot be treated as a part of the record, or as inconsistent with it. The presumption is that the jury were properly sworn, and this will not be controlled by the loose entry on the minutes.

2. In a suit against three, and judgment against one only, an execution against all the defendants is erroneous.

• ERROR to the District Court of Allegheny county.

This was an action of trespass for assault and battery, brought by William McKenna against the three defendants below. There was a general appearance *de bene esse*, and the sheriff's return was "C. C." and "B. B." annexed, as to all the three defendants. The record shows that Breidenthal, one of the defendants, on the 31st day of January, 1849, pleaded not guilty. There was no rule entered to plead, as to the others, and none filed by them.

In this state of the pleadings, on the 31st of January, 1850, a jury was called, and the minutes showed that they were sworn to try an issue joined between William McKenna and Matthew Breidenthal and others. They found for the plaintiff the sum of one hundred dollars. The swearing of the jury, the trial, and verdict, all occurred during the absence of defendants and of their counsel.

On the 2d day of February following, there was a motion for a new trial, and in arrest of judgment.

February 23d, 1850, motion overruled. *Fi. fa.* issued against all the three defendants, and June 15th, 1850, writ of error filed.

Assignment of errors, *inter alia*:

1. There was no rule to plead entered or served as to the two defendants, Irwin and Young, and none filed by either of them.

2. There was no such issue as the one the jury were sworn to try.

3. The jury were improperly and illegally sworn to try an issue which in fact did not exist.

4. There was no previous judgment by default, for want of a plea, against Irwin and Young; and no *venire tam ad triandum quam inquirendum*.

5. The verdict and judgment are erroneous.

6. The court erred in allowing judgment to be entered on the verdict against the defendants.

7. The execution is erroneous.

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Shannon, for plaintiffs in error.*Washington*, for defendant.

The opinion of the court was delivered by

BELL, J.—The record brought up in this case is very imperfect. From it, however, we are enabled to gather that in January, 1849, Breidenthal, one of the defendants, pleaded the general issue. The other defendants, though they appeared on the return of the writ, put in no plea. The cause thus rested until January, 1850, when a jury was sworn to try the issue joined, and rendered a verdict for the plaintiff. This, according to the decision in *Cridland v. Floyd*, 6 Ser. & R. 412, where this branch of practice was thoroughly investigated and satisfactorily settled, is equivalent to the formal entry of a *nolle prosequi* as to the defendants not pleading, or it may be considered as a verdict acquitting them. But not satisfied with this, the counsel for the plaintiffs in error insists that there has been a mistrial, and therefore claims a reversal of the judgment. To prove this, he refers us, not to the record, but to some loose memoranda kept by the clerk of the court, and denominated minutes. These show an entry—"McKenna v. Breidenthal et al., January 31, 1850, jury sworn to try the issue," &c. This, however, cannot be treated as part of the record, nor accepted as showing any thing inconsistent with it; and if it could, it would be asking entirely too much to propose that the abbreviation "et al.," in stating the title of the action, should be accepted as indicating that the jury were sworn as against all the defendants. The presumption is, that the trying court directed the jury to be properly sworn; a presumption not to be overcome by the loose entry referred to, though that had place among the regular docket entries. Even then, it would be subject to rejection as surplusage, or for repugnancy. The judgment against Breidenthal is consequently right enough.

But the execution issued against all the defendants. This was erroneous, for the *fi. fa.* must accord with the judgment, which is against Breidenthal alone. It must therefore be set aside.

Judgment affirmed, but the execution issued thereon is set aside.

Beeler *versus* Turnpike Company.

1. To maintain an action for tolls for passing on a turnpike road, an *express* undertaking to pay is necessary; and a written admission of defendant that a certain amount is due by him to the company, for tolls, is sufficient evidence of such a contract.

2. An action for such tolls, during their sequestration under the 73d, 74th, and 75th sections of the act of 16th June, 1836, relating to executions, must be brought in the name of the company, not in that of the sequestrator.

3. In a suit for such tolls accruing after sequestration, the defendant cannot set off a claim for a loan by him to the company before the sequestration and before the account for tolls commenced.

ERROR to the District Court of *Allegheny county*.

This was an action of *assumpsit*, brought in the name of the President, Managers, and Company of the Pittsburgh Farmers' and Mechanics' Turnpike Road Company, for use of James S. Craft, *vs.* David Beeler.

The case was tried in April, 1847, before HEPBURN, J. The *narr.* contained two counts, one averring an indebtedness to plaintiffs for tolls, and a promise to pay. The second count alleged a special agreement to pay for the privilege of passing over the road, whereby he became indebted, and averring a promise to pay when requested.

The defendant plead *non assumpsit*, payment with leave, &c.

On the part of plaintiffs was offered an instrument of writing, as follows:

Due the F. M. T. Road Company, for tolls ending Jan. 1, 1846, \$218.50. Signed, DAVID BEELER.
December 26, 1845.

Defendant's counsel objected to the admission of this paper—1st, that the declaration is on a special contract; and 2d, that the plaintiffs cannot collect tolls by suit.

The court overruled the objection. If the action cannot be maintained for tolls on the pleading, the plaintiffs should have demurred. We will receive the evidence, and the plaintiffs' right to recover will be determined hereafter.

Defendant excepted.

The account book of tolls was received in evidence, after objection, and it appeared that the account commenced in June, 1841.

It appeared that Mr. Craft was appointed sequestrator of the road, Dec. 15, 1841, and resigned Dec. 30, 1848.

On part of the defendant was offered a certificate, dated May 31, 1837, of a loan of \$1000 by defendant, with interest till paid, to be paid out of the tolls of the company, taken after the completion of the road; also a receipt from plaintiffs, dated August 1, 1837, for \$900 in full of defendant's loan of \$1000 to the company.

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The plaintiffs admitted that the road was completed according to the charter, and as contemplated by the certificate.

Points proposed by defendant's counsel : That the due bill offered in evidence contained no promise to pay, and, although in an ordinary case it might *imply* a promise, such implication is not sufficient to support an action for tolls under the charter of the plaintiffs.

That for tolls incurred during the period of sequestration, the sequestrator is personally responsible, and that he can maintain no action therefor in the name of the company, particularly after having settled his account and been formally discharged.

That in this action, the defendant is entitled to set off the debts owing to him by the company.

The court answered the one first before stated, in the negative. The due bill is sufficient evidence of indebtedness, and taken in connection with the testimony and the plaintiffs' book, is evidence of a promise, if believed, and the plaintiffs may recover.

Next: Negatived for the present, and the point reserved.

As to the last: So much of the plaintiffs' claim as accrued prior to the appointment of Mr. Craft as sequestrator, is a proper subject of set-off—the debt was due by the company to the defendant when Mr. Craft was appointed. The amount due by the defendant to the company at the same time may be set off. But the accruing tolls after the appointment of the sequestrator, were appropriated by law for the payment of all the debts, *pro rata*—and no creditor can come in and sweep the whole, nor can any set-off be allowed which would produce that result. Then, so far as the tolls in this due bill accrued before the appointment of Mr. Craft, the defendant's claim may be allowed as a set-off; for the balance, no set-off can be allowed, and the plaintiff is entitled to a verdict for that balance.

To these answers both parties excepted.

The jury rendered a verdict in favor of plaintiffs, on which a judgment was afterwards entered by the court.

Error was assigned to the answers of the court, and that the court erred in entering judgment in favor of the plaintiffs.

The case was argued by *T. Williams*, for Beeler.—He alleged that the road was under sequestration during nearly the whole period for which tolls were claimed; that the judgment on which it was sequestered was not yet satisfied, and that the company was largely indebted to the defendant. He contended that there was no such evidence of an express promise as would entitle the plaintiffs to recover: 2 *Pa. Rep.* 462; 3 *Watts* 126. 2d. That for tolls incurred during the period of sequestration, no action could be maintained in the name of the company, but that if an action

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lay, it should have been brought in the name of the *sequestrator*; and, 3d, that defendant was entitled to set off the debt owing to him by the company. He made reference to the 73d, 74th, and 75th sections of the act of 16th of June, 1836, relating to executions, the 34th section of the act of the same date, relating to insolvent debtors, and the cases in 5 *Ser. & R.* 394; 9 *id.* 435; 2 *Dal.* 276; 10 *Ser. & R.* 10; 3 *Watts & Ser.* 70, 73, 74, &c.

Craft, contra.—The due bill is an admission that the defendant had become responsible for tolls by agreement: 1 *Chipman* 214; 3 *Watts* 126. That by the term *sequestration* was meant the taking possession for a time, and not an assignment; and that the suit was properly brought. That defendant was not entitled to set-off: 2 *Dal.* 48: 74th section of the act respecting executions.

The opinion of the court was delivered, Oct. 28, by

BELL, J.—It is true, that in the cases of the Turnpike Co. v. Brown, 2 *Pa. Rep.* 462; Same v. Dorman, 3 *Watts* 126, and another not yet reported, it was held the law will not imply an assumption to pay tolls, from the mere *user* of a turnpike road, for the reason that the charters of turnpike companies furnish them with a summary remedy for the collection of tolls. To found an action at law, for the recovery of such dues, an express undertaking to pay is necessary. But what better evidence of such an undertaking can be furnished, than a defendant's written acknowledgment of indebtedness, on account of tolls, such as was here given in evidence. If it be not a promissory note, it is, at least, proof of a debt, upon which an action may be maintained: *Hay v. Hyde*, 1 *Chip.* 214; and as, in this instance, there could be no doubt, apart from an express undertaking, the jury might well infer it from the acknowledgment of indebtedness. Besides, it was evidence of an account stated between the parties, which is in the nature of a new promise, upon a sufficient consideration: *Hulmes v. DeComp*, 1 *Johns. Rep.* 36, and was therefore properly admitted under the count, on an account stated, which, though not a proper form of declaration to recover a single sum due by express contract, may well answer to cover a demand ascertained to be due from former transactions: 1 *Ch. Pl.* 391; *Tassey v. Church*, 4 *W. & Ser.* 144. Now it is not to be doubted such a promise will amount to an agreement to pay pre-incurred tolls. The doctrine of the cases, excluding implied assumptions, has been carried far enough for safety and convenience. We are not to push it to the absurdity of rejecting legitimate proofs of an arrangement for payment, or to require other and stronger evidence of agreement than is deemed sufficient in other cases.

The defendant is then liable, in some form of action, for the amount ascertained by the "due bill," which is the only sum in

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controversy, since the withdrawal of the special count. But is he subject to suit, in the name of the company? Its road being under sequestration at the time the tolls accrued, the defendant below insists on a negative answer, simply because of the supposed resemblance between the office of a trustee, appointed under our insolvent laws, and that of sequestrator, acting under the statute regulating executions. But this is a mistake. When framing the latter statute, it is not to be doubted the legislature had in view the insolvent law; for the same ratio of distribution is provided for the guidance of the sequestrator. Yet, though the latter agent is expressly clothed with all the powers, and made subject to all the duties of insolvent trustees, that provision of the insolvent acts, which vests the trustee with all the estate and property of the insolvent, and confers upon him the capacity to sue for and recover, in his own name, all such estates and property, and all debts and things in action, belonging to the insolvent, seems to have been purposely omitted. This, it is to be presumed, would not have been so, had not the legislature recognized a difference between the two classes of agents; for it is hardly to be pretended the general provision just quoted, in reference to sequestrators, was intended to vest in them the legal title of the defendant in the execution. True, the expressions used might be broad enough to confer a right to sue for a chose in action, in the name of the sequestrator alone; yet, as such a right can only, legitimately, be in the possessor of the legal title, and an express delegation of it was withheld, though contained in the statute, then before the law-makers, it is not to be assumed it was intended to confer it. In fact, our office of insolvent trustee is modelled upon that of assignee in bankruptcy; while sequestration and the agent to execute it is borrowed from the process used in chancery. The former is vested by mere operation of law, with all the estate and effects of the bankrupt; but the latter took possession of the property of the defendant for a temporary purpose only, and with no view of ultimately divesting the estate of the delinquent. Originally, the object of sequestration was to punish a party in contempt, by taking possession of his lands and goods, until he submitted to the decree of the court. This is still the practice upon *mesne* process; and though, under our statutory execution, a sequestrator may, under the order of the court, absolutely dispose of personal chattels sequestered, his business with roads, canals, bridges, or other like property of a corporation, is merely to take the rents, issues, and profits, and distribute them, under the direction of the court, among the creditors. To enable him to perform this duty, he is authorized to take charge of the property and funds, but the legal title still remains in the corporation, to which, ultimately, the possession may again be united. And the same may be said of its issues and debts accruing, until finally disposed of. A sequestrator

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is therefore properly denominated, one who takes possession of property for a time, to satisfy a demand out of its rents and profits, without having any estate in the thing itself. Consequently, he cannot maintain an action at law, in his own name, to recover the debts, profits, and issues, but must use the name of the legal owner. He is governed by the same principle, which compels a foreign assignee in bankruptcy to sue here, for the effects of the bankrupt, in the name of the latter, because the foreign statute is inoperative to transfer the legal title: 2 *Johns. Rep.* 342; and the same is true of an insolvent assignee, appointed in another State: 11 *Johns. Rep.* 48. Indeed, the sequestration which had place here, may, in reference to the present question, be regarded as analagous to a voluntary pledge, by a turnpike company, of its tolls to pay a debt. In such a case, the possession of its goods, &c., in contemplation of law, remains in the company.

But is not the action, in its present form, maintainable on another ground? The instrument sued is given to the company by its corporate name. There is nothing in the law to prevent this, though the sequestrator may become immediately entitled to have the avails for distribution. But what is there to prevent him from enforcing it, in the name of the party to whom it was formally given? Were it a promissory note, not negotiable, there could, I take it, be no question of this. Yet, like a promissory note, it may be made the foundation of an action, when, it seems to me, a like form of action may be adopted; the sequestrator being considered as equitable assignee.

The defendant's attempt to defalk the debt due to him from the company, was rightly repelled, for the reason given below, that the accruing tolls, after the appointment of the sequestrator, were dedicated, by law, to the payment of all the debts, *pro rata*, and no creditor could be permitted to sweep the whole, by way of set-off or otherwise. This direction is fortified both by reason and authority. The statutory provision is, that the nett proceeds of the sequestered property, shall be distributed amongst all the creditors of the corporation, according to the rule established in individual insolvencies; and that rule excludes preferences. *Bainod v. Pelori*, 2 *Dal.* 43.

Judgment affirmed.

Bayer *versus* Reeside.

A claim, stating the amount, for stone, mason-work, &c., and materials, to wit, stone, lime, sand, &c., done and furnished within the six months last past, to wit, between the 1st June, 1848, and 1st April, 1849, is sufficiently definite as to time

ERROR to the District Court of *Allegheny county*.

This was the case of a *scire facias* by Reeside *vs.* Bayer, on a mechanic's lien filed by Reeside *vs.* Bayer, owner and contractor, &c., for \$147.10. Reeside, stone-mason, filed his claim for the payment of \$147.10 against a certain two-story brick house, (describing its situation,) and lot of ground, &c., to wit, stone, mason-work, &c., and materials, to wit, stone, lime, sand, &c., done and furnished by the said Alexander H. Reeside, within the six months last past, to wit, between the 1st June, 1848, and 1st April, 1849, for and about the erection and construction of said building and appurtenances, of which the said Dr. C. Bayer was and is the owner, or reputed owner; and at his instance and request, he being the contractor, architect, and builder thereof, &c., and the said claimant hereto annexes a bill of particulars of the amount of his said debt, &c.:

Dr. C. Bayer to Alexander H. Reeside, *Dr.*

To 91½ feet cut stone hearth, at 35 cents per foot\$ 31.90
 " 302 feet Ashler drawn cut stone, at 37½ cents per foot 113.25
 &c., &c., &c.

including 90 feet curbstone, at 25 cents per foot, 22.50. Credit was allowed for \$96.42; leaving a balance of \$147.10.

The above work done and materials furnished, between June, 1848, and April 1st, 1849.

No date was stated in the account. A demurrer was filed on the part of defendant. Judgment on the demurrer against defendant, *quod respondeat ouster*.

It was objected that the lien does not set forth the time at which the several materials were furnished, or the time said work was done. 2d. That said claim includes material not subject to lien. The latter objection referred to the claim for curbstone.

The case was submitted on the printed arguments.

Sewell was for plaintiff in error.

Stewart and *Marshall* were for defendant.—In their argument, it was remarked: With regard to the exception to the charge of \$22.50 for curbstone, this point was not made below, and whether curbstone, in the erection of a building, is not necessary to the

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building, is an open question. It will be observed that the claimant gives a credit in his claim for \$96.42; the defendant below not having made appropriation at the time of payment, the mechanic has the right to do so. On the trial of this cause below, the defendant made no attempt to deny that the work was performed, and that the mechanic faithfully earned his claim, and the jury, by their verdict, have disposed of all the technical objections to the claim.

The opinion of the court was delivered, October 28th, by

BURNSIDE, J.—The plaintiff complains that the lien filed does not set forth the time at which the several materials were furnished, or the time the said work was done. The act of the 13th June, 1836, section 12, directs that the claim should set forth the time when the materials were furnished or the work was done, as the case may be. I think, in this case, there was a substantial compliance with the act. The defendant in error was a stone-mason, and his claim is filed for stone-mason work. The building is well described. His claim is for the work, and for the stone, lime, and sand, done and found, within six months past, viz., between the 1st June, 1848, and the 1st April, 1849. The bill is given, but it has no other date. The lien is filed for a specific sum, and it specifies the particular work done. It was for this work done and materials found, six months before the claim filed. The case of *Shaw v. Barnes*, 5 *Barr* 20, is a direct authority to support this judgment. There the claim was for plastering within six months before the claim filed. This court there said, that these claims are frequently filed by mechanics unaccustomed to legal forms. We allow a claim which is defective in form to be stricken off, on motion and rule, from the record; but after a trial on the merits, technical objections are disregarded by this court.

Judgment affirmed.

Fosters *versus* McKibben.

A postmaster is not liable to suit by the publisher of a newspaper, for refusing to give to him the publication of the list of letters uncalled for, even though he acted maliciously. A public duty is not enforceable by a private action, except when it has been specifically given by statute.

ERROR to the District Court of *Allegheny county*.

This was an action on the case brought in the District Court of Allegheny county, by Alexander W. Foster, and J. Herron Foster, publishers, &c. of "The Pittsburgh Daily Dispatch," against Chambers McKibben, late postmaster of the city of Pittsburgh.

The *narr.* contains two counts, and recites the act of Congress

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of 3d March, 1845, section 18. It sets forth the fact, that the plaintiffs' paper has the largest circulation of any other published in said city; that, having complied with all the conditions set forth in the act, they demanded the publication of uncalled for letters, which was refused by defendant. It alleges that such refusal by defendant was illegal and corrupt, and lays the damages at \$5000. The facts and circumstances were set forth in the *narr.* with great minuteness and particularity.

The defendant, having first pleaded "not guilty," when the case was called up for trial withdrew his plea, and entered a general demurrer, which he supports on the ground that, although the facts be true as alleged, the refusal of defendant, and publication of the letters in "The Morning Post," is *damnum absque injuria*.

Upon which demurrer, the court below entered judgment for the defendant, and the plaintiffs sue out this writ of error.

The act of Congress of 3d March, 1845, sec. 18—Laws U. S., vol. v., *Peters' Edition*, provides as follows:—

"All advertisements made under the orders of the postmaster general, in a newspaper or newspapers, of letters uncalled for in any post-office, shall be inserted in the paper or papers in the town or place where the office advertising may be situated, having the largest circulation; provided the editor or editors of such paper or papers shall agree to insert the same at a price not greater than that now fixed by law. And in case of question or dispute as to the amount of the circulation of any papers, the editors of which may desire this advertising, it shall be the duty of the postmaster to receive evidence and decide upon the fact.

The case was argued by *A. Burke*, for plaintiffs in error.—The value of a newspaper is its reputed circulation: 8 *W. & Ser.* 245; 1 *Peake's Rep.* 74. On this ground, the good-will of a newspaper is treated as property: *Kennedy v. Lee*, 3 *Mer.* 452–5.

The defendant was a ministerial officer; but though it were otherwise, if in the exercise of his discretion he has acted wilfully and maliciously, he is liable: 8 *Wend.* 462; 1 *Burrowes* 556; 2 *id.* 785; 1 *East* 556, 562, note 563–4; 1 *Leigh N. P.* 545–6, note; 7 *Greenleaf* 412, 421.

Express malice need not be proved: 1 *East* 565–6, note; *Cowper* 765; *Story on Agency* 319–20 *et seq.*

McCandless, for defendant in error, referred to the opinion of the judge below, who decided that the postmaster, in deciding the fact of circulation, acts as judge, and is responsible to no state authority for the manner or the result of his judgment. Even if done corruptly or maliciously, no common law injury arises. It is a breach of an official statutory duty, by an officer of the general government, involving no invasion of common law rights, and is

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therefore not a duty enforceable here. The counsel referred to Schroyer v. Linch, 8 Watts 453.

The opinion of the court was delivered by

GIBSON, C. J.—Postmasters are directed, by law, to publish their advertisements in newspapers which have the largest circulation; not, however, to give the printer a premium for superior activity, but to serve the public; and, however the latter might complain of disregard of the direction, he could not. The printing is not proposed as a prize; nor is there any condition to be performed which may give title to it. The defect in the plaintiff's case is, that he had no right which could be violated. In *Shrunk v. The Schuylkill Navigation Company*, 14 Ser. & R. 83-4, the owner of a fishery was not allowed to recover for the erection of a dam which obstructed the stream and impeded the access of herring and shad to his pool, because he had not property in the fish before they were caught. The words in the act of incorporation were broad enough to cover the demand; and it was rejected, not for any express restriction, but on the general principle. But, though a postmaster is not answerable to a publisher, he would be answerable to a correspondent, whose letter had miscarried for want of publication according to the terms of the statute, because a party actually injured stands on better ground than one who is not, and for the same reason that such a party may have an action against the author of a public nuisance. A public duty has never been enforced by a private action, except when it has been specifically given by statute. Penalties have been imposed, and popular actions have been instituted, to demand them, but always under the sanction of express enactment. How, then, may a refractory postmaster be dealt with? By complaint to his superior, or perhaps to a grand jury. But the declaration avers, and the demurrer confesses, that the defendant was actuated by malice; and though he was doubtless governed only by a sense of partisan duty, we must take the fact as it appears in the pleadings. Still, if the plaintiff had not a legal right to the printing, he could ask for it only as a matter of favor; and even a malicious refusal of it would not entitle him to an action. A man may withhold his benefits for his own reasons, and the most deserving claimants of them may be passed for the worst of motives. If dispensers of patronage were tried by any other rule, it would be a sad thing for executive magistrates, invested with power to appoint to office: they would be ruined by temporal tribunals, whose province it is not to search the heart.

Judgment affirmed.

COULTER, J. dissents.

McCullough *versus* Wainright.

1. Where ambiguity exists in a written contract, arising from its reference to extrinsic objects, it may be explained by parol testimony as to the situation and character of those objects at the time of the contract; and such evidence is for the jury. But the law arising on the contract, as thus explained, is for the court.

2. The *bank* of a stream is the continuous margin where vegetation ceases, and the *shore* is the pebbly, sandy, or rocky space between that and low water mark.

ERROR to the District Court of *Allegheny county*.

This was an action of trespass *quare clausum fregit*, by Wainright *vs.* McCullough. Plea not guilty, with leave, &c. March 5, 1849. Verdict for plaintiff. Wainright owned Wainright's Island and nine acres on the main shore close by.

The material question was the right vested in McCullough by an agreement between him and Wainright, made in August, 1844, which was partly as follows:

"Memorandum of agreement between Joseph Wainright, of the county of Allegheny and State of Pennsylvania, and Michael McCullough, Jr., of the aforesaid State and county, of the other part. The said Wainright of the first part agrees to give said McCullough, Jr., a good and sufficient deed, for what is known as Wainright's Island in the Allegheny river, in the aforesaid county and State, and containing about seven acres, be the same more or less, as also for all the water *privilege made by the said island*, that is now in the right of said Wainright, *and the privilege of erecting any mills or machinery between said island and the east shore, with the liberty of using as much of the (said shore) belonging to Wainright as may be between the water and the trees growing along the same, but not to be construed to abut any dam against any part of Wainright's land on the main shore.*"

The consideration of the deed was to be \$100 per year, payable semi-annually, or the principal sum of \$1666.66. McCullough first erected a saw-mill *on the island*, but afterwards purchased a site on the main shore, and there erected an expensive steam saw-mill, and constructed a log-way on the east or main shore, and he had logs piled on the top of the main bank, back of or *behind* the trees. It was alleged, on the part of Wainright, that the log-way was erected without right, and that this, or the logs, or both, obstructed his landing-place, which was important in carrying on a brewery owned by him. A variety of parol evidence was given.

On the trial, defendant's counsel proposed the following points:

1st. That the situation and true interest of the parties, and the subject matter, are to be considered in the meaning and determining of the contract.

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2d. That for the purpose of aiding the construction of terms used in a written contract or agreement, recourse may be had to the parol evidence, showing the condition of the subject matter of the contract.

3d. That the defendant having clearly the right to use the *east shore* between the water and the trees, the defendant had the right to rest or harbor his rafts and logs there; and if the rise of the water carried the logs or rafts farther in and beyond that space of ground, such result would not amount to a trespass for which this action would lie.

4th. That the actual localities of the ground and the actual position of the *main shore*, as expressed in the contract, is a question of fact, for the jury's consideration and determination, in order to ascertain whether the alleged acts complained of were a trespass or not.

5th. That the quantity of ground or space comprehended or allowed by "said shore between the water and the trees growing along the same," is a question of fact for the consideration of the jury, in view of the subject matter of the contract, and the object and position of the parties to said contract.

LOWRIE, J., affirmed the points, subject to modifications appearing in his charge. He further charged:

1. But it is proper that I should say something of these principles, in their application to the facts in evidence. You will perceive that some difficulty arises from the inaccurate use of the word "shore" in the agreement, it seeming to be used to signify, indiscriminately, shore, bank, and beach. To use more definite language, you would perhaps read the agreement as follows: "Agreed to sell and convey unto the said McCullough, the island known as Wainright's island, together with all the water privilege made thereby, and also the privilege of erecting any mill or machinery between said island and the eastern *bank*, with liberty to use and occupy for that purpose so much of the east *beach* belonging to said Wainright as may be between the water and the trees growing along the *east bank*; but said erections shall be so placed that the dam shall abut against the island, and not against the mainland belonging to W." Certainly I should be inclined so to read it.

2. A principal matter in dispute is as to the areal extent of the shore or beach to which the defendant is entitled. It is so much of the shore as may be between the water and the trees growing along *the same*, that is along the shore or bank; for there are the trees.

3. Now it appears by the evidence, illustrated by the defendant, that there is a row of trees growing along on the brow of the bank, where it is broken by the water, and a few growing some distance back of them on the second bank, and especially one or two trees at the second bank a few rods down the river from the termination

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of the first rows and some rods further back from the river. And the defendant insists that, even if he be confined to the first row as far as it goes, yet, when he comes to the end of the row, he has a right to change his line so as to fall back upon the trees at the second bank, and thus include within his grant a considerable part of the land beyond the first bank.

4. You will decide whether this is a reasonable construction of the agreement under the evidence as to the locality. Is it probable that the parties had in contemplation any but the first row of trees, meaning that this position should stand as a general indication of the extent of the grant. Admitting the facts as testified to, and as illustrated by the defendant, I would so construe it.

5. The rule of law is, that where land is bounded by a class of objects generally, without any one or more being particularly specified, these terms indicate the course of lines on the ground to be ascertained by reference to the objects; and in fixing the exact place of the lines, a reasonable regard be had to the general course of the bounding objects. Where the objects are sufficiently numerous to indicate a clear general course, we cannot change that course in or over to reach one or two objects of the same character that are clearly out of the general course. Where a row of trees on a bank is made a boundary, and there is a row clearly answering to this description, its general course along that bank must be followed; it will not be allowed to change the line so as to strike one or two trees on another bank.

6. The term "water privilege" in the agreement cannot be construed to include the right of floating the defendant's logs in upon the plaintiff's land, where it is overflowed by high water, and using said land to store them on. Indeed the parties seem to have intended to include the right of floating and storing logs within the subsequent clause.

To which instructions of the court the defendant's counsel except.

It was assigned for error, that the court erred as to the construction of the agreement.

The case was argued by *Burke* and *McCandless*, for plaintiff in error.—It was alleged that the court erred in limiting the agreement as to the water privilege made by the island simply to the waterfall, and not extending it to the privileges of the beach necessary to McCullough in carrying on his saw-mill. That the latter was entitled to all the advantages connected with the island and the main shore as a place of deposit for his logs. That the error of the court was in calling this a *land*, and not a *water privilege*: 1 *Whar.* 131; 2 *New Hamp.* 259; *Co. Litt.* 5 a b; *Bacon's Ab. Grant*, H 3; 1 *Rolle's Rep.* 369; 5 *Burrowes* 1824; 4 *Mass.* 266.

Woods and *Loomis*, for defendant, Wainright.

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The opinion of the court was delivered by

COULTER, J.—There is nothing in the five errors assigned; and the answer of the court below, to the five points of the defendant respectively, is correct. These points are answered arbitrarily in favor of the defendant, on the questions of law submitted. The court, however, made some observations on their relevancy to the case in hand, as disclosed by the evidence. And this the court had a right, and, indeed, it was their duty, to do.

It is the province of the court to construe a written deed or contract; and in the observations which they made on the agreement of the parties, the court did not advance to the full extent of their prerogative in that respect, instead of going beyond it, or trenching on the province of the jury. Where a writing possesses an ambiguity, arising from reference to extrinsic objects, it may be explained by parol testimony, relative to the nature, situation, and circumstances of those extrinsic objects at the time of the contract. But never, unless this cannot draw the interpretation or construction of the contract, to the jury. It is the province of the court to declare the construction of the contract, according to the true position and relative situation of these extrinsic objects, *dehors* the writing; and it is the province of the jury to find the true situation and character of these objects. The situation of the trees, the low-water mark, the shore, and the particular localities mentioned in the agreement, would be ascertained only by parol testimony, and their relative position in regard to each other. This was a question for the jury. But the law arising on the contract, as thus explained, was for the court. The whole question might be said to be a mixed question of law and fact, and as such, went to the jury, with suitable legal instructions from the court.

The bank of a stream is the continuous margin where vegetation ceases; and the shore is the pebbly, sandy, or rocky space between that and low-water mark. Along the first margin was a row of trees; and behind them, on the second bank, were other trees. The court left it to the jury to say, whether the terms in the contract, granting privilege to McCullough to use as much of the shore belonging to Wainwright as may be between the water and the trees growing along the shore, extended to the second row, or to the first. In this, certainly, they did no injustice to McCullough, because, it seems to me, that the contract line was clearly the first row, nearest the water. On the whole, we see no error prejudicial to plaintiff in error.

The judgment is affirmed.

Hill et al. *versus* McDowell et al.

1. A claim filed for a specified amount, against a dwelling-house, for work and labor, to wit, carpenter work done, and materials furnished in and about its erection and construction, "within six months last past, the said work having been commenced on or about the 10th day of December, A. D. 1847, and finished on or about the 6th day of May, A. D. 1848, a bill of which is hereto annexed," and having annexed "Dr. to carpenter work done to house \$248.02, May 6, 1848," is sufficiently definite.

2. If work, in erecting a building, be done under a special agreement that it should be paid for at a certain standard of prices, the contract may be proved by parol evidence; and it need not be first shown that defendants agreed to pay the specific amount claimed.

ERROR to the District Court of *Allegheny county*.

This was a *scire facias* on a mechanic's lien, filed against a dwelling-house, describing it, for work and labor, to wit, carpenter work done, and materials furnished in and about the erection and construction of said double frame dwelling-house, within six months last past, the said work having been commenced on or about the 10th day of December, A. D. 1847, and finished on or about the 6th day of May, A. D. 1848, a bill of which is hereto annexed:

June 5th, 1848.

Samuel Hill, contractor, and Alexander Gibson, reputed owner.

To James McDowell and Hugh Thompson, for the use of James McDowell,

Dr.

To carpenter work done to house,.....\$248.02
May 6, 1848.

Defendant pleads, no lien.

By the court, LOWRIE, J.—I am not able to understand the short pleading of "*no lien*," entered by the defendant, in any other light than as a general demurrer, and as such it has been set down for argument.

It then raises the question whether the statement and bill accompanying it set forth a cause of action with such degree of distinctness as to amount to a good lien, and that a judgment can be entered thereon after verdict in favor of plaintiff; and I am of opinion that it does. As a general demurrer, it must, therefore, be overruled, and the defendant have leave to answer over: 5 *W. & Ser.* 262; 2 *Barr* 77; 5 *id.* 18; 6 *id.* 187. Indeed, as a short plea, it is so entirely uncertain whether it means to raise a question of fact or law, that it should not at all be allowed.

Dec. 14, 1848, defendants demur to the lien filed, that it is not a lien, or bill of particulars, as required by the act of Assembly. April 2d, demurrer overruled, and judgment of *respondeat ouster*. April 10, 1849, tried before HEPBURN, J.

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Andrew Dunn sworn for plaintiffs. The plaintiffs offer to prove that they did the carpenter work, for which the lien is filed, under an agreement with defendants, that they should be paid by measurement, at 30 per cent. off the book of prices. The defendants object to any evidence under the lien filed, unless evidence is given to show that the defendants agreed to pay \$248.02 for work done. The lien being irregular, and no such specifications attached as required by the act of Assembly.

PER CURIAM.—The case was before the court on demurrer, and Judge LOWRIE decided that the lien was sufficient, and I do not well see how a party who does work under a contract such as is offered to be proved, can be more specific than in this lien filed. Objection overruled, and evidence admitted.

The court charged that the lien filed was valid and sufficient in law to entitle plaintiffs to recover, if the jury found any balance due them. Verdict for plaintiffs for \$57.64.

It was assigned for error, that the court erred in overruling the demurrer; in admitting the testimony of Dunn; and in charging that the lien filed was sufficient in law.

Woods and Marshall, for plaintiffs in error.—That this was a lumping claim, without specifications. That the claim does not show when the work was done: *Noll v. Swineford*, 6 *Barr* 187; *Rehrer v. Zeigler*, 3 *W. & Ser.* 258.

McConnell and Burke, for defendant, referred to 2 *Barr* 77; 5 *Barr* 18; 7 *Barr* 394; 4 *W. & Ser.* 467. Not necessary that the lien filed should set forth the special contract under which the work was done: 9 *Barr* 97; *id.* 449; 5 *W. & Ser.* 262.

The opinion of the court was delivered, Oct. 30, by

BURNSIDE, J.—The learned judge was right in overruling the demurrer, and in rendering judgment of *respondeat ouster*. The District Court was of opinion that the lien was sufficient, and in that opinion we fully concur. On the trial, the plaintiffs proved that they did the work under an agreement with the defendants, that they should be paid by measurement, at the Pittsburgh book of prices, thirty per cent. off. The evidence was objected to under the lien filed, unless evidence was first given to show that the defendants agreed to pay \$248.02 for the work done. The evidence was properly admitted. When work is to be done by measurement, it would puzzle even a Pittsburgh lawyer to ascertain the price of the work before it was measured. The plaintiff's statement being for work and labor, the bill and statement constituted a valid and sufficient lien, and the evidence of Dunn was rightly admitted.

Judgment affirmed.

The Commonwealth *versus* City of Pittsburgh.

1. The appointment of watchmen or night police for the city of Pittsburgh, exists in the city councils, and not in the mayor.

2. The charter of a municipal corporation is not liable to forfeiture for the misconduct of its officers, not affecting the rights of the public. The usurpation of authority may be corrected, or disputes between its functionaries settled, by appropriate proceedings, without disturbing the charter.

3. In a proceeding against a municipal corporation, to show cause why a writ of *quo warranto* should not issue to it to appear and show by what authority it exercised certain franchises, the court can pronounce no other judgment than a forfeiture of franchises and of the charter.

4. By the term *law*, in the fifth section of the act of 8th April, 1833, relative to the mayor of Pittsburgh, the legislature meant not *ordinances or by-laws of the corporation*, but the public laws or statutes, which conferred important powers on the mayor, as for example, as a conservator of the public peace.

5. Municipal corporations may perform portions of their business through the instrumentality of committees. ✓

A suggestion was filed under the *quo warranto* act of 14th June, 1836, in the name of the Commonwealth of Pennsylvania *ex relatione* the Attorney General *vs.* The Mayor, Aldermen, and Citizens of Pittsburgh, in which, amongst other matters, it was alleged that the Select and Common Councils, for the purpose of depriving the mayor of the city, Joseph Barker, Esq., of his jurisdiction and powers in the appointment of the night police of the said city, did, in Oct. 1850, enact unlawfully an ordinance, requiring the police committee to report to the councils for their approval, the names of the night policemen appointed by said committee of police, and authorizing said committee to fill vacancies in said night police, and authorizing any person so appointed on said police by said committee, to act as such police until the appointment should be confirmed by said councils; and that they enacted penalties against all other persons acting as a night police of said city, &c.

And alleging that the corporation, by their acts, have unlawfully used liberties and franchises not belonging to said corporation, that is, they have claimed the power and franchise of delegating, and have as aforesaid delegated the power of appointment of officers of said corporation, viz. of the night police of the said city, to a committee of their body, and have authorized said committee to make, and said committee have made appointments of said police, and the officers thereof; and have as aforesaid claimed to exercise and have exercised the power and franchise to make and enact ordinances, to repeal the ordinances conferring upon and vesting in said mayor the right and authority to appoint and regulate the night police of said city, and have claimed and exercised the powers and franchises to pass and enact ordinances depriving the mayor aforesaid of the power vested in him by law, of appointing and

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regulating the night police of said city. All and singular which powers, privileges, and franchises, the said corporation, for all the time aforesaid, against the commonwealth of Pennsylvania, had usurped, and did then usurp, in contempt of said commonwealth; and thereupon the attorney general of the commonwealth prays the advice of the court in the premises, and that due process of law might issue in that behalf against the said corporation, to answer to the commonwealth, to show cause by what warrant the said corporation claims to have and exercise the said powers, franchises, and liberties.

All which is respectfully submitted to the honorable the justices of the Supreme Court of the commonwealth.

C. DARRAGH, Attorney General.

The 3d section of the *quo warranto* act of 14th June, 1836, *Purdon* 989, provides: "Whenever the attorney general shall have reason to believe that any association as aforesaid have acted as a corporation, or exercised any of the franchises or privileges thereof, without lawful authority, or that any corporation has forfeited its corporate rights, privileges, or franchises, as aforesaid, or exercised any power, privilege, or franchise, not granted or appertaining to such corporation, it shall be his duty to file, or cause to be filed, a suggestion as aforesaid, and to proceed thereon for the determination of the matter."

The act for the incorporation of the city of Pittsburgh was passed on the 18th March, 1816. By said act, the councils had the power to make ordinances for the government of the city, and to appoint officers. The 24th section gave the councils power to delegate the appointment of officers to the mayor. On the 3d Jan. 1831, the councils authorized the mayor to appoint nightly patrols. On the 8th April, 1833, an act was passed authorizing the councils to appoint the mayor from among the *freemen of the city*, not restricting the appointment to one of the aldermen, and providing that "the mayor so elected shall have all the other powers now vested by law in the mayor of said city, by virtue of his office, and be subject to the same duties."

In Decemebr, 1833, an act was passed providing for the election of the mayor by the citizens.

In March, 1836, the councils passed an ordinance, vesting the appointment of the night patrol, *jointly in the mayor, and a committee, selected by the councils*; and they acted jointly. On the second Friday of January, 1850, the councils selected and appointed certain of their members to act as a police committee, for the purpose of selecting and employing, jointly with the mayor, persons as a night police, and of giving their advice and consent to the discharge by the said mayor of the persons who may be selected as such night police. The persons selected as such police

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committee, acted as such. Joseph Barker was elected mayor on the second Tuesday of January, 1850, and took the oath of office on the second Friday of January.

The committee, on the 29th Jan., met at the mayor's office, and appointed certain persons as a night police, who acted as such, *contrary to the wishes and orders of the mayor*. Mayor Barker afterwards appointed others. Subsequently, viz. in October last, the councils enacted an ordinance, providing, that the committee on police should appoint twenty-four persons as a night police, and four persons as officers, and that the said night police should be under *the government and control of the committee on police*. The police committee made appointments of night police, and subsequently, the councils further enacted penalties upon any person who should hinder, deter, or menace such police in the discharge of their duties, and enacted penalties against all other persons who acted as a night police of said city; that the mayor should not have the power of increasing the night police, and that the ordinances authorizing him to do so be repealed.

The case was argued by *J. Dunlop*, in favor of the suggestion. —The matter in dispute relates to the appointment of the night police. The mayor asserts that it is in him; the councils assert that it is in them, and they have delegated it to a committee. That the rights of *the State* have been invaded, and the councils have usurped powers that did not belong to them. He referred to the acts and ordinances of councils which he considered illegal. The charter gave the councils the power to appoint officers, and to vest the same in the mayor, but that they could not delegate power to any other than the mayor. For such an abuse of their franchises, the corporation could be proceeded against by writ of *quo warranto*. That the charter was forfeited by such illegal acts of councils, and a judgment of *ouster* could be rendered in the case. That the abuse which may work a forfeiture must be wilful, but need not operate to any considerable extent: 4 *Burrowes* 2004, *King v. Cuthbert*; 2 *Shower's Rep.* 275-9; 23 *Wend.* 198, &c.

Kuhn, for the councils.—That the cases cited were decided in times of tyranny. It is not every slight violation or neglect of duty which will operate a forfeiture. The proper remedy as against persons holding office illegally, is a writ of *quo warranto* against them, or the by-law under which they hold may be declared unlawful. That Mayor Barker was the actor in this case. The right of the *State* had not been violated or usurped. None of the American cases cited referred to *municipal* corporations, but to *private* corporations, which could not be reached through the legislature, and with whom the courts were obliged, for that reason, to deal more strictly. That the term *law*, as used in the 5th section of the act

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of April, 1833, means *an act or law of the legislature*, and not an ordinance of the city. It means the public law, which the legislature may be presumed to know, and not city ordinances, with which they may be unacquainted.

Judge *Shaler* on same side.—That the material question was, whether the corporation have done any act in violation of its charter, as against *the commonwealth itself*. If admitted that the councils are wrong in the matter, as between them and the mayor, the *public* have nothing to do with it. He contended that the power of appointment of the night police was in the councils, but that the material question was, whether the allegation that the councils have unlawfully interfered with the authority of the mayor, was a sufficient ground to work a forfeiture of the charter of the city, which he contended was not the case.

Dunlop, in reply.—The judgment need not necessarily forfeit the charter, but may extend only to the removal of the officers or agents. 3 *Burrowes* 1837, *King v. Spencer*, as to the matter of delegated authority.

That the officers whose non-appointment may work a forfeiture, are those whose existence is necessary to the existence of the corporation.

The opinion of the court was delivered by

COULTER, J.—The attorney general is required by the 3d section of the act in relation to writs of *quo warranto*, passed 16th of June, 1836, whenever he shall believe that any corporation has *forfeited its corporate rights, privileges, or franchises*, to file a suggestion and to proceed to the determination of the matter, and in pursuance of this power he has filed this suggestion against the corporation of the Mayor, Aldermen, and Citizens of Pittsburgh; and alleges that by the ordinance of the councils which repealed a certain prior ordinance, passed in 1831, vesting in the mayor the appointment of the night watch and patrol; also by vesting the appointment of said watch in a committee of councils, and finally by the appointment of the night watch by the councils themselves; the said corporation has claimed to use, and has used unlawfully, liberties and franchises not belonging to it; and all which privileges the said corporation has usurped against the commonwealth, &c.; and a rule was granted, at his instance, against the corporation, to show cause why a writ of *quo warranto* should not issue against the said corporation, commanding them to appear and show by what authority they exercised such privileges and franchises. The corporation appeared at the return of the rule, and was heard by her attorneys, and the commonwealth was heard by the representative of the attorney general.

The corporation, even admitting all the allegations in the sug-

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gestion, has not usurped from the commonwealth any liberty, franchise, or privilege; nor has she by any thing, or act, shown to this court, invaded the rights or privileges of any other corporation, nor the rights or privileges of the people at large. She has used no franchise, or privilege, that did not belong to the corporation. It has done nothing more than use privileges and franchises, unquestionably belonging to the corporation, and incident to the emergencies and requirements of its beneficial existence, to wit: the appointment of a night watch. That the corporation possessed this power, will hardly be questioned by any reasonable man. That two of the functionaries, the legislative department, the councils, and the executive department, the mayor, have disputed about their respective powers in the matter, is admitted. But the charter was not granted for the benefit of the mayor or the councils either, but for the benefit of the people of the great municipality. The law has abundant means and power of settling this dispute between the functionaries, without detriment to the people or corporation. Then why should the people be punished, for the wrangling of the officers.

The charter is the charter of the people, and shall they be punished by wresting it from them, and throwing their whole concerns into confusion and disorder, because the mayor and council dispute? The municipality of the city government has been built up and perfected through a course of many years, and by many acts of Assembly; and by many by-laws and ordinances, as they were suggested by experience and time. And shall all this fair fabric, on which lay so many duties and obligations, on which most of the welfare and security of the citizens of a great community depend, be torn down and destroyed by the turbulence of any officer or officers? A case has been cited from the reign of the *Stuarts* in England, as authority and precedent, in the instance of the forfeiture of the charter of London, for irregularity in passing some ordinance. But it must be recollected that the object and policy of the royal government at that time, was to circumvent the liberties of the people, and one means of doing that was to forfeit the franchises of corporations, through the instrumentality of pliant judges, who then held the office at his will, to the use of the king, who granted them out to his creatures upon principles less favorable to liberty. But after the revolution in 1768, when that race was driven from the throne, the Parliament reversed this decision or judgment, and enacted that thereafter, the franchises of the city should not be forfeited for any cause, by the courts. And why should the franchise of any municipal government be forfeited on account of the misconduct, alleged or real, of its officers? The usurpation of officers can be corrected by suitable means, leaving untouched the rights, franchises, and liberties of the citizens and corporators.

If the mayor, who we must believe from the force of the sugges-

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tion, is the real complainant, had filed a suggestion against the council for usurping his functions, this court could, under the eighth section of the act relating to writs of *quo warranto*, have made him, although the relator, a party respondent also, and then determined on his rights and authority as well as on those of the councils; and could have pronounced judgment of *ouster* against whoever was in the wrong; and in such case, by the 15th section of the act of April 13, 1850, being a supplement to the act relating to Orphans' Courts, this court could have appointed trustees from among the citizens eligible to office in the corporation, as trustees to take charge of the corporation until new officers were chosen according to the provisions of the charter.

But in this proceeding we could pronounce no judgment except forfeiture of franchises and of the charter, against the corporation, which would dissolve it and return it to its original elements. We cannot think of such a result; there is not the slightest cause for it. The proceeding has worn a *grotesque* appearance, in my judgment, from the beginning. The rule is therefore discharged.

But as I am instructed, I proceed further to express an opinion of the court, on the power of the councils to appoint and regulate the night watch. On this subject the court entertains no doubt whatever. By the charter, the councils have authority to make all needful ordinances and regulations, (*provided* they are not contrary to the constitution and laws of the United States and this State,) as shall be necessary or convenient for the government or welfare of said city, and the same at their pleasure revoke, alter, or make anew, as occasion may require. By an ordinance of 8d January, 1831, the mayor was authorized to employ a night patrol or watch, for the protection of the city, whenever he should deem it expedient; and it was made a particular point in the argument, that the councils were authorized to make this ordinance by the 24th section of the charter; but that is of exceeding small moment, because every ordinance which they lawfully pass, *is* or *ought* to be authorized by the charter. It being an ordinance for the welfare of the city at the time of its enactment, the councils had an undisputed right to revoke, alter, or make it anew, if, in their wisdom, subsequent circumstances and change or vicissitude of things or manners made it necessary. Such power is incident to, and necessarily inherent in municipal corporations, and nothing but the most clear, direct, and absolute prohibition by legislative enactment, could be construed by this court to take it away.

But it is alleged on the part of the attorney general, that the act of Assembly of the 9th April, 1833, did make the above ordinance, authorizing the mayor to engage a night patrol, immortal, and did invest it with the quality of the laws of the Medes and Persians, which rendered them irreversible, and made them endure under all change of time and manners.

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Previous to the year 1833, the mayor was selected by the councils from among the aldermen, and the alderman selected as mayor carried into that office the authority and powers of an alderman, as conservator of the public peace. But the act of 9th April, 1833, provided that the mayor should be elected annually by the citizens from among themselves. And it provided that the mayor so elected should promulgate the by-laws of the corporation, preside in the mayor's court, and specially attend to the due execution and fulfilment of the by-laws, and that he should have all the other powers then vested by law in the mayor of said city, by virtue of his office, and be subject to the same duties. This, the attorney general contends, made the ordinance of 1831 authorizing the mayor to organize the night patrol, perpetual. And why not, by the same rule, make all other ordinances then existing, as to the mayor, perpetual? But in the first place, I observe that there were other duties devolved on the mayor by law, that is, by acts of Assembly, besides those enumerated in the act of 1833. Such, for instance, as the power to take acknowledgments of deeds, &c. This alone would fulfil the act of 1833, because that confers other powers beyond those of presiding in the mayor's court and seeing to the faithful execution of the by-laws, and is vested in him by law. But the principal thing intended by the legislature was, no doubt, to invest the mayor with the criminal jurisdiction for the preservation of the peace, which belonged to the mayor previously to that act, as alderman, who alone, before that time, could fill that office.

But when the act of 1833 was passed, for the election of mayor from the body of citizens, he would not possess this criminal jurisdiction, which, I may say, is the most valuable part of his office.

It therefore becomes necessary, when that act provided that he should preside in the mayor's court, see to the promulgation of the by-laws, and attend to the due execution and fulfilment of the same, to add that he shall have all the *other* powers vested by *law* in the mayor of said city, by virtue of his office, and be subject to the same duties. And one of the first of these duties is, to render obedience to, and execute and fulfil the ordinances of the corporation, and *not to set himself and all his power, in rebellion against them*. If they invade his rights, he has his appropriate remedy, in a peaceful and orderly way. The Governor of the State, or President of the United States, might as well set themselves up as an independent power, an *imperium in imperio*, and with the military power under their control, rebel against the laws. Their duty is to see that the laws are faithfully executed, and the duty of the mayor is to see that the ordinance of the councils are faithfully executed, until they are pronounced invalid by judicial authority.

But by the term *laws*, the legislature meant not *ordinances* or by-laws of the corporation, but the public laws or statutes which conferred important powers on the mayor. The act of 1794 con-

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ferred on the judges of the Supreme Court, and of the Common Pleas, the mayor of Philadelphia, and all justices of the peace, power to enforce the law against profanity and drunkenness. This power the aldermen possessed in virtue of their being justices of the peace, and while none but an alderman could be selected as mayor, he also then possessed these powers. When, however, in 1833, a citizen was made eligible by election to that office, it became necessary to invest him, in addition to the power of presiding in the mayor's court, promulgating the ordinances, and faithfully enforcing the same, with all the other powers conferred *by law* upon him by virtue of his office, and subject to the same duties. These were not powers expressly conferred by city ordinances, on him to execute, but powers incidental and appurtenant to his office by law, and these powers were the most valuable of his attributes. The power of conservator of the peace, guardian of the public morals, and being a terror to evil doers.

If there was the least doubt on this subject, it would be cleared away and dissipated, by the ordinance of 26th March, 1836, by which the appointment of the night watch was vested in the mayor and a joint committee of councils, and subject to their removal. This is an alteration and repeal of the ordinance of 1831, which was acquiesced in by the mayor, the councils, and the corporators, for fifteen years, until time had settled down upon it, with the sanction of half a generation, and was acknowledged by all as a remodelling of the ordinance of 1831, and remained so, until the distinguished executive functionary of the present year disturbed it.

It may be said that time is the test of all human enactments, and perhaps experience has fully established that a power might safely and usefully have been invested in the mayor, in 1831, which would not be quite as appropriately deposited there in after times. At all events, the city councils, the sole legislative authority of the municipality, had a right to judge on that subject, and after a lapse of fifteen years acquiescence, it is too late for the mayor to allege that the councils could not delegate that power to a committee. Corporations may, and must often do their more important business through the instrumentality of committees. It is not forbidden, and has been often sanctioned by legal decision: I can see no objection to it. As to the appointment of the night watch, they were still and always subject to the inspection and control of the councils.

The case of *Parker v. Commonwealth*, 6 *Barr* 507, is inapplicable, but the repeal of the ordinance authorizing the mayor to appoint either in the whole, or in conjunction with the committee, was lawful, and settled the matter; afterwards, by the appointment of a night watch of his own, the mayor was usurping an authority which he did not possess, and opposing what it was his duty to fulfil. By

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this means, much disorder and confusion has crept into the city, the public peace has been broken, and the stillness of night disturbed, by those who ought to have watched over its quietude. Both property and person have been rendered less secure, and the reputation of the city has suffered. We may indulge a hope that these proceedings will cease, and that peace and quiet among the functionaries will now be restored.

Rule discharged.

Williams *versus* McCandless.

Two transcripts of the same judgment obtained before a justice of the peace, entered in the Common Pleas, constitute but *one record*; and a removal of the record on the second transcript, into another court, legally made, effects a removal of the whole record.

ERROR to the Court of Common Pleas of *Allegheny county*.

This was a *scire facias* to revive a judgment entered upon a transcript from the docket of a justice of the peace. A judgment was confessed in favor of William McCandless *vs.* Isaac Williams, before a justice of the peace, for \$561.50, &c., with stay of execution for eighteen months. A transcript was filed in Nov. 1843, in the Common Pleas, to Dec. term, 1843, No. 90.

On June 5, 1845, another transcript was filed of the same judgment, in the same court, to June term, 1845, No. 147. Execution from the justice had been returned no goods. *Fi. fa.* to Oct. term, 1845, No. 48. In Oct. 1846, rule to show cause why levy, &c., should not be set aside, at plaintiff's costs. Oct. 24, 1846, rule made absolute. Feb. 5, 1848, at the instance of attorneys of plaintiff, this case transferred to the *District Court*, No. 90, April term, 1848, agreeably to the act of Assembly.

Afterwards, viz. on Nov. 13, 1848, a *scire facias* issued in the Common Pleas to revive the judgment entered to Dec. term 1843, on the *first* transcript. It issued against Isaac Williams with notice to Robert Potter and Albert McElheny, terre tenants. Oct. 27, 1849, plea of Potter and McElheny filed. Dec. 4, 1849, replication filed, and judgment against Williams in default of appearance and plea, and a jury sworn to try the issue between plaintiff and Potter and McElheny, who found for plaintiff \$813.88. Dec. 20, on motion, rule to show cause why the judgment and all subsequent proceedings should not be set aside.

In the *District Court*, the removal was docketed William McCandless *v.* Isaac Williams, to April term, 1848, No. 90.—May 19, 1842, judgment was confessed for the sum of five hundred and sixty-one dollars and fifty cents debt, with seventy-five cents costs. Execution returned "no goods." Transcript filed, June 5, 1845, &c.

[Williams v. McCandless.]

Dec. 20, 1849, rule to show cause why judgment and all subsequent proceedings should not be set aside. Jan. 5, 1850, the transfer of this judgment set aside, and all subsequent proceedings thereon.

It was assigned for error, *inter alia*, that the whole proceedings are irregular; the judgment having been certified into the *District Court*, the Court of Common Pleas had no jurisdiction.

The case was argued by *Woods*, for Potter; *Loomis* on same side.—It was contended that the Common Pleas had no jurisdiction; that the proceedings in the Common Pleas were all one record, and that was removed into the District Court.

McCandless for defendant in error.

PER CURIAM.—In the Common Pleas, the two transcripts of the same judgment on the justice's docket made but one record; and the whole of it was removed by the certificate, into the District Court. No record, therefore, remained in the Common Pleas to sustain the *scire facias*, and the defect would have been fatal on *nul tiel* record; but the parties proceeded on the principle of *Minier v. Saltmarsh*, to plead themselves off the record, by going to issue on an immaterial fact—a thing that would not have happened had the report of *Mitchell v. Hamilton* been published. The case is so incongruous, that no verdict ought to have been rendered on the judgment.

Judgment reversed and repleader awarded.

Commonwealth versus Rush et al.

1. The common or public square in the city of Allegheny is dedicated to specific public uses, as mentioned in the 4th section of the act of 1787, and although not a common public highway, yet the public have rights and interests therein of which they cannot be deprived.

2. That although the legal title to said square is vested in the corporation of the city of Allegheny, they hold subject to the trusts in favor of the community, and are but the conservators of the title and soil, and have no power or authority to sell and convey the same for private purposes.

3. That the erection of a private dwelling-house on said square is a public nuisance, and cannot be justified by any title or authority derived from the city corporation, but is indictable in a criminal court.

4. That a court of chancery will grant an injunction to restrain and prevent a nuisance, when the facts are not doubtful and the threatened injury irreparable, and that the chancery powers of the District Court of Allegheny county authorize the issue of an injunction in a like case.

5. That in this case the facts being admitted by the pleading, and the damage of that kind which the law calls irreparable, the plaintiff is entitled to have the injury complained of restrained and prevented by a perpetual injunction.

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APPEAL from the decree of the District Court of *Allegheny county*, sitting in chancery.

A bill in equity was filed in June, 1849, in the name of the Commonwealth, at the instance of C. Darragh, Esq., Attorney General v. Jonathan Rush, Mayor of the City of Allegheny, Edmund Grier, and others, and a special injunction was prayed for, which was awarded, and subpoena issued.

Aug. 4, 1849, opinion of the court read by Justice HEPBURN, and a decree of perpetual injunction awarded, in accordance with the prayer of the bill. Sept. 4, 1849, respondents, Edmund Grier, and others, appealed from the decree.

The matter at issue related to the title to the public square in the city of Allegheny. It appeared from the answer, that for the purpose of redeeming certain scrip or certificates of debt incurred in the construction of the water-works of the city, and for other public purposes, in April and May, 1849, the councils of the city, by an ordinance and resolutions, authorized the committee on city property to cause to be laid off in the said square, forty lots, &c., and directed the said lots to be sold at public sale; that Wesley Grier purchased one of the lots, and employed Edmund Grier and two others of the respondents, as his agents, to erect thereon a house.

The opinion of his Honor, Judge HEPBURN, was as follows :

Commonwealth of Pennsylvania, <i>ex rel.</i>	} No. 448, July Term, 1849. Bill in Equity.
Attorney General,	
v.	
Edmund Grier, Abraham, and Isaac Patterson.	

On the 30th June last, after notice to the defendants, an application was made to this court for an injunction to prohibit the defendants from further proceeding in the erection of a dwelling-house on the public square, in the city of Allegheny. The defendants did not appear in accordance with their notice, and giving no attention to the proceeding, the injunction was issued. The defendants have since appeared and filed their answer, and the merits of the case have been fully heard upon the bill and answer. The plaintiff asks that the injunction may be made perpetual; the defendants, that it may be dissolved.

The square in the city of Allegheny, in regard to which this controversy arises, is located, according to the plan of most of the old towns in the State, about the centre of the city, and by the intersection of the two principal streets at its centre, is divided into four. On the part of the plaintiff, it is alleged that this is a public square and common highway, which has been in part and is about to be further obstructed by the foundation now dug by defendants therein, and the dwelling-house thereon intended to be

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erected. Whereby it is alleged, the citizens of this commonwealth in and upon and through said public square or common highway, could not, nor can now go, return, pass, and repass as they ought and were accustomed to do. The defendants, in their answer, admit the digging of the foundation, and the intended erection of a dwelling-house upon said square, but deny that it is a public square or common highway, as stated in the complainant's bill. They admit the title to be the same as alleged in the bill, but deny that the citizens of this commonwealth have any right whatever to go, return, pass, and repass in, upon and through the same, as claimed by the plaintiff's bill.

This brief reference to the bill and answer, is sufficient to indicate the first question which we are called upon to decide, viz.:

Is this square dedicated to public use, and to what extent?

The title to this square originates in the act of 11th Sept., 1787, by which the president and vice-president in council were empowered to cause to be laid out and surveyed in lots, a town opposite "Fort Pitt;" and by the 4th section of that act they were required to reserve for the *use of the State*, so much land as they should deem necessary for a court house, jail, and market, for places of public worship, and for burying the dead, and without said town, one hundred acres for a common of pasture, and the streets, lanes, and alleys of said town, and lots, shall be common highways for ever.

In pursuance of this act, the town of Allegheny was surveyed and laid out in lots numbering from one to one hundred and twenty-eight, bounded and intersected by streets, lanes, and alleys, and leaving in the centre a public square containing about eight acres, including the streets by which it is intersected.

A plat or draft of the said town was made and filed in the land-office of the commonwealth, exhibiting on its face the situation of the lots, streets and square, and all the lots exhibited on said plan have been sold by the commonwealth.

Thus the legal title rested until 13th April, 1840, when an act of Assembly was passed incorporating the city of Allegheny, by which the right of the commonwealth to all the lands within the limits of the said city, mentioned in the 4th section of the act of 1787, excepting such parts thereof as had been before appropriated by grant and authority of law, was granted and vested in said city of Allegheny, "for such public uses as are recited in said act, and such other public uses as the select and common councils may from time to time direct and ordain."

The act of Assembly under which this town (now city) was laid out, is in the nature of a contract, and to be construed in the same manner as the contract of any proprietor of a town with the public, on their purchasing lots within the proposed town. He designates certain portions of his plan as lots for sale, other portions as streets

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or highways, for the use of the public, and again, other portions as public squares; he may designate the purpose for which they shall be used, either as "public squares" generally, or as situations for cemeteries, churches, markets, and the like, and for whatever purpose they are designated and appropriated, both the proprietor and the public, or lot-holders, are bound by it. The proprietor cannot withdraw the property from the public; his contract binds him, and it must remain; nor, on the other hand, can the public change the use or purpose for which it was originally designed, or at least not so long as there is a single individual interested, dissenting from the proposed alteration. They accepted the grant for the purposes named, and are bound to adhere to it. See *Brown v. Manning*, 6 *Ohio Rep.* 129, where the cases upon this subject are collected; also 20 *Wend.*; 10 *Pet.* 710.

The difficulty in questions of this kind generally arises, where the appropriation of the square is made for some public purpose, and from the want of certainty it is difficult to learn the precise object. And this would appear to be the difficulty intended to be raised by the pleadings in this case.

So far as my information extends, the usual mode of dedicating streets, squares, &c. to the public, in this State, is simply to designate them on the plat or draft of the town as such, and if a square is intended, the purpose for which intended is there inserted; and this is a good and valid dedication, which will be binding on the parties concerned: 6 *Pet. Rep.*, Barclay & Howell; *id.* 431; 10 *Pet.* 712; 6 *Ohio* 130.

When the words "public square" are used on the draft, it would appear to be the most ample dedication to the public use, and places the square in the same situation and under the same regulations as the streets and lanes; indeed the square would be a public highway. But when it is designated for "county buildings," or other specific purpose, then the dedication must be considered with reference to the use for which it is designed, and must be so construed as to carry into effect the purpose intended: 6 *Pet.* 431; 6 *Ohio* 128.

Hence, in the case of the *Commonwealth v. Bowman*, 3 *Barr* 206, where I presume the dedication was in the most general form, the chief justice says:—"The public square is as much a highway as if it were a street, and neither the county nor the public can block it up, to the prejudice of the public or an individual." Yet he says: "To allow the county a reasonable accommodation for its court-house and offices in the front square of the county town, is one of the usages of our State, which has acquired the consistency of law. Such is the foundation of the county's right, and the extent of it: for it certainly has no inherent right to property which has been dedicated, not to its use, but to the use of all the citizens of the commonwealth;" and hence, in that case,

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an old court-house, which had been erected on the public square in 1800, was declared a public nuisance—a new one having been erected on a different part of the square, and the public records removed thereto.

This decision, as also the case of *Rung v. Shoenberger*, 2 *Watts* 23, rests solely on the fact that the dedication is in general terms, and that the squares were therefore common highways—but if the Bedford square had been dedicated to the use of the public buildings, would the old court-house have been a public nuisance, so long as one of the public officers continued to occupy it?

In the case before us, the dedication of this square is specifically stated, “for a court-house, jail, and market-house, for places of public worship, and for burying the dead.” After the passage of this act, the seat of justice was located at Pittsburgh, and hence the use of this square for the public buildings became impossible, and the act of 1840, incorporating the city of Allegheny, vests the right of the commonwealth to the said square in the said city, for such public uses as are recited in the act of 1787—and such other public uses as the select and common councils may direct and devise.

By this latter act, the dedication is not altered, or in any material matter changed; the same purposes are preserved, and the whole placed under the control of the councils, with power, since the public buildings cannot be there located, to designate such other public purposes as they may think right. To my mind, this is very different from a general dedication, and although it gives the public clear and undoubted right to have this property maintained as a public square for ever, yet it does not make it a highway or require that it should be kept open as such. In the case of the *Commonwealth v. Bowman*, the chief justice, while he asserts that that square was a public highway, says, “in which respect it differs from the public squares in Philadelphia, which are dedicated to health and recreation, and which are necessarily subject to regulation by the local authorities.” See also, 6 *Ohio Rep.* 129; *id.* 354.

By the plain terms of this act, this property is under the regulation of the local authorities; they may designate the public purposes to which it shall be applied, which purposes, however, must be entirely consistent with the act of 1787. But the purposes for which it is designated are, to a considerable extent, inconsistent with its being a public highway. A church, or cemetery, would not, probably, have their grounds open and unenclosed. The extent, then, to which this public square is dedicated to public use, is that designated in the 4th section of the act of 1787—for churches, cemeteries, &c. The act of 1840 does not, and cannot alter that act, but it does place it in the control of the city councils to designate the particular parts of the square which may be oc-

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cupied for a market-house, public buildings, churches, &c. It would also, no doubt, authorize the erection thereon of a town hall, or other public useful building, and would clearly enable the city to enclose and ornament the grounds for the health and recreation of the citizens; but beyond this they have no power to proceed.

2. The next question is—Have the city councils a right to sell and convey this property to individuals for private purposes?

The defendants, in their answer, allege that, for the purpose of redeeming certain scrip, or certificates of debt, issued by the said city, in payment of debts incurred by the same in the construction of the water-works of said city, an ordinance of said councils was passed, authorizing the city surveyor to lay off forty lots in the said square, agreeably to a certain plan determined upon; that the said lots were laid off and sold, and that defendant Grier became the purchaser of one of said lots, to wit, No. 7, for the consideration of \$2590; and that, in pursuance of an ordinance for that purpose, the mayor of the city had executed to the said Grier the deed of the corporation for the said lot, subject, also, to a ground-rent of \$20 per annum; and that in pursuance of this purchase and conveyance, he, the said Grier, with the other defendants, had entered upon the said lot No. 7, being part of the said square, and had dug the foundation complained of.

This, doubtless, is the best title the defendants are able to set up to the lot in question, and the best justification they are able to make of the charges now made against them; and nothing can be more clear than that it must eventually fail them. The pretence is, that because the proceeds of the sale of this square are applied to the public purpose of supplying the city with water, that, therefore, the city councils have designated this as the public purpose to which this square shall be applied. But this pretext is almost too barefaced to require a serious answer. It is not the proceeds of the square the uses of which the city councils are authorized to declare, but it is the property itself which is vested in them for public uses, and to no private use can they possibly apply it. Their power over it is restricted and circumscribed; it is not theirs to sell or to dispose of: they may control it within their right, and designate the use, but can go no further. What difference is it to what use the proceeds are applied? The property is not theirs for sale. The use to which it is to be applied is but a debt—the private debt of the corporation; and it is violating the first principle of a trust when the trustee attempts to apply the trust property to his own use or to make money out of it. The city authorities, therefore, had no right to sell this property, and the title of the purchasers derived from them is wholly defective, and can avail them nothing.

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3. The next question is—Is an injunction from this court the proper remedy.

The bill charges that the defendants are engaged in digging out the foundation for a private dwelling-house in the said square, and intend to erect a private dwelling-house thereon, "*whereby the said public square and common highway, &c. was and is still greatly obstructed, narrowed, and straightened,*" so that the citizens of this commonwealth, in and through said public square and common highway could not nor can now go, return, pass, and repass, as they were accustomed to do.

The defendants, by their answer, admit the digging of the foundation in said square, and their intention to erect a private dwelling-house thereon; but deny that said square was dedicated to public use as a public square or common highway, or that the citizens of this commonwealth have any right whatever to go, return, pass, or repass in, upon, or through the same, as in the bill set forth.

The relief prayed for is, that an injunction may issue to restrain the defendants from further excavation of the said square, and from the erection of the intended private dwelling-house thereon.

That the plaintiff's bill does not very accurately set forth the true cause of complaint, seems to be obvious at a glance. Great stress is laid upon the alleged fact that the citizens of this commonwealth could not pass and repass through this public square as they formerly had done, and still, of right, should be permitted to do. Whereas, in truth, they had not been accustomed so to use the square, as the answer alleges that it has been enclosed for two years past; and I have before shown that under the special dedication to the public, it could not be considered as a common public highway.

My first impression was, that the alleged deprivation of the right of way over this square was the *gravamen* of the plaintiff's bill, and as this was denied by the answer, and not sustained by the admitted facts, that the bill must be dismissed; but on further consideration, I perceive the bill alleges that by the said foundation and intended building, the said public square is greatly obstructed, narrowed, and straightened, and then, as an inference of law, alleges that the public are thereby deprived of the right of way.

The facts are admitted. Both the bill and answer agree that the public square will be obstructed by the erection of this dwelling, and, if so, this would be a clear violation of law, which will entitle the injured party to redress in some form of action; and it does not seem to be material whether all the supposed injuries resulting therefrom are truly stated or not. If the facts are admitted, the law is not doubtful; and when facts are admitted, the

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chancellor will draw the proper conclusion, even though denied by the answer. 1 *Baldwin's Rep.*

But notwithstanding this square is not a common public highway, in the ordinary meaning of that phrase, yet it is public property, and the title to it is vested in the corporation of the city for specific public purposes; they are the conservators of the title and soil for public use, and any attempt to appropriate it to private use is a violation of their duty, and any private erection upon it, even by authority of the city councils, is an offence against the public, and indictable as a common nuisance. See 3 *Eng. Com. L.* 453, *Rex v. Lord Grosvenor et al.*; 2 *Story's Eq.* 201-2; *Eden on Injunct.* 157-8; 5 *Porter's Rep.* 289.

On the ground, then, that the intended erection is such public nuisance, the Commonwealth, at the instance of the attorney general, asks that an injunction may be issued to restrain all further proceeding. Have we the authority to issue it, and is it the appropriate remedy?

The chancery jurisdiction of this court is of a limited character, and is regulated by the express provisions of our acts of Assembly.

The provision applicable to the case before us, is the 5th clause of the 13th section of the act of 16th June, 1836, by which the power of a court of chancery is given to this court, so far as it relates to the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals.

The jurisdiction of a court having full chancery powers, includes those cases which are contrary either to equity or law, or contrary both to law and equity. To give us jurisdiction, the act must be *contrary to law*, as well as prejudicial to the interests of the community, or the rights of individuals. 7 *W. & Ser.* 107. A public nuisance is certainly contrary to law, and this ingredient to give us jurisdiction is not wanting. The argument that the title to this public square is in the city of Allegheny, and that, therefore, the lot-holders and the public can have but an equity, is, I think, not tenable. The existence of a grantee is not essential to the dedication of a square to public use, and those who purchase lots according to a plan of a town containing such dedication, have a right to the streets, squares, &c., as an appurtenant to their lots. See 6 *Peters* 10.

Their right is, therefore, something more than a mere equity. But this question is scarcely involved in the case; the act complained of is a public nuisance, and, as such, most clearly illegal.

But it is contended, that although the matter complained of be a public nuisance, yet the plaintiff should have sought redress in a court of law, and that a chancellor will not interfere in a case of this kind, unless the existence of the nuisance is first established at law, and the threatened injury is irreparable.

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It has been frequently said, that a court of chancery rarely uses the process of injunction in cases of nuisance, unless where the right is first established by law, or the exigency of the case renders it indispensable; yet a slight examination will suffice to show that it is a jurisdiction which has been exercised from an early period, and that latterly the cases are by no means rare or uncertain. Thus, we find in *Bain and Boslar*, *Amb.* 158, and 3 *Atk.* 750, a motion was made for an injunction to stay the building of a house in which to inoculate for the small-pox. The chancellor intimated that the attorney general could, at his discretion, file an information in the case, of a public nuisance; but, as it had not been settled that the house in question would be a nuisance, the injunction was denied.

In *Attorney General v. Nichol*, 16 *Vesey* 338, an information was filed on the relation of the Scotch Hospital against Nichol, to enjoin the obstruction and darkening of the ancient lights of the hospital. The injunction having been granted, it was afterwards moved to dissolve it, but the chancellor thought the jurisdiction of equity could not be disputed, notwithstanding the common law remedy by indictment.

In *Attorney General v. Clem*, 18 *Vesey* 211, an injunction was applied for to restrain the defendant from manufacturing certain articles with unwholesome materials, and Lord ELDON admitted that he had jurisdiction of public nuisances upon highways, harbors and the public soil, yet refused the injunction until it could be ascertained by a trial at law that the subject of complaint was a nuisance.

So in *Cowder v. Tinckler*, 19 *Vesey* 617, the chancellor remarks: "If the subject were represented as a mere public nuisance, I could not interfere, as the attorney general is not a party; and if he were a party, the complaint must not be of a public nuisance merely, but which, being so in its nature, is attended with extreme probability of irreparable injury, nor could the court interfere until after a trial by law."

But though it was thus sometimes held, in the earlier cases, that an injunction could not be granted until after a trial, yet we find that in subsequent cases this condition is dispensed with, and, on a proper case being presented, the injunction is granted without difficulty.

Thus, in 1834, 3 *Myl. & K.* 123, 136, it is said the jurisdiction of the court over nuisance by injunction is of recent date, and has not, until recently, been much exercised, &c. In *Attorney General v. Clever*, Lord ELDON appeared to think that there was no instance of an injunction to restrain a nuisance without a trial, *but this cannot now be maintained, &c.*

And, indeed, if this method could yet be insisted upon in ordinary cases, still it could have no application to the case before us; for a

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trial at law necessarily implies that there are some facts disputed and to be tried. In this case, all the facts are admitted; there could be nothing for a jury to do, even if an issue were ordered: the question would be entirely legal, and for the determination of the court. It is presumed, also, that this remark, (that a trial of law is first necessary,) relates wholly to cases where a preliminary injunction is asked for, and can have no application to those, the merits of which are to be finally heard on bill and answer.

It is not necessary to multiply authorities upon this subject. The English cases will be found collected in *Drewry on Injunction* 240, 245, and 247. Our own books, also, have many cases upon the same subject.

In 12 *Peters' Rep.* 98, *City of Georgetown v. Alexandria Canal Company*, it is said, "Courts of equity, it is now settled, may take jurisdiction in cases of public nuisance, by an information filed by the attorney general."

The jurisdiction seems to have been acted upon with great caution and hesitancy, and the court refers to the chancellor's remarks in 18 *Vesey* 217. In 2 *John Ch.* 382, Chancellor KENT remarks, that "the equity jurisdiction in cases of public nuisance, in the only cases in which it has been exercised, that is, in cases of encroachment on the king's soil, had lain dormant for a century and a half; that is, from the time of Charles I. to A. D. 1795."

Yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be obtained at law. Whilst, therefore, it is admitted by all that it is confessedly one of delicacy, and accordingly the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief, before the tardiness of the law could reach it.

See also 6 *Johns. Rep.* 439; 3 *Porter's Ala. Rep.* 280; 10 *Peters* 662; 8 *Wend.* 99; 6 *Paige* 133, 563; 2 *Mylné & Craig* 123, 133; 4 *Paige* 570.

The principle, then, appears to be, that where the bill is filed by the attorney general, and the right is clear, and the threatened injury irreparable, an injunction will be awarded, although the right has not been established at law. And that this is in accordance with the 5th clause of the act of Assembly above referred to, giving equity jurisdiction to this court, is clearly stated in the case of *Hagner v. Heyberger*, 7 *W. & Ser.* 107, by Mr. Justice SERGEANT, who says, "the object of this clause was to provide adequate redress in cases where, although an action at law was maintainable, yet the injury might be irreparable, and it was necessary to justice to step in and prevent its being committed by a summary process. Thus, if there were sufficient ground to believe, in consequence of threats or otherwise, that an individual was about committing waste in timber, &c., or that a corporation was grossly abusing its privileges,

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or that a public officer was destroying or about to destroy public books, &c., or, in short, any act was doing, or likely to be done, for which damages could not, perhaps, compensate, and the legal redress might be too tardy and inefficient, which was in the nature of misfeasance, *nuisance*, waste, spoil, or destruction of property, and the act was contrary to law and injurious to the community or individuals, a summary remedy is given, by the strong arm of an injunction, to stop it, or prevent its being done."

What constitutes the irreparable damage for which the law gives no adequate redress, is also stated by the same learned judge in *Jordan v. The Philadelphia and W. Railroad Co.*, 3 *Whart.* 512. He says: "That the complainant may recover damages at law, is no answer to the application for an injunction against the *permanent appropriation of his property for the road under a claim of right*. This is deemed an irreparable injury, for which the law can give no adequate remedy, or none equal to that which is given in equity, and is an acknowledged ground for its interference. Trespass is destruction in the eye of equity. It prevents its repetition or continuance, protects the right, arrests the injury, and prevents the wrong. This is a more beneficial and complete remedy than the law can give, and therefore the proper one for a court of equity to administer."

How is it in this case? The attempt is to appropriate the property of the public permanently to private use. For this the public can recover no damage. They may undoubtedly proceed by indictment, and thus remove the obstruction, but in the mean time the community are deprived of the public property. For this tardy redress they are not required to wait. The redress now sought furnishes an immediate and effectual remedy, by at once arresting the injury and protecting the right. Furthermore, each individual lot-holder may maintain an action against the wrong doers; and this remedy now resorted to, and sustained, tends directly to arrest litigation—a result generally sufficient to induce the interposition of a chancellor.

From what has been said, we think it is sufficiently established—

1st. That the property in question is a public square, dedicated to specific public uses, as mentioned in the 4th section of the act of 1787; and although not a common public highway, yet the public have rights and interest therein of which they cannot be deprived.

2d. That although the legal title to said square is vested in the corporation of the city of Allegheny, they hold subject to the trusts in favor of the community, and are but the conservators of the title and soil, and have no power or authority to sell and convey the same for private purposes.

3d. That the erection of a private dwelling-house on said square is a public nuisance, and cannot be justified by any title or authority

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derived from the city corporation, but is indictable in a criminal court.

4th. That a court of chancery will grant an injunction to restrain and prevent a nuisance, when the facts are not doubtful, and the threatened injury irreparable; and that the chancery powers of this court authorize us to issue an injunction in a like case.

5th. That in the case before us, the facts are admitted by the pleading, and the damage is of that kind which the law calls irreparable. The plaintiff, therefore, is entitled to have the injury complained of restrained and prevented.

Let the decree, therefore, for a perpetual injunction, be entered accordingly.

H. HEPBURN.

H. M. Brackenridge and *S. Palmer*, were counsel for appellants. *Williams* and *Kuhn*, were concerned for respondents.

Sept. 24, 1850.—*PER CURIAM*.—Let the decree be affirmed on the opinion of the court below.

Lyon *versus* Daniels & Williams.

1. The court is to judge of evidence offered to prove the incompetency of a person offered as a witness, who is objected to as being a partner with the plaintiff.

2. The court have no right to direct a *non-suit*.

ERROR to the Common Pleas of *Clarion county*.

This was an action of assumpsit on book account, brought by John Lyon *vs.* Daniels & Williams, partners. The *narr.* contained the common counts, and defendants plead the general issue, and payment, &c.

Plaintiff called Jacob B. Lyon. He was objected to by defendants' counsel, who proposed to prove that he was a partner with John Lyon, in the contract in question—and that he ought to be joined as a plaintiff, &c.

To this offer of evidence, plaintiff's counsel objected, and the court overruled the objection.

Evidence was accordingly given as to Jacob B. Lyon being a partner; and the court, being of opinion that the evidence proved to the court that Jacob B. Lyon was a partner with John Lyon in the contracts in question, rejected the evidence of Jacob B. Lyon.

To this opinion, plaintiff's counsel excepted.

There being no evidence, the court ordered a *non-suit* to be entered, and discharged the jury. After the jury had left the box, the plaintiff's counsel objected to the order of the court, directing

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a *non-suit*, and requested that the verdict of the jury be taken. The court refused to recall the jury—and the plaintiff's counsel again except to the opinion of the court.

It was *inter alia*, assigned for error :

The court erred in receiving the testimony offered by the defendants, to prove the witness, Jacob B. Lyon, to be a partner with the plaintiff. The case being at issue on the merits, the testimony should have been submitted to the jury.

The court erred in excluding Jacob B. Lyon as a witness. His testimony should have been received, and its credibility left with the jury.

The court erred in directing a non-suit to be entered against the consent of the plaintiff.

The case was argued by *Lathy*, for plaintiff in error.—As to the last error, reference was made to 4 *Bin.* 34; 1 *Ser. & R.* 360; 2 *Yeates* 133; 13 *Johns. Rep.* 334; 6 *Pick.* 117; 14 *Mass.* 154.

McCalmont, for defendant in error.

PER CURIAM.—There was evidence that John and Jacob B. Lyon were partners; and it was for the judge to decide it; but he had no power to direct a non-suit. The plaintiff had a right to go to the jury, if for no other purpose, to have the benefit, on error, of his bills of exceptions to evidence, which he could not have had, if he had submitted to a non-suit. He may perhaps make a better case on another trial.

Judgment reversed and *venire de novo* awarded.

Richardson et al. *versus* Clarion County.

The respective counties are bound to furnish fuel to keep prisoners comfortable in jail; and if they do not do so, and the sheriff furnishes it, the county commissioners are bound to reimburse him.

ERROR to the Common Pleas of *Clarion county*.

This case was an issue directed by the court, on appeal from the report of auditors of Clarion county. The matter to be tried was the legality of an order, drawn by the late commissioners of Clarion county, on the treasurer, in favor of James Hasson, late sheriff of that county, for \$200; and the questions tried were, whether Hasson was entitled to be paid for office-rent, and for fuel for the jail.

In the issue, Clarion county was plaintiff, and Richardson,

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executor of Richardson, and others, late commissioners, were defendants.

BUFFINGTON, J., charged that the item of office-rent ought not to be allowed.

As to the claim for fuel, he charged, as stated in the opinion of COULTER, J., concluding, "We, therefore, think that this item ought to be rejected, and a verdict rendered against the defendants." Verdict was rendered for plaintiff.

Assignment of Errors:

1. The court erred in charging the jury that the issue agreed upon, to try the legality of the order issued by defendants, whilst commissioners of Clarion county, on the treasurer, for certain claims preferred by James Hasson, sheriff, against the county, dispensed with the necessity of producing and giving in evidence the report of the auditors.

2. The commissioners having only allowed two hundred dollars of the bill preferred by James Hasson against the county, the court should have instructed the jury that the commissioners having passed upon the bill and allowed a part of it, the auditors had no power to charge the commissioners with any part of that sum, unless there was evidence of corruption on the part of the commissioners.

3. The court erred in charging the jury that the sheriff was not entitled to compensation for fuel for the jail.

4. The court erred in charging the jury that the sheriff was not entitled to pay for office-rent, it appearing from the evidence that the sheriff had rented a house in which he kept his office, and that the county had no office erected for the sheriff.

The case was argued by *Lathy*, for plaintiffs in error.
Sutton, for defendant.

The opinion of the court was delivered by

COULTER, J.—In the main, the charge of the court below to the jury, is well enough; but there is one particular in which it is signally and emphatically erroneous. It was an appeal from the report of auditors of the county, to the Court of Common Pleas, in relation to certain claims preferred by Hasson, who was sheriff of the county, a great part of which had been allowed by the commissioners and rejected by the auditors. When the appeal was tried, the court below instructed the jury, among other things, as follows: "The remaining charge is for fuel. On this subject, also, the evidence is loose and unsatisfactory; the amount furnished, the price paid, and whether used in his family, (the sheriff's,) or in the prison, is left in doubt. But be that as it may, we think he is not entitled to recover in any event. The act of Assembly requires

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the Court of Quarter Sessions to fix a daily allowance for the board of prisoners, and with that amount the sheriff or jailer must be satisfied. And if it was the intention of the legislature that the sheriff should be allowed for fuel, in addition to boarding, they would have said so." That, however, I think, is a *non sequitur*. Some things are so deeply implanted in our nature, so thoroughly interwoven with the social duties and affections, and so sanctioned by feeling and humanity, that it is not necessary that the legislature should command them, in order to make them obligatory and lawful. And among these is the duty of preventing the captive and prisoner from freezing with cold. Is it becoming a great county, magnanimous in its feelings, to let its captive depend on the bounty and humanity of the jailer, hardened, perhaps, by his occupation, and steeled by his want of reward. Does it become a great and christian State to tolerate such a state of things? It would be a burning shame on the cheek of every citizen, if it were so. But happily, so far as my experience goes, I can say that the practice is not so in the State; and I believe all my brethren concur in their experience on the subject. It is the practice for the county to furnish fuel to keep the prisoners comfortable. The same rule adopted by the court below, would compel the prisoner to sleep in a cold night without fire, on the plank, with no bed under him nor blankets over him, because the legislature have not commanded these to be furnished any more than they have fuel. But the Almighty has commanded it; social duty commands it; religion and humanity commands it, and therefore it ought to be observed. We think the county is bound to furnish fuel sufficient to keep prisoners comfortable in the jail, and that so far as the sheriff furnished fuel for that purpose, the commissioners are bound to reimburse him. A great progress has been made in the treatment of prisoners all the world over, even those who are convicts and sentenced for crime. In the act of 1705, which is yet suffered to remain on the statute book, prisoners are to be allowed the privilege of finding a bed for themselves, and food and other necessities; and for that the public allowance is two pence a day, and no more, which would not buy bread and water. But these shrivelled and parsimonious feelings have long passed away, and mercy and humanity taken their place in public enactments and public law.

We think the court fell into error in instructing the jury that the sheriff was not entitled to an allowance for fuel furnished to the jail.

Judgment reversed and *venire de novo* awarded.

Lantz *versus* Frey and Wife.

A female, living with her stepfather, whilst in her minority, is not entitled, after arriving at full age, to recover from him wages for services rendered, without proof of a contract, express or implied. Such a contract will not be implied, as to one standing in *loco parentis*, merely from the fact of such service having been thus rendered.

ERROR to the Common Pleas of *Erie county*.

This was an action of assumpsit, brought by Frey and his wife, against John Lantz, the plaintiff in error, to recover upon an implied assumpsit for the services of the wife of defendant in error, under the following circumstances: The said Lantz married a widow, the mother of the wife of said Frey. The child at the time of the marriage was eight or nine years old; she went with her mother after the marriage, and lived in the family of Lantz, the stepfather, as one of his own children, without any contract whatever. On the part of Lantz, it was alleged that she was fed, clothed, and schooled, the same as his own child, and she worked in the family in the same manner, until she was between eighteen and nineteen years old, when she married Jacob Frey. Soon after her marriage, she and her husband brought this action to recover wages for the time she lived in the family of her stepfather. The court charged the jury that the plaintiffs below were entitled to recover upon the *quantum meruit*; of which charge and instruction of the court, the plaintiff in error complains.

There was evidence on part of plaintiffs, that the child lived with its uncle until its mother married Lantz; that Lantz said, if she would come and live with him, *he would use her as one of his own children*. That she worked faithfully—was poorly clad—she was not sent much to school; that she worked in the family, like the other children.

On the part of defendant, that she was sick considerable; that she was clothed as other girls in similar circumstances; that she can read.

CHURCH, J., charged:—If a stepfather requests his wife's daughter, who *has already a suitable home provided for her with her relatives*, to come and live with him, and she consents and does so, and he furnishes her with work for him, which she performs, it occurs to the court that the law implies a promise on his part to pay a reasonable compensation in the way of maintenance and education, clothing, &c., according to the circumstances and situation in life of the parties; and if he fails to do this, an action lies to secure such reasonable compensation. This is certainly but justice, and, we think, the law too.

Whether the evidence makes out these requisitions, and thus

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sustains a cause of action in this case, upon these legal principles, is for you, and you alone. Are they such?

To which charge, defendant excepted.

Verdict for plaintiffs, for \$55.

Error was assigned to the charge, the third assignment being, that the court ought to have charged the jury, that from the facts disclosed in evidence, no promise by defendant to pay plaintiff's wife wages, could be inferred.

The case was argued by *Marshall*, with whom was *Galbraith*.—2 *Kent's Com.* 192; 8 *Watts* 366; 8 *Barr* 309; 5 *W. & Ser.* 513, were referred to.

Babbit, for defendants.

The opinion of the court was delivered, September 30th, by *BELL, J.*—The plaintiffs' declaration is upon a contract. In order to recover, they must, consequently, prove an express contract, or show such circumstances as will raise an implied one. The first is not pretended, and we think the evidence discloses facts which preclude the last.

The defendant intermarried with the female plaintiff's mother, after which the child went to reside in the family of her stepfather, until she herself married. By this arrangement, defendant stood in *loco parentis*, and was responsible for the maintenance and education of the child, so long as she continued to reside with him: 2 *Kent's Com.* 192; *Stone v. Carr*, 3 *Esp. Cas.* 1; *Cooper v. Martin*, 4 *East* 76. Now nothing is better settled than that a child is not entitled to demand wages from a parent, for services rendered after attaining full age, in the absence of express contract, or something equivalent to it: *Walker's Estate*, 3 *Rawle* 243; *Candor v. Candor*, 5 *W. & Ser.* 513; a principle which embraces also the liabilities of persons whom the law regards as standing in that relation, although connected by no ties of blood. It was upon this ground that *De-france v. Austin*, 9 *Barr* 309, was decided, and a kindred principle ruled the cases of *Little v. Dawson*, 4 *Dal.* 100, and *Swires v. Parsons*, 5 *W. & Ser.* 357. In the first of these cases, a minor nephew was not permitted to recover for services rendered to an uncle, who had received him as one of his own family; in the second, there was a similar denial, where the services were rendered in expectation of a legacy; and in the last, a woman who had lived in a state of concubinage, was unsuccessful in her claim to be remunerated from the estate of the man towards whom she had discharged the duties of a wife and housekeeper. Each of these determinations is based on the irresistible presumption, springing from the relation of the parties, that neither of them contemplated remuneration by the payment of wages, and in the impolicy of

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sanctioning claims not dreamed of at the time of the transaction. This impolicy is peculiarly apparent where the relation of adult protection and infant dependence exists; the latter expecting naught beyond shelter, food, clothing, and education, and the former enjoying, as of course, whatever services the weaker party is able to render. Such was the relative position of these parties; the girl living in the house of her mother's husband as a member of the family, and the husband regarding her as the child of his wife, and not as a menial or hireling.

The general law springing from this condition of things, as I have stated it, was recognized by the court below, in the answer returned to the defendant's point submitted. But the learned president, moved by the imputed neglect of the stepfather in the discharge of the duty he owed to the child, and by the severity of the labor to which he appears, in some measure, to have devoted her, thought the plaintiff might be entitled to recover remuneration for the defendant's remissness and harshness. In indulging this impression, however, the court forgot the action was to recover for services rendered, and not for any supposed neglect of legal duty on the part of the defendant. Whether such an action will lie in a proper case, I will not take it upon me to say, for the simple reason that no such claim is set up here. But I may say that any device, designed to enable the child of a widowed mother to assume towards a second husband the attitude of creditor for services rendered while living in the family as a member of it, ought to be discouraged, because of the results it must inevitably produce. Men will decline to extend their protection and aid to orphan children, at the hazard of being exposed to suits at law on the suggestion of ill-natured neighbors or exacting friends, that the stepchild has been harshly treated or inadequately provided for. Every one of the least experience knows how difficult at best it is to escape such imputations; and should we permit cynicism to be stimulated by the chances of encouraged litigation, it will be difficult to foresee the extent of evil which may be produced. That one who assumes the office of parent may so grossly violate the duties appertaining to it, as to subject himself to answer at the suit of the injured party, is possible; though I am unaware of any example of such an action. Certainly it will not lie against a natural parent, and many reasons might be urged for extending the same immunity to him whom the law, for many purposes, regards as a father's substitute. But should these be deemed insufficient for his entire protection, it is not to be doubted that to justify legal interference, a very gross case should be clearly established by proof. These speculations are, however, aside from the question presented in this action, which has already been answered adversely to the pretensions of the plaintiffs below.

Judgment reversed and a *venire de novo* awarded.

Kelso versus Kelly.

1. By the act of 14th April, 1840, relative to unseated lands, the owner of a mortgage upon a lot afterwards sold for unpaid taxes, is entitled to the surplus remaining after payment of the taxes and costs; and a proceeding in foreign attachment after the sale, against the last owner, in which the obligor of the bond for the surplus was made garnishee, and the bond attached, will not entitle the attaching creditor to the surplus, in preference to the mortgage creditor.

2. The purchaser, who was garnishee, had a right to defend for the mortgage creditor.

ERROR to the Common Pleas of *Erie county*.

Schwarze was the last owner of a water lot, No. 82, in Erie, he having purchased it in 1836, from the burgess and town council of the borough of Erie. They gave him a deed, and took his bond and mortgage on the lot to secure the balance of the purchase money. This mortgage continued a lien on the lot till the treasurer's sale. The lot was sold in 1840, by the treasurer, to Kelly, for unpaid taxes, and there was a surplus of the purchase money remaining after payment of the taxes. The surplus amounted to \$243.34½. Kelly, the purchaser, executed a bond for the surplus to the treasurer, for the use of the last owner of the lot.

Kelso, in February, 1849, obtained a judgment against Schwarze for \$790.09, in a proceeding in foreign attachment. Kelly was summoned as garnishee, and the bond for the surplus was attached.

The question involved was, whether the borough, by virtue of the lien of the mortgage, had an exclusive right, under the act of April 14, 1840, to the proceeds of the bond for the surplus. The plaintiff in error contended that under said act, the borough, as a lien creditor, has no other or greater right than the last owner of said lot, and that the right of Schwarze having been divested by the aforesaid attachment, the right of the lien creditor, the borough, was also divested.

For the act of April 14, 1840, see *Dunlop's Dig.* 910; *Pamphlet Laws* 349.

CHURCH, J., charged against the claim of Kelso; and error was assigned, on his part, to the charge.

The case was argued by *Marshall*, for Kelso; and by *Babbitt*, for Kelly.

The opinion of the court was delivered by

COULTER, J.—By the 6th section of the act of 14th April, 1840, it is provided, that any person who has a lien on lands, or any other equitable interest, which may be sold for taxes, may redeem the

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same within the time limited by law for that purpose; and if that time is allowed to pass before that is effected, it shall, nevertheless, be lawful for such person to proceed in the manner prescribed by law, to collect the amount of the surplus bond given by the purchaser, as fully and effectually as the last owner, for whose benefit the surplus bond is given, could do; but that the money thus collected shall be paid into court, and distributed, as money is distributed which is produced by the sale of land which is encumbered, by the sheriff: so that the surplus bond is, in substance and effect, substituted for the land, so far as creditors are concerned.

The borough of Erie was a lien creditor of Schwarze, the last owner, of the most meritorious kind, that is, a creditor for the balance of purchase-money on the land sold; and was, of course, entitled to the full benefit of the 6th section of the act of 14th April, 1840. But Kelso, not a lien creditor, issues a foreign attachment against Schwarze, and attaches the surplus bond in the hands of Kelly, the purchaser and obligor in the bond. Thus, seeking to withdraw that bond from within the operation of the act of 1840, and to apply the proceeds to his own debt not secured by lien, in exclusion of the lien creditors.

It is very clear, that if he should succeed in this, he would defeat the 6th section of the act of 1840, and the policy of the law, which substituted the bond in place of the land, as to lien creditors. But that he cannot do. The court is bound to carry out the law, especially as it is just and right, and consistent with sound policy.

Kelly, the garnishee, had a right to defend for the borough of Erie; indeed, he was bound, in good faith, to do so; as, if he had permitted a judgment to go against him in this proceeding, without defence, it would not have availed him in a suit on the bond by the borough of Erie against him.

Judgment affirmed.

GIBSON, C. J., being related to one of the parties, did not sit during the argument of this case.

Reynolds *versus* Richards.

1. The mere fact of evidence being *in writing* does not entitle the court to interpret its meaning conclusively. Where it is unaffected by parol evidence, it is within the province of the court to interpret it; but where the question is not on the interpretation of the writing, but on its effect as evidence of a collateral fact, it is to be submitted to the jury.

2. Where an article of agreement was made for the sale of land, part of which to be paid in cash and part in work, and a note was given for the lat-

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ter amount, on the payment of which the title to be made; an order by the vendor to execute the deed, is not so conclusive as to the payment of the note, as to raise a legal presumption of its payment; it is presumptive evidence of payment, which is to be submitted to the jury.

3. A note which, on its face, points to the terms of another instrument, by which it was payable in work, is not a *negotiable note*, and a suit upon it must be in the name of the payee. If it has been transferred, and the name of the transferee is endorsed on it, in blank, the note being sued in the name of the payee, a recovery by him and payment by the drawer, will protect the latter against any further demand on the note.

ERROR to the Common Pleas of *Clarion county*.

This was an action by Reynolds, for use, (without stating the person,) against Richards, to recover the amount of a note, as follows:

Twelve months after date, I promise to pay to the order of Alexander Reynolds, fifty dollars, with interest from the date hereof, and without stay of execution, after due, for consideration of the carpenter work in our article of agreement, for in-lot, No. 126, Nov. 3d, 1841.

Signed,

ABRAHAM RICHARDS.

Test: A. JAMISON.

The *narr.* contained a special count on a promissory note, and common counts. Plea, payment, &c. Reynolds had an article of agreement with the commissioners of Clarion county, for two in-lots. He agreed to sell to Richards one of the lots, and Richards agreed to pay him \$100, viz., \$50 in hand, and \$50 in carpenter work, at cash prices, to be paid when said Reynolds demands it. Said Reynolds is to make the title as soon as the work is done.

Reynolds, on the 1st day of June, 1842, transferred the said note, by endorsement on it, without recourse, to Alexander Jamison; and it also appeared that Alexander Jamison endorsed the note in blank.

For further facts, see charge of BUFFINGTON, J.:—In the present case, the plaintiff seeks to recover on a note dated on the 3d Nov., 1841, calling for \$50 in carpenter work. Richards bought lot No. 126 from plaintiff, and agreed to pay him \$100; \$50 of which was to be paid in hand, and the balance, by the article, was to be paid in carpenter work, at cash prices, when demanded, and the title to be made as soon as the work was done. A receipt is endorsed on the article for the money, and also for the note now in suit, on the payment of which, plaintiff acknowledges he is to make over the commissioners' article. On the 11th of June, 1845, plaintiff endorses on the article of agreement, an unconditional request or order to the commissioners to make the deed to Richards. The state of facts arising from the written papers, raises a legal presumption that the amount of the note had been paid, according to its terms, at the time the order was given. But to

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rebut this presumption, the plaintiff has read in evidence the assignment of the note to Alex. Jamison, dated the 1st June, 1842; and it further appears, that the said Jamison endorsed the note in blank; when, and to whom, does not appear. The present suit is brought in the name of Reynolds alone, without being marked to the use of any one. We, therefore, treat the endorsement of Jamison as passing the interest out of him; and that, together with the order to the commissioners, and the fact that the suit is brought in the name of Reynolds alone, as passing the interest back to him. The whole case being in writing, it becomes the duty of the court to decide it; and we have come to the conclusion that the whole of the written papers raises a legal presumption *that the note was paid*; and that the verdict should be for the defendant.

To which opinion of the court the plaintiff's counsel excepted.

Verdict for defendant.

It was assigned for error:

1st. That the court erred in saying to the jury that the suit was brought in the name of Reynolds alone, when the record shows it was brought in the name of *Alexander Reynolds*, for use: *Armstrong v. The City of Lancaster*, 5 *Watts* 68.

2d. The court erred in treating the endorsement of Jamison, together with the order to the commissioners, and the fact that the suit was brought in the name of Reynolds alone, as passing the interest in the note back to Reynolds.

3d. The court erred in attaching any importance to the blank endorsement of Alexander Jamison, as the note was not negotiable, and the interest of Jamison would not be passed by a blank endorsement; and also, there was no evidence that Reynolds ever had the possession of the note since he assigned it to Alexander Jamison, on the 1st day of June, 1842.

4th. The court erred in instructing the jury that, from the whole of the written papers given in evidence, there was a legal presumption that the note was paid.

The case was argued by *Corbit*, for plaintiff in error; and by *Sutton*, for defendant.

The opinion of the court was delivered by

GIBSON, C. J.—The question of payment ought not to have been determined by the court as a question of law. In consideration of \$100 to be paid, the half in hand and the half in carpenter work, Reynolds agreed to sell to Richards his equitable title to a lot of ground bought from county commissioners; and to procure the title to be made to him when the work should be done. The hand-money was paid, and Richards subsequently gave, for the residue, the promissory note on which action was brought. Years

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afterwards, Reynolds endorsed on the article a direction to convey the title; which was done. Now, though this direction and the deed which followed it were strong evidence of payment, it was open to contradiction, and ought to have been submitted to the jury as such. It followed not that because the evidence was written, its effect was to be determined by the court. To interpret the meaning of a writing unaffected by parol evidence, is doubtless the province of the judge; but the question below was not on the interpretation of the written direction, but on its effect as evidence of a collateral fact. It was certainly presumptive evidence of payment; but the conclusion from it was not to be drawn by the court.

Presumptions strictly legal shut out further investigation, and exclude the functions of a jury. Presumptions strictly of fact, having no power to produce an assumed belief, or any belief beyond the natural and unassisted effect of the circumstances, exclude the function of the court. The intermediate class, called presumptions of law and fact, might more properly be called legal presumptions of fact, because the law presumes the fact in giving them an artificial effect, beyond the actual weight of the evidence; but though the law dictates the conclusion, it must be drawn by the jury under the direction of the court, and not by the court alone: *Stark. Ev. pl. 4*, page 1243. They give to particular circumstances the force of *prima facie* evidence, which stands for proof till it is rebutted. Thus it is said by Mr. *Starkie*, that a jury is to be required, or at least *advised* to infer a grant of an incorporeal hereditament from an unanswered adverse possession of twenty years. In a parallel case I would direct them, that as the law infers the fact, they are bound to infer it also, even at the expense of their actual belief; but I would at the same time instruct them that it is their province to pronounce it, not mine.

Of this class is every artificial but inconclusive presumption. The instance most analogous to the present, is the case of a receipt for rent, which is *prima facie* evidence of payment of previous arrears. In our case, the law raised a presumption that if the purchase-money had not been paid pursuant to the terms of the bargain, the direction to make the conveyance would not have been given; yet, though the result would doubtless have been the same, the conclusion did not lie entirely with the court. It could no more have been drawn from the circumstances, if found in a special verdict, than a legal conclusion of conversion in trover could be drawn from a finding of demand and refusal: in the one case and the other, the circumstances are but evidence of the fact, and not the fact itself.

Nor was the assignment of the note a bar to the action. It was not negotiable, for there was enough on the face of it to point to the terms of the article by which it was payable in carpenter work,

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and the suit could consequently be maintained only in the name and on the legal title of the payee, who, in contemplation of law, was still the holder. It was immaterial to the defendant whether he was actually so or not, as payment on the foot of an execution would be a valid discharge. He would have no concern with the ownership of the money after it had left his hand; for he could be no further called upon. Even had the note been negotiable, it would be enough that the plaintiff had obtained it again by the blank endorsement of the person to whom he had passed it: The only ground of defence is the presumption of payment.

Judgment reversed and *venire de novo* awarded.

McCracken's Heirs *versus* Graham and Jackson.

As to the form of a certificate of a balance due by administrators to be filed as a lien or notice of the balance due, under the 29th section of the act of 29th March, 1832, relating to Orphans' Courts: see the certificate in this case: the act requires only an abstract, or a condensation of the substance of the account.

ERROR to the Common Pleas of *Erie county*.

The widow and heirs of Robert McCracken, deceased, plaintiffs in error, v. Carson Graham and Smith Jackson.	}	In the Supreme Court, No. 7, September term, 1850.
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Writ of error by the plaintiffs, who were plaintiffs below, to review the judgment of the Court of Common Pleas of Erie county.

The defendants were administrators of the estate of Robert McCracken, deceased; and, on the 11th day of Aug., A. D. 1848, settled their final administration account in the Orphans' Court of Erie county, showing a balance in their hands of \$1458. And on the same day the clerk of the Orphans' Court certified the balance due from the accountants to the Court of Common Pleas, which was on the same day filed and docketed by the prothonotary in the said Court of Common Pleas, as a lien on the real estate of said accountants. Afterwards judgments were recovered against Carson Graham, Esq., which became liens on his real estate. On the 30th day of April, 1849, a rule was granted upon the application of subsequent judgment creditors of Mr. Graham, to show cause why the said judgment or lien in this case should not be set aside; which rule, on the 29th day of Oct. 1849, was made absolute; which judgment of the court below is the matter complained of by the plaintiffs in error.

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DOCKET ENTRIES.

<p>The widow, heirs, and estate of Robert McCracken, deceased, v. Carson Graham and Smith Jackson, administrators of the estate of Robert McCracken, deceased.</p>	}	<p>Certificate of balance due by administrators (defendants) to plaintiffs as per their adminis- tration account, filed and con- firmed in the Orphans' Court.</p>
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Certificate Orphans' Court. Filed and entered, Aug. 11th,
1848. Debt, \$1458.38

Int. Aug. 7th, 1848, tax and pro. fees, 1.87

April 30th, 1849, on motion of attorneys for judgment creditors
of Carson Graham, rule to show cause why judgment should not
be set aside, granted.

And now, Oct. 29th, 1849, rule made absolute.

CERTIFICATE.

Erie county, ss. I Wilson King, clerk of the Orphans' Court,
in and for the county of Erie, do certify that by the account
[L. S.] of Carson Graham, and Smith Jackson, administrators of
Robert McCracken, deceased, late of the borough of Erie,
which was finally settled and confirmed, Aug. 11th, A. D. 1848,
by the court aforesaid, there appears to be due by and in hands
of the said Carson Graham and Smith Jackson, administrators
aforesaid of the estate of said Robert McCracken, deceased, the
sum of \$1458.38, out of which sum the court have directed the
expenses of auditing said account, amounting to the sum of \$21,
to be paid.

In testimony whereof, I have hereunto set my hand, and
affixed the seal of said court, at Erie, Aug. 11th, 1848.

WILSON KING,
Clerk of the Orphans' Court.

It was assigned for error, that the court erred in making the
rule absolute, and striking off the plaintiff's lien.

The case was argued by *Marshall*, for plaintiffs in error; and by
Galbraith, contra.

Oct. 1.—*PER CURIAM*.—The statute creates the lien, the tran-
script gives notice of it; and when that is accomplished, all is
accomplished. No particular form is prescribed, and the descrip-
tive words "transcript or extract," used disjunctively, to make the
one an equivalent for the other, are not very precise. A transcript
would be a copy; but of what? Surely not of the whole adminis-
tration account; and a transcript of the figures at the foot of it
would be insensible. So would be an extract of a part of it. The
legislature evidently meant an abstract, or, in other words, a con-

[McCracken's Heirs v. Graham and Jackson.]

densation of the substance; and it would have been difficult to find any other form of it better adapted to the purpose, than the one used in this instance. It embodies the substance so clearly, that a purchaser could not be misled by it. Similar certificates are employed in almost every instance; and it would do infinite mischief if a lien founded on one of them were to be avoided.

Order of the Common Pleas reversed and rule discharged.

Dewey *versus* Erie Borough.

Where a clock is sold to be paid for at the expiration of a year, on condition that it performs to the satisfaction of the vendees, the vendees to be relieved must return the clock, or offer to return it, with notice of their dissent, within a reasonable time; and if foreign residence in the *vendor* be alleged by them, the vendees must prove it; if he lives in a sister State, they must prove that they had attempted to reach him through the post-office; and if his residence was *unknown*, they must show that they had endeavored to discover it. Failing in these respects, the contract to pay will be absolute.

ERROR to the Common Pleas of *Erie county*.

This was an action in the name of Hiram T. Dewey, for the use of Moses Koch, plaintiffs in error, *vs.* The Burgess and Town Council of the Borough of Erie, in the county of Erie.

This was an action of debt on a promissory note under the corporate seal of the borough of Erie, and was in part consideration for a town-clock purchased by defendants, from Hiram T. Dewey, for \$400, two hundred of which were paid; and this note for \$100, and another note for the same sum, and still unpaid, were given for the balance of the purchase. This note sued was assigned by Dewey, soon after its date, to Moses Koch, and is as follows:

COPY OF NOTE.

\$100.00.

One year from date, with interest, the Burgess and Town Council of the Borough of Erie, in the county of Erie, promise to pay Hiram T. Dewey, at the office of the treasurer of said borough, the sum of one hundred dollars, being in part payment for the town-clock bought of him by resolution of the Town Council of date July 30th, 1845, conditioned, however, that the said clock performs to the satisfaction of the Burgess and Town Council, or their successors.

In witness whereof, I have hereunto caused to be affixed the seal of the said corporation, this fifteenth day of August, 1845.

[L. s.]

CHARLES W. KELSE, *Burgess*.

Attest,

G. J. BALL, *Town Clerk*.

[Dewey v. Erie Borough.]

On the trial, it was shown that the clock was put up at the time the note was given, and that it remained in the use and possession of the defendants up to the time of suit brought, and also that it was in the possession of the defendants at the time of trial. It also appeared that the defendants had never offered to give up or return the clock to plaintiff.

The court allowed defendants to give evidence of the contract forming the consideration of the note, upon the same principle as in case of a failure of consideration, to which plaintiff excepted. Evidence was given that Dewey guaranteed that the clock should run; that Dewey went away after the clock was put up. No notice of dissatisfaction was given to Dewey. Defects in the clock were proved.

On the part of the plaintiff, it was contended that, as defendants retained possession of the clock, and used it more or less up to the time the suit was brought, and had never offered to give up or return the clock, the plaintiff was entitled to recover.

On the part of the defendants, a point was propounded:

If the jury believe, from the evidence, that the clock was in any material particular defective, that it did not keep correct time, that it did not strike the time correctly, or that the hands designed to indicate the time, or any of them, on its several dials or faces, did not at the same period indicate the same time, and the defendants, for these reasons, or any other, were dissatisfied with its performance, then the verdict of the jury should be for the defendants.

The court, CHURCH, J., charged, *inter alia*:—It is a well-settled rule of law, that when, by the terms of a contract, the performance of the stipulations therein on part of plaintiff forms the consideration and condition for the performance on part of defendant, it may be considered as precedent to the right to recover; and unless the plaintiff shows a substantial compliance with such precedent condition, or some act or course of conduct on part of defendants showing a waiver of it, he must fail. A slight and immaterial failure or omission on part of plaintiff will not affect him. It must be in substance and material; something which in its character and extent goes to the very essence of the consideration as an entirety. This note is only payable on condition the clock performs to the satisfaction of defendants—not an arbitrary satisfaction—they are bound to be satisfied, and may be deemed to be so unless there be some substantial and just cause for dissatisfaction. If, then, you find that the clock was materially defective, and did not keep correct, regular time, nor strike correctly, regularly, and the hands on the dials did not indicate uniform similar time, these would justify the defendants in their dissatisfaction, and form a defence here. And if the plaintiff was to put the clock up and make it so perform, or else not have payment on the note as expressed in the note, the fact that the clock has remained where plaintiff

[Dewey v. Erie Borough.]

left it until the suit brought, makes no difference. Defendants were not bound to return it unless an opportunity has been offered; especially if the residence of the plaintiff is at a distance, and unknown to defendants. They do not seek to recover, but to prevent a recovery against them. If there was only a slight defect, make such deduction as is right and just under the evidence, and as will make it good as stipulated for.

To which plaintiff excepts generally.

Verdict was rendered for defendants.

It was assigned for error:

1. The court erred in their charge, in substantially deciding the defendant's point in the affirmative.
2. In laying down the law as applicable to this case.

The case was argued by *Lane* and *Galbraith*, for plaintiff in error.—There was cited 3 *Watts* 331; *Ligget v. Smith*, 6 *Whar.* 299; 4 *Barr* 168.

Babbitt, contra.

The opinion of the court was delivered by

GIBSON, C. J.—The transaction before us is analagous to a transaction between merchants, called "sale or return;" by the terms of which, the party to whom the goods are sent, is bound to return them with notice of his dissent within a reasonable time, or keep them on the terms of the offer; or it is perhaps strictly a conditional sale, of which the same principle is an element. Such was the sale in *Humphreys v. Carvalho*, 16 *East* 45, and many other cases, which it is unnecessary to quote, the principle being settled; and the business is to apply it to the evidence. The defendant promised to pay the price at the expiration of a year, on condition that the clock should perform to the satisfaction of the burgess and town council, or their successors. The corporation, consequently, had a year to signify its determination. This is not a case of warranty, and it is immaterial whether the clock performed well or ill; it was the business of the burgess and council to judge of that, and keep the clock or return it, at the proper time. It was put up, and the plaintiff, who was probably a clock pedlar, went away. The burgess and council were ultimately dissatisfied with it, and after two years, took it down, but did not offer to return it, or attempt to give notice of their dissatisfaction. Three witnesses testified that they had not heard of the plaintiff's whereabouts, then or since; the other witnesses were silent in respect to it. It is clear and indisputable law, that the burgess and council were bound to give notice of their dissatisfaction, with an offer to return the clock, or attempt to do it. They were not bound to follow the

[Dewey v. Erie Borough.]

plaintiff to a foreign country; but if foreign residence had been alleged, they would have been bound to prove it. If his residence was unknown, they were bound to prove that they had attempted to discover it. If it was known to be in a sister State, they were bound to prove that they had attempted to reach him through the post-office. But there was not a spark of evidence to prove that any effort had been made whatever: and the contract had become absolute. The cause, therefore, was not put on its proper point.

Judgment reversed and a *venire de novo* awarded.

Kidder et al. *versus* Lovell.

In an action by a husband for a conspiracy to induce his wife to leave him, the declarations of the wife, made on the day previous to her departure, of former causes of complaint against her husband, are not evidence on the part of defendants, as *res gestæ*.

ERROR to the Common Pleas of Warren county.

This was an action of trespass on the case, by Lovell against Kidder and others, for a conspiracy to induce the wife of Lovell to desert the residence and society of her husband, without any just cause.

On the trial, before CHURCH, J., the defendants, in support of the issue on their part, offered to prove, by the declarations of the plaintiff's wife, made the day before she left plaintiff, what reason induced her to leave her husband, and when she intended to leave. To which evidence plaintiff did then and there object, and thereupon the court overruled the objection and permitted the evidence to be given, &c.

The defendants then offered the deposition of Louisa Beebe, as *the evidence embraced in the above offer*. To which deposition the plaintiff objected, because the deposition does not contain the evidence proposed and permitted by the court, and because it is incompetent for defendants to prove the conduct of plaintiff and his friends, *at other times*, and wholly independent of the time or proximate to the act or period of leaving, by the mere declarations of the wife.

Whereupon the court *sustain* the objection to the deposition so offered as an entirety, because it does not appear to be any thing more than the mere naked, independent declarations of the wife, of acts of plaintiff towards her, long prior to and unconnected with any immediate alleged cause of her leaving, and because it does not appear to have been given by the wife as the reason for her then contemplated departure, and no other evidence is offered in connection with it to prove these were her alleged reasons for leaving her husband. Defendants, by their counsel, excepted.

[Kidder et al. v. Lovell.]

The defendants, by their counsel, then proposed to ask their witness, James Follett, how long he had known the plaintiff's wife, and what her *natural disposition* was. To which plaintiff objected, on the ground that the testimony proposed was wholly irrelevant. And the court sustained the objection. Defendants, by their counsel, excepted.

Verdict for plaintiff, against three of the four defendants, for three hundred dollars.

It was assigned for error :

1. The court erred in rejecting the deposition.
2. The court erred in sustaining the objection to defendants' offer.

The case was argued by *Galbraith*, for plaintiffs in error. By *Brown*, for defendant.

The opinion of the court was delivered by

BELL, J.—Whether, in an action like this, the declarations of an absconding wife, made on the eve of her departure, and in special reference to it, as explanatory of the moving cause, could be received in evidence, as of the *res gestæ*, it does not seem to be necessary here to determine. When the offer of the declarations was first proffered, the court below ruled them admissible, upon the understanding, conveyed by the offer, that they were contemporaneous with the main fact under consideration, and so connected with it as to illustrate its character. It is only their immediate connection with the principal fact which can distinguish such declarations from mere hearsay. To become of the *res gestæ*, they must have been made at the time of the act done, which they are supposed to illustrate: 3 *Con. R.* 250; an instance of which was furnished at the trial of Lord George Gordon, where the cry of the mob, which accompanied the defendant, was proved, as showing the intent and design of the whole movement. It might be objected, with great show of reason, that permitting even this, in a contest where a husband is a party, would be in direct contravention of the rule of policy, which prohibits married persons from testifying for or against each other, though under the sanction of an oath. The same rule is still more stringent in excluding the declarations *in pais* of the wife, as a means of affecting the husband's rights, unless made as his agent; or where, as pointed out in *Steele v. Thompson*, 3 *Pa. Rep.* 39, they are in the nature of *facts*, giving rise to presumptions, not based on the credit of the declarant, but deduced from the fact that admissions touching the rights and interest of the husband were made. Indeed, declarations which are evidence in immediate connection with a particular fact, are so because they are part of the fact itself, and necessary for a full understanding of its import and effect. In *Hadley v. Carter*, 8 *N. Hamp.* 40,

[Kidder et al. v. Lovell.]

this doctrine was carried to the very verge of safety, when in an action for enticing away a servant, the declarations of the latter, made at the moment of departure, were received, to show the actuating cause, existing at the moment. But here, were this application of the rule extended to embrace the averments of a wife, the concession would not be broad enough to cover the contents of the deposition rejected on the trial. The details which it proposes to give from the mouth of the wife, possess not one quality of *res gestæ*. So far from being an exposition of a contemporaneous fact, necessary to its elucidation, the narrative given by the proposed witness is a history of the bickerings, quarrels, and difficulties, which, it is said, unhappily beset the lives of this husband and wife, apparently extending over a series of years, and having no necessary connection with the subsequent elopement, which, for aught that appears, might have been, immediately, occasioned by some new fact, though doubtless colored by the sad hue of prior disagreements. Were such communications as these clothed with the character of evidence, the manufacture of testimony would be an easy operation, the very facility of which would provoke to falsehood. Instead of closing the wife's mouth as a witness against her husband, we should invite her to accusations, prompted by embittered feeling, and probably deeply tinged by the jaundiced medium through which she derived her perceptions. But it is enough that the proposed testimony had nothing in or about it of the character of fact; nothing partaking of *res gestæ*, and that its reception would involve a total departure from the rule of exclusion I have adverted to. Possibly, under some circumstances, the declarations of a flying wife might furnish a mode of proof, but certainly those offered in this instance are not of that class.

The plaintiff in error has not ventured even to suggest a ground upon which the question furnishing the subject of the second bill of exceptions could be regarded as relevant; and we have failed to perceive one. The court were right in esteeming it wholly impertinent.

Judgment affirmed.

Struthers *versus* Lloyd.

Where a joint judgment is entered against two, and the judgment is subsequently, on motion, opened as to *one* of the defendants, it is error to permit execution to issue against the other defendant, until the issue as to the liability of the first has been disposed of.

ERROR to the Common Pleas of *Warren county*

Samuel H. Lloyd *vs.* Thomas Struthers and Robert Falconer. This was a judgment entered in favor of Lloyd *vs.* Thomas Struthers and Robert Falconer jointly, upon a joint and several note of hand

[Struthers v. Lloyd.]

signed by them, No. 97 to June term, 1844, for \$816.70. A *fi. fa.* was issued on the same No. 97 to September term, 1846. On the 31st August, 1846, on motion and affidavit filed, a rule was granted to show cause why the judgment should not be opened and defendants let into a defence.

September 11, 1847, this rule made absolute so far as Robert Falconer is concerned, and judgment opened as to him, the lien to continue; and rule discharged as to Struthers, with leave to plaintiff to take out execution against him. July 3, 1849, Falconer plead payment, with leave, &c., and the issue still remains untried.

March 14, 1849, another *fi. fa.* was issued on the judgment against Struthers alone, and reciting the judgment as against him alone. July 6, 1849, the attorney of Struthers moved that the proceedings in his case be stayed until the issue with Falconer be tried. This motion the court sustained, and stayed the execution till next term. September 8, 1849, the court vacated the order to stay execution, and refused to grant the motion of July 6, 1849. September 10, 1849, a *pluries fi. fa.* issued, No. 15, to December term, 1849, against Struthers and Falconer both, and reciting the judgment as against both, with memorandum on back of the writ as directed in *precipe*, "Proceedings stayed as to R. Falconer, by the court." October 5th, 1849, a rule was granted on plaintiff to show cause why this *fi. fa.* against T. Struthers should not be set aside, returnable forthwith to the court; and, on hearing, the motion to set aside was refused by the court.

Assignment of errors:

1. The court, having opened the judgment as to Falconer, erred in ordering execution to issue against Struthers pending the untried issue between the plaintiff and Falconer.
2. The court erred in their order of September 8th, 1849, vacating their order of July 6th, 1849, staying execution, and in refusing to grant stay of execution until the trial of the issue with Falconer.
3. The judgment having been opened as to Falconer, the *fi. fa.* against Falconer and Struthers was improvidently and irregularly issued, and the court erred in refusing to set it aside.

The case was argued by *H. W. Williams* and *Galbraith*, for plaintiff in error.

Struthers and *Brown*, for defendant in error.

The opinion of the court was delivered, Oct. 9th, by

ROGERS, J.—After the decision of the case of *Talmadge v. Burlingame & Irons*, 9 *Barr* 21, and the practice which has so generally obtained, it is too late to question the order of the court opening the judgment as to Falconer and permitting it to remain as to Struthers, the other defendant in the joint judgment. Accord-

[*Struthers v. Lloyd.*]

ing to the case cited, it is regarded in the light of a collateral or feigned issue, by which one of the parties may be let into a defence personal to himself, the proceedings being regarded, as to him, as a new action. Although this course may be pursued, yet it is not to be recommended, as it destroys the simplicity and symmetry of our judicial proceedings, and frequently gives rise to perplexity in rendering judgment. It would be much better, in joint judgments at least, to pursue the English practice of ordering a collateral issue, with the proper parties, to try the matters alleged by way of defence, staying the proceedings, if necessary, or permitting execution to issue to bring the money into court, according to the circumstances and equity of the case. Here, the court not only open the judgment as to one of the joint defendants, but permit execution to issue against the other to collect the money from him alone, before the trial of the issue, and ascertaining, by the verdict of a jury, whether the other defendant is discharged from his joint liability. This is an order of which Struthers has a right to complain, for it is in vain to contend he is not injured by being compelled to pay the whole amount of the debt, until it is judicially determined that he is alone liable.

For admitting, as is contended, that the matter of defence being personal as to Falconer, a verdict in his favor would enure alone to his own benefit, and would not affect the liability of Struthers, who would still remain charged; yet that is a reason which shows the propriety of determining that issue before he is treated as a separate debtor. He ought not to be deprived of the opportunity of showing that Falconer is still a co-debtor in the judgment. This, so far as appears, he has heretofore been prevented from doing: at any rate, he has not had his case investigated before the jury, which can only be done, as the case now stands, on the trial of the issue. Indeed, the application of Falconer seems to have been made without the co-operation of Struthers; and the objection strikes me, with great force, that if the plaintiff succeeds by means of the process of the court in collecting the money from Struthers, there is an end of the action against Falconer, as the plaintiff will have no further interest to pursue the suit against him; and thus the whole burthen of the debt will be thrown upon Struthers, when it may be shown, if a trial is had, that he is but one of two joint debtors. As this is the case of a joint judgment, the judgment being opened as to one, we are of opinion that no further proceedings can be had until that action is finally disposed of.

The order of the court, granting leave to issue execution against Struthers, set aside, and proceedings stayed, until the issue against Falconer is tried.

Dunn *versus* Olney.

1. Where A has the earliest judgments against a debtor, who was owner of two separate properties, the one in town, the other in the country, and B obtains a subsequent judgment against the same debtor; two persons desiring to purchase the town property, agree with A, that if he will release the same from the lien of his judgments, a judgment which A was to take from the debtor, in lieu of his two former judgments, should be the first lien on the country property. If on the sale of the country property, the judgment of B be taken out of the proceeds, A has a right to subrogation to the judgment of B as to the *town property*, as against the purchasers, who made the agreement, and to whom and others it was conveyed by the debtor, after the said agreement. He is not obliged to resort to his personal covenant with them.

2. That A has purchased the country property at the sheriff's sale, and sold it at an advance, will not affect his right of subrogation.

ERROR to the Common Pleas of *Erie county*.

Judgment was rendered on a case stated. Simeon Dunn owned two properties, one a brick house and lot in Erie, the other a tavern house and lot of ground in Eagle village, Mill Creek township, Erie county. Reed had two judgments against him, which were the *first liens* on the said property. Olney afterwards obtained a judgment against Dunn, entered on the 2d day of March, 1838. On the 4th June, 1839, Dunn sold and conveyed the house and lot in Erie to Lytle, Law, Judd, and Miller, and they paid him the purchase money. Afterwards an agreement, as follows, was made:

Agreement between Lytle and Law, and Reed.

We, James Lytle and John Law, do hereby covenant and agree to and with Charles M. Reed, for and in consideration of the said Reed releasing the liens of two certain judgments he holds against Simeon Dunn, upon a certain brick house and lot in the borough of Erie, sold lately by the said Dunn to the said Lytle, Law, and Arvin Miller, to keep and save harmless the said Charles M. Reed from the judgment liens upon the real property of Simeon Dunn, in Eagle village, and is the same property where the said Dunn now lives, the said Reed having this day taken a judgment against the said Simeon Dunn, and we do agree to make it the same as if it were the first lien upon the said Eagle village property.

In witness whereof, we have hereunto set our hands and seals, this 29th day of June, 1839.

JAMES LYTLE, [L. S.]

JOHN LAW, [L. S.]

In October, 1842, a *sci. fa.* issued to revive the Olney judgment, with notice to the purchasers of the property in Erie.

In November, 1842, judgment.

On the 5th June, 1839, a judgment was entered in favor of Reed v. Dunn, for \$523.26. This judgment was to be in lieu of Reed's

[Dunn v. Olney.]

two former judgments. This judgment was revived in 1842. A *fi. fa.* was issued on the judgment of Reed, and a levy made on the tavern property; it was valued at \$2500. It was sold on *venditioni exponas* on Reed's judgment, and in February, 1845, was purchased by Reed for \$560. The amount due on the Olney judgment was taken out of the proceeds of the sheriff's sale. Reed afterwards sold the property for one thousand dollars.

In October, 1847, a *sci. fa.* was issued for the use of Reed, on the Olney judgment, against Dunn, with notice to Miller, Judd, Lytle, and Law, terre tenants, Reed claiming a right of subrogation as to that judgment, as to the house and lot in Erie. *Sci. fa.* not served as to Judd. The terre tenants served, objected.

A case was stated, and on April 29th, 1850, the court directed judgment to be entered for plaintiff (Reed) against terre tenants, Lytle and Law.

It was assigned for error, that the court erred in entering judgment on the case stated, in favor of the plaintiffs.

The case was argued by *Marshall*, for plaintiffs in error.
Selden, for defendant in error, (Reed.)

The opinion of the court was delivered, Oct. 9th, by

BELL, J.—The written opinion which accompanies the record, indicates the judgment rendered by the Common Pleas to have been the result of an impression that the case presented is the ordinary one of two creditors of the same debtor, the owner of two funds, to both of which one of the creditors may have recourse for payment, while the means of satisfaction of the other creditor is confined to one of the funds. As we have had, recently, frequent occasion to observe, in such a case a chancellor will, almost of course, compel the more fortunate claimant to look to that source of payment against which the other has no claim, if this be necessary to prevent the latter from being balked of his chance of satisfaction. The books abound with instances of this interference, or what is equivalent to it, the subrogation of the disappointed creditor to the legal position of the double creditor, who has availed himself of the fund which was alone liable to respond to the call of the single creditor. But this is not the case before us, though at first blush it would seem to be so. To ascertain who are really the contestants, and their relative rights, we must regard the actual position of the parties, and treat the application for subrogation as though it were a prayer preferred to a chancellor to compel the first lien creditor to seek satisfaction from the premises purchased by the plaintiffs in error. Viewed in this aspect, the case is that propounded by Lord ELDON, in *ex parte Kendall*, 17 Vesey 514, of two creditors having demands against two distinct debtors, each

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of whom are equally liable to one of the creditors, while the claim of the other is against one of the debtors alone.

The *scire facias* under which the contest arises, though in form sued against the defendant in the judgment, is, in truth and legal effect, a proceeding against the plaintiffs in error. The object is to compel them, as *terre tenants* of the land purchased, to make good to Reed, the separate lien creditor of Dunn, his loss occasioned by the application of the proceeds of the sheriff's sale of Dunn's land in discharge of Olney's judgment; that judgment having been, also, an encumbrance upon the land conveyed to the plaintiffs in error. They are thus presented as debtors who, with Dunn, were jointly and severally liable to pay the judgment held by Olney, while Dunn was, alone, liable to Reed. The application to be subrogated must, consequently, proceed on the ground that a court of equity would have compelled Olney to levy his debt upon the premises conveyed to Lytle, Law, Miller, and Judd, in relief of the property retained by Dunn for the benefit of his separate creditor. But, would equity so interpose? It certainly would not; simply because, otherwise, Reed might lose his debt. In cases like this, considerations other than the safety of the several creditors are necessary to call into action the saving power of a chancellor. These considerations are found in some right residing in the separate debtor himself, or in some other supervening equity, which points to his co-debtors as the parties who, rightfully, ought to discharge the encumbrance in aid of the distinct creditor. This is so clearly pointed out by Lord ELDON, in the cases I have cited, when treating of the distinction which marks the relative liabilities of different classes of debtors, that I cannot, perhaps, better elucidate the subject than by extracting the passage. "If," said he, "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 these means of distribution, both shall be paid. This course takes place where both are creditors of the same person, and have demands against funds, the property of the same person. But, it was never 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 drawer and acceptor, or principal and surety; to the intent that all the allegations arising out of these complicated transactions 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 in some equity, *giving B. the right for his own sake to compel me to seek payment of A.*" The application of the principle here developed, has been illustrated by a statement of almost the very case before us. It is put by STORY, in his *Treatise on Equity*, sec. 642, and was cited

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with approbation by Mr. Justice KENNEDY, in Ebenhardt's Appeal, 8 W. & Ser. 327. "Where 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 large 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 joint 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." An examination of our judicial decisions will show that this doctrine has been closely observed by the courts of this country. Among these determinations, our own case of Neff v. Miller, 8 Barr 347, may be specially noticed, as an instance where the equity residing in a surety, the proceeds of whose lands had been applied in discharge of a joint judgment, was found sufficient to enable his separate creditor to lay hold on the joint judgment as a means of replacing a several fund, of which the interference of the joint encumbrancer had deprived him.

But what right has Dunn, as owner of the tavern house in Eagle village, or Reed, simply in his character of several lien creditor, to call upon the plaintiffs in error to replace the sum abstracted by the owner of Olney's judgment? None whatever. On the contrary, following the lead of the courts of New York, it was ruled in Stanley v. Nailor, 10 Ser. & R. 450, and finally settled in Cowden's Estate, 1 Barr 267, as the rule in Pennsylvania, that if one of several estates, encumbered by a joint lien, be aliened by the debtor, the estate still remaining in him is, in equity, first liable to discharge the encumbrance, and a subsequent purchaser will take it *cum onere*. "If," said Chancellor KENT, in Clowes v. Dickinson, 4 Johns. Ch. R. 17, "there be several purchasers in succession, at different times, I apprehend that in that case, there is no equality, and no contribution as between purchasers. Thus, for instance, if there be a judgment against a person owning, at the time, three acres of land, and he sells one acre to A., the remaining two acres are first chargeable, in equity, with the payment of the judgment debt, as we have already seen, and that too, whether the land be in the hands of the debtor himself or of his heirs. If he sells another acre to B., the remaining acre is then chargeable, in the first instance, with the debt against B., as well as against A.; and if it should prove insufficient, then the acre sold to B. ought to supply the deficiency, in preference to the acre sold to

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A.; because, when B. purchased, he took his land charged with the debt in the hands of the debtor, in preference to the land already sold to A. In this respect, we may say of him, as is said of the heir; he sits in the seat of his grantor, and must take the land with all its equitable burdens; it cannot be in the power of the debtor, by the act of his assigning or selling his remaining land, to throw the burden of the judgment, or a ratable part of it, back upon A." In the preceding case of *Gill v. Lyon*, 1 *Johns. Ch. R.* 440, this doctrine was applied to a mortgage. There, a mortgagor had sold part of the mortgaged premises to Lyon, and the rest being sold under a subsequent judgment, it was held, that the mortgage was first to be satisfied out of the land purchased under the judgment, and that Lyon was not bound in equity to bear any proportion of the mortgage debt, unless the residue of the mortgaged premises should be insufficient to satisfy it. And, finally, in a very recent case in this court, a recognition of this principle produced the determination, that a vendee, whose land is taken in execution in discharge of a judgment recovered against his vendor, is entitled to be substituted as against the remaining land of the latter. *In re Gill*, 6 *Barr* 504.

The unanswerable reasoning which gave birth to this rule, also comprehends within its scope posterior encumbrancers whose liens are, of necessity, subservient to the prior encumbrance. They are, in this particular, entitled to no greater rights than those possessed by their debtors; and, consequently, cannot pretend to any superior equities. On this ground *Ebenhardt's Appeal* was decided; a decision which is unimpeachable, if the case be regarded as possessing none but the ordinary features of lien, sale and the subsequent recovery of judgments against the vendor. But I am very strongly impressed with the notion, that sufficient weight was not accorded, by the majority of the court, to the undertaking of the vendee to apply a portion of the purchase money, in payment of the first encumbrance; a fact which, it seems to me, Mr. Justice SERGEANT properly thought of sufficient efficacy to entitle the younger lien creditors to be substituted as against the land first sold, *pro tanto*.

From the general rule ascertained by the authorities to which reference has been made, it results that if, in our own case, the attention be confined to the judgments and conveyances, the pretensions of the junior encumbrancer are unsupported by even the shadow of an equity. Indeed, were chancery called upon to interpose its authority, it could only be for the protection of the plaintiffs in error, as first purchasers, by compelling the elder lien creditor to exhaust the value of the land last sold as the property of Dunn, before calling upon the estate first aliened by him. The right to call for equitable interference would, in truth, reside in the first alienees; and that interposition, uninfluenced by extraneous facts, must have ended by putting the parties in the position

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effected by the proceedings at law. Had the plaintiffs in error expressly purchased subject to Olney's judgment, by estimating its amount as part of the purchase-money, a different case would be presented. In that event, they must, in equity, have been regarded as the principal debtors, and, under the principle stated in *Morris v. Oakford*, the property held by Dunn, esteemed as a security merely, and entitled to the equity which a mere surety may challenge. It was asserted on the argument, and there is some reason to believe they did so purchase; but it is not so certainly ascertained by the record as to warrant us in founding a conclusion upon it. But luckily for the junior encumbrancer, the evidence ascertains a fact which, as between him and the plaintiffs in error, is, in our estimation, of equal value as the foundation of the peculiar equity he invokes. It is found in the agreement of the 29th June, 1839. At this time, Reed was the first encumbrancer. In consideration of his assent to release the lien of this encumbrance as against the property which Lytle and Law, with others, were then about to purchase from Dunn, and to accept in lieu of it a judgment to be entered against the remaining property of their grantor, they undertook to indemnify him against all prior liens upon the Eagle village property, and "to make it the same as if it (the younger judgment) were the first lien upon the said Eagle village property." Among the prior liens, thus guarded against, was Olney's judgment, or rather, I believe, it was the only prior lien, and made so by Reed's relinquishment of his first judgments, at the instance and for the accommodation of Lytle and Law. The object as well as the reason for their undertaking is obvious enough. In requital for the promotion of their interests, Reed was to be saved from all loss which might, by possibility, accrue from his relinquishment of the first place, to become a subordinate encumbrancer; and this was to be effected by substantially securing to him every advantage he could enjoy from the actual occupation of the leading position. But under the events that have occurred, full effect cannot be given to the arrangement without conceding to Reed the assistance he craves. There is no other mode by which Lytle and Law can secure to Reed's judgment the place of "first lien on the Eagle village property," or its equivalent. This they bound themselves to do; and, having failed, their neglect is creative of an equity in Reed, to have the benefit of the elder lien, so far as may be necessary for his reimbursement.

In answer to this claim, it will not do to say the undertaking of the plaintiffs in error is a personal covenant merely, for the breach of which the law furnishes an ample remedy. This may be wholly inadequate. The arrangement was made in anticipation of the intended purchase, and in reference to it. It is, therefore, to be construed in immediate connection with the circumstances in which it originated. So considered, it appears to me to admit of but one in

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terpretation. It is as if Lytle and Law had said to Reed, "If you will enable us to raise money to make the purchases by consenting to assume a place as lien creditor, subordinate to Olney's judgment, we will, if necessary, insure the safety of your interests by foregoing our equity, as first purchasers, to have that judgment satisfied out of the Eagle village property, and will thus, so far as we can, make your judgment the same as if it were the first lien" on that property. Such a stipulation cannot be less adequate to originate a right of substitution than an agreement to buy, subject to the lien, which, beyond question, would have conferred on the younger creditor the equity of subrogation. In the face of such a stipulation, it will not do to turn the party round upon what may prove to be insufficient for his safety—a merely personal covenant. But merely personal covenants frequently furnish ground upon which to found this peculiar equity. *Champlin v. Williams*, 9 *Barr* 341, and *Morris v. Oakford*, *id.* 499, are, among numerous others, instances of this; and neither of them presents stronger reasons than are to be found in the arrangement before us. The remedy must, however, be limited to such estates as Law and Lytle have in the house and lot in the town of Erie. As they alone covenanted with Reed, the remedy springing from the covenant cannot be made effective beyond their respective interests in the subject of the lien, the aid of which is sought; and the court below, in awarding judgment, went not beyond these interests.

It will be observed, the question is treated as solely pending between the plaintiffs and the defendant in error, and without reference to lien creditors of the former. The record makes no mention of such creditors, and it is presumed there are none whose rights are involved in the contest. Were it otherwise, notice of the agreement would seem to be necessary to involve them in its equitable consequences. But upon this point we are not called to express an opinion.

The fact that Reed afterwards sold the Eagle village property at an advance upon the price paid by him, can have no effect to vary the right vested in him before the sale made by him. Had he sold with a loss, that circumstance would not have added to the amount he is now entitled to call for from the plaintiffs in error; nor ought the contrary fact affect him adversely. These consequences were contingencies subject to which he took the land, but with which the plaintiffs in error have no connection. Besides, for all that appears, he may hereafter lose the whole benefit of his sale, upon some one of the common covenants of his conveyance.

Judgment affirmed.

Shannon and Nugent *versus* The Commonwealth.

Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act. There is no such offence as a conspiracy between a man and a woman to commit adultery.

ERROR to the Quarter Sessions of *Venango county*.

The plaintiffs in error were indicted below for a conspiracy to commit adultery. The indictment contained ten counts, on four of which a *nolle prosequi* was entered. It was charged in the first count, that Shannon and Edna Nugent, wife of James Nugent, together with other evil disposed persons, whose names to the inquest are as yet unknown, on the 23d day of February, 1850, wickedly, &c. did conspire, &c., and agree together to commit adultery, to the great damage of the said James Nugent, &c. In the second count it was charged that they did then and there conspire and agree together to commit adultery, omitting to allege a combination with other persons. In the other counts, the charge was in substance as in the first.

On the trial, a verdict of guilty was rendered. Objections made to the indictment were urged on a motion in arrest of judgment, before his Honor Judge BUFFINGTON, and were overruled.

It was assigned for error, that the court erred in pronouncing sentence upon Edna Nugent, for the offence laid in this indictment,

1. Because the offence is not laid with sufficient certainty.
2. Because the offence charged in the indictment is unknown to the laws of this commonwealth.

The case was argued by *A. B. McCalmont*, on the part of plaintiffs in error.—He alleged, *inter alia*, that five of the six counts charge that the defendants named in the indictment, with other persons unknown, conspired. The remaining count omits the reference to other persons, but it does not allege that the parties were to have the intended intercourse together.

He also objected that the mutual agreement of a man and woman to have illicit intercourse together, is not a conspiracy, for several reasons, some of which were,

1. Because such an agreement wants the vital principle of a conspiracy, the accumulation of power for purposes of mischief or oppression.
2. Because, in other cases of conspiracy, the unlawful agreement or combination is an aggravation of the offence; but the agreement charged in this indictment, is a necessary element of the offence of adultery itself. It is a constituent, not an aggravation.
3. Because, if this agreement is treated as a conspiracy, it will follow, in consequence of the doctrine of *non merger*, that there

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may be two convictions for every act of adultery, one for the act itself, and one for the mutual consent necessary to commit it.

Brown, for the Commonwealth.

The opinion of the court was delivered, Oct. 9th, by

GIBSON, C. J.—Of the impolicy of holding a tight rein over the doctrine of conspiracy, I expressed my opinion in *Mifflin v. The Commonwealth*, 5 *W. & Ser.* 464, without intending to intimate that it should be suffered to run wild. It ought, at least, to appear that not only the end to be accomplished, but the motive for it, was wicked. In every count of this indictment the combination is laid to be an agreement to commit adultery, without reference to time, place, or circumstance. The sum of the charge is joint consent, which is an ingredient in every fornication or adultery; and if it were separately a substantive offence, parties acquitted of actual connexion, might be put on trial for what would be, in morals, a lower degree of the same transgression. The statute which made it a temporal offence, contains no provision for splitting it into degrees, like homicide, to give the prosecution of it more than a single chance of success. If consent to an adultery be a lower degree of temporal crime, why might not the parties to it be found guilty of it on an indictment for actual connexion? Because, it may be said, confederacy is an offence of a different stamp. It is so in form, but not in substance, else an adultery or a fornication consummated, would consist of distinct and different crimes. But to call the thing by different names, would not enable the attorney general to put the parties twice in jeopardy for it. If confederacy constituted conspiracy, without regard to the quality of the act to be done, a party might incur the guilt of it by having agreed to be the passive subject of a battery, which did not involve him in a breach of the peace. By such preconcerted encounters, it has been said, a reputation for prowess is sometimes purchased by gentlemen of the fancy. In the same way there might be a conspiracy to commit suicide by drowning or hanging in concert, according to the method of the Parisian *roués*, though no one could be indicted of the felony if it were committed. It may be said, such conspiracies are ridiculous and improbable. But nothing is more ridiculous than a conspiracy to commit adultery—were we not bound to treat it with becoming gravity, it might provoke a smile—or more improbable than that the parties would deliberately postpone an opportunity to appease the most unruly of their appetites. These are subtle premises for a legal conclusion; but their subtlety is in the analysis of the principle, not in the manner of treating it.

It is impossible to lay down a rule for all cases; but it may be said that where concert is a constituent part of the act to be done,

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as it is in fornication and adultery, a party acquitted of the major cannot be indicted of the minor. If it were an integral offence, and not an integrant part of one, he might otherwise be convicted of it, though he had been before convicted of the whole. We understand that this plaintiff in error had been acquitted of actual adultery; and though the fact is not found in the record, it shows how readily an indictment for the substance of the same thing in another form might be made a means of oppression.

When an adulterous enterprise has been relinquished—and it ought, like every other criminal design, to have its *locus penitentie*—it is impossible to believe that society has been so scathed by it, as to admit of no propitiation for it but public castigation. It has been said by unerring wisdom, that if a man look upon a woman to lust after her, he hath committed adultery with her already; but God alone may judge the offences of the heart. Its lust is not the adultery which the statute has bared to the temporal lash. The framers of it knew the futility of attempting to smother the instincts of our nature, or to cleanse our thoughts by an Act of Assembly. Legislation can do no more than protect the public or an individual from overt acts; but how a design, abandoned or suppressed, could be injurious to either, has not been disclosed. Doubtless a confederacy to dishonor a man and disgrace his family, by debauching his wife, would be indictable at the outset; but it would be more guilty in its object and mischievous in its consequences, than an appointment for the indulgence of a passion or the gratification of a desire. Besides, the danger from the uncertainty of the evidence would be imminent. The purest intimacy is sometimes mistaken for an intrigue, which is always a mystery; and the reputation of many a virtuous wife is sacrificed to the insinuations of an enemy, working on the credulity of a suspicious husband. Would it mend the matter much, to make the grounds of such suspicions a subject of public investigation? Decency and justice require that such investigations be not encouraged.

Judgment reversed.

Williams et al. *versus* Wilkes.

The Circuit Court of the United States is not a *foreign* tribunal. Its seal proves itself, in our courts, like the seal of our own State courts. The authentication of its proceedings is not within the provisions of the act of Congress relative to authenticating records and judicial proceedings.

ERROR to the Common Pleas of *Erie* county.

In this case, Henry Wilkes brought ejectment against Williams et al., plaintiffs in error, for four lots in the 2d section of the town of Erie. Both parties claimed through Edward W. Pratt: Wilkes,

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by deed from Pratt, dated *March* 30th, 1837; and Williams and others, by attachment of the lot as the property of Pratt, *August* 3d, 1837, judgment and sale thereon by the sheriff to them. Defendants below claimed that the deed to Wilkes, defendant in error, was made with a view to defraud creditors; and, for the purpose of showing Pratt's large indebtedness at the time, offered in evidence a certified copy of the record of a judgment in the District Court for the Southern District of New York, in favor of the plaintiff in error, against the said Pratt, for \$2954, with costs, purporting to be founded on a promissory note from said Pratt to plaintiffs in error, dated *March* 14th, 1837; to which record plaintiff below objected, that the certificate of the clerk of itself, was not sufficient proof of the record. The court *rejected the evidence*, and, at the request of defendant's counsel, sealed a bill of exceptions; which rejection is the error assigned in this case. The certificate of the clerk is in the following words:

United States of America, Southern District of New York, ss.

I, Alexander Gardiner, Clerk of the Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

Seal of
Circuit Court,
Southern District,
New York. }

In testimony whereof, I have caused the Seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this twenty-first day of July, in the year of our Lord one thousand eight hundred and forty-five, and of the independence of the said United States the seventieth.

ALEXANDER GARDINER, *Clerk*. [L. S.]

It was assigned for error, that the court erred in rejecting the evidence offered by defendant below, as in their first bill of exceptions.

The case was argued by *Babbitt*, for plaintiff in error.
Marshall, for defendant.

The opinion of the court was delivered, Oct. 9th, by
COULTER, J.—It is an established principle, that the laws of a state, designed only for the regulation of its own internal concerns, must be proved as facts, in other countries. Foreign judgments are usually authenticated, first, by an exemplification under the great seal of the country, which seal has been recognized by the executive and legislative departments of this country, in the

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recognition of the government itself. But the seal of a newly-established government, not so recognized, does not prove itself. Second, by a copy, proved to be a copy. Third, by the certificate of an officer authorized by law to give such certificate, which must be properly authenticated: 2 *Cranch* 187, *Church v. Hubbard*. There may be cases where all these modes of authentication are beyond the reach of the party, either by the organization of the foreign government and its courts, or by other insurmountable causes; and in such cases, as a matter of necessity, doubtless, inferior proof would be admitted. The proceedings of prize courts, being common to the family of nations, and recognized by all as international law, are admitted upon less rigid rules. This case is not of that character. The evidence rejected by the court below was, therefore, not properly admissible under the rules relating to the admission of foreign judgments in evidence, the certificate of the officer being the only category under which it could be admitted, not having the authentication entitling even the proceedings of prize courts to be received in evidence. These must be certified under the seal of the court, by the deputy registrar, whose official character is certified by the judge of the court, and that of the judge is certified by a notary public. As a court, this is the proper mode of authenticating its proceedings as evidence in foreign courts: *Yeaton v. Fry*, 5 *Cranch* 335. I do not, therefore, adopt the argument of the counsel for the plaintiff in error, that the proceedings were entitled to admission under the rule for the admission of foreign judicial proceedings; more especially as the Circuit Court of the United States can, in no sense of the word, be considered a foreign tribunal in this State. The proceedings are not within the act of Congress carrying into effect sect. 1 of the Constitution of the United States, article 4, providing that full faith and credit shall be given, in each State, to the judicial proceedings of every other State, and providing the manner in which such proceedings shall be proved. The act of Congress was circumscribed by the constitution, and expressly confines itself to the "records and judicial proceedings of the courts of any State," and enacts the mode of their authentication. On 27th May, 1804, the provisions of the law were extended to the judicial proceedings of the Territorial courts, which were thereafter to be authenticated in the same manner as the proceedings of the State courts; so that the proceedings rejected by the court below could not have been admitted under the act of Congress.

They were not, however, authenticated in the mode pointed out by that act: yet, notwithstanding all this, the evidence rejected was competent, duly certified, and ought to have been received. The Supreme Court of the United States is our court; the Circuit Court is part and parcel of that court. In the establishment of the judicial hierarchy, one circuit embraced several States. It is

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indissolubly connected with the Supreme Court of the Union. An appeal lies in certain cases, and writs of error in others. In cases of difference between the circuit judge and the district judge, the point is certified into the Supreme Court for decision; and in many cases the jurisdiction of the Circuit Court is concurrent with that of the State court. What would be said of a decision that the Circuit Courts of the United States for the Eastern or Western Districts, in this State, were foreign tribunals? Other circuits and districts are established by the same word of power, for the same purposes, and are of like proportions, with the same animating spirit in them, all proceeding from the same source—the Constitution of the United States, connected indissolubly with the Supreme Court of the United States, whose power and jurisdiction overshadow and protects us all, and where the States, like giants, may enter into controversy. In short, the Circuit Court of the United States, wherever it sits, is *native here*, and its seal proves itself in our courts, just as the seal of our own courts do. It is a seal of the paramount and paternal sovereignty, and, like the seal of the king's courts of common law jurisdiction in England, as, for instance, the King's Bench proves itself. This seal is received in all the courts of the Union, as evidence proving itself.

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

McKee versus McKee.

1. In the case of an application to the Orphans' Court, to decree *specific performance* of a parol contract for the purchase of land, by the fifteenth section of the act of 24th February, 1834, relating to executors and administrators, notice must be given to the heirs of the decedent to appear in court on a day certain, and answer such bill or petition; and if it appear from the record that such notice was *not* given, the proceedings are *void*.

2. The only final decree to be made by the Orphans' Court, under the said act, in the case of a parol contract, is for *specific performance*. A decree adjudging the proof sufficient, and that it be endorsed upon the petition and certified, is not such a decree.

ERROR to the Common Pleas of *Erie county*, by John McKee et al., who were defendants below.

In this case, Mary Ann McKee and Harriet McKee, by their guardians, brought ejectment against John McKee and Matilda McKee, for two-sixteenths of one hundred acres of land. Both parties claimed through John McKee, who died intestate in 1814, seized of the land in question, leaving four children, Polly, John, Alexander, and Thomas, and a widow.

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Alexander died in 1843, and the *plaintiffs* are two of his children, and claim as his heirs: defendants being the son of John McKee, deceased, and the widow of Thomas, who died since the decease of Alexander, and defend upon title in Thomas, alleging that Alexander in his lifetime, by parol sale, conveyed all his undivided interest in the land to Thomas, received part of the purchase money, and put Thomas in possession, who had subsequently made valuable improvements on the land.

On trial of the case, defendants offered in evidence a record of the Orphans' Court of Erie county, viz., the petition of Thomas McKee for leave to prove said parol sale, and the proceedings and adjudication thereon, which was objected to by plaintiffs and rejected by the court below, and exception sealed at the request of the defendants' counsel, which rejection is one of the errors alleged in this case.

The petition of Thomas McKee was addressed to the judges of the *Orphans' Court*, and, after referring to the fact of the parol sale and payment of part of the purchase money, stated that petitioner was ready and willing to pay for the said land, or share according to the terms of the contract, all which he was ready to prove. He prayed the court to receive proof of the said contract, in order to the completing of the title, &c. Petition presented in November, 1843.

At November sessions, 1843, the court appointed the widow of the said Alexander, *guardian ad litem* of the minor children of the said Alexander, and appointed G. J. Ball, Esq., commissioner to take the depositions of witnesses respecting the within alleged contract, and directed at least ten days' notice to be given to said widow of Alexander and to the children, heirs and widow of the said John McKee, deceased, of the within application, and of the taking of said depositions.

A notice was signed by the attorneys of Thomas McKee, addressed to Mrs. Eliza McKee, widow, and guardian of the minor children of Alexander McKee, deceased: it referred to the petition of Thomas to the Orphans' Court, and to the main facts stated in the petition, and concluding as follows: "And thereupon the said court appointed the widow of the said Alexander guardian *ad litem* of the minor children of the said Alexander, and appointed G. J. Ball, Esq., commissioner to take the deposition of witnesses respecting the within alleged contract. Now therefore you are hereby notified, that in pursuance of the above-mentioned order of court, the depositions of witnesses will be taken before the said G. J. Ball, Esq., at his office in Erie, on the 19th day of December inst., commencing at ten o'clock, A. M., of said day."

Thomas McKee, being duly sworn according to law, deposes that on the 9th day of December, 1844, he served a copy of the

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annexed notice of taking depositions on *Mrs. Elizabeth McKee, widow of Alexander McKee*, late of Mill Creek township, deceased.

Notice of the taking of depositions, with a reference to the proceedings in the Orphans' Court, was also given to other of the heirs of John McKee, Sen., deceased.

A deposition of John McKee, the claimant of another portion of the land, part of which was in dispute, was taken.

The court adjudicated as follows :

20th December, 1844.—The court adjudge the proof sufficient, and direct the same to be endorsed upon this petition and to be certified, &c.

By the court,

WILSON KING, Clerk.

The papers were recorded in the Recorder's office, Erie county, in deed-book P, pages 615, &c., the 22d day of May, A. D. 1845.

On the trial, the plaintiffs showed title to two-fifths of one-fourth of the land claimed and described in the writ.

The defendants offered the papers purporting to be proceedings, in proof of the parol contract above referred to, including the decree of the court thereon, &c.

The evidence was objected to on the part of plaintiffs, on account of insufficiency.

CHURCH, J.—The jurisdiction of the Orphans' Court to make a decree for the specific execution of such contract, does not attach, except the parties to be affected (especially if they be minors) have had a day in court appointed by preliminary order. These proceedings negative this altogether. The court never appointed such day, and it appears affirmatively that notice was not given, except of the taking the testimony before the commissioners, which of itself was very harmless as respects the interest of the heirs. Besides this, the proceedings contain no decree for a specific performance of the alleged contract, nor is any offered to be shown; without which, the evidence will be ineffectual and irrelevant.

The evidence was rejected, and exception on part of defendants.

The defendants then again offered the same proceedings, and to follow it with the petition of John McKee, one of the defendants in this suit, and the administrators of Alexander McKee, deceased, to the Orphans' Court for leave to make a deed in pursuance of the alleged proof of contract, and the order of said court thereupon to make such deed, and the deed itself made in pursuance thereof, dated 25th March, 1846; and with proof that Thomas McKee paid the balance of the purchase money then remaining to said administrator, and the same was charged to him in his account, since confirmed in the Orphans' Court, and that distribution thereof has been made among the heirs of Alexander McKee, deceased.

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To which evidence plaintiffs did then and there object, on account of want of jurisdiction in the court and want of the essential adjudication or decree of the court, and because the guardian of plaintiffs could not, by receiving the money upon totally defective proceeding, divest the interest of the wards in the real estate of their ancestor.

BY THE COURT.—These latter proceedings have no validity, unless the court had jurisdiction in the former. The court had no authority to order a deed made, unless proceedings were previously recorded. They could not be recorded until certified by the clerk of the court, and he could only certify when and after the court had decreed a specific performance of the contract; and this latter the court could not do to affect the interest of the heirs, unless they had a day in court. All these requisites are wanting. They give no additional validity to these proceedings by accumulation of decrees, for all are dependent upon the jurisdiction and first decree. These failing, all fail, and are not cured by the act of the guardians in receiving the proceeds of the purchase money. If they could thus cure the defect here, they could in any and all cases, which could not be tolerated. The evidence is therefore rejected.

Whereupon the defendants, by their counsel, excepted.

It was assigned for error, that the court below erred in rejecting the record offered in evidence by defendants, as in defendant's first and second bill of exceptions.

The case was argued by *Babbitt*, for plaintiffs in error.—He contended that the Orphans' Court had jurisdiction of the subject, and the decree was intended and understood to be a final decree, and a decree of specific performance, and was so treated by the court in directing the administrator to make a deed. That though there may be errors apparent on the face of the record, the proceedings and decree should not be treated *as void*. That the errors are not examinable in a collateral action. That notice of the application was given. That it does *not* appear *affirmatively* that there was no day appointed for the hearing and no notice given. Both may have been done and omitted to be noticed on the record; it may be presumed: 10 *Ser. & R.* 193; *Kimball v. Saunders*, 10 *id.* 207, 286; sect. 2 of act of 29th March, 1832, relative to Orphans' Courts, providing that the proceedings in the Orphans' Courts shall not be avoided collaterally. That the record, though incomplete in wanting the final adjudication, was evidence as far as it went, and should have been received.

Marshall for defendants in error.—That the Orphans' Court had no jurisdiction of the parties in interest, who never had a day in court; the court never fixed a *day for hearing*, and the petitioner

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did not give notice to the widow and heirs of that part of the order of the Orphans' Court which directed ten days' notice to be given of the *application*.

That the 52d section of the act of 29th March, 1832, provides the manner of giving notice, in all cases in which heirs are interested; and a further provision exists in the 53d section, where there are minors. The 15th section of the act of 24th February, 1834, requires, in case of a contract in writing to convey, notice of the bill or petition to the heirs, to appear on a *day certain* and answer—and the 16th section contains a similar provision as to a *parol contract*.

That the Orphans' Court never made a decree for the *specific performance of the contract*, as directed by the 17th section of the act of 24th February, 1834; they adjudged only the proof sufficient, and direct the same to be endorsed upon the petition, and to be certified, &c. That was not a proper decree to be made in the Orphans' Court, under the provisions of that act.

The opinion of the court was delivered, Oct. 9th, by

BELL, J.—The record offered by the defendants below, exhibits a succession of radical mistakes from beginning to end. It is a little singular, that in spite of the unambiguous provisions of our statutes, relating to the contracts of decedents, court and counsel should have fallen into the error of confounding two distinct remedies, involving a confusion of jurisdiction, and a jumble of decrees, destructive of the whole proceeding.

The acts of 1792 and 1818 provide a method for taking proof in the courts of *Common Pleas*, of the unexecuted real contracts of decedents, previous to the institution of any suit for the breach of them, and enable the executor or administrator to make the necessary conveyance, under the order of the court. This remedy being found imperfect, in certain cases, the act of February, 1834, was passed, conferring on the several *orphans' courts* the power, elsewhere exercised by courts of chancery, of decreeing specific performance of these contracts. The difference between these several modes of procedure, and the results attained by each, is pointed out in Chess' Appeal, 4 *Barr* 52, and McFarson's appeal, 1 *Jones* 503, which show them to be strongly distinguished by features peculiar to each. Indeed, they possess no one leading characteristic in common. The jurisdiction exercised by the *Common Pleas*, is, in fact, a method devised to avoid common law suits for damages, was originated by statute, and is, perhaps, known only in Pennsylvania; while that conferred on the Orphans' Court, is, confessedly, borrowed from the long established practice of courts of equity. These important differences seem to have been overlooked by the defendants below. Apparently acting upon the notion, that the two jurisdictions are concurrent, they invoked the

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Orphans' Court to exert a power possessed by the Common Pleas only. This initiatory error was the propagator of others, equally gross. The step first consequent upon the presentation of the petition, would naturally be, to fix a day for the answer of the defendants, and giving notice thereof, by citation or other order. This, however, was wholly omitted, and instead, the court directed a commission to examine witnesses, of which notice was to be given to a guardian *ad litem*, appointed on the instant. Immediately on the return of this commission, and but one day after taking the single *ex parte* deposition, upon which the decree was founded, the court adjudged the proof to be sufficient, and directed it to be certified. Nay, if we are to give credence to the formal certificate of the proper officer, this adjudication was pronounced by the court of Common Pleas, to which the procedure would seem to have been transferred, without notice to any whose interests were to be affected. Treating this, however, as a clerical error, and conceding that the record remained in the Orphans' Court, the proffered evidence is encountered by the fatal objection, that the whole proceeding is *coram non iudice*; a thing wholly void, for want of the requisite authority in the tribunal employed. As this fatal fact is apparent on the face of the record itself, there is nothing remaining, upon which to found the subsequent petition of John McKee's administrator, to the Orphans' Court, for leave to make a deed, in pursuance of the alleged contract, the order of the court therein, and the deed made in pursuance of it. All these steps were of no avail to vest a title in the defendants below, for they are obnoxious, not only to the objection that the Orphans' Court was incompetent to give effect to the particular statute, under which they had place, but also, that the order, upon which they were based, was without efficacy.

But were it possible to regard the proceeding as originating in an application for a specific performance, under the act of 1834, it would still be found radically defective. In imitation of the known practice of courts of chancery, the 15th section of the act directs due notice of the bill or petition to be given "to the purchaser, or the executors or administrators and heirs of the decedent, or devisees of such estate, as the case may require, to appear in such court, on a day certain, and answer such bill or petition." The 52d and succeeding sections of the act of 29th March, 1832, prescribe the mode to obtain the appearance of persons amenable to the jurisdiction of the Orphans' Court, and to compel obedience to its orders and decrees. The process is by citation, returnable on a day certain, and to be duly served on the defendant, when he can be found within the proper county, or if not, then by other modes of notice pointed out. Where minors are interested, service is to be on the guardian, if there be one residing within forty miles. If not, the minor himself is to be notified, if above the age of four-

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teen years, and if under that age, his next of kin. If, at the next session of the court thereafter, such minor shall not apply for the appointment of a guardian, a guardian *ad litem* may be designated, upon whom all notices shall be served.

The anxiety of the law makers to secure to defendants a day in court, after due notice, so sedulously manifested, is but in accordance with the principle, that before the rights of an individual can be bound by a judicial sentence, he shall have notice of the proceeding against him. This is announced to be an axiom of natural justice and of universal application, by MARSHALL, C. J., in the case of the *Mary*, 3 *Peters' Con. Rep.* 312. Such notice is indispensibly necessary to give jurisdiction over the person of the party. *Com. of Pilotage v. Low*, *Charlton* 298; *Jones v. Kenny*, *Hardin* 96; and it has been truly said that, without citation and an opportunity of being heard, the judgment of a court, whether ecclesiastical or civil, is absolutely void: *Com v. Green*, 4 *Whar.* 568. This principle was recognized in *Ege v. Sidle*, 3 *Barr* 124, and in *Ragan's Estate*, 7 *Watts* 440, 441, where *Jackson v. Brown*, 3 *Johns. Rep.* 459, is approvingly cited. The latter is an instance of its application in a collateral proceeding, in avoidance of a judgment rendered in partition. Indeed, its observance is felt to be so entirely essential to the preservation of individual right and the advancement of social obligation, that no official endorsement is required to enforce its general acceptance. Yet, as the record itself shows, in the case before us, this fundamental rule of right seems to have been entirely overlooked. No process was issued to call in the defendants; no day given them to dispute the assertions of the petitioner; and no hearing had upon the merits of his case. In fact, the whole proceeding was *ex parte*, for it cannot be said the notice of taking depositions rescues it from this condition. That notice was to one invested with no right to represent the minor children. But had this been otherwise, there could regularly be no such notice before the parties were brought into court by process; a preliminary step essential to the jurisdiction. They never were so brought in, nor was there any attempt made to bring them in. They were, consequently, without the power of the court, and are unbound by any decree pronounced against them. In truth, no final decree was pronounced by the Orphans' Court. Under the statute investing it with authority, the only final decree contemplated is of specific performance. The endorsement directed to be made on the petition presented, is not such a decree, nor any thing like it. Indeed, it was not intended to be; for it is obvious, that in directing this entry, those who conducted the application, proceeded under the act regulating the Courts of Common Pleas, and, as already observed, the remedy attempted was that which can only be administered in the latter tribunal. This mistake is radical and fatal. The Orphans' Court attempted

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to do something it had no authority to do. The attempt was, therefore, productive of no results. It could neither confer a right, nor redress a wrong. The power to divest men of their estates and transfer them to others, is a momentous one; to be exercised with great care and caution. Before it can be made effective, the court must possess itself, not only of the subject, but of the person whose interests are to be dealt with; and after this, the proper decree must be pronounced. In these essentials, the action of the Orphans' Court was altogether wanting. The court below was consequently right in rejecting the evidence, as of no importance in assisting a determination of the controversy.

Judgment affirmed.

GIBSON, C. J.—I concur in this case, only because I think there was no order or judgment at all.

Scott versus Heilager et al.

1. The declarations of a vendor, made in the absence of the vendee, that he had sold the personal property in question for the purpose of preventing his creditors from collecting their debts, are not admissible against the vendee: nor that he would not pay a particular creditor.

2. Nor can evidence be given by a witness, of his belief that it was generally known at a furnace, at which the vendor and vendee worked, at the time of the purchase, that the vendor was in debt, it not proving fraud in the purchaser.

ERROR to the Common Pleas of *Mercer county*.

This was an action of trespass, brought by John V. Scott the plaintiff in error, in the Court of Common Pleas, against Frederick Heilager and Samuel Sweezy, the defendants in error, for seizing and taking away two horses, harness, and wagon, the property of the plaintiff, also two new halters. The property had belonged to Samuel Strain, except the halters, which were purchased by Scott from another person. About the last of Jan. 1847, the plaintiff, Scott, purchased the horses, harness, and wagon, with some other property, from Strain, for \$110. After having them in his possession, and using them for about a month or six weeks, defendants levied on them, by virtue of an execution issued by a justice of the peace in favor of Samuel Sweezy, and took them off as the property of Samuel Strain, to satisfy the execution against him in favor of Sweezy. The defendants justified themselves in taking the property, on the grounds that the sale from Strain to Scott was

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fraudulent and void by the statute 13th Eliz., being made with intent to delay, hinder, and defraud creditors, and especially the claim of Samuel Sweezy.

It did not appear that any other claim, except that of Sweezy's, was pressing Strain, or that he was otherwise indebted, except a small judgment of \$15 which was given in evidence. Heilager was the constable. Tried before BREDIN, J.

On the trial, defendants offered to prove by the declarations of Strain, that he sold the property to John V. Scott, the plaintiff, for the purpose of preventing his creditors from collecting their debts: to which the plaintiff objected, on the ground that no evidence had been given showing any degree of concert between Scott and Strain for that purpose, or that John V. Scott, the plaintiff, knew of any such intention. Objections overruled, and the evidence received by the court, and plaintiff excepted.

It was proved that Strain, Scott, and the witness, were working at the same furnace at the time of the sale, and it was afterwards offered to be proved, by the deposition of the same witness, as follows: "I believe it was generally known among the hands, that Strain was in debt, and crowded for the payment of them, before he sold his property. I understood that Caleb Sweezy was one of the creditors and pressing Strain."

This was objected to, but was admitted. Plaintiff excepted.

Defendants offered to prove that Samuel Strain told the witnesses he would not pay the debt for which this property was sold; to which the plaintiff objected, on the ground that no concert or privity had been shown between John V. Scott, the plaintiff, and Samuel Strain, or that Scott knew of any such unwillingness. Objection overruled by the court, and plaintiff excepted.

It was assigned for error, that the court erred in receiving the evidence contained in the several bills of exceptions.

The case was argued for plaintiff in error by *Fetterman*, with whom was *Budd*.

Holstein, and *Stephenson*, were concerned for defendants in error.

The opinion of the court was delivered, Oct. 9, by

COULTER, J.—The evidence contained in the two bills of exceptions, tendered by plaintiff, ought to have been rejected.

Scott had purchased the horses, harness, &c., about four weeks before they were levied on, from Strain, had taken them into his possession, and used them as his own, and paid for them. There was no evidence of any collusion, or fraud, or combination, or concert, between him and Strain; nor that he knew Strain was indebted, much or little, without the means of paying it, arising

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either from this sale or other property. Under these circumstances, the evidence in the first bill of exceptions, to wit, that after Strain had sold to Scott, and perhaps after the levy on the property in Scott's possession, Strain had said, not in the presence of Scott, that he sold the property for the purpose of preventing his creditors from collecting their debts, ought to have been rejected. At the time Scott purchased, there was no execution against Strain, nor for four weeks after the purchase. He could not, therefore, have sold to prevent the due execution of process in the hands of the officer. But what his intentions were, unknown and uncommunicated to Scott, is of no consequence. One man cannot be prejudiced by the fraud of another, of which he has no notice nor opportunity of receiving notice. In that case, he might be guilty of such supine negligence as would be equivalent to fraud against the party injured. But there was nothing of that kind of supine negligence on the part of Scott, in this case. No *scintilla* of it. No man is bound to search all the justices' dockets in a county, to find out whether there are judgments against an individual, before he ventures to purchase a cow or a horse from him, or some wheat, or potatoes, or oats. In short, there is nothing in the evidence to bring the case within the statute of Elizabeth, or the analagous principles of the common law.

The evidence objected to in the second bill of exceptions ought not to have been admitted, to wit, "that the hands at the furnace generally, as witness believed, knew that Strain was in debt, and crowded for payment, before he sold the property; and that witness understood that Sweezy was one of them." What a witness believes other people knew about another man's debts, is as flimsy as cobweb and lighter than gossamer, when Scott, the man affected, is not alleged to be among these people. If such evidence can be lawfully admitted, no man who purchases personal property, no matter how *bonâ fide* and honest his conduct, would be safe. But admit it all to be true, and that Scott had heard the man was crowded for the payment of his debts, that is, craved, I presume, and there appears to be only two creditors, Sweezy and another, all amounting to about \$110, the amount which Scott gave for the property, might not Scott be allowed to presume that the sale was for the very purpose of paying debts?

It is sufficient to say, that this evidence neither brought home, or tended to bring home, any fraud or culpable negligence to Scott, and was, therefore, improperly admitted.

The evidence in the third bill of exceptions is wholly irrelevant and incompetent, for the same reason, to wit, that it does not affect Scott with guilty knowledge, or any knowledge at all, and is of little weight in any respect.

Judgment reversed and a *venire de novo* awarded.

Brocket *versus* The Ohio and Pennsylvania Railroad Company.

The right to enter upon *land* and to appropriate as much thereof as may be necessary for its railroad, granted to The Ohio and Pennsylvania Railroad Company, by the Ohio act, adopted by the Pennsylvania act of 11th April, 1848, includes the right to remove a *dwelling-house*.

CERTIORARI to the Common Pleas of *Beaver county*.

An act of appropriation and description of the lands and tenements of Brocket, intended to be taken, was filed on the part of the Ohio and Pennsylvania Railroad Company. Appraisers were appointed, whose report was set aside and new appraisers appointed. They reported that they met, &c., and after being duly sworn, and after hearing the testimony, do appraise and assess the damages to the property of the defendant (Brocket) at \$500, and benefits none.

The proceeding was had under the ninth section of the Ohio act, chartering the company. The act was adopted by the Legislature of Pennsylvania. See act in the *Pamphlet Laws* of 1849, p. 754, &c.

The ninth section provides, that "such corporation is authorized to enter upon any *land* for the purpose of examining and surveying its railroad line, and may appropriate as much thereof as may be deemed necessary for its railroad, including necessary side-tracks, depots, work-shops, and water-stations, materials for construction, except timber, a right of way over adjacent lands, &c. The company are also authorized to purchase any such lands, or interest of the owner of such land, or in case the same is owned by a person insane, or an infant, at a price to be agreed upon by the guardian or parent of such insane person, or infant, if the same shall be approved by the court in which the description shall be filed. The award of the arbitrators appointed, as to the matter of damages, may be reviewed by the court, on written exceptions filed by either party; and the court shall take such order therein, as right and justice may require, by ordering a new appraisement, on good cause shown," &c.

Exceptions were filed on the part of Brocket, which were subsequently overruled. Certiorari filed.

The material errors assigned were:—That the court erred in overruling the third exception, which was, that the Railroad Company have no authority, by their charter or otherwise, to remove or take off the dwelling-house or out-buildings, or disturb the owner or the inhabitants thereof, by removing or taking off the

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same, without the consent of the said owner, or inhabitants therein.

The court erred in not submitting the case to a jury of the county to assess the damages on the first report of appraisers, instead of ordering and appointing a second set for that purpose.

Shannon, for plaintiff in error, contended, that the term *land*, in the act, does not include buildings or tenements; that it is a term of art, and to be construed strictly; and that, technically, it means *ground*; and that, under this term, the company could not, in constructing their road, remove a *dwelling-house*. That if a house is taken, it could not be returned, if the route of the road be changed: also, that other roads are restricted from passing through dwelling-houses: 3 *Peters' Dig.* 212; 1 *Baldwin* 215-16; *U. S. Law Jour.* 43-4; 6 *Whar.* 25; 2 *Kent* 299; 1 *Black.* 136; 2 *id.* 5 and 198. The trial by jury is a fundamental law, made sacred by the constitution, and cannot be legislated away; and if the legislative act impugns a constitutional principle, the act must give way and be rejected on the score of repugnance, 2 *Dal.* 309. Hence, the court below exceeded their jurisdiction by ordering a second appraisal, instead of submitting the case to a jury of the county, to assess the damages, as desired by the defendant below; 8 *Watts* 243.

Agnew, for the Company: That the term *land* includes not only the face of the earth, but every thing under it or over it. —That the right to have the compensation ascertained by another mode than by a jury, is not to be questioned. To deny it would overturn the whole system of road law, as well as the proceedings where property has been taken, under numerous special acts, for public use. That a distinction exists between the taking of property for public use, and the act of *depriving* a citizen of his rights. The former is the exercise of sovereign power in the State, subject to which the citizen holds his rights, and implies a mere exchange of one thing for another. Deprivation implies *loss*, and involves the idea of forfeiture, and without compensation. Hence they are the subject of distinct and independent provisions in the Declaration of Rights: *Constitution*, 9 art., sec. 9 and 10; also art. 7, sec. 4.

The right of eminent domain or inherent sovereign power, is plenary, and subject to no restrictions except those expressly imposed; which are, that the object shall be a *public one*, and that *compensation* shall be made. But the *mode* of making compensation is nowhere prescribed, and is consequently left to the discretion and justice of the legislature: *Pittsburgh v. Scott*, 1 *Barr* 314; *Mon. Nav. Co. v. Coons*, 6 *W. & Ser.* 113; *Baldwin Rep.* 221-2.

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The opinion of the court was delivered by

GIBSON, C. J.—This is a question not of power, but of intention. The constitution subjects all private property without distinction to public use; and a dwelling-house may be taken for it as legitimately as a forest or a field. Had not the Pea Patch Island in the Delaware been previously purchased by the United States, it might have been adversely taken for the site of the present fortress, and the buildings on it might have been demolished. Houses are often taken down to make way for streets; and in this city, two thoroughfares have been opened through blocks of houses to a neighboring street. In Philadelphia, the occurrence of such things is frequent. What is more to the purpose, the State railroad from that city to Columbia, passes diagonally through blocks of houses in the city of Lancaster. The single question, therefore, is whether the word *land*, in this joint act of incorporation, is to have its legal meaning, or, if there be a difference, its popular one.

The jurisprudence of the enacting States is based upon the common law of England, whose rules of interpretation are our rules; and it is text-book law, that terms of art in a statute or a deed are to be taken in their technical sense, because they have a definite meaning, which is supposed to have been understood by those who were, or ought to have been learned in the law. In England, every act of Parliament, as well as every conveyance, is drawn by counsel. The word *land*, both there and here, is a term of art, and the most comprehensive one that could be applied to the subject of a grant. Lord COKE says that it is *nomen generalissimum*; that it includes every thing fixed to the ground, and every thing above or below the surface of it; that it comprehends castles, houses, and other buildings; and that, not only the soil, but every thing in it or on it, passes by it. It, therefore, distinctly includes a mansion, when its generality is not restrained by the context.

But the other provisions of the section in which it occurs, have nothing to show that the word was used in a peculiar sense. They authorize the company to enter on land, and appropriate as much of it, "except timber," as may be necessary for its purposes; and why an exception, if the word *land* was not supposed to embrace every thing else? The expression of one thing is the exclusion of another; and consequently no further exception was intended. The word *premises*, which includes every part and parcel of a messuage, is used in the section as its synonyme; and the term *property*, which is a very general one, is used in the same sense. The company is authorized to purchase the land, or interest of an infant or insane person from his guardian or committee; or to take it, in case of a disagreement, by an act of appropriation. It can take without agreement whatever it can take with it; and no one

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will doubt that a guardian or committee, thus authorized, might sell a dwelling-house. It was evidently the purpose of the framers of the act to put into the company's hands every means, without restriction, that might conduce to the perfection of the work.

If, then, the general effect of this technical word is not restrained by express provision or necessary implication in the context, what reason is there to think that dwellings were intended to be excepted from the effect of it? The joint act of incorporation is not only a contract with the company, but a compact between the States that are parties to it; and it is not to be supposed that private interests would be allowed to stand in the way of the greatest thoroughfare in the world; and one by which the valley of the Mississippi and the cities of the seaboard must be infinitely benefited. The charter is not to be compared with the charter from an individual State; it is to be liberally construed with reference to the magnitude of the enterprize, by giving the company the necessary means to accomplish the purposes of its creation. Like a treaty, it is the law of the contracting States, without being subject to interpretation by the local usages of either. The same construction of it must be made in both.

But if that were otherwise, the consequence would be the same; for we know of no legislative or popular interpretation of the word that would restrain the meaning of it. On the contrary, our legislation has been consistent with the broadest use of it. Power to interfere with houses, churches, or burying grounds, was expressly withheld from the Central Railroad Company, and sometimes, but not always, it has been withheld from turnpike and canal companies. It was not withheld from the canal commissioners in laying the State railroad, and canals; and so far as legislative interpretation goes, it shows that express exemption was thought necessary where it was intended; and that no pervading prejudice has been felt for the inviolability of the citizen's castle. The abodes of the living are not more inviolable than the abodes of the dead; yet thousands of human bones lie beneath the walks and alleys of Washington Square in Philadelphia, once its Potter's Field, now its most frequented pleasure-ground. If a cemetery cannot impede the march of improvement for purposes of recreation, how can the owner of a cottage expect that it will impede a work of necessity? The legislation of a country necessarily takes its tone from the temper and the necessities of the age. A house, a church, a grave-yard, or any thing else, may be conveniently privileged in an act to incorporate a turnpike or a canal company, because it may be avoided without lessening the usefulness of the work; but every deflexion from a right line in the bed of a railroad, is proportionately productive of danger to property and life. It is indispensable to safety and speed that the route of it be as direct as the surface of the country will permit; but they could not be

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attained in a settled country if every hovel or house were privileged; and thus a *quasi* national work, intended for posterity, might be botched through a respect for the sacredness of temporary erections. The course of a railroad might be insuperably obstructed by the obstinacy of a proprietor in the gorge of a mountain, or the pass be made, at least, difficult and dangerous. A mangled passenger, inquiring the reason of a deflexion, when the cause of it had disappeared, might be told of our infinite respect for property at the expense of safety; but the information would neither ease his pain nor set his leg.

Abuse of the company's power in the exercise of it, is remedial or imaginary. Every delegated power may be abused, but it follows not that power must not be delegated. It is incredible that the directors would turn a family out of doors at an inclement season, and incur personal liability, to show their authority, for the abuse of which they would become trespassers from the beginning; while the assessors of compensation would incline to make the company itself smart for it. It is idle to suppose that a dwelling-house will be removed unnecessarily or wantonly. A proprietor's family is dealt with tenderly, to prevent a pretext for swelling the compensation. A company's injury to private property is considered a windfall, and the proprietor never fails to get out of it at least all that is in it. He has got it in this case, and the act complained of is authorized by the charter. The exceptions to the award are therefore unfounded.

Award of the arbitrators, and judgment of the Common Pleas affirmed.

COULTER, J., dissented.

Ohio and Pennsylvania Railroad Co. *versus* Wallace.

Where it is required by an act of Assembly that a report of viewers assessing damages for the taking of ground for the construction of a railroad, shall set forth the value of the property taken, or damages done to the property, the amount of benefit conferred, and the difference between the damages done to the property taken, an award stating that the viewers, taking into consideration the advantages and disadvantages, found a gross sum due to the owner, but without referring to the advantages to the owner, is not sufficient.

CERTIORARI to the Common Pleas of *Beaver county*.

This was a proceeding by Robert Wallace *vs.* The Ohio and Pennsylvania Railroad Company, to recover damages on account of their railroad passing through his land.

This case originated under an act of Assembly of this commonwealth, passed the 11th day of April, 1848, entitled, "An Act to incorporate the Ohio and Pennsylvania Railroad Company," (*Pamph. Laws of 1849*, p. 754,) which act adopts and enacts into

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a law of this commonwealth, all and singular the provisions of an act of the Legislature of the State of Ohio, passed the 24th day of February, 1848, entitled, "An Act to incorporate the Ohio and Pennsylvania Railroad Company;" and further provides, in the 6th section, "That exemplified copies of the said act of the State of Ohio, and of an act passed by said state on the 11th day of February, 1848, entitled, "An Act regulating railroad companies," shall be annexed to this act, and published in the same manner as this act shall be published.

In conformity with the provisions of the 9th section of the last-mentioned act, which constitutes part of their charter, (*Pamph. Laws of 1849*, p. 758,) the company, on the 27th of March, 1850, deposited with the prothonotary of the Court of Common Pleas of Beaver county, an instrument of appropriation, containing a description of the rights and interests of defendant, Robert Wallace, intended to be appropriated to the use of their railroad. A copy of said instrument of appropriation was afterwards delivered to the defendant; and, upon application in writing made by the company to Judge IRVIN, one of the judges of the court aforesaid, he appointed, by his warrant bearing date the 27th day of March, 1850, three disinterested freeholders of said county, to appraise the damages which the said defendant might sustain by said appropriation.

The appraisers so appointed proceeded, on the 4th of April, 1850, to enter upon the duties of their appointment, in the presence of the attorney of the company, and of the defendant and his attorney. Having been duly sworn, they viewed the ground appropriated, and made out an award in favor of defendant, the owner of the land, for \$900; which award was returned to the said prothonotary, and filed on the 4th day of April aforesaid.

Exceptions were, on the 6th of April, 1850, filed by the attorney of the company to the award of the appraisers; and on the 9th of May, 1850, the exceptions were overruled by the court, and the award confirmed.

Award.—Big Beaver township, April 4th, 1850. We, the appraisers appointed by the annexed rule of Court of Common Pleas of Beaver county—the Ohio and Pennsylvania Railroad Company against Robert Wallace—met, according to agreement, at the house of R. Wallace, and, after being duly sworn according to law, and having viewed the lands and tenements, ground occupied by the said Ohio and Pennsylvania Railroad Company, more particularly described and set forth in a schedule and plot thereof hereto annexed, and made part of the same; after taking into consideration the advantage and disadvantages of the Ohio and Pennsylvania Railroad, do award the said Robert Wallace the sum of nine hundred dollars damages, to be paid him by the said Ohio and Pennsylvania Railroad Company.—Award under hand and seal.

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Plaintiffs, by their counsel, filed exceptions to the award of the appraisers, the first of which was :

The award does not conform to the requisitions of the act of Assembly incorporating the company, but is fatally defective. .

May 9, 1850, exceptions overruled, and award confirmed.

Assignment of error :

The court below erred, in overruling the first exception filed by the counsel for the plaintiffs to the award of the appraisers, and confirming the award.

It is provided in the 9th section of the act regulating railroad companies, hereinbefore referred to, that "such appraisers shall be duly sworn; they shall consider the benefit as well as injury which such owner shall sustain by reason of such railroad, and shall forthwith return their assessment of damages to the clerk of said court, setting forth the value of the property taken, or damages done to the property, the amount of benefit conferred, and the difference between the damages done to the property taken, which they assess to such owner or owners separately, to be by him filed and recorded."

The case was argued by *Cunningham*, for plaintiff in error.
Agnew, for defendant, Wallace.

The opinion of the court was delivered, Oct. 9th, by

ROGERS, J.—The act to incorporate the Ohio and Pennsylvania Railroad Company, in providing a mode of estimating the damages to the land through which it passes, directs that appraisers shall be appointed, who, after being duly sworn, shall consider the benefit as well as injury which the owner shall sustain by reason of such railroad, and shall forthwith return their appraisal of damages to the clerk of the proper court, "setting forth the value of the property taken, or damages done to the property, the amount of benefit conferred, and the difference between the damages done to the property taken, which they assess to such owner or owners separately, to be by him filed and recorded."

The directions of the act, so far from being directory merely, are as mandatory as language can make them. The assessors are imperatively commanded, not as heretofore in other acts, not only to consider, in their estimate of damages, the benefit as well as injury which the owner has sustained, but to spread on the face of their report, and make it part of the award, not only the value of the property taken, or the damages done to it, but specifically to set forth the benefit, if any, accruing to the owner from the railroad, and the difference between the damages done to the property taken. The object of the legislature, evidently, is to put an end to lumping estimates of the compensation to which the owner

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is entitled, by making it the duty of the appraisers to show on the face of the report, the means by which they arrived at the result of their estimate. And the provision, no doubt, was introduced into the act for the benefit, not only of the company, but of the owners of the land, furnishing data to the courts, in whom is invested a supervisory power over the appraisal, by which they may more readily and certainly determine whether injustice is done by the award. In this award, the appraisers have not paid the slightest regard to the requirements of the act, but have confined themselves to a report that, after viewing the land appropriated by the company, and having taken into consideration the advantages and disadvantages of the railroad, awarded to Robert Wallace the sum of \$900 damages, to be paid to him by the company. The appraisers wholly omit to mention the value of the advantages to the owner resulting from the road. As, then, the award was not made in the way pointed out by the act, it must be set aside. The defect appearing on the face of the report itself, it is competent for this court to give relief on *certiorari*.

Award set aside.

Christy et al. *versus* Brien et al.

In the case of an ejectment where part of the land is claimed under a legal title, and part under a parol sale without delivery of possession, but where the sale is testified to, on the part of the plaintiffs, by the heirs who made the parol sale, and affirmed by them; it does not lie with the defendants, who claim merely by possession less than twenty-one years, to object that the parol sale is avoided by the statute of frauds and perjuries. Where the *vendors* acquiesce in the sale, it is not allowable for an intruder to plead claim in them, in defence of his own possession.

ERROR to the Common Pleas of *Butler county*.

This was an ejectment to Dec. term, 1842, for five hundred acres of land, brought in the names of Dorothy Brien, Henry Rodgers, and Sarah his wife, late Sarah Brien, against Christy and others.

The land was a donation tract drawn by Gen. Edward Hand. He left three children, viz.: Dorothy, Sarah, and Mary; Dorothy intermarried with Edward Brien, and left one child, Sarah, wife of Rodgers, plaintiff in the suit.

The plaintiffs below showed title in themselves to one-third of the land in dispute, and the other two-thirds they claimed under a parol sale, made by Sarah Bethel and Mary Hand, the other heirs of the estate of Gen. Hand, to Edward Brien. The fact of the sale was testified to in the depositions of Mrs. Bethel and Mary Hand. Neither the plaintiffs, nor those under whom they claimed, had ever been in possession of the land. The sale to Edward Brien was

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made upwards of thirty-five years ago. The land was assessed as unseated from 1810 till 1826, both years inclusive. In 1810, assessed in name of Gen. Hand; in 1814, in name of Edward Brien; in 1815 and up to and including 1826, in the name of the heirs of Gen. Hand; taxes paid; since 1826, no taxes paid by plaintiffs or those under whom they claim. The land was assessed in 1827 to James Christy, as unseated.

The defendants, Christy and others, have been in possession since 1823, and have paid taxes part of the time. They claimed title by possession. The only question on the trial was, whether the law will presume a conveyance, in favor of a tenant in common, who has never been in possession of the land, and who has done no act amounting to an ouster of his co-tenants.

The court, BREDIN, J., charged that if the facts relative to the conveyance to Edward Brien were true, that they would be sufficient to justify the jury in presuming a grant as against an intruder.

The case was argued by *Purviance*, for plaintiffs in error.
Graham and *Agnew*, for defendants in error.

The opinion of the court was delivered by

GIBSON, C. J.—A conveyance, unaccordant with the possession, is never presumed from lapse of time; and the plaintiffs have not been in possession. But a fiction, by which equity is enabled to look on things agreed to be done as actually done, enabled us when we had not chancery powers, and still enables us when we have, to sustain an ejectment on an executory agreement; and it is, consequently, unnecessary to presume a conveyance to those who are entitled to have it. For one part of the land, the plaintiffs have brought their action on an equitable title, derived from an unexecuted parol contract of sale to the father of one of them; and the single question is, whether it is taken out of the statute of frauds by the acquiescence of the vendors, who are the plaintiffs' witnesses, promoting a recovery by their testimony, instead of opposing it even by a wish. They stand in the attitude of respondents to a bill in equity, confessing the contract, and refusing to plead the statute. They not only confess it, but they swear to it. In England, the plaintiffs would file their bill against them, if they were unwilling to convey, without the direction of a court of equity; and on their confessing the contract, without interposing the statute, specific performance of it would be decreed; after which, the plaintiffs would make short work with the intrusive defendants, in an action founded on the legal title. As the latter would have no right to intermeddle with the parties in equity, they would not be made parties to the bill; and the result of the two suits would be a judgment at law to recover the possession, which is obtained here by

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settling the equity and the law of the case, at one operation. On a bill for specific execution, the vendors might plead the statute; but in this action the defendants cannot plead it for them. Should the vendors insist on it hereafter, they can do so by an ejectment on their legal title, against the plaintiffs, or any one in possession; but here, a stranger, who could not insist on it in equity, attempts to set it up as a defence to an intrusive possession. Where perjury or fraud is impossible, there is no room for the statute, if it be not introduced by a party to the contract, as a specific point of defence; and how is it possible that the defendants could be defrauded by the perjury of these witnesses? The effect of the legal title would be the same whether it were in them or their vendees. The defendants, therefore, could not found a defence on the want of a legal conveyance, which doubtless would have been supplied, had the omission of it been discovered in time for the action. The plaintiffs are entitled without it; and on this ground the case was properly ruled.

Judgment affirmed.

ROGERS, J., being related to one of the parties, did not sit during the argument of this case.

Leitch et al. *versus* Little et al.

Where two persons purchase land by article of agreement and make partition between themselves, and one of them being in possession of the share of his co-tenant, under a lease from his widow, whom the heirs had agreed might enjoy the land during her life, an ejectment is brought against him, by the vendor, to recover the balance of the purchase money remaining unpaid on the share of the *co-tenant*, and he pays the same; he is not bound to deliver up the possession till he has been reimbursed his advances for payment of the purchase money, with interest, and the costs of the said ejectment:—He cannot, however, retain the possession as a security for other debts of the intestate, paid by him as administrator of his estate.

ERROR to the Common Pleas of *Beaver county*.

This was an ejectment by Little and wife, and C. Agnew, heirs of John Leitch, *vs.* Daniel and Malcolm Leitch, to recover the undivided three-fifths of a tract of about 100 acres, with notice that mesne profits would be claimed for the six years immediately preceding the institution of the suit. Both parties claimed under John Leitch, deceased. The plaintiffs claimed as his heirs; Daniel Leitch, one of defendants, was a son of John Leitch.

Defendants below claimed as follows:—On the 18th May, 1813, John Leitch, Daniel Leitch, and Joseph Bigham, by articles of agreement, purchased from Ebenezer Vowell, in whom was vested the legal title, a tract of land containing about three hundred acres, of which the land in controversy was part. *Partition was made*

[Leitch et al. v. Little et al.]

between them, and Daniel Leitch and the heirs of Joseph Bigham paid Vowell their proportion of the purchase money on the parts allotted to them. The land in controversy was allotted to John Leitch, who entered into possession of it, and occupied it till his death in 1827, 1828, or 1829. At his death, there were about forty acres cleared, and two small cabins and a log stable on it.

On the 15th December, 1829, Ann Leitch, the widow of *John Leitch*, entered into an agreement in writing with Daniel Leitch and the plaintiffs in this suit, by which they agreed to let *her* have the real and personal estate of John Leitch, her late husband, during her life, for her maintenance; and she agreed to sell the personal property, excepting a few articles, and to pay the debts of the estate. She made use of the personal property, and died in 1838 or 1839, leaving the debts, hereafter mentioned, unpaid, and no personal property wherewith to pay them. Before her death, Daniel Leitch leased from her the land in controversy, and went into possession, and has remained in possession ever since.

The purchase money of the land in controversy, was not all paid in the lifetime of John Leitch; and after his death, to June term, 1835, Vowell brought an ejectment against Daniel Leitch, who had then leased from the widow, to enforce the payment of the purchase money; and in September, 1836, Daniel Leitch confessed a judgment, with stay of execution to the 1st April, then next ensuing, to be released upon the payment of such sum of money as might be found due by the counsel of the parties. On the 27th January, 1837, the amount due the plaintiff was liquidated at \$320.51, costs \$19.97½. On the 17th April, 1837, John Little, one of the defendants in error, paid \$12 of the costs, which sum was refunded to him on the 1st April, 1845, by Daniel Leitch. Daniel Leitch paid the remainder of the judgment and the costs.

In Nov. 1838, letters of administration on the estate of John Leitch, deceased, were granted to *Daniel Leitch*. He procured an order of sale, and in Sept. 1840, reported sale to himself, which was confirmed. In 1841 he paid a claim of Harbison and wife, against the estate of John Leitch. In 1846, on petition of Little and wife to the Orphans' Court, the sale to Daniel Leitch was set aside.

Daniel Leitch, after his purchase, and before the application to set the sale aside, made valuable improvements on the land. Before and at the time of the sale, and whilst he was making the improvements, John Little and wife lived in Beaver county, seven or eight miles from the land; and Catharine Agnew in Pittsburgh, about eighteen miles from it.

Deed was to be made by Vowell, the vendor, on payment of the second instalment of the purchase money, and mortgage on the land given to secure the residue of it. No conveyance of the legal title to the land in dispute, to John Leitch, or, since his decease, to his heirs.

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That John Leitch owed to Vowell the purchase money paid by Daniel Leitch, or to Harbison and wife, the debt paid them, was not denied on the trial below; nor was the title to three-fifths of the land disputed. The defendants below claimed, before they surrendered the possession of the land, to be reimbursed the purchase money paid to Vowell, with interest, and the costs of the Vowell ejectment, and the debt paid to Harbison and wife, with interest from the time of payment, and the costs paid on the Harbison judgment; and also contended, that they were answerable for mesne profits only from the time when the sale made under the order of the Orphans' Court was set aside; or, at most, only for one year before the bringing of the ejectment.

On the part of plaintiffs, a point was presented:—1st. That the defendant was clothed with no possession or title acquired from Vowell that would protect him against the recovery of his cotenants, who had been ousted by him from the prior possession of their own under the contract. 2d. That the debts paid by Leitch were not liens on the land when paid by him; and, therefore, not recoverable on that ground. 3d. That the statute of limitations had barred the recovery of the money paid by him; and, therefore, not recoverable on that ground. 4th. That the possession cannot be withheld, in this case, on the ground of payment of any other sums of money paid by him. 5th. That the defendant cannot set up any of the improvements against the mesne profits. 6th. That if the value of any of the improvements be allowed defendant, it can only be so far as they may go to extinguish the mesne profits, and not as a substantive set-off, or so that an excess over the profits can be recovered from the plaintiffs.

On the part of defendants, a point was presented to the effect, *inter alia*, that the payment, to Vowell or his agent, of the purchase money, was also for the plaintiff's benefit; and that he was entitled to be reimbursed by the plaintiff, three-fifths of the money so paid, with interest thereon, and the costs of the ejectment.

The court, BREDIN, *inter alia*, charged, that though the contract existed between the widow and the heirs of John Leitch, deceased, giving the possession and profits of the real estate of the deceased to her during her natural life, and Daniel Leitch being in possession under his mother; and, although the action of ejectment brought by Thomas Vowell against Daniel Leitch was to June term, 1835, and by the recovery of the land, unless the balance of the purchase money was paid, the title of the plaintiffs, as well as the title of Daniel Leitch, was gone; and though the payment of the balance of the purchase money by Daniel Leitch, some years before the death of his mother, operated to the benefit of the plaintiffs and the defendant, Daniel Leitch, yet he cannot retain the possession until repaid this money.

Verdict was rendered for the plaintiffs.

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Error was assigned :

1st. In the answers of the court to the plaintiffs' first point, and defendants' first point.

2d. In the answers to the second, third, and fourth points of plaintiffs, in which the court say, "that the *debts* paid by the defendant (Daniel Leitch) are not recoverable in this suit, nor can the defendants retain possession from their co-tenants, until their share of the money is paid."

The case was argued by *Fetterman*, for plaintiffs; and by *Agnew*, for defendants.

The opinion of the court was delivered by

GIBSON, C. J.—The plaintiffs below brought their ejectment on an equitable title, derived from an agreement of purchase by the father of the parties on both sides. The father had died; his children had agreed to let their mother have the estate during her life; and she had agreed to pay the debts out of the personalty. She had consumed it, and died, leaving them unpaid. The defendants had gone into possession, under a lease from her; paid the residue of the purchase money, under the pressure of an ejectment, and received a legal conveyance from the vendor, whose place they were thus compelled to take. Would a chancellor compel them to convey to the other children, before they had been reimbursed their advances? A simple statement of the case shows he would not. The legal title would, however, be a security for no more than the purchase money with interest, and the costs of the former ejectment.

Judgment reversed.

McCall's Heirs *versus* Anchors and Smith.

1. Where one has made a settlement on land west of the Allegheny river, and afterwards leaves it, the law will not presume an abandonment at the end of four years; and if, at the end of that period, and for several years immediately succeeding it, the land be assessed as unseated, and sold for taxes, in the name of the settler, the purchaser will be entitled to the claim of the improver.

2. Where a settlement, as required by law, has been made on land in that section for five years, the commonwealth alone can take advantage of its *abandonment*; it cannot be alleged by an intruder, in defence of his own possession.

3. Where an official survey was made of land claimed by several settlers, and designating their several claims, including the portion in dispute, it is, as to it, a sufficient compliance with the act of 1792, requiring a settler to designate the boundaries of his settlement.

ERROR to the Common Pleas of *Butler county*.

This was an ejectment for 100 acres of land, by McCall and others, heirs of Archibald McCall, *vs.* Anchors and Smith. De-

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fendants claimed by possession, taken in 1840. Verdict for plaintiffs.

The tract of land, of which the land in dispute is a part, was surveyed on 29th March, 1837, by Thos. H. Lyon, deputy surveyor, and contains 451 acres and 40 perches; which was given in evidence as the official survey of the whole tract. In the spring of 1799, Henry Murphy settled on the tract, but not on the part in dispute, and in July of the same year he left it. Some time afterwards, Eli Farr took possession of Murphy's cabin. Murphy soon after returned and disputed with Farr, and finally agreed upon a line, the part now in dispute falling to Farr, who built a cabin, raised some grain, and remained there till 1802. He agreed with Wm. Black for finishing the settlement, for which Black was to have 50 acres. Black went into possession of Farr's cabin and remained there till 1806, when he left, and the premises remained vacant, fields grown up and fences down until 1814. In 1810-11-12-13, it was assessed as unseated, and in 1814, it was sold for taxes, in the name of Wm. Black, and purchased by James Bovard, who sold it to Archibald McCall, 18th Sept. 1835. No person was in possession, or occupied the land, from 1806, till the defendant took possession in 1840.

The survey made by Thomas H. Lyon, deputy surveyor, in 1837, was an official survey, not only of the whole tract, but of this 100 acres for McCall; and the survey is thus entered on the deputy surveyor's book. He surveyed the whole tract, and then run off 200 acres to Wilson, 150 acres to Say, and 100 to McCall, and entered the survey on the county records; showing the division-lines run, and the names of the respective owners written within their parts, with the quantity of land each one was to receive.

Defendant alleges, 1st. That as Farr and Murphy made distinct settlements, they required distinct official surveys, and that the survey of 1837, of the whole, was not sufficient; and 2d. That the court should have left it to the jury, as a question of abandonment by Black; and that, in the event of the jury so finding, the plaintiffs, who purchased Black's interest, were in no better position than Black himself.

In 1814-15-16-17, the land in dispute was assessed to Black, and the taxes paid by Bovard. From 1818 till 1837, it was assessed to Bovard; afterwards to McCall.

On the trial, the following points were submitted on the part of defendants:

1st. That Black and Farr having left the land in 1806, and never having returned, and neither themselves or heirs afterwards having asserted any claim thereto, the rights of said Black and Farr were abandoned, and the plaintiffs are not entitled to recover.

2d. That unless the plaintiffs can show that the purchase money was paid to the commonwealth, the property being left for upwards

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of eight years, the land was open to settlement by any other person who might take possession thereof.

The court charged, *inter alia*:—When *seated* land, whether the title is derived by warrant, or by settlement, ceases to be occupied, and is permitted to remain unoccupied so long that the fences are down, fields waste, it is abandoned so far as to be subject to be assessed with taxes as unseated land, and the taxes to be collected by the sale of the land by the treasurer; and the purchaser, at the sale for taxes, will be vested with such a title as will enable him to recover the possession of the land from intruders, if not redeemed by the owner. The land is not abandoned, so as to be not subject to taxation, nor subject to entry and taking possession of it, without being specially granted by the commonwealth to the person taking possession.

And, in answering the second point, he charged:—When the settlement has been completed, and the settler has left the occupancy of it, and has not paid the purchase money, no person can take advantage of the non-payment of the purchase money, by taking possession of it, without an authority from the commonwealth. Since 1833, no title can be acquired by settlement: all titles to the vacant lands of the commonwealth are acquired by paying the purchase money, and obtaining a warrant, not by occupancy.

Errors assigned:

1st. That the court erred in receiving and treating the survey as an official survey of the land in dispute.

2d. The court erred in not submitting to the jury the question of abandonment, and in not charging the jury that, in the event of an abandonment, the purchaser at treasurer's sale would stand in no better position than Black himself.

The case was argued by *Purviance*, for plaintiffs in error.—At the time Murphy and Farr made the line between them, there had not been any official survey around the entire tract, nor has there been since any official designation of boundary or claim of the respective tracts. They settled two tracts, and the survey of 1837 could not cover both of them. It is the case of a scramble for possession, and a compromise by which each one takes a distinct possession, claiming by lines of their own, each having its own designation, which the survey of 1837 does not describe.

There being no official survey, then, of the tract in dispute, and the act of 1792 requiring a survey, the plaintiffs could not maintain this ejectment: Act 1792, *Dunlop* 192–3; also 2 *Yeates* 227; *Dawson v. Laughlin*, 2 *Bin.* 126.

The question of abandonment should have been submitted to the jury. Farr and Black left the land, the one in 1802, and the other in 1806, and neither of them ever returned; and no possession

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was taken of the land until taken by defendant, in 1840. From 1806 till 1814 no one even paid taxes for it, and, from the evidence, it is manifest that Farr and Black had left it without any intention of ever returning. If the land was abandoned, plaintiffs must stand in the shoes of Black. If once abandoned, no act, short of retaking of possession, could confer title on plaintiffs.

Graham, for defendants.—The abandonment of the *occupancy and cultivation of the land*, subjects it to assessment and sale as unseated land: *Foster v. McDivitt*, 5 *W. & Ser.* 359; *Gibson v. Robins*, 9 *Watts* 156—whether the title be acquired by warrant or settlement; but though the *possession and occupancy* be abandoned, the *title* is not, in either case: 5 *W. & Ser.* 360.

Here there was no offer to prove an abandonment in fact, and the time was too short to raise a presumptive abandonment, if such a principle even was applicable to the title of a settler under the act of 1792. Black left the land in 1806, and in 1810, '11, '12, and '13 it was assessed as unseated, and sold in 1814 to Bovard, who, or his vendee, continued to pay the taxes ever since. The title of Bovard is thus carried back, by relation, till the year 1810, only four years from the time Black left, which brings it precisely within the *facts* of the case of *Gibson v. Robins*, 9 *Watts* 156. That the survey was sufficient, cited 7 *Ser. & R.* 220, *Morris v. Trevis*.

The opinion of the court was delivered, Oct. 14th, by

COULTER, J.—Black, having completed the residence and settlement of five years, under the act of 3d April, 1792, relative to the sale of lands north and west of the Allegheny river, had acquired a substantial equity in the land.

Whether that would be considered as abandoned by an absence short of twenty years, or not, it is not necessary to decide in this case; because, even if it might be so abandoned, the settler would have an undoubted right to return, and resume his equity before any other individual had settled on the land, or the commonwealth, to whom it would revert, had granted it to any one else. Although Black did not return, yet it was assessed as his property, and sold for taxes; and after he had been absent for the space of six years, the taxing and selling it as unseated was perfectly justifiable, for he had left and abandoned the occupancy or possession, but not the equity: *Foster v. McDivitt*, 5 *W. & Ser.* 359; *Gibson v. Robins*, 9 *Watts* 156. Black left the land in 1806, and in 1810, '11, '12, and '13 it was assessed as unseated, in the name of Black, and sold to Bovard, who regularly paid the taxes every year until he sold to McCall. Thus Bovard's title runs back till 1810, just four years after Black left, a period entirely too short to raise the legal presumption of abandonment, even if it was such an equity

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as might be abandoned, in the absence of all proof of an actual or express abandonment in fact. Whatever equity Black had, was transferred to Bovard, who paid the taxes regularly until he sold to McCall, in 1837; since which time the taxes have been regularly paid by him and his heirs. On the 29th March, 1837, McCall procured a survey of the whole tract originally settled by Murphy, and subdivided by consent between these settlers. This survey was made by the county surveyor, as required by the act of 1792, and a draft of it filed in his office, on which he marked the subdivisions, setting off to McCall the one hundred acres he claimed under his purchase from Bovard. This survey was properly received in evidence, because it was precisely the survey directed to be made by the act of 1792. Thus, then, the settlement required by the act of five years was completed, and the survey directed by the act has been made, and the taxes regularly paid since 1810. If Black himself had returned and paid the taxes from 1810, and had a survey made in 1837, there could have been no pretence of abandonment; for the only settlement that he was bound to make, he had fully completed: and as all his equity was transferred by the treasurer's sale, there can be as little pretence of abandonment against the alienee.

The present defendant, who sets up this abandonment, never entered, or squatted, until 1840, when a good and valid equity, unabandoned, subsisted in the plaintiffs or their ancestor. The act provides, that the purchase money, with interest, shall remain charged on the land until paid, and that the commonwealth, if the settler or his alienee does not apply for a warrant in ten years, may grant a warrant to any other person, reciting the default of the first settler. The commonwealth has not granted the land to any other person, or forfeited the right of the alienee of the first settler, and the land remains charged with the purchase money and the interest since 1798. The court committed no error in not submitting the question of abandonment to the jury. There was no dispute about the facts; it was simply a question of law, whether the facts, not disputed or contradicted, amounted to a legal, or implied, or constructive abandonment, or not.

And the only two points put to the court by the defendant solicit an instruction that these facts did amount to an abandonment. When, therefore, the court negatived those points, it seems rather out of place to assign the answering them for error. The only question is, whether the answer was right or not. We think it was right.

As to the remaining error assigned for the admission of the survey in evidence, I have already said that it was properly admitted. Even if that survey had not designated and plotted off the separate allotments of the settlers, according to their agreed or consentible lines, it would have been good, because it would

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have been a compliance with the act. Their different shares could be adjusted when they applied for a warrant for their respective parts; or they might take a warrant for the whole, in the name of one of the settlers, and adjust their proportions afterwards. The survey, as made, was a compliance with the act.

Judgment affirmed.

Galbraith, *versus* The Commonwealth.

Where a man dies intestate unmarried, and without leaving lawful issue, but leaving collateral heirs and an illegitimate son, who is legitimated by an act of the legislature, giving to him the benefits and rights of a child born in lawful wedlock, as if he had been born in lawful wedlock, which act, however, was not approved till the day *after* the decease of the intestate; such act does not divest the right of the commonwealth to collateral inheritance tax on the whole estate.

ERROR to *Butler county*.

The question in this case was whether collateral inheritance tax was due to the commonwealth, out of the estate of William Ayres, of Butler county, deceased. A case was stated for the opinion of the court, in the nature of a special verdict.

It appeared that William Ayres, Esq., died on the *fourth* day of April, A. D. 1843, unmarried and without lawful issue, but leaving William John Ayres, an illegitimate son, and brothers and sisters, and other collateral heirs. At the time of his death, he was seized and possessed of a considerable estate, consisting principally of personalty and some realty. Before his death, the said William Ayres made an alleged nuncupative will in favor of his son, the said William John Ayres, in which he bequeathed to him the whole estate. This alleged nuncupative will was, after the death of the said William Ayres, to wit, on the 18th of April, 1843, admitted to probate, and letters of administration with the will annexed, issued thereon, by the register to John Galbraith and William Campbell, who is since deceased. An appeal was taken from the probate of this will by one of the collateral heirs, but in consequence of a compromise with the appellant, it was never prosecuted, but he agreed to discontinue it.

On the 4th of April, 1843, the Legislature of Pennsylvania passed through both branches, the following law, but which was not approved by the Governor *till the following day*, to wit, the *fifth* of April, 1843:

An act to confer on William John Ayres the benefit of a child born in lawful wedlock.—Be it enacted, &c., "That William John Ayres, son of William Ayres, Esq., of Butler county, is hereby declared to be legitimate, and to have and be entitled to all the benefits

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and rights of a child born in lawful wedlock, in the same manner and with like effect as if he had been born in lawful wedlock."

On the 17th June, 1843, William John Ayres and the collateral heirs entered into an agreement of compromise, in which, after protesting their respective rights, it was agreed that William John Ayres should have the farm adjoining the borough of Butler, which he claimed to hold under a *parol gift* from his father in his lifetime, and the one-third of the residue of the estate, real and personal; the other two-thirds to be divided in certain proportions among the collateral heirs.

The question was, whether the said estate or any part of it, was liable to pay a collateral inheritance tax.

BREDIN, J., *inter alia*:—The legislature having given to him (William John Ayres,) the rights of a child born in lawful wedlock, is stopped from receiving any collateral inheritance taxes on that portion of the estate received *by him*. So far as the *collateral* heirs receive, or are to receive of the estate of the deceased William Ayres, the court is of opinion that they are bound to pay the collateral inheritance tax on the personal and real estate of the deceased, so far as they have or are to receive it by the agreement, the value to be ascertained in the manner agreed in the case stated; and the court give judgment in favor of the commonwealth for the tax, with interest on this amount of said estate.

The case was argued by *Graham* and *Fetterman*, for plaintiff in error.

Purviance and *Bredin* were for the commonwealth, but were not heard in reply.

The opinion of the court was delivered, Oct. 14th, by

BURNSIDE, J.—The parties stated a case in the Common Pleas. Both claimed a reversal of the judgment below; and they desired the opinion of the Supreme Court on the whole case. The commonwealth had neglected to take a writ of error, and on the suggestion of this court, the counsel agreed in writing that the case should be heard and decided as if both parties had writs of error.

The case stated shows that William Ayres died on the 4th April, 1843, unmarried and without lawful issue, leaving William John Ayres, an illegitimate son. His heirs at law were brothers and sisters, and their descendants. He died, leaving a large real and personal estate, subject to the collateral inheritance law of the 7th of April, 1826: *Dunlop*, second edition, 453. William John, his son, claimed the estate under an alleged nuncupative will, which was admitted to probate by the register. From this decree, the collateral heirs appealed. The parties compromised, agreeing to divide the estate. The appeal never was legally determined, nor is it material, when the case is properly considered.

[Galbraith v. The Commonwealth.]

On the 5th April, 1843, an act of the legislature was passed to confer on William John Ayres the benefits of a child born in lawful wedlock. This was after the death of his father. On the death of William Ayres, his estate descended and vested in his collateral heirs, unless he had disposed of it by will. The right of the commonwealth to the collateral inheritance tax vested before William John Ayres was legitimized, and the act did not divest it, nor affect the right of the commonwealth to the tax. The moment a man dies, leaving heirs, lineal or collateral, his estate vests, and is beyond the constitutional power of the legislature: *Norman v. Heist*, 5 W. & Ser. 171. The learned judge who tried the cause, was of the opinion that as to the portion of the estate which William John Ayres received under his agreement with the collateral heirs of his father, the commonwealth was not entitled to the collateral inheritance tax, because the government had given him the rights of a child born in lawful wedlock. But we must bear in mind that the rights of the State had vested the day before the legislative act took effect, and there is nothing in that act which divests any right of the State. We are of opinion that the administrator is liable and bound to pay the collateral inheritance tax to the commonwealth, on the whole estate, real, personal and mixed, of William Ayres at the time of his death, as well the part taken and received by the collateral heirs, as the part taken and received by William John Ayres; and we enter judgment for the commonwealth accordingly; the amount to be ascertained as the counsel have agreed upon.

The judgment against the collateral heirs is affirmed, and the judgment in favor of William John Ayres is reversed, and judgment entered in favor of the commonwealth.

Christy et al. *versus* Barnhart et al.

In order to take a parol gift of lands out of the statute of frauds, possession must be taken in pursuance of the gift. A previous possession will not have that effect.

ERROR to the Common Pleas of *Butler county*.

This was an ejectment by Barnhart and others *vs.* Christy and the minor children of William Barnhart, deceased, for 100 acres of land. The plaintiffs claimed as heirs of Jacob Barnhart, and the defendants as heirs of William Barnhart, who was a son of Jacob. Fifty-one acres and 102 perches of the land in dispute was admitted to have belonged to Jacob Barnhart, and was at one time a part of his old place. This piece of 51 acres and 102 perches, was claimed by *defendants* as having been given by Jacob

[Christy et al v. Barnhart et al.]

to William Barnhart, his son, by parol gift. That William took possession of it about the year 1830—that the old man had it surveyed, and gave it absolutely to him; that he made valuable improvements on it afterwards. The old man died in Nov., 1838, William died in 1845. In 1837, the survey was made; that in 1838, the land was assessed in the name of William, and so continued till the death of William. Before 1838, it was assessed in the name of the old man.

As to the other piece of fifty acres, the defendants below claimed it as having been purchased by Jacob Barnhart, the father, in 1836, from McCall, expressly for William, and that it was paid for jointly by Jacob and William; that William took possession and made valuable improvements on it, and exercising acts of ownership till his death, in 1845. It appeared from the article of agreement between McCall and Jacob, that Jacob Barnhart paid \$176, and William paid \$90. That William finished the payments on it, after his father's death, and that he took a deed to himself *in trust for the heirs of Jacob Barnhart*, dated 28th Oct. 1839. It was said that William was an illiterate man, and may not have known the terms of the deed as to the trust.

BREDIN, J., charged, *inter alia*, that "the mere payment of money by William, on the purchase made by his father from McCall, if there was no agreement that his father was to purchase for him, or for him and his father, would give him no interest in the fifty acres purchased.

In answer to a point, he stated, *that if the evidence on both sides is, that the possession was taken before the alleged contract of gift*, then the defendants would not have any title by the alleged gift.

Verdict was rendered in favor of the plaintiffs, for portions of the land in dispute.

Error was assigned to the charge; and particularly, that

The court erred in saying that if the jury believed that Jacob Barnhart purchased the fifty acres for himself and William, &c. &c. The evidence referred to is, that he purchased it exclusively for William.

The court erred in their answer to plaintiffs' fourth point, in charging that if the defendants were in possession *before* the contract of gift, that defendants would not have any title by the alleged gift.

The case was argued by *Timblin*, for plaintiffs in error; and by *Purviance*, for defendants in error.

The opinion of the court was delivered, Oct. 14th, by

BELL, J.—It is not to be disputed, at this time of day, that to

[Christy et al. v. Barnhart et al.]

withdraw a parol sale of lands from the blighting effects of the statute of frauds, there must be an open and absolute possession taken in pursuance of the contract, with *a view to the performance of it*. It is consequently a settled rule that a parol sale to a tenant in possession is within the statute, though his possession be afterwards continued, because there is no change of possession, in execution of the contract: *Galbraith v. Galbraith*, 5 *Watts* 146; *Brawdy v. Brawdy*, 7 *Barr* 16. This has been thought indispensable, and it certainly is so, notwithstanding the inferences the plaintiff in error seeks to draw from *Lee v. Lee*, 9 *Barr* 117. That case was decided under its peculiar circumstances; and although I did not unite with my brethren in ruling it, I am authorized to say it was not for a moment intended to draw into question a principle which lies at the very foundation of the equity invoked. Much less was it the object of the determination to assert that assessment of the land sold, in the name of the vendee, and payment of taxes by him, is equivalent to a change of possession. It proceeded principally on the ground of an exchange of property, followed by a corresponding possession and subsequent sale of one of the tracts exchanged, which put it out of the power of the plaintiff to reinstate the before existing relations of the parties. It was thought possession of one of the tracts, in conjunction with the assessment of the other in the name of the tenant's vendee, might be accepted as tantamount to an actual corresponding possession of both the tracts. Had there been no possession by the plaintiff, there would have been no pretence for the position, that the transaction was not within the statute. As it is, the case carried the exception as far as it can be urged with any degree of safety. A step further would abrogate the statute itself. The court below was consequently right in its direction to the jury on this point. What was said is in entire accordance with the facts proved, and harmonizes with the law springing from them. In respect to the fifty acres which originally belonged to the father, it is indisputable the son was in possession prior to the alleged gift, which possession was continued without visible change. As to the fifty acres purchased from McCall, the jury found the plaintiffs were entitled to one moiety of it, by way of resulting trust. Of the other moiety, they were correctly told, the plaintiffs could recover, unless there was an absolute gift of it, and possession taken in pursuance of the gift.

Judgment affirmed.

Hetrick *versus* Campbell and Crum.

Where one engaged in agriculture has in his possession *two* yoke of oxen, one yoke of which he had sold, but had received back the possession of them on the same day, to break them, for the vendee; though this sale be void as to his creditors, it is valid as to the vendor, and divests him of the ownership; and the *other* yoke, still owned by him, is not liable to levy and sale, being protected by the exemption act of 22d April, 1846.

ERROR to the Common Pleas of *Armstrong county*.

This was an action by Hetrick *vs.* Campbell and Crum. The action was in trespass, brought to recover the value of a yoke of oxen, which, in the summer of 1848, were the property of the *plaintiff*. It seems that a judgment was obtained against him on the 30th August, 1840, which remained unsatisfied, and, on the 22d July, 1848, was assigned to Hugh Campbell, one of the defendants. Two days after that, on the 24th July, he issued an execution upon it, and placed it in the hands of the other defendant, D. Crum, who, by virtue of it, levied on the cattle in dispute, and sold them, and returned the writ, money made in part, \$45.37.

The plaintiff claimed that the oxen were exempt from execution, under the act of 22d April, 1846. The plaintiff was a poor man, and lived on a small farm. On the part of defendants, it was contended, that at the time of the levy, the plaintiff, Hetrick, had *in his possession another yoke of oxen*. On the part of the plaintiff, it was proved that he had sold the *other yoke* about a year previous to the levy and sale of the oxen in dispute, to one Grinder, and that he forbid the constable from taking the cattle which he had not sold. On the part of defendant, it was alleged that the sale to Grinder was a legal fraud as against the creditors of plaintiff. According to the testimony of Grinder, the bargain was, that Hetrick was to be paid nineteen dollars for the cattle, and have the use of them for one year for breaking them. They had not been well-broken at the time, and he supposed they would be able to work by the next spring. In pursuance of this bargain, early in the morning, before breakfast, the cattle were driven to the farm of Isaac Nulf, being part of the same tract where plaintiff lived, and within a very short time, on the same day, were driven back by the plaintiff to his own house, used as they had been before, and so continued till July or August, 1848, when the levy was made on the cattle in dispute. The nineteen dollars were paid.

It thus appeared that when the levy was made, plaintiff had in his actual possession *both yoke of cattle*, both of which he had broken and used for a length of time, and both of which were confessed to be his own property at one time.

On the part of Hetrick, it was contended that the sale to Grinder

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was good as between the parties, and thus left the plaintiff none but the yoke levied on as his own property; that *Grinder* could take one yoke under the sale, and if the other was liable to be taken by the levy, he would be without a yoke, contrary to the act of Assembly.

The act of 22d April, 1846, exempts from levy and sale one yoke of oxen, with yoke and chain, and certain other property, "when owned by any person actually engaged in the science of agriculture."

BUFFINGTON, J., *inter alia*, instructed the jury, that upon the undisputed facts in this case, the sale of the one yoke to *Grinder* was fraudulent and void, and, of course, as if no sale had been made, so far as regards creditors; and being thus void, left *both* yoke the property of the plaintiff, and the officer had a right to take *either*, and their verdict ought to be for the defendants.

Plaintiff's counsel excepted, and it was assigned for error, that the court erred in instructing the jury that the sale of the yoke of oxen as between *Grinder* and *Hetrick* was *not good*; that *Grinder* could not take the oxen from *Hetrick* under the sale.

2d. The court erred in instructing the jury, that "when the officer came there and found two yoke of oxen in the possession of the plaintiff, both of which he had confessedly owned and broken, and was then using, that he was not bound to inquire or know which had been sold. If he had made the inquiry he would have found that the sale was void as to creditors, and as if no sale had taken place."

3d. To the part of the charge above quoted.

The case was argued by *Lee*, for *Hetrick*, plaintiff in error.—He contended, *inter alia*, that it was admitted on the trial that the sale to *Grinder* was a *bona fide transaction*, and that it was the province of the jury to find whether there had been such a delivery and retention of possession as the law requires. That, *as between Hetrick and Grinder, the sale was good*, and, if so, *Hetrick* was, at the time of the levy, the *owner* of but *one* yoke, meaning the yoke levied on, and which *Hetrick* had not sold. That the act of 16th June, 1836, applies to property *owned or in the possession* of any debtor: 10 *Watts* 144: and the act of 22d April, 1846, to property when *owned* by any person, &c.

Phelps, for defendant in error.—That if the sale to *Grinder* was fraudulent in law, the right of property never passed to him, and that either yoke might have been levied on as the property of *Hetrick*: 10 *Ser. & R.* 419; 2 *W. & Ser.* 147; 10 *Watts* 438.

The opinion of the court was delivered, Oct. 21st, by

COULTER, J.—*Hetrick*, who was a farmer in a small way, but did a little at every thing, as appears by the evidence, had two

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yoke of young oxen in his possession, at the time the alleged grievance was committed by the defendants, one of whom is a judgment creditor, and the other a constable. In July, 1848, Campbell issued an execution on his judgment against Hetrick, which Crum, the constable, levied on one of the yoke of oxen, which were acknowledged, on all hands, to be the property of Hetrick, and sold them. And for that this action of trespass is brought, under the exemption law of 22d April, 1846. The other yoke of oxen, it appears very distinctly from the evidence, were sold by Hetrick, in August, 1847, to Grinder, who paid the money for them, part at the time of his purchase, and the residue soon afterwards, but agreed that Hetrick should retain them one year, for the purpose of breaking them thoroughly to the yoke, which Hetrick agreed to do; by which time, it was the understanding of the parties, that the younger oxen, sold by the constable, would be sufficiently tutored and trained to do the work on his sterile bit of land, where he was, in the language of the act of Assembly, "actually engaged in the science of agriculture." The question, then is, whether the sale to Grinder, being a constructive or legal fraud, and therefore void as to creditors, in consequence of the possession of the oxen not accompanying the sale, did or did not divest Hetrick of the ownership. There is no evidence of actual fraud on the part of Grinder. It is admitted, or not denied, but that the purchase by him was *bona fide* and for value.

The court below instructed the jury that as the possession did not accompany and follow the sale to Grinder, it was a legal fraud against creditors; and in this they were right. But they further instructed them, that it did not divest Hetrick of the ownership; and there the learned court fell into an error. The statute of 13th Elizabeth enacts, that all sales, transfers, and assurances, made with intent to defraud creditors, shall be considered void, as against the interest intended to be defrauded. And a long train of decisions has firmly established, that the retention of possession by the vendor of a chattel, is a constructive or legal fraud, as against creditors. And this rule was adopted because possession of a chattel is the ordinary evidence of ownership, and because a contrary rule would give facility to collusive and fraudulent sales, for the purposes of covin, whilst the vendor retained all the advantages of ownership. But the very same train of decisions establish that such sales are good and valid between the parties themselves. And if good between the parties, Hetrick ceased to be, and Grinder became the owner. Grinder's creditors, if he had any, could have lawfully levied on the oxen left in the possession of Hetrick, and lawfully sold them; or Grinder himself could have taken them; and thus poor Hetrick would have been stripped and deprived of all his oxen, without remedy or redress, contrary to the plain words of the act of Assembly, which entitled him to

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retain one pair, of which he was the owner. It was the creditor's own fault, and results from his own want of caution and vigilance, if he is brought into a dilemma. He ought to have levied on the pair of oxen sold to Grinder, because, against the creditor, that sale was void, and Grinder would have no cause of complaint, inasmuch as it was his own folly and remissness to leave the chattel in the possession of Hetrick. He knew, for every man is presumed to know the law, that by that act he ran the risk of losing his property. Thus the law deals out its judgments with an equal hand in relation to all parties concerned. It is bootless to say that the creditor and the constable did not know which, or whether both yoke of the cattle were owned by Hetrick. It was their business to inquire. The officer always executes process at his peril. He is not bound to execute at all without indemnity; and the law favors only the vigilant officer. The defendant in error relies much upon the case of *Fuller v. Lindsay*, 10 *Watts* 146. But that decision was made on a different statute, and went upon grounds not applicable to this case. The exemption in the act of 1836, was to "articles owned by *or* in the possession of any debtor." There the defendant was in the possession of two cows, one of which he owned, and the other he had leased for a definite period. The court held that either of the cows in his possession might be sold; his interest in the one which he possessed by lease, and the right to the other which he owned; and that the sheriff was not liable for selling the one of which the debtor was the absolute owner, because he might levy on either, and because the exemption was to articles "owned by *or* in the possession of any debtor;" not owned by *and* in the possession, &c. A distinction somewhat refined, but so the decision runs. The distinction, however, is exact and just, nevertheless. That decision went upon the peculiar phraseology of the act of 1836, and upon the fact of the one held by lease being subject to sale for the term; so that both or either were subject to levy, the act not giving the debtor the privilege of electing which, but only that one should be exempt. This decision was before the eye of the law-making power in 1846, when they passed the act exempting one horse, mare, or gelding, or in lieu thereof, one yoke of oxen, *at the option of the defendant*; and it is in full evidence that the defendant in this case objected to the levy on the oxen, which the constable took. The phraseology of the act is as follows, to wit: property owned by any person actually engaged in the science of agriculture, to wit, one horse, &c., leaving out all the language as to possession. That decision does not touch or reach the principle of this case; the question of legal fraud was not implicated in it, and because both cows there were liable to execution, being in the debtor's possession. But here both yoke of oxen were not the property of Hetrick; of one he had divested himself by the sale for value to

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Grinder, whose creditors could at any time have taken it before the levy, or who could take it himself, whilst in the possession of Hetrick, and whose property it was, unless the creditors levied on it in the possession of Hetrick; and that would raise the question of legal fraud, and consequent invalidity of the sale as against them. This left but one yoke, as the property of Hetrick, because the other yoke could not be his and Grinder's, at the same time; and the former he owned, and was entitled to retain against creditors, under the act of 1846, but which the defendants took from him against law. I confess that this may seem to afford some facility to covinous debtors. But we must take the law as we find it written and established. And the law is always made with relation to the rights and remedies of all persons interested. But neither the law itself, nor the action of courts upon it, can always circumvent or frustrate the covin of fraudulent persons, without the aid of the caution, vigilance, and circumspect action of the creditor himself and the officer who executes process.

Judgment reversed and *venire de novo* awarded.

Bovard *versus* Christy.

Where the direction of the court tends to withdraw the attention of the jury from the conflict of testimony which it was the province of the latter to dispose of, it is error.—Therefore, where a dispute existed as to the height of water raised by a dam, and the court referred the jury, as to its cause, to changes in the bed of the stream above the dam, which this court consider impossible, the judgment was reversed.

ERROR to the Common Pleas of *Westmoreland county*.

This was an action on the case for a nuisance, brought by Christy against Bovard, for flooding his lands by the erection of a mill-dam upon Beaver Run, a small stream which ran through the farms of the parties.

It appeared from the evidence, that John Bovard, the father of the plaintiff in error, erected a saw-mill dam, upon Beaver Run, in 1816, the water from which dam he used for driving a saw-mill, until his death. By his will, he devised the property to his son, who entered and continued in the enjoyment till 1834, when he built a grist-mill upon the site of the saw-mill, without, however, altering the dam. In July, 1837, the dam was carried away by a freshet, and Bovard erected a new one upon the old foundation, or very nearly so. In the mean time the land above this dam was devised to the defendant in error, by his father, and he went into possession.

Upon the trial, the question was, whether the new dam was higher than the old one, and whether it threw the water back upon Christy

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further than before. The plaintiff below, (Christy,) offered evidence to prove, that since the erection of the new dam with a higher and more extended wing-dam, the water in the dam was raised higher, and that his meadows were worse flooded and injured than before.

The defendant, Bovard, offered evidence to prove that the new dam was not higher than the old, and could not, therefore, be the cause of the increased flooding above it, if such did exist.

Upon this part of the case, the court charged the jury, "that the defendant was justified in flooding the land to the same extent and no greater than he had done for twenty-one years before the commencement of this suit; and further, if by *changes in the bed of the stream above the dam*, the water was thrown further back by reason of the obstruction occasioned by the dam, than it had been for twenty-one years, the defendant would be liable for the additional injury, *although the height of the dam may not have been increased*, for the reason that the presumption of grant arising from the period aforesaid, was as to the particular land flooded, and not as to the height of the dam."

The jury, under this instruction, returned a verdict for the plaintiff for \$36; upon which there was judgment.

Error was assigned as to the above part of the charge, and in other respects.

The case was argued by *Cowan*, for plaintiff in error; and by *Burrel*, contra, with whom was *Foster*.

The opinion of the court was delivered by

GIBSON, C. J.—It was said in *Riddle v. Dixon*, 2 Barr 364, that an error in hydrostatics is not a subject of legal adjudication; but it becomes an error in law, when the court gives it a direction that may lead the jury to error of fact. There was a conflict of testimony in this case, and witnesses, who swore that the surface of the pool at the dam was no higher than the permanent watermarks on the old forebay and the shores, were confronted with witnesses who swore that it was raised at the upper end of the pool, for that more of the plaintiff's land had been submerged since the erection of the new dam than was submerged before it. Both sets could not be right; for it is an eternal principle, that water finds its level; yet the court pointed out a middle ground to reconcile them, by directing, that if by *changes in the bed of the stream above the dam*, the water was thrown further back by reason of the obstruction raised by the dam, than it had been for twenty-one years, the defendant would be liable for the additional injury, *though the height of the dam may not have been increased*. But such an effect, from such a cause, was impossible. No deposit in the pool or excavation in the

[Bovard v. Christy.]

channel above it, could alter the pitch of the surface; and, as was said in *McCalmont v. Whitaker*, 3 *Rawle* 84, it is the relative height of the surface which determines the quantity of the water power. No matter how much the bottom of the stream may have been washed away, the effect would be to deepen the water in it, not to overflow its banks; nor could any sand-bar be occasioned by the dam which would produce the supposed effect. The direction, consequently, tended to withdraw the attention of the jury from the conflict of testimony, which it was their business to dispose of.

Judgment reversed and a *venire de novo* awarded.

Konigmaker versus Brown.

1. The lien of a judgment obtained against one in his lifetime will not be divested in favor of *his heirs or devisees*, as to the lands bound by it at the death of defendant, merely by reason of the lapse of above nineteen years from his death, without *scire facias*.

2. A sale by executors, under power in the will to sell for payment of debts, will not discharge, in favor of the *heirs or devisees of a testator*, the lien of a judgment existing against him at his death, where the proceeds of sale have been applied to the payment of subsequent liens.

ERROR to the Common Pleas of *Armstrong county*.

These were writs of *scire facias* in the name of Joseph Konigmaker, administrator *de bonis non* of Samuel Cochran, deceased, *vs.* Catharine Brown, acting executrix of James Brown, Jr., deceased, with notice to the widow, heirs, and devisees of said deceased. They were three writs of *scire facias* issued to June term, 1848, to revive three judgments against James Brown, existing to September term, 1825.

It was agreed that the following facts be submitted as a case stated in the nature of a special verdict, for the opinion and decision of the court, either party to be permitted to take a writ of error.

The following judgments were duly obtained and entered in Armstrong Common Pleas, on the 3d December, 1825:

Samuel Cochran v. James Brown, Jr.—No. 67, September term, 1825. Judgment \$200. Interest from 2d December, 1825. *Stay of execution till 1st December, 1848.*

Same v. Same.—No. 68, September term, 1825. Judgment \$200. Interest from 2d December, 1825. *Stay of execution till 1st December, 1829.*

Same v. Same.—No. 69, September term, 1825. Judgment

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\$240.29. Interest from 2d December, 1825. *Stay of execution till 1st December, 1830.*

James Brown, Jr., died *on the 25th February, 1829*, seised in fee of certain real estate, upon which the aforementioned judgments were then a lien; a portion of which real estate is now in the possession of the defendants, as his heirs and devisees. By his will, he appointed James E. Brown and Catharine Brown his executors, and granted them authority to sell real estate for the payment of debts. By virtue of this authority, real estate was sold amounting to \$2132.50, which came into the hands of James E. Brown, as executor, and was accounted for by him to the estate, his account having been finally settled. The funds were used in paying debts, which were *subsequent*, in point of lien, to Cochran's judgments. *Scire facias issued to revive these judgments to June term, 1848.*

If the court should be of opinion, that the plaintiff is entitled to judgment of revival against the executor, and the lands of the decedent in the hands of the heirs and devisees, then judgment to be entered generally for plaintiff; amount to be ascertained by the attorneys, (partial payments having been made;) but if they are of opinion that the lien of the judgments is lost, as against the real estate, then judgment to be entered (amount to be ascertained in like manner) *against executrix de bonis testatoris, and in favor of the widow, heirs, and devisees.* It is further agreed, that after the death of Brown, *his executors applied to Cochran for indulgence* in the payment of these judgments, which was granted, and that payments were made within twenty-one years.

The defence, on the part of the heirs and devisees, is twofold:

1st. That the judgments should have been paid out of the fund raised by the sale of real estate made by the executors.

2d. That the lands are discharged from the lien by the lapse of time.

OPINION OF THE COURT.

We think both objections are valid. The fund raised by the sale of real estate, and upon which the judgments were the first lien, was ample, and if the plaintiff neglected to claim the money, or acquiesced in its application to other purposes, he cannot now be permitted to resort to the land in the hands of the heirs and devisees; and even if it was simply a *devastavit* on the part of the executors, upon the principle of *Pry's Appeal*, 8 *Watts* 255, the creditor should find his remedy against the executors and not the heirs and devisees.

But, be this as it may, the other is, in our opinion, a fatal objection. These judgments were entered in 1825; and a period of twenty-three years from their entry, and nearly twenty years from the death of the original defendant, is suffered to elapse before

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any notice is given to the widow and heirs that the land in their hands would be resorted to for payment. Whatever the rule may have been at one time in Pennsylvania, we believe it to be now settled, that heirs and devisees are to be treated, in this respect, as purchasers, so as to receive the benefit of the statute limiting the liens of the debts of decedents. If this be so, the question is too plain for argument; and we, therefore, give judgment in favor of the *plaintiff*, against the executrix *de bonis testatoris only*; and, as to the others, we direct that judgment be entered *in their favor*.

By the court.

KNOX, President.

It was assigned for error, that,

1st. The court erred in deciding, that if the plaintiff neglected to claim the money arising from the sale of the real estate, or acquiesced in its application to other purposes, he cannot be permitted to resort to the land in the hands of the heirs and devisees.

2d. That the judgments, by lapse of time, had lost their lien against the land of the testator, and that it cannot be resorted to for payment in the hands of his heirs and devisees.

3d. In not giving judgment generally, on the case stated, in favor of the plaintiff, and *de terris* against the widow, heirs, and devisees.

The case was argued by *Phelps*, for plaintiff in error.—The plaintiff's judgments were a lien *at the death of the testator*, on the land sold, and also on that now in the possession of the defendants, and it would not be divested by the sale: *Wells v. Baird*, 3 *Barr* 351; 1 *Watts* 494, *Culp v. Fisher*. It would not alter the case, if it were a judicial sale, and the proceeds applied to junior liens: 9 *Watts* 529. The liens were not divested *by lapse of time*: 4 *Watts* 424; 1 *Dal.* 481; 8 *Watts* 124; *Marsh v. Halde-man*, 3 *Pa. Law Jour.* 512; 5 *Whar.* 324.

Lee and Foster, for defendant in error.—That the creditor is to be affected by the misapplication of the funds: 4 *Yeates* 487; 1 *Pa. Rep.* 240; 10 *Barr* 265; 1 *Wh. Dig.* 1850, p. 261; 8 *Watts* 255. That the heirs and devisees are to be treated *as purchasers*: 1 *Watts* 14; 6 *Watts* 22; 6 *W. & Ser.* 119; 9 *Barr* 265.

The opinion of the court was delivered by

BELL, J.—If iteration is of any value in determining discussion, the principal question presented by this record, ought to be treated as at rest. Connected with the subject of lien, there is, perhaps, no one topic that has undergone more frequent examination and

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deliberate decision than that which touches the continued encumbrance of a judgment recovered against a decedent, in his lifetime. The disposition sometimes manifested to prolong the agitation, arises, not from any difficulty inherent in the inquiry, or harshness in operation of the settled rule, but, most probably, from confounding it with a totally distinct though kindred subject.

A legal consequence of the acts of 1700 and 1705, treating the lands of a decedent as assets for the payment of his debts, was to continue these as liens, against all the world, for an indefinite period of time. The inconveniences attending this result becoming apparent, it was enacted by the act of 1797, that no such debts, except they be *secured by mortgage, judgment, recognizance or other record*, shall remain a lien on the lands of a deceased debtor, for a longer period than seven years unless certain steps, pointed out by the act, be taken by the creditor within that period. This provision is repeated by the act of 1834, save that the number of years allowed for prosecuting claims is reduced to five. For some time, a doubt was entertained whether lands held by heirs and devisees were within the protection of these statutes, and this doubt produced some contrariety of decision. But finally, *Kerper v. Hoch*, 1 *Watts* 9, followed by *Hemphill v. Carpenter*, 6 *Watts* 22; and *Bailey v. Bowman*, 6 *W. & Ser.* 118, settled the question affirmatively, and it is now ascertained that mere lapse of time will divest the burden of a decedent's general debts, even in favor of volunteers. A close adherence to the provisions of these acts, necessarily restricted the protection they afforded to such claims as were not duly prosecuted within the statutory periods. When prosecuted to judgment, the limitation ceased to be applicable since the case was no longer strictly within the purview of the acts. But startled by the suggestion of unlimited lien, this court, by a liberal use of the doctrine of analogy, was induced to borrow the principle of the act of 1798, relating to the limitation of the lien of judgments *inter vivos*, and to engraft it on the act of 1797. This was thought to be justified by considerations of public policy, though at the same time, it was conceded the younger statute was not, directly, applicable to *post mortem* judgments: *Trevor v. Ellenberger*, 2 *Pa. Rep.* 94; *Penn v. Hamilton*, 2 *Watts* 53. Yet, notwithstanding the disinclination to prolonged liens, and the disposition manifested to repudiate them, even at the risk of trenching upon the proper functions of the legislature, it was never thought either of the statutes referred to had any effect to limit the lien of a judgment recovered against a decedent, in favor of his heirs or devisees. This species of security could not be made subject to the acts of 1797 and 1834, because it is a security of record, specifically pointed to in those statutes "to preclude the implication of an intent to abridge or impair them;" and the act of 1798 was expressly ruled, in *Fetterman v. Murphy*, 4 *Watts* 424,

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to be applicable only where there are purchasers or subsequent encumbrancers. The difference, in this particular, between the lien acquired by the general debts of a decedent, and that attending a judgment recovered against him, is strongly illustrated by *Morehead v. McKinney*, 9 *Barr* 265, where after a judgment *inter vivos*, the defendant purchased lands and died. It was held that as the judgment was not a lien on those lands, at the moment of the death, it fell within the class of general debts, and therefore, required to be revived as against the heirs. In *Jack v. James*, 5 *Whar.* 321, it was ruled on the authority of *Fryhoffer v. Busby*, 17 *Ser. & R.* 121, that a judgment, though possessing the property of lien, at the death of the defendant, must be revived under the act of 1798, to preserve the encumbrance as against a subsequent judgment creditor of one of the heirs of the intestate. But the case goes expressly on the distinction pointed out in *Fetterman v. Murphy*, between those who may be esteemed volunteers, and others, having an interest in the subject of the lien. It repeats the doctrine, that "the act of 1798, which alone regulates judgments against a decedent, is considered as having been passed for the protection of purchasers and judgment creditors, and not for the protection of heirs and devisees, *who must stand exactly in the situation of the debtor*;" and notices, approvingly, the decision in the preceding case, sustaining the lien of a judgment against the lands of a decedent, in the hands of heirs, though twelve years had elapsed since his death, without any proceeding had upon it. Shortly before this, was decided *Brobst v. Bright*, 8 *Watts* 124, where, following *Fetterman v. Murphy*, it was determined that there is no statute limiting the lien of a judgment in favor of heirs. "Nor," it was added, "is there any reason for it. After a reasonable time for the presentment of demands, it is proper to secure the heirs from secret debts, that they may improve the estate without risking the expenditure; but the propriety of it vanishes before a debt of record." This was followed by *Wells v. Baird*, 3 *Barr* 351, in which the same doctrine was applied to judgments which were liens on lands held under a devise, the court remarking, "according to settled principles, the judgment against the testator continued a lien on the lands in the hands of the devisees, without any legislative provision." Before dismissing these cases, it may be well enough to remark that in *Fetterman v. Murphy*, nineteen years had run from the date of the judgment, and twelve from the death of the defendant, before a *scire facias* sued against his heirs; in *Brobst v. Bright* there had, in like manner, elapsed twenty years from the rendition of the judgment, and thirteen from the death of the testator; and in *Wells v. Baird*, eleven years from the death of the defendant. In our case, nineteen years passed after the death of the defendant, before *scire facias* issued. Were it necessary to give any reason for this

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delay, it might be found in the successful solicitations for indulgence, preferred by, at least, one of the parties who, as *terre tenants*, now seek to aver time as a flat bar. To prevent misapprehension, it is, however, proper to say, that, without this feature of his case, the lien of the plaintiff's judgment is undisturbed.

The course of decision I have brought to notice is in entire harmony with, and indeed sustained by the 25th section of the act of February, 1834, which provides that judgments recovered against a decedent shall bind his real estate for the term of five years from his death, though they be not revived by *scire facias*, or otherwise, "and after the expiration of such term, such judgments shall not continue a lien on the real estate of said decedents, *as against a bona fide purchaser, mortgagee, or other judgment creditor* of such decedent, unless revived by *scire facias*, according to the laws regulating the revival of judgments."

Had the authorities been cited to the court below, it is more than probable we should not have been troubled to overrule this judgment. The labor of bringing them together may, perhaps, be compensated by the avoidance of a similar necessity hereafter.

The second question presented is also shown by decided cases to be free of difficulty. As a general rule, a judicial sale discharges encumbrances, and lien creditors are bound to look to the application of the fund at their peril: *Bank of Pennsylvania v. Winger*, 1 *Rawle* 295; *Finney v. The Commonwealth*, 1 *Pa. Rep.* 241. The same principle is operative to discharge from the general debts of a testator, land sold by a trustee under a testamentary power given for that purpose: *Cadbury v. Duval*, 10 *Barr* 265. But such a sale will not disturb specific encumbrances, by mortgage, judgment, recognizance, and the like; and when there are several distinct parcels of land bound by the same encumbrance, even a judicial sale of one of them will not, necessarily, divest the encumbrance as to the others, unless there exist an equity calling imperatively on the creditor to look to the fund raised by the sale, and he refuses to do so, after notice. Generally, an encumbrancer, who enjoys the security of two estates or funds, possesses both the legal and equitable right to resort to either for payment; and he may, therefore, rightfully forbear to make his debt from the avails of the estate first converted. And where, as here, that fund has been applied in discharge of other burdens upon the estate, though subordinate in degree or junior in time to the encumbrance in question, there can be no pretence, on the part of volunteers holding the unsold lands, that they hold discharged of the lien. This is familiar doctrine, and so reasonable in itself that it may well stand alone, without the buttress of decided cases. But I may refer to our determinations in *Adams v. Heffernan*, 9 *Watts* 529; *Benner v. Phillips*, 9 *W. & Ser.* 18, and *Wells v. Baird*, *supra*, as fully recognizing it. The last of these is, in principle, precisely

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like the instance before us, and may be accepted as ruling the point, without reference to the important fact that those representing this estate, with a view to its beneficial administration, asked and obtained from the plaintiff's testator, postponement of the payment of his demand. This of itself, ought to estop them from averring a misapplication of the avails of the land sold under the power, even though it were shown the creditor had notice of it.

Judgment reversed, and judgment to be entered under the case stated, for the plaintiff, Konigmaker, administrator, &c. The amount to be settled as stipulated by the case stated.

Davis *versus* Steiner.

1. On a demurrer to evidence, the party demurring admits all the facts which the evidence tends or conduces to prove in the slightest degree, or which the jury might, with the least degree of propriety, have inferred from it; and no testimony can be considered, which impugns its truth.

2. To take a case out of the statute of limitations, the acknowledgment need not refer to the *amount of the debt*. It is necessary, however, that there be no uncertainty in the acknowledgment, as to the debt referred to.

ERROR to the Common Pleas of *Westmoreland county*.

This was an action on the case by David Davis *vs.* Steiner, executor of Philip Kuhns, deceased. Summons issued 22d Jan. 1848.

The plaintiff claimed in this case to recover on the grounds—that, on the 5th March, 1819, he sold, by articles of agreement, a tract of land to Jacob Dry, for \$2530, and received on it the hand-money—one thousand dollars. About the time of the sale, judgments were entered against David Davis, the plaintiff, for about six hundred dollars. On one of the judgments execution issued, and David Davis's interest in the land levied on; and before the sheriff's sale, plaintiff alleges an arrangement was made between him, Jacob Dry the purchaser, and Philip Kuhns the defendant's testate, his brother-in-law, that Kuhns was to bid off the land at sheriff's sale, and take a deed in his own name; that he was to pay the judgments against Davis, and was to receive from Dry the balance of the purchase money on his contract with Davis, and make Dry a deed, in pursuance of the contract between Davis and Dry, and after being reimbursed the money he paid, was to pay the residue to Davis. In pursuance of this arrangement, all the payments coming due on the article, after the sheriff's sale, were made to Kuhns by Dry, the last of which was due in 1827, when Kuhns made a deed to Dry. This suit was brought on the 22d Jan. 1848, to recover the amount Kuhns received from Dry, over what he paid to the sheriff. The property of Davis was sold on *venditioni exponas*, in Nov. 1819, to Kuhns, for \$1050.

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The question decided by the court was, that the evidence did not show such an acknowledgment of the debt within six years, as took the case out of the operation of the statute of limitations; and on *demurrer to the evidence*, the court entered judgment for the *defendant*.

The evidence which is referred to in the opinion of his Honor Judge ROGERS, relative to the acknowledgment, was as follows:

Joseph Davis, sworn.—My father sent me in from Mercer county, to ask Kuhns for money that he claimed. This was in 1844. He said he had no money, and could not make any money. I said I would take a good horse. He said he could not spare any; said he must do for his own children, before he could do any thing for my father. This was about the amount that passed between us—I talking to him about the money that my father claimed on the Dry farm.

John W. Davis, sworn.—I used to live in Philip Kuhns' neighborhood. In 1844, I was on my road to Grapeville—caught up with Philip Kuhns. He said he owed David Davis some money, and his son was in after it, and he was coming on to Greensburgh to make arrangements to pay the money.

BLACK, J., *inter alia*, in his opinion stated—But surely it does not follow from this, that a right of action on a contract, obscure at first, and which has slept for more than a quarter of a century, can be relieved by a vague and indefinite admission of indebtedness in a loose conversation, which contains not the remotest allusion to the matter on which the suit is based. The defendant's testator said he owed Davis some money. Does this amount to an acknowledgment that he owed the sum claimed in the present action? He did not speak of nor refer to any thing as the origin or consideration of the debt. Would any jury be allowed to infer from his silence, that he meant to admit the justice of the claim now set up? My opinion is in the negative, and judgment therefore to be entered for the defendant.

It was assigned for error, that the court erred in entering judgment for the defendant on the demurrer.

The case was argued by *Foster*, for plaintiff in error.—Reference to 6 W. & Ser. 218; 4 Barr 321; *Hazelberger v. Reeves*, not yet reported; *Reader v. Grim*, *Law Journal*, August, 1850, p. 65.

Cowan, for defendant, the executor.—10 Watts 120; 6 id. 220; and the cases cited on the part of plaintiff in error.

The opinion of the court was delivered, Oct. 18th, by ROGERS, J.—On a demurrer to evidence, the party demurring admits all the facts which the evidence tends or conduces to prove,

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though but in the slightest degree or which the jury might, with the least degree of propriety, have inferred from it. Every fact is taken against the party demurring as true, and no testimony can be considered which impugns its truth: *Fry v. Decamp*, 15 *Ser. & R.* 231; *Crawford v. Jackson*, 1 *Rawle* 431; *McKinley v. McGregor*, 8 *Whar.* 376; *Duerhagen v. United States*, 2 *Ser. & R.* 185. The court is not by the demurrer substituted for the jury, whose duty it is to weigh the testimony, but the case must be ruled on the evidence adduced, in strict subordination to the rules stated.

The evidence proves, or, which is the same thing, tends or conduces to prove this state of facts. On the 5th March, 1819, plaintiff sold, by articles of agreement, a tract of land to Jacob Dry, for \$2500, and received \$1000 in part payment of the purchase money. About the time of sale, judgments were entered against the vendor the plaintiff, for about \$600. On one of the judgments, execution issued, and the vendor's interest in the land was levied on. After the first contract, but before the sheriff's sale, an agreement was entered into between plaintiff, Philip Kuhns defendant's testate, who was his brother-in-law, and the purchaser Jacob Dry. Kuhns was to bid off the land, at the sheriff's sale, and take a deed in his own name. He was to pay the judgment against Davis, and to receive from Dry the unpaid purchase money as it became due, and to make Dry a deed, in pursuance of the original contract. After being reimbursed the money advanced, it was agreed that the residue should be paid by Kuhns to Davis. In pursuance of the contract, the money remaining due was regularly paid to Kuhns, the last payment in 1827, when Kuhns executed a deed to Dry. The suit was brought on the 22d January, 1848, to recover the amount which Kuhns received over what he paid to the sheriff. Jacob Dry, one of the contracting parties, whose testimony, as we have seen, must be taken to be true, furnishes abundant proof of the contract as above stated; at least, it cannot with any plausibility be denied, that it tends or conduces to prove it; nor can it be alleged there would have been the least degree of impropriety in the jury inferring the contract from his evidence alone. His statement derives strength from the relationship between the parties, and, in addition, it is corroborated by repeated confessions of Kuhns, as detailed in the evidence of all the other witnesses who were examined.

From the whole testimony, the result is plain, that the jury not only might, but were bound to believe there was a contract between the parties, such as is alleged by the plaintiff. It must be remarked that it is not pretended by the defendant that he performed the contract, by the payment of a single dollar to Davis, although he concedes he received all the purchase money, and does not deny that he only paid, at the sheriff's sale, \$1050. Conceding these facts, the amount of the indebtedness may be readily ascertained.

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It clearly is the difference between the amount received from Dry, and the money paid at the sheriff's sale, with interest to be calculated according to the contract. This is plain, but some difficulty has arisen as to the money for which Davis gave his receipt to the sheriff. The plaintiff alleges he never received any money whatever, except the \$1000 which was first paid; that the whole was received by Kuhns; that he receipted the docket, as it is expressed, merely for the purpose of enabling Kuhns to make a deed. If that be so, then Kuhns only paid for Davis the amount of the judgment, for which alone is he entitled to credit. This, however, we do not undertake to decide, as the whole matter of indebtedness will be investigated before the inquest, to which it is our purpose to refer it.

But, admitting the contract, the defendants contend they are not liable, because there was no consideration; and that the action is barred by the statute of limitations.

As to the question of consideration, Dry testifies that he intended, but for the contract, to purchase the property at the sheriff's sale. If so, he would have been bound to perform his contract with Davis, by payment of the purchase money. It was, therefore, depriving Davis of an advantage which he would otherwise have had, which is a sufficient consideration to support a contract. Any advantage to one, or detriment to the other, however small, as has been repeatedly held, is a sufficient consideration to support a promise.

Next, as to the statute of limitations. This mainly depends on the testimony of John and Joseph Davis. Joseph Davis testifies in this wise: "My father sent me in from Mercer county to ask Kuhns for money that he claimed. This was in 1844. He said he had no money, and could not make any money. I said I would take a good horse. He said he could not spare any; said he must do for his own children before he could do any thing for my father." The witness further said, "I was talking to him about the money my father claimed on the Dry farm." It must be remarked, that the claim is not made as a favor, but as a debt, to which his father was justly entitled, for that is the fair import of the testimony; and yet the defendant's testate does not venture to deny the claim, but alleges, as an excuse for not paying, that he had no money, nor horse to spare; that he must do for his own children before he could do any thing for the father of the witness. Although this would raise a suspicion in the minds of a jury that a debt was due, which he was ashamed to deny, yet I acknowledge the case could not be safely rested on this testimony alone. The acknowledgment is not so clear and unequivocal as the law requires; but in connection with the testimony of John W. Davis, but little doubt can rest upon it. He proves a clear, distinct, unqualified acknowledgment of the debt. He says: "I used to live in the neighborhood of Philip Kuhns. In 1844, I was on the road to Grapeville; caught up with Philip Kuhns. He said he owed David Davis some

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money, and his son was in after it, and he was coming to Greensburgh to make arrangements to pay the money." If this was not an unequivocal acknowledgment of a debt, there is no force in language; and that it was the money claimed on the Dry farm, now in dispute, explicitly appears from the testimony of Joseph Davis, who says they were talking about the money claimed on the Dry farm. In truth, it must have referred to that debt, as, so far as appears, there was no other pecuniary transactions between them, much less was there any other demand by Davis against Kuhns: nor was it likely there should have been, as Kuhns was sick, and Davis thriftless and poor. The testimony, it must be recollected, must be taken as true; so that all that remains is to ascertain the amount due, which may readily be done from other testimony, which has been already adverted to. There is, therefore, nothing in the plea of the statute; for whatever opinions may have been erroneously entertained heretofore, it is now settled that, to take a case out of the statute of limitations, it is not necessary the acknowledgment should refer to the amount of the debt. It is only necessary there should be no uncertainty in the acknowledgment as to the debt referred to. This is ruled in *Hazelberger v. Reeves*, and *Reader v. Grim*, not yet reported.

Judgment reversed, and judgment for plaintiff. Writ of inquiry of damages awarded, and record remitted.

Nicholls *versus* Johnston.

Under the 38th section of the act of 15th April, 1835, relating to Inspections, and the 2d section of the supplement thereto, of 31st March, 1836, a miller is required to have his brand-mark entered with the clerk of the Quarter Sessions only when the flour barrelled is intended for exportation *out of* the State, *except* by the Delaware or Susquehanna, or their branches; when shipped by either of those streams or their branches, to a market out of the State, *but within the United States*, the brand-mark need not be entered: and the question of intention is for the jury.

ERROR to the Common Pleas of *Westmoreland county*.

This was a *qui tam* action, brought by Nicholls *vs.* Johnston, to recover the penalty, under the act of Assembly, for not filing his brand with the clerk of the Court of Quarter Sessions; defendant being the owner of a small mill in the county of Westmoreland. He made flour there for about twelve years past; the mill runs about three months in the year. He ground the wheat of the neighbors, and barrelled and branded it for them. Formerly, all barrels containing the flour were branded superfine, but *the inspectors objected to it*.

The 38th section of the act of 15th April, 1835, entitled, "An

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Act relating to Inspections," is as follows:—"Every miller and bolter of flour for exportation shall cause his brand-mark, as aforesaid, to be entered with the clerk of the Court of Quarter Sessions of the county where he resides, together with his name and place of residence, under the penalty of five dollars for every month during which he shall have exercised his said employment without having made such entry."

The 2d section of the supplement, of 31st March, 1836, *Dunlop* 706, provides, "Nothing in the act to which this is a supplement, shall be so construed as to require the inspection, proving, or branding of flour or meal, of any kind, shipped or laden on the waters of the Susquehanna and Delaware, and their branches, and intended to be transported by the waters of said rivers, to a market out of this State, but within the limits of the United States."

KNOX, J., charged, *inter alia*, that, "in order to bring one within the provisions of the section first above quoted, it is necessary to show that the flour manufactured at his mill was intended, either by himself or others, for exportation out of the State; and that, knowing such to be the fact, he neglected to file his brand with the clerk of the sessions." But he further charged, that "there is no evidence in the case before us, that the defendant ever manufactured a barrel of flour which was intended for exportation, or which was ever actually exported, or sold out of this State; and we, therefore, instruct the jury that the case is not made out, and the verdict must be for the defendant."

It was assigned for error, that the court erred in their construction of the 38th section of the act of 15th April, 1735; and by directing the jury that that they must find for the defendant.

The case was argued by *Cowan*, for plaintiff in error.—He contended, that where flour is actually branded, the miller is liable for the penalty, if he does not cause his brand-mark to be entered.

Foster, for defendant in error.

The opinion of the court was delivered by

COULTER, J.—The different laws on the subject of the inspection of flour are somewhat confused, and the penalties ill-defined in their application. By the 2d section of the act of 31st March, 1836, being a supplement to the act of 1835, it is provided, that nothing in the act to which this is a supplement, shall be so construed as to require the inspection or branding of flour or meal of any kind, shipped or laden on the waters of the Susquehanna and Delaware and their branches, and intended to be transported by their waters to a market out of the State, but within the limits of the United States. By the act of 6th April, 1841, entitled "An

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Act to incorporate a company to erect a bridge over Lackawaxen, near Paupack Eddy," it is provided, that a painted device may be substituted by bolters or millers, for the brand in the act of 1835, and that a description of the device shall be filed by every bolter or miller of flour for exportation, with the clerk of the Court of Quarter Sessions of the county, in the same manner as description of the brands are required to be filed. In various sections, throughout the act of 1835, flour intended for exportation, and the branding of it, is spoken of as contradistinguished from other sections, where the flour is intended to be used, as well as inspected, in the State. The mark of No. 1, and 2, is required to be put on barrels, according to the weight, without specifying whether that is intended to be exported or not. The section under which the penalty in this case is claimed, expressly states that the flour must be intended for exportation. This, taken in connection with the phraseology of the first section of this act, of the 5th section, and the 20th section, and also of the 2d section of the act of 31 March, 1836, satisfies me fully that the penalty in the 38th section of the act of 1835, for which this suit is brought, attaches only where the flour, barrelled and put up, was intended for exportation out of the State. Taking the whole act together, the clear intent of the legislature was to establish the reputation of Pennsylvania brands in foreign markets; because the act of 1836, removing the penalty from flour shipped on the Delaware and Susquehanna and their branches, to places within the United States, virtually, and almost entirely obliterated the penalty, except as to foreign shipments; there being little flour shipped down the Ohio since 1836. But, although the flour barrelled and put up by bolters and millers must be intended for exportation to draw and attach the penalty for not filing a description of the brand or device with the clerk of the Quarter Sessions to such omission, yet, still the question is, What is evidence of that intention? And that is the real question in this cause. The court here withdrew that question from the jury, and decided it on the evidence peremptorily against the plaintiff. Now, undoubtedly, there was some evidence proper to be submitted to the jury on that head. I say not that it was sufficient or conclusive; that is for a jury. Although it was a small mill, and ran only three months in the year, yet flour was barrelled at it every year, and branded with the name of the defendant's father, and marked No. 1, and 2, as the case might be, and superfine or fine. This was sent abroad, into the markets of the country. It might be exported, or it might not. It appears that the miller knew the flour was inspected somewhere; for he speaks of the inspectors finding fault with the mode in which it was branded, which was afterwards corrected. We think the evidence ought to have been submitted to the jury. The defendant will be at liberty to give any evidence on the sub-

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ject; and, from the whole, the jury will determine the fact, whether the flour, manufactured and put up, was intended to be exported, so as to bring the defendant within the penalty, or not. It would seem, that if it was a neighborhood mill, used and conducted for neighborhood purposes, and the flour put up in barrels was intended to be used within the State, or to be transported out of the State, to parts within the United States, by means of the Delaware or Susquehanna, or their waters, that the penalty ought not to attach. The action being for a penalty, the rule of evidence, in such cases, is, that the proof ought to be plain and satisfactory, in order to inflict it.

Judgment reversed and a *venire de novo* awarded.

Eichar *versus* Kistler.

1. In an action for seduction brought by the father of the female, the marriage of the defendant with the female, after the birth of the child, may mitigate the damages, but is not a bar to the recovery of exemplary damages.

2. In such a suit, the acquittal of the defendant on an indictment for seduction, by reason of his marriage with the female, may mitigate the damages, but is not a bar to the recovery of exemplary damages. The jury are not to be limited to the value of the actual loss of her service.

ERROR to the Common Pleas of *Westmoreland county*.

This was an action of seduction, brought by Kistler against Eichar, who was charged with having seduced his daughter and got her with child, whereby plaintiff lost her services, &c.

The facts were these: Eichar frequently visited the house of Kistler, and kept company with his daughter Catharine, during the years 1846-7. She proved to be with child, and it was born on the 10th day of August, 1847. Some time after this, Eichar went to her father's house and married her, but, immediately after the ceremony, went away and left her, without returning.

Afterwards, to May sessions, 1848, he was indicted for seduction, fornication, and bastardy, but was acquitted of the seduction, and convicted and sentenced for the fornication and bastardy. After this, to August term, 1849, she applied for a divorce, *a mensa et thoro* and alimony.

The questions which arose on the trial of the cause were: 1. As to the effect of the act of 19th April, 1843, upon the measure of damages. 2. As to the effect of the marriage on the same—the defendant contending that since the passage of that act the measure could only be the actual loss sustained by reason of the loss of service. And again, that in no case could a plaintiff recover more when the seducer had married the servant.

The court were of opinion that this matter only went in mitigation of damages.

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On the trial, evidence was given as to the service rendered by the female about the house, and as to her state of health since her confinement; and that she cannot attend to domestic duties as she could before.

The defendant's counsel submitted the following points:

1. The court are requested to charge the jury that since the passage of the act of 19th April, 1843, the courts will not, in actions like the present, allow the defendant to be mulcted in heavy and exemplary damages by the jury, as the act cited gives a statutory remedy.

2. That if the defendant married the woman seduced after the birth of the child and *before the impetration of this writ*, that then they cannot find for the plaintiff more than the actual loss sustained by him in the loss of her service.

3. That the defendant having been indicted under the act of 19th April, 1843, for the seduction of his present wife, the jury cannot now find for the plaintiff more than for the actual loss of her service.

The court, KNOX, J., answered these points:

As to the first: The object of the act referred to is to punish seduction accomplished by a promise of marriage criminally, and it has no effect upon the question of damages in a suit like the present.

As to the second: We have permitted evidence of the marriage to go to the jury in mitigation of damages. It is for the jury to say how far, under the circumstances attending said marriage, it goes in mitigation. We refuse the specific instruction asked for in this point.

As to the third: In the proceedings by indictment, mentioned in this point, the defendant was acquitted upon the ground that he had performed his promise of marriage, and that therefore he was not within the spirit of the act making seduction a criminal offence. An unperformed or false promise being necessary, in the opinion of the court, but the proceedings by indictment can have no effect in this suit.

If the jury are satisfied of the seduction and the loss of service, the plaintiff is entitled to recover; and in estimating the amount of damages, they will consider not only the actual loss of service, but the mental suffering, the injury to the standing of the plaintiff and his family, their condition in life, the pecuniary condition of the defendant, giving him the benefit of the marriage in mitigation as far as its tendency would be to alleviate the distress of mind and restore or prevent injury to the character and standing of those connected with the seduced.

Verdict was rendered for plaintiff, for \$525.

Errors assigned:

1. The court erred in admitting evidence of the loss of service which took place after the marriage of plaintiff's daughter with defendant.

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2. The court erred in their answer to the first, second, and third points, put by the defendant's counsel.

The opinion of the court was delivered, Oct. 14th, by

BELL, J.—In this court a question is made whether a father can recover, in this form of action, for the lost services of a debauched daughter which might have been rendered after her marriage with the seducer? As the action is technically *per quod servitium amittit*, the suggested doubt would seem to be well worthy of consideration, and, were the point properly presented, it would call for a distinct determination, notwithstanding the real injury to be avenged is not the result of merely pecuniary loss, but flows from the wrongs inflicted upon the plaintiff's social position, and the violence done to his peace as a parent, and his honor as a man. But it is apparent from the record, that this question was not so raised on the trial as to demand of the trying tribunal an expression of opinion, or to justify us in pronouncing any which might affect the rights guarantied by the verdict. It is said to be fairly offered for discussion by the exception taken to the admission of evidence. This cannot be. When the evidence excepted to was offered, there was no proof the plaintiff's daughter had ever been married. Nay, there was not even a suggestion of this fact; a fact, no doubt, sedulously excluded by the counsel as forming part of the defence, and which could not be introduced incidentally or upon cross-examination against the assent of the plaintiff. Probably from the form assumed by the exception, an effort was then made to bring the marriage to the notice of the court; but as the progress of the plaintiff's case could not be suspended for such a purpose, it necessarily failed. Accordingly, we find that immediately after the defence was opened, the defendant recalled the same witness to establish the marriage of his sister in November, 1847. Up to this moment, it could not have been judicially known to the court, and of course, a prior ruling of a controverted point of evidence could not, by possibility, have turned upon it. How, then, stood the case when the objection to evidence was offered? The witness was testifying to the domestic habits of his sister before her pregnancy and confinement. He had said she used to assist her mother in the necessary work of the house, and added: "I don't know how long she was confined to her bed, but she is not healthy ever since." Then follows the *memorandum*, for it is nothing more. "Evidence since marriage, objected to." Evidence of what? Whose marriage? To neither of these questions does the record up to this point furnish an answer. How, then, could the court be called upon to determine at that moment what would be the legal effect of the daughter's marriage upon the father's rights? It is obvious no such inquiry could then be propounded to it; and it is equally obvious the court did not, as it regularly could not, assume to answer

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if the query were then presented. Had the defendant wished the instruction of the court upon this head, it was very easy to procure it by submitting the proper request. But although he furnished points upon which he prayed a direction to the jury, he wholly omitted to call attention to the question he now attempts to make. He was probably influenced to this omission by the conviction that whatever might be the answer returned, it would, under the developed facts, affect but little, if at all, the final result. Under these circumstances, we should hazard injustice both to the party and to the learned President of the Common Pleas, by entertaining the inquiry pressed upon us.

The idea advanced by the second of the defendant's points is, certainly, a novel one; at least to me. It assumes that the marriage of a debauched daughter with her seducer, must be accepted in all cases as a full atonement for the mental anguish endured by the parent; for the insult offered to his honorable feelings; for the deep distress which may overwhelm the family circle, because of the indelible disgrace inflicted upon one of its members; and for the irretrievable loss of social position. Marriage, though tardy, may, in many instances, alleviate these wrongs but it cannot, in any, entirely compensate them. Marriage, may, therefore be reasonably offered as a fact which ought to mitigate the damages to be recovered; and so the judge told the jury in this case. But the proposition is, that it ought to be accepted as a complete bar to the recovery of any sum beyond the mere pecuniary value of the actual service lost by the parent. This position is, certainly, somewhat startling, especially when it is recollected that, in a large majority of the cases where a galling sense of wrong has overborne the natural reluctance to offer private distress to the publicity of judicial investigation, the loss of service is a mere fiction, the toleration of which sheer necessity has wrung from the obduracy of the ancient common law. That necessity sprung not from the propriety of reimbursing an abstracted profit, but from the conviction that private happiness and public order alike demanded, at the hands of the law, some protection of the sanctities of home against the desolating intrusion of lawless passion. None of the numerous cases of this description with which our books abound, offer a recognition of the supposed principle, invoked by the defendant. Did it exist, the instance before us would offer a strong illustration of its injustice. The evidence indicates that the seeming reparation offered by the defendant, was suggested by no penitent desire to atone for the past, but was embraced as a means of escaping from the legal consequences attendant upon the wrong inflicted. The events which followed the marriage, prove it to have been an accumulation of injury; if, indeed, it were not so intended. How, consistently with reason, such a marriage can be set up as a bar to the recovery of exemplary damages I am at a

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loss to perceive. I do not say what followed immediately upon it, ought to be received as a legitimate cause for swelling the damages, but, certainly, may very properly be considered in weighing the question whether the marriage itself ought to be accepted in mitigation? To assert otherwise, would be to ascribe to a new insult the singular power of obliterating the old.

The views expressed by the Court of Common Pleas as to the legal effect of the act of 1843 and the indictment framed under it, upon the rights and remedies of the plaintiff in this action, are well founded. The legislature, when creating a new crime, had no intent to interfere with an existing civil remedy. Each is entirely independent of the other. In fact, the criminal offence requires the ingredient of a promise to marry, which does not, necessarily, enter into the civil injury. The defendant was acquitted under the indictment, solely because he had redeemed this promise. It would be singular, indeed, if the mere fact of having been indicted and acquitted, should also relieve him from the penalties of a private wrong, not involving the element to which he owed his escape from the public prosecution. Besides, the object of one proceeding is to vindicate the public peace and dignity; of the other, to avenge an individual injury by the infliction of heavy pecuniary damages. They may, therefore, well stand together. If not, why should not the statutory indictment for fornication—an offence also founded in seduction—operate to destroy the private remedy? an effect I have never heard attributed to it. But as this point was very faintly urged, it is unnecessary to labor it.

The cause seems to have been fairly tried, and the questions of law presented correctly determined. If the defendant has been severely dealt with, he must ascribe it to the peculiarities of his case: there is no room to visit it upon the conduct of the judge.

Judgment affirmed.

Callen *versus* Hilty.

Where an owner of a farm agrees with another to permit him to occupy and clear a part of the woodland of the same, during a certain period, the owner reserving the use of the timber on the clearing, except what may be necessary for the buildings and rails for the premises, and fire-wood of the occupant, the owner is entitled to the *timber* cut on the part cleared.

ERROR to the Common Pleas of *Westmoreland county*.

This was a suit by Hilty *vs.* Callen. Hilty was Callen's tenant, under an agreement in writing, in which Callen covenanted to find the boards, nails, and laths, for a house. Callen having furnished but part of the boards, and no nails or laths, Hilty brought this

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suit, and declared in covenant to recover damages from Callen, the landlord, for non-performance of this stipulation.

Defendant pleaded set-off, and, amongst other things, gave evidence of plaintiff's having cut trees, and sold the timber off the land leased, and of his not having fulfilled his agreement in other particulars.

The agreement was under seal. It witnessed, that the said Callen doth let or give the said Hilty privilege of living four years on his farm, from the first day of April next. The said Hilty is bound to clear thirty-five acres of land on said farm, and build the fences six rails high, and stake and rider said fences: and the said Hilty is to put such buildings on said farm as may suit his own convenience—Callen to furnish the boards for house, and also nails and lath for a clapboard roof—twenty acres of the land to be cleared on the east side of the Beaver Run, and the balance on the west side of said run; four acres of the said clearing to be put in grass (or meadow); one-third of the plough-land not to be seeded when the said Hilty quits the possession on the first day of April, 1848. The said Hilty is not to join fences with the said Callen at any part of the said lease. *Callen reserves the use of all the timber, except what may be necessary for the buildings, rails, and fire-wood of the said Hilty.*

KNOX, J., charged, *inter alia*, that when there was a failure on the part of either party, the jury should estimate the damage, and set off one against the other, and return a verdict for the difference in favor of whichever was entitled.

2d. That the reservation of the timber in the article in favor of the defendant, did not extend to the timber on the land which plaintiff cleared; but as to that he could do what he pleased, either burn it or take it off and use it for his own purposes.

Defendant's counsel excepted, and error was assigned as to the part of the charge relating to the timber.

The case was argued by *Burrell*, for plaintiff in error; and by *Foster*, for defendant.

The opinion of the court was delivered, Oct. 14th, by

COULTER, J.—A lease is properly a conveyance of any lands or tenements in consideration of rent or other annual recompense, though, doubtless, a return or recompense in gross would be sufficient. This conveyance is for life or for years, or at will; and during the continuance of the term, the tenant is entitled to the exclusive possession and enjoyment of the premises, so that he commits no waste. But the law, resulting from the relation of landlord and tenant, may be modified by the particular covenants in the lease entered into by the parties; and a mere license to live

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upon land, and to do certain acts thereon, may be granted without creating the relation of landlord and tenant, or giving any other rights to the occupant than those conceded or granted by the license; and of this character would seem to be the relation subsisting between the plaintiff and defendant, according to their article of agreement. There is no grant or conveyance of the farm, or of any particular part of it, for any time. But, in the language of the agreement itself, Callen doth let or give the said Hilty privilege of living on his farm for four years from the first day of April then next. The said Hilty is bound to clear thirty-five acres, and fence what he clears; and Hilty to put up such buildings as suits his own convenience; Callen to furnish the boards for the house, and nails and laths for a clapboard roof. Every agreement is to be interpreted and construed with reference to the circumstances under which the parties contract. Callen had a large tract of land, on which he resided himself; and wishing to have more land cleared, he agreed with Hilty to clear thirty-five acres at a place specified, and agreed to let him live thereon four years, and help him to build a house. The object of Callen was to have his land cleared, and Hilty was to get a home for four years, with assistance in building a house, and what he could make in that time off the land which he cleared. It was a contract in which the respective rights of the parties and their duties was set out, and it related to the thirty-five acres to be cleared, and cannot, in any sense, be construed into a lease of the whole farm, nor to create the relation of landlord and tenant between the parties as to any part of it. Callen reserves the use of all the timber, except what may be necessary for the buildings, rails, and fire-wood of Hilty. Hilty cut off the timber and sold it for saw-logs; and it is contended that he had a right to do so, as tenant, because he might have burnt it on the ground, in log-heaps, and that Callen had no right to enter on his tenant to take any of the timber away. But this cannot be allowed without doing violence to the agreement, and the well-known customs of the country. When land is cleared, the first thing is to make rails for fencing it out of the timber that is cut down, and, if a house is to be built, to build it of the logs on the clearing, and to convert the tops and the branches of crooked trees into fire-wood. And when Callen reserved the use of all the timber except what was required to fence the ground, to build the house, and to make fire-wood, it was obviously intended of the timber cut on the cleared land. Why should Callen reserve the use of all the timber on his own land, still standing and growing there. A man does not use standing and growing trees, but he uses those which are felled. It is impossible to suppose that farmers, well acquainted with woodcraft and the husbandry of good timber, meant any thing else than that Hilty should fence the cleared land from the timber cut on it, build his cabin from the trees cut on the thirty-five acres, and get his fire-wood

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from the tops and refuse trees ; and that Callen should have the use of all the rest. It appears from the evidence that Hilty took forty logs to the saw-mill, many of them cherry, some of them walnut, and others good oak logs. Such logs ought to be worth one dollar per stick, at almost any place in Westmoreland county, except on the mountains. He did not clear all the land by nine or ten acres, and it appears by the testimony, that it was worth more with the timber on it, than it would be after it was taken off. This fact gives an unerring clue to the intent of the parties. In many parts of the country, the timber on land is worth more than the land after it is stripped. And when the owner reserves all the timber for his own use, except what is used for fencing, building the cabin, and for fire-wood, we are impelled to the conclusion, indicated as well by the words of the agreement as the concomitant circumstances and the nature of the contract, that Callen was entitled to the timber cut on the land cleared by Hilty, except that used for fencing, building the cabin, and fire-wood. If Callen had refused to take away the timber, it would be a different case. But there was no danger of that, as it appears that saw-mills were close at hand. Callen, not having conveyed away the land by lease, but having merely granted a license and privilege to Hilty, had the right of entry to take away the logs according to contract.

The judgment must therefore be reversed and a *venire de novo* awarded.

Wray versus Miller et al.

Where a dispute exists as to whether marked trees, then existing, were corners of surveys, or whether the corner was at another tree which has been destroyed, great respect will be paid after the lapse of three-fourths of a century to the return of the deputy surveyor. Slight evidence as to lines and corners supposed once to have existed, will justify a jury in presuming that the survey was made as returned.

ERROR to the Common Pleas of *Armstrong county*.

This was an ejectment by Robert Wray *vs.* George Miller and others, for a tract of land said to contain about one hundred and fifty acres.

Robert Wray claimed title under warrant to Millisentt Wade, dated 23d July, 1773, surveyed 9th Dec. 1773. Defendants claim under warrant of same date to John Morton, with survey thereon, 10th Dec. 1773. The surveys adjoin each other. Plaintiff claims to a chesnut oak corner, found upon the ground at the distance mentioned in the return of survey, whilst the defendants claim to a white oak, on the opposite side of the survey, eighty-one perches further north than the chesnut oak. It was

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testified that both of these trees were original corners marked as such upon the ground, and the dispute is in reference to the land within these eighty-one perches. The Wade and Morton surveys adjoin, and the disputed part is either on the southern part of the Wade, or northern part of the Morton tract.

The case was tried before KNOX, J., who charged, *inter alia*, as follows :

If you are not satisfied that the white oak is the true corner, you will next inquire as to the *chesnut oak*, which is claimed as the corner by the plaintiff.

This tree is found marked as a corner, and corresponds in age with the original survey. There is no line running from it, and it is not on the direct line, and is not the tree called for, the one being a chesnut and the other a chesnut oak ; but it has this advantage over the white oak, it is found at the correct distance.

If you find the chesnut oak to be the corner, then the plaintiff is entitled to your verdict. But if you are not satisfied to accept either the white oak or the chesnut oak, then, in the absence of any division line between the tracts, you must resort to the return of survey, and divide the land equally between the two warrants ; and then it becomes necessary to establish the southern boundary of Morton and the northern of Wade. There is not much difficulty in the southern boundary of the Morton survey. The black oak and hickory are well established.

Suppose the white oak and the chesnut oak both to be established as corners. A diagonal line should run from the one to the other, and that would divide the disputed part. If the jury should find that it was *the intention of the surveyor to make both these trees corners*, then in order to carry out such intention, a diagonal line would have to be run. *But there is nothing in the case that would lead one to such a conclusion.* There is no pretence of any line being found *running from one to the other*, and the corners on the eastern and western side are returned as parallel, or nearly so, instead of there being a difference of eighty-one or eighty-two perches. We cannot see how the jury can come to the conclusion that *both the white and chesnut oak are legitimate corners*. The case, in the opinion of the court, rests upon the question of which of the two the jury adopt. *If the white oak, the verdict will be for the defendant.* If the chesnut oak is adopted, or if both are set aside, then the plaintiff is entitled to a verdict.

To which charge the plaintiff by his counsel excepted.

Errors assigned :

1. The court erred in confining the inquiry of the jury to the finding of one or the other of the corners sworn to by the surveyors to be the true corner. The jury had a right, and should have been so instructed, to say, if they believe the evidence justi-

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fied them, that both the white oak and chesnut oak were original corners.

2. The court erred in charging the jury that they must have evidence of the intention of the surveyors to make the white oak and chesnut oak corners. The opinion and belief of Carpenter and Meredith, the surveyors, that they were original corners, and the marks on the trees, was the best evidence of that fact, and the question of intention of the original surveyors should not have been submitted to the jury.

3. The court erred in saying that because there was *no line from these two corners*, that therefore there was no pretence for believing that the surveyors intended both these trees as corners.

4. The court erred in charging the jury that the case turned upon which of the trees the jury should adopt, and in saying that they could not see how the jury could come to the conclusion that both were corners.

The case was argued by *Lee* and *Foster*, for plaintiff in error; and by *Boggs* and *Burrell*, for defendants.

The opinion of the court was delivered by

BURNSIDE, J.—Our law has ever held that where two corners are established, the course is to be disregarded: *Hall v. Powell*, 4 Ser. & R. 462. If the chesnut oak was really the corner of the plaintiff's survey, a diagonal line to the white oak would prevail. The return drafts did not call for the chesnut oak corner. They called for a chesnut eighty-one or eighty-two perches distant, and so returned to the land-office three quarters of a century ago. To establish the chesnut oak as a corner, and consequently the diagonal line claimed by the plaintiff, the shape of both surveys will be changed. Eighty-one perches will be taken from Miller's survey and given to Wray, and a tree fixed upon as a corner not called for correctly by name on either draft. There is evidence, which was for the jury, that the chesnut once existed; but time or accident has destroyed it, if it ever existed. Great regard has ever been paid to the return of a deputy surveyor. Even slight evidence of lines and corners marked, will justify a jury in presuming that the survey was made as returned: *Fugate v. Coxe*, 4 Ser. & R. 293. The material error insisted on and urged in this court, is, that the judge misdirected the jury and decided the facts. Certainly, the body of his charge is correct. He instructed the jury that the Wade and Morton surveys adjoin, and the disputed part is either in the southern part of the Wade survey, or the northern part of the Morton tract; and that the well-settled rule of law was, that the marks of the surveyor, when found upon the ground, are the best evidence of location and boundary. The line as returned is eighty-one perches north of the chesnut oak. The plaintiff claims

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to this chesnut oak. *The draft called for a chesnut.* The evidence of the two Scotts, Whitehill and Shirley, tended to establish *the chesnut corner, which the return drafts of both parties called for.* The whole charge strongly tends to demonstrate that the judge was inclined to the opinion that there was originally a chesnut corner, as called for by the return drafts of the parties. In this opinion he was supported, as well by the returns as the parol evidence. Considering the age of the surveys, I am not surprised at this.

The law being correctly stated by the judge, his reasoning or his conclusions are not the subject of error. The plaintiff's counsel complain of the latter part of this charge. He tells the jury that "he cannot see how the jury can come to the conclusion, that both the white oak and chesnut oak are legitimate corners." The reasoning upon the facts in evidence was strong. The chesnut oak was eighty-one perches from where it ought to have been, if called for. It was not mentioned or returned on either of the surveys. The returned drafts called for a chesnut, and the parol evidence tends strongly to prove that anciently it existed. If it existed, it was the true corner of these surveys. The judge further adds, which is complained of, that in the opinion of the court, the case rests upon the question, which of the two the jury will adopt. If the white oak, (and the judge means the line to the chesnut,) the verdict will be for the defendant. If the chesnut oak is adopted, or if both are set aside, the plaintiff is entitled to recover. There is nothing binding in this part of his charge, when taken in connection with his prior instructions. There is some confusion as to his meaning, which might have been a ground for a motion for a new trial. But on a careful examination of the whole charge taken together, there is no binding instruction of which the plaintiff has any right to complain. The weight of evidence greatly preponderated against the plaintiff, and tended to show that in 1774, a chesnut corner was made and marked on the return draft as called for, eighty-one perches short of the surveyor's distance, to fill his warrants. If he did mark the chesnut oak, (and surveyors generally mark the chesnut,) if he had been a careful surveyor, which he was not, he would have obliterated those marks. I have a great aversion, at this day, to disturb surveys made in 1774, where no injustice is done, and the boundaries of the returned drafts maintain it.

The judgment is affirmed.

Stewart *versus* Walker.

Where there is an agreement to give a person work for a year, but he is discharged, before its expiration, without good cause, he is entitled to recover the amount of damage sustained.

ERROR to the Common Pleas of *Indiana county*.

This was an action on the case by Walker *vs.* Stewart. The plaintiff declared on a contract, by which he alleged that defendant had employed him with his team for one entire year, from the month of , 1845, at \$2.35 for each and every day said team performed their duty, and alleged that defendant *had dismissed him from his employ* on the 31st day of December, 1845; and *he sought to recover his wages for the balance of the year*. Defendant denied that the contract was for an entire year—and also contended, that if it were even so, that the conduct of the plaintiff both before and after his dismissal was such as put an end to the contract, and the plaintiff could not recover in this action.

The plaintiff gave in evidence the article of agreement between E. and J. Wallace and Stewart, made 4th August, 1845, by which E. and James Wallace agreed to furnish a good six-horse team complete, and a driver for the same, for the term of one year, which was to be in the employ and under the direction of said Stewart.

For and in consideration of which, said Stewart agrees to pay E. and James at the rate of two dollars and thirty-five cents for every day said team performs the duty required; also, to find the kind and quantity of feed said Stewart allows his own teams, shoe the horses, board the driver, and keep the wagon in repair. The payments as follows, viz., one-fourth the pay, at least, in orders to Pittsburgh for bar iron, groceries, &c.; any goods taken from the store of said Stewart to be at a reduction of 20 per cent. below his customary selling prices, the balance to be paid in cash.

It is understood by the parties, that should the teams lie idle at any time, on account of inability to perform the duty required, or on account of wet days, said E. and James here agree to lose the time and allow said Stewart for the feed; should the team be obliged to lay idle on account of the wagon getting out of order, or for want of hauling, it is understood that Stewart is to be at the loss of the time, &c.

It was testified, that the agreement with *Walker* was to be of the same character as that with the *Wallaces*: also, that Walker commenced hauling, and was discharged about the first of January.

On the part of defendant it was testified, that Walker, after his discharge, left the neighborhood, and that he hauled for McKennans, at Lockport furnace, and for Ritter & Irwin.

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On part of plaintiff it was alleged, that Walker was not paid by the last-named persons for the hauling done for them; and on his part was offered evidence of judgments obtained by Walker against those persons, for hauling done by him. To the admission of this evidence, defendant's counsel excepted.

KNOX, President, charged as follows:—The defendant prayed for the following instruction, viz., that if the jury believed the plaintiff received his pay for the time he labored for defendant, left the neighborhood, and entered into the employ of other persons, the contract was thereby rescinded, and there could be no recovery: this instruction was refused, and the jury were told, that if Stewart, the defendant, had agreed to give the plaintiff work for a year, and discharged him without good cause before the expiration of the year, from that moment the contract was broken, and the defendant was liable for the damages which the plaintiff would sustain by reason of such violation.

If the plaintiff was out of employ for the entire year, holding himself ready at all times to labor for the defendant, he would be entitled to receive pay for the entire year; but he was not bound to remain idle at the risk of losing all claim upon the defendant; he might seek employment and obtain it, (although not bound to do so,) and the defendant could not complain, as it would reduce the damages, and thereby enure to his benefit.

In ascertaining the amount of damages, the jury were instructed, that they should consider how long the plaintiff was out of employ, and what his necessary expenses were in obtaining work, and compensate him accordingly, but not to include the money lost from McKennans, or Ritter & Irwin, for the reason, that the plaintiff, when he entered into their service, took upon himself the risk of recovering his pay; by doing so he precluded the defendant from offering him employment himself, or having it offered by others; and it would be inequitable for the plaintiff to deprive the defendant of the right, and still hold him responsible for the solvency of the persons with whom he had voluntarily engaged.

A verdict was rendered for plaintiff, for \$353.56.

On the part of defendant below, it was assigned for error:

1st. The court erred in admitting in evidence the record of a judgment in Cambria county, John S. Walker v. Ritter & Irwin, mentioned in defendant's first bill of exceptions, as the same was entirely irrelevant and calculated to influence the minds of the jury against the interests of the defendant below.

2d. The court erred in their answer to the defendant's point asking for instructions to the jury.

3d. The court erred in instructing the jury that the plaintiff below was not bound to remain idle at the risk of losing all claim upon the defendant.

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The case was argued by *Banks* and *Foster*, for Stewart, plaintiff in error.—It was contended that plaintiff could not recover for a *dismissal*, unless he had declared for it; that he declared on the special contract and alleged a *dismissal*; also, that he should not have left the neighborhood without the assent of Stewart, and if he did, that he treated the contract as rescinded.

Hampton and *Johnston*, were for defendant in error.—It was alleged that plaintiff below had not bound himself to any other person so as to prevent his hauling for Stewart, if the latter had requested it; that Walker did not go more than twelve miles off, and worked, during part of the time, within about four miles of Stewart.

PER CURIAM.—Affirmed for reasons given below.

McCullough versus McCullough.

Where one takes the personal property of another, the owner may waive the tort and maintain assumpsit for its value.

ERROR to the Common Pleas of *Jefferson county*.

This was an action of assumpsit, by *William McCullough* vs. *James S. McCullough*, to recover, *inter alia*, the value of certain boards, which were run down the Ohio River by defendant. Whether they were sold by defendant, did not appear in testimony.

On the trial, the court was requested to instruct the jury that the price of the boards cannot be recovered in this action, because there is no evidence of a sale; but the action ought to have been in trover or trespass.

BUFFINGTON, J., charged *inter alia*:—In addition to the plaintiff's charges in his book, he claims to recover the value of a quantity of boards, belonging to him, and which, he says, the defendant took to market and sold. The testimony of John McCullough, if believed, proves that he rafted in the boards, amounting to about six platforms, one-half of which belonged to the plaintiff, and the other half to himself. The boards were not owned in common, nor mixed up in the rafting, but the plaintiff's all together, and those belonging to the witness in a separate lot. The witness ran them down the creek some distance, when he stranded, and afterwards sold his half to the defendant, James S. McCullough. Some time after that, the defendant ran the boards to market, or, at least, down the Ohio River. Whether this testimony be true, is a question for the jury. But, if true, we are requested to charge the jury, that the plaintiff cannot recover in this form of action; but

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his remedy, if any, would be trover or trespass. The court thinks that, if the defendant took the boards down the river, to market, for the purpose of selling them, and making merchandise out of them, the plaintiff may recover in this suit. It may be true that trover would lie. But the plaintiff might waive the tort, and treat the transaction as a sale, and ask to recover the value of the property only. If the jury believe the defendant assumed ownership over the property, and ran it to market as merchandise, and for the purpose of selling, we think he may recover in this form of action, in the absence of any evidence on part of the defendant to rebut the presumption of a sale and receipt of the money.

It was assigned for error, that,

The court erred in answering the defendant's first point in the negative, and in saying the burden of the proof rested on the defendant to show that he had not sold the boards: *Willet v. Willet*, 3 *Watts* 277.

The case was argued by *Arthurs*, for plaintiff in error; and by *Gordon*, for defendant in error.

The opinion of the court was delivered by

BURNSIDE, J.—The principle ruled by the King's Bench, in *Longchamp v. Kenny*, *Douglas* 187, goes far to govern this case. There it was decided, that great benefit arises from a liberal extension of the action "for money had and received," because the charge and defence in this kind of action are both governed by true equity and conscience; and the court held, that if one person obtain possession of goods intrusted to another to be sold at a fixed price; and at the time when the goods are to be redelivered, or the price accounted for, he refuses to do either; and the person to whom they were intrusted, being threatened with an action, pays the fixed price to the owner, such person may recover the same against him who took possession of them, in an action for money had and received. This has ever been considered a leading case to sustain this equitable action; and from that day to the present, both in England and in this country, the rule held in *Longchamps* and *Kenny* has been rather extended than abridged. Our last decision on this subject reported, (and we have many,) is *Gray v. Griffith*, 10 *Watts* 431, where the court held, that if goods be sent to a merchant who refuses to receive them because they are not such as were ordered, and, under pretence of redelivering the same to the order of the owner, spurious articles are substituted, and the genuine ones are not returned or accounted for, the owner may waive the tort, and recover the price for which the latter may have been sold, in an action for money had and received; but not upon a count for goods sold and delivered. It is in evi-

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dence by John McCullough, that he stuck the raft in six platforms, eight or nine floors deep, from fourteen to sixteen thousand feet of boards in the raft. They were rafted scale-fashion. It was delivered to the plaintiff in error; one half of the raft belonged to the defendant below, and the other half to James S. McCullough, by purchase. The boards of the respective parties were in different platforms. James S. McCullough took the raft from Brady's, and was last seen with it on the Ohio. It is contended that the court ought to have instructed the jury that the plaintiff could not recover in this action, which, in the judgment of this court, would have been manifest error. It is settled in very many cases, that where one man takes the goods of another, the owner may waive the tort, and maintain assumpsit for their value.

Another question attempted to be raised, was, an alleged settlement between the plaintiff in error and the attorney of the defendant, who is now deceased. There is not a particle of evidence in the case, tending to show that that settlement had any thing to do with the boards in question.

Judgment affirmed.

Hughs *versus* Pickering.

1. Where a trespasser on land commences an improvement, and makes a gift of his right to another, or authorizes a sale of it, and leaves the possession, and it is sold, and the vendee takes possession in pursuance of the contract, the possession of the trespasser can be tacked to his own, so as to give title to the vendee, by the statute of limitations.

2. Where the possession of a trespasser is *abandoned*, the law casts the possession on the legal owner; but to constitute abandonment and create a vacancy to produce that effect, the title of a subsequent holder must be *unconnected* with the title of the previous holder; but when the entry of the subsequent holder is with the permission of the previous holder, the former may tack the one possession to the other: and *actual possession* by the *first* holder at the time of the entry by the second, is not necessary to authorize that result.

3. If a settler designate his boundaries by the lines of the surrounding surveys, his vendee can claim the land within those boundaries; if otherwise, he can claim only the part actually enclosed and improved.

ERROR to the Common Pleas of Jefferson county.

This was an action of ejectment by John Pickering *vs.* Joseph Hughs and others, to recover the possession of a tract of land of two hundred acres, in Rose township, Jefferson county, part of warrant No. 371, issued on the 17th May, 1785, to Timothy Pickering. His heir at law was the Hon. John Pickering, and the plaintiff claimed that at his death, the title to this land vested in him.

The defendants relied on the statute of limitations, and the only

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question in the case was, whether the defendants had acquired title by the statute.

On the trial, George Mason testified: "I made the first improvement on the place in May, 1825; I deadened timber in May, grubbed six acres in June, chopped logs and saplings on four acres, burnt brush, chopped logs in July; I had a shanty about ten by twelve feet square; my brother-in-law, Israel Bartlett, died; he lived near the place, within forty or fifty rods; he married my sister; I told her she might take my right and sell it, and if she could get any thing for it, well and good. I did not work any more after my brother-in-law died in July, 1825. Several tracts adjoined the land I claimed; I calculated to claim all the land in the piece; I had no other survey, only traced the tracts adjoining; Maxwell and Guthrie had traced the lines on adjoining tracts for me. I was with them; was carrying chain for Judge Shippen; run one line along the pike. They showed me a piece of land I might make my own if I would take care of it. I had just commenced on it. When we came to white oak, we were not surveying this tract. I claimed to the lines we were running that day. I commenced in May, 1825. I helped Bartlett on another tract; he did not work on this improvement."

Mrs. Long, the widow of Bartlett, testified, that *Bartlett* made the improvement on the land in dispute. That he was then living on an adjoining tract. That he died there in July; don't know the year. She said that she sold the land to Hughs; precise time not stated. That Geo. Mason was at work on the same place.

She further said, I paid George Mason the half the money that I got for the land. She says that he was living with them, and she does not know whether he was to get a part of the land or not. Hughs gave me five dollars in money for the improvement. She did not get any thing but the five dollars in money. George Mason worked on the land the fall after Bartlett died, and he was working for me.

Hughs took possession probably in August, 1826. The ejectment was commenced in March, 1847, within twenty-one years after possession taken by him.

It was testified that the place has been occupied every year; the cabin, about a third of the time. Between twenty-five and forty acres cleared; no other building on it; occupied every year in some way or other.

KNOX, J., charged, *inter alia*:

This suit was commenced in March, 1847, and to make the twenty-one years, it is necessary for Hughs to connect the position of Mason or Bartlett with his; otherwise, he is within the limitation.

The first question is, whether Hughs is in a position to avail himself of the possession or claim of Mason or Bartlett? Second,

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if so, was the possession sufficient in law to give title to the land in dispute?

We think the case is against the defendant upon both points.

If Mason is correct that the original entry was made by him, his parol gift to his sister, unaccompanied by any act of hers in taking possession, would confer no title upon her, and she would have nothing to sell to Hughs. If, upon the other hand, the right was in Bartlett, upon his death it descended to his heirs, and a sale by the widow would give no right to the purchaser. Hence, at the time Hughs took possession, in August, 1826, he had no valid claim to any interest that might have been previously acquired.

But even if this were otherwise, the possession of Mason or Bartlett was worthless for the purpose of giving title by the statute of limitations.

There is no pretence that either entered under any color of title, that any survey was made or any land actually cleared, enclosed, or cultivated. They were simply trespassers for a period of two or three months, from May to July, 1825, and then the tract was left for upwards of a year, without any thing done upon it evidencing an intention to follow up the original entry. * * *

Again, although Mason testifies that he claimed all the land within the interference, (which is the part in dispute,) there is nothing to show that he ever exercised any act of ownership over any portion of the tract except where he commenced clearing. His claim never was made known by declarations or otherwise as to its extent. It was not returned in the fall of 1825, either by himself or Mrs. Bartlett, for taxation. In a word, it was that kind of claim or possession that, if continued for a period of twenty-one years, would only have been protected to the extent of the land actually enclosed or cultivated.

He instructed the jury that their verdict must be for the plaintiff.

Verdict for plaintiff.

Error was assigned to the charge, in stating that if Mason made the entry, his parol gift to his sister conferred no title upon her. 2. That if the right was in Bartlett, it descended to his heirs, and that Hughs had no valid claim to any interest acquired *before he took possession*. 3. In deciding, as a matter of law, that the possession of Mason or Bartlett was worthless for the purpose of giving title by the statute of limitations. 4. That the court erred in taking the case from the jury, and deciding it as a question of law, when the whole evidence shows that it was a question of fact which could only be resolved by the jury. 5. In telling the jury that there was no disputed facts in the case.

B. F. Lucas, for plaintiff in error.—It was contended on the

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trial, that Mason and Bartlett were tenants in common, and that Mason gave to his sister a parol authority to sell; and though it may not have been sufficient to pass a title legal or equitable, yet under the case of *Cunningham v. Patton*, 6 *Barr* 355, it was sufficient to pass the *possession*. That they were *trespassers* is not important.

J. G. Gordon, and Judge *White*, for defendants. — Plaintiff showed a legal title. Defendants claimed by possession, and, to maintain it, must show a title by *continuous* possession. That Mrs. Bartlett never had possession, and therefore had nothing to sell; that possession in her was a link which was wanting to connect Hughes with Mason, who made the first improvement: 3 *Barr* 214, *Bishop v. Lee*. Mason made no cultivation. That the statute of frauds applies to all transfers of land.

The opinion of the court was delivered by

ROGERS, J.—The plaintiff exhibits in evidence a perfect legal title to the premises in controversy. This is admitted, but the defendant relies on the act of limitations. The suit was instituted the 19th March, 1847; the title under which the defendant claims commenced in May, 1825, so that more than twenty-one years elapsed from the commencement of the title until the institution of the suit.

To acquire a right by the act of limitations requires a possession of twenty-one years, actual, visible, *continued*, notorious, distinct, and hostile. The plaintiff contends he is not barred because the possession was not a continued possession; but that the possession was interrupted in its transmission from Mason, the first intruder, to Hughes the defendant. On this point the cause mainly turns. Mason proves that he made the first improvement in May, 1825; that he deadened trees in May, grubbed six acres in June, chopped logs and saplings on four acres, burnt brush, chopped logs in July, and that he had a shanty on the place, about ten by twelve feet square. That, being about to leave the property, he told his sister, the widow of Israel Bartlett, that she might take his right and sell it, and if she could get any thing for it, well and good. Whether we consider this transaction as a parol sale, or gift, or an authority to sell, is, perhaps, of but little consequence. But that it was the latter, in the estimation of the parties, at least, would appear from their subsequent conduct; for, after selling to Hughes, who took possession in pursuance of the contract, she paid over to her brother one-half of the purchase money. Coupling this with the words used, it indicates rather a power of sale than a gift or sale to her. But be that as it may, is the agreement between Mrs. Bartlett and Hughes, subsequently ratified by Mason receiving half the purchase money, possession taken in pursuance of it, to be viewed as a sepa-

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rate, distinct trespass, or is it a continuation of the original trespass? In other words, has Hughes the right to tack Mason's possession, for which he paid value, to his own, so as to bar plaintiff's right? Had Mason abandoned the property absolutely, or had Hughes taken possession without authority, these would present such a case of a want of continuity as would be fatal to the defence. But does this appear? These are points which the jury must decide: 4 *Watts* 409, *Simpson v. McBeth*; 5 *Watts* 441, *Fish v. Brown*. In *Cunningham v. Patton*, 6 *Barr* 355, it is ruled, that when adverse possession is proved by parol testimony only, it is a question for the jury whether it is continuous. Indeed, when there is a spark of evidence, a question of fact must be submitted to the jury as the legitimate triers of it: *Bank of Pittsburgh v. Whitehead et al.*, 10 *Watts* 397. The facts which particularly bear on this point are these: Under authority derived from Mason, Mrs. Bartlett sells to Hughes; Mason receives one-half of the purchase money, and, under this contract, Hughes enters, and ever since has been in the actual possession of the land. That Hughes was a trespasser as to the plaintiff, may be admitted; but was he a trespasser as to either Mason or Mrs. Bartlett, who sold their right in the property, whatever it was, and received the purchase money? Under such a state of facts, it is clear that no action of trespass could be sustained by either of them. The court would seem to be under the impression that unless Mason was in the actual possession at the time of the contract, the law would not unite the possession to the title; that the continuity of possession which the law requires cannot be preserved, unless there is actual, continued possession of the premises. So I understand the court, and, if so, the point is ruled in direct opposition to *Sailor v. Hertzog*, 4 *Whar.* 272. In that case it was insisted the continuity of possession was destroyed by the interruption of the actual possession; that the premises had been vacant about the year 1815, an important period in the title, bearing directly on the defence under the statute. But the judge who tried the cause at Nisi Prius, afterwards affirmed by the Supreme Court, says, "That in order to destroy the continuity of possession, the vacancy must not be merely occasional, such as occurs in every case where a party, from some cause, unable to obtain a tenant, shuts up his property for a short, or, indeed, for a long time. When the possession is abandoned for any time, or when a person takes possession of the property in dispute, or is totally unconnected with the previous holder, it prevents the operation of the act, because the continuity of possession, which is essential to a title under the act of limitation, is broken. It is a principle of law, it is true, that when the possession is vacant, the law casts the possession on the legal owner. But the question is, what is such a vacancy of possession as produces this effect? And we have seen that the vacancy must be not

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merely occasional, but the title of the subsequent holder must be unconnected with the title of the previous holder. There must be a want of privity of contract, for when the subsequent holder enters with the assent and permission of the previous holder, the former has the right to tack one possession to another. That actual possession is not required, is also shown in *Porter v. McGinnis*, 1 *Barr* 413.

But, granting that the defence is good in part, the next inquiry will be, to what extent has the defendant a right to take defence. And this will mainly depend on the testimony of Mason; for, if the jury believe that Mason designated his boundaries by the lines of the surrounding surveys, then, as is ruled in *Porter v. McGinnis*, 1 *Barr* 416, the defendant has title to all the land contained in those boundaries. But, if otherwise, he can only claim the part he actually enclosed and improved.

Judgment reversed.

Grubb *versus* Mahoning Navigation Company.

1. In a suit by the Mahoning Navigation Company, for subscription for stock, proof of the act of incorporation, the certificate of the commissioners, and the letters-patent, are sufficient to establish the right to sue. The organization by the election of officers, need not be proved, though laid in the declaration; being unconnected with the plaintiffs' right to sue, and not entering into the foundation of the action, it might have been stricken out, as surplusage.

2. *Immaterial* matter which must be proved, if laid, is that which enters into the foundation of the action. For distinction between immaterial and impertinent averments, see the opinion in this case.

3. In a suit not for the *penalty* prescribed, but for the amount of subscription, previous notice to pay need not be proved, in order to recover.

¶ ERROR to the Common Pleas of *Jefferson county*.

This was an appeal by defendant from the judgment of a justice of the peace, in a suit by the President, Managers, and Company of the Mahoning Navigation Company, against John Grubb, to recover the amount of subscription for two shares, of \$25 each, in the stock of the company. The *narr.* alleged the existence of the act of 1st April, 1845, for the incorporation of the company, the appointment of commissioners to receive subscriptions, and the issuing of letters-patent; that the company was organized by the election of officers; and that Grubb subscribed for two shares of the stock. The plea was non assumpsit, and payment with leave, &c. Plaintiffs gave in evidence the act of Assembly and charter of incorporation, and evidence of the subscription by Grubb.

BUFFINGTON, J., charged:—In the present case, the plaintiffs seek to recover the amount of the subscription, being two shares of stock, amounting to fifty dollars, subscribed by the defendant, to

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the capital stock of said company. For that purpose they have shown the act of assembly authorizing the incorporation of said company, the letters-patent, and the subscription-book in which the defendant's name appears, taking two shares of stock. This they proved to be genuine by the witness who was present and saw him sign it.

The plaintiffs, upon this evidence, rest their cause, and ask for a recovery. This is objected to by defendant, who contends that by the act of assembly to which the one authorizing this company refers, it is necessary to show that the company was regularly organized by the due and proper election of officers, and that notice to pay was given to the subscribers. On the first of these questions we differ with the counsel of the defendant, and instruct the jury that it is not necessary in the trial of this cause, to show a regular election of officers, or what he calls the organization of the company. As to the second question, if the defendant was aggrieved for the want of notice, he ought to have pleaded that matter in abatement, but the matter being dilatory in its character, and not going to the merits of the case, cannot avail the defendant in the general issue.

Upon the whole of the evidence, if the jury believe the defendant made the subscription, his objection will not avail him, and the plaintiffs are entitled to recover with interest from the time of bringing suit.

To which charge the defendant objected. Verdict for plaintiff.

It was assigned for error:—1st. The court erred in instructing the jury that proof of a regular organization of the company was not necessary. 2d. The court erred in charging the jury that proof of notice to pay given by the plaintiff to the defendant, was unnecessary under the general issue. 3d. The court erred in generally charging the jury, that if they believed that the defendant made the subscription, his objections would not avail him, and that the plaintiffs were entitled to recover with interest from the time of bringing suit.

W. P. Jenks, for plaintiff in error, contended that the act of assembly and act of incorporation and charter were evidence merely of a right to exist; but that evidence should have been given of the acceptance of the charter and an organization under it. That the existence is alleged in the declaration, an organization being averred in it: 10 *Mass.* 97, *Portsmouth Livery Company v. Watson*. That proof of notice to pay was necessary: 3 *Pa. Rep.* 149; 4 *Whar.* 12; 3 *id.* 198; 4 *Yeates* 350. As to the third error, that evidence should have been given that the defendant below, at the time he made the subscription, paid the two dollars required by the act to be paid: 10 *Watts* 864.

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B. F. Lucas, for the Company.—That the charter, in pursuance of the act, gave existence to the company. That if notice to pay was necessary, the want of it should have been pleaded in abatement. But that it was not necessary; that notice is to be proved only when the *penalty* is sued for: *Gray v. M. N. Company*, 2 *W. & Ser.* 162. That the objection as to the non-payment of two dollars per share, was not raised in the court below: 3 *Pa. Rep.* 71.

The opinion of the court was delivered by

BELL, J.—That a plaintiff corporation need neither aver nor prove the fact of its incorporation, unless that fact be put in issue by a proper plea pleaded, would seem to be the doctrine declared in the case of *Zion Church v. St. Peter's Church*, 5 *W. & Ser.* 215. Other cases of authority, however, hold that though the charter of incorporation need not be specially set out in the pleadings, it is incumbent on the plaintiff to prove it on the trial of the general issue: *Bank of United States v. Haskins*, 1 *Johns. Cases* 132; *Jackson v. Plumbe*, 8 *Johns. Rep.* 378; *Dutchess Cot. Man. v. Davis*, 14 *Johns. Rep.* 238. If the former be the true rule, the present plaintiff below went further than he could rightfully have been called on to go; if the latter, I think it is clear the proof given was fully competent to establish the asserted fact. The act of incorporation provides, that when sixty shares of the capital stock of the company shall have been subscribed, the commissioners may, and after the whole number of shares are subscribed, shall certify the fact to the Governor, who shall thereupon create and erect the subscribers into a body politic and corporate, in deed and in law, by the name, style, and title of the "President, Managers, and Company of the Mahoning Navigation Company," by which name the said subscribers shall enjoy all the immunities and privileges of a corporation, among which is specially enumerated the power of bringing actions at law. The plaintiff accordingly averred and proved the act of Assembly, the certificate of the commissioners, and the letters-patent issued in pursuance of the act, by the Governor of the Commonwealth. Clearly this was all it was necessary to do, in order to establish the corporate existence. From the moment the letters-patent were issued, the subscribers, including the defendant below, became a corporation for every practicable purpose: 10 *Wend.* 267; 8 *Greenleaf* 365; 2 *W. & Ser.* 79. The subsequent formal organization of the company, by the election of its officers, was not at all necessary to perfect the corporate being. This was required only for the convenient transaction of its business, not to confer upon it the capacity to act. An examination of all the cases, with features similar to that before us, will show that no more was required to establish the plaintiff's title to sue, than was exhibited here.

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But it is insisted that as the plaintiff chose, though unnecessarily, specifically to allege in the *narr.* as a part of his case, that the company had been duly organized in pursuance of the act of incorporation, by the election of the designated officers, he was bound to prove it, under the principle that an immaterial averment connected with the cause of action, though unnecessarily introduced, must be established by evidence under the penalty of failure. This is, unquestionably, a rule of pleading which has always been insisted upon. It would, perhaps, have been better to have said in the beginning that immaterial allegations might be rejected as surplusage, as most accordant with reason. But though the courts have followed the established rule, they have recognized a distinction between immaterial and impertinent averments, which has greatly narrowed the circle of its operation. Immaterial matter, which must be proved, is that which enters into the foundation of the action though the plaintiff might have succeeded without stating it. As, for instance, where occupancy is sufficient to sustain the action and the plaintiff falsely avers a particular estate or interest in the land; or where he needlessly undertakes to recite part of a deed on which the action is founded, and misrecites it; and, again, if he set forth a judgment on which a *fi. fa.* is founded, although it would have been sufficient to set forth the *fi. fa.* alone, he shall be held to prove the judgment: *Bristow v. Wright*, *Doug.* 667; *Waun v. White*, 2 *Bl. Rep.* 342; *Savage qui tam v. Smith*, *id.* 1101. But if the matter introduced have no necessary connection with the action, and would be stricken out on motion, it is deemed impertinent and need not be proved. It is sometimes difficult to distinguish between what is immaterial and that which is merely impertinent. Yet, as the modern inclination of courts is not to insist stringently upon rules which are not founded in some reason or some overruling policy, I think it may be safely assumed that where there is doubt of the character of an averment, it is best to class it with those subject to rejection as surplusage. This inclination was, perhaps, acted upon in the New York case of *Allaire v. Ouland*, 2 *Johns. Cases* 52, where a plaintiff averred the issuing of a writ called an attachment of privilege, which, though connected with his cause of action did not lie at the foundation of it, and it was rejected as surplusage. In like manner, I think it may be said the allegation of the election of corporate officers is unconnected with the plaintiffs' right to sue. It enters not into the foundation of his action, which existed before and independently of any election. It is a fact connected with the general subject or history of the corporation, but is in no way linked with the action instituted by it. It might, therefore, have been stricken out as surplusage, and, consequently, was well enough passed without proof.

The imputed error in charging that the plaintiff might recover

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the amount subscribed by the defendant without showing a newspaper publication of notice to subscribers in pursuance of the sixth section of the act of incorporation, is ruled by the determination in *Gray v. Monongahela Navigation Company*, 2 *W. & Ser.* 162. Under a legislative provision, similar in all respects to that before us, it was there held, that notice of a call on stockholders to pay the amount of their subscriptions is only necessary to subject them to the monthly pecuniary penalty for non-payment, and not to found an action for the principal which may be demanded on the foot of the call, without notice of it. There is nothing in the cases cited for the plaintiff in error inconsistent with this doctrine. *Sinklor v. The Turnpike Company*, 3 *Pa. Rep.* 149; *West Philadelphia Canal Company v. Innes*, 3 *Whar.* 198; and *Crozier et al. v. Leland*, 4 *Whar.* 12, arose under acts of Assembly very different in their provisions, and were decided upon points distinct from those presented here.

Under the third error assigned, is presented a question not made below. Besides, the ground upon which it is made to rest is inconsistent with fact, as is shown by the paper-book of the defendant in error.

Judgment affirmed.

Philiber et al. *versus* Matson.

Where a raft lodged in a small stream and interrupted the channel, and caused another raft to lodge, the owner of the second raft, which is in danger from other rafts, may lawfully cut away a portion of the first, after allowing for the removal of the obstruction as much time as circumstances permit, and doing no unnecessary damage.

ERROR to the Common Pleas of *Jefferson county*.

This was an appeal from the judgment of a justice of the peace, in a suit by Philiber & Robinson *vs.* Matson, for damages for cutting a raft of plaintiffs', by which a portion of it went adrift.

BUFFINGTON, J., charged the jury, *inter alia* :

It seems that Robinson, one of the plaintiffs, owns a dam in Red Bank Creek, a navigable highway; that in floating down the raft belonging to both plaintiffs, they stuck on the dam, part of the raft over the breast of the dam and part in the pool. Whether it was there an obstruction is a disputed question, and for the jury. The defendant came down with his raft, and in trying to avoid the plaintiffs' raft thus in the schute, was thrown to the left-hand bank, below the dam, and was stuck on the shore. In this situation, another raft came down, struck the hind end of defendant's raft and the upper end swung round and lodged against the plaintiffs'

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raft. In this position, the defendant alleges that, if there was any cutting done, it was necessary and justifiable, in order to enable them to get their rafts loose and pass along the stream. The question is whether, if the plaintiffs' raft is so lodged upon his dam as to prevent rafts from passing over with safety, a person running along and thus obstructed, would have a right to remove so much of the obstruction as would enable him to pursue his voyage. And we think he would. * * *

We therefore think that if the jury believe the plaintiffs' raft was the cause of that of the defendant running on the shore and of the other raft jamming in between them, and that on account thereof it became necessary to remove a portion of the raft of the plaintiffs to enable him to get loose and pass, or if the jury believe it was necessary in order to clear the stream, the defendant might cut off some of the plaintiff's logs, in order to bring the raft around which lay below the plaintiff's, provided that no more was done than was necessary for that purpose, the defendant would be justifiable in so doing. If, on the other hand, it was not necessary to cut plaintiffs' raft for that purpose, but the act was wanton and uncalled for, or more injury was done than the circumstances required, then the defendant would be a trespasser, provided he was the person who did the injury.

The jury found for the defendant.

Error was assigned to the charge.

Arthurs, for plaintiffs in error, contended that where a raft is stranded *accidentally*, the owner should have a reasonable time to remove it; which he contended plaintiffs had not: *Whar. Crim. Law*, 508; 2 *Barr* 114; 3 *Ch. Bla.* 167, in notes. That there was no evidence to leave to the jury to say that the plaintiffs' raft should have been removed to clear the channel.

Gordon, for defendant.—That the court charged fairly; that there was no time to wait, as the flood might have subsided.

The opinion of the court was delivered by

GIBSON, C. J.—The law of the case was accurately laid down. It is certainly true that a nuisance can be lawfully abated only after as much time has been allowed to remove the cause of it as circumstances would permit, and by doing no unnecessary damage to it; but it is just as true, that a loss which must fall on one of two innocent persons, must be borne by him whose accident was the cause of it. The plaintiff's raft, in attempting to pass it over a mill-dam, was unskillfully or unfortunately managed; by reason of which, the defendant's raft, in following it, was jostled and thrown on rocks below, where it stuck fast. In a few minutes

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another raft was lodged between the two, and lay foul of both. What was to be done? Not only was the water abating, but the stream was crowded with rafts, momentarily descending; and an hour's delay might not only have deprived the defendant of the benefit of the flood, but have exposed his property to collision with rafts from above. In this emergency, he had a right to extricate it in the only way he could; and that he was compelled to cut loose was not his fault, but the plaintiff's misfortune. There was, therefore, no room for complaint.

Judgment affirmed.

Espy versus Anderson.

1. A written agreement for the sale of land cannot be altered by a subsequent parol agreement. In equity, a written agreement may be rescinded by parol, but to rescind, the party desiring it must place the opposite party in the situation he occupied when the contract was made.

2. If a judgment remaining unsatisfied on the judgment docket is actually paid, it is to that extent a compliance with the agreement to convey clear of all encumbrances, though the judgment remain open on the judgment docket.

3. A tender of the whole chain of title is not necessary to enable the vendor to recover the purchase money; the tender of the deed alone is sufficient.

4. Where the plea of defendant in an action of covenant, does not deny the title, it lies on him to prove it defective.

5. A covenant to convey in fee simple is satisfied by a deed in fee simple with special warranty—a general warranty is not necessary.

ERROR to the Common Pleas of Jefferson county.

This was an action of covenant, brought by John Anderson, the defendant in error, who was the plaintiff below, against Samuel C. Espy, to recover a part of the price of a house and lot in the borough of Brookville, alleged to be due on an article of agreement between the parties, dated Dec. 11, 1847.

The *narr.* referred to the agreement, and it was alleged that the possession was given, and that Anderson made and tendered a deed in fee simple, clear of encumbrances, &c.

Defendant plead *non est factum, non infregit conventionem*, and covenants performed—and plead specially, that after the making of the written contract, and before the defendant took possession, the written contract was rescinded by a parol agreement, and that a second parol agreement was made for the sale of the premises, varying the terms of the written agreement, under which the defendant took possession.

Defendant contended, first, that the article of agreement had been rescinded by a subsequent parol agreement, and that, therefore, an action of covenant would not lie. Second, that if the written agreement could not be rescinded by parol, that it was in-

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cumbent on Anderson, at least to exhibit his title to Espy before he could require the payment of the purchase money, or bring a suit to enforce its payment.

The court below (BUFFINGTON, President Judge) decided both these questions against the defendant, the deed being one with covenant of *special warranty*.

There was given in evidence, a deed of Feb. 8, 1844, from county commissioners and Pickering to William McCullough, for the lot sold by Anderson to Espy; also, record of a deed from McCullough and wife to Brownlee. Deed, Feb. 28, 1848, from Brownlee and wife to John Anderson. Deed by Anderson to Espy, dated April 29, 1848.

In the article of agreement, Anderson agreed to convey the property by such deed or deeds of conveyance as their counsel should advise, to Espy, his heirs, and assigns, in fee simple, clear of all encumbrances.

On the trial, defendant offered to prove, that after the making of the article of agreement given in evidence, and before Espy took possession, a parol agreement was made between the parties to rescind the article of agreement; that Anderson admitted at that time that he could not make title, to be followed by proof, that after the rescision of the written agreement, another parol agreement was made between the parties, under which Espy took possession.

This was objected to on the part of the plaintiff, as varying a written agreement, or rescinding the same in regard to land, by parol; and also because not admissible under the pleadings.

Proposition overruled by the court, to which opinion and decision of the court the defendant's counsel excepted.

BUFFINGTON, J., charged, *inter alia*, that if when the plaintiff brought this suit, he was vested with a good title in fee to the lot, and he made a tender of a deed conveying that estate to the defendant clear of encumbrances, it was all he was bound to do. That it was not necessary for him to make a tender of the whole chain of title.

It was assigned for error:

1. The court erred in rejecting the evidence offered by defendant below, as contained in the first bill of exceptions, and in ruling that a written contract in regard to land cannot be varied or rescinded by parol.

2. The court erred in telling the jury that "on examination it was ascertained the judgments were paid off." This should have been left as a fact for the jury to find, inasmuch as the evidence showed one judgment remaining on the judgment docket unsatisfied at the trial. It is true that Mr. Arthurs testified on the trial that the amount of the judgment had been paid. But it is a well-

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settled principle, that a purchaser, at the time of accepting the deed is not required to look beyond the judgment docket; and if the judgments had all been paid, it was not a fact within Espy's knowledge.

3. The court erred in ruling the case against the defendant under the circumstances on the point raised, and that a tender of the deed from Brownlee to the plaintiff need not have been made to the defendant before suit brought.

4. The court erred in entering judgment in this case, because the declaration sets forth no cause of action.

The case was argued *Lucas*, for Espy, plaintiff in error, and by *Arthurs*, for defendant.

The opinion of the court was delivered, Oct. 21st, by
COULTER, J.—The defendant below offered to prove that, after making the article of agreement given in evidence by the plaintiff, and before the defendant took possession, a parol agreement was made between the parties to rescind it, and that Anderson then admitted that he could not make title, to be followed by proof that, after the rescision, another parol agreement was made between the parties, under which Espy took possession. The court below rejected this evidence, which is assigned for the first error. In equity, a written agreement may be rescinded by parol; a court of chancery will oftentimes refuse to decree a specific performance of an agreement, which, nevertheless, it will not declare rescinded; and a specific performance will be decreed upon the application of one party, when the court would refuse to act upon the application of the other. The intervention of the court can only be successfully invoked by the special circumstances of the whole case, from which the preponderating justice, on the one side or the other, is established. The action, therefore, of a court of chancery, as to such matters, is essentially dependent on discretion; not of a capricious discretion, but of sound judicial volition, according to the principles of equity. But in order to rescind a contract, under such circumstances, both parties must place themselves in the same situation that they occupied before the contract was made, so that neither can have or take advantage of the other: and that was not offered to be proved in this case. The agreement was not cancelled or delivered up; the fifty-five dollars paid on the 11th of December, 1847, was not refunded, nor was it proposed to show that any act was done in pursuance of the alleged rescision. It was then a mere naked or voluntary agreement, unexecuted, and without consideration, and, therefore, not regarded in equity as of any moment whatever. But the agreement was not considered rescinded by either party, as was fully manifested by the subsequent evidence in the cause; and, therefore, as the rejection of the proposed evidence

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could have been no real detriment to the defendant below, the court would not reverse on that account. David S. Deering, a witness who was called by the defendant, testified that Espy, the defendant below, brought the deed tendered to him by Anderson, and wished to know whether it conformed to his article of agreement. He instructed him that it did not. He further testified that the same deed was tendered at May court following, and the same objection was made, that it did not conform to the article of agreement. George W. Zeigler testified the same thing. He was the partner of Deering, and they were the attorneys under whose advice Espy acted. It is apparent, therefore, that both parties considered the articles in their original vigor. But the subsequent part of the offer shows plainly enough the category into which the defendant wished to bring his case; that is, he wished to establish that the written agreement was varied or altered by a parol agreement, without specifying in his offer what that alteration was. But that is not material, for a written agreement respecting the sale of land cannot be altered by parol testimony. If it could, the statute of frauds and perjuries would be of no practical use, nor answer any beneficial purpose. What was said and done by the parties, at or about the time the written agreement was entered into, may be given in evidence, in explanation; or to correct a mistake of the scrivener; but a subsequent parol agreement cannot be received in evidence to alter the terms of a written agreement for the sale of land. The evidence was properly rejected.

The second error assigned is not sustained. The testimony was direct and positive, that the only judgment remaining open on the docket was actually paid. This was quite sufficient, for it put the defendant into the knowledge and possession of evidence by which he might compel the plaintiff to enter satisfaction; and if that was not sufficient security for him, he might have retained so much of the purchase money as would have discharged it, until Anderson had procured satisfaction to be entered; or he might have tendered to the plaintiff in the judgment, the amount, and retained it out of the purchase money, if it had not been paid. But this error assigned is only a make-weight, for the entry on the docket is, all costs paid, and \$9 of the debt: and the plaintiff in the judgment, Heath, testified that this \$9 was the balance of the judgment due at the time the entry was made, which was before the tender of the deed, the rest having been paid at a previous time. But if there had been encumbrances, all that the plaintiff was bound to do was to satisfy the jury that he was able to discharge them, if the defendant had been willing to accept a deed: *Hampton v. Specknagle*, 9 *Ser. & R.* 212, and *Cassel v. Cooke*, 8 *id.* 268.

In relation to the third error assigned, I have to observe that it is not necessary to tender the whole chain of title at the time the vendor tenders a deed to the vendee. In many cases this would

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be absolutely impossible; as, for instance, when a patent covers a large tract of land which is subsequently divided into many parts, which is extremely common, the owner of every part cannot have the original patent: and so, in relation to a deed from an individual for a large tract afterwards divided into parcels, the owner of each parcel cannot have the original deed; and in this country, where titles are on record, it is of no consequence, because the vendee can resort to the record for information as to the title. The rule is *caveat emptor*. It is the duty, therefore, of a purchaser to examine for himself. The defendant is not bound to accept a doubtful title, but it is his business to show that it is doubtful, or positively bad. In England, it is customary to give to the vendee an abstract of the title, but that is not usual here. It is common, however, to recite the chain of title in the preamble to the deed. We do not know whether that was done or not in this case, as the deed is not on the paper-book. But the tender of the deed was sufficient to enable the plaintiff to recover, it being conformable to the contract. This was ruled in *Jones v. Love*, 4 *Watts* 465, and more specially decided in *Martin v. Hammon*, 8 *Barr* 272, and in *Snevily v. Egle*, 1 *W. & Ser.* 480. In the two latter cases, the plea was payment and covenants performed and *non est factum*, just the same as in this case. There was here added, upon leave, a special plea of the rescision of the contract, but that in no way impugned, or denied, or controverted the title of the plaintiff, and left the principle on which *Snevily v. Egle* and *Martin v. Hammon* was decided, in full play and operation on this case, to wit, that he did not manifest, on this record, any intention to deny the title, and therefore he was bound to prove it defective. The covenant, on the part of the plaintiff, is well and sufficiently to grant, convey, and assign in fee simple, &c. This covenant is satisfied by a deed in fee simple, with special warranty, or without general warranty. The chain of title is fully set out in the article of agreement, and, I presume, was as fully set out in the deed. It is fair and good on its face, and there is nothing in the pleadings or evidence to impeach it.

As to the fourth error assigned, it is of no account. A good cause of action is set out in the *narr.*

Judgment affirmed.

Wann *versus* Pattengale.

A suit was brought before a justice of the peace, against two defendants, and service upon one only, and judgment against him. A suit afterwards brought before *another justice of the peace*, against the party who was not served, is not a continuation of the first suit, and will not avoid the plea of the statute of limitations.

ERROR to the Common Pleas of *Jefferson county*.

This was an appeal from the judgment of a justice of the peace, in an action brought by Wann *vs.* Pattengale, to recover from him the price of fifty sets of windmill irons, sold by plaintiff to Pattengale & Barrett, in 1839. The defendant relied upon the statute of limitations. To avoid the statute, the plaintiff showed that in June, 1844, he commenced suit against Pattengale & Barrett, before *Jas. M. Wilson*, a justice of the peace. The summons was returned, served on Barrett, and a judgment was rendered against him on the 29th of June, 1844, for \$81.10. Upon this judgment an execution issued against Barrett, and was returned, "no goods."

The present suit was commenced before *Justice Gallagher*, on the 28th August, 1846; Justice Wilson then being an acting justice, having been recommissioned in March, 1845.

The plaintiff contends that this suit is a continuation of the proceedings before Justice Wilson; and that, therefore, the statute is no bar to a recovery, six years not having elapsed when the first suit was commenced.

KNOX, J., charged, *inter alia*:—Here the first proceeding was consummated by the judgment against Barrett alone. No steps were taken against Pattengale for more than two years, when a suit was commenced against him by an *original* summons, issued by *another* justice of the peace, for the same cause of action. This must be considered in the light of an original suit, in no wise connected with the one commenced in 1844, before Justice Wilson; and, according to the decision in *Magraw v. Clark*, 6 *Watts* 528, the bar of the statute is not *avoided*.—The jury were directed to return a verdict for the defendant.

To which charge of the court the plaintiff, by his counsel, excepted.

Error was assigned to the charge.

The case was argued by *Arthurs*, for plaintiff; and by *Lucas*, for defendant.

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The opinion of the court was delivered by

BELL, J.—The action was brought against the present defendant under the act of 6th April, 1880, not as a continuation of the original suit instituted before Justice Wilson against both Pattengale and Barrett, but with the view of obtaining against the former, a distinct judgment, though for the same debt. In *Moore v. Hepburn*, 5 *Barr* 399, the obvious mischief proposed to be cured by the act of 1830, is shown to have been the common law consequence of a joint action against two or more, some of whom only were brought into court. The plaintiff, by proceeding to judgment against the party summoned, was thereby precluded from any subsequent pursuit of the other co-promissors, though the defendant in the judgment turned out to be insolvent. This was properly denounced by C. J. TILGHMAN, in *Downey v. The Bank of Greencastle*, 13 *Ser. & R.* 288, as unjust and unreasonable, with the expression of a wish that the legislature would afford a remedy. Accordingly, with this intent, the statute gives a distinct action against those not brought in by the first writ, in which, after judgment, a separate execution may be issued, though there can be but one satisfaction. The second action can in no respect be considered as a continuation of, or emanation from the original action, nor had the legislature in view to invest it with any of the legal effects flowing from such a continuation. It is wholly unlike those proceedings where, to save the bar of the statute of limitations, an original suit may be continued down by entries of *vice comes non misit breve*, until a party, who has not been taken upon the first process, is brought in. Mr. Justice SERGEANT, in *Magraw v. Clark*, 6 *Watts* 528, upon the authority of the cases there cited, shows it must appear that the court has, from time to time, kept the original suit alive, and that the plaintiff is proceeding to bring the omitted defendant into court, in the original suit; and he suggests some difficulties to be encountered under our form of practice, in affecting this, where the first writ has been returned. But in *Pennock v. Hart*, 8 *Ser. & R.* 380, the use of an *alias* or *pluries* in the same action, is pointed to as the common means of continuing the first process, in answer to the bar of the statute. It is clear, however, that whatever difficulty may intervene in carrying forward the original suit, the institution of a new and distinct action cannot be so connected with the old, as, by the use of both, to count back within the period of limitation. This is very clearly shown in *Magraw v. Clark*, where a second suit, brought against both the defendants, was held to be no continuation of the first, though no judgment had been entered in the original action. But here such a judgment was entered, and is, at this moment, in full force. It is impossible, therefore to assert the second action against Pattengale is but the prolongation of that in which Barrett is the defendant. In truth, no such idea was entertained at the time of its inception.

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The sole object was the recovery of a several judgment against the former, under the statutory provision, which has no relation to questions springing from the act of limitations. This, I think, is very clearly manifested by the fact that the second suit was instituted before another magistrate, who was incompetent to take cognizance of a controversy depending before the first justice, still in commission. This of itself, is sufficient to put at rest the pretence now set up as an answer to the defendant's plea of the statute. But I prefer to put it on the ground that suits brought under the act of 1830, cannot be esteemed in the nature of secondary process, under continuances of the original suit brought down; for the reason that the statute contemplates a judgment in the first action, before a second can be commenced. After judgment, there is no such thing as the entries required, real or imaginary.

Judgment affirmed.

Emerick versus Kroh.

1. Where the declaration alleged the suit to be on a promissory note or due bill in writing, and the evidence was of a note *under seal*, there is no substantial variance.

2. A *due bill* is a sealed acknowledgment of a debt, and a promise to pay it.

3. On a demurrer to evidence, exceptions as to variances between the declaration and proof, will not be very critically examined.

ERROR to the Common Pleas of *Jefferson county*.

This was stated to be a summons in debt on bill under seal. The declaration alleged the suit to be on a certain promissory note or due bill, in writing. On the trial, the note in evidence was as follows:

"Know all men by these presents, that I am in due Jacob Kroh two hundred dollars, lawful money, to be paid to the said Jacob Kroh at any time within two years, by delivering to him at Port Barnett, good and merchantable saw-logs, to be taken at the market price when delivered, without interest. Witness my hand and seal this 21st day of April, 1847.

"JOHN EMERICK, [Seal.]

"In presence of H. Brady."

Defendant demurred to the evidence. Plaintiff joined, and judgment was rendered for the plaintiff on the demurrer, sum to be liquidated by prothonotary by calculation; interest from the time the note became due.

It was assigned for error, that the court erred in entering judgment on the demurrer to the evidence, for the plaintiff.

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*Arthur*s was for defendant.—The declaration sets forth a note not under seal. The note given in evidence is a note under seal. In this there is a variance: 9 *Barr* 407; 5 *id.* 508; 1 *W. C. C. Rep.* 97. There was a variance between the declaration and the writ.

Gordon was for defendant, but the court did not hear him.

PER CURIAM.—There is no substantial variance. Though the cause of action is called in the statement a promissory note, it is also called a due bill, which in the parlance of the country means a sealed acknowledgment of debt and a promise to pay it. On a demurrer to evidence, we will not look very critically into such exceptions.

Judgment affirmed.

Work versus Work.

Where land was taken at a valuation in the Orphans' Court, by A. for himself, and in trust for B., and both subsequently sell to C., who is afterwards appointed executor of the will of A., and in that capacity settles an account in the Orphans' Court; in that account the individual liability of C. to B., or his vendee for the purchase money, was not involved, and the decree of the Orphans' Court on the account, will not preclude the assignee of B. from recovering from C. in his individual capacity, any amount due by him on account of his purchase of the land; and, in that suit, the proceedings on his account as executor, were not admissible in evidence.

ERROR to the Common Pleas of *Fayette county*.

A suit was brought in the name of Alexander Work for the use of James F. Canon against Andrew M. Work, (who was plaintiff in error,) to recover a balance of purchase money for land sold by John Work to the said Andrew M. Work.

A verdict was rendered in favor of the plaintiff below, for \$337.26.

John Work, deceased, took part of his father's real estate, (a farm and mills,) at the valuation of \$3000, upon proceedings in the Orphans' Court, for himself and his brother, Alexander Work. John Work and Alexander Work could not pay the heirs their parts; and they sold the farm to their brother, Andrew M. Work, the defendant below and the plaintiff in error in this case. Some time after, John Work, one of the tenants in common, died, and made his brother, Andrew M. Work, one of his executors. Andrew M. Work then occupied two relations, that of executor, and also vendee of the land. He was compelled to settle his administration account, which was referred to an auditor, who charged him

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with the balance due of purchase money of the land. Before the auditor, amongst other matters, A. M. Work insisted that his mother's dower was a lien on the land, and that he ought to retain for it. But the auditor decided the point against him, which was confirmed by the court, and is unappealed from. Alexander Work, the surviving owner of the land, assigned the balance of the purchase money to Canon, who had paid off one of the heirs his purpart, which was a lien on the land, in order to satisfy it, and which A. M. Work was bound to pay. This suit was brought in the name of Alex. Work, for the use of Canon, to recover the balance of purchase money due for the land.

Bills of exception were taken by the plaintiff in error to the admission of the auditor's report, and the assignment from Work to Canon.

GILMORE, J., charged, *inter alia* :

Alexander Work, for the use of James F. Canon, now seeks to recover the balance of purchase money in the hands of Andrew M. Work. The defendant objects, and among other matters, alleges that he has been compelled to extinguish the widow's dower, which was secured by recognizance, and for this he has paid \$300. But the question of this lien was before the auditor and passed upon, and the court charge that in this action the decree of the Orphans' Court confirming this report is conclusive in this action, and the correctness of the auditor's decision cannot be questioned in this suit, and that if the jury believe that Alexander Work was tenant in common with his brother, John Work, in this land, part of which was sold to Andrew M. Work, he, as survivor, could maintain this action of debt, to recover from the defendant the balance of any purchase money remaining due and unpaid, and that the auditor's report fixing the amount, and the decree of the court confirming the report, is conclusive. The court, therefore, charge you, that the auditor does pass upon the question, whether the recognizance securing the widow's dower is a lien, and decide that it is not, and that no deduction should be made to the accountant on this account, and that this report, having been confirmed, is conclusive. Therefore, the only question for your determination is, whether Alex. Work was tenant in common with his brother, and for the proof of this you are referred to the evidence, &c.

It was assigned for error, that the court erred in admitting in evidence the report of the auditor, and in admitting the assignment of Alexander Work to Canon.

The case was argued by *Howell*, with whom was *Oliphant*, for plaintiff in error, defendant below.—He contended, *inter alia*, that if the balance belonged to Alexander Work, plaintiff below, he should have appeared before the auditor and objected to its being charged against defendant below, as executor.

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J. H. Deford, with whom was *A. Patterson*, for defendant in error.—The auditor's report was offered merely as record evidence of the amount of purchase money due for the land.

The opinion of the court was delivered by

GIBSON, C. J.—This action is brought by an equitable tenant in common, as a substitute for a bill in equity, to recover his share of the price of land sold by his co-tenant and trustee of the legal estate. The plaintiff and his trustee, the defendant's testator, accepted a part of their intestate father's real estate at the valuation in the Orphans' Court; but as the choice was made by the testator, as the actor, the title was vested in him exclusively. The foundation of the claim is a resulting trust in a moiety of the land sold by the testator. In equity, the brothers were tenants in common, the testator being a trustee of the plaintiff's moiety. This is the aspect in which the case must be viewed, to found the action. The testator sold the whole, with the plaintiff's assent, to another brother, the defendant, who purchased with notice of the trust, and, at the testator's death, became his executor. The subject of the action, therefore, had no connexion with the subject of the defendant's administration account; and how it could have been involved in the settlement of it and the decree of confirmation, it is impossible to tell. No part of the assets could come to the plaintiff; and in that respect the case is stronger than *Weiting v. Nissley*, 1 *Harris* 650, in which the party entitled to the estate was not bound by the settlement, because the Orphans' Court had not jurisdiction of the particular matter. In the present case, the defendant is sued for a debt said to be due by him, not as an executor, but as a purchaser of the plaintiff's equity; and whether the plaintiff was in truth an equitable owner; whether the defendant had paid over the purchase money in ignorance of the trust; or whether it was still in his hands—no matter whether as purchaser or executor—were questions which could not be agitated at the settlement of the administration account. They are questions which cannot arise in any case specified in the nineteenth section of the act of 1836, by which the jurisdiction of the Orphans' Court is limited and defined. They arise in England only on a bill in equity between vendor and vendee; and here, only in an equitable action, as a substitute for it. The present is such an action, and there consequently can be no question about survivorship of remedy. If the plaintiff's money is in the defendant's hands—no matter how—he must pay it without regard to the claims of the testator's creditors, because it is no part of the assets. View the case as if the vendee and the executor of the vendor were different persons, and as if the legatees were attempting to surcharge the administration account with the entire price of the land: what would the plaintiff, a stranger to the will, and the vendee, equally so, have to do with it? Neither

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would be estopped by the decree, because neither would be a party to it. The defendant happens to be both purchaser and executor; but a man's acts take their character and consequences from the capacity in which they were done. Even if he could have been a party to the decree as a purchaser, the plaintiff was not a party to it as a vendor; and it is a trite rule of evidence that a party who would not have benefited by a judgment had it been in his favor, shall not be prejudiced by it as an estoppel when it is against him. The admission of the Orphans' Court proceedings in evidence, therefore, and the direction consequent on it, were erroneous.

Judgment reversed and *venire de novo* awarded.

Nixon *versus* Brownfield.

Where, in a meeting for settlement of accounts, an item was admitted as a ground of charge, but no balance was struck, nor the account adjusted; this is not an acknowledgment that such an item was a present existing debt, so as to toll the statute as to that item, or from which a promise to pay it is to be inferred.

ERROR to the Common Pleas of *Fayette county*.

This was an action of assumpsit brought by Basil Brownfield *vs.* Isaac Nixon, to March term, 1847.

The declaration contained the usual counts, for money lent, goods sold, and account stated. The pleas were non-assumpsit, payment, and the statute of limitations added after the jury was sworn, to which amendment the plaintiff excepted. The cause had been arbitrated.

In the spring of 1836, the parties borrowed of the Brownsville Bank one thousand dollars, for the purpose of buying a drove of cattle; of this money, Nixon took two hundred and eighty dollars, Brownfield the residue. Each purchased cattle for the common concern, and each put into it a few of his own. The cattle were kept through the summer by Nixon, and in the fall (September) were sold by Brownfield for one thousand dollars, who paid the debt in Bank with it.

In June, 1846, the parties made an attempt to settle. They had their books before them, and as they agreed on the items, they were entered on a slip of paper. They differed as to the number of cattle put in by Brownfield, and this was to be referred to Samuel Wylie. Nixon, as stated on the slip of paper, was to have credit for keeping the cattle, but no price was agreed on. Wylie was never called on by the parties to fix the number of cattle, but he proved on the trial that there were fourteen. Embraced in the same settlement was a charge of seventy-five dollars, loaned by Brownfield to Nixon in 1835, and also a charge on the same side, of sixty-eight bushels of oats, under date of July 8, 1841.

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The plaintiff, to maintain the issue on his part, gave in evidence his original book of entries, from which he read the following item: July 8, 1841, Isaac Nixon, Dr. to sixty-eight bushels of oats at twenty-eight cents, \$18.44. The plaintiff, further to maintain the issue on his part, called *Samuel Goodwin*, who being affirmed, deposed as follows, (a paper having first been shown to the witness, purporting to be a settlement between plaintiff and defendant, as partners. I was present when they were engaged in settling; the items were taken down on a piece of paper, and the same items talked of are on this paper. I believe it to be the same paper; they went on in the settlement until they came to the cattle at Wylie's. Brownfield said there were sixteen there. Nixon said there were but fourteen; but whatever was the number, it was to be left to Mr. Wylie to say—then the settlement was to be closed; both agreed to the items on the paper; it was final so far, as I understood, whenever they agreed as to the number of the cattle at Wylie's, and that was to be left to Mr. Wylie; parties had their books there; this was three years ago last June, 1849.

On his cross-examination, witness says—I was there two or three hours, until they were through; when I went into the room, they were just commencing to settle; they enumerated the items—they referred to books. I saw the paper afterwards on the same day. I believe it to be the same paper, because the same items are there; the item of one thousand dollars borrowed from the Brownsville Bank. Nixon had got of this two hundred and eighty dollars, and Basil Brownfield the remainder. I cannot tell how about the cattle, each had so many of their own. Mr. Brownfield paid the Bank from the sale of the cattle; some other dealings spoken of, seventy-five dollars of money borrowed from Brownfield by Nixon they put down on the paper; the oats, also, put down on the paper.

Thereupon, the plaintiff offered to read to the jury *the paper referred to by witness*; to which the defendant objected. The court, GILMORE, president, overruled the objection, and the defendant excepted.

The plaintiff then read to the jury the paper of settlement.

Plaintiff then called *Samuel Wylie*, who deposed as follows:—Brownfield called on me. I wintered sixteen head of cattle for Brownfield; they were sent in the spring to Isaac Nixon's; it was the time they had the drove in partnership. Also, Daniel Colyer, who swore that he bought the drove from Brownfield, in September, 1836, for which he paid him one thousand dollars.

Whereupon, the court charged the jury, that if the evidence of Goodwin was believed, and the paper relied on, it would amount to an unequivocal acknowledgment of indebtedness of the seventy-five dollars borrowed by Nixon from Brownfield, the year before they bought the drove; and this acknowledgment having been made in June, 1844, would entitle the plaintiff to recover the seventy-

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five dollars with interest from the time of borrowing the same: as to the claim *for the oats*, if either the book of original entries or the paper is relied upon, the plaintiff is entitled to recover this item. There is a slight difference between the book and the paper in respect to this item, both as to quantity and price. The court instructed the jury that the paper was the most reliable evidence, and should be taken as containing the true price and quantity.

To which charge both plaintiff and defendant excepted.

Verdict for plaintiff.

Exceptions:

1. The court erred in admitting the paper referred to in the defendant's first and only bill.

2. The court erred in charging the jury, that if the evidence of Goodwin was believed and the paper relied on, it would amount to an unequivocal acknowledgment of an indebtedness of the seventy-five dollars borrowed by Nixon from Brownfield, the year before they bought the drove; and this acknowledgment having been made in June, 1844, would entitle the plaintiff to recover the seventy-five dollars, with interest from the time of borrowing the same.

The case was argued by *J. Miller*, for Nixon, plaintiff in error.—The question was, whether the testimony of Goodwin took the case out of the statute of limitations as to the seventy-five dollars. The court charged that there was a sufficient acknowledgment as to the seventy-five dollars, but that plaintiff could not recover any partnership indebtedness in this action of assumpsit. He contended that the admission was not of present indebtedness; that plaintiff admitted merely that the seventy-five dollars had been borrowed, and did not admit that it had not been paid or covered by subsequent dealings. As to first error, was cited 3 *W. & Ser.* 508; 1 *Watts* 253. As to second error, 6 *Watts* 219; 9 *id.* 380; 10 *id.* 172; 7 *W. & Ser.* 180; 3 *Pa. Rep.* 177; 1 *Peters* 387; 22 *Pick.* 298; 2 *id.* 278; 8 *Cranch* 74; 2 *Greenfield*, sec. 440.

Deford, for defendant in error.—Though a certain part of the claim was rejected, or not settled, yet an item distinctly admitted as a ground of charge, may be recovered.

The opinion of the court was delivered by

COULTER, J.—There was no acknowledgment proved of a then subsisting debt. There was not, in the language of the books, an acknowledgment of an existing debt, so precise and distinct in its admission as to preclude hesitation about its extent or character. The character of the acknowledgment must be such as not to be inconsistent with a promise to pay, and from which a promise to pay clearly results, or is inferential.

That is the gist of the matter. There must be substantially

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what is equivalent to a promise to pay. To acknowledge that a debt was once due and existed, is altogether insufficient. The plea of the statute virtually admits that a debt was once due.

An acknowledgment of the correctness of a particular item in an account between the parties, where the balance was never struck, nor the account adjusted, is not such an acknowledgment, either practically, commercially, or legally, that such item was a precise, present existing debt against the defendant, as would toll the statute as to that item, because, upon a balance being adjusted and struck, the defendant might conscientiously and honestly believe that nothing was due. And that appears to have been the belief of the defendant in this case. He thought nothing was due to the plaintiff; but, upon an attempt to state an account, which the parties could not close, he admitted an item of borrowed money, and it is now sought to recover that identical item from him, on this admission, independent of all the other transactions. This cannot be. The great length of time suffered to elapse fortifies the position taken by the defendant, that nothing was due to plaintiff; although, as an honest man, he would say, true, I borrowed \$75 from you, but, upon a settlement of the account between us, this would be satisfied and paid. This amounted to nothing like an acknowledgment that the \$75 was then a subsisting debt. Every thing said or done by Nixon was inconsistent with a promise to pay this \$75, and by itself was not taken out of the statute of limitations. If they had been able to close their settlement, or if Brownfield had established the matters in dispute, and not ascertained on the paper on which the admitted items were put down, possibly the statute would have been prevented from running against the balance established; but that is not the question presented, as the court instructed the jury that the plaintiff could not recover on the general account, as there was no balance struck or agreed on. But as the court instructed that the plaintiff had a right to recover for the \$75 and the oats, on the acknowledgment made when the items were put down on the paper, the judgment must be reversed.

The paper itself was not an account stated, nor was it made with an intent of being evidence against the parties as to the separate items. If used for that purpose, it might be a trap, and entangle the party against his intent, and against the justice and honesty of the case. It was made up by a bystander, who acted as amanuensis of the parties, with a view and for the purpose of settling the whole concern. It would be admissible evidence, so far as it went, in a settlement of the whole concern or dealings between the parties, corroborated by the oath of the person who made the memorandum.

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

Dimond's Estate.

1. Where an heir agreed that a portion of his interest in real estate, which was about to be sold under proceedings in the Orphans' Court, should be applied to the payment of a debt for which another was his surety; but before the return of sale, he assigned to two others, to whom he was indebted, a portion of the proceeds of sale, after the payment of the former transfer, and in case the sale be set aside, then he transfers to them his right, title, and interest in the land, or money made by its sale, to the said amount: *Held*, that the second instrument was not a conveyance of the land, but a mere transfer of the land or money to the amount of the indebtedness; and that though the *first sale was set aside*, that still the second transferees took subject to the first agreement.

2. A judgment before a justice of the peace against the administrator of an heir to real estate, with notice by the summons, to his widow and the guardian of his children, which is not entered in the Common Pleas, is not a lien either on the land or the fund produced by its sale.

THIS was an appeal, by Basil Brownfield, Richard Poundstone, and James Barnes, from the order of the Orphans' Court of Fayette county, distributing the proceeds of the real estate of *Daniel Dimond, Sr.*, deceased, raised by a sale, under an order of the court, on proceedings in partition among the heirs and creditors of the deceased. Daniel Dimond died in 1880—1 or 2.

William Smiley, a grandson of the deceased, was entitled to a portion of the proceeds, in right of his mother, and he assigned to Horatio Griffith, as a security for liabilities incurred for him, \$300 of the money raised by the sale. He also, by his deed, conveyed to Brownfield & Poundstone, \$281.25 of the proceeds of the sale, subject to the previous assignment or order to Griffith, in case the *then sale* should be confirmed, but if it should be set aside by the court, then he transfers to Brownfield & Poundstone, absolutely, his interest in the land of his deceased grandfather to the amount of their claim, which deed was duly recorded before the sale. The first sale was set aside by the court, and another sale made, which increased considerably the amount to be distributed; and the interest of William Smiley in the estate not producing sufficient to satisfy both claims, the question was, which was to be preferred, Griffith's, or Brownfield & Poundstone's. For dates of assignment, *see postea*. The sale of the property was between the 14th Dec., 1847, and 22d March, 1848.

James Barnes also appeals—he is a creditor of *Henry Dimond*, deceased, *who was a son and heir at law* of Daniel Dimond, deceased. Mr. Barnes claims the amount of a judgment obtained before a justice of the peace against the administrator and heirs of the said Henry Dimond, deceased, Jan. 29, 1839, and which was suffered to lie until the distribution of the estate in this case. Henry Dimond had no estate but his interest in the land of his father, Daniel Dimond, Sr., and that was subject to the life estate of his mother, who died but a few years since. A question was,

[Dimond's Estate.]

whether James Barnes should be paid the amount of his judgment against the administrators of Henry Dimond, since his estate was in course of distribution amongst his heirs and creditors.

ASSIGNMENT TO HORATIO GRIFFITH.

Horatio Griffith having become security in a note with myself and Hugh H. Dearman, to William Mosier, for three hundred dollars, dated about the month of May or June last, and being desirous to secure the said Griffith, I do hereby agree that my interest in the money arising from the sale of the real estate of Daniel Dimond deceased, shall be bound for the same, and I do hereby direct and authorize Sheriff Frost to retain in his hands my interest, as aforesaid, or so much of the money coming to me as shall be sufficient to pay the said note and interest thereon, until the said note shall be paid as aforesaid, or the said Griffith shall be released from all liability for the same. And in case the said Griffith shall pay off the said note, then this shall be his authority to receive the amount so paid, from the said Sheriff Frost, out of the proceeds of sale as aforesaid, and the said Frost shall not pay over the said interest or money to me, until I shall produce evidence of the payment of the note to said Mosier, or that he, the said Griffith, has been released from the same. Nov. 29, 1887.

Test—*J. B. Miller.*

WILLIAM SMILEY.

ASSIGNMENT TO BROWNFIELD & POUNDSTONE.

For value received of Basil Brownfield and Richard Poundstone, to wit: one hundred and thirty-one dollars and twenty-five cents of B. Brownfield, and one hundred and fifty dollars of said Poundstone—for which they hold my notes and Hugh Dearman's, the whole sum of two hundred and eighty-one dollars and twenty-five cents—I do hereby assign and transfer to the said Basil Brownfield and Richard Poundstone, two hundred and eighty-one dollars and twenty-five cents of the money arising from the sale of the real estate of Daniel Dimond, Sr., deceased, by the trustee, Westley Frost, Esq., to come out of my share of the same as one of the grand-children of said Daniel Dimond, deceased—after the payment, however, of three hundred dollars heretofore assigned to Horatio Griffith, of the same fund. And in case said sale should be set aside, then I do hereby transfer to them, their heirs or assigns, my right, title, and interest in the land, or money made by the sale thereof, to the said amount. Witness my hand and seal, Dec. 4, 1847.

Attest—*J. H. Deford.*

WILLIAM SMILEY, [L. S.]

The judgment of James Barnes was against the administrator of Henry Dimond, deceased, with notice to the widow and children of deceased, by their guardian. Jan. 29, 1889, judgment for \$80.12. Defendants appeal from the judgment.

[Dimond's Estate.]

Inquisition for valuation or partition awarded in March, 1847. June 10, 1847, inquisition and appraisements returned, and confirmed, and rule upon heirs. Sept. 18, 1847, sheriff appointed trustee to sell. Dec. 14, 1847, sale returned, set aside, and new order to sell granted. March 22, 1848, report of sale, and sale confirmed, and auditor appointed to distribute proceeds to heirs and legatees. June 10, 1848, report filed. The auditor made a conditional report, depending on the decision of questions of law. To the report of the auditor as to the judgment of Barnes, it was excepted that the judgment was no lien upon the fund in court. The exception was sustained on the ground, that the judgment, being before a justice of the peace, was not made a lien of record, within seven years after the decease of the intestate, which discharged the land sold from the lien of the same.

The court decided that the assignment to Poundstone & Brownfield was to be *postponed* to the assignment to Griffith.

It was assigned for error, that the court erred in giving preference to the assignment of Horatio Griffith, rather than to the deed of Brownfield & Poundstone.

The court erred in rejecting the claim of James Barnes, and refusing to allow its payment out of the share of Henry Dimond's heirs.

The case was argued by *J. H. Deford*, for appellants.—He contended that the instrument in favor of Griffith was merely an order, which he could countermand, and which he did by his deed. That it was conditional that he pay a note, of the payment of which there was no evidence. That the judgment against Henry Dimond was a lien or charge on his estate, as against his heirs, who were notified: § *Barr* 352; 4th sec. of act of 4th April, 1797.

J. Miller, for appellee.—That the order in favor of Griffith was valid, so as to require the money to be retained till proof of payment of the note. That the note has been paid. That the judgment of Barnes was never entered in the Common Pleas. That a *summons* before a justice is not equivalent to a *scire facias* in court.

The opinion of the court was delivered by

COULTER, J.—It was evidently the intent of the parties to the assignment of Smiley to Brownfield & Poundstone that they, to wit, the latter, should participate in the fund, subject to the interest in the same fund previously assigned to Horatio Griffith. That being the clear understanding and contract of the parties, no court ought to violate it, or give a contrary direction to the fund. That the first sale might be set aside, was within the legal and actual category of such affairs, and the stipulation in the assignment that

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if it was, still Poundstone & Brownfield should get the amount assigned out of the second sale, was nothing more than what the law would have awarded to them without that stipulation. And for the same reason, the first assignment to Griffith continued good, notwithstanding the first sale was set aside, because so much of the fund was so devoted, and so applied by the owner of it, for a good and valuable consideration. The property was to be sold and converted into money, to answer the exigencies of the law; and whenever it was converted into money, then the assignments were entitled to their respective shares, according to the intent of the parties; and if the first assignment took up the whole fund, there remained nothing for the second. It is a total mistake to call the assignment to Brownfield & Poundstone a deed for the land; it is a mere transfer, in case the first sale should be set aside, of the land *or* money made thereout, to the amount of the order; and that order was expressly subject to Griffiths' assignment. The land was in *gremio legis*. It was in legal process of mutation; and the clear intent was to transfer money, not land.

The second error assigned is of no account. The judgment against Henry Dimond's heirs was no lien, either on the land or the fund produced by its sale. The authorities are so full and explicit on this point, that it is not necessary to say more.

Judgment affirmed.

Schacklett & Glyde's Appeal.

A writ of foreign attachment in Pennsylvania, executed upon *real estate*, binds the same from the time of its execution and before judgment, as well against subsequent judgments as against purchasers and mortgagees.

THIS was an appeal from the decree of the Court of Common Pleas of *Greene county*, distributing the proceeds of the sheriff's sale of the real estate of Robert Jones. Robert Jones was a resident of Cincinnati, to which place he removed from *Greene county*. Schacklett & Glyde issued a foreign attachment against him to No. 22 of March term, 1847, which was duly executed on the 18th January, 1847, upon the real estate of the defendant in the county of *Greene*. On the 22d of January, 1847, an appearance by counsel, and pleas were entered for the defendant. At June term, 1847, the cause was set down for trial by the plaintiffs, when it was continued by the court upon the application of the defendant. It was again put upon the trial list for September term, 1847, by the plaintiffs, when it was continued a second time, upon a like application. At *November term*, 1848, the cause was reached for

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trial, when a verdict and judgment were rendered for the plaintiffs. In the mean time attachments were sued out by others, which were executed upon the same real estate upon which the attachment of Schacklett & Glyde was laid, and judgments were also confessed by Jones, as follows:

Duvall, Keighler & Co., No. 46, May term, 1848. Foreign attachment, executed by defendant April 28, 1848. Judgment confessed by defendant, June 20, 1848, \$587.37.

John and James Sleven, No. 11, August term, 1848. Judgment confessed and entered, May 12, 1848, \$2036.64.

Joseph Dunlap, for himself and in trust for others, No. 12, August term, 1848. Judgment confessed and entered, May 12, 1848, \$900.

Duvall, Keighler & Co., No. 50, August term, 1848. Judgment confessed and entered, June 20, 1848, \$479.90.

The real estate, upon which the attachment of Schacklett & Glyde was executed, was sold under their judgment, and an auditor appointed to distribute the proceeds.

The question presented for the decision of the auditor was, whether a writ of foreign attachment, regularly executed, was a lien upon the real estate attached?

The auditor decided that the act of June, 1836, was the foundation of the process issued in this instance, and as that act limits the lien of a foreign attachment executed upon real estate, so as to bind the same as against *purchasers and mortgagees* from the time of the execution of the attachment, that, therefore, the judgment of Schacklett & Glyde did not acquire a priority of lien.

The report of the auditor was excepted to, in not appropriating the fund to the attachment and judgment of Schacklett & Glyde, but the exception was overruled by the court, and the report confirmed.

It was assigned for error:—That the court erred in not directing the application of the fund to the attachment and judgment of Schacklett & Glyde.

The 50th section of the act of 13th June, 1836, relative to the commencement of actions, provides, with respect to foreign attachments, that “the goods and effects of the defendant in the attachment, in the hands of the garnishee, shall, after such service, be bound by such writ, and be in the officer’s power; and, if susceptible of seizure or manual occupation, the officer shall proceed to secure the same, to answer and abide the judgment in the case; unless the person having the possession thereof shall give security therefor.”

It is provided in section 51st, relating to real estate:—“Every writ of attachment executed upon real estate, shall bind the same as against *purchasers and mortgagees*, from the time of the execu-

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tion thereof; and it shall be the duty of the sheriff to file in the office of the prothonotary of the court, a description of the property attached, within five days after he shall have made the attachment; which description shall be entered by the prothonotary on his docket, and the names of the parties, with the date of the execution of the writ, and the amount of the bail required, shall also be entered by him on his judgment docket."

The 64th section provides that "it shall be lawful for any defendant in an attachment, instead of giving bail or security at his election, at any time before judgment obtained in the attachment, to cause an appearance to be entered for him, and to take defence to the action; in which case, the action shall proceed as if commenced by a summons; but the attachment shall, nevertheless, continue to bind the estate or effects attached, as in other cases, unless judgment be rendered for the defendant in such attachment; and if judgment be rendered for the plaintiff, such judgment shall have the like force and effect as in case of an action commenced by a summons," &c.

The case was submitted on the printed arguments. *T. & W. McKennan* being for appellants; and *Downey and Black*, for appellees.

On the part of the appellants, it was contended, that before the act of 1836, lands in Pennsylvania were susceptible of seizure on foreign attachment; that a lien in favor of the attaching creditor, as against a subsequent judgment, was a necessary and recognised incident of such seizure; that the act of 13th of June, 1836, does not, by express enactment, alter the law and postpone this lien to that of a subsequent judgment; and that, to give the act this effect by construction, would go far to defeat the object of the proceeding: 1 *Dal.* 376; 4 *id.* 55; 2 *id.* 93; *Ser. on Att.* 73; 3 *Yeates* 285; 3 *Bin.* 463; 9 *Watts* 157; 4 *W. & Ser.* 345. That the act of 1836 did not provide that the land attached should be bound *only* as against purchasers and mortgagees; but that they should be affected with notice of its existence.

On the part of the appellees, it was not disputed that lands were liable, before the act of 1836, to attachment; but that the question was as to the *date* of the lien. That, at the time of the passage of the law of 1705, lands were regarded as chattels, for all purposes, and could be levied on and sold as such. This continued to be the law until 1759, when it was enacted that lands could only be sold after condemnation, &c. It was under this state of things that the act of 1705 was passed, which was construed to embrace lands. There is nothing in any of these acts, prior to 1836, nor in any of the adjudicated cases, that recognises the doc-

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trine insisted on by the appellant. Doubtless, a lien attached as to personal property, arising from its changeable nature; and the officer, if possible, was to take actual possession of the goods attached. But this very fact argues that there was nothing in the policy of the law that required the application of the rule to *real estate*. The lien of judgments commencing from the date of the rendition thereof, there was no reason for departing from this uniform rule in favor of attaching creditors.

Such being the law prior to 1836, the legislature revised and reduced the proceeding in foreign attachment to a well-ordered system. That, if the legislature did not intend to make a distinction between personal property and real estate, as to the date of the lien, the 51st section of the act of 1836 was useless. That if lands were goods and chattels, they would have been embraced in those terms; but the object in the passage of the 51st section was, as to real estate, to bind it as against purchasers and mortgagees only.

That the death of the defendants at any time before final judgment would dissolve the attachment and release the property: 4 *Dal.* 60; 8 *W. & Ser.* 219.

The opinion of the court was delivered by

GIBSON, C. J.—It is an undoubted fact that the framers of the act of 1705 intended to exempt land from attachment; but as there was no reason for an exemption, as land was liable to execution as a chattel, and as the language of the act was not imperative, though its details were adapted to cases of garnishment, the courts made no distinction. Nor ought they to have done otherwise; at least they did not. The assertion of counsel in *McClenachan v. McCarty*, 1 *Dal.* 376, and *Ludlow v. Bingham*, 4 *Dal.* 55, uncontradicted as it was in either case by the opposing counsel or the court, is proof of the contemporaneous construction. Mr. Justice SERGEANT expresses a belief, in his Treatise, p. 63, that many titles depend on sales by execution on judgments in foreign attachment. As land was not mentioned in the statute, it was not expressly said that an attachment should bind it; but lien was attributable to the execution of the writ as a necessary consequence of a common law principle which creates it whenever property is seized to make satisfaction. A levy on a *testatum* execution binds the land, though the judgment does not; and it was held in *Todd v. McCulloch*, 3 *Pa. Rep.* 404, and *Brown v. Campbell*, 1 *Watts* 41, that the lien of an execution levied on a particular tract, survived the lien of the judgment. Though a judgment does not bind a personal chattel, an execution does; and as land is a chattel for purposes of satisfaction, it may be bound by the common law lien of an execution independent of the lien of the judgment by construction of the statute of Westminster the second. The primary intent of a

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foreign attachment was doubtless to compel the debtor to put in bail, and, till that was done, the property attached was bound, and so far as it was involved, it answered the purpose of an appearance; in which respect the execution of an attachment is a species of levy in anticipation of the judgment. Since the act of 1836, which allows him to enter a common appearance and defend without dissolving the attachment, the primary intent is to sequester the property. But it was not intended that a common appearance should impair the lien, or it would have been discharged as well in favor of mortgagees and purchasers as of judgment creditors. The case of a creditor who can raise money on a hypothecation of his land by judgment as readily as by mortgage, is as distinctly within the mischief intended to be prevented, as the case of a mortgagee or a purchaser. But the act of 1836, which expressly declares and defines the lien, restricts it to protection against mortgagees or purchasers, in terms. "Every writ of attachment executed on real estate," it is said, "shall bind the same against purchasers and mortgagees;" and judgment creditors are neither. The clause, however, is but another proof that every codification of the law must necessarily be lame and imperfect, though executed by the ablest hands. The case of a judgment creditor is not within the letter of it, but it is within its equity; and the letter would die did not construction come to its assistance. It would be eluded by a very obvious and simple contrivance—a judgment acknowledged for money borrowed. The interpretation necessary to frustrate it, is not more strained than that which was put on the act of 1798, to limit the duration of liens by judgment *inter vivos*, which, though the declared object of it was the protection of purchasers, was extended by construction to the protection of subsequent judgment creditors. The difference here is, that the protection is against them. To prevent the machinery of a code from cutting the merits of particular cases to pieces, it is necessary that it be fitted, its mistakes corrected, and its deficiencies supplied, by judicial interpretation, after experience has disclosed them: without which it would work badly, or not at all.

Decree reversed; and ordered that the fund be applied to the appellant's judgment in the first place; and that the residue, if any, be applied to the other judgments in their order.

Jackson *versus* McGinness.

1. In an ejectment by a vendor against a *purchaser from the vendee*, to enforce the payment of purchase money due by the vendee, where the vendee has not paid to his vendor any part of the purchase money or made valuable improvements, the defendant cannot set up the weakness of the title of the first vendor, in defence of his own possession. He must either pay the purchase money or relinquish the possession, unless fraud has been practised upon him. Nor can he set up an outstanding title in another, or an adverse title in himself; and his payment of part of his purchase money to the vendee will not affect the claim of the vendor, unless he was connected with the vendee in the second sale.

2. Where a deputy sheriff purchases property at the sheriff's sale, and there is no fraud, the owner of the property may disaffirm the sale, but must repay the purchase money paid.

ERROR to the Common Pleas of *Fayette county*.

This was an ejectment by Hiram Jackson *vs.* Johnston McGinness. The land in dispute belonged to Acre Worley, deceased; who, by will dated the 29th April, 1826, *devise*d said land to his wife, *Lydia Worley*, during her life, and, at her death, to his two half brothers, Samuel and Joseph Worley. In 1834, after the decease of Acre Worley, the Bank of Brownsville obtained judgment against *Lydia and Samuel Worley*, on which *fi. fa.* issued, the property in dispute levied on and condemned, *ven. exp.* issued, and sold to Hiram Jackson, plaintiff, March 6th, 1834. No deed from the sheriff to Jackson was in evidence.

Some time after Jackson had purchased at sheriff's sale, he sold the property to Gideon John, who took possession, but paid no part of the purchase money. Gideon John was sheriff of Fayette county at the time of the sheriff's sale. The sale by Hiram Jackson to Gideon John was by parol; but when made, or for what price, did not appear in evidence.

In 1839, Gideon John sold to *Johnston McGinness*, the defendant, who went into possession, *paid a portion* in hand, and gave his notes for the balance of purchase money. One of these notes was assigned by Gideon John to Jesse Antram; on this note Jesse Antram brought suit against Johnston McGinness and obtained judgment. On this judgment, the property was sold by the sheriff, and purchased by Jesse Antram for \$270; deed dated 13th Dec., 1842. McGinness showed that he was in possession *as the tenant of Antram*.

One other note of \$140, given by McGinness to John, was paid; *the balance he refused to pay, on account of defect of title.*

Hiram Jackson, the plaintiff, having received no part of the purchase money from John, brought this ejectment to enforce the payment of the same.

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Nearly two years *after* the bringing this ejectment, Jesse Antram procured a deed from Lydia Worley for her interest in this land.

On the trial, the defendant offered to show that Hiram Jackson, the plaintiff, who was the purchaser at sheriff's sale, was *deputy sheriff of Fayette county at the time of said sale*, for the purpose of showing that the sale was voidable. To this testimony, the plaintiff objected, on the ground that, as Gideon John had never paid any portion of the purchase money, nor he nor defendant expended any thing for improvement, neither he nor his vendee, McGinness, the defendant, could impeach the title of the original vendor, the plaintiff. If the title is defective, and they refuse to pay, they must give up possession. A vendee cannot retain both the money and the land.

The court, however, overruled the objection and admitted the testimony, which is the ground of exception referred to in the *first* error assigned.

Defendant then offered the deed from Lydia Worley the tenant for life, to Jesse Antram, dated 1st January, 1849, for the purpose of showing that Mrs. Worley *elected to avoid the sale*. This objected to by plaintiff, on the ground that, "a vendee in possession by articles of agreement, against whom an ejectment is brought to compel the payment of purchase money, shall not be permitted to set up an outstanding title in a third person to defeat a recovery by the vendor:" 4 *Watts* 146. Neither shall the vendee, nor any one holding under him, (as in this case,) be permitted to set up title in himself adverse to the title of his vendor: 7 *W. & Ser.* 138. A vendee is "bound to restore his vendor to the situation in which he found him." The court, however, overruled the objection; and the admission of this testimony is the *second* error assigned.

GILMORE, J., after bringing to the attention of the jury the material facts, said:—It is for you to say, from the evidence, whether Hiram Jackson was the deputy of Gideon John, the sheriff, at the time he made the purchase on the 6th March, 1834. If he was, the law, we apprehend, is plain, and the sale could be considered and treated as a nullity. It is true, it was competent for the defendants, or either of them in that judgment, to sanction the sale; but it would seem that Mrs. Worley *has elected to avoid it*. The rule is this, that where a trustee becomes the purchaser of the trust estate, the *cestui que trust* may set aside the purchase—and this principle extends not only to a trustee properly so called, but to judicial officers, and all other persons who in any respect have a concern in the disposition and sale of the property of others; and it is immaterial whether the sale is public or private, judicial or otherwise, or for a low price: 2 *Whar.* 53; 2 *Johns. Cha.* 212; *Story on Agency* 211.

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The plaintiff contends that Johnston McGinness, the defendant, being the vendee here of John, is bound to restore possession. The defendant here bargained for a title. Now, if the jury are satisfied that Hiram Jackson was the deputy sheriff at the time of the Sheriff's sale, and that Mrs. Worley has determined to avoid that sale, then it is evident that the defendant can never make a title for the premises, and we see no reason why the defendant should be turned out, *at least not until he has been indemnified*; and this, we think, is in conformity to the case of 6 *Watts* 229; and 9 *W. & Ser.* 82.

Verdict was rendered for the defendant.

It was assigned for error:

1st. The court erred in admitting the testimony referred to in first bill of exceptions by plaintiff.

2d. The court erred in admitting the testimony referred to in second bill of exceptions.

3d. The court erred in charging the jury that, "if plaintiff was deputy sheriff at the time he made the purchase, the sale could be treated as a nullity, and avoided by the act of Mrs. Worley."

4th. The court erred under the facts of this case, by charging the jury that, "as the defendant bargained for a title, he should not be turned out unless he was indemnified."

A. Patterson, for plaintiff in error.—That the purchaser must pay or give up the possession, *there being no actual fraud proved*. As to the first exception, he referred to 2 *Watts* 485; 4 *id.* 146; 2 *Barr* 34. As to second error, 2 *Bin.* 468; 6 *id.* 62; 1 *Barbour* 114; 4 *Johnson* 210.

J. Veech, for defendant in error.—That the sale to the deputy sheriff, Jackson, was voidable, and that Mrs. Worley could avoid it: 6 *Ves.* 617, 625; 10 *id.* 381; 7 *Watts* 387; 9 *Barr* 284.

The opinion of the court was delivered by

BELL, J.—Under the proof as it stands, McGinness, as representing Antram, must be taken as in possession primarily, under the sale made by Jackson to John. In relation to the former, he stands in the shoes of the latter, without pretence of payment of purchase money or valuable improvements made; for it is almost needless to observe that the payments made by McGinness to John, cannot be set up as affecting any right residing in the plaintiff, Jackson. Considered as between him and the defendant, we are then presented with the case of a vendor and vendee, the latter being in possession without payment of purchase money, and the former seeking to recover it or the possession. Now nothing is more firmly settled, than that such a vendee cannot retain both

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money and land. He must pay the one or yield the possession of the other; and in an action to enforce this duty, he can only defend on such ground as would entitle him, in equity, to an injunction against his vendor: *Smith v. Webster*, 2 *Watts* 485-6. Where, as here, there is neither purchase money paid nor improvements made, he cannot aver the weakness of the title he has purchased, as a defence. If he likes it not, he must relinquish it, unless he can show some fraud has been practised upon him. Neither can he be permitted to set up an outstanding title in a third person, or an adverse title in himself, to defeat a recovery by the vendor: *Congregation v. Miles*, 4 *Watts* 146; for, as was observed in *Treaster v. Fleisher*, 7 *W. & Ser.* 138, "for the same reason that a tenant may not contest the title of his landlord from whom he obtained possession, a vendee is bound to restore his vendor to the situation in which he found him." This is a rule of policy not to be lightly broken in upon. Good faith, truth, honesty, and the peace and order of the community, require that he who has acquired possession under a contract not tainted with fraud, should not use that possession to the injury of him from whom he received it. But the defendant attempts to sustain his defence on both of these prohibited grounds. It was said below, he bargained for a good title. It does not appear what were the terms of the contract in this particular, between the plaintiff and John; and this is the only contract we have to do with at present. It may be that Jackson sold to John just the title he had, free of any stipulation as to its quality. But if it be conceded the agreement was for a good title, which Jackson cannot make, what is that to the defendant? He has not paid Jackson for a perfect title, and need not, unless he chooses. If he has been so improvident as to pay John for what is worthless, he cannot visit that upon Jackson without showing the latter was, in some way, connected with John in the transaction. It is unfortunate if he has thus thrown away his money; but under the facts as they now stand, the law can afford him no relief.

Then as to the title acquired from Mrs. Worley. If Jackson was deputy sheriff at the time of his purchase, and it was untainted by actual fraud, (of which I perceive no evidence,) the most that Mrs. Worley could do, would be to avoid the sale by reimbursing Jackson his outlay. The governing principle in such cases was indicated in *Beeson v. Beeson*, 9 *Barr* 279, where it was ruled that a purchase by a trustee or officer at his own sale is not void, but voidable only, the legal title passing to the purchaser until the sale be set aside by a competent tribunal, which will only be done on the terms of reimbursing the purchasing trustee. After doing or offering to do this, Mrs. Worley, by ejectment, might disaffirm the sale to the extent of her interest in the land. But for the reason already given, the defendant, as tenant of Antram, cannot set up

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her conveyance, either as vesting an adverse title, or as evidence of disaffirmance of Jackson's purchase, to defeat this action. . The attempt is a fraud upon his own possession, which I have already said sound policy will not sanction. He must first turn out by yielding the subject of this contest, before he can be suffered to impeach the title under which he originally entered, for possession and disloyalty are repugnant. After this, he may take ground hostile to the plaintiff, by availing himself of the conveyance from Mrs. Worley, if it shall be found of value.

The learned judge before whom the cause was tried, seems to have been led to give his sanction to the defence, by his understanding of the cases of *Richardson v. Kuhn*, 6 *Watts* 299, and *Creigh v. Shatto*, 9 *W. & Ser.* 82. But in both those instances, the attempt was to force on the vendee, who had paid part of the purchase money, a worthless, or at least a doubtful title, under the penalty of forfeiture of what had been paid, and the value of improvements made. In the first of them, the court said, speaking of the vendors and vendee, "they may not call on him to turn out, without rescinding the bargain, restoring purchase money paid, and tendering compensation for intermediate improvements." In the other, the action was to recover *balance* of purchase money, as is evident from the opinion of the court, the case being treated as a bill in equity for a specific performance, where the vendee had acquired a beneficial interest. These features, which essentially differ these cases from the present, were overlooked in the hurry of a trial, which sometimes precludes the opportunity for critical examination. It has been urged upon us here, that the plaintiff, having failed to show the price John was to pay him for the land, cannot recover in an action to enforce the payment of it. But the cause was not put upon that foot at the trial; had it been, satisfactory proof might have been given on this head, for aught we know. It is evident the jury, under the charge given them, must have decided it upon another ground. It is, however, proper to say, that it is incumbent on the plaintiff to give some evidence of the sum John agreed to pay; for if Jackson presented John with the land without price, or if the former purchased for the latter, he cannot recover without at least refunding the purchase money paid by McGinness and Antram.

Judgment reversed and a *venire de novo* awarded.

Stewart *versus* West.

1. Where a conveyance of a lot of ground and the buildings on it is made with covenant of general warranty of title, and another person afterwards lawfully removes from the premises a building erected before the conveyance, under a previous agreement with the grantor's agent, a right of action does not accrue to the grantee till the building has been removed: and the limitation does not begin to run till the building has been removed.

2. A covenant of *seisin* may be broken as soon as the deed is delivered; but under a covenant of warranty of title, a right of action does not accrue till the paramount owner has entered or exercised his right of ownership to the prejudice of the vendee.

ERROR to the Common Pleas of *Fayette county*.

This was an action of covenant, brought in the court below by Enos West *vs.* Andrew Stewart, to recover damages for an alleged breach of warranty contained in a deed from the said Stewart to the said West, dated 16th November, 1822, for the sale and conveyance of a lot of ground in the then town of Columbus, in the State of Ohio. The suit was brought and summons issued on the 19th February, 1845.

The pleas were covenants performed, &c., to which were added special pleas filed by leave of the court, and limitations.

This case was up before, and a report will be found in 7 *Barr* 122, &c. Andrew Stewart, by his deed, dated the 16th day of November, 1822, granted and sold to the said Enos West, his heirs and assigns forever, a certain lot of ground situate in the town of Columbus, in the State of Ohio, &c., together with all and singular the buildings and improvements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, &c.

And the said Andrew Stewart, and his heirs, all and singular the lot of ground, No. 256, aforesaid, the hereby granted premises, with the appurtenances, unto the said party, &c., "against the said Andrew Stewart, and his heirs, all or any of them, claiming or to claim the said hereby granted *premises, or any part thereof*, by, from, or under him or his heirs, or any other person or persons whatsoever lawfully claiming the same, shall and will warrant and forever defend by these presents."

It was averred in the declaration that the said Andrew Stewart did not warrant and defend the premises, and all and every part thereof, but that a certain John Warner, claiming by virtue of a title obtained from the said Stewart, prior to the date of the indenture, did pull down and remove the dwelling-house, workshop, and watchmaker's shop situated upon the lot.

On the trial, the plaintiff showed the deed, and also that there had been a small house or shop on the premises at the date of the

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deed, erected by the tenant, (Warner,) under an agreement with Stewart's agent that he should be permitted to remove the same at the end of his lease, and that it had been removed.

The defendant, on his part, showed the article of agreement between himself and West, dated 16th November, 1821, for the sale of lot No. 256, for the purpose of showing that there was no agreement to warrant the house or buildings; that there was nothing sold but the lot. The defendant further contended that West had notice at the time of the agreement that there was a small tenement on the lot, which was put there by Warner, and which he, Warner, had a right to remove; and that West was merely to receive the rent of the house as long as it remained on the lot.

The court, among other points, was requested to charge the jury that:

The covenant of the defendant being broken the instant the defendant executed the deed, the plaintiff's suit is barred by the lapse of time.

The court charged the jury on this point:

The court charge you that this suit is not barred by the lapse of time, if the witnesses of the plaintiff are believed, who prove that the house was not removed until the summer of 1825 and '26, this suit having been brought within twenty years after this period. The right of action did not properly accrue to the plaintiff here until after the removal of the house; and although there are some expressions made by the Supreme Court, when the case was before them, which would seem to indicate that the covenant of warranty was broken at the minute of the execution of the deed, yet this was not the point before the court, and there are other expressions which indicate that the removal of the house was the breach of the covenant.

Verdict for plaintiff—amount not stated on paper-book.

It was assigned for error, that the court erred in its answer, and in thus instructing the jury.

The cause was argued by *Howell* and *N. Ewing*, for plaintiff in error.—It was contended, *inter alia*, that the plaintiff having averred that prior to the date of the indenture the defendant had made an agreement with a third person, which precluded him from conveying the house and shop to the plaintiff, the covenant of warranty was immediately broken, and that the plaintiff's right to sue began at the date of the deed; and that more than twenty years having elapsed from that time until the commencement of this suit, the lapse of time presents a bar to recovery: 11 *Mass.* 306, *Hopkins v. Young*; 16 *id.* 161; 6 *Johns.* 50; 6 *Cowen* 238; 4 *Peters* 172; 1 *Rawle* 377; 11 *Ser. & R.* 111.

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Veech, for defendant, with whom was *Deford*, the latter of whom the court did not hear.—The ground taken on the former trial was, that the warranty did not cover *the house*. The plaintiff below had not only a right of action at the time the deed was sealed, in which he might have recovered *nominal* damages, as Warner had the right to remove the house, or not, as he pleased; but he had also a right of action under the special warranty of the buildings, in which he can recover damages for the removal of the house. That he has a right to sue for each successive breach of the covenant as it arises: 1 *Bibb* 169; 1 *Marsh*. 515; 3 *id.* 449; 1 *United States Dig.* 684; 3 *W. & Ser.* 136. The limitation does not begin to run till the cause of action is complete: 1 *Pa. Rep.* 492.

The opinion of the court was delivered by

GIBSON, C. J.—The modern covenant of warranty differs from the ancient warranty, not because the latter bound the feoffor to defend the land, but because it bound him to render, not damages, but a recompense in kind for a breach of it. The form of the writ, as well as the nature of the recompense in value, was different; but the measure of the obligation was the same. The feoffor was bound by his warranty to defend the land: the grantor is bound by his covenant to do as much, and no more, by defending the grantee from eviction on a superior title. By reason of its strictness, even this modern covenant of warranty has given place, in English conveyances, to the common covenants for title against particular defects which it does not reach. In Pennsylvania, it has been retained by unprofessed scriveners as a nostrum supposed to contain the virtues of the whole five; but its potency has not been recognised by the bench. The writ of *warrantia chartæ* was founded on an assize, or a writ of entry in the nature of an assize, brought against the feoffee; and the covenant of the feoffor was to warrant the land by defending the action—the modern writ of covenant is brought against the grantor to recover damages for a failure to do so. The gravamen, therefore, is not the defect of title, but the eviction consequent on it. The declaration in *Swenk v. Stout*, 2 *Yeates* 470, is a precedent for the principle that an eviction must be laid; and it consequently must be proved, but not necessarily, by evidence of forcible expulsion. It was said in *Clark v. McNulty*, 3 *Ser. & R.* 364, and *Patton v. McFarland*, 3 *Pa. Rep.* 319, that the grantee may give way to a judgment in ejectment, without waiting to be turned out by the shoulders; and, for the same reason, he may give way to an entry on superior title, which is a remedy by act of the party. In this case there was an entry and dispossession, which were equivalent to a constructive eviction. A covenant for quiet enjoyment, which resembles the modern covenant of warranty, differs from it in this, that the former is broken by the very commencement of an action on the

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better title. When the cause was here before, the warranty was inadvertently treated as a covenant of seisin, from which it is shown by *Bender v. Fromberger*, 4 Dal. 438, to differ so far that the latter is broken as soon as the deed is delivered. It is strictly a covenant of warranty, however, and, as a right of action did not accrue on it till the paramount owner had entered, there was not a sufficient interval between his entry and the inception of the action to raise a presumption of accord and satisfaction or release.

Judgment affirmed.

John and Paull *versus* Rush et al.

In the case of a sale of *unseated* land by the commissioners, if the purchaser fail to comply for several years, and before payment is tendered by him the owner of the land pays to the commissioners the taxes and costs and receives from them a deed for the land, the vendee of the owner may recover the possession from the purchaser.

ERROR to the Common Pleas of *Fayette county*.

This case was argued in 1849. It was an ejectment, brought on the 1st March, 1847, for 400 acres of land, by James Rush et al., heirs of Samuel Rush, deceased, *vs.* Samuel John, for 400 acres of land, and Joseph Paull was admitted as co-defendant, as landlord of Samuel John. The plaintiffs claimed as heirs at law of Samuel Rush, deceased, and claimed under warrant to William Tinsley, survey and conveyances. It appeared from the evidence that the land was warranted to William Tinsley, and that he, by deed dated in October, 1788, conveyed to Henry Keys the undivided half part of the 400 acres 38 perches. At the death of Henry Keys, in 1815, his children were entitled to this half. His children, Isabella and Russell Keys, conveyed to Samuel Keys, by deed dated 2d September, 1836, and Samuel Keys conveyed to *Samuel Rush*, the father of plaintiff, by deed dated May 17, 1842. On part of plaintiffs was given in evidence, deed from commissioners to Russell Keys, hereinafter referred to.

On the part of defendants it was alleged, that the tract of land was assessed in the name of William Tinsley, the warrantee, and was sold for taxes by the treasurer of Fayette county to the commissioners, and conveyed to them by deed dated 14th August, 1826. The commissioners held the land for some years, and not being redeemed, they sold it at public auction, on 18th June, 1882, to *James Paull & Sons*, for \$10.40, and on the day of

1832, they acknowledged a deed-poll to said Paull & Sons, for 399 acres of land, which was admitted to be the same land. This sale by the commissioners, and deed, being in 1832, was

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years *before* the conveyance to Samuel Keys, which was in 1836, and also before the conveyance by *Keys to Rush*, which was in 1842.

Whether *James Paull* lifted this deed or not, or whether he paid the amount of his bid, did not appear on the trial, and it was stated in the paper-book, "could not be made to appear." In 1842, however, the executor of the will of James Paull and the devisees of this property, tendered to the treasurer of Fayette county \$18, for the Tinsley tract. This tender was made, probably, in 1842 or 1848.

The plaintiffs gave in evidence a deed for the land *from the commissioners of Fayette county* to Russell Keys, dated 8d May, 1836, with treasurer's receipt to Samuel Keys for Russell Keys, per James Piper, Esq., dated May 8d, 1836, for taxes, interest, and costs.

The defendants, *inter alia*, offered to read in evidence from the commissioner's book of sales, with *treasurer's* receipts, &c., the following memorandum :

"Received of Samuel Keys, per James Piper, Esq., seventeen dollars and seventy-three cents, in full on the Tinsley William tract, to the year 1885. May 8d, 1836.

"WM. CRAWFORD, *Treasurer of Fayette county.*"

To this evidence the plaintiffs objected, and the court sustained the objection, and the defendants excepted.

The court, GILMORE J., charged the jury that if they believed that Samuel Keys, on the 8d May, 1836, paid to the commissioners the sum of \$17.73, the taxes and costs of the former sale, and the taxes which had accumulated while they held the lands, and the payment was made before Col. Paull paid into the treasury of the county the amount for which he had purchased the land from the commissioners, on the 18th June, 1832, and before any deed was delivered to him by the commissioners, that the plaintiffs were entitled to recover the undivided moiety of this land to which they had shown title.

Defendants' counsel excepted to the charge. Verdict was rendered for plaintiffs, for 202 acres and 80 perches; and as to residue, for defendants.

Error was assigned to the rejection of the evidence above referred to, and to the charge.

The case was argued by *Veech* and *Howell*, with whom was *Dawson*, for plaintiffs in error.—It was contended, that when the property was struck down to Paull & Sons, by the commissioners, an interest was vested in them, which the commissioners could not by any subsequent act impair : *Dickey's case*, 1 *Jour. Juris.* ; 7 *Watts* 437 ; 5 *Ser. & R.* 161 ; 3 *Whar. Rep.* 21-25 ; 15 *Wend.* 545 ; 13 *Pickering* 69.

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Deford and Miller, for defendants in error, plaintiffs below.

The opinion of the court was delivered, Oct. 28th, by
BURNSIDE, J.—The evidence offered in the first assignment of error was immaterial. Its rejection did the plaintiff no injury. All the taxes due and owing on the Tinsley survey had been paid to and received by the county, many years before the Paulls made any attempt to perfect their title and pay their bid. In 1836, the original owner, Russell Keys, paid all the taxes and costs due to the county, and obtained a deed from the commissioners. The paper-book shows, and the evidence is clear that, after the bid in 1832, the Paulls slept on it till 1843, when, after the former owner had paid the taxes and costs, they appeared to pay their bid to the treasurer, with full knowledge that the tract had been redeemed. In principle this case is like the contest between *Donnel v. Bellas*, 10 *Barr* 347. Our law requires reasonable vigilance from bidders at treasurer's sales, and I think the same vigilance should be extended to bidders at commissioners' sales, where the land has been purchased in by the commissioners for the benefit of the county. The 3d section of the act of March 13th, 1815, makes it the duty of the purchaser, as soon as the deed is tendered by the treasurer, to pay down the money: *Dunlop*, 2d ed. 323. But this was found inconvenient. Purchasers could not be always found, and when found, were sometimes unable or unwilling to pay. Hence the act of March 13th, 1817, 6 *Smith's Laws*, 426, *Dunlop*, 333, makes it the duty of the purchaser or purchasers at treasurer's sales, as soon as the property is struck down, to pay the amount of the purchase money, or such part thereof as is necessary to pay the taxes and costs, as also one dollar for the use of the prothonotary for entering the acknowledgment of the deed. In case it is not forthwith paid, the sale may be avoided, and the property immediately set up by the treasurer. I am unable to devise any reason why the same principle should not be applied to sales made by the commissioners. The sales are cash sales. The object is to raise money for the county. The commissioners ought to exercise their judgment, and where they have no confidence in the ability of the bidder to pay, and he omits to pay, as faithful public servants, they ought to put up the tracts and sell again. Here the bidder never appears. It is true, he is dead. After the original owner has redeemed, payment of the bid is then offered, and improperly received by the treasurer. *Steiner v. Coxe*, 4 *Barr* 13, legalizes the redemption to which I refer.

The judgment is affirmed.

Paull et al. *versus* Oliphant.

1. The act of 21st April, 1846, relating to equitable actions of ejectment to enforce the payment of purchase-money, limiting a vendee to one ejectment, applies only to actions *founded on the contract*; and the act does not apply where the purchase-money has been paid by the vendee before he institutes an action of ejectment.

2. *Query*: Whether an award of arbitrators is equivalent to the verdict of a jury under that act?

3. Whether the record of an action of ejectment is conclusive, under the act of 1846, must be judged of from the record alone. If not, on its face, such a conditional verdict as the act requires, the omission cannot be aided by parol evidence.

4. Where a record was received in evidence for one purpose, it will not be allowed in this court a different quality, not asked for it in the court below.

5. Where, after the institution of an action of ejectment by a vendor, to enforce the payment of purchase-money and judgment therein, a person, in contemplation of becoming trustee for creditors of the vendee, pays the purchase-money and acquires the legal title, he cannot afterwards set up that title to defeat the trust.

ERROR to the Common Pleas of *Fayette county*.

This was an action of ejectment, brought to December term, 1847, by E. B. Oliphant *vs.* James Paull and others, to recover the possession of a lot of ground, in New Haven, Fayette county, containing about one acre, on which is erected a woollen factory, &c. It consisted of *four* contiguous town lots. To *two* of the lots one Foster had the legal title; in the other *two*, Nos. 11 and 12, he had only an equitable title, under an article of agreement with Rogers, executor of the will of Isaac Meason, deceased, to whom about \$600 or \$700 of purchase-money was due.

The plaintiff below (Oliphant) claimed under a sheriff's deed to him; acknowledged October 21, 1847, for all the title, estate, &c., of *Blocher, Shoemaker & Taylor*, sold on a judgment entered January 26, 1848.

In the spring of 1842, Foster being embarrassed by judgments and executions, all his estates were about to be sold by the sheriff.

It appeared by the evidence, that, after considerable negotiation, an arrangement was made, or supposed to have been made, between Judge Ewing and other creditors of Foster, on the one part, and a company of persons, of whom were *Blocher, Shoemaker & Taylor*, (whose title the plaintiff below claimed as sheriff's vendee,) on the other part; by which a sheriff's sale was to be made of all Foster's titles to real estate, and that it should be bought in by and conveyed by the sheriff to James Veech, Esq., who was afterwards to convey said titles to said *Blocher, Shoemaker & Taylor*, upon certain terms. What these terms were was one of the matters in controversy.

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These negotiations all took place between May and the 13th July, 1842, when a sheriff's sale was made of the property in dispute, (*cum alia*,) and conveyed by the sheriff, in September following, to James Veech, Esq., his heirs and assigns, in the usual form of sheriffs' deeds, for less than \$30,000. It was alleged, on the part of defendant in error, that Veech was to purchase the property for a company, viz., Blocher and others. After the sheriff's sale, Blocher, Shoemaker & Taylor got possession of the property; and, on the 2d December, they executed a mortgage and bond for the amount of Judge Ewing's liabilities; and on the same day they executed other judgment bonds to secure others of those liabilities, one of which was to N. Ewing, for about \$322, on which the trust property in dispute was afterwards sold to Oliphant. It was alleged that whether this bond to N. Ewing was for one of the class called Judge Ewing's liabilities, was disputed. It was, however, one of the Foster debts, which entered into the aggregate sum which Blocher, Shoemaker & Taylor were to pay for the realty.

By the plaintiff below, it was contended, that in this arrangement and purchase by Mr. Veech, he was the mere agent of Blocher, Shoemaker & Taylor, and bought for them alone; and that he was to convey to them, whenever they paid, or satisfactorily secured, such debts of Foster, as *Judge Ewing was concerned in*, not to exceed \$30,000. That these debts really amounted to only about \$28,000.

By the defendant below, (James Paull,) who held under deeds from Mr. Veech and Daniel Rogers, executor of Isaac Meason, it was contended, that Blocher, Shoemaker & Taylor agreed to pay for *Foster's titles alone*, the full sum of \$30,000; which was to be appropriated to pay,—1st, the debts of Foster, wherein Judge Ewing was concerned, (for the greater part of which, judgments, &c., exceeding the probable amount of a sheriff's sale, were the earliest liens;) and 2d, to pay the residue of the \$30,000 to certain other creditors of Foster; and that Mr. Veech was to retain the sheriff's titles until the \$30,000 were so paid or secured, and then to convey to Blocher, Shoemaker & Taylor. In other words, that Veech was not to convey to the company until they paid or secured \$30,000.

To *March term*, 1843, Daniel Rogers, surviving executor of Isaac Meason, deceased, brought an *ejectment* against Blocher, Shoemaker, Taylor, and Veech, for two of the four lots composing the property in dispute. Veech appeared and disclaimed possession; and, on the 25th November, 1843, judgment was obtained *on an award* for plaintiff, against defendants, to be released on payment of \$698.99, on or before the 1st of April next. *Hab. fac. poss.* to September term, 1844: returned, "Executed this writ by giving Daniel Rogers possession of the within described property."

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Blocher and others not paying, an ejectment was brought, by creditors of Foster, who were interested, *in the name of Veech*, against Blocher, Shoemaker & Taylor, who were in possession, to December term, 1843; and it is stated on the record, "June 26, 1844. Judgment by consent for plaintiff,—for conditions, see paper filed." But no paper was filed. *Hab. facias poss.* to June term, 1846; on which, by Veech's direction, possession was delivered to James Paull, to whom he had, October 4, 1845, assigned his title; Paull having paid the residue of what Veech held the title to secure. As to this paper, parol proof was given that it was a statement of the amount, (about \$7000,) upon payment of which by defendants, Blocher, Shoemaker & Taylor, within one year, the judgment was to be released. A few days before the conveyance of Veech to Paull, the latter took a conveyance from the executor of the will of Meason. The conveyance is dated 4th October, 1845. Afterwards, *Blocher, Shoemaker & Taylor*, claiming that they had complied with their agreement with Judge Ewing, and that the trust, under which Mr. Veech held, was terminated, brought ejectment to March term, 1847, against Paull and Gillis his tenant, for the property, to enforce the trust. Before it was tried, the property in question in that ejectment, and in this one, was sold at sheriff's sale, on 17th June, 1847, on a judgment against Blocher, Shoemaker & Taylor, entered on 26th January, 1843, on the bond given to Judge Ewing, for about \$322. The judgment on that bond was assigned by N. Ewing to Mr. Howell before the issuing of process upon it to sell. The property was purchased in the name of Oliphant, plaintiff in this suit. The ejectment under consideration, in the name of Oliphant *vs.* Paull and Gillis his tenant, was afterwards brought to recover possession under the sheriff's deed. It was alleged that Paull was present at the sale, and that no notice was given on the part of Paull, or other person, of any claim to it. The deed to Oliphant was not acknowledged till October 21, 1847. After this sale, the ejectment brought by Blocher and others *vs.* Paull, above referred to, was tried, and, September 30, 1847, verdict for plaintiffs, subject to payment to defendant, Paull, of \$8500, with interest and costs, within thirty-six months, Paull to file deed; which was done. Deed dated October 22, 1847. February 18, 1848. Judgment on verdict.

It was alleged, on part of defendant in error, Oliphant, that on the trial, the defendants, Paull and others, admitted that Paull held in trust; but the defence was set up that Blocher & Co. had not complied with their agreement with Judge Ewing, and were not entitled to possession. It was further alleged, on the part of Oliphant, that Blocher and others had fully complied with their agreement, and received their deeds; and it was further contended, that if they had not complied, the property was discharged from

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the trust, by the sale on a judgment, given for money, which the trust was held to secure.

Before the institution of the ejectment by Blocher and others against Paull, a tender was made by Blocher to Paull, of the amount of purchase-money paid by him to Meason's executor, but it was refused; and \$1000, the amount paid by Paull for the Rogers title, was paid into court Feb. 18, 1848, in that suit.

Oliphant claimed to recover, on paying the balance of purchase-money paid to the estate of Meason.

For Paull, it was contended, that Oliphant could not recover at all, that part of the ground which belonged to Meason; that, *as to that*, he was concluded by the act of 21st April, 1846, the amount of purchase-money not having been paid *in the time limited by the award*; and that he could not recover *any part* without paying the whole balance claimed, amounting to about \$8500, at the time of the trial. See verdict in the ejectment by Blocher and others against Paull and Gillis.

On the trial, the defendant's counsel asked the court to instruct the jury—

That an action of ejectment having been brought by Daniel Rogers, executor of Isaac Meason, deceased, against Samuel Blocher, Isaac Shoemaker, and Joseph R. Taylor, to No. 135, March term, 1843, to enforce the payment of purchase-money of the two lots, Nos. 11 & 12, embraced in this suit, wherein judgment was obtained by the plaintiff on the 25th November, 1843, to be released on the payment of \$698.99, on the first of April then next following, and wherein also the said sum, not being paid, an *hab. fac.* was issued and possession delivered to the said plaintiff,—and an action of ejectment having afterwards been brought to 92 of March term, 1847, by the same *defendants*, against James Paull, in whom the title of the said Isaac Meason was then vested, to recover possession of the said two lots, in which action a judgment was rendered for the plaintiffs, upon condition that they pay to the said James Paull, defendant, the sum of \$8500 and costs, within thirty-six months, with interest from date, that, therefore, this suit cannot be maintained, so far as *those two lots are concerned*, and for them the jury must find a verdict for the defendants absolutely—the defendants in that Rogers judgment, having had their action as given to them by the act of 21st April, 1846, which gives but *one* such action: and that plaintiff's payment into court of the consideration of that Rogers title is unavailing.

This point was thus answered by the court:

HEPBURN, J.—The executor of Isaac Meason, recovered in ejectment by the award of arbitrators, on the 25th of November, 1843, two of the lots in controversy, from Blocher & Co., whose title the plaintiff now holds, to be released on the payment of \$698.99 on the 1st of April then next, (1844.) In the fall of

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1845, Blucher tendered to James Paull, who then held the title of Meason's executor, \$770 in payment of this award. To March term, 1847, Blocher *et al.* brought ejectment against Paull for the said two lots, together with other real estate, in which judgment was entered for plaintiffs, on condition that they pay to the said Paull the sum of \$8500 within thirty-six months. Is this recovery conclusive under the provisions of the act of 21st April, 1846?

Mr. Paull took this title from Meason's executor, a few days before the conveyance of Mr. Veech to him, by which, he contends, and the court have so held, that he took upon himself the trusts under which Mr. Veech held the title. If done, then, in contemplation of becoming the trustee, he could do nothing to impair the trust; but in that view he was right in doing any thing to support the trust and the furtherance of it.

Under these circumstances, he cannot avail himself of the payment to Meason's executor, or of the title derived from him, to defeat the trust and appropriate the trust property to his own use. Nor can he by that title prevent the *cestui que* trusts from asserting their rights on refunding the money. The money was tendered to Paull previous to the ejectment of 1847, and, since the present suit was brought, the money was paid into court. Under these circumstances, I do not think that the former recovery is conclusive, but that the title remains in Mr. Paull as trustee, and subject to the plaintiff's claim. Also, Blocher stands in the position of one who has paid the money, and the act in question does not say that the party who has paid the money shall have but one action of ejectment to enforce his contract. This point is answered in the negative.

To this part of the charge of the court the defendant's counsel excepted.

Verdict was rendered for plaintiff.

Errors assigned :

The court erred in answer to the prayer by plaintiffs in error for instructions to the jury—

1st. In assuming that the Rogers title had any connection with the trust under which Veech held the sheriff's title; or that the Rogers title was acquired by Paull with a view to support the trust, or in furtherance of it.

2d. In not giving the instructions prayed for

3d. The court erred in assuming that the defendant below (Paull) was a trustee for the purchasers, in a sense different from that in which every vendor is a trustee for his purchaser.

4th. In charging that the ejectment of Blocher and others *vs.* Paull and others, No. 92 of March term, 1847, was no bar to this suit.

5th. It is evident upon the whole record that the plaintiff below is not entitled to recover, because, without reference to the suit of

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Meason's executor and the proceedings under it, it appears that, to December term, 1843, the Foster creditors, the vendors of Blocher and others, brought an ejectment in the name of James Veech, Esq., *vs.* Blocher and others, the purchasers, and recovered a judgment, to be released on the payment, in one year, of \$7000, which not being paid within the time, possession was delivered under a *hab. facias*;—and that subsequently, by virtue of the act of the 21st April, 1846, Blocher and others brought their action, No. 92, March term, 1847, *vs.* James Paull, who then held the title of Mr. Veech, and had paid all the other creditors of Foster, for whose use Mr. Veech held the title.

For this reason, this court should reverse, although the point was not made below: *Hoffer v. Wightman*, 5 *Watts* 205. "If it appears by the record that the plaintiff has no cause of action, this court will reverse judgment in his favor, although the point may not have been made in the court below, or assigned for error."

The court is also referred to the act of 21st April, 1846, relating to "equitable actions of ejectment," &c. *Dunlop's Digest*, (1st edition,) page 969.

The case was argued by *N. Ewing*, for plaintiffs in error.—Paull purchased the interest of Ewing and others of the creditors of Foster who were interested in the property, and Veech, by direction, conveyed to him the legal title. That if it had not been for the act of the 5th May, 1841, which enacted that one judgment in ejectment should *not* be conclusive, the recovery by Veech, and conveyance to Paul, would have been conclusive. That act was altered by the act of 21st April, 1846, under which Blocher and others were authorized to bring ejectment against Paull, within two years. Ejectment was brought and judgment recovered, conditioned for payment to Paull of \$8500 within thirty-six months. That afterward, the title of Blocher and others was conveyed to Oliphant, who tendered only the amount due to Meason's estate. That as Blocher and others were entitled to receive the legal title on payment of \$7000 and interest, he had an interest which could be sold; and this was sold to Oliphant. That Paull is willing that Oliphant should have the legal title on payment of \$8500, notwithstanding the two years have elapsed; but that Oliphant cannot recover without paying that amount. He offered to pay only the amount due to Meason's estate.

Patterson for defendant in error, alleged that the object of offering the judgment in the ejectment in favor of Blocher and others was to impeach witnesses of plaintiff, and to show that defendant *was in possession*; and not as a bar to plaintiff's recovery. That that ejectment was not by a *vendor*. That Veech held merely in trust; that his title was in the nature of a *mortgage*, and

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was divested by the sheriff's sale. That the *award*, in the case of the ejectment by Meason's executor, was not a judgment on *verdict*; and was not such a judgment as to which time is essential, under the act of 21st April, 1846.

The opinion of the court was delivered by

BELL, J.—Upon the argument of this cause, many facts were verbally introduced by the counsel on both sides, rather with the effect of confusing than elucidating the points at issue. I do not, therefore, propose to notice them, except so far as they may be suggested by the record brought up, and are connected with the questions presented for discussion.

This action was brought by Oliphant, the plaintiff below, as purchaser of the land in dispute, at a sheriff's sale, made by virtue of an execution issued *sur* one of the judgments confessed by Blocher, Shoemaker, and Taylor, to secure certain liabilities incurred by Thomas Foster, and for which Judge Ewing, and perhaps others, had become responsible as sureties. The title of the plaintiff below would, therefore, seem to be paramount to the trust created to secure the payment of those liabilities, and which was represented by Veech, the holder of the legal title, subject to the trust, and afterwards by Paul, the defendant below, by a conveyance from Veech, under similar conditions. On the trial of the cause, this relation to the land, and the parties interested in it, was established by all the evidence; and the court, in the view taken of the controversy, recognise Paull's character of trustee, and allow him every benefit to be derived from it. It seems the question principally debated between the litigants, was whether Blocher, Shoemaker, and Taylor had fulfilled their agreement with Ewing, as a security for which Veech held the legal title, and from whom Paull had received the proper conveyance of that title. Upon this issue there was a general verdict for the plaintiff below; but the court having granted a new trial, upon the second contest, the defendants set up an additional defence, which, however, went to but a part of the land in dispute. To a comprehension of this part of the case, a brief recapitulation of facts is necessary.

Two of the lots of land included in this ejectment had been purchased by Thomas Foster from a certain Isaac Meason.

As part of the purchase-money remained unpaid, no formal conveyance of the lots was executed; the vendor retaining the legal title as security for payment, though the vendee was permitted to enter upon and enjoy the land. Pending this condition of things, Foster's estate was sold by the sheriff, and conveyed to Veech, subject to the trust at which I have already glanced; and in pursuance of it, Blocher, Shoemaker and Taylor, *as cestui que trusts*, immediately entered upon the beneficial possession of the property. After this, in March, 1848, Meason, the vendor, having

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died, his executor instituted against the last-named tenants an action of ejectment for the two lots sold to Foster by his testator; the object of which was to enforce payment of the purchase-money. In November of the same year, a judgment *sur* award of arbitrators was recovered by the plaintiff in this action, to be released on payment of \$698.99 purchase-money, on or before the first of April then next. This condition being unfulfilled, an *habere facias* issued to September term, 1844, under which Rogers, the then plaintiff, was put into actual possession of the lots.

About a year after this, viz. on the 4th October, 1845, Veech, as already intimated, conveyed all the property which had been Foster's, to Paull as trustee. The latter, in order to perfect a title in the two lots, had paid to Rogers, the executor, the balance of the purchase-money ascertained by the award, and taken a conveyance of the legal title. He thus became the legal holder of all the estate sold as Foster's by the sheriff. But, prior to this, in December, 1843, Veech had instituted an action of ejectment against Blocher, Shoemaker, and Taylor, who were then in possession of all the property. In June, 1844, this action was determined by the following entry upon the record: "Judgment, by consent, for plaintiff—for conditions, see paper filed." No such paper as is here referred to was ever filed; nor are we furnished with any reliable evidence of its existence and contents. Under the judgment thus entered, an *habere facias* issued to June term, 1846, by virtue of which Paull, who then had the legal title, was put into possession by Veech's direction. Subsequently to this, in March, 1847, Blocher, Shoemaker, and Taylor, averring they had performed all that was necessary under their agreement with Judge Ewing to attract the legal title, instituted an action of ejectment against Paull, in which they claimed to recover all the property that had belonged to Foster. Pending this action, the execution already referred to, under which the plaintiff below purchased, was issued, and the property sold to him on the 17th June, 1847, the sheriff's deed being acknowledged on the 21st October in the same year. Less than a month before the latter date, the last-mentioned ejectment came on to be tried, and resulted in a verdict for the plaintiffs, subject, however, to the payment to Paull, the defendant, of \$8500, with interest and costs, within thirty-six months.

Before the bringing of the ejectment by Blocher, there was tendered to Paull, the defendant, the purchase-money paid by the latter to Meason's executor. It was refused, and, after this suit brought, was paid into court. On the trial, the defendants prayed the court to instruct the jury, as was submitted in their propounded point, brought up with the record. This proposition states the partial defence, of which I have before spoken, and the answer returned to it by the court is the only subject for investigation

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properly before us. It relates, exclusively, to the two lots purchased from Meason, and presents the question whether the two ejectments, mentioned in the point submitted, can, under the act of 21st April, 1846, operate to bar the plaintiff below from maintaining the present action. This inquiry was properly answered in the negative. Were it even admitted that an award of arbitrators is within the purview of the act of 1846,—a position I am not called on to discuss at present,—it is beyond all dispute, that, as Paull acquired title as a trustee, standing in Veech's place, after the recovery in the ejectment brought by Meason's executor, he cannot set up that judgment to defeat the trust. All that he did must be taken as in furtherance of the trust. To this he was bound by the duties of his office; and it would be strange, indeed, if he could wrest the judgment recovered by Rogers, into an instrument of attack upon the interests he undertook to subserve, and for the protection of which he must be taken as having procured the conveyance of Meason's title. That conveyance put an end to any legal consequence which otherwise might have flowed from the judgment recovered. Besides, as the court below very properly observed, Blocher and his fellows stood in the position of parties who had paid the sum ascertained by the award; and the statute in question does not say that he who has satisfied the condition shall have but one action of ejectment upon a contract. But to vest the judgment of which we have been speaking with any conclusive effect, it is necessary to connect it with some subsequent action of ejectment, brought by the defendants to enforce the contract, which was the foundation of the first action. The language of the act is, "that it shall be lawful for any such defendant, within two years after the passage of the act, to commence an action, and therein enforce his contract in such case, on paying the amount of purchase-money, interest, and costs," &c., "to be paid within such reasonable time, as may be fixed by the jury under the direction of the court; and if not paid within such time, such failure to pay shall operate as an absolute rescission of the contract," &c. As satisfying this provision, the defendant refers to the judgment rendered in the ejectment brought by Blocher, Shoemaker and Taylor against Paull, in 1847. The answer is, that *that* ejectment was not, in any degree, founded upon the contract made between Foster and Meason. It was brought to enforce the execution of the trust represented by Paull, in respect to all the lands which had been held by Foster, and the questions then agitated were, whether the plaintiffs had fulfilled their agreement with Judge Ewing, and thus entitled themselves to a legal conveyance.

I have, however, spent more time upon this part of the case than was, perhaps, called for. Indeed, the plaintiff in error, satisfied that it was destitute of merit, wholly abandoned it upon the argu-

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ment, and substituted for it a ground of defence not suggested on the trial. It is, that the judgment recovered in the action of ejectment, instituted by Veech against Blocher and his associates, to December term, 1843, is conclusive against the present plaintiff, under the act of 1846. Several answers might be returned to this proposition, showing this action, as it is presented upon the record, is not within the purview of the statute, or, if it were, that it is incompetent to affect the rights of the now plaintiff. But, without enumerating these, it is sufficient to say the record of that action was not used on the trial, for any such purpose as is now claimed for it. It was specifically offered to impeach the testimony of Blocher and others of the plaintiff's witnesses, and to show that, under the *habere facias* then issued, the defendant, Paull, was put into possession of the lands, and Blocher, Shoemaker, and Taylor turned out. Under objection, it was admitted for this purpose, and this purpose alone. Yet, though this be so, it is said we may now ascribe to it an effect not claimed for it below, under the authority of *Hoffer v. Wightman*, 5 *Watts* 205, where it was held, that, if it appears by the record that the plaintiff has no cause of action, the court will reverse a judgment rendered in his favor, although the point may not have been considered in the court below, or assigned for error. In that instance, the feature of the case upon which the court relied was conclusive against the plaintiff's right, and, upon his own showing, admitted of no answer. But how can we hazard the assertion, without danger of violent injustice, that the imperfect record of the judgment rendered in the ejectment now relied on admitted of no explanation? To invest it with the slightest force under the act of 1846, the defendant below was obliged to have recourse to parol proof, not, however, with the view now suggested, which was not then dreamed of. How can we say that, had it been, the plaintiff could have furnished no answer through the same medium of proof? It is, therefore, obviously not within the spirit of the decision cited, but falls within the reason of the numerous cases which forbids the introduction of new matter in error. We cannot, therefore, without infracting a well-settled rule, founded in the plainest propriety, concede to this judgment a quality not asked for it below. It might not be necessary to say more than this; but I cannot persuade myself to leave this point without observing, that, to ascertain the character of that judgment, we must look to the record of it alone. That shows not it is such a conditional judgment as is contemplated by the statute; and this omission cannot be aided by parol.

Judgment affirmed.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA

EASTERN DISTRICT—DECEMBER TERM, 1850.

PHILADELPHIA.

Seip versus Drach.

In a suit against one as executor, counts for a claim against the testator cannot be joined with a count against defendant for money received by him as executor, for the use of the plaintiff, and alleging a promise to pay the same when he, as executor, should be requested. The counts are incongruous, requiring different judgments, the first *de bonis testatoris*, the other *de bonis propriis*.

ERROR to the Common Pleas of *Northampton county*.

This was an action in case, brought by Jacob Seip, surviving administrator of the estate of *Jacob Heller*, deceased, against Joseph Drach, executor, &c. of *Simon Heller*, deceased. Pleas were non assumpsit, payment with leave, &c.

Old Jacob Heller, having made his will, in which he appointed Jacob Heller, the younger, and Simon Heller, his executors, died. These executors, having taken upon themselves the execution of the trust, on the 25th July, 1828, filed an account, whereby it appeared that they were indebted to the estate of their testator \$7865.29. This was a joint account. On the 1st August, 1833, Simon Heller, one of these executors and accountants, died, leaving a will, in which he appointed Joseph Drach his executor. Mr. Drach took out letters testamentary, and proceeded to administer the estate of his testator. On the 1st November, 1834, Jacob

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Heller the younger died, and by his death the administration of old Jacob Heller's estate becoming vacant, letters of administration thereupon, *de bonis non cum testamento annexo*, were granted to Jacob Seip and Abraham Bauer. Simon and Jacob Heller, the executors of Jacob Heller the elder, being both dead, Joseph Drach, the executor of Simon, and as such, made and delivered his promissory note for \$1291.04, payable on 1st April, 1835, to Abraham Bauer, one of the administrators *de bonis non*, &c. of Jacob Heller the elder. Some payments were made on this note. Abraham Bauer, the payee, died, and the note seems to have passed into the hands of his co-administrator, Jacob Seip. This suit was then instituted, amicably, between Seip, the surviving administrator *de bonis non*, &c. of Jacob Heller the elder, as plaintiff, and Drach, the executor of Simon, as defendant. The plaintiff claims the balance which he alleges is due to him upon this note.

The *narr.* contained four counts. In the *first* count it was alleged that Simon Heller aforesaid and Jacob Heller the younger had been executors of the will of Jacob Heller the elder, and that, on the settlement of their joint account, there was in the hands of Simon Heller \$4000; that he died, having appointed Joseph Drach, the defendant, the executor of his will, who, it was alleged, became liable to pay the \$4000.

In the *second* count it was alleged that Drach, as executor, made his promissory note, by which he promised to pay to Bauer, one of the administrators of the estate of Jacob Heller the elder, or order, the sum of \$1291.04; that Bauer died, leaving Jacob Seip, the other administrator of the said Jacob Heller, surviving him—to whom the note was delivered; and that, being so liable, Drach, as executor, promised to pay the sum of money in the note specified.

In the *third* count, it was alleged, that Drach, as executor, was indebted to Seip, surviving administrator, in the further sum of \$4000, for so much money by the said Drach as executor, as aforesaid, before that time had and received, to and for the use of the said Jacob Seip, surviving administrator as aforesaid; and being so indebted, &c., undertook and promised to pay the said sum of money when he, as executor, should be requested.

The *fourth* count was on an accounting, between Drach as executor as aforesaid, and Seip and Bauer, as administrators *de bonis non* with the will annexed of Jacob Heller, deceased, concerning divers other sums of money, from the said Simon Heller, in his lifetime, due and owing, and alleging that upon that accounting, Simon Heller, in his lifetime, and at the time of his death, was found to be in arrear, and indebted in the further sum of \$4000, and being so indebted, and the money remaining unpaid, Drach, as executor, &c., in consideration thereof, undertook and promised to pay.

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His Honor, Judge JONES, charged, *inter alia*:

1. The first point of the defendant is, "That Jacob Heller, the younger, having survived Simon Heller, his co-executor, if the plaintiff in this case has any cause of action, it is against Jacob Heller and his representatives only, and not against the executor of Simon Heller." If Simon Heller, as executor of old Jacob Heller, received into his hands a larger portion of the estate of the testator than was received by his co-executor, he and his estate after his death would certainly be liable to his co-executor, and after the death of that co-executor, the administrator *de bonis non* could also have recourse against Simon's estate, in favor of the estate of his testator. As it has been treated in the argument, the note would seem to have been given by Simon's executor to one of the administrators *de bonis non* of old Jacob Heller, for so much money due to the estate of old Jacob Heller from the estate of Simon Heller, being money which had come into the hands of the latter as executor of the former, and had not been paid over. It is true, that Simon and Jacob Heller, the younger, filed a joint account as executors; but that does not, nor does the survivorship between them, as far as we can see, affect this liability of their estates, individually, to this plaintiff. We answer this point in the negative.

2. The second point of the defendant is, "That two of the counts in the declaration being against the defendant, upon a personal liability, no recovery can be had in this suit." It seems to us that the judgment on the first and fourth counts of this declaration would be *de bonis testatoris*, and that on the second and third it would be *de bonis propriis*. The execution of the note by Drach as executor, would not save him from personal liability to the payee. The form of the judgment must determine whether several counts are properly joined. Where the judgment is the same on all the counts, they may be joined. Where it is different, they may not: *Malin v. Bull*, 13 Ser. & R. 443; 1 *Chitty's Plead.* 235, edition of 1833. Here there is a misjoinder of counts.

3. The third point of the defendant, "That, even if the counts were properly joined, the plaintiff was bound to show assets in the hands of the defendant as executor of Simon Heller, and, not having done so, must fail," we answer in the affirmative. The verdict must be for the defendant.

To this charge the plaintiff excepted.

Verdict was rendered for defendant.

It was assigned for error:

1. The court erred in their answer to the second point propounded by defendant's counsel, wherein they say, that the judgment on the first and fourth counts of the declaration, would be *de bonis*

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testatoris, and that, on the second and third counts, *de bonis propriis*, and therefore this joinder.

2. The court also erred in their answer to the third point propounded by defendant's counsel, wherein they say, that if the counts were properly joined, plaintiff was bound to show assets in the hands of defendant as executor of Simon Heller, and not having done so, the verdict must be for defendant.

The case was argued by *Thrie*, for plaintiff in error.
Reeder, with whom was *McCartney*, for defendant.

The opinion of the court was delivered by

ROGERS, J.—It is a principle too well settled to admit of dispute, that a misjoinder of actions or of counts in a declaration, is a matter of substance, and consequently is bad on general demurrer, in arrest of judgment, or in error: 2 *Williams on Ex'rs.* 1191; 24 *Wend.* 184, *Gillet v. Hutchinson*; and *Malin v. Bull*, 13 *Ser. & R.* 443. The principal point is, whether there is an incongruity of counts as the defendant alleges, viz. so that they require different judgments, one *de bonis testatoris*, the other *de bonis propriis* of the executor. There cannot, it is conceded, be two different judgments in one action; but counts, which require the same judgment, may be joined.

The declaration contains four counts, in two of which, the 1st and 4th, the judgment is *bonis testatoris*. This is conceded. The dispute is as to the proper judgment to be rendered on the second and third counts. The plaintiff alleges that on those counts also, the judgment should be *de bonis testatoris*; whereas it is strenuously insisted by the defendant, that the only judgment which can be rendered, is a judgment *de bonis propriis*. If it be, as contended by the defendant, it is a misjoinder, and the judgment must be affirmed. On that point the whole case turns.

As the case does not require it, it is not our intention to decide whether, if the question depended on the second count, there would not be great force in the argument of the plaintiffs in error. For as, in that count, reference is made to the promissory note, which was given by Drach, as executor, it is by no means clear that judgment may not be rendered *de bonis testatoris*. But be this as it may, there is nothing of that kind in the third count. And if one be liable to the objection, it is equally fatal. For it can be of no consequence whether there be one or two counts of that description.

In that count no reference is made to the promissory note, nor is there any thing to indicate that the action is brought to recover a debt owing by the testator to the plaintiff's intestate. The suit is brought, so far as appears in that count, on a promise made by

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the defendant, as executor. The promise laid, is simply a promise, as executor, to pay the debt. This would seem to bring the case within the operation of the principle, well settled in this State and elsewhere, that a promise by an executor does not bind the estate, but the executor personally. The naming him executor, is surplusage, and the action is in his own name, or against him personally; and consequently, in the latter case, the judgment is a judgment *de bonis propriis*. He alone, in his individual character, is liable to suit. This principle is decided in *Geyer v. Smith*, 1 *Dal.* 372, note *Fritz v. Thomas*, 1 *Whar.* 71, and in *Grier v. Hamilton*, 8 *Ser. & R.* 403. In the last case, it is ruled, that in all cases of promises, express or implied, made to an administrator, after the death of the intestate, the action lies by or against the administrator personally. If a promissory note be given by A as executor of B, the naming him as executor is surplusage, and the action lies in his own name. Administrator giving bond as administrator is chargeable personally. Nothing is better settled than that an executor or administrator, is answerable in his official character, for no cause of action that was not created by the act of the decedent himself. In actions against the personal representative on his own contracts and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis*; and he is, by every principle of legal analogy, to answer it with his personal property. So in *Masterson v. Masterson*, 5 *Rawle* 139, it is said that executors cannot promise or covenant as such, so as to make themselves liable as executors. They are liable in a representative character only on the contract of the testator. That this is a settled principle, may also be seen in 2 *Brod. & Bing.*, *Childs v. Monins*; 2 *Williams on Ex'rs*, 1093-4, 1088; 7 *Taunton* 585, *Powel v. Graham*; *Rose v. Bowler*, 1 *Henry Bl.* 108-9; *Ashby v. Ashby*, 7 *B. & C.* 444.

In *Ashby v. Ashby* and *Rose v. Bowler*, it is ruled that a count for money had and received by defendant as executor, to use of plaintiff, cannot be joined with a count upon account stated with him as executor. These authorities clearly show that the judgment, on the third count is *de bonis propriis*, and consequently there is a joinder of incongruous counts, which, as we have seen, is fatal to the action.

This view of the case relieves me from the consideration of the other points raised on the argument. For be the decision on these questions erroneous or otherwise, the point already noticed presents an insuperable bar to the plaintiff's recovery. It is true, the plaintiff would have had the right to retrieve his slip in pleading by entering a *nolle prosequi*, or withdrawing the count. But this he did not choose to do. Nor was there any request to be permitted to do so, which appears on the record. The court was therefore right in ruling that the plaintiff was not entitled to

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recover. The plaintiff asked judgment on all the counts, to which, clearly, he was not entitled.

Judgment affirmed.

Chapman *versus* Calder.

In actions of trespass *quare clausum fregit*, the forty shillings prescribed as the minimum of damages, which will entitle a plaintiff to full costs, is to be reckoned in Pennsylvania currency, and not in sterling money.

ERROR to the Common Pleas of *Wayne county*.

This was an action of trespass *quare clausum fregit*, by Chapman against Alexander Calder and James Calder, for breaking and entering the close of Chapman, and treading down and spoiling the grass and corn, and for breaking and carrying away the fences. Defendants severally plead not guilty. Verdict for plaintiff for \$8.76. Feb. 22, 1848, court grant a rule to show cause why judgment should not be entered for \$8.76 with the same amount of costs. Rule made absolute.

It was assigned for error, that the court erred in entering judgment for \$8.76, with the same amount of costs only; judgment should have been entered for \$8.76, with full costs.

Dimmick, for plaintiff in error, submitted that—The amount necessary to give full costs in this State, is forty shillings Pennsylvania currency, equal to \$5.33½, and not forty shillings sterling, as in England, although the statute was passed with reference to sterling money. *Brightly on Costs*, 22; 2 *Pa. Rep.* 137; 2 *Pa. Prac.* 22; 22 and 23 *Charles 2*, ch. 9, passed in 1670; 4 *Ser. & R.* 419. That the defendant in the evidence justified the trespass, setting up that there was a public highway through and over the close in which the trespass was committed.

Mallery, for defendant.—The title of the land did not come into question. No certificate of the judge to that effect. There was no proof as to rails being carried away. That was merely a formal part of the declaration. The statute applies to actions of trespass *quare clausum fregit*; *Sayer's Law of Costs*, from page 32 to 52. That the amount of the verdict which will carry costs is to be determined by the standard fixed at the time the statute was passed; that by adopting the statute, the standard to determine the amount of costs is to be the same here as in England.

The opinion of the court was delivered by
COULTER, J.—Whether the forty shillings prescribed as the

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minimum amount of damages which will entitle a plaintiff to recover full costs in an action of trespass *quare clausum fregit* is to be reckoned in sterling money or in Pennsylvania currency, is, in this State, essentially a question to be ruled by the practice of our courts. In this point of view, the authority of *Brightly on Costs*, cited by the plaintiff in error, is of some weight; for although his opinion, or that of any other recent writer, upon a question of principle, unless supported by authority, would not have much weight, yet, as to a settled practice, it may weigh much. Mr. Brightly is a respectable lawyer, an inquiring and assiduous annotator, and no doubt, before adopting the opinion expressed in his book, had made diligent inquiry among the profession. We are disposed to regard it favorably, because it accords with our own experience, and is in unison with what we think has been the general practice of the State; and that is, that forty shillings, Pennsylvania currency, has been and is the uniform standard of value on the subject. If any adjudicated cases, either in manuscript or printed, had been produced, it would have made us pause.

It is probable, but I have not the opportunity at hand to examine, that a regulation was made by the Provincial Governor and Council on the subject of the value of pounds, shillings, and pence, at an early period. Statutes were enacted directly after the Revolution, fixing salaries of officers in pounds and shillings, which were always paid in the Pennsylvania currency. And so penalties were inflicted by statute, at an early period, in pounds, which were always paid according to the Pennsylvania standard. The English statute fixed forty shillings, to wit, the 22d and 23d statute of Charles the Second, chap. 9. And so far as the amount of costs in trespass was regulated, that statute was adopted here. But it was adopted, of course, according to our own habits of business and customs. The question then was the value of a shilling. Our courts adopted the value of our own shilling. There was nothing contrary to the statutory rule in this. It was adopted by us according to this value of the shilling, as being the most convenient in practice, and suited to the knowledge of our jurors and courts. I think no practitioner ever heard a court charge a jury that the rule as to costs was forty shillings *sterling* money, and then tell them how much an English shilling *sterling* was in our own currency. The rule, adopting forty shillings of our own money, is more consistent with our independence, our nationality, and the habits of our people, and was therefore always commended to our adoption.

By the act of 22d March, 1814, the jurisdiction of aldermen and justices of the peace is extended to \$100, in actions of trespass *quare clausum fregit*, and the rule as to costs is, that if the plaintiff recovers over one dollar, he recovers costs, and either party has the right to appeal when the damages exceed forty shil-

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lings, \$5.83½. And the act of 13th Feb. 1816, enacts, that in actions of trespass for injury done to real estate, when the same is referred according to law, the arbitrators, if they find damages, may find who shall pay the costs, or divide them. And by the act of 1814, the proceedings in court are to be according to the rules established in the amended and consolidated one hundred dollar act, so that if the plaintiff finally recovered over one dollar, he would recover costs. It would seem, therefore, that the legislature did not consider the act of 22 and 23 Charles as extended to this country. It certainly does not apply where the proceeding originated before a justice. And why should the rule be different as to cases in the same forum having original jurisdiction? But we are of opinion that where the statute was adopted in practice, it was adopted with the standard of the Pennsylvania shilling, and not the shilling sterling.

I incline strongly to the opinion, that on this record, as it stands, the plaintiff would be entitled to costs, even admitting that the rule was forty shillings sterling; because the evidence sent up shows that the principal point in controversy was the plaintiff's right to the freehold. There is no certificate of the judge, but he may have considered the rule peremptory.

There is also charged, as part of the trespass, that the defendant took and carried away the rails of the plaintiff. Now, in England it is fully decided that the statute applies only to actions of trespass *quare clausum fregit*, and for assault and battery of the person, because in these actions the judge can readily give the certificate required. But whether the statute applies where a charge of taking personal property is mixed with the injury to real, is a vexed question in the English courts: many decisions exist on both sides. But we put it on the ground of forty shillings Pennsylvania currency being the true rule, so that the practice may be settled.

The judgment as to costs is reversed, and judgment entered here for \$8.76 damages, with full costs; and this judgment is directed to be certified and remitted to the Court of Common Pleas of Wayne county, to be carried into execution.

Moore versus Skelton.

After judgment against the executor, *scire facias* may be issued thereon against the devisee, under the 34th section of the act of 24th Feb. 1834, relating to executors, in which proceeding judgment may be entered against the devisee.

ERROR to the Common Pleas of *Bucks county*.

This was a writ of *scire facias*, issued in name of John Skelton,

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executor of the will of Elizabeth Hunt, against James Moore, executor of the will of Isaiah Michener, and Isaiah Michener, devisee, upon a judgment obtained by Elizabeth Hunt against Moore, executor of the will of Isaiah Michener, deceased. Michener took defence and plead payment.

The plaintiff gave in evidence the record of the suit by Elizabeth Hunt *vs.* Moore, executor, &c., to Feb. term, 1847, on which judgment was obtained, Aug. 20, 1847, on award of arbitrators. No further evidence was offered on either side.

The court, KRAUSE, J., charged the jury that, "on the facts in evidence, the court directs the jury to find for plaintiff, for the amount claimed by him, viz. \$300.47."

Defendant excepted. Verdict for plaintiff.

It was assigned for error :

1. The court erred in directing the jury to find for the plaintiff under the evidence given to the jury.
2. The verdict, being against both the executor and devisee, is erroneous, and judgment cannot be entered upon it.

The case was argued by *Ross*, for plaintiffs in error.—He alleged that the date of the death of testator within five years before suit, should have been averred, because the debts of a decedent are not a lien for more than five years. Also, that execution should have gone against the executor, and that there were not sufficient assets to pay the debt shown, before issuing *sci. fa.* against the devisee. 2 *Barr* 112.

Roberts and *Dubois*, for defendant, referred to *Murphy's* appeal; 8 *W. & Ser.* 165; 5 *Barr* 290.

The *sci. fa.* set forth that the testator died seized of real estate, which was devised to the devisee; and if plaintiff was barred, it was a matter of defence. All that is required, is to call on the devisee to show cause why plaintiff should not have execution.

The plaintiff may not desire the collection of his debt, but only to continue the lien; and, therefore, it need not be averred that execution had issued.

The opinion of the court was delivered by

BURNSIDE, J.—Elizabeth Hunt obtained a judgment in August, 1847, by the award of arbitrators, against James Moore, executor of the will of Isaiah Michener. This judgment was given in evidence by the plaintiff below. The defendants gave no evidence. The court directed the jury that the plaintiff was entitled to recover. Isaiah Michener, the devisee of the land, plead payment.

Two errors have been assigned in this court: 1st. That the court erred in directing the jury to find for the plaintiff under the

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evidence. 2d. The verdict, being against both the executor and devisee, is erroneous, and judgment cannot be entered upon it.

It is well settled, that the action against Moore, the executor, did not release the real estate of the deceased from the payment of this debt. *Benner v. Phillips*, 9 *W. & Ser.* 13; Murphy's appeal, 8 *id.* 165, and in many other cases. These cases settled another principle, as well as an important rule of practice, that a writ of *scire facias* may be issued upon a judgment against executors, in which proceeding a judgment may be entered against the heir or devisee, in accordance with the provisions of the act of 1834. By the 34th section of that act, the lien of debts of a decedent upon his real estate, is limited to five years, and under the provisions of this act, 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 or devisee 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. *Benner v. Phillips*, Murphy's appeal, *supra*. There is no hardship in this, because our law allows the heirs or devisees to make the same defence which they could have made if originally joined in the suit.

These principles have been so often ruled by this court, and this practice under the act of 1834 so frequently explained and settled, it is to us strange there should be any diversity of opinion upon the subject.

Judgment is affirmed.

Rigler versus Cloud.

1. Trust estates are not within the provisions of the intestate law of the 8th April, 1833. Therefore, a husband who has conveyed real estate to another *in trust* for his wife, is not entitled to the trust estate, on her death, as tenant by the curtesy.

2. A trustee appointed by the court, in the room of the trustee to whom the said conveyance was made, is not such as is required to give security by the provisions of the act of 14th June, 1836, relating to assignees.

3. The delivery of a deed may be inferred from circumstances, the actual manual investiture of it need not be proved. The signing, attestation, and the acknowledgment by the grantor, and the recording of it, are *prima facie* evidence of delivery.

4. Where a deed, made by a husband in Pennsylvania, to a resident in Trenton, New Jersey, in trust for the use and benefit of his own wife and her heirs, and attested by one witness, is acknowledged by the grantor before the Mayor of the city of Trenton, whose certificate is subscribed with his name and the seal of the city affixed; this acknowledgment is a substantial compliance with the provisions of the acts of 28th May, 1715; act of 23d March, 1819, and of 16th April, 1840, in relation to the acknowledgment of deeds.

5. It does not lie with the grantor, fifteen years after the execution and acknowledgment of a deed, to object to a mere irregularity in his acknowledgment, and especially where no subsequent alienee for value is interested.

6. The 4th section of the act of 28th May, 1715, does not require that a deed executed out of the State shall have more than one subscribing witness.

[Rigler v. Cloud.]

ERROR to the District Court at Philadelphia.

This was an action of ejectment by John Cloud, trustee of Elizabeth Lanning, and Anna Maria Rigler, against Henry Rigler, for property in Kensington.

On 7th January, 1833, Henry Rigler, plaintiff in error, by deed, conveyed to Catharine George, residing in Trenton, New Jersey, and to her heirs, the property in dispute, in trust for his wife Maria Rigler, and her heirs for ever, to the sole and separate use of the said Maria Rigler, and her heirs, and not to be in any way liable to the future control, debts, or liabilities of her present or any future husband. The deed was acknowledged by Henry Rigler, and Catharine George, on the 8th January, 1833, before the mayor of the city of Trenton, who subscribed his name, and affixed the seal of said city. The deed purported to be sealed and delivered in the presence of Thomas Gordon, (only one witness.)

On the 26th April, 1845, a petition was presented by Elizabeth Lanning, (one of the daughters of the *cestui que trust*, named in the deed,) as a party directly interested, setting forth that the trustee was unable from ill health to attend to the duties of her appointment, and praying the court to appoint some one in her place, to prevent a failure of the trust.

On the 26th April, 1845, a citation issued to the trustee, who filed an answer, admitting the allegations in the petition.

On the 17th May, 1845, the Court of Common Pleas appointed John Cloud trustee, from whom no security was required, notice having been given to Henry Rigler, and he appearing by counsel.

In June following, the new trustee, Cloud, brought this suit to recover, on behalf of Anna Maria Rigler and Elizabeth Lanning, the premises named in the deed of trust. Henry Rigler, the defendant, was the grantor in the deed.

On the trial, the plaintiff's counsel gave in evidence the petition to the Common Pleas, and the appointment of Cloud, and then offered the deed of trust, recorded August 5, 1834, in Philadelphia county. The deed was objected to, because there is but one witness to it; because it was not properly acknowledged or proved according to law, to admit it to record. It being contended that the 4th section of the act of 28th May, 1715, requires that deeds made out of the State be *proved by one or more of the witnesses*, and that the 15th section of the act of 16th April, 1840, applies to deeds by husband and wife; and, further, that the recording was an unofficial act, and that the deed could not be given in evidence without proof of its execution.

The deed was admitted. Admission excepted to. On the part of defendant, evidence was given, that Maria Rigler, the wife of Henry Rigler, died in 1839, and that the defendant has continued in the possession of the property and of the deed of trust.

The court charged the jury, that the plaintiff could recover as

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trustee, although he has given no surety; that proof of delivery of the deed was necessary, and that the *acknowledgment* by the grantor is *prima facie* evidence of it; that this may be rebutted, but the possession of the deed and the property is no evidence to be left to the jury, that the deed was not delivered to Catharine George; and that Mary Rigler, the wife, being dead, Henry Rigler, her husband, was not entitled to the property under the intestate laws; that their verdict should be for the plaintiff; that there was no fact to be left to the jury; that the deed was legally proved, and that *one* subscribing witness to a deed was sufficient. Defendant's counsel excepted.

Error was assigned to the admission in evidence of the deed, and in the answers and charge of the judge.

W. L. Hirst, for plaintiff in error.—That the appointment of the trustee, was *nisi*, conditional upon his giving security: Act of 14th June, 1836, relating to assignees, section 26.

2. That the mere acknowledgment of a deed is not sufficient, if rebutted by the fact of continued possession of the land and of the deed by the donor. At least, it is for the jury to decide.

3. That the husband succeeds, under the intestate act of April 8, 1833, to the estate of his wife for life.

4. That the deed was not proved, and was void for want of two subscribing witnesses.

Rush, for defendant.—As to 1st point: that the act of 14th June, 1836, refers to assignees and trustees, for the benefit of creditors. The plaintiff below was appointed under the act of 14th April, 1828, to “prevent failure of trusts.”

As to 2d point, 1 *Ser.* § *R.* 72; 1 *Dal.* 63 and 93.

As to 3d point, as to the right of plaintiff to hold as tenant by curtesy: 4 *W. & Ser.* 95; 1 *Vesey* 298; *Co. Lit.* 29, a, ch. 4.

4th. That a deed is good without subscribing witnesses: 1 *Ser.* § *R.* 72. The act of 18th March, 1775, authorizes one witness; and the deed in this case is in accordance with its provisions.

The opinion of the court was delivered by

COULTER, J.—Rigler has not the shadow of interest as tenant by the curtesy. The clause in the deed made by him to Catharine George, in trust for his wife, effectually shuts him out. That clause is as follows: “To the use and benefit of Maria Rigler, (wife of the said Henry Rigler,) and her heirs for ever, so that the same shall not be subject, in any wise, to the *future control*, debts, or liabilities of her present or any future husband.” It conveys an estate for her sole and separate use, free and clear of

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all claims, incidents, or liabilities consequent upon the marital state.

This case is not within the class which require trustees to give security in court, under the act of 14th June, 1836. The original appointment of trustee is made by the grantor of the estate, and not by the fiat of the law. In certain contingencies, every trustee may be compelled to give security, or be removed from his office.

Cloud, the present trustee, was appointed, merely because Catharine George, through age and other circumstances, had become incapable of discharging the trust. Neither the original appointment, nor the appointment of Cloud by the court, was void for want of surety. The crowning fact, in the execution of a deed, is its delivery. But it is not necessary to prove the actual manual investiture. The delivery may be inferred or presumed from circumstances. Thus, the signing, attested by witnesses, the acknowledgment by the grantor, and the recording of the deed have been considered full *prima facie* evidence of delivery. All these circumstances were present in this case. But it is contended that the acknowledgment was made out of the State, before the Mayor of Trenton, in New Jersey, and duly certified by him, and recorded, where the land lies, in Philadelphia county.

It is to be observed that it is the person who made the deed, the grantor, and the person who acknowledged it, who now, after a period of some fifteen years, objects to the acknowledgment as insufficient. It is, however, good and sufficient to protect the heirs of the wife in the estate, as against the grantor. The question might have been somewhat different between a subsequent alienee for value, before the death of Mrs. Rigler, the first alienee. I do not, however, say that it would. My opinion is, that this acknowledgment is fully covered by the act of 23d March, 1819. It is against the spirit and genius of our government to extend nice technical objections to the acts of magistrates and other functionaries of the law, who are called periodically, from the mass of the people, to discharge such duties, without previous legal learning or experience, and thereby disturb estates long settled and purchased for full value, and thus re-vest the estate in the hands of the original vendor by a legal quirk. But the legislature have expressly validated deeds defectively acknowledged by husband and wife in other States, so as to divest their estates retrospectively, by the fifteenth section of the act of 1840. And the words of that section are so very general, that they might be interpreted to include this case, which was a deed from a husband to a trustee for the benefit of the wife. But the great and primary object of recording deeds is to give notice. And how can the plaintiff in this suit allege, in a court of justice, that he had no notice, when he executed the deed himself, and selected the officer before whom he chose to acknowledge it. To allow the success of such a scheme

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would be to give effect, knowingly, to fraud, deceit and chicanery. The Mayor of Trenton had authority to receive proof of the deed by one of the subscribing witnesses, and to certify it for probate. Here he received the open acknowledgment of the parties that they executed the instrument, and he duly certifies that fact. I hold *that*, under the circumstances, to be more than equivalent to the testimony of one of the subscribing witnesses, and a substantial compliance with the act, as against the grantor. No subsequent alienee is present here, alleging that he had not notice. But the whole scope and spirit of the legislation, of modern years, discountenances these formal objections to record of deeds long acquiesced in. And so do the decisions of this court. If a substantial defect can be pointed out, which reaches the merit and justice of the case, it will be attended to. But the security of estates, the tranquillity of society, and the public good require that objections, merely formal, should be disregarded.

The remaining objection, to wit, that there was only one witness to the deed, is of no account, and requires no notice.

Judgment affirmed.

Chapman *versus* Calder.

Though in an ordinary action for slander or libel, defendant cannot give evidence under the general issue alone, of facts tending to prove the charges, yet, in the case of a *privileged communication*, the rule is different; probable cause is in bar of the suit; and in an action for a libel for such a communication, such evidence is admissible under the general issue alone for the purpose of showing probable cause for the complaint.

ERROR to the Common Pleas of *Wayne county*.

This was an action on the case, by Calder against Chapman, for a libel. The parties were ministers in the Methodist Episcopal Church, and the charges were contained in a communication addressed by Chapman to the Rev. R. Scott, preacher in Chenango and Deposit Circuits, which charged Calder with unchristianlike and immoral conduct, first, in using means to get one or two roads through the improvements belonging to said Chapman, and for Sabbath-breaking, &c.; second, for hindering Chapman from floating logs down the Equinunk Creek, &c.; third, for falsehood, &c.; fourth, for falsehood under oath, in a suit between Calder and Kellam, in 1844; secondly, in a suit he pettifogged before Esq. Jones, against Chapman, in favor of A. Lloyd, in the year 1844.

It appeared that the charges were heard before an ecclesiastical tribunal, before which Chapman appeared, but the committee reported that the charges were not sustained.

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In this action on the case, the plea was not guilty.

After a variety of evidence had been given, the defendant's counsel offered to read in evidence to the jury, the depositions of Archibald C. Niven and John Roosa, taken on commission.

To this evidence, the counsel for the plaintiff objected: first, because it is evidence in justification; second, because no notice of special matters had been given according to the sixty-second rule of court, and the notice heretofore given in evidence.

The defendant alleges that he offers the evidence, not to justify, but to repel the allegations of malice. The court admitted so much of the evidence as went to show that the plaintiff was a witness in a certain case, but rejected the residue of the evidence offered as tending to show a justification which was not pleaded; to which the counsel for the plaintiff excepted. See opinion of ROGERS, J.

After other evidence had been given, defendant's counsel offered to prove by Abram Dillon, jun., that at the suit of Lloyd v. Chapman before Esq. Jones, Calder appeared as pettifogger for Lloyd, and that he attempted to show, by two or three witnesses, that a line of the road ran through a cornfield, in which he failed; and that he then affirmed himself and was sworn, and stated that a line taken ten or fifteen to twenty rods from the gate-post would pass through the field; and that the witness afterwards measured the distance, and found that such a line at ten rods would miss the field eight feet, and at twenty rods would miss it some ten rods. To this evidence the counsel for the plaintiff objected. The court sustained the objection and rejected the evidence, to which counsel for the defendant excepted.

This was the *second* bill of exceptions.

After other evidence had been received, the plaintiff's counsel, as rebutting evidence, called Paul S. Preston, as a witness, and offered to prove by him what rumors were in circulation in relation to the plaintiff's swearing false before Jones. To this evidence, the counsel for the defendant objected. The court overruled the objection and admitted the evidence, to which the counsel for the defendant excepted.

JESSUP, J., charged, *inter alia*:

The charges exhibited by the defendant against the plaintiff, upon their face are libellous; but being originated by a proceeding in discipline between these members of the same church, according to the course of discipline in that church, the defendant is protected therein, unless they were originated and published from malicious motives. * * *

The plea is not guilty. There is no allegation of the truth of the charges on the record or before the court, and in order to settle the right of the plaintiff, the jury have to decide the question of express malice in bringing forward the charges. The charges are here to be taken as false, because the plaintiff was acquitted before

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the church tribunal, and the defendant does not allege their truth. The jury, in deciding the question of malice, will consider all the evidence which tends to show the motives by which the prosecution in the church was originated, &c.

Defendant's counsel excepted to the charge.

September 15, 1848, verdict for plaintiff for \$200.

The following errors were assigned:

1. The court erred in telling the jury, "the charges are *here* to be taken as false, because the plaintiff was acquitted before the church tribunal, and the defendant does not allege their truth."

2. The court erred in rejecting the deposition of John Roosa, taken on commission to the State of New York, as contained in the first bill of exceptions.

3. The court erred in rejecting the offer contained in the second bill of exceptions.

4. The court erred in admitting the evidence of Paul S. Preston, as contained in third bill.

The case was argued by *Wm. H. Dimmick* and *J. M. Porter*, for plaintiff in error; and by *G. Mallery*, for defendant in error.

The opinion of the court was delivered, Dec. 27, 1850, by

ROGERS, J.—This is an action on the case, for a libel charging plaintiff with violence, fraud and perjury. Plea, not guilty. The paper, containing the libel, was addressed to the Rev. R. Scott, preacher in the Methodist church in Chenango and Deposit circuits, stating the charge and accusations against the defendant. On these charges there was a trial before an ecclesiastical court, regularly constituted, according to the rules and discipline of the church, which resulted in a report that the charges were not sustained. In 5 *W. & Ser.* 364, *Petrie v. Rose*, it is ruled that 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 to be 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 justification, even though he expressly disavows justification.

To the same point is *Kay v. Fredrigal*, 3 *Barr* 21, which recognises *Petrie v. Rose*, and rules that where the evidence goes to prove the truth of words charged as slanderous, it cannot be received, unless with a plea of justification.

In 9 *Barr* 313, *Minesinger v. Kerr*, it is said that, in Pennsylvania, it is now settled that, without the plea of justification, it is incompetent to a defendant in slander, to give evidence of particular facts which induced him to believe the charge true at the time it was made, if such facts are of a nature to establish the accusation, or may form links in a chain of circumstantial testimony

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tending to fasten guilt on the plaintiff. Justice Bell gives the true reason for the rule. You shall not, says the law, attack indirectly, if you fear to do it directly, by placing on the record an avowal of your intent, and thus put him on his guard. And in *Uddegrove v. Zimmerman*, 1 *Harris* 619, the same point is ruled. In an action of slander, as is there decided, circumstances which do not amount to a justification, and from which the jury could not infer or presume that the party charged was guilty of the offence, may be given in evidence, on the plea of not guilty, in mitigation of damages, because they weaken the proof of malice. But where they lead directly toward the proof of guilt, they cannot be given in evidence on that plea.

If, then, this was a case of an ordinary action of slander or libel, (on the authority of the cases cited,) there would be no difficulty in supporting the decision of the court, excluding the evidence contained in the first and second bill of exceptions. But this is the case of a privileged communication. The charges which are the subject-matter of complaint, were addressed to, and acted upon in the ecclesiastical council, or forum, to which they were addressed. And the question is, whether the same rules are applicable, in such a state of facts, as in ordinary actions of slander or libel.

In one respect, the two classes of cases, which must be kept separate and distinct, are essentially different. In an ordinary action for a libel, probable cause although receivable in mitigation of damages, is not in bar of the action. Nothing but proof of the truth of the charge, under a plea of justification, is an answer to the suit. Whereas, in the case of a privileged communication, which this undoubtedly is, probable cause is in bar of the suit, as fully appears in the cases hereafter cited. This principle is expressly recognised and settled in *Gray v. Pentland*, 2 *Ser. & R.* 23. That was the case of an accusation preferred to the governor against a person in office. It was the case of a privileged communication. It was held that the defendant was answerable, if the charges did not originate in malice, and without probable cause. If there were probable cause, no action could be sustained, notwithstanding the charges were untrue. Justice YEATES says he has no doubt, that one, who, maliciously, wantonly, and without probable cause, asperses the character of a public officer, is liable. BRACKENRIDGE, J., says, the defendant must either prove the truth, or show reasonable ground or probable cause for their truth. TILGHMAN, C. J., says, any thing which satisfies the jury that the proceedings did not originate in malice, and without probable cause, is sufficient to excuse him.

The law was so laid down in the case of *McMillan v. Birch*, 1 *Bin.* 178, where the words for which plaintiff brought his action were spoken by the defendant in the usual course of proceedings in the religious society of which they were both members.

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Cases of privileged communications are to be treated in the same manner as actions for malicious prosecution. The same rule would seem to be applicable to both, as strictly in analogy to each other. Indeed, in the case under consideration, but for a reason, perhaps technical, an action for a malicious prosecution would be the appropriate remedy. But such an action could not be sustained, because the religious society, before whose tribunal the trial was had, being a voluntary association, their courts are not recognized, and consequently such an action would not lie. Hence the necessity for bringing an action for libel in the common form. That it ought to be viewed in the light of a malicious prosecution, would seem to be the opinion of Justice BRACKENRIDGE, in *Gray v. Pentland*, already cited. And to the same purport is *Howard v. Thompson*, 21 *Wendell* 319. If, then, the rules applicable to that action apply here, it would seem to be clear that the evidence, although tending to prove the truth of the charge, would be admissible under the plea of not guilty.

In that action, all the defendant has to do is to show probable cause and want of malice. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence of which he stands charged: 3 *W. C. C. R.* 31; *Travis v. Smith*, 1 *Barr* 234; 8 *Watts* 241, *Herman v. Brookerhoff*. The issue is whether the defendant had probable cause. His belief is not enough. Nor is it of any consequence that he was actuated by malice, as it is well settled that, if he had probable cause, it is an answer to the action: *Winebiddle v. Porterfield*, 9 *Barr* 187; *Travis v. Smith*, 1 *Barr* 234. That the evidence offered tends to prove that the defendant was guilty of the charge in that action, would be no objection to its competency; for, if true, and he knows it to be so, then he was warranted in believing that the person accused is guilty of the offence with which he stands charged. There would be no necessity, as in cases of libel or slander, to put in the plea of justification, so as to warrant the introduction of evidence tending to prove the guilt of the accused. In all cases of libel, *prima facie* excusable on account of the occasion of uttering or publishing it, all the facts and circumstances of the case may be given in evidence by the defendant, to show probable ground, and to rebut the idea of malice. *Cook on Defamation*, Law Library, vol. 43, p. 38-39; *Greenleaf on Ev.*, sec. 421; *Starkie on Slander* 55; 5 *Barn. & Ald.* 642.

In *Pattison v. Jones*, 8 *Barn & Cres.* 578, 15 *Eng. C. L. R.* 306, LITLEDAL, J., says that in a privileged communication it is not necessary for the defendant to plead a justification; he may make his defence on the general issue, and give evidence to satisfy the jury that, under the circumstances of the case, it was a *bona*

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fide communication. To the point I also refer to *O'Donaghue v. McGovern*, 23 *Wend.* 26.

The offer in the first bill was to prove what had taken place before the arbitration or reference in New York. This evidence tended to negative the allegation of malice and to show probable cause. Roosa and Niven proved that Calder, the plaintiff, had sworn to one state of facts, whilst two or more witnesses swore differently. Indeed it was not an offer to prove the truth of the charge, but to prove what had transpired before the complaint was exhibited to the preacher in charge, and the foundation the defendant had for making that charge in the ecclesiastical tribunal.

It is also right to say that we see nothing in the rule of court on which the exclusion of the evidence can be rested. *Buehler v. Stoeber*, 2 *Whar.* 813, disposes of that point. Nor does it appear to have been ruled on that exception. The same reasoning applies to both bills, which were ruled on the exception that the evidence was not admissible except under the plea of justification.

The rule we take to be this, that evidence, although true, or tending to prove the truth of the charges, in a privileged communication, may be admitted under the general issue, for the purpose of showing probable cause for the complaint, and rebutting any presumption of malice. For these purposes, we think that the court erred in excluding the evidence contained in the first and second bills of exceptions.

We see no error in the admission of the evidence contained in the *third* bill. It was certainly competent for the plaintiff to show by whom the rumors were put in circulation, whether by the friends of the plaintiff or the defendant.

The exception to the charge is rather a cavil at the word false, than a principle. The meaning of the court is, that the plaintiff having been acquitted by the ecclesiastical tribunal, the jury are to take it that he is innocent of the charges preferred against him, so as to throw the onus of proof on the defendant that he had probable cause for the accusation, and was not actuated by malice.

Judgment reversed, and *venire de novo* awarded.

Davis' Appeal.

Where in the case of a sale for the payment of debts made under an order of the Orphans' Court, which did not prescribe the terms of sale, the administrator reported a sale in gross for a particular sum, and afterwards he settled an administration account, in which he charged himself with the nett balance of the proceeds of the sale: in the next year he petitioned for a review as to the charge for portions of the purchase-money outstanding, which the Orphans' Court refused to grant: on appeal from this decree, it was *held* that he was chargeable with the amount of the sale before the same had been received by him, notwithstanding the existence of an usage in the county to sell for part cash and part on credit.

APPEAL from the decree of the Orphans' Court of *Bucks county*.

An order of sale had been granted to John Davis, administrator of the estate of Thomas Purdy, deceased, to sell certain real estate for the payment of debts. The administrator reported that he exposed the lands and premises to public sale, and sold the same for the sum of \$65.25 per acre, amounting in the whole to the sum of \$5793.79, which sale he prays may be confirmed.

In 1846 he settled an administration account, in which he stated himself to be, in 1845, Dr. real estate, 88 acres, &c., of land, sold &c., at \$65.25 per acre, amounting to \$5793, viz. April 1, received cash, first payment, being one-third of the purchase-money,—and one-third payable in one year, with interest; the other third payable in two years, with interest yearly,—and 1846, April 1, one year's interest on the two last sums.

He asked credit for payments on bonds, and for commissions, amounting to \$1839.03, leaving, 1846, April 1, balance in administrator's hands of \$4186.48.

On the 20th Sept. 1847, his petition was filed, in which it was stated that the above account had been confirmed in Sept. 1846, but that there were errors in it, consisting in his being charged with the two last yearly payments; and he asked for a rehearing and review of that much of the account.

The court appointed an auditor, before whom testimony was given as to the usage in Bucks county being not to prescribe the terms of sale in the order, but to leave them to the direction of the executor or administrator; and that sales were usually made for part cash, and the residue on credit.

The auditor reported, *inter alia*, that on examining the records of the Orphans' Court he did not find that any uniform practice existed on the subject, but that in a majority of cases examined by him, reports were made without stating the conditions on which the property had been sold; and he expressed the opinion that the administrator, having sold the real estate for the payment of debts, and having made report of sale without specifying any conditions in the return, became liable to account as fully as

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if the whole of the purchase-money had been paid in cash on delivery of the deed for the property. The court, KRAUSE, Pres't, confirmed the report of the auditor.

The case was argued by *Fox* and *Miller*, for appellant; and by *Ross*, for appellee.

The opinion of the court was delivered by

COULTER, J.—The decree of the court below must be affirmed. The object of the legislature in providing that the Orphans' Court should decree the sale of a decedent's real estate for the purpose of paying the debts of the deceased, was to bring the assets under the management and within the distribution of an officer subject to the supervision of the Orphans' Court, the tribunal, in our system, peculiarly adapted and fitted to that purpose, and at the same time to save costs to the estate. It is a mistaken notion to suppose that the object was to effect a sale on time, so that the estate might bring more money. That object could have been attained by a sheriff's sale, as readily as by an Orphans' Court sale.

I do not question the right of the Orphans' Court to decree a sale on time as to part of the estate, if it will more than pay the debts. Such part as will probably remain for distribution is within the discretion of the court as to the time of payment. But for such part as is necessary to pay the debts of the deceased, I know of no law that authorizes the court to postpone the creditor indefinitely or *ad libitum*. The statute requires the administrator to exhibit on oath, a statement of the debts of deceased and his available personal assets, before the court, previous to their ordering a sale of the realty. And the court ought to be careful to order or decree a sale of so much only as will pay the debts of the decedent for the conversion of real estate of minors or distributees, by the representatives of the deceased, is not favored by the law. But to delegate this high discretion of postponing creditors, according to the discretion of every sort of administrator, would be against the policy of the State and the security of creditors. I take it, from the depositions furnished with the record, that there must have been in Bucks county a very extensive and a very evil practice for administrators to sell just on what terms as to time they pleased. It is time that it should be corrected. The Orphans' Court, it would appear, knew nothing about the terms of sale. They made the order of sale, and left the rest to the administrator, who returned his sale as in gross, although made for payments. And there the matter ended. In all such cases, no matter what the custom was, he was liable for the whole sum, and amenable to account for it to the creditors and others interested, through the Orphans' Court, as soon as the sale was approved. But from the report of the auditor, the practice in the county was not uniform, each administrator,

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perhaps, consulting his own discretion; but it appears that it was nearly uniform, neither to prescribe the terms of sale in the order, nor to state them in the return. It is a little singular, that the proceedings of the Orphans' Court, upon which so many titles hang, and on which so many interests depend, are conducted, in many places, with almost reckless carelessness. As the complexity of business and the intricacy of estates increase with the great advancement of population and the value of property, it behooves those tribunals to be especially careful and vigilant in the conduct of their business and the management of their records. The administrator, having made a sale in this case, without any terms being prescribed by the court, and having made return of a sale in gross, for a particular sum, he was legally chargeable with that sum, when the sale was approved, irrespective of any custom in that county. The estates of decedents, and the interests of creditors and distributees are guarded, protected, and supervised by the law itself, and a wise discretion, to a certain extent, in the courts; but are nowhere subject to the will of the administrator, or to a local, obscure, and ill-defined custom of any particular locality. The administrator, having taken the responsibility, must abide it.

The decree charging him with the whole amount of the sale, is affirmed.

Hellings *versus* Wright.

1. Amendments in the pleadings are allowable at any time during the trial, if the ends of justice will thereby be promoted, and this must be left, in a great measure, to the discretion of the court.

2. Where an owner of land left the possession, and a trespasser entered and cultivated the land, and afterwards the land was sold on a judgment against the owner obtained after the grain was sown by the trespasser: the purchaser issued a landlord's warrant under which the grain was levied on, and the trespasser replevied, the purchaser avowed for rent in arrear, and the trespasser plead *non tenuit*, &c.: *Held*, that the purchaser was not estopped from pleading *property*, and claiming as *purchaser* the grain levied upon.

ERROR to the Common Pleas of *Bucks county*.

This was an action of replevin, brought by Hellings against Wright, to recover the value of ten acres of wheat and ten acres of rye, which was seized under a landlord's warrant, issued on the 1st April, 1847, by Wright, for rent which was alleged to be due him by Hellings.

In 1842, William Osmond was the owner of a tract of land in Bucks county. In the spring of 1842, Osmond left the property, and Hellings moved on the land and farmed it, so far as it appeared in evidence in this case, without the consent of Osmond. On the

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5th of May, 1846, a judgment was obtained against Osmond by the administrators of James H. Wright, on which execution was issued and the land sold to Robert Wright, the defendant, on October 21, 1846. A deed was acknowledged by the sheriff to him, November 9, 1846. Hellings left the property some time in the last of March, 1847, having sowed ten acres of wheat and ten acres of rye the previous autumn. On April 1, 1847, this grain was levied upon under a landlord's warrant issued by Robert Wright, and this action of replevin was brought by Hellings to recover the value of the wheat and rye, and damages, &c. The defendant avowed for rent in arrear, plaintiff replied *non tenuit* and no rent in arrear. Upon the trial, after the jury were sworn, and after the plaintiff had closed his case, but before the witnesses were discharged, the defendant added the plea of property, by leave of the court, the plaintiff objecting.

On the part of the plaintiff, the court was requested to charge the jury,

1. That there is no evidence in this cause that the plaintiff was tenant to the defendant, nor that there was any rent reserved to any person whatever.

2. That under the evidence in the cause, the defendant had no right to distrain upon the goods of the plaintiff, and that such distress was illegal and void.

3. That the plaintiff must recover, because the defendant has not alleged in his avowry, nor given any evidence to the jury, that he had demised to the plaintiff the tract of land upon which the property, for which this replevin was brought, was distrained, at a certain fixed rent, for a certain fixed period of time, and that the pretended rent, for which the said distress was made, was due and payable before the distress was made.

KRAUSE, President J., instructed the jury that the plaintiff's claim in this action cannot be resisted by the defendant *on the ground of his landlord's warrant*, since neither landlord, tenant, nor rent is proved in the case. But defendant has added the plea of property, by leave of the court, under objection, the witnesses not having been discharged. And the question is, whether this grain was his property when he took it to himself and deprived plaintiff of it? On this point, the court instructs the jury that the sheriff's deed, conveying Osmond's title to defendant, also conveyed to him the growing grain, under the evidence, if it is believed by the jury, as against the plaintiff, who shows no title whatever, and entered as a trespasser against the owner. And one so entering is not entitled to take the growing crop, but the owner may lawfully appropriate it to himself: 2 *Com. Dig.* 138; 1 *Tomlin's Law Dictionary*, 630. And therefore, although there is no defence by virtue of the landlord's warrant of distress, there is a full one on this ground, if the jury believe the testimony. The plaintiff has

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submitted certain points. The court affirm the first and the second. The third states the facts truly; but they do not entitle the plaintiff to recover if the jury find that defendant bought the title of the owner of the land at sheriff's sale as stated, and plaintiff had taken possession of the premises, and sowed the grain in question, without authority from Osmond or Wright's administrators.

Verdict was rendered for defendant.

Error was assigned to the permission to defendant to add the plea of property after the jury were sworn and the plaintiff had closed his case; and to the parts of the charge hereinbefore stated.

The case was argued by *E. J. Fox* and *Roberts*, for plaintiff in error; and by *Ross*, for defendant.

The opinion of the court was delivered by

COULTER, J.—The sheriff's deed conveyed to Wright all the title of Osmond, who, it appears, and the fact is not disputed, was the owner of the land, and the grain growing on the land at the time of the sale and acknowledgment of the deed, unless it had been sown by a tenant under a lease from Osmond. The grain, it seems, was sown by Hellings, who went on the land after Osmond left it, without his permission or any privity whatever between them. If he had been the tenant of Osmond, Wright would have occupied the place of the landlord in virtue of the sale. Wright, supposing that Hellings was the tenant of Osmond, issued a landlord's warrant and levied on the grain. Hellings issued a writ of replevin, and to the avowry of Wright he replied *non tenuit*, &c. On the trial, and after Hellings had closed his case, Wright, by permission of the court, and before the witnesses were discharged, added the plea of property; and this is assigned as the first error. But there was no error in it. Amendments in the pleadings are allowable at any time during the trial, if the ends of justice will thereby be promoted; the determination of which contingency must be left, in a great measure, to the discretion of the court trying the cause. If either party is taken by surprise by such amendment, he is entitled to a continuance of the cause; and if Hellings had asked for a continuance, the court would no doubt have granted it. As he did not choose to take that course, he must abide by the amendment.

It is very clear that Wright could not recover on his avowry for rent in arrear, because the facts in evidence show that there was no tenancy, but that Hellings entered without leave or license from anybody, and, of course, as a mere trespasser and intruder. But he contends now that Wright was bound by his election to treat him as a tenant, and that he cannot now treat him in any other character. But Hellings denied on record that he was a tenant,

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and by the evidence he adduced. He made his election therefore, as well as Wright. Hellings denied the tenancy, which was fully made out by the evidence; and Wright takes him at his word; what right therefore has he to complain? If he was not a tenant, the grain all belonged, by virtue of the sheriff's sale, to Wright. And if Wright was willing to take the milder course, and accept the landlord's share of the grain, if permitted to do so, and the opposite party would not allow him to do it, why should he not be permitted to accept the true state of the case, as asserted and disclosed by Hellings himself, and claim his just right according to the truth of the case? There is no reason against either, in law or conscience. And if the plaintiff in error was permitted to succeed, it would be the mere triumph of a juggle. The law is not so imbecile, nor so much the victim of mere words. In replevin both parties are actors. And when the plaintiff Hellings maintained his plea of *non tenuit*, his evidence not only established that he had no property in the grain himself, but that it belonged to Wright, who was entitled to it under his plea of property. Neither equity nor law favors the kind of estoppel that is attempted here against Wright. He did no act whatever, either on record or *in pais*, which was injurious to Hellings. He only mistook or did not know the full extent of his rights; and the acts and testimony of his adversary put him in possession of that knowledge; and the proceedings of the plaintiff in replevin gave him full opportunity of availing himself of the justice and law of his case.

Judgment affirmed.

Schoneman versus Fegley.

1. In proving notice to an endorser of demand and refusal which was sent *by mail*, it should be distinctly proved where the notice was sent, and when.

2. The expression of an opinion by the court as to the insufficiency of evidence, which is, however, referred to the jury, is not error.

3. The act of 5th April, 1849, as to demand of payment and acceptance of promissory notes and notice to parties, does not apply to notes which had matured and as to which the rights of the parties had become fixed before its passage.

4. Where the answer of a witness works no injury, the court will not reverse on account of the question being allowed to be put.

* { 5. When a witness disclaimed knowledge of the fact whether a receipt had been given by him for a note, the fact could not be proved by evidence of a general practice on his part. *

ERROR to the Common Pleas of *Northampton county*.

This was an action on the case, brought by Schoneman & Elfelt against Fegley & Goff, to Nov. term, 1848, to recover a balance on book account, May 5, 1841, of \$186.95, with interest, against defendants.

See ante - this case commented on.

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The case was in this court before, and is reported: see 7 *Barr* 438.

Plaintiffs showed their book of original entries, which, after crediting Fegley & Goff with two notes on other persons, one for \$156, and one for \$156.38, left a balance of \$185.95. Elfelt, one of the plaintiffs, being under examination, said, in relation to a note on J. & G. C. Vanhorn for \$200, it was received as all promissory notes are, which, when paid, would be in full. The amount of this note was not received by plaintiffs at maturity. It was protested. It has not been paid since. I think this note was received by the firm in June, 1841. The note was received in consideration for a settlement for those goods, the charges for which have been read in evidence.

Question by defendants' counsel:—Is there not a credit for that note in the books of Schoneman & Elfelt? Objected to, because the contents of an entry in a book cannot be given in evidence without notice to produce, and neglect or refusal—and because it is not a cross-examination. The court overruled the objection, and plaintiffs' counsel excepted. The witness said: If this note is credited, I have no recollection of it. I presume it was, although I have not seen the account for a number of years. He afterwards said, I do not know whether I gave a receipt for the amount of this note, or not.

Question by plaintiffs' counsel:—*Did you usually give receipts for notes received?* Objected to: objection sustained, and plaintiffs' counsel excepted. This was the second bill.

He further said there were no goods bought when this note was received.

The note in question was a note of J. & G. C. Van Horn, dated

New Hope, June 11th, 1841.

Six months after date, we or either of us promise to pay to the order of Fegley & Goff, two hundred dollars, at the New Hope Delaware Bridge Company, in Lambertsville, without defalcation, for value received.

J. & G. C. VAN HORN.

Endorsed, *Fegley & Goff*—*Schoneman & Elfelt*.

Notarial certificate of a notary in New Jersey, as to the protest of the note on the 14th Dec. 1841, was received in evidence. It stated that he exhibited the note to Jonathan Fisk, cashier of the New Hope Delaware Bridge Company, and demanded payment, and received for answer that the drawer had no funds in his hands to pay said note, "of which I notified the endorsers thereof by mail."

It was testified that Fegley & Goff did business at Port Jenkins, in Luzerne county—that Whites Haven was the nearest post-office—that during the year 1841, the firm dissolved and left there—that Fegley went to Mauch Chunk, and Goff remained.

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The deposition of the notary was taken on commission, and he stated that he believed he sent the notice of protest to Fegley & Goff by mail, and that he believed he deposited the letter in the post office himself, and that he could not recollect the post-office to which he directed the letter, nor does it appear from an examination of the post-office transcripts that any letter, directed to Fegley & Goff, was sent to Mauch Chunk or Whites Haven on the day of the date of the protest, or for one or two days thereafter.

JONES, J., charged, *inter alia*, that if the note was endorsed to plaintiffs in absolute satisfaction, they could not recover *on the account*; and if received conditionally, plaintiffs were bound to show demand and notice of non-payment. The notary in this case is a foreign notary, and his protest is not evidence either of demand at the place designated for payment by the maker of the note, or of his own notarial act of sending notice of non-payment to the endorsers. These facts must be proved by other evidence. * * The certificate cannot be used to enlarge that other evidence.

The notary, it seems to us, does not say in his deposition, that he made demand of payment of this note at the place mentioned on its face, at least not in that direct way it is wished he had done—though you will judge for yourselves as to that, &c. &c. Direct personal notice is not pretended; it is notice by mail that is alleged. Notice of this kind should appear with some degree of certainty in the proof of it. We should be informed positively where the notice was sent to, and when it was sent. Evidence of the deposit of a written notice in some post-office, to some other unascertained post-office, say the Supreme Court, 7 Barr 438, is too loose and unsatisfactory to satisfy the rule, which requires great certainty and distinctness of proof, to charge an endorser on the foot of a post-office notice. Where was the notice in this case sent? There is nothing in the case to satisfy us as to that. Now, if the plaintiffs fail in either of these particulars—proof of demand or of notice—your verdict must be for the defendants. If you are satisfied that the proof establishes notice and demand, you will then consider how much the plaintiffs are entitled to recover.

Verdict for defendants.

It was assigned for error:

1. The court erred in admitting the evidence referred to in plaintiffs' first bill of exceptions.
2. The court erred in rejecting the evidence referred to in plaintiffs' second bill of exceptions.
3. The court erred in their charge to the jury: In what they say on the subject of the protest of the note and its evidence in the cause. Also, in what they say in regard to the notice of non-payment. Also, in effect and substance, in taking the facts from the jury, and charging that plaintiffs could not recover for goods

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sold and delivered, for failure of evidence in regard to the notice and protest, as well as demand of payment.

The case was argued by *Porter*, with whom was *Jones*, for plaintiffs in error.—As to the matter of demand and notice, reference was made to 4 *Watts* 308–316; *Andrews* 187, *Smith v. Wilson*; 7 *Taunton* 312; 4 *W. & Ser.* 505; 7 *Ser. & R.* 324; 7 *Barr* 436; 3 *Ohio* 319; 1 *Pickering* 401; 2 *Law Lib.* 152; Act of 5th April, 1849; *Pamph. Laws* of 1849, p. 436.

McCartney and *Brown*, for defendants.—As to demand and notice, reference was made to 7 *Barr* 483; *Story on Prom. Notes*, sec. 117; 4 *Watts* 315; *Andrews* 187, *Smith v. Wilson*; *Chitty on Con.* 768; *Story on Con.* 979.

The opinion of the court was delivered by

BELL, J.—The former investigation of this cause resulted in the application of certain principles, which, in effect reduced the contest to the simple question whether the plaintiffs, as holders of the note endorsed by the defendants, had been so far negligent as to discharge the latter from their original liability? This was the single ground upon which the case was made to rest at the second trial. In treating it, the court below, as it appears to us, very fairly instructed the jury in accordance with the prior adjudication here. The duties of demand and notice incumbent on the plaintiffs were clearly pointed out, and the evidence tending to show performance or the contrary was properly referred to the jury. It is true, this reference was attended by instructions on the subject of the certainty and distinctness of the required proof, and an expressed opinion of the value of the proof given by the plaintiff. But those instructions are in entire harmony with ascertained rules, as is proved by the cases cited on the argument, and it would not be difficult to show the opinion expressed is fully justified by the character of the evidence reviewed. Indeed, upon this head, less was said in disparagement of the plaintiff's case than its defects would seem to warrant. It appears to me, that without at all jeopardizing the truth, the jury might have been told there was not sufficient evidence of demand and notice of non-payment. Were this, however, otherwise, it would furnish no cause for reversing the judgment, since no attempt was made to impose on the jury the impressions of the judge, as a binding direction. In this respect they were left free in the exercise of their judgments, under the repeated assurance that to them alone appertained the decision of the disputed facts. We perceive no error in the charge.

It is very clear, too, that the act of April 5, 1849, cannot legitimately affect this branch of the controversy. It was enacted long after the institution of this action, and consequently, after

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the respective rights of the parties were ascertained and fixed. It is therefore powerless to create an interest in the subject of the action, which did not exist before, or to impose a liability which the law did not then recognise. Nor did the legislature intend otherwise. By its very terms, the statute was to operate prospectively. No retroactive force was conferred upon it, nor any attempt made to confer it. Collecting its character from its language, we find it to be accordant, in this particular, with the dictates of sound policy and abstract justice.

There is no merit in the exceptions to evidence. The answer returned by the witness to the first question objected against, worked no injury. It is simply, that he had no recollection on the subject. Besides, the court, in its charge, gave to the plaintiffs the benefit of their averment that the note had been accepted conditionally. Upon this concession the cause was tried, and, therefore, no inconvenience was inflicted by the question complained of.

As to the second bill, it is sufficient to say, the fact sought to be established could not be proved by evidence of a general practice, after the witness had disclaimed knowledge in the particular instance. But this, too, is subject to the remark, that if an error was committed, it was cured by the concession just alluded to.

Judgment affirmed.

Crawford *versus* Boyer.

1. When premises, subject to a mortgage, which is the *first* lien, are sold under a junior judgment, the mortgagee, purchasing the premises, has no right to a deed from the sheriff, on crediting the amount of his bid in satisfaction of his mortgage, when there was no stipulation to that effect in the conditions of sale, or any such arrangement with the sheriff.

2. Want of approval by the court, of the inquisition of condemnation of real estate as provided for by the sixty-first section of the act of 16th June, 1836, relating to executions, is a mere irregularity, of which none but the defendant can take advantage, and he, only within a proper time.

3. If a purchaser of real estate has bid under a misapprehension as to his rights, his remedy is an application to the court to set aside the sale.

ERROR to the Common Pleas of *Montgomery county*.

This was an action of debt, brought by John Boyer, sheriff, against Andrew Crawford, to recover the difference between a first and second sale of a house and ground in Norristown. Joseph T. Dill had been the owner of the property. On the 17th October, 1844, Dill mortgaged this property to Andrew Crawford, the plaintiff in error, for \$1500, it being the first lien on the property. Dill raised various other sums of money, and gave judgments on this property, to secure the payment of the same, until the liens

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amounted to about \$3800, which it was supposed was about the value of the property. Whilden, one of the said judgment-creditors, issued process upon his judgment, amounting to \$700, by virtue of which the sheriff levied upon and sold the premises. At the sale, the said Crawford became the purchaser, at his bid of \$1500, and duly executed the conditions of sale, but afterwards refused to comply with the same, and filed exceptions to the sheriff's sale, which were dismissed by the court, when other process was issued and the property resold, at his risk. This suit was brought against him to recover the difference between the two sales.

It was prescribed, in the conditions of sale, that the purchaser was to pay fifty dollars, when the premises are struck off, and the remainder of the purchase-money at a time fixed. If he neglects or refuses to comply with the conditions of sale, the property will be resold, at his risk. Crawford signed the conditions of sale, acknowledging that the premises were struck off to him, and binding himself to pay the sum of \$1500 to Boyer, the sheriff. The property was returned as sold to Crawford, and conditions not complied with. The *venditioni exponas*, on which the premises were sold, was founded on a *fi. fa.*, to February term, 1848, under which the inquest found that the profits of the premises were not sufficient to pay the debts within seven years; but the finding of the inquest was not approved of by the court.

The sixty-first section of the act of 16th June, 1836, relating to executions, provides that, "If the inquest shall find that the clear profits of any real estate levied as aforesaid, will not be sufficient to satisfy, within seven years, the debt or damages in such execution, and the same shall be approved of by the court, the plaintiff in such writ may have a writ of *venditioni exponas*, to sell such real estate," &c.

Exceptions were filed to the sale, that the levy and inquisition were defective and not as required by law; that Crawford held a mortgage which was the first lien for \$1500, and bid that amount of it, in satisfaction of his mortgage, but that the sheriff refused to acknowledge a deed to him, unless he will pay that sum to the sheriff for the benefit of other creditors, which was contrary to his contract, as he understood it; and that the finding of the inquest had not been approved of by the court, as required by the act of 16th June, 1836.

The court dismissed the exceptions, as follows: "As to the exception of having bought subject to a mortgage, that falls under the rule of *caveat emptor*. The other exceptions none but the defendant in the execution can make.

The court instructed the jury that under the evidence, the plaintiff was entitled to recover the difference between the defendant's bid at the first sale and the price given for the land at the second.

Verdict for plaintiff for \$1627 debt, with six cents costs.

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Various errors were assigned; one of which was as to the overruling the exceptions to the sale; and another, as to the instruction above referred to.

Mulvany was for plaintiff in error.

Boyd, for defendant in error.

The opinion of the court was delivered by

BELL, J.—The leading question made by the plaintiff in error is, whether a mortgagee who purchases the mortgaged premises, under a younger judgment, for a sum not exceeding the amount secured by the mortgage, is entitled to pay the purchase-money by entering satisfaction upon the mortgage. As preliminary, a grave doubt has been suggested whether such an inquiry can be entertained in this action, founded, as it is, upon the total failure of the purchaser to comply with the conditions of sale? The allegation is that he wholly refused to abide by his contract; and there is no evidence that, at any time, he offered to do so, or any thing equivalent to it. It is said that had he wished to ascertain his rights and liabilities as purchasing mortgagee, the proper course would have been to pay the purchase-money into court, followed by an application to take it out in satisfaction of his mortgage, or possibly, by instituting a proceeding under the act of 20th April, 1846, relative to lien creditors becoming purchasers at sheriffs' sales. But instead of thus recognising and insisting on his purchase, the mortgagee repudiated and disclaimed it, in direct violation of his covenant, the stipulated penalty of which was a resale at his risk. How, then, it is asked, can the mortgagee, in this action to enforce the penalty, set up the existence of the mortgage as a defence even under an admission of his right to apply it in satisfaction, had the offer been properly made? I confess this query struck me as one difficult to answer, when it was first presented, and I am not yet satisfied that it rests on mistaken ground. Perhaps it might be answered that the risk to be hazarded by the mortgagee depends simply upon the contingency of a sum being bid, at the second sale, less than the amount of the mortgage; a contingency which has not happened in this instance, and consequently no damages have been suffered beyond the costs of the last sale. But I will not pause upon this proposition, since, under the view we take of this part of the defence, it is unnecessary to decide it. To avoid all merely technical difficulties, we prefer to rest the decision of the point upon a total denial of the assumed right of the mortgagee. Such a creditor, purchasing the mortgaged lands generally, and without any previous stipulation, stands in no more favorable position in relation to the subject of the sale than a stranger to it. I will not say that a mortgagee may not, with the assent of the sheriff, and under a distinctly ascertained stipa-

[Crawford v. Boyer.]

lation inserted in the conditions of sale, purchase the pledged land, free of the lien of the mortgage, and thus enable himself to apply the amount of the lien in satisfaction. But heretofore it has never been thought that, since the act of 1830, he may without a word of caution, or any agreement on the subject, bid for the property a specified sum, and then, in defeat of subsequent lien creditors, discharge his bid by an application of his mortgage. To permit this, would be to destroy all competition between him and other purchasers, by making the existence of the lien to depend upon the person of the bidder. The proposition would be, if the mortgagee buys, he takes free of the lien, but a subsequent encumbrancer and strangers take subject to it. In this way, the latter might be offering double the amount bid by the former, and until the hammer of the auctioneer fell, no one could tell what was to be the final condition of the property. The recognition of any such rule would lead to intolerable mischief, by clothing mortgage creditors with unreasonable mastery of their debtors' property, regardless alike of the interests of the debtor and the rights of his other creditors. Were the case of a mortgagee purchaser excluded by the letter of the statute relating to this subject, this reason, with others which might be given, would afford sufficient ground for such an exposition as would bring him within the operation of the act. But we are not driven to construction to effect this. Such a purchase is within the letter of the provision as well as within its spirit, and ingenuity would be taxed in vain for an argument suggestive of the propriety of change in this particular. Since the enactment of the statute, it has undergone much discussion, both in reference to its general aspect, and its effect upon the interests of a mortgagee supposed to be assenting to a sale free of the encumbrance. In these instances, much has been said as to the arrangements and mode of proof requisite to sustain such a sale, but none have supposed that without such prior arrangement the lien of the mortgage could be affected, either for or against the mortgagee. Before leaving this point, I may say that if the plaintiff in error stands in danger of injustice, it results from the refusal of the Court of Common Pleas to set aside the sheriff's first sale. If the mortgagee bid for and purchased the land under a misapprehension of his right in the particular we have been considering, I should think the mistake might have furnished a sufficient reason for setting aside the sale. In the exercise of a reasonable discretion, the courts have not been rigid in the application of the maxim *caveat emptor* to judicial sales, but have always liberally interfered for the protection of an erring purchaser untainted by fraud. In this instance, however, the execution court refused its aid, and doubtless for some sufficient reason. But whether right or wrong in this, we are incompetent to review its conclusion, since no appeal lies from it.

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The second point of defence rests in the supposed invalidity of the sheriff's sale, because of the absence of an express approval by the court of the inquisition of condemnation. But this omission is at best but an irregularity, of which none can take advantage but the defendant in the execution, and he only at the proper season. *Crowell v. Meconkey*, 5 *Barr* 168, furnishes a parallel instance in which it was so ruled. Indeed, to hold that such an objection is fatal, in the mouth of a stranger, at any distance of time, would be attended with the most disastrous results; since, so far as my experience extends, that provision of the act of 1836, which speaks of the inquisition being approved by the court, has never been literally executed. The certificates that have been submitted to us show that in Philadelphia, Chester, Berks, Montgomery, and Lancaster counties, the practice of procuring the express approval by the courts has never obtained. The same may probably be said of most of the other counties of the Commonwealth. Now, many of our reported cases show that, even conceding this omission to be an error in the beginning, its universality would be accepted as a practical construction of the law, which the safety of the community requires should be adhered to. This would be the doctrine applicable, were it necessary to resort to it. There is, however, really no need for recourse to the argument *ab inconvenienti*; as the writ of *venditioni* is, in legal contemplation, issued by the court itself, or by its permission, liberty to sue it out may be regarded as evidence of the court's approval of the inquisition. Certainly so, 'as against a stranger to the process.

The other specifications of error have not been insisted on. Indeed, those which have been considered cover all there is of substance in the defence.

Judgment affirmed.

Vanartsdalen *versus* Same, and Cornell's Appeal.

A grandfather cannot, by his will, appoint a guardian of the persons of his grandchildren in derogation of the right of the father, but he may devise an estate to them on condition that a certain person be their guardian, and he may commit the management of the estate to a person indicated in the will: and if there be a gift to the father in the will, and he submits to it, and enjoys the bequest, the Orphans' Court should not afterwards appoint a guardian, on his application, to the prejudice of the interests of his children.

ERROR to the Common Pleas of *Bucks county*, and also an appeal from the decree of the Orphans' Court.

An ejectment had been brought in the name of Rachel Vanartsdalen and others, minor children of Jane Eliza Vanartsdalen, de-

[Vanartsdalen v. Same, and Cornell's Appeal.]

ceased, by their guardian, David Cornell, now plaintiffs in error against George Vanartsdalen, defendant in error.

Adrian Cornell died in 1841, having made his will, in which *inter alia*, it was provided,

"I give, devise and bequeath to the children of my daughter, Jane Eliza Vanartsdalen, the farm of one hundred and ten and a half acres of land, lately purchased from the administrators of the estate of Jacob Vanartsdalen, deceased, lying in Southampton township, bounded by lands of John Gregg, and Asa Worthington, and the Attleborough and Buck road, &c., which farm I give, devise, and bequeath to the children of my said daughter, Jane Eliza Vanartsdalen, after the decease of their mother—*subject to the payment of two thousand dollars, together with the five per cent. per annum interest for the same, from the time of my decease until paid, said devise subject also to the maintenance of my said daughter, Jane Eliza Vanartsdalen, during life; my executors hereinafter named to be guardians for the children of my said daughter, Jane Eliza Vanartsdalen, during their minority, and I do hereby nominate and appoint them for that purpose; my executors likewise to have the care and superintendence and the letting of said farm, and to see that the timber be not wasted, and give directions for repairing the fences, and all necessary repairs of the buildings, the expenses to be defrayed out of the rent, and to see that none but the decayed and dead timber be cut, which they are to point out, the tenants to find their own firewood. It is further my will, that my daughter, Jane Eliza Vanartsdalen remain on my said farm during life, and to pay a moderate rent for the same; but if it shall so happen that my said daughter shall become very infirm and helpless, then, and in such case, my executors are to deduct out of the rent any sum which she shall stand in need of, if it shall amount to the whole of the rent. It is further my will, that whatever sums of money my executors shall receive as rent, over and above the repairs of the farm and buildings, shall by them be entered as a credit in part pay of the two thousand dollars and its interest, which her children are charged with on the land; and if it shall so happen that my said daughter shall be enabled to pay the whole debt, then she is to have the farm, rent free, except the keeping it and the buildings in good repair during her life."*

He appointed his son, David Cornell, executor of his will. Will dated 28th December, 1833.

George Vanartsdalen and Jane his wife, the daughter of the testator, remained in possession of the premises during her life, without paying any rent. She died on the 28th May, 1843. After her death, George Vanartsdalen, with whom the children lived upon the farm, refused to become a tenant and pay rent. David Cornell, as guardian of the children, brought an ejectment against Vanartsdalen, on the 17th day of July, 1843. At this

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time, the charge upon the land had accumulated to about \$2400, and the Orphans' Court of Bucks, on the 15th day of September, 1843, directed David Cornell, the guardian, to raise this sum by mortgage upon the premises, which was done. The children had no other property whatever. The ejectment was tried in the Common Pleas of Bucks, on the 18th day of September, 1845, when the court decided that the action was brought improperly, inasmuch as it should have been brought in the name of David Cornell, as executor, and not as guardian. This decision was reversed, and the case was arbitrated by the plaintiff, and an award made for plaintiff. From this award Vanartsdalen appealed, and C. W. Biles was the surety in the recognizance upon the appeal. The case was several times on the trial list, and particularly at September term, 1848. When the case was then called, on the 11th of September, 1848, it was said by the defendant's counsel, that the case had been discontinued by the guardian of the children, Charles W. Biles. It then appeared that upon the petition of Vanartsdalen, Biles had been appointed guardian for two of the children; and one, having arrived at the age of fourteen, chose Biles for her guardian. On that day, Biles filed a paper in the prothonotary's office of Bucks county, directing the said action of ejectment to be discontinued.

As soon as these facts were ascertained, the attorney for David Cornell, the guardian, obtained in the Orphans' Court a rule upon the said Charles W. Biles, to show cause why the said appointment should not be revoked and the said C. W. Biles dismissed from his guardianship; and in the Common Pleas obtained a rule to strike off the discontinuance. In both cases, upon the allegation that the whole proceeding was a fraud upon the children.

It was alleged that George Vanartsdalen was insolvent, and that a *scire facias* had been issued on the mortgage.

The court, KRAUSE, J., dismissed the rules taken in the Orphans' Court and Common Pleas.

It was assigned for error that the court erred in not striking off the discontinuance directed to be entered by C. W. Biles.

That the court had not power to appoint another guardian for these children, without notice to and removing the guardian appointed by the will.

And that the facts in the case show such misconduct on the part of Biles, as requires the court to remove him.

The case was argued by J. and E. J. Fox, for plaintiffs in error.—That a grandfather may give his estate to his grandchildren on condition that a certain person be their guardian; and if the father do not submit to the will, the court will make the father's opposition work a forfeiture of his son's estate: *Ambler* 306, *Blake v. Leigh*.

[*Vanartsdalen v. Same*, and *Cornell's Appeal*.]

The court may name a guardian to a natural child, and the court will appoint unless objection appear: 4 *Com. Dig.* 269. 2 *Barr*, 312, was also cited.

Ross, contra.—That the appointment of a guardian by the will was a nullity; that none but the father could appoint: 1 *Roberts on Wills*, 184; 3 *Atk.* 519.

The opinion of the court was delivered by

ROGERS, J.—The act of 8th April, 1833, *Dunlop* 571, an act relating to last wills and testaments, provides, That every person competent to make a will, being the father of any minor child, unmarried, may devise the custody of such child, during his or her minority, or for any shorter period. From the words of the statute, an inference arises that no person, except the father, has authority to exercise that right, and such is the construction of the statute, Charles 2, ch. 21, sec. 8. Thus, it is ruled in *Ex parte Edwards*, 3 *Atkyns* 519, that the mother's appointment of a guardian to her son by will is void, the statute confining the power of appointing a testamentary guardian to the father. So far as the custody and care of the person of the infant is concerned, it cannot be doubted that a testamentary appointment by a grandfather, mother, or stranger, is simply void. But although a grandfather may not appoint, under the statute, a guardian for his grandson, in derogation of the unquestioned right of the father, yet there is nothing to prevent him from giving his estate to him on that condition. Thus, it is said, in *Blake v. Leigh*, *Ambler* 306, the grandfather has no power to appoint guardians of his grandson, it being a right vested in the father. But any one can give his estate on what conditions he pleases; and the father, in this case, submitted to the conditions of the will. There are instances where a grandfather has given his estate to his grandchild, and appointed guardians of his estate and person; and if the father did not submit to the will, the court has made the testator's opposition work a forfeiture of the son's estate. But if there is any gift to the father in the will and he submits to it, the court directs and appoints a guardian on his submission. In the present case, the court has interposed, after the father had waived his parental right; therefore, there is no ground to alter what was done with the consent of all parties.

Even conceding that the testator has appointed a guardian for the persons of his grandchildren, as well as a trustee or curator of the estate devised, yet the appointment would be good, inasmuch as the father has submitted to the will by an enjoyment of the estate devised, in right of his wife, during her life. For it is only since her death that he has acted in opposition to the will. But be this as it may, here the testator devises an estate to his grand-

[*Vanartsdalen v. Same, and Cornell's Appeal.*]

children, and, for satisfactory reasons best known to himself, chooses to commit the custody and management of it to his own son, instead of to his son-in-law. It does not need the authority of Lord HARDWICKE for the position that any one can give his estate on what conditions he pleases.

It is plain the testator does not mean to interfere with the natural right of the father to the custody and care of his children. All that is intended is to commit the management of the estate to his executors, who are appointed guardians of the children. It is of no sort of consequence that he designates them as guardians, rather than as trustees or curators of the estate for the benefit of the infants. The will must receive such a construction as is beneficial to the minors, at the same time carrying out the intention of the testator. The disposition in the will does not require the assent of the father, as none of his rights are affected by it, nor is it in his power to defeat its provisions, or, by any opposition, work a forfeiture of the estate, as perhaps might be the case if the grandfather had undertaken to deprive him of the care and management of his children. What right then has he to complain, when a grandfather or mother, or even a stranger, devises an estate to his children, coupled with a condition that its care and management shall be intrusted to another rather than to him.

The Orphans' Court have disregarded this distinction. They have treated the appointment by the grandfather as null and void, and have proceeded to appoint a stranger as guardian, without any notice whatever to the testamentary guardian. But so far from being void, it is not even voidable, except on proof of fraud or gross mismanagement, or some personable disability of the guardian. This we think altogether irregular and erroneous, and for this reason the proceedings in the Orphans' Court must be reversed.

The testator devised a farm in Bucks county to his daughter, the wife of George Vanartsdalen, for life, and, after her death, to her children in fee. He appointed David Cornell, his son, executor of his will and guardian of his grandchildren, and provided that \$2000 should be a charge upon the land, to be paid by the children, unless a moderate rent, which he directed his executor to charge to his daughter, should sink this sum. George Vanartsdalen and his wife remained in possession of the premises during her life, without paying any rent. The wife died, and after her death, George Vanartsdalen, with whom the children lived on the farm, refused to become a tenant and pay rent. David Cornell, as the guardian of the children, brought an ejectment, as he was bound to do, against Vanartsdalen. The ejectment was tried in the Court of Common Pleas, and the case being arbitrated, an award (from which the defendant appealed) was made for the plaintiff. C. W. Biles was the surety in the recognizance on the appeal. The case was marked for trial at the Sept. term, 1848,

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and when called, on the 11th Sept., it was said by defendant's counsel that the case had been discontinued by the guardian of the children. It then appeared that, on the petition of Vanartsdalen, Charles W. Biles was appointed guardian for two of the children, and one, having arrived at the age of fourteen, chose Biles for her guardian. On the same day, Biles filed a paper in the prothonotary's office of Bucks county, directing the action of ejectment to be discontinued. After this history of the case, it is impossible to shut our eyes to the fact that this whole proceeding, in the Orphans' Court, and in the Common Pleas, was concocted in fraud, a mere scheme or contrivance of Biles and Vanartsdalen, entered into with the object and intent of enabling the latter to retain possession of the estate, without paying any rent; the inevitable result of which will be to deprive the children of all benefit from the bounty of their grandfather, and, in fact, to set aside his will. For if no rent is paid, and applied to the extinguishment of the charge on the estate, as is directed by the will, the accumulation of the debt by accruing interest must necessarily absorb the whole estate, and leave the children destitute of any property whatever. This, of itself, would be sufficient to induce the court to lay their hands upon it and arrest the proceeding. What right had Biles to discontinue the suit? He had nothing to do with the estate devised to the children. The testator had thought proper to intrust that office solely to another, who was then pursuing his duty, by an action of ejectment to recover the possession of the property from a person who would neither surrender it nor pay rent for it.

Whether raising the money charged on the land, by mortgage, was right or wrong, it is not the time now to inquire, as the mortgage is not before the court. We are therefore of the opinion, that the court erred in refusing to strike off the discontinuance directed to be entered by C. W. Biles.

It is ordered that the decree of the Orphans' Court be reversed, the discontinuance of the ejectment be stricken off, the cause reinstated, and *procedendo* awarded.

Banks *versus* Clegg.

1. A witness cannot remove an appearance of interest in himself by his own oath.

2. Declarations by a first assignee of a judgment made subsequent to the assignment to him when the judgment was about to be marked to the use of another, that he took the first assignment merely as the agent of the latter person, are not *res gestæ* as it respects the first assignment, and do not remove the apparent interest existing in him, so as to render him a competent witness to rebut the defence made.

ERROR to the District Court at Philadelphia.

A judgment was entered in the District Court in the name of Joseph Clegg against Philip Banks. Judgment entered, September 24, 1839, on bond and warrant of attorney. May 8, 1841, this judgment marked to the use of Francis Blackburne. July 20, 1843, this judgment marked to the use of John Taylor, junior.

July 21, 1843, *sci. fa.* issued to revive the judgment.

In February, 1845, the case was on trial, before STROUD, J., and after defendant's evidence under the plea of payment had been concluded, Mr. Fallon, plaintiff's attorney, was offered on the part of plaintiff to prove admissions by Blackburne and Taylor, at the time the judgment was marked to the use of Taylor, that Blackburne was merely the agent of Taylor in the transaction. Objected to, because the declarations or conversation took place in the absence of the defendant. The evidence was admitted, and exception on the part of defendant. Mr. Fallon testified that he never was counsel for Clegg. In July, 1843, either on the day the judgment was marked to Taylor's use, or a little before, Blackburne and Taylor were at his office. No consideration for the assignment was paid, and both informed him that the judgment had been transferred to Blackburne, merely as Taylor's agent. After this testimony was given, Blackburne, the assignee of the judgment, was offered to rebut the defendant's proof of payment, and to show that Taylor was from the first known to Banks as the owner and purchaser of the judgment, and that it was transferred by Clegg after notice to defendant, who represented it as wholly due. His admission was objected to on the ground that he was a plaintiff in the *scire facias*, and that he had an *apparent* interest in the case, which could not be removed by his own testimony.

The plaintiff's counsel paid into court a sum of money fixed by the counsel as sufficient to pay the costs for which Blackburne might be liable, and he was admitted. Defendant's counsel excepted.

Blackburne, *inter alia*, testified that "Mr. Taylor wished the affair managed by me. I have not, nor never had, any interest in

[Banks v. Clegg.]

the case; I never received nor expect to receive any commission for it."

Verdict for plaintiff, for \$1305.23.

Error was assigned to the admission of Mr. Fallon to prove conversations with his clients in the absence of the defendant below.

2. To the admission of Blackburne, the assignor of the judgment.
3. In admitting Blackburne to make way for his testimony, that he was merely the agent of Taylor, and that he had no interest in the case.

McIntyre and *Haly*, for plaintiff in error.—It was alleged that Blackburne was incompetent on several grounds: First, because he assigned his claim in order to become a witness: 5 *W. & Ser.* 435; 6 *id.* 555; 7 *id.* 144; *id.* 317; 1 *Barr* 365; 2 *id.* 46; 5 *id.* 395; 6 *id.* 326; 10 *id.* 430. Second, because he was a party to the record: 1 *Barr* 438; 3 *id.* 361; *id.* 377; 4 *id.* 374; 6 *id.* 402. Third, because he was under an implied warranty to Taylor as to the existence of the debt: 5 *Watts* 419; 1 *W. & Ser.* 147; 5 *Wh.* 447.

D. P. Brown, for defendant in error.

PER CURIAM.—The rule is settled with us, that a witness may not remove an appearance of interest in him, by his own oath. Here the witness, having taken an assignment of the judgment to himself, continued to be the ostensible owner of it till shortly before the trial; and then assigned it to the actual owner to take his name off the record. Had the declarations at the second assignment been made at the first, they would have explained the transaction before an appearance of interest had attached to it, and shown the witness to be, what he was in truth, a nominal owner; but their explanation of a bygone matter was no part of the *res gestæ*, and came too late.

Judgment reversed and *venire de novo* awarded.

Fitler versus Eyre.

Where the object of offering entries in a book was not to prove a sale and delivery of goods, but as memoranda to identify the subject of them, where the question was as to whether the sale was conditional or absolute, and they were embodied in the deposition of the witness who made and verified them, the entries were admissible in evidence.

ERROR to the District Court at Philadelphia.

This was an action of trespass brought by Joseph K. Eyre against Daniel Fitler, formerly sheriff of Philadelphia county. In the *narr.* the plaintiff declared in trespass for taking and carrying away "certain goods and chattels, viz., two casks of merchandise, which in the amended *narr.* were said to contain sundry items of goods, ten boxes of bottled cider, one barrel of almonds, and six boxes of claret."

On May 15th, 1848, a jury was called, and on the trial, evidence was offered by plaintiff, to show that the defendant, as sheriff of Philadelphia, under a writ of attachment directed to him, and ordering him to attach the goods of Clements & Hall, had seized and taken certain casks containing merchandise, which had been sold by plaintiff, to Clements & Hall on certain terms. A main question submitted to the jury was, whether the sale and delivery had been so far completed prior to the attachment, as to divest the property in, or possession of the goods out of plaintiff, and to vest it in the purchasers, Clements & Hall. This question was decided in the negative by the jury, who found for plaintiff \$746.52.

On the trial, various exceptions were taken; one was as follows: On the trial, the plaintiff read the deposition of E. M. Hopkins, a former clerk of plaintiff, who proved the sale by plaintiff to Clements & Hall, through one professing to act as their agent, and the terms of sale, and he proved what portion of the goods so sold were seized by the sheriff. Hopkins likewise proved that a certain book produced before him was what was called the "ORDER BOOK" of plaintiff, in which he or his clerks were in the habit of entering such goods as were from time to time ordered from him. This book was afterwards produced, and plaintiff offered to read the entries therein, *made by Hopkins*, relative to the purchase of Clements & Hall; to this, defendants objected, the objection was overruled, exceptions taken by defendant, and the book read.

Hopkins testified that certain ticks or marks opposite some of the entries were meant to show what goods had been delivered to the drayman. He did not know the meaning of the mark of certain letters. The small ticks were meant for such of the goods as were put up ready to be marked. The figures indicate the price,

[Fittler v. Eyre.]

number of gallons, or weight of the different articles, and the gross amount.

The case was tried before SHARSWOOD, J.

It was assigned for error :

That the court erred in overruling the objections made to the offer of plaintiff to read the entries in his order-book, and permitting the same to be read.

The case was argued by *C. Fallon* and *Guillou*, for plaintiff in error.—Reference was made to 4 *Rawle* 404; 7 *W. & Ser.* 429; 13 *Ser. & R.* 127.—The syllabus in this case incorrectly reports the words of the chief justice.

Miller, for defendant.

PER CURIAM.—A general objection to evidence competent for some purpose, is not sustained by a specific ground of exception. In this instance, the purpose was to prove, not a sale, but that there was, in the transaction, no more than an agreement to sell on a condition not performed, and the entries were offered to identify the subject of it, not the value. They were consequently before the court, not as book entries, which are competent to prove only a sale and delivery. They were imbodyed in the testimony of a witness who made them, and verified them, as memoranda to designate the goods selected; and who testified that the ticks and marks placed opposite to the items were used to distinguish the casks or packages delivered to the drayman. The witness did not, as is usual in regard to book entries, authenticate the book and leave it to speak for itself; he testified to the particulars of the transaction from his own knowledge; and, thus corroborated, the entries were clearly admissible.

Judgment affirmed.

Satterthwaite et al. *versus* Mutual Beneficial Insurance Association.

Where the constitution and by-laws of a mutual insurance company do not require from an applicant for insurance, a statement as to the condition of the property desired to be insured; but where the by-laws provide for a survey at the instance of the company, the policy is not void, by reason of omission, on the part of the insured, to state a fact material to the risk, where no inquiry is made of him on the subject.

ERROR to the Common Pleas of *Bucks county*.

This was an action of assumpsit, by Thomas Satterthwaite, and Joseph H. Satterthwaite, trading under the firm of Satterthwaite & Vol. II.—50

[Satterthwaite et al. v. Mutual Beneficial Insurance Association.]

Brother, against the Mutual Beneficial Insurance Association, on a policy of insurance on the personal effects of Satterthwaite & Brother, in the mills at Newportville, then in their occupancy. The plaintiffs below, having read in evidence the constitution and by-laws of the association, gave in evidence the policy of insurance, running from December 31, 1846, to December 31, 1847, on personal effects in the mill, to the value of \$6000. They also proved that the mill was destroyed by fire on the night of the 17th of June, 1847, and their personal property, on which the insurance was effected, amounting to \$5000, was in consequence wholly lost. They further proved that the sixty days' notice required by the charter had been given, and also that the secretary of the company was the only agent for effecting insurance on personal property; and that a printed copy of the constitution and by-laws was furnished by the secretary to each member, on his becoming a member of the association.

The defendants below waived the necessity of showing that the plaintiffs were members of the company, and also admitted that the association was regularly organized when the insurance was effected.

The plaintiffs having closed, the defendants then offered to prove what is stated in the opinion of the court, as to the omission of the corn-kiln; and further, that the concealment of the existence of this kiln was a suppression of a material fact, which increased the risk of the company, and which the plaintiffs were bound to have communicated to the defendants.

To this evidence the plaintiffs objected, and the court sustained the objection, and sealed a bill of exceptions. A verdict was then given for the amount of the plaintiffs' claim.

It was assigned for error:

That the court erred in rejecting the evidence contained in the bill of exception.

Ross, for plaintiff in error.—That the suppression of a fact material to the risk, renders the contract void: *Ellis on Insurance*; 4 *Law. Lib.* 23; 3 *Burr* 1905; 14 *East* 494; 8 *Mass.* 336.

Dubois, for defendants in error.—That there are no provisions prescribed by the by-laws for any statement to be made by the insured, on making his application. Information respecting the subject-matter of insurance need not be communicated, unless there be a request: 2 *Sel. N. P.* 196. That it is presumed that the insurer is acquainted with the usage and circumstances of the branch of trade to which the policy relates: 9 *Peters* 557; 1 *Wash. C. C. R.* 283; *id.* 385; 2 *Peters* 25; 8 *Pick.* 86; 3 *Kent.* 285; 7 *Wend.* 72; 5 *Hill* 188.

[Satterthwaite et al. v. Mutual Beneficial Insurance Association.]

The opinion of the court was delivered by

BURNSIDE, J.—It is true that our law is well settled, that a concealment of facts material to the risk, and within the knowledge or power of the assured, and which the insured is not bound to know, vitiates the policy: *Hazzard v. New Eng. Marine Ins. Co.*, 1 *Wash. C. C. Rep.* 283; 2 *id.* 357; 1 *id.* 566.

But is this principle to be applied to the case before us? This is a mutual insurance association or company, in which the defendants in error, the moment they effected a policy, were *ipso facto* members of the corporation, and as much bound by its constitution and by-laws as the other members of the institution: *Susquehanna Ins. Co. v. Perrine*, 7 *W. & Ser.* 348. Its principal capital was the deposit notes of the insured.

Was there an omission on the part of the assured, which the by-laws or printed and published regulations of the company required? Did they omit to perform any duty the company required? We look in vain into their printed constitution and by-laws for evidence which will enable us to answer either of these questions in the affirmative. The second section of the by-laws makes it the duty of the company to appoint a surveyor, who is made a standing and permanent officer of the association; and the sixth section provides "that it shall be the duty of the surveyor, within three days after application shall have been made, to examine, survey, and take the *correct* description and dimensions of all property to be insured by this association, and to set a valuation thereon, taking into consideration the exposure and liabilities of the premises to be-insured to loss or damage by fire, and fix the per centage, as shall be hereinafter specified and determined in the conditions of insurance, and to furnish the secretary with an accurate copy of the same, within three days after the survey shall have been executed." There is nothing that I can discover in the constitution and by-laws of the association that imposes any duty upon the insured, but to make his application. All necessary and subsequent duties and examinations the company reserves and imposes on their own officers. When the association is satisfied, the policy issues, and the insured pays his money, and gives his bond, which becomes a part of the capital of the company. This insurance was on the personal effects of the plaintiffs below in their mill at Newportville. The offer was to prove, "that at the time when the application for insurance was made, and the policy granted, the plaintiffs gave to the secretary of the company a statement of the personal property they desired to have insured, and they *omitted* to state that there was a corn-kiln attached to the mill, in which the personal property was deposited—that the fire, which consumed the building, originated in the corn-kiln. And further, that the secretary and company had no knowledge, when the policy of insurance was issued, or at any time, till after the fire, that there was a corn-kiln attached to

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the mill ; and if they had known that fact, the rate of insurance would have been higher. And that one of the plaintiffs admitted that it was not made known to the company that there was a corn-kiln, when the contract of insurance was effected." The court rejected this offer, and this is the error assigned. If the company had not reserved all subsequent duties of survey and examination to themselves and their own officers, after the application was made for the insurance, there would be some weight in this offer, and it ought to have gone to the jury ; but as they have imposed no duty, beyond the application, on the insured, it was the business of the company, before they issued the policy, to see whether the corn-kiln was adjacent to the mill insured, as well as to examine all other buildings adjacent thereto. If the company had made inquiry, and a false statement had been given, it no doubt would have been receivable in evidence. And if given by the plaintiffs, or either of them or their agent, it would have tended to avoid the policy. But the mere omission by the plaintiffs, when they made their application to insure grain in the mill, to return the corn-kiln, or to say any thing about it, when it is well known that there are corn-kilns attached to half or more of the grist and merchant mills in Bucks county, would not excuse the officers of the company, who neglected inquiry, from gross negligence. No men of common prudence would grant a policy on the grain, in a grist or merchant mill, without inquiring into its situation, and the situation of the adjacent buildings. As regards this mutual insurance company, under the rules and regulations, the evidence would have been irrelevant, and the court were right in refusing to receive it.

The governing principle and object of mutual insurance associations is to share each others' losses for the general weal : 7 *W. & Ser.* 351. There was no breach on the part of the insured, of any by-law or regulation of the association : *Rhinehart v. The Allegheny county M. I. Co.*, 1 *Barr* 359. The officers of the company omitted a duty, expressed or fairly implied in their by-laws. It was their duty to examine the mill and the buildings adjacent, before they granted the policy. The plaintiffs are not to suffer from their neglect. Mutual insurance associations are of modern growth. They were originally intended for the safety of the vicinity and country in which they were located. In some instances they have endeavored to grasp the State, and extend their operations into every county. For one, I will never agree to extend to them the law as it has been settled in cases of marine insurance. They shall have the law fairly administered to them, in accordance with their charters.

The judgment is affirmed.

Babb versus Stromberg.

1. The agreement of an attorney at law to submit a question of boundary to the action of arbitrators who have been chosen in a suit between the parties, is binding on his client, where the award is not appealed from, the right of appealing having been provided for: and where the question of submission is disputed, parol evidence as to it should be submitted to the jury.

2. If the award includes a matter not submitted, it is so far void.

ERROR to the Common Pleas of Chester county.

This was an action of trespass on the case, to Oct. term, 1848, by Stromberg against John Babb, to recover damages for an alleged injury to the real estate of plaintiff by reason of the construction of a stable by defendant near the line of lands of plaintiff, so that its eaves overhung plaintiff's ground, and the water flowed therefrom upon his garden. The defendant pleads not guilty. On the trial, the plaintiff offered an award and proceedings in a former action of trespass by plaintiff against defendant, to July term, 1845. The arbitrators, who were appointed under the act of 16th June, 1836, reported "that they are of opinion, and do award, that there is due to the plaintiff from the defendant the sum of \$10. And by consent of parties, the arbitrators were authorized to fix and define the line between them, (and other matters connected therewith,) so as to avoid all controversy and dispute hereafter upon the subject. They therefore define the line as follows, viz.," &c.,—"and that the defendant put and keep up a spout on the south side of his stable, so as to conduct the water that falls upon the roof off the land of the plaintiff. It is understood that nothing herein contained shall interfere with or prevent either party from appealing from said award—and if appealed from, the rights of neither party shall be prejudiced by any thing therein stated."

June 5th, 1846, report filed.

The attorneys of defendant objected to the reception of the award and proceeding in evidence, unless it was first shown that the parties to the suit gave the authority to the arbitrators which is recited in the award.

The court overruled the objection, and admitted the award, and defendant's counsel excepted.

Plaintiff's counsel proceeded with other evidence, it being alleged by plaintiff that the boundary line was as reported by the arbitrators.

Afterwards, defendant's counsel proceeded to give evidence, and Mr. Smith, the counsel of Babb in the suit in which the award was made, was called, and he testified that John Babb, the defendant, was sick at the time of the choosing and meeting of the arbi-

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trators. His son, John W. Babb, attended to the choosing of the arbitrators. After the arbitrators had met, and certain evidence had been heard, "it occurred to me it was more important to have the matter settled, rather than how it was settled. I suggested to John W. Babb that the arbitrators should have the whole matter committed to them; he thought it would be well, but declined to give any authority to do so. He and I had a private conversation about it; he declined giving any authority, and said he had none, and said it was impossible to consult with his father because of his sickness. I then stated to the arbitrators that they might state a line or recommend a line, and if the award was not appealed from, it might be binding on the parties. There was nothing said about the spout." He further said: "I may have stated that the arbitrators might state a line, and if not appealed from, be final."

On the part of Stromberg, the plaintiff, a witness testified: I was one of the arbitrators in 1846, *Stromberg vs. Babb*; we went on to the ground; a proposition was made for us to go on and fix the line; it was first made by Mr. Smith; Stromberg agreed to it; John W. Babb said he had no authority: the substance is in our award: I heard no person objecting when finally agreed to.

Cross-examined.—We got authority from nobody but Mr. Smith. John W. Babb never gave me authority. Mr. Smith was counsel for the defendant then.

Other evidence was given; a portion to show where the line was. Defendant's counsel objected to any evidence being offered as to the line. Objection overruled, and exception on part of defendant.

Defendant's counsel proposed several points, the first of which was: If the arbitrators had authority to settle the line between the parties, and require John Babb to spout his roof, as set forth in the award, then this action cannot be sustained, as the suit ought to have been *on the award*, and not upon the original cause of action.

The fourth was: The plaintiff has not proven that the arbitrators had authority to fix the line and require the stable to be spouted, as set out in the award, therefore the award is void.

CHAPMAN, J., in answer to first point, charged—This action is brought for an alleged injury since the award, and consequently could not be on the award.

To the fourth—There is no evidence in respect to spout. Whether Babb gave such authority to Mr. Smith, or subsequently ratified it, is a question of fact for the jury.

Defendant's counsel excepted, and error was assigned as to the admission of the award and proceedings without proof first given as the authority of the arbitrators to make the award in reference to the settlement of the line and spouting the stable. 2d. To the introduction of additional proof of the line *after defendant had closed his testimony*. 3d and 4th. In the answer to

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the first and fourth points; and 5th. That the award was irrelevant, and ought not to have been received in evidence.

The case was argued by *Brinton and Rutter*, for plaintiff in error. —As to third specification, 1 *Dal.* 364; *Billings on Awards* 25; 17 *Eng. Com. Law R.* 498–9; *Barn. & Cress.* 786. As to the answer to fourth point, 3 *Watts* 320; 2 *id.* 471.

Pennypacker, for defendant.—The award was conclusive: 7 *Ser. & R.* 171; 9 *Barr* 100. An award fixing a boundary line is binding; 15 *Ser. & R.* 169; 7 *Watts* 313; 7 *W. & Ser.* 347. The agreement of attorney bound his client: 16 *Ser. & R.* 368; 9 *Barr* 101, *Wilson v. Young*; 7 *Watts* 312, per KENNEDY, J. The award, in connection with the parol proof, showed acquiescence and ratification: 14 *Ser. & R.* 309.

The opinion of the court was delivered by

GIBSON, C. J.—The submission under the rule, and the parol submission at the meeting of the arbitrators, were distinct matters. The first had regard to a trespass: the second, to a boundary. That a question of boundary is a subject of arbitration, is plain upon principle as well as authority. An award is an act of the parties performed through their agents, and assented to in advance; and there is no reason why they may not as well establish, by means of it, what is called, in common parlance, “a consentable line,” as by their immediate act. And the cases abundantly prove that an attorney is competent to bind his client; so that the question before the jury was whether the question of boundary had actually been submitted. The award of damages was under the first submission: the award of boundary, at the common law, was under the parol submission, and dependent on the written one for the right of appeal, by which both awards might be annulled. The spout was not within either submission, and the award was so far void. If there was a parol submission, the award of the boundary would conclude the parties in subsequent suits. The question was one of fact, and if there was any affirmative evidence whatever, it was proper to send it to the jury. The plaintiff was present in person at the meeting of the arbitrators, and the defendant was present by his attorney, who, wisely judging it better to have the controversy settled wrong than not to have it entirely settled, proposed that the “arbitrators might state a line, or recommend a line, and that, if the award was not appealed from, it might be binding on the parties.” He thought he was proposing to submit the whole matter, for nothing less could bind. No objection being made on the other side, the arbitrators reported a line; and as no appeal was taken, the award would, on the terms proposed, become absolute. Now, it is not pretended that there

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was, in this, an explicit submission expressly offered and accepted; but a parol submission, like any other parol agreement, depends on the assent of the parties; and it may be signified by acts as well as words. The defendant's attorney certainly proposed an additional article; the plaintiff did not object to it; and the arbitrators proceeded on the basis of it. To say nothing of acts of confirmation, there was enough in this to send the question to the jury. The record was competent to lay a ground for evidence of subsequent submission; and the cause was in all respects properly ruled.

Judgment affirmed.

Bromley versus Hopewell.

The landlord who is entitled, under the 83d section of the act relating to executions, to rent not exceeding one year, out of the proceeds of sale of goods of a tenant sold by a sheriff under an execution, is the *immediate* landlord of the party whose goods have been sold.

CERTIORARI to the District Court, *Philadelphia*, in relation to the distribution of certain money raised on an execution of Bromley against Hopewell. An auditor was appointed, who reported, that the plaintiff in the said case claims the balance due on his judgment, after deducting the sum of \$175 paid him by the defendant at different times.

The other claim is by John and Joseph Wright, who hold the premises on which the defendant's goods were at the time of levy, by virtue of a lease to them from Simon Gratz, made Dec. 23d, 1836, for the term of four years, from Jan. 1st, 1837, at an annual rent of \$1500, payable quarterly. By an indenture made March 6th, 1838, the said John and Joseph Wright let the said premises to Thomas D. Dougherty and Jacob W. Souder, "for the remainder of a lease granted by Simon Gratz to the said John Wright and Joseph Wright, having two years and nine months to run, from the 30th day of March present, (1838,) at the yearly rent of \$1200, payable in equal quarterly payments of \$300 each, on the 30th days of the months of March, June, September, and December," &c. &c.: and the said Dougherty and Souder further agree that they "will yield up quiet possession of the said premises at the expiration of this lease; namely, on the 30th day of December, 1840," &c. There was an agreement in the lease, that Dougherty and Souder might rent any part or parts of said premises, except the store, during their term. By a memorandum made Sept. 15th, 1838, the Messrs. Wright agreed that Dougherty and Souder might underlease the store to J. C. Hopewell, or

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Shewell and Hopewell, "the said Dougherty and Souder remaining, however, always liable for the rent of the whole premises, as fully as if no underlease had been made."

The said J. and J. Wright claim, as landlords of Dougherty and Souder, and Shewell and Hopewell, the rent of the whole of said premises, from June 30th, 1839, to the time of levy, amounting to \$262.96, under the 83d section of the act of 1836, relating to executions.

The plaintiff contends, 1. That the indenture between the Messrs. Wright, and Dougherty and Souder, operates as an assignment of their whole term, by force of the words "for the remainder of a lease granted by S. Gratz to the said J. and J. Wright," &c.; consequently, that the Messrs. Wright have no right to distrain for the rent reserved to them, and are therefore excluded from the benefit provided in the act.

2. That Gratz alone has a claim as landlord under the act, and having waived it, there can be no claim for rent out of the proceeds of the execution by any party.

Evidence was given to show that Gratz disclaimed looking to Shewell and Hopewell (the defendants) for the rent due to him for the premises, and considered the Messrs. Wright alone responsible for it.

1. The first point is, whether the lease of the Messrs. Wright to Dougherty and Souder is a lease of only part of their interest, or an assignment of their whole term.

2. The second question is, whether the Messrs. Wright are entitled, as the landlords mentioned in the act of 1836, relating to executions, to the amount of rent reserved to them in their lease to Dougherty and Souder, out of the proceeds of the execution against the goods of the defendant Hopewell, who was the under-lessee. The plaintiff contends that Gratz, the original landlord, alone has a claim under the act, and as he has waived his claim, it exists in no one. The claim on behalf of the Wrights is, that *they* are the landlords mentioned in the act, and that the goods on the premises, being liable to their distress, should satisfy the rent reserved to them in their lease. We find but one authority applicable to this point, viz. the case of Bennett, reported in *Strange* 787, who was ground landlord of a house, in which an under-lessee dwelt, against whom there was an execution; it was held that Bennett was not entitled to rent out of the proceeds of the execution, and that the statute of Ann. c. 14, under which he claimed, extended only to the *immediate* landlord of the party whose goods are subject to an execution. This question was started in the case of *Ege v. Ege*, 5 *Watts* 134, but was not decided, being immaterial to the case, which was disposed of on other grounds. The act of Assembly of 1772 was taken from the statute 8 Ann. c. 14; and there seems to be no reason why it should not bear the same con-

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struction as regards the present question. The 83d section of the act of 1836 contains the additional proviso, that the goods and chattels, &c., taken in execution, there mentioned, must be such as are "liable to the distress of the landlord." The object of this provision, it is conceived, can only be to exempt from liability to satisfy rent, such goods as are commonly exempted from a distress, but which, without such provision, would go to pay rent when sold under an execution; otherwise, there seems to be no force in this provision, as all goods on the premises, except those particularly exempted by the common law, or otherwise, are liable to the distress of the landlord.

The undersigned is, therefore, of opinion, that the Messrs. Wright are not entitled to their rent out of the fund in court; and that it is to go to satisfy the plaintiff's judgment, after deducting costs and expenses.

It was assigned for error :

1. The auditor has decided the Messrs. Wright have not the right to receive the rent due to them, out of the proceeds of the execution.

2. Because he had decided, that by the true construction of the act of assembly, the Messrs. Wright are not the "landlords," whose rent is to be paid by the sheriff.

Williams was counsel for plaintiff.

Henderson, for defendant.

The opinion of the court was delivered by

BELL, J.—As early as 1727, it was decided that, under the proper construction of 8 Anne c. 14, the *immediate* landlord of a defendant in an execution was alone entitled to claim a year's rent from the sheriff, before the removal of the goods. (Bennett's case.) This rule, then settled, has ever since been adhered to in England, and is now the law of that country, as is shown by the modern case of *Thorsgood v. Richardson*, 7 Bing. 420. In this particular, our act of 1772 is a transcript of the British statute, and the act of 1836 differs from it only in the additional proviso that the goods and chattels taken in execution must be such as are "liable to the distress of the landlord." It is said, the language of this proviso is indicative of a legislative intent to confer the right to a year's rent upon any of the lessors who might have distrained the goods of the tenant, and is, thus, introductive of a principle different from that which obtains under the statute of Anne. But, for the reason given by the auditor, we agree with him that the object of this provision is to exempt from liability to satisfy rent such goods as are commonly exempted from distress, but which would, without the provision, be subject to the payment of rent when sold under an execution; and not to creat-

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a right, before then unknown to the law. We are to take it for granted the lawmakers were aware of the doctrine established by prior adjudications. If so, it is impossible to believe they contemplated a change so radical and important, without employing language better fitted to express it. The argument which favors an intended alteration proceeds upon the ground that the right to demand rent from the sheriff is, necessarily, a concomitant of the power of distress. But the decisions show that the one is not always dependent on the other. Though the right to demand does not, perhaps, exist independently of the power to distrain, the latter is not, of itself alone, sufficiently potent to give birth to the former. It would seem there must also be an agreement, express or implied, as the foundation of the landlord's privilege to come in under an execution. And there is reason in this, of which the case before us furnishes an illustration. Hopewell rented but part of the whole premises from Dougherty and Souder, and yet the Messrs. Wright claim to receive the whole amount of rent reserved to them for the *whole property*, by their demise to Dougherty and Souder. Again, the Wrights agreed to pay to Gratz \$1500 *per annum*, while they leased to Dougherty and Souder for \$1200. If the middle men are entitled to come in on the fund in the hands of the sheriff, so is the original lessor, and thus the tenant's goods would be liable to pay not only what his immediate landlord agreed to pay, but larger sums contracted for by preceding tenants. These considerations show the propriety of adhering to the contract of the parties as the foundation of the right, and this will confine it to the immediate landlord. That is the basis upon which it is authoritatively held the British legislature proceeded, and no sufficient reason has been suggested to induce the belief that our legislature intended differently. It is not enough to say the preceding lessors might have distrained on the same goods for the whole amount of the rent due to them respectively, and, therefore, there is no harshness in making those goods subject, in the hands of the sheriff, for the same amounts. The answer is, that although, to a certain extent, the statutory claim of the landlord was intended as a compensation for balking his remedy by distress, there is nothing in the statute to show it was intended to be commensurate with the multiplications of the remedy which might be created by successive demises. Without, however, further elaboration of the argument, it may be sufficient to repeat that the right was restrained to the immediate landlord by the interpretation at Westminster, and there is nothing to show an intent to introduce a different rule in this country.

The view we have taken renders it unnecessary to consider the question whether the agreement between the Wrights and Dougherty and Souder was an assignment of the whole term, or a sublease. In either case, they have no claim on the fund.

Decree confirmed.

Commercial Bank *versus* Woodside et al.

1. It is essential to a sale of land, made in 1836, for taxes, that it has been assessed and returned as unseated, or, where it has been returned as a *seated* tract or lot, that it be transferred to the *unseated* list by the county commissioners, or their authorized agents, with notice to the owner, if practicable, before sale.

2. If there be uncertainty in the description of property sold at a county treasurer's sale, evidence *abunde* may be received to designate it.

ERROR to the Common Pleas of *Schuylkill county*.

This was an ejectment by the Commercial Bank of Pennsylvania against Robert Woodside and William Haggerty, for a lot of ground in the borough of Pottsville, on the south side of Market street, twenty-five feet from the corner of the Market square.

The plaintiffs showed a perfect title to the lot in question, from John Pott, the proprietor of the town of Pottsville, and who occupied the said town-plat, with other land, as a seated tract.

It was a part of the plaintiff's evidence, that on the 30th of June, 1832, John F. Hallerman conveyed the lot in question to Thomas Ashburner, and the conveyance was, on the 13th day of July, A. D. 1832, recorded in deed book No. 12, p. 566; and on the 20th day of Nov., 1835, the said Thomas Ashburner conveyed the same lot to the plaintiffs, and the deed thereof was also recorded on the 29th day of Dec., A. D. 1835.

The *defendants* claimed under a tax sale by the county treasurer in June, 1836.

The *defendants*, in order to establish a tax sale of the lot in question, offered in evidence the assessment from the commissioners' office for the year 1834, containing the following assessment in the regular list of seated property, to wit:

"Ashburner Thomas, Philadelphia—

1 25 feet lot by 114 feet, corner of Market and	} 100. 70. 10."
Courtland streets, \$50	
1 25 " " " adjoining the above, 50	

To which plaintiffs objected, because it is assessed as seated land, and not unseated. The defendants then called Godfrey Zulich, the then commissioners' clerk, who testified as follows:

"I came into the commissioners' office in the spring of 1845—I know nothing of the proceedings of the office before that time—I cannot say that this assessment contains any *unseated* lands—it contains nothing under the head of unseated lands. I have found that the unseated lands were under the head of unseated or non-residents in most of the books—they placed the unseated in the same book, but under a different head—there are no unseated or non-residents in this book, and it does not appear what it is, except

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houses and lots—I have seen unseated lots in the borough of Pottsville assessments since 1841, but none before that time.”

The defendants, in connection with this evidence, offered the *treasurer's book*, containing entries of the collectors' returns, and called Benjamin Christ, treasurer, who testified as follows:

“This is the treasurer's book, containing unseated and seated lands—they are the returns made by the collector to the commissioners, and the returns of the road taxes—the heading shows unseated lands—by what appears in relation to other sales, the treasurer takes it from this book—this is a copy from the original returns.”

Cross-examined—“The original returns are always filed in the Treasurer's office—I don't know the handwriting of this book.”

The original return to the commissioners produced. It was as follows:

“Return of County and State tax of the Borough of Pottsville for the year 1834, Daniel Christian, collector.”

1835, Feb. 23. It contained, *inter alia*, as follows:

	County tax.	State tax.
Ashbury Thomas, Philad., 1 lot,	70.	10.

In the treasurer's book, under head of “Borough of Pottsville, County and State tax on the unseated lands for 1834, Daniel Christian, collector, entered Feb. 4th, 1836, was entered:

	County tax.	State tax.
Ashbury Thomas, 1 lot,	70.	10.”

The defendants further offered and gave in evidence the treasurer's *sale book* of the sales in June, 1836, in the following words: “2 lots, *Ashburn* Thomas, 80 cents, commissioners \$3.42.” To the admission of which, exception was taken by plaintiffs' counsel.

And subject to the same exception, the defendants gave in evidence a deed, dated the 16th July, 1836, “Joseph Attinger, treasurer, to the commissioners of Schuylkill county,” containing the following description, to wit: One lot in the borough of Pottsville, owned by Thomas Ashburn.

And also, the entry by the commissioners of the lands purchased by them at treasurer's sale, in these words, to wit:—

Borough of Pottsville.

One lot of ground sold in the name of Thomas Ashburn.

County tax	-	-	-	-	70
State tax	-	-	-	-	10
					<hr/> 80

Unseated Lands.

Whole amount of tax due - - - - - \$19 91

February 13th, 1843, sold to Robert Woodside for 6 00

And also a deed by the county commissioners to Woodside for

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the lot, for the consideration of \$6, describing the lot as owned by Thomas Ashburn.

Also an assignment by Robert Woodside of the one moiety to William Haggerty, the other defendant.

The defendants then called several witnesses, who proved that the lot in question was now in a thickly-settled part of the borough of Pottsville, and that valuable houses were constructed in its immediate neighborhood, in 1834, at the time of the assessment; that the said lot at that time was a cleared lot, but was not fenced, nor had it any buildings upon it.

The *plaintiffs* then gave in evidence a deed from John F. Halberman to Thomas *Ashburner*, dated the 30th day of June, 1832, for a lot of ground on the corner of Market square, in the said borough, adjoining the lot in question, and precisely of the same size and dimensions, and which said deed was also placed upon record in deed book No. 12, page 565, the 13th day of July, A. D. 1832.

This deed was given in evidence to show that Thomas Ashburner was the owner of *two* lots of ground on Market street, in Pottsville, at the time of the assessment in 1834, and that he remained the owner of the said lot at the time of the treasurer's sale in 1836.

The plaintiffs also showed, by the testimony of Andrew Mortimer, that this corner lot was vacant and unimproved at the time of the assessment in 1834. In the language of the witness, "it was then in the same situation as the lot in question."

The case was tried before KIDDER, J. The plaintiff's counsel submitted various points:

1st Point.—If the ground on which the town of Pottsville is located, was a seated tract of land when it was laid out in lots, the lots so laid out could not thereafter be sold for taxes, as unseated, unless they were taken from the seated list and assessed as unseated lands.

1st Answer.—The court answer this point in the negative. This was, according to the evidence, a vacant town-lot, and it being assessed with taxes which were unpaid, it was competent for the commissioners to transfer it to the unseated list and direct its sale for taxes.

2d Point.—In order to authorize the sale of a town-lot in a thickly-settled town, such as the town of Pottsville, it must appear from the records that the lot in question was assessed as an unseated tract of land, and returned by the commissioners to the treasurer as such. It does not appear from the records in the office that there was any assessment made on the lot in question, as an unseated tract of land.

2d Answer.—The assessment of the lot in question, as exhibited upon the records of the commissioners and treasurer, was sufficient to authorize the sale under the act of Assembly.

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3d Point.—If the evidence shows that Thomas Ashburner was the owner of *two* lots of ground that were assessed as two lots, they could not legally be sold as one lot, and the sale would be void, even if the other facts would warrant a sale.

3d Answer.—The court answer this point in the affirmative. If two lots were actually sold as one lot, the sale would be void, and consequently no title would be conferred upon the purchaser.

4th Point.—If but one lot was sold, it appearing that Thomas Ashburner was the owner of two lots, and there being nothing to designate which was sold, the deed is void, for uncertainty.

4th Answer.—If but one lot was sold, we cannot say to you, under the evidence in this case, that the deed would be void for uncertainty. There is no evidence that Woodside took possession of but one lot in pursuance of his deed from the commissioners, and that is the one now in dispute. It appears that Ashburner owned two adjoining lots at the time of the assessment; and if Woodside purchased one, and took possession of one, the fact of there being one adjoining to it of the same size, would not render his deed void.

5th Point.—The property must be so described that the owner may know that it is his lot that is selling, and he could not know by the description in this sale.

5th Answer.—The lot was sufficiently described; and as the owner paid no taxes, he has no reason to complain.

6th Point.—It does not appear that the lots assessed in 1834 were ever returned to the treasury as unpaid, either by the county commissioners or collector, and the only return found, was one made in 1836, 4th of February, in the name of Thomas Ashbury; and on that return or assessment, no sale could take place until one year thereafter.

6th Answer.—The evidence in the case does not sustain this point. It appears by the evidence, that the assessment was made in 1834, and the sale from the treasurer to the commissioners was made in 1836, for taxes assessed in 1834.

The plaintiffs' counsel excepted to the answers of the court to the points submitted.

Errors assigned :

1. The court erred in admitting in evidence the assessment of 1834, because it nowhere appears that it was assessed as an unseated tract, but is amongst the seated lands; and as all the seated lands are assessed in the county by immemorial usage, and this assessment is to Thomas Ashburner, and not to Thomas Ashburn.

2. The court erred in admitting in evidence the so-called return of the collector of

Ashbury Thomas, Philadelphia, 1 lot,	County tax. 70 cts.	State tax. 10 cts.
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because it is not returned as unseated, but simply as a return of a tax that could not be collected from the person of Thomas Ashbury. It does not appear to have the least connection with the assessment of two lots to Thomas Ashburner, nor with the lot in question. And this return is not acted upon by the commissioners, and not signed by Daniel Christian, the collector, nor entered in the treasurer's office until February 4th, 1836, nearly a year after the sale to the plaintiffs.

3. The court erred in admitting the entry in the treasurer's book, for the purpose of showing that the lot in question was assessed and returned as unseated, because that entry is founded upon the return, and the return does not state the lot to be vacant or unseated, nor does it appear to be a return of the lot in question, nor of the lots assessed.

4. The court erred in admitting the treasurer's sales book, because it is stated to be a sale of two lots in the name of Thomas Ashburn, having no connection with the return of the collector, on which the sale is alleged to be founded. And for the same cause, the court erred in admitting the deed of the treasurer, and the proceedings of the commissioners thereupon, both of which describe one lot owned by Thomas Ashburn.

5. The court erred in their answers to all the points submitted by the plaintiffs' counsel.

The case was argued by *Bannan*, for plaintiff in error.—He contended that error existed in the matter to which the 1st, 2d, 3d, and 4th bills of exceptions relate, because, that in order to authorize the sale of a town-lot, laid out upon a seated tract of land, and in a thickly-settled part of a town, it must appear that the said lot was taken from the seated list, and assessed as unseated. And it is not enough to prove, at the trial, after a sale to innocent purchasers, that the lot was in fact vacant at the time of the assessment. Reference was made to *McCalmont v. McClelland*, 3 *Pa. Rep.* 106; *Owens v. Vanhook*, 3 *Watts* 260. Notice to the owner should have been given: *Larimer v. McCall*, 4 *W. & Ser.* 133; *Milliken v. Benedict*, 8 *id.* 160; 4 *id.* 174; 13 *Ser. & R.* 151; 1 *Watts* 533; 1 *Barr* 80. Thomas Ashburner lived in Philadelphia at the time of the sale in 1836. The assessment is in the name of Thomas Ashburner; there is also a family of the name of Ashburn, and when the Bank saw the advertisement of two lots of ground in the town of Pottsville, in the name of Thomas Ashburn, what was there to inform them that it was their lot that was offered for sale?

Parry, for defendant, with whom was *Hegins*.—In Schuylkill county, previous to 1841, the seated and unseated land was placed in the assessment by the assessor, without distinction. By some

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assessors, part of the land was assessed under the head of "non-residents," whether unseated or improved. The assessment thus made was transferred to the collector's duplicate, and where the land was unseated, he was exonerated from the tax, and the land returned as unseated by the commissioners to the treasurer, to be sold. The lot in question was regularly assessed in 1834, by the assessor of the borough of Pottsville, and returned to the commissioners. There was no property assessed in this assessment under the head of "non-residents." The commissioners returned one of these lots as unseated to the treasurer, to be sold, as follows, viz.: Extract from treasurer's book of unseated lands—"Borough of Pottsville, county and State tax on unseated lands for 1834, Daniel Christian, collector, entered Feb. 4, 1836." The lot was proved to have been unseated in 1834, in a state of nature, and unimproved. The treasurer's sale book shows a sale of *two* lots; *but this is clearly a clerical error*. There was but *one* lot returned to the treasurer; and the deed from him to the commissioners is for one lot; and their record of the lands purchased by them shows the purchase of but one lot. The lot was well assessed; or if there was an irregularity, it is cured by the act of 1815: *Hubley v. Keyser*, 2 *Pa. Rep.* 502; 1 *W. & Ser.* 328; 4 *id.* 269; 7 *id.* 260. It is immaterial in what name the lot was taxed and sold: 1 *W. & Ser.* 166; 6 *id.* 520; 7 *id.* 386; 3 *id.* 238. The description of the lot in the assessment, and treasurer's and commissioners' deeds, is sufficient. The question of identity was for the jury, and has been decided: *Coxe v. Blauden*, 1 *Watts* 534; *Burns v. Lyon*, 4 *id.* 363.

The opinion of the court was delivered by

BELL, J.—It is essential to the validity of every tax sale of lands that the subject of it should be assessed and returned, by some competent authority, as unseated, or, where it has been rated as a *seated* tract or lot, that it be transferred to the unseated list, by the commissioners of the county, or their authorized agents, with notice to the owner, if that be possible. This is the doctrine of all the cases in which the subject has been treated. They settle, indisputably, that an omission, in this particular, is uncured by the act of 1815, which applies only to irregularities in the proceeding. It is the assessment, says *Larimer v. McCall*, 4 *W.* 35; *S. C.* 4 *W. & Ser.* 133, "which confers the power to sell in the same manner as a judgment on which an execution is issued. Without this, there is no authority to divest the title of the owner, and if a tract be returned as *seated*, it cannot be sold for taxes." To the same effect are the other adjudications, down to *Milliken v. Benedict*, 8 *Barr* 169. These also deny the right of a collector, or other officer, except the commissioners of the county, to transfer land from the *seated* to the unseated list after the assessor has made his return, and emphatically point out the injustice which otherwise might be

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inflicted on owners, who, resting upon the return of their property as seated, and therefore not liable to sale, are entitled to await the visit of a collector, or, at least, notice that public convenience has dictated a change in the manner of assessment. Ordinary propriety exacts this where the lands assessed remain the property of the same individual, but its stringency is much enhanced where a tract assessed as seated is purchased by a stranger after the assessment. Upon this point it was observed in *Owens v. Vanhook*, 3 *Watts* 260, that "while the same person continues owner of the land, it may be less material whether it is taxed as seated or unseated, or that it be transferred from one list to the other; but to a purchaser, it may be most material; if taxed as unseated lands, he can *discover that* by application to the treasurer, and retain the amount out of his purchase-money to meet the lien; if not in the list of unseated lands, the taxes, though unpaid, are no lien. To change property from the seated to the unseated list, after a purchaser had paid his money, would be then most unjust as respects him." In that case, it was proved the lot sold was vacant and unimproved at the time of the assessment, and that the proper collector had so returned it, as a reason why he could not collect the tax. But it did not appear the commissioners had acted on this return, or exonerated the collector from liability for any part of the taxes charged in his duplicate. And it was determined the sale was void for want of authority. The conclusion was put on the express ground that the commissioners cannot change land from the seated to the unseated list, so as to affect an honest purchaser, nor can they sell as unseated, property taxed as seated and never transferred to the unseated list. I am aware that in *Frick v. Sterrett*, 4 *W. & Ser.* 269, decided at the same time with *Larimer v. McCall*, it was held that a town-lot, situate in a county where a practice had obtained of assessing seated and unseated lands without discriminating between them, was well sold as vacant. But there the collector had returned it as vacant, and, as a consequence, claimed to be exonerated from the collection of the tax imposed on it, which exoneration was conceded by the commissioners, and the lot thereupon transferred to the unseated book kept in the treasurer's office, according to a general usage. The records of the commissioners' office had been destroyed by fire. Under these circumstances, it was thought fair to infer that the commissioners had transferred the property to the unseated list before the sale. The decision proceeded upon the assumed action of the commissioners, the only persons authorized to interfere, based on the exoneration of the collector and the proved practice of the office; and, as the question of notice was not raised, it is in harmony with the preceding adjudications. Indeed, it would be scarce respectful to suppose it was intended to conflict with *Larimer v. McCall*, just before determined for the third time.

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The governing rule, ascertained by these precedents, is, I think, decisive of the present controversy. The land, here in question, was assessed and returned as a seated lot in the year 1834, and preceding years. Throughout the county of Schuylkill generally, it was usual to distinguish, in the assessor's returns, between improved and vacant lands, the latter being designated by the term "non-residentor." But up to 1841, it was not customary to return as unseated any of the lots situate in the borough of Pottsville. If we may judge from the return before us, made in 1834, and the foundation of this difficulty, seated and unseated land was not simply confounded, but every species of property was treated as being represented by some responsible individual as owner, who was to be looked to for the taxes. Thus we find the lot in question returned as belonging to Thomas Ashburner, of Philadelphia, in a long list of taxable items, consisting of houses, stores, shops, occupations of single freemen, and other lots. There cannot, therefore, be the least pretence for the position that an intent was entertained by the assessing officers to return this property as unseated. Every thing indicates a contrary intention, in consonance with the prevailing practice. As seated property it was inserted in the collector's duplicate, and, in 1835, he returned it to the commissioners as representing unpaid tax, in a list consisting of assessed persons who were dead, or had left the county, and of some other lots. But it is somewhat remarkable, that though each of the latter is noted in the return as being vacant, there is no such intimation as to the lot owned by "Thos. Ashbury, Philadelphia." No action upon this return appears to have been had by the county commissioners, and we hear nothing more on the subject until February, 1836, when, with other lots, it appears to have been entered as Thomas Ashbury's, in a book kept by the county treasurer, containing entries of unseated lands. These entries, it is said, were taken from the collector's returns to the commissioners, but it does not appear the latter authorized them or knew any thing of them. It is not even shown they exonerated the collector from liability for these taxes returned as uncollected. The attempted transfer from the seated to the unseated list was consequently made without authority, for it is almost needless to observe the county treasurer, of himself, is as powerless to effect such a change as the supervisor and assessor were determined to be in *Larimer v. McCall*, and *Milliken v. Benedict*. But in November, 1835, and, therefore, prior to the interference of the treasurer, Ashburner had conveyed the property in suit to the plaintiff, for a valuable consideration, and who, it must be presumed, was aware that the lot had been treated as seated by the county authorities. The case thus falls directly under the principles settled in *Owens v. Vanhook*, which protect an innocent purchaser from even the interference of the commissioners themselves, without notice. It is an

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instance of an attempt to deprive of his property one who, it must be supposed, relied in good faith upon what the public officers had done and sanctioned in 1834, and to put it in the strongest position for the defendant, sought to undo, without notice to him, in 1836, just four months before the sale. This would be the aspect worn by the case had it been shown the commissioners authorized the transfer to the unseated list. But this feature is wanting, and the defendant is, consequently, compelled to meet the additional objection of want of authority. Thus regarded, the treasurer's sale is obnoxious to two exceptions, each of which has been held as fatal by this court. Indeed, the whole proceeding seems to have been conducted with such utter disregard to even the decencies of form and contempt of every thing like certainty, that the most zealous advocate of the curative qualities of the act of 1815, would be more than puzzled in attempting to sustain it. The two distinct lots assessed in 1834 as the property of Thomas Ashburner, and particularly described by the assessor, are returned by the collector, in the succeeding year, as one lot, owned by "Thomas Ashbury," and it is so entered in what has been called the unseated land book, kept by the treasurer. But in the treasurer's sales book it is stated that in June, 1836, he sold to the commissioners *two* lots of Thomas Ashburn for a tax of 80 cents; while the latter officers acknowledge, by the entry made in their book, the purchase of but one lot of ground, sold in the name of Thomas Ashburn, which lot, it is stated, they sold to Robert Woodside, in February, 1843. The deed, too, made by the commissioners to Woodside, is for a single lot, formerly owned by Thomas Ashburn. It is easy to get over the alteration of the name from Ashburner to Ashburn and Ashbury, as a clerical error, and under the doctrine that an erroneous designation of the owner will not vitiate a tax sale. But the uncertainty as to the subject of the sale presents greater difficulty. Did the commissioners purchase both lots, or only one? If both, *sold as one*, it is conceded the sale is void. If they bought but one, which of them? If both, which of them did they afterwards sell to Woodside? for it is certain he bought but one. Upon this point the commissioners' deed is silent. Were we confined to the official entries and the conveyance, I should be inclined to say they leave us in such doubt and uncertainty as to the answers proper to be returned to these questions, that it would be impossible to establish a title in the defendant. But the particular lot bought and sold may be designated by evidence *aliunde*; and if the purchaser, soon after the sale, took possession of one of the Ashburner lots, and afterwards treated it as his own, a jury might be satisfied that this was the property purchased. The court, in its answer to the plaintiff's fourth point, speaks of such a possession by Woodside, but there is no evidence of it upon the paper-books furnished us. To say the least, such proof is cer-

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tainly necessary to relieve the uncertainty suggested by the documentary evidence.

The answer returned to the sixth point is correct, upon the assumption that the lot returned by the collector in 1835, and registered by the treasurer in 1836 as vacant, was one of those assessed as Thomas Ashburner's in 1834, and sold to defendant in 1836. But whether this be so, is an inquiry for the jury, under all the evidence. The objection is that the court seems to have taken it for granted.

What has been said covers, and, perhaps, disposes of the whole case. Certainly so upon the evidence as now presented. The defendant may, possibly, make out a better case on a second trial.

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

Hibbs versus Blair.

1. In the case of a proceeding by attachment under the 27th section of the act of 12th July, 1842, to abolish imprisonment for debt, where the justice had entered a non-suit on account of a copy of the attachment not having been served upon defendant, a bond given under the proviso to that section, is binding on the sureties of the plaintiff in the proceeding, even though the latter clause, as *to failure in the action*, has been omitted in it.

2. Nor is such a bond void against a surety of the plaintiff merely because the penalty to a small extent exceeds double the amount of the plaintiff's claim.

3. Where such an attachment has been levied on property of the defendant therein, and a non-suit has been entered by the justice on account of defendant not having been served with a copy of the attachment, the condition of the bond of the plaintiff and his sureties is thereby broken, and the defendant in the original proceeding may recover upon it.

4. It is not necessary that the principal in such a bond be first pursued, and his liability fixed, before a surety in the bond can be sued.

5. In a suit on the bond by the defendant in the former proceeding against the surety in the bond, it is not error to refuse to permit the surety to show that the plaintiff in the suit trying obtained credit from the plaintiff in the former suit, by false representations as to his means of payment; nor in overruling an offer on part of the surety to prove that the plaintiff in the suit trying, had confessed judgments in favour of other creditors than the plaintiff in the former suit in which the bond was given, and had requested them to issue execution. Such evidence is irrelevant to the issue in the suit on the bond against the surety.

6. A transcript of the docket entries of a justice of the peace as to a proceeding before him, proved by the justice, is admissible in evidence in a suit between the defendant in said proceeding, and a surety in a bond given in that case: though the docket is the best evidence, it need not be produced.

7. Where a justice of the peace is offered as a witness to verify a transcript made by him, and he testifies that he was at the time of the proceeding a justice of the peace, no other evidence of his official character will be required: the court will take judicial notice of the fact.

ERROR to the Common Pleas of *Bucks county*.

This was an action by Thomas Blair against Mahlon G. Hibbs, under the following circumstances:

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Gillingham, being the holder of a note against Blair for \$87.53, made oath, under the act abolishing imprisonment for debt, before Samuel Allen, a justice of the peace, that Blair was about to secrete and remove his property, &c., and entered into bond with Hibbs, defendant below, and another, as his sureties, in the sum of \$176, conditioned that if said Gillingham should obtain a judgment of at least one-half of his demand of \$87.53 in an attachment suit then depending before said Allen against said Blair, then the bond should be void, &c. It was alleged on the part of Hibbs, the defendant, that this condition is different from that prescribed by the act, that the condition of the bond is more burdensome to the obligors than that prescribed by the statute, and contains more than the statute requires. See copy of the provision, *postea*. Justice Allen at the same time issued *the attachment*, to which the constable returned that he had served the attachment personally, and by attaching two horses in the hands of defendant. At the hearing, defendant claimed a *non-suit* on account of the attachment not being legally served and returned. *Non-suit* granted on account of defendant not being furnished with a copy. The justice immediately issued a second attachment, but the property of Blair had, in the mean time, been seized by others of his judgment creditors.

This suit was brought by Blair against Hibbs, one of the sureties upon the bond given as aforesaid.

The defendant pleaded *non est factum* and payment, and that the bond had not been forfeited. The jury found for the plaintiff.

Upon the trial, the plaintiff called Samuel Allen, who testified, "In 1847, I was a justice of the peace. This paper shown me is a *transcript* from my docket, made out by myself."

The plaintiff offered to read the transcript; defendant's counsel objected, on the ground that the docket was the best evidence, and that Allen was not proved to be a justice of the peace. Objection overruled, and exception on part of defendant.

The execution of the *bond* was proved, and offered. It was objected to, admitted, and defendant excepted.

Plaintiff offered to prove that he had, at the time of the service of the attachment, other property, cows, grain, &c. Defendant's objection overruled, and he excepted.

It was admitted that judgments were confessed by Blair, the plaintiff in this suit, pending the attachment hereinbefore referred to.

On the part of *Hibbs, the defendant*, it was asked a witness, whether the plaintiff (Blair) requested executions to be issued on the judgments confessed by him. Objection on part of defendant sustained, and defendant excepted.

The *condition* of the bond is prescribed by the proviso to the

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27th section of the act of 12th July, 1842, to abolish imprisonment for debt. The proviso is as follows:

"Provided that before such attachment shall issue, the plaintiff, or some one in his behalf, shall execute a bond in the penalty of at least double the amount of his claim, with good and sufficient sureties, conditioned that in case the plaintiff shall fail to recover a judgment of *at least one-half the amount of his claim*, he shall pay to the defendant his damages for the wrongful taking of any property over and above an amount sufficient to satisfy the judgment and costs, and that if the plaintiff shall *fail in his action*, he shall pay to the defendant his legal costs and all damages which he may sustain by reason of said attachment."—*Dunlop* 867-8.

The defendant's counsel requested the court to charge the jury:

1. "The bond on which the suit is brought is void, and the plaintiff cannot recover."

2. "The judgment of non-suit given by the justice was illegal, and did not work a forfeiture of the bond."

3. "There is no evidence in the cause showing a forfeiture of the bond."

4. "That the liability of the defendant in this case is only a secondary liability; and that it was incumbent on the plaintiff first to pursue the principal in the bond, and fix his liability, and the amount of it, before this action could be brought, and plaintiff cannot recover."

KRAUSE, J., charged, *cum alia*:

This action is brought on a bond, dated 22d March, 1847, and given, it appears, under the act of 1842, exempting debtors from imprisonment, in a suit of Albanus Gillingham v. Thomas Blair, before Samuel Allen, a justice of the peace, to procure an attachment. This instrument, with the endorsement upon it, is part of the plaintiff's evidence. The defendant asks the court, in his first point, here read, to say to the jury that *the bond on which the suit is brought is void, and the plaintiff cannot recover*, and he gives several reasons for this in his argument: one is, that it is not conformable to the statute, as it does not embrace the two conditions which the statute prescribes. The court, however, dissents from this reason, as *the omission complained of is more in ease of the defendant than otherwise*. Another is, that the penalty is more than double the amount which the plaintiff before the justice claimed; but then the statute requires such penalty to be at least double the amount claimed, and imports, therefore, that a larger one may be taken, if the justice thinks proper. The court, then, instructs the jury that the bond is not void, so as to prevent plaintiff from recovering. In the defendant's second point, he asks the court that the judgment of non-suit given by the justice was illegal, and did not work a forfeiture of the bond. But the court replies to the jury, that under the evidence, this is not a true

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statement of the law in the case. His third point is, that there is no evidence in the cause showing a forfeiture of the bond. There is evidence, however, that the parties in the attachment suit appeared before the justice, and after hearing, the defendant, who is plaintiff here, claimed a non-suit on account of the attachment not being legally served and returned, which non-suit the justice granted on account of the defendant's not being furnished with a copy. And there is evidence also that two horses of the plaintiff in the suit now trying, had been taken under the attachment and moved to his neighbor's place. This evidence shows, if the jury believes it, that the bond is forfeited. The condition of the bond is, that Albanus Gillingham shall obtain a judgment of at least one-half his demand of \$87.53, in the attachment suit in which it was given; and the judgment of the justice shows that he recovered nothing; for, according to the case of *Gould v. Crawford*, 2 *Barr* 89, the non-suit granted by him being unappealed from, is conclusive. If therefore the jury finds the facts as stated, the condition of the bond has been broken, and the plaintiff may recover the reasonable damages he has sustained in consequence of such taking of his horses. With these observations, this third point is negated by the court. The defendant's fourth point is also negated, the principle stated in it being inapplicable to this case. The jury will then take the testimony, and without any intimation from the court in regard to it, find the facts for themselves; and on the facts and the principles of law which have been stated, make up their verdict. It is proper, however, to add, that the plaintiff has received his horses back, and cannot, therefore, recover damages for them according to their value. What he is entitled to, if the jury finds damages at all, is a reasonable compensation for the taking and detention of them, if they were taken and detained from him as he alleges, and the consequent loss of their use, and interruption of his business during the time he was so deprived, &c.

The defendant excepted to the charge.

The jury found a verdict for the plaintiff.

Error was assigned in admitting the bond in evidence, and to the charge in answer to defendant's first point—to the answer to the second and third points—also, in the charge on the fourth point—in admitting the transcript in evidence, it being contended that the docket was the best evidence, and that Allen was not proved to be a justice; and that the court erred in refusing to permit the defendant to prove that, pending the attachment, the plaintiff confessed judgment in favor of other parties, and requested them to issue executions upon such judgments.

The case was argued by *Fox*, for plaintiff in error.

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PER CURIAM.—After a careful examination of the charge, we perceive no error. The reasons given by Judge KRAUSE are perfectly satisfactory. This part of the case is affirmed for reasons given by him. There was no error in admitting the transcript of the justice, proved by himself to be a true copy. It would be intolerably inconvenient and oppressive to parties to be obliged to bring the docket into court, and hence, although it is the best evidence, its production is dispensed with.

Nor was it necessary to prove that Allen was a justice. The court takes judicial notice of that fact. The court was right in refusing to permit the defendant to prove that the plaintiff obtained credit for the debt by false representations as to his means of payment; and also, in refusing to permit defendant to prove that, pending the attachment, the plaintiff confessed judgment in favor of other parties, and required them to issue executions upon their judgments, because the evidence was impertinent and wholly irrelevant to the issue trying: its admission would serve no other purpose than to perplex and bewilder the jury.

Judgment affirmed.

In re Gangwere's Estate.

1. To defeat a widow's right of dower, the proof must be clear. If a marriage contract be alleged, its existence, and its whole contents must be clearly proved.

2. Where a marriage contract was entered into for the purpose of quieting the children of the husband, but with a promise by the husband that after showing it to his children he would destroy it, and where the husband afterwards got it from the trustee for the purpose of destroying it, and declared at the time that it should be null and void: this *may* be equivalent to a destruction of the paper, and it is not material that it was kept for years without its actual destruction.

3. The actual destruction of the contract by the husband is binding on him, and if ratified by the wife, after his death, it is binding on her.

4. The fact of witnesses being nearly related to a party, is to be weighed in a doubtful case, but should not be allowed altogether to destroy their credit, when they swear positively and are otherwise unimpeached.

5. An inquisition of lunacy finding the party a lunatic without lucid intervals is *prima facie* evidence, but not conclusive: and a petitioner for the proceeding is not estopped from asserting the truth against it, and showing that the party had lucid intervals.

6. An act done in a lucid interval by one who has been found to be a lunatic, is binding on him, but the proof of the lucid interval in which it was done, must be clear.

7. As to whether a marriage contract executed on *Sunday* be legal, the court were divided.

APPEAL by the heirs of Henry Gangwere from the decree of the Orphans' Court of *Lehigh county*.

On the petition of Jacob Gangwere, Joseph Gangwere, and Solo-
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mon Gangwere, a citation issued out of the Orphans' Court of Lehigh county, directed to Jacobina, the widow of Henry Gangwere, deceased, alleging, *inter alia*, that said Henry Gangwere died intestate, seized of certain real estate in said county and the county of Northampton adjoining, leaving a widow, the said Jacobina, and issue by a former marriage—that said real estate had been appraised according to law, and would be accepted at the next term by the heirs or some of them—that said Jacobina was entitled to no part or interest in said real estate, her sole interest in the estate of the said Henry Gangwere having been secured to her by a marriage contract, and requiring her to show cause why the bonds, &c., to be executed by the acceptants should not be made to the heirs respectively, without securing any part or interest therein to said widow, &c.

To this citation an answer was filed by the said widow, denying *inter alia* the existence of any valid marriage contract, as alleged in the citation, but admitting the execution of a paper by the said Henry Gangwere and herself, on the day of their marriage, to wit, on Sunday, the sixteenth day of November, 1828, immediately prior to the performance of the marriage ceremony, and which he promised, after showing it to his sons, to destroy; and alleging further the subsequent destruction of said paper by the said Henry Gangwere.

To this, a replication was filed, traversing and denying the truths of the matters alleged in said answer.

The only matter in controversy was the right of the said widow to the interest of the one-third of the valuation money of said real estate.

The petitioners proved, by the testimony of Henrietta Beitel, C. F. Beitel and others, the execution of a marriage contract between the said parties, dated Saturday, the 15th of November, 1828, and prepared for execution on that day, by C. F. Beitel, according to the instructions of the said Henry Gangwere, given about a week previous thereto, but which was not executed by the parties until Sunday morning, the 16th of said month, immediately before the performance of the marriage ceremony; and (having given notice to the respondent to produce said marriage contract) proved the contents thereof, and its existence in her possession in the latter part of October or beginning of November, A. D. 1846; and further proved the existence of said contract, and its contents, by the declarations and admissions of the parties thereto, and also that most of the marriages in Lehigh county are solemnized on Sunday.

The respondent then proved, by the testimony of Catharine Phlueger and David Young, that about the last of September or the beginning of October, 1846, a paper writing was burned by the said Henry Gangwere, at his residence in Saucon township, Lehigh county, which paper writing was alleged to be the said marriage contract.

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The petitioners thereupon proved, that at the time of the alleged destruction of the said marriage contract, the said Henry Gangwere was, by inquest, found in the Common Pleas of Lehigh county, a lunatic, without lucid intervals; which proceeding was founded on the petition of the said Jacobina, verified by her oath on the 12th day of April, 1847, in which she averred that he, the said Henry Gangwere, was then and had been deprived of the exercise of his rational faculties and understanding, so as to be altogether incapable of protecting himself or of managing his affairs in a proper manner, for the space of one year previous thereto; which fact the said inquest found, and also that, for a year and upwards last past, he, the said Henry Gangwere, had not enjoyed any lucid intervals; on which a committee was appointed, who continued in office until his death.

The petitioners also produced on the same point the testimony of his medical attendant, Dr. Detweiler, and others.

And the respondent, the testimony of Philip Bahl and others.

The respondent also averring that the said marriage contract was delivered up to be cancelled, and was cancelled—proved by the testimony of C. F. Beitel that, half a year or a year and a half after it was executed, Henry Gangwere, deceased, asked him for the paper, saying he wanted to destroy it—that it was not given up to him—that some time after this the parties came together, when the paper was taken away by him, they saying “*that it shall be given up.*” They also proved by the same witness that he was a trustee in the contract.

In answer to this, the complainants proved by Michael Giffert, that between three and five years after the parties were married, Henry Gangwere, in the presence of his wife, the said Jacobina, said that they had a marriage contract with each other, by which she was to have \$200 or \$300 after his death, and that she said nothing against it; and proved by Joseph Huber, that two or three weeks after the marriage, she said she was satisfied with it. They further proved by the testimony of Jacob Correll and A. K. Wittman, that on the 27th of September, 1846, the respondent was called on for this marriage contract—that she produced a box of papers, saying that if it was not there, she did not know where it was. It was not there, but that about four or six weeks afterwards she exhibited the contract to them, and on its being read to her, said it was of no use, because it was signed on Sunday, and would not stand law.

The Orphans' Court, on hearing the case, dismissed the citation, and directed the acceptants of said real estate to enter into recognition to secure the purport of the said respondent, upon the ground that the marriage contract was void in law, having been executed on Sunday; expressing an opinion that there was not sufficient evidence of its having been delivered up for cancellation—

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that they did not believe the paper ever was destroyed by Henry Gangwere, deceased; and if it was, they more than doubted his capacity to do such an act understandingly.

A witness, Jacob Correll, testified, *inter alia*—Mrs. Gangwere brought a paper to me, about October, 1846. * * *

On cross-examination, he testified—I had seen Mr. Gangwere, four or five weeks before she showed me the paper. And in reply to a question, he said—“We talked very little to him; but what we talked to him, he answered correctly.”

He testified to counting money at the house of Gangwere, with Wittman and Dr. Detweiler.

Andrew K. Wittman testified, *inter alia*—“I think the time we counted the money was between the twentieth and thirtieth of September, 1846.” * * *

Re-cross-examined—“When we counted the money, the old man was sensible, very sensible. The old woman said she did not like to have the money in the house—she wanted it put somewhere where it would be secure; she said the boys were afraid she would take some of it. I believe we told the old man the amount of money we counted—at least, it was made known in the house; the old man was present; he did not express any dissatisfaction with the amount,” &c.

The opinion delivered by his Honor J. P. JONES was partly as follows:—

On the 16th November, 1828, being Sunday, a marriage was solemnized between Henry Gangwere the decedent, and Mrs. Jacobina Phlueger, before the Rev. Mr. Zeller, previous to which, and on the same day, they executed a certain writing between them, by which it would appear that it was agreed, in case she survived him, that she was to receive a certain sum per annum, in lieu of dower. She, having survived him, now claims her purpart of the appraised value of his real estate, upon three distinct grounds.

The first position taken is, that the contract, or writing before mentioned, having been executed on Sunday, and in contravention of the act of 1794, which prohibits the doing or performing of any worldly employment or business whatsoever on the Lord's day under a certain penalty, is void.

It has never, we believe, been supposed that the contract of marriage, entered into on that day, was void—indeed that contract stands on a footing so different from all others, that it could not with any propriety be called a worldly employment or business. In all that portion of the Christian world, which derives its doctrine and discipline from Rome, marriage is regarded as a solemn sacrament—and in Protestant countries, though divested of that high and mysterious sanction, it is still regarded as of Divine institution and with religious veneration. A contract of this kind might well be supposed to lay beyond the operation of this act of

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assembly. Looking at the undoubted validity of this marriage, celebrated as it was on Sunday, we were inclined to think, upon the argument, that the written contract of the parties, which preceded their marriage, and was executed on the same day, was to be regarded as a limitation or restriction of the legal effect of the contract of marriage, and so a part of that contract itself, we regarded it as constituting but one transaction. Until the marriage was had, that writing had only a contingent validity, which by that event was rendered absolute. Marriage was required to give it vitality, and in doing so, drew the dependent contract to it, merging the less in the greater, and making the two together the whole contract of marriage of these parties. In this way, we supposed that the execution of the written contract on Sunday might be cured.

Considered, however, merely in its civil and legal character as a contract, there follow upon marriage being entered into, certain rights of property, with which the law invests the husband and the wife at the moment they assume those relations towards each other. The wife's right to dower attaches upon the land of her husband immediately upon the marriage, or as soon after as he becomes seized. That is a necessary, inevitable legal consequence of the contract of marriage, which may well enough be supposed to enter into the contemplation of the parties. Nevertheless, the estate created by that operation of law does not arise by force of any contract, express or implied. That estate is an absolute creation of the law, not of the contract of marriage. Now, though parties may enter into the contract of marriage on Sunday, and if they do so, these legal results will attach to their respective properties, yet they cannot execute deeds with regard to those properties on that day, which will be good and valid as against the prohibition of worldly employment and business. The contract of marriage does not *per se* or *in se* include any agreement, express or implied, with regard to those properties—and therefore it will not do to say that a deed of settlement, or any other contract restricting or enlarging the rights of husband or wife with regard to the other's property, is part of the contract of marriage, and as such may be executed on Sunday. There is no mutual dependence between the two contracts—for although the marriage would be good without the settlement, the settlement would not be good without the marriage. The settlement does not in any way modify the contract of marriage—it only restricts or enlarges an estate about to be created, by operation of law, upon the happening of the marriage. As a contract, it is independent—the contract of marriage being but the mere contingency, on the happening of which the settlement is to take effect. Distinct as these two contracts in their nature seem to be, we are constrained, against our first inclination, &c. &c., to come to the conclusion that that paper was void, as being executed on Sunday.

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But for that, we would have no difficulty in coming to conclusions adverse to her pretensions upon the two other grounds, of which the first was, that the paper having been delivered up to be cancelled, in equity was cancelled. As to that, we think there is no sufficient evidence that the paper ever was delivered up to be cancelled. And then, with regard to the third ground, that, at the alleged destruction of the paper by Henry Gangwere in the fall of 1846, he was of sound mind—we do not believe the paper was destroyed by him; and if it was, we more than doubt his capacity to do such an act understandingly. But into these matters it is not necessary to enter, if, as we suppose, that written contract was void in consequence of being executed on Sunday.

Let the citation be dismissed and the acceptant or acceptants of the real estate be directed to enter into recognizances to secure the purpart of the widow Jacobina Gangwere.

From the decree the heirs appealed.

Exceptions were filed:—

1. The court erred in their opinion that the marriage contract was void, and in not decreeing that it was valid and binding under the circumstances of the case, even though executed on Sunday.

2. The court should have decreed that the said marriage contract, being a valid one, had never been cancelled or destroyed, and therefore that the widow was not entitled to the "thirds" under the intestate law, but only to the provision made for her by the said marriage settlement.

3. The court erred in confirming the report of auditors distributing to Jacobina Gangwere the one-third of the fund in the hands of the administrator, to wit, the sum of \$1215.61.

The case was re-argued by *Wright* and *Davis*, for appellants.—It was contended that the amount settled on the respondent cannot with propriety be considered in deciding the question before the court: *Glancy on Married Women* 221–3.

The form of the instrument is immaterial, nor is it necessary that the provision be said to be *in lieu of dower*: *id.* 222–6. The marriage contract was a valid instrument. That there was no proof before the court that the paper burned was the marriage contract. That if it were, the destruction was committed by a lunatic, by the connivance of the appellee, who was herself the petitioner, in whose petition it was averred that he had been "deprived of the exercise of his rational faculties or understanding, so as to be altogether incapable of governing and protecting himself, or of managing his affairs in a proper manner, for a year and upwards prior to April 12, 1847," and who was found by inquest to have been "of insane mind, *without lucid intervals*, for the space of one year and upwards prior to May 10, 1847." As to the respondent, the inquiry is

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conclusive: 4 *Rawle* 239. Like a legal presumption, it operates till it is overpowered: 6 *Barr* 378. No witness disproves it. The persons who testify to its destruction were her daughter and the husband of her grand-daughter.

That the getting the paper into their possession for cancellation was not sufficient, its actual cancellation or destruction was necessary: 7 *Barr* 100; *id.* 251; 8 *id.* 286. The paper, after being obtained, was preserved within reach of both parties for seventeen or eighteen years, and their intention was abandoned.

As to the objection that the contract was void on account of being executed on *Sunday*. Marriage is a civil contract: 6 *Bin.* 405; 2 *Watts* 10, 11; and though solemnized on Sunday, is valid. It does not come within the spirit of the act of 1794, imposing a penalty for performing "any worldly employment or business whatsoever on the Lord's day." A recovery may be had on the consideration of a note executed on *Sunday*, if the consideration arose on *Saturday*: 6 *Watts* 232; 4 *W. & Ser.* 547.

The contract was valid, because the whole was an entire contract, the settlement entering into and forming a part of the consideration of marriage: *Story on Con.* sec. 22; 17 *Ser. & R.* 70. It must be rescinded in toto, or not at all: *Story*, sec. 25; *Reeve's Dom. Rel.* 174; *Atherly* 28, 42, 49.

Porter and King, for appellee.—In the answer of the respondent, she avers that there never has been a marriage contract. That on Sunday morning, the day of her marriage with Henry Gangwere, he told her that his sons were howling about the marriage; that he wished her to sign a paper which he could show to them to pacify them, and after having shown it to them he would destroy it. That, relying on this promise, she signed a paper which was presented to her, and that then they went and were married. That afterwards the deceased obtained the paper from Beitel for the purpose of destroying the same. That he took it home, and destroyed the same by putting it in the fire, the date of doing which she cannot recollect. This is verified by affidavit. The denials are not so verified. That the testimony proves the facts set forth in the answer.

1. Was a legal marriage contract executed? It was argued that the act of 22d April, 1794, rendered it void: 4 *Ser. & R.* 159; 4 *Dal.* 298; 4 *Yeates* 24; 6 *Bin.* 321. Though it is said that a bond given on Sunday is void by the statute and not by the common law: 3 *W. & Ser.* 444; 1 *Taunton* 135, opinion of Lord MANSFIELD; yet it was contended that the opinion at this day seems to be that contracts made on Sunday are void by the common law, for Christianity is part of the common law: *Broome's Legal Maxims* 19; 40 *Law. Lib.* The judges cannot sit on Sunday: *id.* and *Co. Litt.* 135; 4 *Bl. Com.* 63; *Dyer* 181.

But whether void at common law or not, the act of 1794 inter-

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dicts all contracts coming under the denomination of worldly business: 6 *Watts* 221; 2 *Barr* 451; 7 *id.* 492-9.

The contents of the contract were not proved, and equity will not decree specific execution of a contract, the terms of which are uncertain: 2 *Ball & Beatty* 451, *Savage v. Carroll*; 2 *id.* 369, *Ormond v. Anderson*; 2 *Schoal & Lef.* 549; *Prec. in Chan.* 538, *Young v. Clark*.

If a bond be delivered to be cancelled, but, not cancelled, come again into the hands of the obligee, though it is valid in law, the obligor will be relieved in equity: *Cross v. Powell, Cro. Eliz.* 483; 7 *Barr* 252-3.

As to the sanity—That the jurors who testified, said substantially that Mrs. Gangwere, when examined as a witness before the inquest, said that within the last two years she had seen something not right about him—at times he had his understanding, and at times not; and one of them added: "It was only occasionally that she thought she saw any thing wrong about him." But within a short time (some say she said six months) before we were there, she said he was childish, and not able to manage his affairs. She was excited and alarmed when she testified, and seemed hardly to know what she did say.

The inquisition is only *prima facie* evidence: 4 *Rawle* 234; 6 *Barr* 373; 2 *Atk.* 412-13; *Collison* 389.

A marriage celebrated on Sunday is valid. When it is said to be a civil contract, it is meant that it is not a matter for ecclesiastical jurisdiction, and need not be celebrated by an ecclesiastic. It is cognizable in our courts of law. In England it is not so. The jurisdiction there is in the ecclesiastical courts. Even the divorce for adultery, cruelty, &c., is decreed by the spiritual court, and is only a *mensa et thoro*, leaving the marriage contract still existing. In Protestant countries, marriage is not considered a sacrament, but a contract; yet, unlike all other contracts, it is one which the parties themselves cannot rescind or dissolve. We, following the Scottish law, treat it as a contract of this nature, and have given our courts of common law jurisdiction to dissolve the marriage contract for certain reasons, without bastardizing the issue.

Marriage is a contract civil and divine: 1 *MacQueen on Husband and Wife*, p. 1, (49 *Law Lib.*.) and this is the light in which we view it.

The opinion of the court was delivered by

ROGERS, J.—As the deceased, Henry Gangwere, died intestate, Jacobina Gangwere, his widow, under the intestate laws, is entitled to the one-third of the personal absolutely, and the one-third of the real estate during life. This is not disputed; and if there was nothing else in the case, the distribution of the estate would be at-

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tended with little difficulty. But the heirs of the intestate contend she is not entitled to any portion in the distribution, because, before or at the time of the marriage, the parties entered into a marriage contract. To defeat the widow's right of dower, which is favored by the law, three things must be clearly proven: the existence of the marriage contract, its loss or destruction, and the contents. That a marriage contract was entered into between the parties, we have no reason to doubt, as there is proof of the fact by the witnesses examined on the part of the appellant and appellee. They prove repeated declarations to that effect, not only by Henry Gangwere, but by his wife also. The marriage settlement seems to have been made for the purpose of quieting the minds of the children of the intestate by a former wife, who, as is usual in such cases, made a violent opposition to the second marriage. There is reason to believe that, without that, no contract would have been made; the marriage would have been suffered to take its usual course. This was the reason assigned by the husband to his intended wife, and there is some ground to believe it was designed for no other purpose whatever: that it was the understanding when this design was answered the agreement should be cancelled, or that compensation should be made to her, if she survived, by a will afterwards to be made. Hence it is that we find that, after the contract had remained in the possession of Christian F. Beitel, the trustee, a year and a half or more, the old man, as he testifies, came to him and wanted the paper to destroy it. He was quite out of humor because Mr. B. would not give it to him. He told him he must bring his wife along, as he could not give it up without all the parties were present. After some time, the old man and his wife came and demanded the paper again. He gave it to them, and they, at the time he delivered it to them, declared it to be null and void. It was declared null and void, as he says, at the time the witness delivered it. The conversation was in German, the literal translation of the expressions used is, as the witness says, that it shall be given up. This testimony there is nothing to contradict, and, coming from a respectable witness, I shall take it to be true. It amounts, in my opinion, to a declaration, by both parties, that the marriage contract should be of no effect between them. That the agreement was not actually destroyed and cancelled at the time, evinced by the repeated declarations of the old man and his wife, amounts to but little, if, as I am inclined to believe, the original motive for entering into it was to quiet the fears of the children, who, as the old man said, were howling about his marriage, and would continue to do so if they were led to believe the marriage settlement had been cancelled and destroyed. To avoid unpleasant scenes in the family, may and in all probability was the real cause the contract was not actually cancelled and destroyed. The provision for the wife, according to the

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representations of the witnesses, was so inadequate, that we can with difficulty believe she would have submitted to it, or that he would have been so ungenerous and unreasonable as to exact it, unless there was an understanding it should be considered as of no efficacy, or that a will should be made making up to her any deficiency in the marriage settlement. If, then, the instrument was delivered up by the trustee to the parties, at their request, and at the time of delivery they declared it should be null and void, or words of equivalent import were used, as that it shall be given up, that would be perhaps equivalent to a cancellation or destruction of the paper itself. The intention of the parties alone is to be considered; not the mode adopted to signify that intent. *Campbell's Estate*, 7 *Barr* 101, is to this point. It is said that the trustee had no right to deliver up the paper to be cancelled, and that the assent of the wife does not bind her. That both must be bound or neither. But not so, if, although she is not bound, the husband is. As the wife, since his death, has ratified the acts of the parties, there is no objection on that account. The intention of the alleged article of agreement was (according to the testimony) to limit the rights of the feme. C. F. Beitel was named as trustee. There is no positive evidence that the paper was under seal, and it may be the delivery or surrender of such a paper to be cancelled is, in equity, to be considered equal to a cancellation. But whether this was such a delivery of possession as amounts to a cancellation of the paper, without more, according to the case of *Cross v. Powell*, *Cro. Eliz.* 483, recognised in *Campbell's Estate*, 7 *Barr* 101, it is unnecessary to consider, as it is agreed that if it was delivered up to be cancelled, and was cancelled, the instrument cannot be enforced as a valid settlement. Whether it was cancelled or destroyed, will be examined in another part of this opinion.

As has been before said, it is necessary for the sons to prove the existence of the paper, its destruction, and afterwards its contents. That such a paper existed at one time, has been fully proved; it is also equally certain it has been destroyed; and the next question is, have the contents of the paper been legally proved. On this point, the law is well settled: the rule is, that the contents of a lost paper must be so proved as that the court can say, with something approximating to certainty, what it contains. When a party has failed to prove the terms of the agreement he relies on, equity will not assist him, by directing an issue to ascertain the terms. If he be plaintiff, it is incumbent on him to state in his bill the agreement of which he calls on the court to decree performance, and to prove the agreement as stated: *Savage v. Carroll*, 2 *Ball & Beatty* 451; *Ormond v. Anderson*, 2 *Ball & Beatty* 368.

Equity will not decree the specific execution of a contract the terms of which are uncertain as to its extent: *Harnet v. Yielding*, 2 *Schoal & Lefr.* 549. And again, equity will not decree the spe-

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cific execution of articles of agreement, when they appear to be unreasonable or founded on fraud: *Young v. Clark*, *Prec. in Chan.* 538.

In addition to the authorities cited, it may be added, that chancery will not decree specific performance, without proof of the whole contents of the instrument. Evidence of part will not suffice, and particularly a marriage contract, where the words used by the parties (see *Ellmaker's Estate*, 4 *Watts* 89) are so important as regards the rights of the feme. In this case, proof of the contents is singularly meagre and uncertain. There is not a single witness who undertakes to give the whole contents of the contract. What sum she was to receive, whether 100, 125, 200, or 300 dollars, we are not informed; whether that sum was in gross, or to be paid to her annually, we know not; nor do we know (which is very important to her rights) what she relinquished in consideration of the settlement, whether her right to dower, her right to the personalty in case of intestacy, or her right to both. On these important matters, we are left entirely in the dark. There is nothing proven on which equity could found a decree. But, notwithstanding this radical defect in the appellant's proof, I grant if they have shown that the marriage contract was fraudulently destroyed by the appellee herself, equity will not make any intendment against him. Equity will not brook that a party shall take advantage of his own wrong. And this leads to the inquiry as to the loss of the paper, and the persons by whom it was destroyed. That the contract is not now in existence, seems to be put beyond all doubt. Indeed, this seems to be taken as a conceded fact by both parties. But, although destroyed, the appellants allege it was fraudulently destroyed by the appellee or by her connivance; that, although it may have been in the presence of her husband, and with his assent, he was in such a condition of mental imbecility as to be incapable of giving any validity to it. The allegation of the appellants, it is vain to deny, amounts to a direct charge of perjury against two witnesses, and of combination and fraud between these witnesses and the appellee. To sustain such a charge, requires clear and stringent proof. The witnesses to whom I allude are Catherine Phleuger and David Young, who prove that the paper was actually destroyed by Henry Gangwere himself. The old woman refused to destroy it, and then, as the witnesses say, he put it in the stove and burnt it himself. That this was the marriage contract, we have no reason to doubt. It was said by one of them, but which the witness does not recollect, it was the writing they had with each other; and it is very certain, they had no contract except the marriage contract. Catharine Phleuger testifies, the old man said the paper (referring to the paper burnt) was the agreement they had made together when they were married. I do not lay much stress on the fact that Catharine Phleuger was mistaken, admitting she was so, in the

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time this transaction took place. There is nothing so difficult to recollect, and in which witnesses are so liable to mistake as in dates, and to stamp them with the charge of perjury for that reason, would be most perilous. If we suppose the transaction to which the witness testifies took place after the time the money was counted, there is next to nothing to throw a shade of suspicion on the evidence given by those witnesses. We should not be warranted in disbelieving them merely because of their connection with the appellee, one being married to her son, the other to her granddaughter. These are circumstances to be weighed in a doubtful case, but ought not to be allowed to shake our credit altogether in witnesses who swear positively to the fact and are otherwise unimpeached.

Taking it, then, for granted that the contract was destroyed, in manner described by them, the next inquiry is, was Henry Gangwere in a condition to assent to its destruction? It is alleged that at the time he was a lunatic. In proof of this, the appellants rely on a petition or commission of lunacy, which was presented at the May term, 1847, the inquisition held the 10th May, 1847, finding him of unsound mind, &c., and that he hath been in the same state for the term of one year, last past, and upwards. This, it will be observed, overreaches the time testified to, when the contract was destroyed. The petition, it appears, was presented by the appellee, and she was examined as a witness. Some of the jurors have testified as to what she swore on that occasion. As was natural to expect, they have given entirely different versions of it. This, coupled with the fact that she was very much alarmed and confused, will prevent me from paying much attention to this part of the evidence, except in stating, that it rather tends to show that he was not entirely bereft of understanding: it evinces, what is very important in this inquiry, that he had lucid intervals. Great reliance is placed on the fact that the commission of lunacy overreaches the time of the alleged burning of the will. This, undoubtedly, is entitled to great weight; but it is well settled that instruments executed or acts done by a lunatic, in a lucid interval, are binding, even if afterwards overreached. It is *prima facie*, but not conclusive evidence, as is ruled in *Hutchinson v. Sandt*, 4 *Rawle* 234; *Rogers v. Walker*, 6 *Barr* 373; 2 *Atk.* 412-13, *Sergeson v. Sealy*; *Collison* 389, sec. 1, 2, 3. The inquisition in this case was no more binding on Mrs. Gangwere, although a petitioner and witness, than on a stranger. She is not estopped from asserting the truth, as is in effect ruled in *Hutchinson v. Sandt*, 4 *Rawle* 234, where it is held that one of the inquest himself was not estopped. It was ruled to be persuasive evidence only. The testimony adduced on both sides, whilst it shows clearly a general imbecility of mind, also as clearly proves that Henry Gangwere had lucid intervals. The evidence on that point is irresistible. In addition to the whole

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current of the evidence, the testimony of Jacob Correll and Wittman, who testify as to what took place the 26th Sept., 1846, when they went to count the old man's money, is conclusive. "We talked very little to him; but what we talked to him, he answered correctly." When we counted the money, the witness saw nothing wrong in him. He was in a low, weak state. What little questions we put to him, he answered sensibly. He was sitting up. He directed me where to find the money in his tenant's house. He told us there was a small trunk in a chest, in the garret in his tenant's house. That there was about \$1200 there.—We went and got it, and found it there, and counted it, and it overran a little, \$10, \$12, or \$14. Mr. Wittman says, when they counted the money, the old man was sensible, very sensible. I had a conversation with the old man. He told me things about my uncle, which I knew to be true. He talked about his younger days.—If this testimony is to be taken as true, and there is no reason to doubt it, the old man had the possession of his mental faculties at that time. Any act of his then would have been good, notwithstanding the commission. The proof of a lucid interval would be most clear. This, be it observed, was about the time testified to by Catharine Phleuger and David Young, when the contract was burnt. Catharine Phleuger, after giving a clear statement of what was said and done by the old man and his wife, says, "What he talked to me, he talked understandingly." David Young, in answer to a question put to him, says, "He had his understanding, as much as I could see. He talked like a man having his understanding, as he had done before we knew there was any thing out of the way with him." From the testimony taken together, the evidence is clear, that at times, although his understanding had been impaired by age, and considerable imbecility of mind existed, yet he had lucid intervals, and it is proved, by two witnesses, that when the contract was destroyed, it was destroyed by himself, in pursuance of a resolution long before taken, and prevented from being carried into effect by the delicacy of his wife; and that, at the time, he had an understanding sufficiently clear to enable him to do any valid act in the disposition of his property, and particularly in relation to an obligation or act of duty which he conceived himself bound in conscience to perform.

I am unwilling to believe that the old lady, who has shown, as is proved, singular integrity and delicacy of mind and sense of propriety, in relation to her husband and his children, should have been guilty of subornation of perjury and wicked combination to cheat and defraud. At any rate, the testimony is not so clear as to justify us in putting a decision on a point on which this must be assumed as its groundwork. It is impossible to rule this case in favour of the appellants, on any other hypothesis.

It will be remarked that this decision goes on the assumption that the marriage contract was legal, though executed on Sunday.

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The court gives no opinion on that point, because, being equally divided, we were unable to come to any conclusion on this part of the case.

Decree of the Orphans' Court affirmed.

Pennypacker's Appeal.

After the lapse of above twenty years from the time an account of an executor has been confirmed, and credit allowed for a claim outstanding, and acquiescence during that period by the heirs interested, the account will not be opened in order to charge the executor with the amount credited, upon an allegation that it might have been collected. The decree, after twenty years, will be held to be final and conclusive.

APPEAL from the decree of the Orphans' Court of *Chester county*.

Elijah Funk and Joseph Pennypacker were executors of John Wolf Whisler, deceased. They inventoried the estate of their testator, which consisted chiefly of bonds and mortgages; and, on the 29th of Dec. 1821, filed their account, charging themselves with the whole amount of the inventory, and taking credit for debts paid, &c., showing a balance in their hands of \$3768.69 for distribution among the legatees. The account was confirmed on Feb. 4, 1822.

This account was headed thus:

"Elijah Funk, and Joseph Pennypacker, executors of the estate of John W. Whisler, late of Charlestown township, Chester county, in account with said estate."

In that account, they asked and were allowed credit, "By loss on a bond of Jonathan Adamson, the sum of \$204.63."

The balance on the account was paid over to the legatees by the executors, and receipts taken in full.

The receipt given by the attorney in fact of Susan McCowan, one of the legatees, was as follows:

"Received from the executors of the estate of John Wolf Whisler, deceased, the sum of three hundred ninety-five dollars forty-nine cents, on the within power of attorney, in full for the present dividend till after the death of John Whisler; received by me this 15th of January, 1822.
JOHN MCCOWAN."

By the last will of the said John Wolf Whisler, he recites that he has sold all his real estate to his daughter Mary, and taken her obligation for seven hundred pounds. Two hundred of the seven hundred pounds he directs to be paid, at his death, to his executors, and the remaining five hundred pounds he directs shall remain a charge on the land he sold to his daughter Mary, for the support of his lunatic son John. He appoints Joseph Pennypacker

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guardian of his son John, and, after bequeathing other moneys for his support, directs as follows :

"All the moneys remaining which may not be wanted, shall be paid, in one year after my son John's decease, into the hands of my executors, which shall be equally divided among my other lawful representatives."

Elijah Funk, one of the executors, died in 1823.

At the death of the lunatic son, in 1839, all the moneys had been expended in his support, save the five hundred pounds. This was paid over to Joseph Pennypacker, the surviving executor.

On the receipt of the money, the surviving executor, agreeably to the directions of the will above recited, paid over to the respective legatees their shares, and took their receipts in full, with the single exception of the share coming to Susan McCowan.

Susan McCowan being dead, a question arose whether the husband or children of Susan McCowan were entitled to her distributive share of the five hundred pounds. A case was stated and filed in the Common Pleas for the opinion of the court, and was withdrawn on the suggestion of the counsel for the surviving executor, that the surviving executor might file an account in the Orphans' Court of said moneys in his hands, and the question could be settled most readily in a decree of distribution, whether the father or children were entitled. This was agreed to by the counsel on the other side.

The surviving executor accordingly filed an account headed thus :

"The final account of Joseph Pennypacker, surviving executor of the last will and testament of John Wolf Whisler, late of Charles-town, now Schuylkill township, in said county, deceased."

The accountant in this account charged himself with the amount of Susan McCowan's share of the five hundred pounds and interest thereon for six years, showing the balance due her to be \$436.34.

To this account, David McCowan, one of the children of Susan, came in and filed exceptions, alleging the accountant had not charged himself with all the money he received, or ought to have received, as executor as aforesaid.

An auditor was appointed, and, on the hearing, it was insisted that the surviving executor should be charged with the sum of \$204.63, with interest thereon from the 29th of Dec. 1821, meaning the amount of the Adamson bond, and interest on it.

It was shown, that when Elijah Funk and Joseph Pennypacker filed their account, in Dec. 1821, they claimed in that account a credit, as before stated, as follows :

"By loss on a bond of Jonathan Adamson, the sum of \$204.63."

It appeared in evidence before the auditor, that Jonathan Adamson was insolvent, and that Daniel Conard was surety in the bond, and that the executors had recovered of him \$200 ; and the

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balance of the bond, to wit, \$204.63, they claimed to be allowed in their account as a bad debt, uncollectable.

It was also urged before the auditor, that the balance of the bond might have been collected from the surety in 1822, '23, or '24, as he lived upon a farm well stocked, and was in good credit, &c. On this point, the evidence was somewhat in conflict.

The auditor, in his report, charged the surviving executor with the uncollected balance of said bond, with interest from December 29, 1821, up to the date of his report, viz. \$535.62.

On the presentation of the report of the auditor for confirmation, Joseph Pennypacker, surviving executor, filed exceptions against being charged with the debt remaining due upon said bond, and also with interest for all the time the money could by any possibility have been in his hands. On argument, they were overruled, and the exceptor appealed to this court, and filed the following specifications of errors.

Specification of errors:

1. The court erred in overruling the appellant's exceptions to the report of the auditor.

2. The court erred in charging the accountant with an old claim of \$204.63 and interest thereon for twenty-six years—it having been allowed to the executors in a former account as a bad debt in 1821, and having been acquiesced in for more than twenty years by all parties interested.

The case was argued by *Pennypacker*, for appellant.
Lewis, contra.

The opinion of the court was delivered by

BURNSIDE, J.—This is a stale complaint. A reference to the dates and facts in the paper-book are essential to its correct determination. John Wolf Whistler died in 1819 or '20. The precise date is not in the paper-book, nor is it material. Shortly before his death, he had sold all his real estate to his daughter Mary, and taken her obligations for £700. Two hundred of this sum in his will he directed to be paid to his executors, and the residue, £500, was to remain a charge on his farm, for the support of his lunatic son John. He bequeathed other moneys for his support, in his will, which were collected and expended for the support of John, who died in 1839. Some time after the death of John, the £500 was paid to Pennypacker, the accountant and surviving executor and trustee of John, under his father's will.

The estate being in bonds and specialties, on the 20th of December, 1821, the executors, having collected what they believed to be all the estate, filed their account for distribution, which was headed, "Elijah Funk and Joseph Pennypacker, executors of the

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estate of John W. Whistler, late of Charlestown township, Chester county, deceased, in account with said estate." This account exhibited the whole estate the executors had collected, and in their hands—and they charged themselves with a balance of \$3968.69, which they distributed and paid over, as the will directed, among the heirs of the testator. Susan McCowan, a daughter of the deceased, had removed with her husband and family to the State of Ohio. Her portion was paid on a letter of attorney, on which was endorsed, that on the 15th January, 1822, he had "Received from the executors of the estate of John Wolf Whistler the sum of three hundred and ninety-five dollars forty-nine cents, on the within power of attorney, *in full for the present dividend, till after the death of John Whistler.*" This account was confirmed by the Orphans' Court, on the 4th of February, 1822, where it has remained firm and stable to this day.

Among the assets and vouchers of the estate, was a bond of one Jonathan Adamson, in which a Daniel Conard was bail. It is not pretended but that Adamson was insolvent. The executors had collected without suit, and received from Conard, \$200. They charged themselves in their administration account with the whole bond, credited the estate with the \$200 received, and claimed a credit by a loss on the bond of \$204.63, which was allowed by the register or clerk, and confirmed by the Orphans' Court, without objection. It is now alleged that some years after this period, Conard was in circumstances, and able to pay the balance. Conard sold out in Chester county, and is long since dead. Funk, though then an aged man, was an active man of business. He died in 1823. Pennypacker was a young man, in whom the testator must have had great confidence, for in his will he made him guardian for his unfortunate son. No suit was ever brought against Conard for the balance due on the bond, and it is possible it might have been collected; but there is one fact which was but little noticed by either side in the argument, which struck me with force. When Conard paid the \$200, he demanded the bond to be given up to him: it was refused until the balance was paid, when he declared that if he had known that, he never would have paid a cent of it.

In November, 1847, the appellant, as surviving executor, having received the £500 from the administrator of Mary Place, who represented the real estate devised to his daughter Mary, filed an account exhibiting a balance in his hands due the heirs of \$1335.52. He paid all the heirs, except Susan McCowan, who was deceased—when a question arose whether her husband or her children were entitled. A case was stated and filed in the Common Pleas for the opinion of the court, which was finally withdrawn—whereupon Pennypacker filed the account which I have referred to, as "the final account of Joseph Pennypacker, surviving executor of the

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last will and testament of John Wolf Whistler, late of Charlestown township, in said county, deceased." The executor made the balance due Susan McCowan in his hands \$436.34. To this account David McCowan, one of the children of Susan, filed exceptions, alleging the accountant had not charged himself with all the money he had received, *or ought to have received*, as executor. The Orphans' Court referred the account and exceptions to an auditor, who charged the accountant with the balance stated in the former account of 1821, of \$204.63, which the court had given him credit for, and with 27 years, 6 months, and 15 days' interest, \$830.99, making this item from loss by negligence, \$535.62. To this report of the auditor, Pennypacker filed exceptions which the court overruled. The exceptions in this court are reducible to one point: whether, after a lapse of more than twenty years, the former account could be opened, after so long an acquiescence in its correctness, the decree being of a court of competent jurisdiction?

The Orphans' Court of Pennsylvania is governed by the well-settled principles of courts of equity. After a lapse of twenty years, bonds and all other specialties, merchants' accounts, legacies, mortgages, judgments, as well as all evidences of debt excepted out of the statute of limitations, are presumed to be paid: 1 *Fon. Eq.* 329; *Gil. Eq. Rep.* 224; *Bickley v. Richards*, 13 *Ser. & R.* 402; *Foulke v. Brown*, 2 *Watts* 214. Here there is a decree of the proper court giving credit for this claim—all parties interested rested satisfied; and at this distant day, this decree is attempted to be set aside, on an alleged negligence, when all or nearly all who knew the situation of the parties are in their graves. It was well said by Mr. Justice SERGEANT, when he honored this bench with a seat, that "the rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them:" 2 *Watts* 214-15. I consider the decrees of the Orphans' Court of twenty years standing final and conclusive on all parties in cases within their jurisdiction. Here the attempt is to set aside that decree at this distant day, when the bond is lost, and those witnesses dead who could best explain the transaction, upon evidence of doubtful negligence, and to charge an executor with money he never received; and this in the face of a decree of an equitable court of competent and full jurisdiction.

Courts of equity have ever held and considered it mischievous to encourage claims founded upon transactions that took place at a

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remote period: 2 *Sch. & Lef.* 71. But it is said, Susan and her family were in Ohio, and that this is an equitable circumstance. It is of no weight after twenty years. Such a circumstance would be entitled to consideration within the limitation of that period. Culpable negligence must be clearly shown to raise a presumption of wilful misconduct: 4 *Watts* 179. A non-receiving trustee is never held liable for a loss, only when culpable negligence has occasioned it, which must be clearly shown. Our law allows extensive discretion to executors in settling claims: 6 *Watts* 250.

Here the executors collected and paid over with but little expense or loss to the estate. At this distance of time, the legal presumption is that the debt of Adamson was a bad debt. The exhibition of it, and the allowance of a credit for it, by a court of competent jurisdiction more than twenty years ago, and the acquiescence of the heirs without complaint, ratified and confirmed the decree of the court thereon, and settles it for ever.

The report of the auditor and the decree of affirmance thereon of the Orphans' Court is reversed, with costs accruing after the report was made by the auditor to the Orphans' Court, and the account of the executor is affirmed.

Dannaker *versus* Riley.

Before the act of 10th April, 1849, relative to the right to compensation for the use of party walls, the claim for the use of a party wall did not pass from the first owner by his conveyance of the house and lot; and that act does not operate retrospectively, upon a suit for compensation for the use of the wall instituted before its passage.

ERROR to the District Court, *Philadelphia*.

This was a suit by Joseph S. Riley against Dannaker, to be paid for the half of a party wall on the north side of a house, No. 139 N. Third street, Philadelphia. This party wall was not, originally, built by Riley, but was extended by him, during his ownership, viz. during 1832. In that year, Riley purchased the house from the heirs of Myers.

18th Sept. 1835, J. S. Riley conveyed this house to William Patten, by deed, not mentioning or reserving the party wall.

4th March, 1843, J. S. Riley made a general assignment to his son, J. S. Riley, Jr., in trust for his creditors.

Subsequently, *Dannaker* bought the lot next northward, of Myers' heirs, and erected buildings, using the party wall in question. This was between 4th March, 1843, and June, 1845.

Patten demanded payment from *Dannaker* for the use of so much of it as he used, and *Dannaker* paid him for the same.

After said payment, Joseph S. Riley claimed the same in his

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own right, and brought this action, June, 1845, to recover it, in his own name, and not to use of his assignee.

Narr. in assumpt. common counts. Plea, general issue. Also additional pleas, viz.:

1st. General assignment by Riley. 2d. Riley's conveyance of house to Wm. Patten. 3d. Payment for party wall to Wm. Patten, before this suit.

General demurrer to additional pleas.

The court below having rendered judgment on the demurrer in favor of the plaintiff below, judgment was entered by agreement of the parties, filed Nov. 5, 1847, on all the pleas, in favor of the plaintiff, for \$150.12, subject to the decision of the court upon the pleas demurred to, without prejudice to the right to take a writ of error.

The wall in question was thus not used by Dannaker till *after* the conveyance to Patten, and a question was, whether, under the conveyance in 1835 by Riley to Patten of the house, the right to compensation for the use of the party wall, when it was subsequently used by Dannaker, passed to Patten, or whether it remained in Riley or his assignee. It is provided in the act of 10th April, 1849, (see Acts of 1849, p. 600,) sec. 4, "That, in all conveyances of houses and buildings, the right to compensation for the party wall built therewith shall be taken to have passed to the purchaser, unless otherwise expressed; and the owner of the house for the time being shall have all the remedies in respect to such party wall, as he might have in relation to the house to which this attached; and so much of any previous law as is inconsistent with the provisions of this section is hereby repealed."

It was assigned for error that the court erred in sustaining the demurrer and overruling the pleas.

The case was argued by *Dunlap*, for Dannaker, plaintiff in error.—He contended that, under a proper construction of the act of 1849, the right to compensation for the use of a party wall does not remain in the first builder of it, unless he continue to be the owner; that by his conveyance of the house, the right to the party wall, and to compensation for it when subsequently used, passed to his grantee. He contended that the right to compensation to the first builder was given by the act of 1721; and that the act of 1849 takes away the right of the first builder or owner; that it repealed the act of 1721, and arrests all proceeding in favor of first builders, commenced by them for their alleged interests in party walls; and that the act of 1849 was necessarily retroactive. That this court can now enter judgment by virtue of the act of 1849, in favor of defendant, even though the latter act has been

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passed since judgment in the court below: 4 *Yeates* 392; 1 *Watts* 258; *id.* 382; 7 *Barr* 173; 7 *Watts* 300; 6 *Wend.* 526.

Markland, for defendant.—The judgment was entered before the passage of the act of 1849. Prior to this, the right did not pass by the conveyance by Riley to Patten: 10 *Barr* 155; *id.* 219. The only question is, what effect the act of 1849 has on this case. He contended, that when Dannaker commenced to build on the party wall, a contract immediately arose between him and the owner of the party wall, which could not constitutionally be *divested*. That it was not like the case of a building commenced on a wall *after* the act of 1849 was passed. That the question is, whether the court were right in entering judgment. That the case of *Greenough v. Greenough*, 1 *Jones* 489, respects vested rights. (See 1 *Harris* 521.)

The opinion of the court was delivered by

BURNSIDE, J.—The act of 24th Feb. 1721, *Dunlop*, 2d edition, 72, provides that the foundation shall be laid equally upon the lands of the persons between whom a party wall is to be made, and directs, that “the first builder shall be reimbursed one moiety of the charge of such party wall, or for so much thereof as the next builder shall have occasion to make use of, before such next builder shall any ways use or break into the said wall.” So the law stood until the passage of the act of 10th April, 1849, a period of more than three-quarters of a century. It is now for the first time discovered that the judges of Pennsylvania, as well before as after the Revolution, were in error, and that the rights of the first builder must be disregarded, although the act of 1721 expressly enacts that the first builder shall be reimbursed. That the act of 1849 is declaratory of the law, although the whole course of decision was uniform and to the contrary; that William Patten, the owner of the house for the time being, is entitled to the compensation for the party wall, and that the act arrests all proceedings in favor of first builders, commenced by them for their alleged interests in party walls.

That the legislature has changed the law on the subject of party walls, on the 10th April, 1849, I readily admit; and when a case arises on which that act will operate, it will receive the respect and attention of this court.

There is nothing in that act retrospective, or operating on deeds and buildings made or erected before the passage of the act. It simply provides, “That in all conveyances of houses and buildings, the right to, and compensation for the party wall built therewith shall be taken to have passed to the purchaser, unless otherwise expressed; and the owner of the house for the time being shall have all the remedies in respect to such party wall, as he might

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have in relation to the house to which this attached; and so much of any previous law as is inconsistent with the provisions of this section is hereby repealed." *Pamphlet Laws* of 1849, page 600. There is nothing retrospective in this section. It has no operation or effect on cases that existed previous to its passage. Our courts have ever held that the right to reimbursement is a chose in action, and that the vendee of the first builder has only an equitable right by the conveyance of the first builder, and should sue in the name of the vendor: 2 *Miles* 395.

The charge for reimbursement is not a lien on the lot of the second builder, but a personal charge against him: 1 *Dal.* 341; 5 *Ser. & R.* 1, *Hart v. Kucher*. The right to reimbursement under the act of 1721, for the use of the party wall, is in the first builder, and does not pass by his conveyance of the house and lot: *Todd v. Stokes*, 10 *Barr* 155; *id.* 219. The act of 1849 was not passed when the judgment was entered; the judgment was right under the act of 1721. It is no ground to reverse because the legislature has chosen, as they had a right to do, to change the law on this subject. This court will not give a retrospective effect to statutes operating on a right, unless compelled to do so by direct and positive words, *Lefever v. Witmer*, 10 *Barr* 505, and then the constitutionality of the statute will be considered. The cases cited and relied on by the learned counsel of the plaintiff in error have no direct application to the case before us.

The judgment is affirmed.

Thomas versus Lowber.

1. An indenture by which a party covenants and agrees to convey to the parties with whom the agreement is made, or the survivor of them, all his real and personal estate when required by them, in trust to sell the same and apply the proceeds to certain creditors named in a schedule annexed, is a voluntary deed, and not having been recorded within thirty days, is void against creditors by the fifth section of the act of 24th March, 1818.

2. An absolute deed between the *same parties*, made subsequent to the agreement in trust, will not avail against a vendee at sheriff's sale, on a judgment against the grantor obtained subsequent to both instruments on a cause of action existing prior to the trust agreement.

THIS case came up from the Nisi Prins, *Philadelphia*.

This was an action of ejectment by Lowber and Wilmer against Thomas and others, to recover possession of two lots of ground, one on the north side of George street, the other on the east side of Schuylkill Sixth street, Philadelphia.

Plaintiffs claimed under a sheriff's deed from William A. Porter for the former Sheriff Morris, dated April 5, 1843, for the premises sold as the property of Robert H. Large, by execution on a judg-

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ment obtained June 25, 1842, in the District Court, on a cause of action which accrued prior to 1840. The defendant, Thomas, who was the only person served with process, claimed under an instrument bearing date the 20th February, 1840, recorded March 6th, 1841, and a conveyance made by Large to Thomas, Leaming, and Smith, made March 3d, 1841, recorded March 6th, 1841.

The instrument first above referred to, dated 20th February, 1840, was an indenture made between Robert H. Large of the one part, and John Thomas, J. Fisher Leaming, and T. Leaming Smith, of the other part. It stated that Large was indebted to persons named in a schedule annexed in the amounts therein specified, and that he was desirous of giving his said creditors all the satisfaction that lies in his power. Large, in consideration of the premises and of one dollar paid by the said parties, did covenant, grant, and agree with the parties of the second part, their heirs, executors, administrators, and assigns, in manner of form following, viz.:—That he, the said Large, when required, will grant, convey, and assign all and singular such estate real and personal as he now is seized or possessed of or in any way entitled to, and it was understood to be the meaning of the instrument and of the parties, that the said estate shall be held to, for, and upon the uses, intents, and purposes thereafter mentioned, viz. upon trust, at the discretion of the trustees to convert the personal estate into cash, and to sell the real estate and convey it in fee, and the money that may be produced to apply, after deducting commissions, &c., for and towards the payment of the said debts in said schedule, and, after paying the commissions, &c., and the debts, to pay the overplus, if any remain, and to reconvey all such real estate as may then be vested in the trustees, unto the said Robert H. Large, his heirs, &c., free from all trusts, &c. And for the performance of his covenants, Large bound himself to the parties of the second part, or the survivor of them, in the penal sum of \$75,000. The instrument, dated the third day of March, 1841, was an absolute deed of conveyance of the same premises by Large to Thomas, Leaming, and Smith, and it contained a covenant by Large, that his wife, on attaining her full age, shall execute a release of all claim of dower in the premises. It was acknowledged on the day of its date, and recorded on the 6th March, 1841.

A subsequent instrument, dated 27th July, 1842, by Large and Mary his wife, released, in pursuance of the covenant in the former deed, her claim of dower. Acknowledged on same day.

The case was tried in the Court of Nisi Prius, March 16th, 1846, before the Hon. THOMAS BURNSIDE, who charged the jury (after stating plaintiff's title) that, on February 20th, 1840, Robert H. Large conveyed his estate to Thomas, Leaming, and Smith—that this deed was not recorded till March 6th, 1841, more than a year afterward—that on March 3d, 1841, Large further made a deed to

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Thomas, Leaming, and Smith, for the lots in question, in consideration of one dollar—that this deed had no reference to the prior assignment, but purported to be an absolute conveyance—that it was contended on the one hand that the deed of assignment is void by section 5th of act of March 24th, 1818, not being recorded within thirty days. On the other hand, that it was contended that the deed for the lots not being made till March 3d, 1841, and both deeds being recorded March 6th, 1841, the act of 1818 did not apply to the case; that he could not come to this conclusion, but it seemed to him that the assignment was void for not being recorded; and instructed the jury that the plaintiffs were entitled to their verdict—that the deed of assignment was void as against creditors, not being recorded.

Thomas, the defendant, took a writ of error, and assigned three errors, as follows:

1. Because the court erred in deciding that the agreement dated February 20th, 1840, was an assignment for the benefit of creditors, and therefore should have been recorded within thirty days.

2. Because the court erred in deciding that the deed dated March 3d, 1841, was void as against creditors.

3. Because the court erred in instructing the jury to find a verdict in favor of the plaintiffs, instead of allowing them to find a verdict according to the evidence, &c.

The case was argued by *R. Rundle Smith*, for Thomas, plaintiff in error.—He contended that the paper dated February 20th, 1840, is not an assignment, but an agreement to convey when requested. It is not an absolute assignment or conveyance, such as is required to be recorded within thirty days, but a covenant and agreement to make a conveyance when required.

An assignment means an absolute transfer of the whole property: 2 *Black. Com.* 326–7; 10 *Watts* 237; 1 *Rawle* 163. Could Thomas and others be required to give bond, &c.; or is it not to be taken as a portion of the subsequent deed of March 3d, 1841, and both papers taken as one instrument? 4 *Barr* 278. The act of 1818 is remedial. There was no intent to defraud creditors, but the deed of March 3d, 1841, was for the sole benefit of creditors.

J. Fallon, for defendants in error.—Plaintiffs claimed under a sheriff's deed on proceedings on a judgment against Large, obtained June 26th, 1842, on a cause of action that accrued prior to 1839, and showed title in Large before that time.

The first is essentially an assignment for the benefit of creditors; and, not having been recorded within thirty days, is void against creditors.

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The second deed, dated 6th March, 1841, is on its face an absolute deed. It does not refer to the former deed, nor is there anything in the last deed to show that it was intended as an assignment, or made on any trust.

If the first deed be invalid against creditors, for want of recording, still it is good as between the parties, and the assignor could not make a valid deed of the same premises to the same persons: 4 *Barr* 274. The latter deed is also invalid against creditors, for want of consideration.

If both deeds be considered as one instrument, as being an assignment in trust for creditors, it is invalid, because a part was not recorded for a year after its date: 9 *Watts* 508.

The opinion of the court was delivered January 13th, by

BURNSIDE, J.—The indenture, as it declares and purports, of the 20th of February, 1840, of Large to Thomas and others, is unquestionably a voluntary assignment for the benefit of certain creditors named in the schedule to the indenture, within the words and object of the 5th section of the act of the 24th of March, 1818: *Dunlop*, 2d ed. 341. The principle of the act is to compel assignees in all voluntary assignments to settle their accounts. But the 5th section of the act provides “that all assignments, so as aforesaid to be made and executed, which shall not be recorded in the office for recording of deeds in the county in which such assignor resides within thirty days after the execution thereof, shall be considered null and void as against any of the creditors of the said assignor.”

The argument is that this indenture, as it calls itself, is only an agreement to convey, and therefore not within the act of 1818. The deed was signed and executed by the parties under their hands and seals. It recites that Large was indebted to sundry persons in the schedule annexed, which he was unable to pay. The indenture then witnesseth that Large, in consideration of the premises and of one dollar, covenants, grants, and agrees, when required by the grantees or the survivor of them, by good and sufficient deeds to grant, convey, and assign all his real and personal estate to which he was entitled in law or equity. The grantees were to stand seized and possessed of his real and personal estate upon trust, to convert it into cash at their discretion, then to apply the proceeds to pay the debts in the schedule.

This instrument was not recorded until the 6th of March, 1841, more than a year after its execution. On the 3d of March, 1841, Large made an absolute deed in fee simple of the premises in question to the same grantees, for the consideration “of one dollar and for other good causes and valuable considerations.” This deed was also recorded on the 6th of March, 1841. This latter deed has no reference in any part of it to the prior indenture; nor does

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it show that it was so intended. There is no trust expressed in it, nor obligation of any kind upon the grantees. It is an absolute conveyance in fee simple, for the consideration expressed on its face. This court ruled, in *Englebert v. Blanjot*, 2 *Whar.* 240, that an assignment of a part of a man's estate in trust for a part of his creditors is within the act, and must be recorded. The instrument of the 20th of February, 1840, call it what you may, is essentially a deed of assignment to trustees for the benefit of particular creditors. It passed some interest in trust, under a penalty of \$75,000 that he will fulfil his engagements. It released probably the dower of his wife, and was a deed within the letter and spirit of the act of 1818, which was passed for the purpose of letting the world know the acts and circumstances of a failing debtor. The statute is remedial to some extent, and should be liberally and fairly construed. Under either deed, or both taken together, the defendant below had no case against the sheriff's sale and conveyance.

The judgment is affirmed.

Academy of Fine Arts *versus* Power.

1. In the case of a writ of error by a corporation, the affidavit required by law may be made by an agent of the corporation though he is not expressly deputed for that purpose. The fourth section of the act of 22d of March, 1817, relative to suits brought by or against corporations, is not repealed, as respects such affidavits, by the third section of the act of 11th June, 1832, relative to affidavits in suing out writs of error.

ERROR to the District Court of Philadelphia county.

In order to obtain the writ of error in this case, an affidavit was made as follows :

"C. Macalester, agent for the within named plaintiff, being duly sworn, saith that the writ of error in this case is not for the purpose of delay.

C. MACALESTER.

"Sworn and subscribed before me, this third day of June, 1850.

"J. Simon Cohen, Proth'y."

The 4th section of the act of 22d March, 1817, relative to suits brought by or against corporations, provides that "In case of appeal, certiorari or writ of error, by any corporation, the oath or affirmation required by law shall be made by the president or other chief officer of the corporation, or, in his absence, by the cashier, treasurer or secretary," &c.

The 3d section of the act of 11th June, 1832, provides, "from and after the passage of this act, whenever a writ of error may be sued out from the supreme court to remove the proceedings of any

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inferior court, the party, his agent, or attorney, shall be competent to make the affidavit required in such cases."

A. Miller, for the defendant in error, moved to quash the writ in this case, upon the grounds—

1. That it did not appear that the person who made the affidavit was an "agent" of the corporation, or in any way authorized by them to make the affidavit required by law.

2. That the affidavit required must be made by the "president or other chief officer of the corporation, or, in case of his absence, by the cashier, treasurer, or secretary."

For the motion, it was insisted that the act of 22d March, 1817, "relative to suits brought by or against corporations," which requires that the affidavit should be made by the president, &c. of the corporation, was in full force.

That the subsequent act, of 11th June, 1832, did not in that respect alter or repeal that of 1817.

And to show the practice under the act of 1817, cited 4 *W. & Ser.* 416; 6 *Ser. & R.* 89; 8 *id.* 517.

He contended also, that it did not legally appear that Macalester was the "agent" of the plaintiff in error, nor was that fact ascertained by the prothonotary at the time the affidavit was made.

C. Ingersoll, contra, alleged that by the uniform practice of the court since the act of 1832, affidavits in like cases, made by agents and attorneys of corporations, had been allowed, and called upon the prothonotary of the court, who stated that to have been the practice. That the act of 1817 was merely directory in cases where the corporation did not act by an agent or attorney.

Hood replied.

The opinion of the court was delivered, January 20th, by

GIBSON, C. J.—The act of 1832 enlarges the act of 1817, but does not repeal it. Why should not the affidavit be made as well by a special deputy as by a president, secretary, or treasurer? Such a deputy is within not only the letter, but the reason of the subsequent act, though corporations are not particularly mentioned in it. A corporation is certainly a party, and its deputy is its agent. An affidavit could seldom be made by an officer of a foreign corporation in time to supersede execution; and the proper officer of even a domestic one may be abroad at the important moment. As a preventive of abuse, the affidavit is not of sufficient worth to induce a rigid construction. Every man who has lost a lawsuit believes he has suffered injustice, and is willing to swear it; but his agent or attorney, less influenced by resentment, will swear with more caution. It sufficiently appears, in this instance,

[Academy of Fine Arts v. Power.]

that the agent had authority to interfere. To require an express deputation, would be as inconvenient as to require an affidavit by a corporate officer. The practice has been otherwise, and we will not disturb it.

Rule discharged.

Cobb versus Biddle.

A ground-rent is *real* estate; and where a testator devised one-third of all his property whatever to his wife, and the other two-thirds to be equally divided among his children, and appointed his wife and certain of his sons executors of his will, and authorized and empowered them to sell such part of his real estate as they shall think necessary and proper: *Held*, that the power was given to them *as executors*, and that under the act of 24th February, 1834, relating to executors and administrators, the power survived, and the survivor of the executors could maintain suit for the arrears of ground-rent accruing after the decease of the testator.

ERROR to the District Court, *Philadelphia*.

This was an action of covenant, brought by James Biddle, surviving executor of the will of Charles Biddle, deceased, against Ebenezer Cobb, to recover the arrears of ground-rent and interest. The right of the plaintiff to recover or collect it was denied by Cobb.

Charles Biddle devised to his wife, Hannah Biddle, "one-third of all my property whatever; the other two-thirds to be equally divided among my children," with a certain exception in favor of the family of one of his sons; and his will provided as follows: "I appoint my wife executrix, and my sons William, James, and Nicholas, executors of this my will, and do authorize and empower them to sell such part of my real estate as they shall think necessary and proper. Witness my hand and seal, this 28th day of October, 1819."

Charles Biddle died in 1821. The executors of his will collected the ground-rent in question till 1842. This suit was brought to recover the arrears from that time. An affidavit of defence was filed, setting forth that the ground-rent was payable to John H. Brinton, his heirs and assigns; that the rent was not demanded; and, *inter alia*, that the devisees under the will were the owners of the ground-rent, and entitled to receive and sue in their own names therefor; and that it did not appear that the executors have authority by the will to sue for ground-rent accruing after the death of Charles Biddle.

Judgment was entered for the plaintiff; and this judgment, and not sustaining the defence set up, was assigned for error.

[Cobb v. Biddle.]

The case was argued by *Kennedy*, for plaintiff in error.—He contended, *inter alia*, that the power given to the persons named as executors, to sell when they shall think necessary, is given to them personally, and not to the office of executor: Case of Elizabeth Baird, 1 *W. & Ser.* 290. The power is given to the persons, and cannot be exercised by the executor surviving: Ebert and Barnitz' Appeal, 9 *Watts* 302–3. The devise to the wife and children is not destroyed by the power to sell given, nor are the devisees prevented from exercising in their own names the legal remedies to recover the rent. The power to sell, as given, does not authorize the surviving appointee of the power to sue as executor to recover the rents in arrear. After twenty-one years, a power thus given and not exercised will be considered as lost. He also cited 10 *Barr* 131; 9 *Watts* 148; 5 *Whar.* 562; 1 *id.* 266.

C. Biddle, for defendant in error.—That the power was given to them as executors, and not as individuals: 1 *Whar.* 266; *Ram. on Assets* 76; *Wells v. Sleyer*, 3 *Pa. Law Jour.* 206; 13 *Ser. & R.* 332–3; 2 *Rawle* 188; *Sug. on Ven.* 130; 10 *Vesey* 129; 2 *Rawle* 188. That in Pennsylvania, a naked power to sell real estate given to executors, gives them the same interest as if it were devised to them to be sold; in other words, a power coupled with an interest: *Act of Feb.* 24, sec. 13; 3 *Pa. Law Jour.*; 13 *Ser. & R.* and 2 *Rawle*, above cited. The heirs have elected to take money, not land: *Story's Eq.* 793.

The opinion of the court was delivered by

GIBSON, C. J.—A ground-rent is real estate, and, in a case of intestacy, goes to the heir; but it may pass by devise, and the question in this instance is, whether it passed to the testators executors. "I appoint my wife executrix," said he, "and my sons William, James, and Nicholas, executors of this my will, and do authorize and empower them to sell such part of my real estate as they shall think necessary and proper." At common law, this is a naked power, which does not break the descent; but our statute enacts that executors, to whom is given authority to sell real estate, shall hold the same interests in it, and the same power over it, for all purposes of sale and of remedy by entry or action, as if it had been devised to them to be sold. Nothing could be more full or complete. On the death of the testator, the persons named as executors became seized of this ground-rent, for the uses in the will, and consequently entitled to demand arrears subsequently due. But at common law, a naked power does not survive; and the act which was intended to correct the mischief is limited to powers given to executors. The argument for the defendant below, has been, that the power, in this instance, was not given to the donees of it as executors, but to them as individuals, standing, in

[Cobb v. Biddle.]

relation to it, as if they had been unconnected with the executorship. It would require a clear and strong expression of intention to sustain that interpretation. But the intention was clearly the other way. The testator, certainly, did not design that the power shall be extinguished by the death of one of the persons named as his executors; and the intention to be collected even from a grammatical construction, accords with this evident truth. I appoint my wife executrix, and my sons executors, and empower *them* to sell. Empower whom? A relative pronoun refers to the last antecedent, and in this case, the word executors is such. He therefore empowered his executors to sell, and the power survived.
Judgment affirmed.

Pennock's Appeal.

1. The employment of a bidder merely to raise the price at a sale of real estate made under an order of the Orphans' Court, is a fraud upon the purchaser. The case of *Steel v. Ellmaker*, 11 *Ser. & R.* 86, overruled.

2. One of several administrators may bid at a sale of real estate, made by them under an order of the Orphans' Court, subject, in the event of a sale to him, to the power of disaffirmance by heirs or creditors: other bidders have no right to disaffirm the act, where the bidding was in good faith.

APPEAL from the decree of the Orphans' Court of *Delaware county*.

This was an appeal by Abraham L. Pennock, and James Sellers from the decree of the Orphans' Court of Delaware county, in the matter of the sale of the real estate late of Abram Powell, deceased, for payment of debts.

Nov. 27, 1849, the said Orphans' Court granted an order to Elizabeth Powell, John B. Powell, and Joseph Powell, administrators of the said Abram Powell, deceased, to make sale of the real estate of said deceased, for the purpose of the payment of debts.

In pursuance of the power given by said order, said administrators did, on the 27th day of December, in the year aforesaid, expose the said real estate to public sale, and sold tract designated A (the mill property) in the order, to said Abraham L. Pennock and James Sellers, for the sum of \$4000, and sold tract designated C in said order, to said Abraham L. Pennock and James Sellers, Jr., for the sum of \$3000.

The written conditions of sale, were:

1st. The highest and best bidder shall be the buyer.

2d. One hundred dollars of the purchase-money to be paid immediately upon the property being struck off to the purchaser, and the remainder upon the 25th day of March next, when possession will be given, and a deed executed at the purchaser's expense.

[Pennock's Appeal.]

3d. The purchaser to be responsible for all losses by any subsequent sale, if such sale should be necessary by reason of his not complying with the above conditions.

To the said order of sale, said administrators, on the 25th day of February, 1850, made the following report to said court :

That under and by virtue of the annexed order of sale, having first given due and timely notice of the time and place of sale, they did, on the 27th of December, last past, expose the real estate, in the order described, by public vendue, or auction, for cash ; whereupon Abraham L. Pennock and James Sellers, Jr., became the purchasers of tract A in said order, for the sum of \$4000. And the said Abraham L. Pennock and James Sellers, Jr., did become the purchasers of tract designated C in said order, for the sum of \$3000, they being the highest and best bidders for the said tracts, and the above sums the highest and best prices bidden for the same.

The sale was confirmed *nisi* by said court, on Feb. 25th, 1850, and the following exceptions to the confirmation of the sale of tract No. 1 (A) was filed the same day. This was the mill property.

1st. The administrators of said deceased, or some of them, engaged and employed a puffer or puffers to bid at and greatly enhance the price of said real estate, struck off to the exceptors, Abraham L. Pennock, and James Sellers, and that the bids made by the persons who made the bids at the instance of the administrators, did not make such bids with the intention of purchasing the real estate, but for the object and purpose of running the price up on the *bona fide* purchasers.

2d. That by reason of the puffing and false bids of the person or persons employed by the administrators, the price of the real estate was enhanced to the amount of six or eight hundred dollars above what the same would have sold for, had none bid but persons who bid with the intention to purchase.

3d. That the said real estate was struck off to the exceptors at the sum of \$4000, which is greatly above the just value of the same, and greatly more than they would have bid, except against other bidders, who bid with a design to purchase.

4th. That said puffing and false bids were made without the exceptors and other persons present at the sale having any knowledge of the nature and object of the bids ; on the contrary, the administrators, or their agent the auctioneer, informed the bidders and persons assembled, that there should be no underbidding or puffing.

At the same time, exceptions, substantially of the same character, were filed to the confirmation of the sale of tract C.

Testimony was taken under an order of the court.

As to tract designated C, it was testified by Elizabeth Powell, one of the administrators, that she authorized Joseph Powell to

[Pennock's Appeal.]

bid for her, and to go as high as about \$100 per acre. After the sale, he said he had bid for me. Nothing was said between us about the payment. I intended to take the property, if it had been struck off to Joseph Powell. I had no conversation with Abraham L. Pennock or James Sellers, Jr., concerning the bids on the property.

The *crier* testified, that after the tract A (the mill property) was put up a second time, John Sellers made the first bid, which was \$3050 or \$3450; and that after he bid, the only bidders were Abraham L. Pennock and Joseph Hibberd. That the tract was struck off to Pennock for \$4000. That he, the *crier*, proclaimed, at the outset of the sale, that it would be a fair sale: that this was done with the assent of one of the administrators.

Joseph Hibberd testified that he was the guardian of the minor children of Abram Powell. He said we had among ourselves fixed \$4000 as a limit under which we would not sell the mill property. The sale of it was stopped, and it was put up again. When it got to \$3400, it dwelt awhile, and Joseph Powell told me to go and bid. He told me to bid, and bid out. I bid out loud enough for all to hear who were on the ground. I bid by nodding, after the first bid. "My bids were to *help the property up to the price we wanted for it*. It was knocked off at \$4000. I don't think that a *high price*," &c. He further said, that I did not tell Abraham L. Pennock, or James Sellers, Jr., or make it publicly known in bidding for tract A, what my object was.

Other testimony, and different opinions were expressed as to the value of the property.

CHAPMAN, J., observed, *inter alia*:

That there was a conflict of decisions in the English courts, and that he would follow the doctrine indicated by our own courts, which he considered to be, that a bidder may be privately appointed by the owner to prevent the estate from being sold at an under value. That there was a difference between employing one and two or more persons to bid; that to prevent a sacrifice, one is sufficient, but if more are employed, the inference is strong that the object is to impose on the purchaser. That a sale "to the highest and best bidder," and a sale *without reserve*, are not the same; that under the former, there is an implied understanding that the seller has a right to bid in the property, but that a sale "without reserve," *ex vi termini* excludes the idea of the seller's bidding.

The exceptions were dismissed, and the sales confirmed.
Pennock and Sellers appealed.

It was assigned for error, that the court erred in dismissing the exceptions to the report and confirmation of the sales of tracts A and C, and in decreeing a confirmation of the sales of said tracts.

[Pennock's Appeal.]

The case was argued by *E. Darlington*, for appellants.—He contended that the sales were fraudulent, and should have been set aside. That in *Bexwell v. Christie*, *Cowp.* 395, decided in 1776, Lord MANSFIELD decided that the employment of a secret puffer was a fraud upon the public. He also referred to *Howard v. Castle*, 6 *Term Rep.* 642; *Blashford v. Preston*, 8 *Term Rep.* 98; *Crowder v. Austin*, tried in 1825, before BEST, C. J., in which it was said, the purpose of employing a bidder must be declared in the conditions of sale: 2 *Car. & P.* 208; 12 *E. C. L.* 92; 3 *Bing.* 368; *Sugden on Vendors*, 16; 6 *W. & Ser.* 13; 2 *Kent's Com.* 539; *Wheeler v. Collier*, 1 *M. & M.* 123; 22 *E. C. L.* 266; *Thornet v. Haines*, 15 *Mee & Wells*, 366, decided in 1846; 8 *Howard* 134; *Veazie v. Williams*, 13 *Lou. Rep.* 287; *Meadows v. Tanner*, *Madd. Rep.* 34.

Broomall and *W. Darlington*, for appellee, contended that fraud is the only ground of relief, and that no fraud existed in this case; and that it is not illegal to employ a bidder to prevent a sacrifice: *Sugden on Vendors*, 29; *Bramley v. Alt*, 3 *Ves. Jr.* 620–624; *Conoly v. Parsons*, 3 *Ves. Jr.* 625, 628; *Smith v. Clarke*, 12 *Vesey* 477; *Steel v. Ellmaker*, 11 *Ser. & R.* 86, 2 *Coms. R.* 821; *Jenkins v. Hogg*; *Wheeler v. Collins*, 1 *Moo. & M.* 123. In *Crowder v. Austin*, 3 *Bing.* 368, the bidding was merely to enhance the price. In *Thornet v. Haines*, 15 *M. & W.* 367, the sale was without reserve. That in *Steel v. Ellmaker*, 11 *Ser. & R.*, C. J. TILGHMAN has reviewed all the cases at law and in equity, and adhered to the reasoning and authority of the latter.

Lewis, in reply, for appellants.—The fact that the property was not sold above its value is not material: *Robinson v. Wall*, 2 *Phillips' Rep.* 372. Under bidding is a fraud in law, and the only case where it is allowable is where there is a reservation in the conditions. The property may be withdrawn. The vendor has a *locus penitentiae*, as well as the vendee, till the property is struck off. See 2 *Phillips* 372. The case of *Bexwell v. Christie* has been overruled: 2 *Kent's Com.* 539; *Story's Com.*

There is no difference in principle between employing one and more bidders. In *Baham v. Bach*, 13 *Lou. Rep.* 287, there was but one bidder.

The opinion of the court was delivered by

GIBSON, C. J.—It is impossible to doubt the principle of the civil law adopted by Lord MANSFIELD, in *Bexwell v. Christie*. Good faith is an indispensable ingredient of fair dealing; and it is impossible to imagine a purpose, consistent with it, for which sham-bidding is necessarily employed. The vendor may prescribe conditions of sale which will enable him to retain the property should

[Pennock's Appeal.]

it not come up to his price; and if he do not produce the effect openly, why should he do it covertly? Common honesty requires that all should be fair and above-board. To screw up the price, as it has been aptly termed, by secret machinery, can be no less than a fraud; and a sham-bidder can be used for no other purpose. The decisions on the subject have fluctuated; but the largest license allowed in any of them has been to employ a single puffer: yet, whether there be one, or whether there be twenty, the mischief is the same, except as to the degree of it. It has been said that the employment of a plurality discloses too clearly to be mistaken, not a design to protect the property from being sacrificed, but to give an artificial impulse to the sale of it. That touches the honesty of the vendor's motive; but what have the bidders to do with it? Should he actually think that not less than twenty could protect it, the sale would still be, according to all the cases, fraudulent and void. It is not his motive, but his acts, by which they are affected; and these present a question, not of actual, but of legal fraud. In a treaty for a private sale, the vendor may praise his property without stint, because his interest in the price of it is so obvious as to put the vendee on his guard, who consequently purchases, not on the faith of the vendor's representation of its value, but on his own judgment; but in a public sale, especially of land, which has no standard of value in the market, he is necessarily influenced by the bids of those whose interest it is to get the property at the smallest price. Timid bidders are emboldened by decided ones; and to employ a decoy-duck to inspire them with false confidence, is grossly immoral. The very excitement of competition has its influence, and it is unfair to increase it by introducing a man of straw.

It is wonderful how slowly the most obvious truths are perceived and admitted. The plain and simple morality of the gospel required a revelation. Even in my day at the bar, it was the constant practice of the Orphans' Courts to allow a charge in administration accounts for the price of strong drink, furnished avowedly to stimulate the bidders at the sale of the decedent's effects.

The weight of authority is now, as it was at first, in favor of the true principle. Whatever may have been the state of the balance when Mr. Sugden collected the cases in his treatise on vendors, his own opinion evidently coincided with that of Lord MANSFIELD; and Chancellor KENT expressly adhered to it. Against *Bramley v. Alt*, *Conoly v. Parsons*, *Smith v. Clarke*, and *Steele v. Ellmaker*, we have, in addition to *Christie v. Bexwell*, and *Howard v. Castle*, the modern cases of *Crowder v. Austin*, *Wheeler v. Collier*, *Thornet v. Haines*, *Meadows v. Tanner*, and *Veasie v. Williams*. After the English judges have overruled three of their decisions to restore the principle of the civil law, we ought not to be tenacious of our single one. I concurred in the decision of *Steele v. Ellma-*

[Pennock's Appeal.]

ker exclusively on the foundation of precedent; but the balance of authority is conclusively the other way, and that case has neither principle nor precedent to support it. Chief Justice TILGHMAN did not doubt Lord MANSFIELD's decision—he said that none of the courts had gone so far as to affirm that it is not law—but he doubted whether the rule of the civil law was not too severe to be applied to the transactions of business. The duties and obligations of the civilians are often too nice for modern use; but this is not one of them. The rule is exactly defined; and it may be practically applied, without let or hindrance, to every case without exception.

The objection to the sale of the tract designated as letter C, is not sustained. The bids alleged to have been spurious on it, were made by an agent of the widow, who, though an administratrix, had a right to purchase, subject to the power of disaffirmance in the heirs or creditors. The other bidders had no right to disaffirm her act; and her bids, made through her agent, were in good faith. The argument would have been more plausible had she been utterly incapacitated; but as a sale to her would have been but voidable and probably confirmed, there is no room to say she was not a *bona fide* bidder.

It is ordered and decreed that the sale of the tract designated by the letter A be set aside; and that the decree of confirmation be affirmed for the residue.

Balliet's Appeal.^x

1. When both real and personal estate are devised, the sale and conveyance of the real estate by the testator after the making of the will, is a revocation of the will as to the *real estate only*, not as to the personal estate.

2. Where pecuniary legacies are to be paid *only* out of certain real estate, the sale and conveyance by the testator of the real estate, after the making of the will, is in law an ademption of the legacies.

3. As to specific and demonstrative legacies, see this case.

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APPEAL from the decree of the Orphans' Court of *Lehigh county*.

This was an appeal by Stephen Balliet, Jr., and Paul Balliet, from the decree of distribution on the account of Stephen and Paul Balliet, executors of the will of Paul Balliet, deceased.

Paul Balliet, of the township of North Whitehall, in the county of Lehigh, in his will, devised to his wife Elizabeth, in lieu of dower, his house and lot in North Whitehall township, &c. to hold to her during her widowhood; also, all his household goods; and he directed that certain hay, rye, wheat, &c. be furnished to her annually, at the proper season, during her widowhood, by Stephen Balliet, Jr., and Paul Balliet, and hereby made a charge upon the

** Re-affirmed 11th Decr 1851 16 Pa. 281
" " Shupser & Baylont 103 324*

[Balliet's Appeal.]

messuage, tenement and tract of land hereinafter devised to them. And he also bequeathed to her the interest accruing on five thousand dollars to be paid to her at different times during her widowhood, by the said Stephen Balliet, Jr., and Paul Balliet, and *hereby charged* on the messuage, tenement and tract of land hereinafter devised to them.

He also bequeathed the sum of \$5000 to the six children of his sister *Maria Catharine*, deceased; 2d, to the issue of his brother *Stephen*, to be equally divided between them, the sum of \$5000; 3d, to his sister *Susanna*, or her issue, \$5000; 4th, to his sister *Eve*, \$5000; and 5th, to the issue of his brother *John*, the sum of \$5000; all *payable as hereinafter specified*.

6th item: I give and bequeath to the issue of my sister *Magdalena*, deceased, who was intermarried with *Christian Troxsell*, deceased, the sum of five thousand dollars, to be paid on the following conditions, and in the following manner: First, the sum of fifty dollars for each and every year which *Jesse Troxsell* may have kept the said *Magdalena*, his mother, and a proportional sum for any period less than a year, (the time to be ascertained by the arbitrators hereinafter named, in case of dispute,) shall be deducted from the said five thousand dollars and paid to the said *Jesse*, and the residue thereof shall be paid to the issue of the said *Magdalena* (including the said *Jesse*) in equal parts or portions, at the time hereinafter specified.

Item, I give and devise all that my messuage, tenement or tract of land situate in the township of North Whitehall, in the county of Lehigh, *adjoining lands of Stephen Balliet*, late *Peter Butz*, *Jonas Troxsell* and others, containing *two hundred and sixty acres*, more or less, with the appurtenances, to the said *Stephen Balliet, Jr.*, and *Paul Balliet*, (sons of my nephew *Stephen Balliet*,) their heirs and assigns forever as tenants in common and not as joint tenants, charged and chargeable nevertheless with the furnishing, delivering and payment yearly of the articles and interest hereinbefore bequeathed to my said wife, and the sum of thirty thousand dollars, hereinbefore bequeathed to my sister and the issue of my deceased brothers and sisters, to be paid as follows, viz.: twenty-five thousand dollars thereof to be paid in six equal yearly payments, of four thousand one hundred and sixty-six dollars and sixty-seven cents (\$4166.67) each, the first thereof to be made at the end of one year next after my decease to the issue of my eldest sister deceased, and the next equal yearly payment to be made to the issue of my eldest brother deceased, and so on in the order of the births of my said brothers and sisters till the sum of twenty-five thousand dollars (\$25,000) be paid. The remaining sum of five thousand dollars (\$5000) to be paid at the termination of my wife's widowhood or at her decease.

And further, I do give and devise my house and lot *whereon I*

[Balliet's Appeal.]

now reside, hereinbefore given to my said wife to hold to her during her widowhood, from and after the termination of her widowhood, to the said Stephen Balliet, Jr., and Paul Balliet, their heirs and assigns for ever, as tenants in common, and my undivided third part of a certain messuage, tenement, and tract of land situate in *South Whitehall township, adjoining lands of Peter Moyer and others*, containing *one hundred and thirty acres*, more or less, with the appurtenances and my undivided moiety of a certain tract of woodland, situate in North Whitehall township, adjoining lands of James Deshler and others, containing thirty-three acres more or less, with the appurtenances, and my undivided third part of a certain piece of woodland, situate in North Whitehall township, *adjoining lands of late George Semmel*, containing six acres more or less, with the appurtenances, and *my bank stock and all the rest, residue and remainder of my estate, effects, and property of whatsoever kind and wheresoever situate*, I give and devise to the said Stephen Balliet, Jr., and Paul Balliet, and their heirs and assigns for ever, to be equally divided between them: *Provided*, nevertheless, and my will expressly is, that in case the residue of my personal estate shall exceed the sum of twenty thousand dollars, *the excess or overplus—above twenty thousand dollars—*shall be rateably applied to the six legacies of five thousand dollars each, hereinbefore given to my sister and the issue of my deceased brothers and sisters.

Item, it is my will and desire that none of the legacies herein bequeathed shall lapse, but in case any legatee, whether herein named as such or described as such, is now dead, or shall hereafter die, before the legacy or share of a legacy herein given or limited shall become payable, that such legacy or share of a legacy shall be deemed vested in the issue of such deceased legatee, which issue shall take, by representation of their parents respectively, such share as their parents would have taken if living.

He appointed Stephen Balliet, Jr., and Paul Balliet, executors. The testator died February 17, 1845. His will was proved on 21st February, 1845, and letters testamentary granted to Stephen and Paul Balliet. His wife died before him. After the making of the will, the testator sold and conveyed *all his real estate*, viz. part to one Semmels, for \$214.37, viz. 6 acres of woodland; part to Peter Moyer, for \$2373.07½, viz. the one-third of 180 acres in *South Whitehall township*; and 350 acres to Stephen and Paul Balliet, for the consideration of \$10,000. This tract embraced all the land devised to them by the will, except what had been conveyed by the two preceding deeds.

By the change thus made, the testator was not seized of any real estate at the time of his death. He held securities for the land sold and conveyed to Peter Moyer to the amount of about \$2500, and for the lands sold and conveyed to Daniel Semmels, to the

[Balliet's Appeal]

amount of \$71.46; and for the land sold and conveyed to Stephen Balliet, Jr., and Paul Balliet to the amount of \$10,000, payable as per the inventory and account, and other personal estate as per said inventory and account.

Before the testator's death, suits had been brought against the Directors of the Northampton Bank, of whom he had been one, for alleged over issues, two of which suits had been arbitrated, in one an award was made for plaintiff of \$6995, and in the other for \$4425, and from the awards he and the other directors summoned had appealed. He died before the cause could come on for trial. The suits are still depending.

The testator, when he made his will, owned and held two hundred and thirty shares of stock in the Northampton Bank, on which \$50 per share had been paid. They were then somewhat depreciated. On the 22d of September, 1843, and from thence till his death and since, the shares were of no value, in consequence of the final failure of the institution in the spring of 1843.

The account of the executors was filed in March, 1846. It was referred to auditors, who reported a distribution of the balance of \$26,988.43, among the legatees, viz. to the issue of Maria Deshler, of Stephen Balliet, deceased, of Susanna Baer, of Eve N. Saeger, of John Balliet, and of Magdalena Troxsell, each \$4498.07½, amounting to \$25,988.43.

They submitted to the court the matter of the suits depending for over issues, and how far distribution should be made, until the determination of those suits.

In the account thus audited, the executors charged themselves with the outstanding notes and bonds, calculating them at their then present value, and including the unpaid bonds of Stephen Balliet, Jr., and Paul Balliet, Jr., given for part of the said consideration money of \$10,000.

This report was confirmed *nisi*.

On the 3d of December, 1846, exceptions to the distribution were filed, on behalf of Stephen Balliet, Jr., and Paul Balliet, Jr., the accountants and two of the legatees, verified by affidavit:

1. That the auditors erred in not awarding to the accountants, who are devisees and legatees of the testator, the sum of \$2672.69½, due on Peter Moyer's bond, and \$80.40, due on Daniel Semmel's bond, being the proceeds of land devised by the testator to the accountants, but sold in his lifetime.

2. That if the allowance mentioned in the first exception is not according to the correct construction of the will, then the sum of \$20,000 should have been first distributed to the accountants as devisees and legatees, before any distribution was made to the other legatees, under the changes of the testator's estate, which had taken place between the making of his will and his decease.

3. That the distribution is erroneous in other respects.

[Balliet's Appeal.]

Other exceptions were filed on the part of other legatees, one of which was to the distribution in favor of the other legatees, except Susanna Baer.

In September, 1848, the court set aside the report of the auditors, and decreed distribution of the balance *as in case of intestacy*.

From this decree, Stephen Balliet, Jr., and Paul Balliet appealed.

It was assigned for error :

1. The Orphans' Court erred in decreeing distribution of the balance, as in case of intestacy, to and among the next of kin, and should have decreed \$20,000 of the said balance to Stephen Balliet, Jr., and Paul Balliet, as given to them by the will of the testator.

2. That if the said sum of \$20,000, under the will of the testator, and the changes which had taken place in regard to his real estate, between the making of his will and his death, is not decreed to the said Stephen Balliet, Jr., and Paul Balliet, they are entitled to the sum of \$2672.69½ due on Peter Moyer's bond, and \$80.40½ due on Daniel Semmel's bond, those securities having been taken for land devised to the said Stephen Balliet, Jr., and Paul Balliet, and sold and conveyed by the testator to the said Moyer and Semmel in his lifetime.

3. That the Orphans' Court erred in deciding that the will of the testator was revoked *in toto* by the conveyances of the testator's real estate, the said conveyances being only a revocation of the same so far as the devises of the said real estate and the legacies charged thereon were concerned, and did not affect any of the remaining provisions of the will disposing of the testator's personal estate.

The case was argued by *J. M. Porter*, for appellants.—He contended that the conveyances by the testator of his real estate were not a revocation of the *entire will*, but only a revocation *pro tanto*, or so far as the real estate and the legacies charged thereon were concerned. That the entire will was not revoked, as there was left of the testator's personal estate above \$26,000, of which the remaining parts of the will made a disposition, which was unrevoked either in form or by implication. That the Orphans' Court should first have allowed the appellants \$20,000, and ordered the excess beyond that sum, to wit, \$6988.48, to be paid in equal and ratable proportions to the appellees. That the effect of the sale of the real estate was to enlarge the fund for the payment of the \$20,000. That the will was ambulatory, and must operate on all his personal estate.

The devise of the *real estate* was revoked by the sale and conveyance of it: 3 *Atkyn* 799; 4 *Kent Com.* 528; 5 *John. Ch.* 156; 5 *id.* 450; 7 *id.* 267.

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The devise of the real estate being revoked, the legacies charged thereon were also revoked or adeemed. The land is the fund to which the legatees must look: 9 *Watts* 63; 2 *Atkins* 378; 1 *Roper on Leg.* 152; 2 *Freeman's Rep.* 22; *id.* 124; 1 *Bro. Ch.* 401; 1 *Russ. & M.* 677; 3 *Pa. Rep.* 533; 5 *Barr* 356; 3 *Watts* 337.

That this revocation was only *pro tanto*: *Powell* 377; 2 *Ves. Jr.* 428, *Bridges v. Dutchess of Chandos*; 2 *P. Wms.* 333; 2 *Vern.* 720; 9 *Pick.* 350; 15 *id.* 388; 4 *Greenleaf* 341, *Carter v. Thomas*; 7 *John. Ch.* 258; 11 *Ser. & R.* 141, *Wogan v. Small*; 1 *Whar.* 246; 2 *id.* 103; 7 *Paige* 97; 4 *Barr* 88, *Cooper's estate*.

The appellants were the chief objects of the testator's bounty. By the decision of the Orphans' Court they get nothing, as they are grand-nephews of the testator, and their father is living. The bank stock became of no value before his death.

A. E. Brown, for appellees, contended that the testator revoked his entire will by the change he made in his property after its execution: *Cooper's Estate*, 4 *Barr* 88.

The legacies of \$30,000 were the primary object of the testator, for they are the first and last named in the will. The land was not the only fund contemplated by the testator for their payment. If the land was worth \$30,000, why did he take bonds for \$10,000 for it, and that with the intention of securing them to the obligees at his death? Why charge legacies to the amount of \$30,000 on land worth only \$10,000, if he meant them to be paid? He meant that his estate was to go to Stephen and Paul, and the six families of the legatees named. The bank stock, worth \$11,500 at the making of the will, became of no value. If there was to be an abatement of the legacies, this accomplished it. The testator intended that his will, so far as those dispositions which his own acts had rendered nugatory were concerned, should be revoked. He gave in his lifetime to Stephen and Paul what they were to have in land, and provided a fund for the payment of the legacies, as far as it would reach. The intestate laws will give to his brothers and sisters' children what it was intended they should have.

It was a revocation *pro tanto*, but it extended to the entire estate as affected by the will. Now, it is contended for the appellants, that the bonds of Stephen and Paul should go back to themselves, and not to the other legatees. That not only is the devise of the land revoked, but that he intended to increase his personal estate for their benefit.

In this case there was a conveyance of the whole real estate, and an entire change in every thing relating to the estate, his wife dead, the bank stock wholly depreciated, and the real estate converted into personalty.

But if the will was not revoked, he contended that the legacies were chargeable both on real and personal estate, and that they

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were not adeemed by the sale of the land to Stephen and Paul, nor would they have been if it had been sold to a *stranger*. That they were not specific, but *demonstrative*; that is, a legacy of mere quantity with a specific fund appropriated for the payment of it; the mention of the fund being rather by way of demonstration than of condition; rather showing how or by what means the legacy may be paid, than whether it shall be paid at all: *Ward on Legacies* 21, 18 *Law Lib.*; 5 *Barr* 351.

A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for payment. This kind is called a *demonstrative* legacy, and is so far general, and differs in effect from one properly specific, that if the fund be called in or fail, the legatees will not be deprived of his legacy, but be permitted to receive it out of the general assets: *Williams on Executors* 740. Courts are averse to construing legacies to be specific, and the intention of the testator that they be so, must be clear: *Id.* 741; 7 *John. Ch.* 262. A legacy is not necessarily *specific* because payable out of a particular fund. They have precedence of payment out of that fund, but, failing the fund, may be payable out of the general estate: 6 *Watts* 473; 3 *id.* 337; 7 *John. Ch. R.* 262-3.

If the intention is clear to give the legacies, they will not fail because the land has failed. Ademption does not apply to *demonstrative* legacies, i. e. to legacies of so much money with reference to a particular fund for payment: 2 *Williams on Executors* 820.

It is not enough that the *real estate be charged*; the *personal estate must be discharged*: 2 *Wms. Ex.* 1050; 1 *Mer.* 220-230. If the legacy is not only charged upon real estate, but *given out of it*, the legatee can only have recourse to that fund: *Matthews on Ex'rs.* 248, 9 *Law Lib.* But the mere charge of debts and legacies upon *real estate* does not discharge the personalty. It is liable unless the *contrary appears*: *Dick* 417; 4 *Vesey* 76; 9 *id.* 447; 18 *id.* 132; 1 *Roper on Leg.* 196; *Ram on Assets* 62-3.

The phrase as *hereinafter specified* does not apply to the fund out of which the legacies were payable, but to the time of payment, as will be seen by examining the sixth bequest to Magdalena, as he there speaks of the *time hereinafter specified*, without using any thing to indicate any particular fund.

The real and personal estate are blended in the residuary clause. This is relied on to show that the legacies are to be paid. Rest and residue means what is left after the payment of debts and legacies: 1 *Pa. Rep.* 112; 2 *Dal.* 131; 6 *Bin.* 395; 2 *Wms. Ex.* 895-6.

It is said that Paul and Stephen were the chief objects of the testator's bounty, and that by the decision they get nothing. The deed to them is for 350 acres, and they got it for \$10,000. A witness rated it at \$70 per acre. The court, in deciding on the

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question of *intention*, may receive evidence of the value of property devised or mentioned in the will: 2 *Barr* 288.

J. Banks on same side.

The opinion of the court was delivered by

ROGERS, J.—I am unable to agree with the Orphans' Court that the sale of the real estate amounts to a total revocation of the will, but to a revocation *pro tanto* only. There are no circumstances in evidence, from which it can reasonably be inferred that the testator intended a total revocation.

The testator devised his whole real estate to his two nephews, Stephen and Paul Balliet, burthened with the payment of \$30,000 to his sister, and nephews, and nieces, and their issue. He moreover bequeathed to the same persons other real estate, all his bank stock, and all the rest and remainder of his estate, effects, and property of whatsoever kind, and wheresoever situated; provided, nevertheless, in case the residue of his personal estate shall exceed twenty thousand dollars, the excess or overplus shall be rateably applied to the six legacies of \$5000 each, thereinbefore given to his sister, and the issue of his deceased brothers and sisters. Notwithstanding the alienation of the whole real estate in the lifetime, there is evidently something on which the will can operate, viz. the \$20,000 bequeathed by the will, and the residue to which the legatees will be entitled, namely, the surplus of the personal estate, over and above the amount bequeathed to Stephen and Paul Balliet. Thus, if as in Cooper's estate, the testator, by the sale of the property, rendered it impossible to carry out the provisions and clear intent of the will, it would amount to a revocation *in toto*. The case of Cooper's Estate, 4 *Barr* 88, was ruled under peculiar circumstances, evincing, as the court suppose, the intent of Cooper to revoke his will, by the sale he made of the principal part of the estate. The disproportion of the real and personal estate, the situation of the testator's family, and the manifest injustice which resulted from its giving the whole estate to two daughters, and excluding five other daughters who got nothing, mainly entered into its consideration. This case differs from that in this, that under our construction there is nothing unreasonable in the will, as one of the effects will be to give to Stephen and Paul \$20,000, which it is perfectly plain the testator intended they should have out of the personal estate. Nor would we be at liberty to frustrate this intent—the inevitable effect of ruling that the sale of the real estate was a revocation *in toto*. Under that construction, these legatees, instead of getting twenty thousand dollars out of the personal estate, would get nothing. The appellants, who were evidently the great objects of the testator's bounty, would be deprived of any portion of the estate, as they were the grand-

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nephews of the testator, and their father still living. So that if there be any hardship in the construction given the will, it is equally great in one case as in the other. And this view of the principle of revocation is in accordance with the authorities, some of which will be cited. Thus in *Howes v. Humphrey*, 9 *Pick.* 350: The testator in his lifetime, and subsequent to the making of his will, conveyed by deed a part of the estate devised. *Per curiam*: "To the extent of these conveyances, there is a revocation *pro tanto*, and *nothing more*. In order to defeat altogether a testamentary disposition, there must be a subsequent conveyance of the *whole estate*. If the conveyance be of a *part only*, it will only amount to a revocation *pro tanto*." Brown's Appeal, 15 *Pick.* 388, was the case of an appeal from the decree of a judge of probate disallowing a certain instrument offered for probate as a last will. The testator, subsequently to executing his last will, had aliened *all his real estate*, as here, and had written on his will the following words: "It is my intention at some future time, to alter the tenor of the above will, or rather to make another will. I desire the foregoing to be considered revoked, and of no effect." This was not attested, as required by the statute to revoke a will of real estate. Held by the court, "If a testator devises both real and personal estate by a will duly attested, and by an alienation of the real estate revokes the will *pro tanto*, the will then stands as a will of personalty only, and is revokable accordingly by any writing sufficient to make a will of personal estate." In *Carter v. Thomas*, 4 *Greenleaf* 341, the question was whether the will of Joseph Thomas was revoked, he having devised part of his real estate to his daughter, and the residue to his two sons, whom he also made residuary legatees, and afterwards having in his lifetime sold and conveyed the same to one of the sons by deed. The Supreme Court, on appeal, held: The alienation of real estate by the testator, after he has devised the same by will, is a revocation of the will, only as to the part thus alienated. The will being suffered to remain uncanceled, evinces that his intention was unchanged with respect to the other property devised or bequeathed. See *Wogan v. Small*, 11 *Ser. & R.* 141. A man seized of two tracts of land, nearly equal in value, and possessed of personal estate, devised one tract of land to one child, and the other to the family of the other child, and gave a pecuniary legacy to a bastard grandchild. He afterwards sold one of the tracts and incurred debts which swept away the other, and died, leaving no more estate than was sufficient to pay his debts and the legacy to his illegitimate grandchild. Held, that these circumstances did not amount to an implied revocation of his whole will. In *Jones v. Hartley*, 2 *Whar.* 103, it was held, that a conveyance in trust, for the payment of the debts of the grantor, and then to revert to him, is not such a disposition of the estate as to revoke a previous will. The court say, "Being then a com-

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plete alienation of the real estate, after the date of the will, it is a revocation of the will, so far as it relates to the property thus conveyed." See also, to the same effect, 3 *Bin.* 498, *Coates v. Hughes*, 1 *Whar.* 246; 2 *Vern.* 720; 2 *P. Wms.* 833, *Rider v. Wager*.

In *Bridges v. The Dutchess of Chandos*, 2 *Vesey Jr.* 428, the lord chancellor states it as a principle, which is not shaken in authority, that any new disposition made subsequent to the will, or in other words, any conveyance of that which had been conveyed by the will, shall defeat the will; but then it must be a conveyance of the whole estate, it must extend as far as that appointment which the will has made; for if it be but a part, it affects the will no farther than that part goes. In this case, part only of the property devised and bequeathed is disposed of; consequently those parts of the will which remain are untouched. There is no impossibility, as in *Cooper's Estate*, 4 *Barr.*, to give effect to the disposition of the will. In *Marshall v. Marshall*, 1 *Jones* 430, it is held, that when the alteration in the testator's circumstances is such as to render it impossible to execute any part of his will, as in *Cooper v. Cooper*, it will be considered as entirely revoked. But when it can be partially executed, the revocation is *pro tanto* merely as to that part which cannot be carried into effect. The same point was ruled at Pittsburgh at the last session. For these reasons, the judgment of the Orphans' Court, decreeing an intestacy, must be reversed.

It being then a revocation *pro tanto* only, it will be necessary for this court to ascertain the effect of the alienation of the real estate on the different provisions of the will.

The general rule is, that when, after making a will, the testator executes any legal conveyance of the devised property, the will is revoked. This is well established by authority. Lord HARWICH says, in *Sparrow v. Hardcastle*, 8 *Atk.* 799, that the estate being gone by the conveyance, the will has lost the subject of its operation. The law requires that the same interest which the testator had when he made the will, should continue to be the same interest, and remain unaltered to his death. The least alteration in that interest is a revocation: *Roberts on Wills* 219; *Powell on Devises* 377; *id.* 548; *Lovell on Wills* 852; 4 *Kent's Com.* 528; 8 *Atk.* 748, *Parsons v. Freeman*; 6 *Vesey* 199; 3 *Johns. Ch.* 156; 5 *id.* 450, *Minuse v. Cox*; 7 *id.* 267. Under the authorities cited, it is not disputed that the devise of the real estate to Stephen and Paul Balliet is revoked by the sale and conveyance of the estate to them by the testator. The will, so far as respects the real estate, has nothing to operate upon, and therefore, for this and the other reasons given above, the alienation is a revocation of the devise.

The devise of the real estate, being revoked by the sale and conveyance of the real estate, the next and important question is, what

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is the effect on the legacies of \$80,000 given by the testator to his sister, and his brothers and sisters' children; and this depends on the fact whether those legacies are made payable by the devisees, Stephen and Paul Balliet, out of that fund, and the personal estate exempted and exonerated from it. All the authorities agree that when a legacy is payable exclusively out of a particular fund, by a particular person, a disposition of that fund, in the lifetime, is taken to be an ademption of the legacy. The distinction is taken between a specific, a pecuniary, and a demonstrative legacy. In the former it is adeemed, in the latter it is not.

A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for payment. This kind of legacy is called a demonstrative legacy, and it is so far general, and differs in effect so far from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets: 2 *Williams' Ex'rs.* 740. Ademption does not apply to demonstrative legacies, *i. e.* to legacies of so much money with reference merely to a particular fund for payment. Courts are averse to construing legacies to be specific, and the intention of the testator that they should be must be clear. The principle, I agree, which has the greatest influence on the determination of the question, and which has been uniformly supported by all the cases, is, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to the payment of his debts and legacies. The rule of construction is such as aims at finding not that the real estate is charged, but that the personal estate is discharged. In other words, it is not by an intention to charge the real estate, but by a plain intention to discharge the personal estate, that the question is to be decided: 2 *Williams' Ex'rs.* 1050, citing 1 *Mer.* 220, 230. Test this case by the principles adverted to, and which are conceded to be specific or demonstrative legacies. The objects of the testator's bounty were the wife of the testator; 2d, his brothers' and sisters' children, six families, and Stephen and Paul Balliet, his grand-nephews. After providing what he esteemed a comfortable provision for his wife, since dead, he devised his whole real estate to his two grand-nephews, Stephen and Paul Balliet, with a pecuniary legacy, as a residuary bequest, not exceeding the sum of \$20,000. By the construction put upon the will by the Orphans' Court, these devisees get nothing. In the will, as it originally stood, they were entitled to real estate on certain conditions, and to the personal estate, not exceeding a certain amount, absolutely. The real and personal estates are kept separate and distinct. It is not the case of two funds blended into one, as the provisions of the will abundantly show. The legacies are given to his brothers in the same language, payable as herein-

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after specified, with the exception of the bequest to his sister Magdalena of \$5000, to be paid *on the following conditions and in the following manner*. The legacies being to be paid as afterwards specified, or on the following conditions, which I take to be the same thing, we must resort to another part of the will to ascertain how and by whom they are to be paid. By the phrase payable as hereinafter specified, I understand a designation of the fund out of which the legacies are to be paid, and by whom payable, is intended. And this appears in the next item, where the testator says, "I give and devise all that messuage, tenement, or tract of land (describing it) to Stephen Balliet and Paul Balliet, sons of my nephew Stephen Balliet, their heirs and assigns for ever, as tenants in common, and not as joint tenants, charged and chargeable nevertheless, with the furnishing, delivering, and payment yearly of the articles and interest hereinbefore bequeathed to my said wife, and the sum of \$30,000 hereinbefore bequeathed to my sister, and the issue of my deceased brothers and sisters."

The testator, in the next item, after specifying certain real estate not before disposed of, which he devises to Stephen and Paul, and some bank stock, bequeathed all the rest, residue and remainder of his estate, effects, and property, of whatsoever kind and wheresoever situate, to the said Stephen Balliet, Jr., and Paul Balliet, and their heirs and assigns for ever, to be equally divided between them; provided, nevertheless, and his will expressly is, that in case the residue of his personal estate shall exceed the sum of \$20,000, the excess or overplus above \$20,000 shall be rateably applied to the six legacies, of \$5000 each, hereinbefore given to his sister, and the issue of his deceased brothers and sisters. The distinctions between a specific and pecuniary legacy, and a specific and demonstrative legacy, are sometimes very nice, and, perhaps, this is a case of that description. The plan of the will generally seems to have been to give to his two nephews, who would appear to be the principal objects of his bounty, his whole real estate on certain conditions, that is, they paying certain specified sums of money to other persons specifically named in the will. He also bequeaths to them the residue of his estate, not exceeding \$20,000. This is so plain, that had not other disposition been made of part of his estate in his lifetime, there would have been no difficulty in the distribution of it. Had the sale or conveyance of the specific devise been made by a stranger, it would be somewhat difficult to believe he thereby intended to deprive his two favorite nephews of all interest whatever in his estate; the necessary effect of considering the legacies of \$30,000 as subsisting legacies, and not adeemed. It does not, however, strike me that the persons to whom it is conveyed, viz. Stephen and Paul Balliet, can alter the case. At least, the argument on that fact, with evidence of the value of the property, is too uncertain to make it the ground-

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work of a judicial decision. So, also, if the legatees of the \$20,000 under the residuary clause, had been other than they were, it would strike me as unjust that the legatees first named should come upon the personal estate devoted to other persons, on failure of the fund to which they ought to look for payment. Much less ought they to be permitted to destroy or impair the right of those who were principally in the view of the testator. It is very possible that the testator was unaware of the effect to be produced by the sale of his real estate; and if he had, it may be probable that he would have altered the provisions of the will so as to suit the altered circumstances. But such conjectures (for they are nothing more) are not to be regarded. We must determine the case on fixed and settled principles. On the whole case, we have (not without hesitation) come to the conclusion that the sale and conveyance of the real estate (it being the fund out of which only the legacies were to be paid) was in law an ademption of the legacies charged on that part of the estate.

By the account settled by the executors, it appears that the personal estate amounts to \$26,988.47. In what manner is that to be distributed, is the remaining question. In the opinion of the court, \$20,000 is in the first place to be paid Stephen Balliet, Jr., and Paul Balliet, to be equally divided between them. By the proviso, their legacy is not to exceed that sum. It directs that the excess or overplus shall be rateably applied to the six legacies of \$5000 each, given to his sister and the issue of his deceased brothers and sisters. In this respect, we think the intention is clear; and as effect can be given to this part of the will, without interfering with the rights of others, we are pleased to give it this construction.

The Court decrees distribution to be made accordingly.

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Reasonable diligence on the part of a ward to call his or her guardian to account, will be required: and if the husband of a female ward delays to ask for a citation for nearly nineteen years after an alleged settlement between him and the guardian, and for fifteen years after the ward came of age, and until after the death of the guardian, the settlement of an account will not be decreed, merely on the suggestion that no account has been filed, no sufficient reason having been assigned for the delay; ignorance alone on the part of the husband being assigned, and that probably resulting from his own supineness; there being nothing in the case showing that the guardian placed difficulties in the way of the investigation, or practised artifice to mislead inquiry.

APPEAL from the decree of the Orphans' Court of *Northampton county*.

On the 21st day of August, 1846, the petition of Jacob Gress,

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of Covington township, Luzerne county, verified by affidavit, was presented, setting forth, that on the 1st day of Dec. 1820, the said Orphans' Court, on the petition of Christian Miller, had appointed Henry Fenner guardian of the person and estate of Susan Umfert, a minor, under the age of fourteen years; that, as such guardian, the said Henry Fenner had received, as the property of his ward, two certain notes, one of them given by John Brotzman and Jacob Shoemaker; and the other given by John Metzgar and John Miller—both payable to Christian Miller, and by him assigned to the said Henry Fenner, for the use of his said ward, and amounting at the time she became of age, to the sum of \$500, or thereabouts. That neither the said Henry Fenner in his lifetime, nor his administrator since his decease, have ever settled an account of said guardianship. That on the 19th March, 1826, the said petitioner was intermarried with said ward, and praying a citation to the administrator of said Henry Fenner, now deceased, to render an account of said guardianship.

Citation awarded by the court, which was duly served and returned.

20th Nov. 1846, Joseph Fenner, administrator of Henry Fenner, deceased, files an answer, verified by affidavit, admitting the appointment of said Henry Fenner as guardian, as stated in the petition, but alleging that the said appointment, by its terms, expired when said minor should attain the age of fourteen years, and that said minor attained said age about the year 1823 or 1824; that respondent had no personal knowledge that said Henry Fenner ever received any funds or estate belonging to said ward; but among the papers of said deceased, was found a bill single, dated Aug. 29, 1819, of John Brotzman and John Shoemaker, to Christian Miller, for \$130 with interest, informally assigned by him, 5th May, 1820, to Susan Umfert, on which sundry payments appear to have been made to the said Henry Fenner, leaving a balance still due and unpaid thereon. That respondent does not believe any funds other than the said bill single ever came to the hands of said intestate for the said ward; that by an endorsement on the certificate of guardianship, dated 19th May, 1821, subscribed by the said Christian Miller, it is stated that he had appointed said Henry Fenner guardian of the said Susan, and thereby gave over to him the aforesaid bill single, for \$130, with interest from date, which sum said Henry Fenner was to give said Susan at her lawful age. That after the marriage of the said Susan with said Jacob Gress, *when the said Susan had attained the age of eighteen years, to wit, on the 9th. Oct. 1827*, a settlement took place, as respondent had been informed and believed, between the said Henry Fenner and said Jacob Gress, in which said bill single was taken into account, and the interest thereon added for eight years, one month, and ten days, which, with the principal, made an aggregate

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of \$193.26; and on the same day, a bill single of said Jacob Gress, with one Nicholas Metzgar, for \$200, payable to said Henry Fenner, bearing date the same 9th Oct. 1827, was executed and delivered to said Henry Fenner. That from a memorandum of said Henry Fenner, respondent believes that said Henry advanced to said Gress the \$6.74 over and above the principal and interest of the bill single of said Brotzman and Shoemaker; and that the said Gress, without making any allowance for the compensation of said intestate, is indebted to his estate the said sum of \$6.74, with interest. That respondent is informed and believes that the said bill single of Gress and Metzgar was taken for the security of said Fenner as to the said sum of \$193.26, against any claim that might be made upon him in consequence of the said Susan not having attained the age of twenty-one, and as to the residue thereof, \$6.74, together with its interest, for the repayment of the same to him. That so far as respondent knows and believes, the said Henry Fenner and said Jacob Gress treated the said transaction of 9th Oct. 1827, as a full and final settlement of said guardianship. That, said Henry Fenner died 15th Oct. 1845, and respondent has no materials to settle or adjust an account, other than that of 9th Oct. 1827.

Jan. 21, 1848, the reply, verified by affidavit of Jacob Gress, the petitioner, was filed, in which he sets forth that the other note or bill single, received by the said Henry Fenner, for the use of his said ward, was given by John Metzgar and John Miller to Christian Miller, for about \$200, dated in 1819, and assigned by said Christian Miller for the use of said ward, and delivered to said guardian. That on or about the 9th day of October, 1827, the petitioner called on H. Fenner, for the purpose of endeavoring to make some settlement with him of said guardianship. That the said Henry Fenner informed him, he could make no settlement with him, nor could he pay over the moneys in his hands until the wife of petitioner should attain the age of twenty-one; but that he would advance him the sum of \$200, if petitioner would give him security for the said money, inasmuch as if the wife should die under the age of twenty-one and without children, petitioner would not be entitled to it. The petitioner thereupon procured Nicholas Metzgar as such surety, and he received the said sum of \$200, and he and Metzgar signed an instrument of writing, the nature of which he does not recollect, but presumes that it was the bill single mentioned in the answer of respondent. That petitioner was, and is unable to read or write, except to write his name, and that the \$200 was all the money he stood in need of at the time. That several years afterwards, and when his wife was over the age of twenty-one years, petitioner again called on said Henry Fenner, and requested a settlement, when he was informed by said Fenner, that the sum of \$200, which he had already received, was about

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all he was entitled to; that he inquired of said Fenner what and how much was the estate that he had received for said ward, and was told by him that it consisted of the note above mentioned, of John Brotzman and Jacob Shoemaker, with its interest, and that the \$200 was about the amount, and there was no need of any further settlement. That petitioner then left him, and in May, 1846, for the first time learned that said Henry Fenner had received for his said ward the note of John Metzgar and John Miller; and soon after, applied to counsel and procured the issue of the citation in this case. He denied that there was ever any settlement or accounting, by the said Henry Fenner, with him, in respect of the said guardianship, and prayed that the said administrator may be compelled to settle an account, or in default thereof, that the court would cause an account to be settled for him, according to the act of Assembly.

December 2, 1848, the court, JONES, J., dismissed the citation, and gave the following opinion:

After the lapse of twenty years, and after the death of the guardian, we are asked by the husband of the ward to decree an account of the guardianship.

It is true, that as a general rule, lapse of time does not operate as a bar to relief in equity, when the parties stand in the relation of trustee and *cestui que trust*; but there are exceptions to the universality of that rule, founded on considerations of experience and policy. Courts will not allow this rule to be invoked for the purpose of bringing forward stale and doubtful claims, long after the original parties have passed from life, and when, in the ordinary course of human affairs, their documents and vouchers have been scattered or destroyed. Before a court of equity will open the fountains of such litigation, it will satisfy itself that it will be able to do complete justice notwithstanding the lapse of time. The inability to do that justice under the circumstances presented in a given case, is recognised as sufficient ground for refusing relief: *Story's Eq.* 3d edit. sec. 1520.

Here the petitioner, representing himself to be a poor and an ignorant man, has lain by for something over nineteen years. There was never an account settled by the guardian before the register; nor was any step taken by the petitioner to compel such a settlement. The guardian might easily have been compelled to answer upon oath all proper questions touching the trust. Neither poverty nor ignorance of the law will excuse one for not pursuing his remedies with promptitude, though poverty, so far as it accounts for laches, has been allowed to weaken the foundation of the presumption, where advantage has been taken of it by the other side. Nothing of the kind is alleged here. But it was not till after the death of the guardian that the petitioner discovered that other property than that admitted by him to have been received for his

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ward, had come into his possession. It is certainly well settled in equity, that no one will be presumed to have abandoned a right so long as he remains in ignorance of it, or labors under a mistake. Mere ignorance of a fact does not *per se* import culpable negligence; and yet where one has had the means of obtaining knowledge constantly on hand, and has neglected to avail himself of it, he cannot, it would seem, set up his ignorance, and avoid the consequences of his neglect. A party who seeks relief against the representatives of one deceased, upon the ground of his ignorance of a given right, should be held to satisfy the conscience of the court in a degree far more satisfactory than could be required *inter vivos*.

When twenty years have thrown their shadows around the transaction, deepening its obscurity by the lapse of time, and when the important discovery is made only just after the death of the party whose estate is sought to be charged, it seems to us that the case should be clear as a sunbeam, to authorize the court to interfere. The maxim, "*vigilantibus non dormientibus lex est*," prevails as well in equity as at law; and who can say that by the exercise of ordinary diligence, this petitioner could not have made the discovery he has made whilst the guardian was alive, whilst all the matters were fresh, and perhaps were susceptible of an easy explanation by the one most capable of giving it. We can see that it would be establishing a precedent full of danger and fruitful of litigation to call upon Fenner's administrator to account on the case before us, and we therefore dismiss the citation.

14th April, 1849, Jacob Gress appealed.

It was assigned for error:

The court erred in dismissing the citation, and in refusing to order an account to be taken of the said guardianship.

The case was argued by *Reeder*, for appellant.

Porter, for appellee.

The opinion of the court was delivered December 14th, by
BELL, J.—For the reasons given by the President of the Orphans' Court, we think its decree dismissing the citation, is well pronounced. It will, therefore, be perceived, our conclusion is not based upon any supposed operation of the statutes of limitation; for these, as is shown by *Commonwealth v. Moltz*, 10 *Barr* 527, and the cases there cited, are inapplicable here. Nor do we proceed upon any presumption of payment springing from mere lapse of time. Less than twenty years have expired between the moment when the petitioner might have called on the guardian for payment, and the period of the initiation of this proceeding; and I have failed to perceive any peculiar circumstances proper to aid the absence

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of the full period. Neither is our refusal to aid the petitioner founded in an actual settlement between the guardian and the husband of his ward. It results, altogether, from the unwarrantable negligence of the party to call for an account, without offering any sufficient reason accounting for the delay. The rule which obtains in courts of equity, suggested by the hazard of exposing the trustee to injustice, was well stated by the court below; and although no particular period can be ascertained which, of itself, will be sufficient to bar relief in all cases, it is certainly true that, at least, reasonable diligence is required in every case. This is absolutely necessary to attract the aid of the court, and it is wholly wanting here. Were fraud alleged, or could the long delay be imputed to the duplicity or other turpitude of the guardian, a different case would be presented. But no such allegation is indulged. Nay, it is not even alleged the latter received or ought to have received money or other property, for which he is liable to account. The pleadings, to which we can alone look, present a simple call by a ward upon the representatives of her late guardian to file an account, upon the bare suggestion that no account has been filed according to law, made nineteen years after the relation of confidence had ceased to subsist between them. Now, it is the undoubted duty of these trustees regularly to exhibit official statements of their administration of the trust committed to them; a duty which, under ordinary circumstances, will be enforced by compulsory process. But where, as in the instance before us, after payment and receipt of a sum averred to be the whole fortune of the ward, the latter, or those representing him, acquiesces for a period of, at least, fifteen years, until after the death of the guardian, and, probably the destruction of the evidence he relied on for safety, it is next to impossible to reopen the transaction by ordering an account, without running the hazard of wrong and injustice. The chance of this would seem to be sufficient to stay the hand of a tribunal governed by equitable considerations, and is certainly so, where the only reason given for the delay is the ignorance of the petitioner, resulting, as it would appear, from his own supineness or indifference. The road to knowledge was always open to him. So far as we are given to understand, the information recently obtained might have been attained to long ago. At all events, there is nothing to show the guardian placed obstacles in the path, or practised artifice to mislead inquiry. The mere neglect to settle and adjust an account cannot be so esteemed. Our books show the omission to do so is not at all unusual, and the cases of *Ex parte Cress*, 2 *Whart.* 294, and *Lukens' Appeal*, 7 *W. & Ser.* 48, prove that it is not such gross *laches* as ought to place the guardian altogether at the mercy of his late ward; especially where something like a settlement was had between them.

I repeat, we entirely concur in the reasoning of the learned

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judge who ruled the case below, and it is therefore unnecessary further to elaborate.

Decree affirmed.

Brown versus Clark.

1. In a suit on a negotiable note given in renewal of a former note drawn by a partnership, it is not sufficient that the holder knew of the dissolution of the firm *before the note in suit was given*. To affect the holder, the knowledge must have been possessed by him before the *original* note was given.

2. If an inaccuracy in the charge of the court may have led the jury to a false conclusion, it is not an answer to suggest that, probably, the jury understood the instruction differently from that which the language used indicated.

3. When the dissolution of a firm and the knowledge of it by the holder of a note signed by the firm name is material, it is not sufficient evidence thereof that the store of the firm was transferred, and that the firm ceased to do business, inasmuch as the firm may exist for the purpose of closing the concern.

4. The stock of a former firm having been sold and transferred by them to a new firm, of which one of the old firm was a member, before the date of a note in suit signed with the name of the old firm, the new firm transacting the same kind of business in the same place, the new firm having the books of the former one, collecting moneys due them, and paying debts of theirs from the proceeds; these circumstances are not sufficient to enable a jury to infer from them a *dissolution* of the old firm, before the date of the note in suit, so as to affect with notice of the fact the holder of the note, or him from whom his title was derived, inasmuch as they are not inconsistent with the existence of the partnership for the purpose of winding up the concern.

5. To affect the community with knowledge of the dissolution of a partnership, the evidence of the dissolution should be clear, distinct, and unambiguous, and the notice of it be by means sufficient to give it.

6. It is not a sufficient objection to evidence that of itself it is not sufficient to prove the fact which it is offered to establish: if it is illustrative of other facts, which point to the main result, it should be received.

7. When the time of the commencement and continued existence of a partnership is in question, a witness may, in relation to it, refer in his testimony to an advertisement of the partners published in his newspaper.

8. The collection of the debts of a firm by another firm, and the payment from the proceeds of the debts of the former, is evidence to be referred to the jury that the former firm was in existence for the purpose of winding it up.

9. In a suit on a note signed by the partnership name, against one of the partners who alleged its execution *after the firm had ceased*, evidence may be given of the existence of another note signed by the partnership after its dissolution, and a payment by the defendant on account of it, though it does not appear which of the firm signed the note, as the payment by defendant may be evidence of ratification, though not executed by him. Though open to explanation, it is evidence, as the transactions of the alleged partners with third persons may tend to prove the continued existence of the partnership.

10. In a suit against the drawers, on a negotiable note endorsed in blank, the defendants have no concern with the question of the actual ownership of the note, except where the defence turns upon points involving the personal conduct of the true owner or of those who preceded him, inasmuch as the owner of such a note may fill it up with what name he pleases, and the person, whose name is inserted, is deemed the legal owner, for the purposes of the action.

[Brown v. Clark.]

THIS case was from the Nisi Prius, *Philadelphia*.

It was an action brought by John J. Brown, as endorsee of Stephen Cummings, against Enoch W. Clark, as one of the firm of Mudge & Clark, upon a promissory note, of which the following is a copy:

The date of the note in question, is October 24, 1836, at six months, and is in the following words and figures:—

“\$1500.

Portland, October 24, 1836.

Six months from date, we promise to pay Stephen Cummings, or order, fifteen hundred dollars, value received.

Signed, MUDGE & CLARK.”

(Endorsed, Stephen Cummings.)

It was alleged, on part of defendant, that this note was a renewal of a note, which was discounted by the Exchange Bank, at Portland, on the 10th of May, 1834, made by the same makers, in favor of N. G. Jewett, and by him endorsed, and also by E. R. Mudge and Stephen Cummings, and it had annexed to it the word “Collateral,” signifying that there was accompanying the offer to the bank, collateral security. That it did not appear, on the trial, what this collateral was, or what became of it.

The first discount took place on the 10th of May, 1834; the last, the 28th of October, 1836. It was further alleged that the first discount was four months and ten days after the connection in business between Mudge and Clark had ceased; *that it ceased on the 1st of January, 1834*, and the last discount having occurred with Stephen Cummings’ name alone on the note, (the others having disappeared.) The 28th of October, 1836, was two years, five months, and eighteen days from the date of the first discount, and two years, nine months, and twenty-eight days from the alleged termination of the partnership between Mudge and Clark.

Brown was the cashier of the Exchange Bank, at Portland.

The *narr.* was in assumpsit. Pleas, non-assumpsit, statute of limitations, and payment and set-off. The case was tried before BURNSIDE, J. Verdict for defendant.

On the part of plaintiff, it was alleged that the firm of Mudge & Clark had been composed of Enoch W. Clark, the defendant, and Solomon H. Mudge; that the note had been drawn by Solomon H. Mudge, in the name of Mudge & Clark, and that the material questions were, whether that firm legally existed as to that note at its date, or on the 10th of May, 1834, the day of the negotiation of the original note, of which the one in suit was the last in a series of renewals; and a point raised by defendant’s counsel as to plaintiff’s right to sue on the note. That there never had been any express dissolution of the firm of Mudge & Clark.

On the trial, plaintiff’s counsel read the note in suit, and gave other testimony.

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Defendant's counsel read in evidence the depositions of Rand, Hanson, and from that of William E. Edwards. Edwards testified that he was in connection with Joseph M. Gerrish, publisher of the Portland Advertiser. The following part of his deposition was objected to:

"We had, as publishers of said paper, a running account with the firm of Mudge & Clark, from the time they commenced business in Portland, to December 31, 1833, when the account was closed and settled. The account was for sundry advertisements of merchandise, &c., as commission merchants, and for the paper."

To the competency of which plaintiff's counsel objected; and it was *admitted*, and excepted to.

From another deposition of the *same witness*, the following was offered: "The formation of the partnership of Mudge & Clark was advertised in our paper, September 1, 1831, and their last advertisement was published December 31, 1833. I have no other means of knowing."

This was objected to on the part of plaintiff; and being *admitted*, was excepted to.

Defendant's counsel read the depositions of Varnum and Patten, and offered to read from the deposition of *Thomas Todd*, as follows: "I think they commenced business in 1831, and continued in business till said Mudge formed a partnership with P. F. Varnum, in January, 1834."

Objected to on part of plaintiff; admitted, and excepted to.

The counsel for the *plaintiff* read from depositions of Charles Patten and Phineas Varnum.

In the deposition of Patten, the following was offered: "For instance, Mudge & Varnum collected the amounts due to Mudge & Clark, for which they gave credit and paid debts of that firm, for which they charged them."

Defendant's counsel objected; the testimony was rejected, and plaintiff's counsel excepted.

In the deposition of Varnum, the following was offered on part of *plaintiff*: "I had a note signed Mudge & Clark, dated March 15, 1837, for \$1432, which note has never been paid. I sued it in the court of Cumberland county, in this State. Since I obtained judgment, Mr. Clark has paid \$400. *I do not know which of the firm signed the note.* Clark lived in Boston or Philadelphia, I don't know which, but he was occasionally in Portland. I have sent, or caused the said judgment to be sent to Philadelphia, to be collected there off said Clark. After I obtained judgment, I wrote to said Clark on the subject, and received letters from him in reply, in which he did not deny the debt. The \$400 which I have said was paid by said Clark, was paid to me by William H. Wood, a broker of this place, who informed me it was sent by Clark; and I do not know, except by the information of Wood, that the money

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came from Clark. I do not know that either Mudge or Clark made any defence to my suit on the note aforesaid, signed by them. The note was given originally to my son, P. F. Varnum, and the note sued was a renewal of the one first given. At the time the \$400 was paid by Wood as aforesaid, I gave to Wood, for Clark, an agreement that I would receive payment of the judgment in instalments of \$100 each, every sixty days; but I never have received any thing upon the debt since."

Defendant's counsel objected, as being *res inter alios acta*. The offer was overruled, and plaintiff's counsel excepted.

BURNSIDE, J., charged the jury as follows:—The plaintiff's demand is founded on a promissory note, dated, "Portland, Oct. 24th, 1836. \$1500. Six months from date, we promise to pay Stephen Cummings, or order, fifteen hundred dollars, value received. Signed, Mudge & Clark."

This note was endorsed by Stephen Cummings, of Portland, and discounted at the Exchange Bank at that place, of which John J. Brown was the cashier. You have in evidence that Mudge resided at Portland, and Clark at Providence, Boston, or Philadelphia. There was a commission house at Portland, as you have heard, composed of Mudge & Clark: and you have also evidence that the house ceased on the 1st January, 1834; but there is no evidence that any notice in newspapers or otherwise was given of this dissolution. The first ceased, as you have heard, and a new firm of Mudge & Varnum took their place, in the same building.

John Rand, a gentleman of the bar in Portland, swears that he knew the parties, Mudge & Clark, and that he was a director of the Exchange Bank, from October, 1836 to the expiration of its charter, in December or January last (1843). He proves that the note in question, in October, 1836, was discounted to pay a prior note, and he swears that the first of the series was a note of Mudge & Clark for \$2500, discounted the 10th May, 1834.

It would seem to the court from the evidence, of which you are the judges, that Mudge managed this business; and there is no evidence that Clark was in Portland; that they did no new business after the 1st January, 1834, and that Mudge was left there to close up the business of Mudge & Clark.

Mudge & Varnum became the successors, as you have heard, of Mudge & Clark. It was more than four months after the firm of Mudge & Clark had ceased to do business, before this note was discounted. But it is contended by the plaintiff's counsel that the partnership of Mudge & Clark never was dissolved. There certainly is no evidence of a formal dissolution published, but there is evidence that their store was sold out on the first of January, 1834, to Mudge & Varnum, and they continued the business under the firm of Mudge & Varnum.

The proper course for an outgoing partner to protect himself

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from liability for future debts to be contracted by his old house, is to give notice of the dissolution to the world; and if he suffers an innocent person to advance his money to a firm that did not exist, but had existed, he must abide by the consequences. But it is contended that, from all the evidence in the case, Dr. Cummings had notice; and for this, a variety of circumstances are relied on.

The fact of Dr. Cummings residing in the same town where the firm existed, the store having been sold out, a new firm coming in, he must have had notice that the partnership had ceased. I think there is no question but that Mudge transacted the whole business. There is no evidence that we can discover, that Clark, the defendant, had or had not notice of the transaction; nor is there any evidence that I can see in the case, showing to what use or purpose the money went.

Unless you find Cummings had notice of the firm ceasing to do business and being dissolved, although he endorsed it to oblige Mudge, and for his use, I think Clark will be entitled to your verdict. If he did not know of the firm having ceased to do business, and did not know it was dissolved, Clark will be bound, although there was no evidence that the debt went to the use of the firm. It is true that Cummings swears he did it to oblige Mudge. The circumstance that the bank did not pursue Mudge & Clark, the drawers of the note, but took wild lands from the endorser in payment, is urged on your consideration, and that they knew Clark had no knowledge of the transaction. The delay in bringing this action is also urged. We instruct you the evidence does not support the plea of the statute of limitations; and on that ground, the defendant is not entitled to your verdict. Six years is the period fixed in the statute, and that period must expire before the right of action ceases, and before the statute is a bar. To the other grounds urged, you will give such weight as you think they deserve.

The plaintiff asks us to instruct you,

1st. That the right of the plaintiff is in all respects the same as that which the Exchange Bank would have had, to recover on the note of the 8th May, 1834.

Answer. I agree to this.

2d. That, to find notice of a dissolution, the jury must find a dissolution; and, to affect the plaintiff's rights, to find such a notice of a dissolution to have been given to the Exchange Bank, prior to the 10th May, 1834.

I have instructed you fully, I think, on this part, in the general charge. I agree that the jury must find a dissolution, and it is for them to consider the whole evidence, and if, under all the evidence, they are satisfied the bank knew of the dissolution, no formal notice was necessary. The jury may find the fact from facts and circumstances proved; and if they find that the bank knew it before the note in question was discounted, it would affect

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the bank if they were plaintiffs in this suit, in the absence of all proof that no part of the proceeds of the note went for the benefit of the defendant.

3d. That there is no evidence of dissolution, nor of notice thereof, at least before the 10th day of May, 1834.

There is evidence that the store was transferred, and that the firm ceased to do new business.

There is no evidence of personal notice, and certainly Clark has no ground of complaint if he has to pay money, when he was so neglectful in not causing notice to be given. But it is for the jury, not for the court, to say that there is no evidence of dissolution.

The defendant has made a point, that if the plaintiff, J. J. Brown, has no interest in this note, the plaintiff cannot recover. This is admitted by the plaintiff's counsel to be correct. The defendant's counsel relies principally on the releases. Cummings releases Brown, and Brown releases Cummings. But the receipt of Brown for the note is transferred by Cummings to his son, Sumner Cummings. When Cummings lifted the note from the bank, he paid them in lands. The bank has no claim. But according to the evidence of Cummings, if believed, he owes Brown \$300—and the balance is to go to Sumner. If you are satisfied that Brown has an interest to the amount of \$300, and that he is a trustee for Sumner, then he can maintain this action.

The counsel for the plaintiff excepted to the charge and opinion of the court.

Error was assigned, 1st and 2d, to the admission of those parts of the deposition of *Wm. E. Edwards* which were objected to; 3d, to the admission in evidence of that part of the deposition of *Thomas Todd* which was objected to; 4th, to the rejection of the portion of the deposition of *Charles Patten* which was objected to; 5th, to the rejection of that part of the deposition of *Varnum* which was objected to; 6th, to the answers of the judge to the 2d and 3d points proposed by the counsel of plaintiff; 7th, to the residue of the charge on the point of the alleged dissolution of the firm of *Mudge & Clark*; 8th, to the answer to the point proposed by the counsel for *defendant*.

The case was argued by *Gerhard*, for plaintiff in error; and by *Badger* and *Mallery*, for defendant.

The opinion of the court was delivered by

BELL, J.—The note here in suit was made on the 10th of October, 1836. But it was a continuation, by way of renewal, of a series of notes, first discounted by the Exchange Bank of Portland, on the 10th of May, 1834. Under the evidence, it is not to be doubted these renewals were effected by *Mudge*, as liquidating

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partner of the firm of Mudge & Clarke, and which, according to Davis and Dusaque, 5 *Whar.* 584; Houser v. Irvine, 3 *W. & Ser.* 347, and kindred cases, bound his former associates, provided the first note of the series was properly made in the name of the firm. The former existence of this partnership being conceded, and necessarily, with it, the authority of one partner thus to bind his fellow in the ordinary course of business, it becomes essential to the defence to show a dissolution of the association, at some time prior to the date of the first note. In recognition of this principle, the jury was properly instructed that "the right of the plaintiff is, in all respects, the same as that which the Exchange Bank would have had to recover on the note of May 8, 1834." But, in answer to the second point submitted, to the effect that to exonerate the defendant, the jury must not only find a dissolution, but that notice of it was in possession of the bank prior to the last-mentioned date, the court answered, that if the "bank knew of it *before the note in question was discounted*, it would affect the bank, if it were plaintiff in this suit." The inaccuracy of this answer, in directing the inquiry on this point, to the date of the note in suit, instead of the prior date, is, probably, ascribable rather to carelessness of expression than to misconception of the principle imbodyed in the plaintiff's proposition; yet this inaccuracy may have misled the jury to the conclusion that knowledge of a dissolution of the partnership, at any time before acceptance of the last note, the immediate subject of this action, was sufficient to defeat the plaintiff. It is not enough to suggest that, probably, the jury understood the court as intending to affirm the point as submitted. The answer is, the language inadvertently used might have led them into error. Such a possibility is sufficient to found a valid exception.

This, however, is perhaps of minor consequence. Upon the trial, the leading inquiry was as to the fact of dissolution, and whether, if that fact existed, notice of it was traced to the holders of the first note discounted? The plaintiff submitted there was no evidence of dissolution, and, of course, no notice thereof, at least before the 10th of May, 1834. To this the court answered, "There is evidence that the store was transferred, and that the firm ceased to do new business." No direct response was then given to the latter portion of the point relating to notice. But in a previous part of the charge, the jury was, in effect, told that an inference of dissolution might be drawn from the sale and transfer, in January, 1834, of Mudge & Clarke's store to Mudge & Varnum, who continued the business of the former firm, and that notice of the dissolution might be imputed to Dr. Cummings from his residence in the same town at the time of these transactions. The only additional circumstance connected with this point of the case, is that the books of the older firm were placed in the hands of the younger, who collected the sums due to the former, for which a credit was

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given, and paid debts due from them, and with which they were charged. Ought the circumstances to which reference has been made, be accepted as establishing the fact of a dissolution? If so, it must be because they tend to prove an agreement between the partners to put an end to their prior relationship. This is one of the recognised modes by which partnerships may be destroyed, and, as between the partners alone, the most secret understanding is sufficient. It is enough that they have assented. But were this contest between them alone, how could it be asserted, without hazard of error, that in May, 1834, a dissolution had taken place? The facts upon which the idea is predicated, are entirely consistent with continued partnership, if for no other purpose than, finally to close the business of the firm. For this purpose new obligations may be assumed, and new securities put in circulation, though the partners may cease to prosecute their former general business. Nay, it is not, perhaps, very unusual for commercial associations to sell out their stock of merchandise, and relinquish their place of business for a season, with a view to a change of pursuit. Certainly, such an arrangement is not incompatible with the idea of a continued association, even though the books of account be left for settlement with a new firm which includes a member of the old. In this very instance, it is in proof that an account was kept in the books of Mudge & Varnum, with the firm of Mudge & Clark, and under that title, up to May, 1836; and their clerk, Patten, swears he never knew of any formal dissolution of the latter partnership. At the important moment of time to which attention is to be directed, it would, then, be impossible to assert, with certainty, that the partnership was at an end, even for the determination of a controversy between the partners themselves; and so we think the jury ought to have been instructed. If this be so, the facts relied on must be wholly insufficient to implicate third persons. To visit the community at large with the consequences of a dissolution by assent of the partners, the evidence of it should be clear, distinct, and unambiguous. It is not to be left to mere conjecture or the hazard of possible inferences. The nature of the notice requisite to charge strangers with knowledge, shows this. It must be shown, says *Wilkinson v. The Bank of Pennsylvania*, 4 *Whar.* 484, that notice was communicated in some way or other. To reach those who have before dealt with the firm, direct and express notice of the fact is essential. To those before unconnected with the association, it may be communicated by publication in the proper newspapers. The latter species of notice is only tolerated from necessity, but yet, like the other, it is bottomed upon an open avowal, by the parties themselves, of their agreement to dissolve. Would a publication that the partners had sold their stock of goods to another firm, which had succeeded them in possession of the storehouse, and with whom the books of account had been left for the

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collection of the debts due, be deemed tantamount to the customary newspaper notice? This will hardly be pretended. And yet the defendant, whose duty it was to give at least the ordinary warning, asks us to go further than this, and to visit the plaintiff with information which he may, possibly, have derived from an inconclusive state of facts, which *may* have been known to him. If such facts will not justify a conclusion of dissolution to affect the parties themselves, how can they be made the vehicle for conveying notice of it to strangers? Such a proposition is, obviously, inadmissible. Indeed, where the determination of a partnership results from the express agreement of the partners, every mode of notice with which I am acquainted, involves the communication of the agreement by some sufficient means. In treating this question of notice in the case before us, it must be recollected that, at the date of the first note, Mudge & Clark had ceased to undertake new business but for the short period of four months, and were, at that very time, engaged in winding up their old business, under their firm name. As already intimated, this might be as legitimately the object of prolonged association, as the prosecution of new affairs, at least for a period sufficient in duration for that purpose. Though there may be an express agreement to sever the connection of partners, the law recognises its continued legal existence for such a purpose; and it is not at all unusual for the parties themselves to preserve their association, with all its legal incidents, until this object be accomplished; while they expressly decline to undertake new enterprises. To say, therefore, that a relinquishment of a store-house and the cessation of new business, furnishes ground for an inference of dissolution, or notice of it, is, we think, to ascribe to it an effect experience will not justify. In this instance, it is not necessary to assert that an uninterrupted suspension of all business during a very considerable lapse of time, within the knowledge of the party to be affected, might not be referred to a jury as furnishing ground for a deduction. It is sufficient, now, to say that it would be too hazardous to affirm this, in reference to the action of these partners between January and May, 1846, more especially when it is recollected the personal relations of the partners appeared to continue as theretofore. Standing on the proof, as we have it, and after considering with proper deference the opinion of our brother, before whom the cause was tried, we think the instruction should have been, that there is nothing in the case to carry notice of the dissolution to the plaintiff, or those from whom he derives title to sue, at the time the first note was made.

The view taken of the principal point in controversy, reduces to comparative unimportance the question arising under the bills of exception to the admission and rejection of evidence. It is, yet, proper to indicate our opinion in reference to them, as, upon another

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trial, the same points may be presented under a different aspect of the general case.

We think, then, the evidence which is the subject of the first, second, and third bills, was properly received. It was relevant, for it established certain facts which tended, in some degree at least, to show a dissolution of the partnership in December, 1833, or early in January, 1834. It is not enough to object that, of itself, it was altogether too slight to lead to so grave a conclusion. If it could, possibly, be illustrative of other facts pointing to a dissolution, or corroborative, in the least degree, of other testimony, the objection of irrelevancy is answered. The assertion that the witnesses' knowledge was derived from a secondary source, was very faintly, if at all, urged on the argument. The forbearance was very proper, for the objection is not well founded. The witnesses speak of facts with which they became acquainted in the course of their business. They may have refreshed their recollections by consulting their books of accounts and the newspaper published by them, but this, it is almost needless to say, is permissible.

The same reasons that justify the reception of the evidence just considered, condemn the rejection of that subsequently offered by the plaintiff, mentioned in the fourth and fifth bills of exception. That Mudge & Varnum collected debts due to Mudge & Clark, in their firm name, and paid debts owing by them, under circumstances showing the assent of the present defendant, after the alleged dissolution of the partnership, was certainly a fact for the jury; and I should say an important one too. Its bearing upon the disputed question I have already, incidentally, adverted to.

The transaction detailed by Phineas Varnum was excluded solely on the ground of its having been *inter alios acta*. It appears to us it was not obnoxious to this objection. There was no attempt to introduce a fact or record, for the purpose of concluding the defendant by way of estoppel. The object was, simply, to show a transaction in which he was an actor, inconsistent with his allegation of a prior dissolution of partnership, and want of authority in Mudge to sign promissory notes in the name of the firm. If the note spoken of by Varnum, was actually signed by Clark in the name of the firm, it was an express acknowledgment by him of its continued existence so late as 1837. If it was signed by Mudge and afterwards recognised by Clark, it affords at least some evidence of continued partnership. Doubtless, it is open to explanation which might neutralize its effect. But this possibility, of course, creates no impediment to its introduction. In contests like the present, similar facts are frequently adduced as furnishing legitimate sources of inference. Indeed, a very common mode of establishing the fact of copartnership is to show the doings of the alleged partners with third persons. Sometimes, these constitute

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the whole sum of proof, which may be, and frequently is, entirely convincing.

In answer to a proposition made on the part of the defendant, to the effect that if Brown, the plaintiff, has no actual interest in the note in suit, he cannot recover in this action, the court answered, if the jury was satisfied that Brown had an interest to the amount of \$300, and is a trustee for Varnum, he might maintain the action. This answer, by implication, affirmed the defendant's point. It is very probable no actual injury was inflicted, as, in all likelihood, the cause was decided against the plaintiff on other grounds. But, possibly, it may have been otherwise; and, consequently, the point is entitled to consideration.

A slight examination of authority shows it to be an established rule that, in an action on a negotiable instrument, the defendant has no concern in the question of actual ownership, except where the defence turns upon points involving the personal conduct of the true owner, or those who preceded him. In *Gage v. Kendall*, 15 *Wend.* 641, it is laid down that the owner of a note endorsed in blank, may fill it up with what name he pleases, and the person whose name is so inserted is deemed, on record, the legal owner, for all the purposes of action. Our own cases accord with this doctrine. It mattered not, therefore, to Clark, whether Brown has an actual interest in the note or not. Had the precedents been brought to the notice of the trying tribunal, such would, doubtless, have been the instruction given. In the hurry of trial, this peculiarity of the law merchant was overlooked.

Judgment reversed and a *venire de novo* awarded.

Kensington Bank *versus* Patton.

1. To take a case out of the operation of the statute of limitations, the acknowledgment must contain an unqualified and direct admission of a previous debt, which the party is willing to pay.

2. It must be a promise to pay on demand; an immediate unqualified promise to pay, without restriction or conditions. *Per ROGERS, J.*

ERROR to the District Court of *Philadelphia*.

This was a suit brought by the Kensington Bank against Robert Patton.

On the 11th January, A. D. 1841, the defendant made his promissory note for \$100, payable at ninety days, to the order of John Telford, who endorsed it to the plaintiff; the note was payable on the 14th day of April, 1841; and on the 28th day of April, 1847, or six years and seventeen days after the right of action commenced, the suit was brought.

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At first the plaintiff, declared in the common form against the defendant as maker of the note, and also upon the common counts: to which the defendant pleaded (*inter alia*) non-assumpsit *infra sex annos*, and *actio non accrevit infra sex annos*. On these pleadings the cause was tried, and on the evidence hereafter set out, the plaintiff obtained a verdict, which the court set aside. Before the next trial, the plaintiffs obtained a rule to show cause why they should not have leave to file special counts, but the court refused to permit them to be filed. On the next trial below, the same offer was made, and again rejected; and on the plaintiff's evidence having been given, the judge directed a non-suit.

Evidence on part of plaintiff was given, as follows:

"I am a clerk in the Kensington Bank. I called on Patton (the defendant), April 14th, 1847, with this note. He said he would come up to the bank in the course of a few days, and make some arrangements to pay the note."

And being cross-examined by defendant's counsel, the witness said: "I went to Patton, and said there was a note of his at the Kensington Bank for \$100, which had been lying unpaid, and I had been sent to have some arrangement made respecting the payment of it. He said he would call up at the bank, in course of a few days and make some arrangement respecting the payment of it. He said he might pay it, or could pay it, in the course of a year. I asked defendant to call at my house to meet the cashier. He wrought at day's work, and I told him the bank did not care about his losing time. I don't remember whether he said he would go to my house, or not. I don't know if I offered to take a new note. I had no instructions to do so. Something was said by me of taking five dollars at a time. I told him the bank would take it in any sums he chose. I do not remember whether defendant declined that, or not."

It was assigned for error, that the judge erred in entering a non-suit.

The case was argued by *J. Johnston*, for plaintiff in error, with whom was *St. Geo. T. Campbell*.—It was contended that the evidence was sufficient that the defendant acknowledged and promised to pay the debt: 9 *Barr* 258; 8 *Ser. & R.* 211; 7 *id.* 116; 2 *Gale & Davison*, 593 (in 1842); 15 *Vermont* 560, *Chapin v. Warden* (in 1843); 4 *Denio*, *Stilwell v. Cooper*; 8 *Wend.* 600; 3 *Whar.* 81; *Best on Ev.* 40; 6 *Miss.* 21; *R. M. Charlton's Rep.* 8; 18 *E. C. L.* 85; 16 *Vermont* 198; *id.* 297.

Hood, for defendant.—1 *Brown's Rep.* 123, *Bell v. McCall*; 9 *Con. Rep.* 496; 4 *Barr* 322-3; 9 *Watts* 380; 10 *id.* 172; 6 *id.* 220; 15 *Maine Rep.* 360, *Oakes v. Mitchell*. In 1 *Pet.* 351, it was

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held that plaintiff must show himself entitled to recover on the terms of the new promise. Also cited 6 B. & C. 549; 14 Mees. & Wels. 741, Hart v. Prendergast (1845). The *onus* lies on plaintiff: 4 C. & P. 173; 5 J. J. Marshall, 255; Joyne on Stat. of Lim. 98.

The opinion of the court was delivered by

ROGERS, J.—Was this a case to be tested exclusively by the earlier decisions, sufficient appears in the evidence to take it out of the operation of the act of limitations. This is conceded; but the later cases have adopted more stringent rules, and have *nearly* restored the construction of the act to what it ought originally to have been. Being a statute of repose, it deserved encouragement, a benign interpretation, instead of rebuke, censure, and discountenance, carried to such an extent as almost to amount to a repeal of the act itself. Nor do I think that the law will be put upon a proper footing, until some legislative action is had, some enactment, similar to the British statute, is introduced into our system, requiring the acknowledgment and promise to pay, to be *in writing*. The inquiry now is, how does the case stand on the modern decisions, some of which only is it my intention to notice. In Bell v. Morrison, *Peters* 351, it was held, that plaintiff must show himself entitled to recover on the terms of the new promise; and if any conditions were annexed, they ought to be shown to have been performed. The acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. Expressions equivocal, vague, and indeterminate, will not suffice. The statute was designed to guard against persons being entrapped in careless conversations and betrayed by perjuries. The promise to pay must not be vague, shadowy, and uncertain; it must be plain, unambiguous, and express, and such as to preclude hesitation and doubt: Allison v. James, 9 Watts 380; Gilkyson v. Larue, 6 W. & Ser. 213; Morgan v. Walton, 4 Barr 322; Berghaus v. Calhoun, 6 Watts 219. In Morgan v. Walton, the words were, I owe your father, but tell him, I cannot pay him this fall, not before next spring; but next spring, I intend to settle with your father and pay him what I owe him, or pay him his account. Held, not to take the case out of the act. Although there was an acknowledgment of the debt, yet it was qualified by what took place at the time.

The words on which plaintiff relies are, that defendant said to an agent of theirs, that he would come up to the bank, in the course of a few days, and make some arrangement to pay the note. The witness, who was a clerk in the bank, says he went to Patton, the defendant, and said there was a note of his for \$100, which had been lying unpaid, and that he had been sent to have some arrangement made respecting the payment of it. The defendant said he would call up at the bank, in the course of a few days, and

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make some arrangement respecting the payment of it. He said he might pay it, or could pay it, in the course of a year. Something was said by witness, of taking five dollars at a time. Witness told him that the bank would take it in any sums he chose. Does not remember whether defendant declined that, or not. That this may be considered as the acknowledgment of a debt, may be conceded; but is it consistent with a promise to pay? The witness says, he would call up and make some arrangement to pay the debt. In *Oakes v. Mitchell*, 15 *Maine Rep.* 360, the words were, an arrangement will soon be made to pay the note. I calculate to pay it, and I always calculated to pay it. This was held not sufficient to take the case out of the act of limitations. That case is very like the present. It is also ruled in England, that the acknowledgment must be such as plainly to imply a promise to pay, on request or demand, because the promise in the declaration is to pay when thereto requested; or, in other words, on demand. Here, if we take the whole conversation together, it was a promise to pay in the course of a year. Thus, in addition to *Oakes v. Mitchell*, and the other cases cited, which decide this case, in *Tanner v. Smart*, 6 *B. & C.* 549, Lord TENTERDEN declared, that the acknowledgment must be positive, distinct, and unqualified, and such as to maintain the promises in the declaration, viz. to pay on demand. The acknowledgment and promise, in that case, were, "I cannot pay the debt at present, but I will pay it, as soon as I can." This rule is approved in *Hart v. Prendergast*, 14 *Mees. & Wels.* 741, by POLLOCK, C. J., and Barons PARKE, ALDERSON, and ROLFE. In *Hart v. Prendergast*, this latter was held insufficient. I will not fail to meet Mr. H., "the plaintiff, on fair terms, and have now a hope that before perhaps a week from this date, I shall have it in my power to pay him, at all events a portion of the debt, when we shall settle about the liquidation of the balance." In that case, there is an acknowledgment of the debt, which, unqualified, would be sufficient; but, inasmuch as it appears he was unwilling to pay except on terms, it failed to take the case out of the operation of the act. So here, although there is an acknowledgment of the debt, yet it is accompanied by evidence that he was unwilling to pay, except in the course of twelve months. He said he might pay, or could pay it, in the course of a year. He said he would call at the bank, in the course of a few days, and make some arrangement respecting the payment of it. It also appears, that to a proposition to pay five dollars at a time, no response was made by the defendant: at least none is recollected. It is very true, that from an unqualified acknowledgment of the debt, a promise to pay may be inferred; but this presumption may be rebutted by other parts of the conversation, which show that it is not the intention of the defendant to bind himself to pay the debt on demand. In *Tanner v. Smart*, it is true, the words being,

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"I cannot pay the debt at present, but I will pay it as soon as I can," an intimation is given that if there had been proof of the defendant's ability to pay, the court would have held it sufficient to take it out of the act. That, however, is not the point of the decision, the principle ruled. (I speak for myself alone :) What I take to be the true principle is, that it must be a promise to pay on demand; an immediate, unqualified promise to pay, without restriction or conditions. This construction, I think, policy demands for the security of the unfortunate debtor. Experience shows (and this is a case of that description) that, as soon as an insolvent debtor is beginning to retrieve his affairs, traps are set, and persons employed to betray him into unguarded expressions, which are immediately laid hold of as the foundation of a suit. Hence it is that we have so many cases on our docket, of this class. And this will ever be the case, when a state of prosperity succeeds a state of extreme depression and adversity; which latter is unfortunately too often the case among our active, enterprising, and untiring countrymen. A strict interpretation of the act, in my judgment, is better for both creditors and debtors, more particularly in this country, where the creditor of to-day may become the debtor to-morrow. And, although this point, as to construction, is not expressly ruled; yet it comes within the spirit of decisions in this State. Although intimations have been thrown out by judges, from time to time, yet the contrary has not been expressly decided.

Judgment affirmed.

Tobey *versus* Lennig.

A mistake in a notice to an endorser by which he could not have been misled, is immaterial. Hence, where a notice was served on an endorser on the 25th May, setting forth that a note endorsed by him was due on that day, which was the day on which the note in suit actually fell due, but which notice was dated May 26th, the notice was held to be sufficient, the note only being misdescribed, and the endorser, if he had chosen, might have inquired as to it.

ERROR to the District Court, *Philadelphia*.

This was an action brought by F. Lennig, the defendant in error, against S. & C. S. Tobey, as endorsers on the following note, viz :

"\$727.08.

Philadelphia, January 22, 1846.

Four months after date, we promise to pay Messrs. S. & C. S. Tobey, or order, seven hundred and twenty-seven ⁰⁰/₁₀₀ dollars, without defalcation, value received.

Signed,

THOS. MERCER, SON & Co."

(Endorsed, S. & C. S. Tobey.)

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After the reading of the note in evidence, the following testimony was given:

Francis J. Troubat, Esq., being sworn, said—

As the Notary of the Mechanics' Bank, this note (viz. the above note) came to my hands in the afternoon of the 25th day of May, 1846. I presented it to the makers, on the wharf, for payment, which they declined, refused. This was on the afternoon of the 25th day of May, 1846. They said it was an affair of the endorsers. I immediately went to the *endorsers*. I had the notice in my pocket. I left the notice there, of non-payment—the usual notice of non-payment. This is the notice which I served. I handed this to Mr. Tobey, one of the defendants, &c. *I made a mistake in dating the notice.* I dated it the 26th, when I should have dated it the 25th.

The notice referred to in the deposition of Mr. Troubat, is as follows:—

“*Philadelphia, May 26th, 1846.*

“Payment of Thomas Mercer, Son & Co.'s note, in favor of yourselves, and by you endorsed, for 727 ⁰⁰/₁₀₀ dollars, and delivered to me for protest, by the Mechanics' Bank of the City and County of Philadelphia, the holders, being this day due, demanded and refused, it has been by me duly protested accordingly, and you will be looked to for payment, of which you hereby have notice.

“*Messrs. S. & C. S. Tobey.*”

Signed by Mr. Troubat, the notary.

The plaintiffs rested upon this testimony; the defendants did not produce any. The point as to the sufficiency of the evidence to charge defendants, was reserved, and verdict rendered for plaintiff, and in September, 1848, the judges rendered judgment on the verdict in favor of the plaintiff.

Error was assigned to the decision of the reserved point in favor of plaintiff, and to the entry of judgment.

The case was argued by *G. M. Wharton*, for plaintiffs in error, who contended that the endorsers were discharged by the neglect to give them notice of non-payment of the note. That the notice being a mistaken or defective notice, was in law no notice. That the note fell due on the 25th May, 1846; the notice was of a note due May 26th. They had a right to presume the mistake would be discovered, and that a proper demand would be made, and notice given accordingly. Hearing no more of it, they had a right to repose on the belief that the note was paid: 2 *Barr* 355, *Etting v. Schuylkill Bank*; 2 *Hill* 588; 3 *Wend.* 456.

Miller, for defendant.—In the cases cited, the mistake was such as to mislead. Here the notice was delivered on the right day, and

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the incorrect day went for nothing. The notice stated the date of the note, and stated that it was due on a certain day when it could not have fallen due. The decisions are becoming more liberal on this subject: *Story on Bills*, sec. 301; 11 *Wheaton* 436; *Bayley on Bills* 254; 5 *Humphreys* 335; 23 *Maine* 392-8; 10 *Jurist* 982; 11 *Mees. & Wels.*, *Storkman v. Parr*; *Remer v. Downer*, 23 *Wend.*

Wharton, in reply.—The note was not shown to the party in this case, and nothing existed in the notice from which he could make a calculation, which would show a mistake. But in the case in 11 *Wheaton*, the date of the note was given. The endorsers are entitled to notice of the very truth: 2 *Barr* 355.

The opinion of the court was delivered by

GIBSON, C. J.—It is agreed in all the cases, that a mistake by which the endorser could not have been misled, is immaterial. For this reason, it has been held that a misdescription of the note, or of the place of payment, is so. *Etting v. The Schuylkill Bank*, which is relied on as a precedent against the principle, is entirely consistent with it. By reference to the date of the notice in that case, it bore that demand had been made of the maker, on the second day of grace; and as the day of the date was past when the notice was received, the endorser had no reason to believe there was any thing wrong in it. He had reason to think that the demand was premature, and that he had no occasion to give himself any concern about it; if further demand should be made at the proper time, the note would be paid, or he would receive due notice of its dishonor. All might be as it was stated without involving his contingent responsibility; and as he had no reason to suspect that the notice was misdated, he had no motive to look to his relations with the maker or the preceding endorsers. But in the present case, the notice showed the mistake on the face of it; for when it was handed to the endorser the day of its date had not arrived. He could, therefore, have been misled only by supineness in neglecting to ask for explanation. The effect of the mistake was misdescription of the note, and he knew whether he had negotiated any other. The error would have been verbally corrected on the spot; and if he doubted the identity of his endorsement, it was his business to have his doubt resolved.

Judgment affirmed.

Carpenter's Case.

The Supreme Court possesses an inherent power to revise the proceedings of all inferior jurisdictions, in order to correct errors on their face, but not to rejudge their judgments on the merits. This revisory power has been taken or withheld from it, by the act of July 2d 1839, to provide for the election of prothonotaries, &c.; the determination of the Common Pleas, as to the election of a prothonotary, being, by the 5th section of that act, final.

CERTIORARI to the Common Pleas of *Philadelphia*.

A *certiorari* issued to the Common Pleas to remove the proceedings in the case of the contested election of George Carpenter to the office of Prothonotary of the Court of Common Pleas of Philadelphia.

A petition had been presented to the Court of Common Pleas, signed by thirty persons, complaining of the undue election and return of George Carpenter, as prothonotary of the said court; and it was alleged that James Vinyard was duly and legally elected to said office. Various specifications were made in the petition. Petition was filed October 18, 1850. October 26, 1850, on motion of the attorney for Carpenter, a rule was granted on petitioners, to show cause why the proceedings should not be quashed, and the petition dismissed. November 23, 1850, the court ordered that the petition filed be dismissed, and directed that a copy of the order, as entered of record, be certified to the Governor, as required by the act of Assembly.

November 26, 1850, petitioners enter an appeal; *eo die, certiorari* brought into office to remove record and proceedings to the Supreme Court.

The fifth section of the act of July 2d, 1839, providing for the election of Prothonotaries, &c., provides:

“That the returns of the elections, under this act, shall be subject to the inquiry, determination, and judgment of the Court of Common Pleas of the proper county, upon complaint, in writing, of thirty or more of the qualified electors of the proper county, of undue election or return of any such officer: two of them shall take and subscribe an oath or affirmation that the facts set forth in such complaint are true, to the best of their knowledge and belief; and the said court shall, in judging concerning said election, proceed *upon the merits thereof*, and shall determine, *finally*, concerning the same, according to the laws of this commonwealth; and the prothonotary of the said court shall immediately certify to the Governor the decree of the said court on such election, and in whose favor such contested election shall be terminated, and the Governor shall then issue the commission to such person in whose favor such contested election has determined; and the said court shall

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hear and determine such contested election at the next term after the election shall have been held : and such complaint shall not be valid, nor regarded by the court, unless the same shall have been filed in the prothonotary's office within ten days after the election ; and in case such complaint is filed within the time above mentioned, it shall be the duty of the prothonotary to transmit by mail immediately, to the Governor, a certified copy thereof ; and in such case no commission shall be issued until the court shall have determined and adjudged on such complaint, as aforesaid."

On December 9, 1850, a rule was obtained on the part of Carpenter, to show cause why the writ of *certiorari* should not be quashed.

This rule was argued by *Gibbons* and *Randall*, on part of petitioners.—It was contended that by the quashing of the *proceedings*, there was no other remedy than by *certiorari*. That the writ of *certiorari* being a beneficial writ, is not to be taken away without express words: 8 *Durn. & E.* 542 ; 2 *Burrowes* 1040, *Rex v. Morely* ; 4 *Rawle* 366, *Commonwealth v. Beaumont* ; 5 *W. & Ser.* 281, case of Borough of West Philadelphia ; 1 *W. Black* 231 ; 10 *Watts* 333 ; 2 *Ser. & R.* 566.

That the act of 1722 and the constitution of the State, give to the Supreme Court all the powers of the King's Bench, Common Pleas, and Exchequer at Westminster, and that the jurisdiction of the King's Bench is high and transcendent. It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy : 3 *Black. Com.* 42.

Secondly, that the language of the Fifth Section of the act of July, 1839, does not take away expressly or by inevitable implication the jurisdiction of the Supreme Court: 8 *Term. Rep.* 542 ; 5 *id.* 626 ; 2 *Ser. & R.* 363 ; *Act of 16th June, 1836.*

Horn and *Hirst*, for Carpenter.—The Common Pleas is not of that class of tribunals over which the Supreme Court exercises appellate jurisdiction by necessary implication, being a special jurisdiction created by statute, and not known to the common law : that to enable the Supreme Court to exercise such jurisdiction, the tribunal subject to it should be in the first place, in the nature of a common law jurisdiction, and in the second place should be of an inferior jurisdiction : *Cowper Rep.* 554 ; 14 *Mass.* 393 ; 10 *Watts*, 333 ; 2 *Bin.* 273 ; 4 *Watts* 154 ; 2 *Burrowes* 1042.

As to the second point, the determination of the Court of Common Pleas in this matter is expressly final. Cited case of *Ranson v. Dundas*, 3 *Scott's Rep.* 429.

The opinion of the court was delivered by

GIBSON, C. J.—There is certainly an inherent power in this court to revise the proceedings of all inferior jurisdictions, to cor-

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rect errors on the face of their proceedings, but not to rejudge their judgments on the merits. This correctional power extends no further than to keep them within the limits of their jurisdiction, and to compel them to exercise it with regularity. But it has been resolved that this revisory power may be constitutionally taken away, or withheld in express terms, or by necessary implication; and the question is whether it has been withheld by the act which is the basis of the proceeding.

It is obvious that the decision was intended to be summary and speedy. There is no provision for a trial by jury, or for a suspension of the certificate till a writ of *certiorari* could be sued out. The court is directed to pronounce on the fact and the law, promptly and conclusively. The election returns "shall be subject to the inquiry, *determination*, and *judgment* of the Court of *Common Pleas*;" and "the said court shall, in judging, proceed on the *merits* thereof, and shall determine *finally* on the same, according to the laws of this commonwealth; and the prothonotary of the said court shall *immediately* certify to the Governor the decree of the said court on such election, and in whose favor such contested election shall be *terminated*; and the governor shall *then* issue the commission;" and "the said court shall hear and determine such contested election at the *next term*." The complaint is to be certified to the Governor, and no commission is to be issued till it shall have been determined.

These provisions so concurrently point to a definitive sentence, that no words could more clearly constitute a tribunal for the final and conclusive determination of a controversy. Judgment on a case stated may not be removed by writ of error unless a right be expressly reserved to sue it out; but here it is expressly declared that the judgment shall be final. I am aware it has been held that a similar stipulation in a submission to arbitrators shall not preclude exceptions to the award, because the law requires every award to be final in its terms to make an end of the controversy; and the parties were supposed to express no more than the law would express for them. With very great respect for the opinions of our predecessors, I may be suffered to say that the conclusion was drawn from doubtful premises. Every man is presumed to know the law; and as every man is presumed to mean something by his words, it would be more consistent with the intention of the parties to hold that they intended to do more than use a redundant expression. The principle, however, is undoubtedly settled as regards awards; but I would not extend it to a judgment like the present, which, whatever be its shape or form, is necessarily final. The legislature certainly meant more than to say that the commission should not issue on an interlocutory judgment, even if there could be such a thing. It is impossible to conceive how it could be otherwise than final in any other aspect than the power of re-

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view. But, as I have said, all the concomitant clauses point to the same conclusion. The contest is to be determined by the particular court; there is to be no jury; the prothonotary is to certify the judgment to the Governor, who is immediately to issue the commission: all this shows that the office was not to be in abeyance a single moment longer than should be absolutely necessary, and that protracted litigation was not to be endured. Not only the mischief, but the futility of it, was shown by Lelar's case, which was suffered to lie over till the term of office had expired. What would be the consequence if a *certiorari* were held to lie? Contested elections would fill the court with most unprofitable and embarrassing litigation. It could go no further by its judgment than to set aside the proceedings: and then would come a doubt as to what was to be done next. A *procedendo* in such a case would be a novelty; and the parties would be where they began. In the mean time, what would be the effect on the commission? These difficulties would certainly arise, and it would not be easy to dispose of them. To avoid them, it would be our duty to let the matter rest on the decision of the special tribunal, even if the legislative will were less distinctly indicated.

Having no appellate jurisdiction of the case, it would be neither respectful nor proper to express an extrajudicial opinion on the regularity of the proceedings.

Writ quashed.

Greenfield's Estate.

1. A deed and declaration of trust made at the same time are to be treated as one transaction.

2. When a gift of real and personal estate is executed or otherwise fixed in the beneficiary, either by a direct conveyance of the estate or the creation of an use, it is beyond the power of the donor or his representative to revoke it. If fairly made and carried into effect, uninfluenced by fraud or circumvention, it cannot be subsequently impeached.

3. A voluntary conveyance of real estate made by one not indebted, or who reserves sufficient to pay his existing debts, cannot be impeached by subsequent creditors, unless it were made in anticipation of future indebtedness.

4. The difference between a deed and a will is not in the form but effect of the instrument; which, if it convey an estate *in presenti*, cannot be a *will*, for that operates only *in futuro*.

5. The general rule is that a party executing a legal instrument is presumed to be acquainted with its contents. Where it is unconnected with suspicious circumstances and uninfluenced, actually or presumptively, by the relation between the maker of it and the party to be benefited by it, the burden of disproving the presumption lies on him who would impeach the deed.

6. A provision in a voluntary deed in favor of the counsel who drew or advised it, for his services to be performed as a trustee under it, with the further provision that the said trustee may resign the trust to the other trustees without forfeiting the compensation, is void, at least unless it be proved that

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the grantor knew of the particular provisions, and, without influence from those interested, assented to them. *If a doubt exists* in this respect, the provision for compensation is invalid; and the provision in favor of the other trustees who acted in the arrangement of the matter, through the counsel, or in connection with him, is also invalid. The trustees may, however, be decreed compensation by the proper tribunal.

7. The invalidity of the provision in favor of the trustees does not invalidate the trust in other respects, which are distinct and separate from the interests of the trustees.

8. Where, by the terms of the instrument by which the trust is created, the trust is to include whatever of the income and profits from the estate are unappropriated by the grantor at her death, the administrator of the estate of the grantor is not entitled to the unexpended balance of the income and profits.

APPEAL from the decree of the Court of *Nisi Prius* sitting in equity.

This was an appeal from the decree made at *Nisi Prius* dismissing the bill filed by Matthew Anderson, executor of the last will of Elizabeth Greenfield, deceased, against Joseph Howell, John Bouvier, Samuel Rush, and the executors of the will of Charles Roberts, deceased, the object of which was to have a certain deed, executed by Elizabeth Greenfield, dated 15th December, 1834, declared void, &c., as against complainant; and also to have an account of the receipts, disbursements, &c. under the deed, and the balance in the hands of the defendants, or at least so much of the same as consisted of the unpaid incomes of the estate remaining in the hands of defendants on the decease of Mrs. Greenfield, transferred or paid over to complainant; and for general relief.

Mrs. Greenfield was the widow of Jesse Greenfield, who had been a planter in Mississippi; after his death, she married Benjamin Roach, from whom she was afterwards divorced by an act of Assembly, and she resumed her former name. By her exertions she acquired considerable property, most of which was invested in landed estate and stocks in Mississippi. During the latter years of her life, she resided in Philadelphia.

It was alleged in the bill that her maiden name was Rees, and that Ebenezer Rees and David Rees were her brothers. Ebenezer Rees had several children; one of his daughters, Elizabeth, was married to S. W. Rush, and another, Celeste, married to Anderson, the complainant. On the other side, it was alleged that Mrs. Greenfield was illegitimate, and that she did not know who her parents were, nor their names. That the name given to her by them was Betsy Holliday. That she was born in Wales, was entrusted to David Rees, and along with her person some valuables were confided to Mr. Rees. The Reeses came to this country and brought her with them.

On the 15th December, 1834, Mrs. Greenfield executed the deed in question; at this time, she was a resident of Philadelphia, of the age of about 86 or 87, hard of hearing, and otherwise infirm. By

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this deed, for the nominal consideration of one hundred dollars, she conveyed to Joseph Howell, Charles Roberts, John Bouvier, and Samuel W. Rush, all her estate real and personal, which was alleged on the part of some of the trustees to be worth, perhaps, above \$200,000. This deed, which is absolute on its face and unqualified by any trust, was recorded on the 31st December, 1834. On the day of its execution, viz. 15th December, the grantees executed a *declaration of trust*. This was not recorded until July, 1845, after the death of Mrs. Greenfield. By this deed or declaration of trust, which it was alleged remained in the custody of the grantees, the grantees declared that they held the property conveyed to them in trust "to apply the income and profits thereof as the said Elizabeth shall direct, and for want of such direction, that we will the profits, after deducting all expenses, in some stocks, invest or lend the same upon security, and that such sums shall be considered as under the same situation, and for the same trusts, as the property conveyed to us as aforesaid, and after the death of the said Elizabeth Greenfield, for the uses and purposes following, to wit," &c., in trust, after disposing of certain specific real estate in Mississippi, &c., to sell the residue, and apply the proceeds.

1st. To pay all debts due by the said Elizabeth Greenfield, and her funeral expenses, or debts which may become due.

2d. To pay all expenses and charges incident in executing this trust.

3d. To pay to each of us, the said Joseph Howell, Charles Roberts, John Bouvier, and Samuel W. Rush, the sum of ten thousand dollars for our services; and after paying all the above,

4th. To pay to Elizabeth Rush, the wife of the said Samuel W. Rush, ten thousand dollars.

5th. To pay to John Bouvier \$10,000, to be held by him in trust for the use of Celeste Rees, &c., &c., free from the control of any husband she might marry, &c.

Then to pay to various persons sundry sums of money, annuities, &c. Among others, "to pay to Joseph Howell \$5000 in addition to the above sum declared to be for his services."

It is then provided, among other things—

That any of us (the trustees) may resign the trust hereby declared, to the other trustees, upon accounting to them for all moneys or property which he may have received, belonging to this estate, provided that such resignation shall not have the effect to deprive such resigning trustee of the sum of ten thousand dollars, above declared to be for his use, or any part thereof.

That on the resignation of any one of us, such resigning trustee shall make a deed of conveyance of his interest in the property hereby declared to be in trust, except as to the sum of ten thousand dollars above mentioned, which shall be accepted by the other trustees,

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before such resignation shall take effect, the deed to be made in favor of the other trustees.

On part of complainant, it was alleged that of these gentlemen, Joseph Howell stood to her in the relation of confidant and adviser. She was in the habit of consulting with him in relation to her affairs and other matters. It was at his suggestion that Mr. Bouvier was consulted as counsel in relation to making the deed in question, and, after she had consulted with him, he was employed to prepare it. It was also at his suggestion that Charles Roberts, *who until then had been a stranger to Mrs. Greenfield*, was named one of the grantees. As to Mr. Rush, it was alleged that he was little consulted about the matter, either in the preparation of the deed and declaration of trust, or in its subsequent custody or performance of the trust imposed.

That there is no evidence that the deeds were read to or by her, before execution. The answers of Messrs. Howell and Bouvier allege that the deeds were left with her for several days before execution; but so far as the answers are responsive to and in conflict with the bill, their averments are denied by the general replication; besides, they are contradicted in these particulars by the answer of S. W. Rush, their co-defendant.

It was further alleged on the part of the complainant, that from the evidence, it would appear that she was under the impression that she had made a *will*, and not a *deed*.

It was further alleged on the part of complainant, that at the time of her decease, Mrs. Greenfield was indebted to various persons; one of her debts, viz. to Christian Braubert, being on a bond executed by her on the 8th February, 1825; the other debts, so far as known, contracted *since* December 15, 1834. That complainant holds no assets for payment of the debts. That a portion of the property in the hands of defendants at the time of the decease of Mrs. Greenfield, consisted of, or arose out of the uninvested income of her estate. The bond of Braubert amounted to about \$1800.

Several answers of the respondents were filed, the substance of that of John Bouvier is as follows:

1. That between 1828 and 1833, he called upon Elizabeth Greenfield, at her request: that she had told Joseph Howell to call on respondent. At her request, he drew her will.

2. That in the fall of 1834, she sent for him again, and desired to make a change as to the disposition of her property, stating she wished to put "her property in such a way that she could have no power to change it, as she was growing old, and might become unable to manage her concerns, and she might be easily imposed upon."

3. At her request, respondent drew a set of papers, and left the names of the grantees in blank; they were exhibited to her shortly

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afterwards. When respondent next saw her, she said she wished to make alterations. Another set was then drawn and submitted to her. At last, those executed on the 15th of December, 1834, were approved, and left with her for several days.

4. That at her request, the Hon. Henry Baldwin, and Andrew Pettit, Esq., were invited to go and witness the execution of the papers. They and the trustees went to the house of Elizabeth Greenfield, and found her in the parlor. She then produced the deed and declaration of trust, as they had been prepared by respondent, and the same were there and then executed as they now are. That Judge Baldwin explained to her the nature of the papers, and asked her if she was satisfied, and if she understood what she was doing; on her answering that that was what she wished, he replied, that it was like the laws of the Medes and Persians, which could not be changed; she replied, that was what she wanted.

5. That the said Elizabeth Greenfield afterwards expressed herself pleased that the same had been done.

6. That she directed the said trustees to do every thing for her good.

7. That respondent admits the declaration of trust was not recorded till the 10th of July, 1845.

8. That he cannot tell the value of the estate, but the greater part remains in specie, as the same was conveyed to the trustees.

9. That he denies the complainant's allegation that Elizabeth Greenfield thought she was making a will; on the contrary, she desired to put her property out of her power.

10. That he admits the deed and declaration of trust were prepared by him. He does not know Mrs. Greenfield's age when she executed the papers; but till 1842 or 1843, when she was attacked with disease, she was a shrewd and intelligent woman.

11. That he admits the trustees took possession of the property mentioned in the declaration of trust.

12. That he denies the allegation of complainant, that the trustees refused to admit they were trustees. And the reason the said declaration was not put upon record immediately after its execution, was to prevent the many vexations to which the said Elizabeth Greenfield would otherwise have been exposed.

13. That the sum of one hundred dollars was not paid by the trustees to the said Elizabeth Greenfield, but there were considerations paid, namely, services rendered by Joseph Howell and respondent to Elizabeth Greenfield, from time to time, and future services were to be rendered.

14. That the sum of \$10,000 each to the trustees for their services was fixed by said Elizabeth Greenfield; that she proposed to give more to respondent, which he declined; and Joseph Howell did not know any thing of the sum of \$5000 reserved to him until after the papers were all prepared.

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15. That he does not know of the debts being due by Elizabeth Greenfield which are mentined in complainant's bill.

16. That she sent to respondent a single bill, through the hands of Samuel W. Rush, for \$5000, which he has never claimed. That at the same time, she made a similar bill in favor of the Rev. W. Suddards, for \$6000.

17. Respondent admits that complainant claims to be a creditor of Elizabeth Greenfield.

18. That the account of the trustees was filed in the Court of Common Pleas on the 4th day of December, 1845. That the said court have appointed an auditor to settle the same.

19. That respondent has been advised and believes the said Elizabeth Greenfield could not revoke the said deed and declaration of trusts.

20. That he admits he received several notes from the counsel of complainant, and gave answers.

21. That the accounts were filed in the Common Pleas before he heard of this suit, and that he refused to furnish the accounts of trustees to complainant, because he had no right to demand them.

22. That there is deposited, in the name of the trustees, in the Farmers' and Mechanics' Bank, \$3354.51, and that, as trustees, they hold 111 shares of the stock of said bank. That they have refused to pay the same to complainant.

And in answer to the said supplemental bill, the said John Bouvier says, 1. That the complainant did file his bill, and that it was demurred to.

2. That the trustees bought the bank stock in complainant's supplemental bill mentioned, but out of what moneys, whether principal or income, he cannot tell.

3. That there are one or two dividends unpaid by the said banks, which the trustees have not been able to get in consequence of the notice of the complainant to them that he claimed the same.

The will under which Dr. Anderson, the complainant, claimed, was dated the 8th day of August, 1843. He and Samuel Rush were appointed executors of it.

And another will was produced, in which it was said, "The intention of this my last will and testament is to dispose of the unexpended and uninvested balance of the income of my estates, real and personal, which may be in my own hand, or in the hands of any attorney, agent, trustee, or other person or corporation acting for me, or in my behalf."

This last was dated the 26th day of March, 1845.

Mrs. Greenfield died on the 9th July, 1845, aged about ninety-eight years.

Samuel W. Rush renounced his executorship by paper, dated August 25, 1845.

The case was heard upon bill, answer, replication, and deposi-

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tions, before GIBSON, Chief Justice, who delivered opinion and decreed as follows, viz.:

Much the greater part of the evidence in the cause is irrelevant. All that relates to the actions of the parties subsequent to the execution of the deed of trust, has nothing in it that bears on the integrity of that transaction, except that Mrs. Greenfield habitually spoke of the instrument as her will; whence an argument that she was deceived in supposing that she was executing an ordinary will, and not an irrevocable instrument. But though she spoke of it as a will, she spoke of it as an irrevocable one; and, almost to the last, exulted in the belief that it was so. She knew she had made a posthumous disposition of her estate, and it was natural for a person ignorant of technical terms, to designate it as she did. Even Rush, a trustee, and privy to the whole transaction, called it her will. As to its being, in fact, a testamentary act, and therefore revocable, the argument is scarce worth an answer. 'Tis true, a deed containing a posthumous disposition has been proved as a will; but here the trust was not entirely posthumous, for the legal title was vested in the trustees, in order to let them manage the property in her lifetime, and to pay as much of the produce as she should desire into her hands. There was nothing testamentary in that. But according to all the proofs, the very object of resorting to a trust deed, was to make the disposition unalterable; and, if the owner of property cannot tie up his hands in regard to it by such an instrument, he cannot do it at all.

What objection, then, is there to the execution of the two instruments? It is charged that neither was read to her, nor the contents made known to her, prior to, and at the time of the execution of them, nor ever after, till the time of her decease; and it is said, that the charge is corroborated by the confidential relation in which one of the trustees stood to her, in connection with the exorbitant compensation reserved, and the provision for exempting the trustees from responsibility for their agents, or for each other. As compensation merely, the sum of \$40,000 for managing an estate worth only five times as much, would be inordinate; but if she thought proper to give a princely recompense to those who served her, there could be no indelicacy in accepting it. Not a drop of her blood ran in the veins of any living creature; for the allegation of her consanguinity to the Reeses, and supposed attachment to them, has been entirely disproved, if any thing can be disproved. Indeed, it seems to have been their importunities principally, against which she sought protection. Now all the depositions show that she was generous to a fault; indeed, she seemed to have a passion for giving; and she might well give munificently to those who helped her to accomplish the closing object of her life, a settlement of her property, which would secure her from imposition in her second childhood, and prevent litigation

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about her property after her death, of which she spoke with fear and apprehension. Nor was this trust thought by others a thing to be coveted. Mr. Cowperthwait deposed that both he and Dr. Hulings declined it. But the amount of compensation was suggested by Mr. Rush, the colluding trustee; and it is clear that he, the husband of a member of the Rees family, and the father of another, did not think it too great. As to the disqualification of a lawyer to act in a trust about which he has been consulted professionally, I know nothing of it. His confidential relation can, at most, give cause of suspicion, which may be removed.

The circumstances at the execution of the trust deeds were such as usually attend such transactions. Unfortunately, Mr. Justice Baldwin and Alderman Pettit, the only two disinterested persons present, have passed away; but they have stamped the transaction with the impress of their high character. Foul play in the presence of Judge Baldwin could not have been successfully practiced, nor can it be successfully imputed; and we accordingly find that the bill does not directly charge either fraud, imposition, or misrepresentation. I am far from clear that it might not have been demurred to. If a party who can read, as Mrs. Greenfield could, will not read a deed put before him for execution; or if, being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in equity or at law. At law, it certainly is not. "If the party that is to seal the deed, can read himself and doth not, or being illiterate or blind, doth not require to hear the deed read, or the contents thereof declared, in these cases, albeit the deed is contrary to his mind, yet it is good and unavoidable." *Touch.* 56. But, adds Mr. Preston, the editor, "Equity may correct mistakes, frauds," &c. For this he refers to Manser's case, 2 Co. 3 b, in a note to which there is a reference to Bennet v. Vade, 2 Atk. 324, which was the case, however, of a conveyance by a man on the verge of insanity, who had even been married at the instigation of others, without proposal made to him, or without being conscious that he was so; who had been cautioned by a friend not to sign papers; and who stood so much in awe of the grantee, that the bare name of the latter would reduce him to submission when he was furious. That was a case of undue influence. The principle of Mr. Preston is asserted also by Mr. Thomas, in a note to Thoroughgood's case, 2 Co. 9 b, for which he refers to Jones v. Crawley, *Finch's Rep.* 161, which was a case of positive misrepresentation; and to the Attorney-General v. Sothorn, 2 Vern. 497, which was a case of compulsion; neither of which sustain the principle for which they were quoted; and the dicta of these respectable editors have to encounter authorities which bear the other way, without the benefit of adventitious aid. In an anonymous case in *Skin.* 159, one who could read, made an

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agreement for a lease for twenty-one years; the lessor drew a lease for one year, but read it twenty-one; and equity refused to relieve the lessee, because he could read and would not; and in this it certainly carried the principle of non-intervention a great way. But in *Willes v. Jernegan*, 2 *Atk.* 251, equity refused to relieve against a hard bargain made by a man with his eyes open, because there was no fraud. Nor will a party be relieved merely because he put an unguarded confidence in another: *Langley v. Brown*, *id.* 202. Now, if Mrs. Greenfield neither called for the deeds, nor inquired what the trustees were to have, she left them to make their own terms, and she was bound by it. Such a thing as fraud, imposture, or deceit, by them, is neither charged nor proved. The complainant relies exclusively on the abstract effect of the fact—if it be a fact—that the deeds were not read to the grantor at the time of execution, or the contents made known to her at any time before; yet as she could read and did not, my opinion is that the complainant be not relieved on that ground, without superadded proof of management and surprise.

Of all the persons present at the act of execution, John Bouvier, Joseph Howell, and Samuel W. Rush, alone survive, and can speak of what took place. Mary Richards, it is true, deposed that Mrs. Greenfield told her Judge Baldwin had read the deeds to her; but she was evidently mistaken, for the respondents do not allege in their answer that they were read then. Mr. Bouvier says they were produced by her, and their nature was explained to her by Judge Baldwin. Mr. Howell says that, being asked if she knew their contents, she replied that she knew all about them; but both say they had been in her possession for several days for examination. Mr. Howell further says that the clause for compensation was suggested, as he believes, not by the trustees, but by her. That she did not consider that she had been overreached in regard to it, is evident from the fact proved by the complainant himself, that she had subsequently made a voluntary offer of a sealed note to Mr. Bouvier of \$5000 in addition. It will not do to say that this note may have been procured by an abuse of confidence, for Mr. Bouvier is too good a lawyer not to know that it was altogether worthless, as it could not prevail against the declaration of trust. Now, these answers of the trustees, though not evidence of any fact in favor of themselves, are nevertheless sufficient to rebut the whole charge in the plaintiff's bill, and to leave the proofs to stand on the depositions and exhibits. We have the affirmation of two of the surviving trustees against that of the complainant, which would be enough to satisfy even the Roman law. I say nothing of the answer of Mr. Rush, whose position in the cause is too equivocal to let his admissions be evidence against his co-trustees, even did not the general rule prevent it. But giving the complainant the benefit of his affirmation, the proofs on the pleadings

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would stand in equilibrio; and how do they stand on the testimony of witnesses? In vain do we look into it for a syllable on the subject, except the statements of Mary Richards already noted; and we are to presume foul play in the absence of proof of it! Long experience in these matters teaches me that a deed is very seldom read over to the grantor in the presence of the magistrate in attendance; nor is it usual to communicate the substance of it to the grantor, except in making the separate examination of a married woman. That is presumed to have been done before. Had the trustees insisted on having these deeds read to Mrs. Greenfield, deaf as an adder, I would have applied to them the spirit of Lord MANSFIELD's remark, that he had never known a forged will which did not purport to have been executed according to the strictest requirements of the statute of frauds. The presumption of innocence in this case, casts the *onus* of proof on the complainant, and he has failed to sustain it.

But he insists that he is entitled to the profits of the estate and an account. I think it clear that he is not. In the declaration of trust, the respondents say "we will apply the income and profits thereof as the said Elizabeth shall direct; and for want of such direction, that we will invest the profits, after deducting all expenses, in some stock, or lend the same upon security; and that such sums shall be considered as under the same situation, and for the same trusts, as the property conveyed to us as aforesaid, and after the death of the said Elizabeth Greenfield, for the uses and purposes following, to wit," and they are then set down. She reserved a right to spend the whole of the profits in her lifetime; not to direct the application of them by will, an exercise of power on her part, she was anxious above all things to preclude. Had they continued to swell, as they did till they reached the amount of fourteen thousand dollars in the year immediately preceding the loss of half the estate in the stocks of the Mississippi banks, she would have had as much to bequeath, on the principle of the argument, as half of the original amount of the estate, and have been exposed to the importunities and impositions she so much dreaded. When the settlement was executed, she frequently spoke of it in a tone almost of exultation, that she was done with such dispositions for ever. But the trusts were to take up whatever was unexpended at her death; indeed it would seem that each annual surplus was to be invested as trust money in her lifetime. The complainant, therefore, is not entitled to either the profits or an account, in his character of administrator with the will annexed; and, if that were otherwise, the Common Pleas had acquired jurisdiction of the account at the filing of the bill.

Bill dismissed with costs; and it was decreed, that the bill of the said Matthew Anderson, administrator with the will annexed of Elizabeth Greenfield, be dismissed; and further, that the said com-

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plainant pay unto the respondents in the bill, the costs of this suit.

An appeal was entered from the decree.

Subsequently, on the part of defendants, was produced a will of Mrs. Greenfield, dated the 17th of 10th month, 1807, and also another will of same, dated April 1st, 1824.

The case was argued by *C. Fallon* and *J. M. Scott*, on the part of complainant.—It was contended, 1. That the deed of 15th December, 1834, to Howell and others, if taken by itself, is void as to complainant.

2. That the deed, if taken in connection with the declaration of trust of same date, is also void as to complainant; or at least, they together constitute a *testamentary* disposition of property which is revocable, and has been revoked by the subsequent will.

3. That at all events, even assuming the deed to be valid in all respects, complainant is entitled to so much of the funds in the hands of the grantees, as arose from the *income* of the estate purporting to have been conveyed.

4. That the bill should not have been dismissed with costs.

Under the *first* point, it was contended that the deed was void as to complainant, at least without some evidence to sustain it, on the ground that the two grantees who it was alleged procured the making of it, stood in fiduciary relations to the grantor; the one, Joseph Howell, being her confidential adviser, the other, Judge Bouvier, being her legal counsel and attorney, having drawn her previous will, and having in that capacity been employed about and drawn the deed, she having previously, at the instance of Mr. Howell, consulted with Mr. Bouvier in relation thereto: *Story's Equity*, sec. 308-9-11; 1 *Cox Rep.* 125; 13 *Vesey* 137.

The burthen of establishing its fairness and adequacy, is thrown upon the attorney: *Story*, sec. 312; 2 *Vesey* 627; 4 *Dessaussure* 678-9; 1 *Ball & Beatty* 105-6; 2 *B. & B.* 89; 15 *Vesey* 34; 14 *id.* 273.

There is no evidence that the deed was read to Mrs. Greenfield, and if it had been, it should also have been explained: 2 *Atkyn* 202; 3 *Peere Wms.* 180; 9 *Vesey* 292; 12 *id.* 376; 2 *Sch. & Lef.* 492; 2 *Vesey* 199; 14 *id.* 91.

That Mrs. Greenfield thought she was executing a will, and the deed and declaration of trust should be considered as a testamentary disposition and as revocable: 2 *Ves.* *Str.* 440-591; 2 *Hagerty* 247-554; 4 *id.* 856; 1 *Jarmin* 12.

The deed and declaration being executed simultaneously, the deed was not valid till the declaration was recorded: 17 *Ser. & R.* 70; 4 *Watts* 134. She was indebted at her decease.

At all events, the executor is entitled to the income unexpended

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at the decease of Mrs. Greenfield: 2 *Watts* 188; 6 *Coke* 17; 8 *Bac. Abr.* 387; 1 *Dal.* 148.

That defendants should pay the costs: 15 *Vesey* 84.

H. M. Phillips and *W. B. Reed*, with whom was *H. J. Williams*, for Howell and Bouvier.—Mrs. Greenfield was legally competent to make such a settlement, and had sufficient intellect to do so.

The instruments were executed in form, and the deed transfers the whole estate. She understood their effect, she knew that they were not a will; she had made wills before. She was informed by Judge Baldwin of the nature of the instruments.

The estate was taken possession of by the trustees, and the income received for years. They are not void because *voluntary*. The authorities cited in 2 *Story's Eq.* sec. 973; 4 *Kent* 282, and 1 *Ves. Jr.* 53, were cases of *imperfect* agreements. In this case, no aid is asked of a court of equity. The title at law is perfect. When a money consideration is stated in a deed of bargain and sale, no averment is to be received to the contrary: 1 *Bin.* 518–19; 2 *Ph. Ev.* 761; *Robb on Frauds* 119.

No *fraud* is proved: 13 *Ser. & R.* 434. The English rule, from which ours has been adopted, is founded on the statutes of 13 and 27 Eliz. The former avoids instruments made to delay, hinder, and defraud creditors; the latter to protect purchasers; but in both cases, *fraud* is the test. *Voluntary* settlements by one not indebted, are not void: 2 *Br. Ch. C.* 90; 5 *Vesey* 384; 12 *id.* 148, 136.

They are valid as to *subsequent* creditors: 8 *Mees. & Wels.* 405; 4 *N. Hamp.* 229; 1 *Marshall* 582; 8 *Wheaton* 229–242; 11 *id.* 211.

The presumption is that a party executing and acknowledging a sealed instrument, is acquainted with its contents, and parol declarations cannot be received to substitute another contract for it. It was not necessary to prove that the deed was read to the grantor, unless it was required by her: 2 *Johns. Rep.* 404; 5 *Bos. & Pul.* 415; 1 *Nev. & Man.* 576.

The instruments were not *testamentary* papers, and were not *revocable*. 1. They purport to be made *inter vivos*, and to take immediate effect. 2. They did take effect by delivery of the deeds and the management of the estate. 3. That provisions are made in them for action *during the life of Mrs. Greenfield*. 4. That these provisions were complied with for ten years. 5. They were complete; there was no control retained by Mrs. Greenfield, and no power to appoint by will, and nothing to show an intention to retain any power over the estate, except over *its income*. It is not so much the *form* of the instrument which distinguishes a will from a deed, as the *time of its intended operation*: 1 *Jarman* 16–17–18; 3 *Price* 368, *Attorney-General v. Jones*; *Thompson v. Brown*, 3 *Myl. & Keen* 32, 8 *Eng. Ch. Rep.*; 2 *Kelly's Geo. Rep.* 32–6; 3 *id.* 569–574; *id.* 460–484; 4 *Hawkes* 141–171.

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As to the compensation, it was not inordinate. That at the date of the deed, Mrs. Greenfield supposed that she was worth about \$227,000. She had no blood relations. Nothing was to be paid to the trustees until after her death. It was not invalid because made partly *in favor of counsel*, there being no fraud existing: 1 *Story's Eq.* sec. 312; 9 *Vesey* 292, *Hatch v. Hatch*; 13 *Vesey* 137; 12 *id.* 376; 14 *id.* 273.

The fact of the declaration of trust not being recorded during the lifetime of Mrs. Greenfield, does not affect its validity. As between grantor and grantee, the recording acts have no operation, nor between legatees and *cestui que* trusts: 1 *Whar. Dig.* 452, *Deed*, pl. 54-55-63.

The answer of Mr. Rush, one of respondents, is not evidence against the others: 12 *Vesey* 361. Rush was interested to support the will.

The opinion of the court was delivered by

BELL, J.—After much reflection, and a critical examination of the voluminous evidence and exhibits with which the case is loaded, we entirely agree with the Chief Justice, in his general estimate of the transaction in question. Any difficulty which may have retarded the announcement of our conclusion, has arisen, not from a doubt of the validity of the disposition made by Mrs. Greenfield, considered in its general aspect, but from hesitancy as to the light in which a particular feature of it ought to be regarded.

The original conveyance to trustees and the deed declaratory of the trusts, are to be accepted as one transaction: *Hamilton v. Elliot*, 5 *Ser. & R.* 384; *Cromwell's case*, 2 *Rep.* 75; and, consequently, the interests of the parties claiming under them, and the rights of those who impeach them, are to be considered precisely as though the two instruments constituted but one muniment of title. Conceding the creation of it to have been purely voluntary, the competency of Mrs. Greenfield to make it is beyond cavil. To say nothing of the valuable consideration mentioned in the conveyance itself, the perfect right of a proprietor to divest himself of his estate by way of gift, uninduced by pecuniary consideration, is among those which do not admit of question, and when such a gift is executed or otherwise fixed in the beneficiary, either by the direct conveyance of an estate or the creation of an use, it is beyond the power of the donor or his representative to revoke it. Settlements like that before us, reserving a present interest in the creator of them, and carrying a future benefit or bounty to other designated parties, are very usual. If fairly made and carried into effect, uninfluenced by fraud or circumvention, they cannot be subsequently impeached, as is shown, among other determinations, by our own case of *Ruth v. Reese*, 13 *Ser. & R.* 434. The authorities cited for the plaintiff as hostile to this position, look only to un-

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executed covenants or agreements to raise future trusts, by way of gift, which equity will not enforce, if founded in mere benevolence, or a purely moral obligation.

Nor is this transaction open to impeachment on the ground that it is in fraud of creditors. At the time of its inception, Mrs. Greenfield was of ample fortune, very far beyond any amount of debt for which she was liable. Indeed, there appears to have existed, at that time, but a single debt, and for this provision was made. Those averred to have been since created, cannot be invoked in aid of this attempt to invalidate the arrangement, for a voluntary settlement of an estate, made by one unindebted at the time, or who reserves sufficient to pay all existing debts, cannot be successfully attacked by subsequent creditors, unless, indeed, there be something to show the settlement was made in anticipation of future indebtedness. I know some doubt was thrown upon the soundness of this principle by *Thomson v. Dougherty*, 12 *Ser. & R.* 448; but it was afterwards dissipated in *Mateer v. Hassin*, 3 *P. R.* 160, supported by a multitude of cases cited for the defendants on the argument.

Neither is there the slightest pretence for saying the settlement must be accepted as a testamentary disposition, or that the donor was unduly induced to give it effect under the erroneous idea that it was a last will, or something in the nature of one. That it is not so, in fact, is abundantly shown by the reasons given at *Nisi Prius*, in corroboration of which, numerous authorities might be adduced. It may, however, suffice to refer to *Thompson v. Brown*, 3 *Mill & Keen* 32; and the concurring American cases of *Hester v. Young*, 2 *Kelly (Geo.) Rep.* 31-46; *Jackson v. Culpeper*, 3 *Kelly* 569-573-574; *Cumming v. Cumming*, *ib.* 460-484; and *Allison v. Kurtz*, 4 *Hawkes* 141-171. These settle the difference to be not in the form but effect of the instrument used, which, if it convey an estate *in presenti*, cannot be a will, for that operates only *in futuro*. The subject is well discussed by Mr. Jarmin, in his treatise on wills, where it is shown the true principle is that ascertained by *Thompson v. Brown*. That case, in the particular under consideration, is identical with the present. As was well observed at the bar, the instruments here in question, purport, first, to be made *inter vivos*, and to take effect immediately; second, that they did take effect immediately, by the delivery of the deeds and the transfer of the whole estate; third, that provision was made in them for the action of the trustees during the life of Mrs. Greenfield; fourth, that those provisions were executed for ten years; and, fifth, that the instruments were complete, and calculated for instant operation. All of these features are utterly inconsistent with the aspect of a purely testamentary disposition, and therefore disprove the deeds in question, as belonging to that class.

There is no evidence in the cause, upon which reliance can be

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placed, as showing the belief of Mrs. Greenfield, at the moment of execution, that the documents submitted for her acceptance were testamentary, and therefore revocable. The proof is, she was acquainted with the nature of testamentary dispositions, having executed at least two wills before that time; that she became dissatisfied with the liability to solicitation and the consequent annoyance to which the revocable nature of these exposed her; that to escape from this, and by way of protection even against herself, she desired to make an irrevocable arrangement of her affairs, and that, with this view, she perfected the disposition of which she afterwards spoke as unchangeable by any mere exertion of her desire. It is true, that she sometimes referred to it as her "will." But as it was to be chiefly operative after her death, it is not at all surprising one unacquainted with the strict import of the term, should occasionally misapply it, when referring to documents which dealt largely in posthumous gifts. Yet, certain it is, that she frequently alluded to it, as being unalterable "as the laws of the Medes and Persians," and seemed to exult in that fact, as her protection against imposition and obtrusive importunity. It is also true, that after the conversation with Charles Roberts, in which he reproached her with extravagant expenditure, she seems occasionally to have entertained a desire to revoke the prior arrangement, and to resume the full dominion of her property. But there is evidence that these expressions of impatience were made during moments of excitement, probably induced by the remarks of interested persons calling into question the action of the trustees, and thus prompting an enfeebled intellect to a suspicion that those in whom she had trusted were exerting an improper exercise of the power vested in them. Yet, even in her conferences with Mr. Gilpin relative to the testamentary paper afterwards executed, she recognized the then distasteful fact that she had relinquished the command of her property, by the expression of her dissatisfaction with the existing condition of her affairs, and of her desire to resume the absolute control of them, with a view to a new disposition. This, while it certainly indicates present discontent, seems to point unerringly to prior knowledge of the nature of the disposition already made. Indeed, without wading through it in detail, I may indicate the tendency of the mass of the testimony on this point, by saying that, in my apprehension, it establishes both Mrs. Greenfield's intention to make a final disposition of her estate, and her knowledge that she had done so. Whether her subsequent discontent was created by the practices at which I have hinted, or was the result of spontaneous repentance, it is almost needless to remark, it was impotent to destroy the trusts she had created, even though her desire to do so was manifested by her execution of the testamentary paper prepared by Mr. Gilpin.

After what has been said, a few words will suffice to dispose of

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the objection that the deeds creating the trusts were not read to her, at or before the time they were executed; treating the objection as applicable to all the dispositions made. The general rule is, that a party executing a legal instrument is presumed to be acquainted with its contents. Where it is of ordinary import, unconnected with suspicious circumstances, and uninfluenced, actually or presumptively, by the peculiar relation subsisting between the maker of it and the party to be benefited by it, the burden of disproving the presumption lies on him who would impeach the deed. Nay, the authorities show that, usually, if one who is about to execute an instrument can read it, and neglects to do so; or being blind or illiterate, chooses to act without requiring the contents to be made known to him, he will be bound to it, though it turn out to be contrary to his mind: *Touch. 56*; *Hollenbeck v. Dewitt*, 2 *John. R.* 404; *King v. Longnor*, 1 *Nev. & Man.* 576. Doubtless, a fraud, actively practised upon a party so situated, would vitiate his act, and it has been made a question whether, in an ordinary case, equity would correct a mistake in a deed so executed? If so, most certainly a chancellor would not interfere except upon distinct and convincing proof of the alleged mistake, by him who averred it. So far as the general disposition of this estate is involved, I perceive nothing to withdraw it from the operation of the ordinary rule I have stated. In this aspect, it presents an instance of one who, possessed of wealth but destitute of relatives, was desirous to provide for the future disposition of her estate among those whom, during a long and active life, she had regarded as friends. So far as appears, this was effected without the slightest improper interference by them, or any thing to induce the most remote suspicion of undue influence or unfair practice. No whisper of it has been heard in the proofs. Indeed, so far as the general beneficiaries are concerned, the deeds are unassailed upon this ground. Nor is there any room for the suggestion of incompetency from imbecility of intellect. The evidence shows she was capable of comprehending the contemplated distribution of her estate, and the presumption is she did understand it, at least to the extent of the dispositions in favor of persons not parties to the deeds.

The Chief Justice was of opinion, at *Nisi Prius*, that those clauses of the declaration of trust which propose to reserve certain sums to the trustees are protected and sustained by the same principle. But further examination and reflection have satisfied him that, in this particular, he fell into an error; and I am authorized to say that he concurs with his brethren in thinking those clauses stand on a distinct foot, and are to be measured by a different rule.

The deeds were prepared by Mr. Bouvier, who, for some time prior, had been the legal adviser and confidential attorney of Mrs. Greenfield. In this instance, he acted upon the express suggestion

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and recommendation of Mr. Howell, in whom the donor reposed the most implicit faith. It is evident, both these gentlemen exercised over her an almost unbounded influence, and were thus enabled to give direction to her thoughts and actions. Mr. Rush also stood towards her in a fiduciary relation; and the fourth trustee, Mr. Roberts, was brought into the business by Mr. Howell, under a recommendation well calculated to command her utmost trust. For a considerable time before the conveyance, it is proved she was improvident, if not extravagant, in the expenditure of her fortune, and, in reference to it, singularly open to solicitation and importunity. In the language used at *Nisi Prius*, she was generous to a fault, and seems to have been haunted by a passion for giving. While indulging this inclination for expenditure, the deeds in question were made. By these is reserved to the trustees the sum of \$40,000, being \$10,000 to each, professedly as compensation for assuming the burden of a trust which might have been terminated in a year; and, according to every probability, would not endure for a very long period. As a reward for the future management of an estate worth, at the utmost, only five times as much, the sum named has been well designated as inordinate. Yet this fact will by no means justify a charge of actual fraud against the parties who principally managed this transaction. As already intimated, there is no proof in the cause to warrant so grave an accusation, especially of individuals enjoying the eminent reputation which all accord to these trustees. I can very well imagine how, without a violation of conscience, they might conceive themselves entitled to a princely remuneration, under the circumstances then surrounding the donor. But in spite of this concession, a rule of public policy and pure morals, founded in long experience of the human heart and knowledge of man's cupidity, interposes to forbid an allowance of the claim. In this feature, the case presents what is called a constructive fraud, springing from the confidential relations existing between the parties. This peculiarity, withdrawing it from the operation of ordinary rules, throws upon the beneficiaries the duty of showing expressly that the arrangement was fair and conscientious, beyond the reach of suspicion. In requiring this, courts of equity act irrespective of any admixture of deceit, imposition, overreaching, or other positive fraud. As it has often been said, the principle stands independently of such elements of active mischief. It is founded upon a motive of general policy, and is designed to protect a party, so far as may be, against his own overweening confidence and self-delusion, the infirmities of a hasty judgment, and even the impulses of a too sanguine temperament. It has been beneficially applied to those confidences which owe their birth to the relation of parent and child, guardian and ward, trustee and *cestui que trust*, and, above all, attorney and client. To guard against the strong influences which these connections are

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so apt to originate, the law not only watches over the transactions of the parties with great and jealous scrutiny, but it often declares transactions absolutely void, which, between other parties, would be open to no exception. This is emphatically true of the relation of client and attorney, and to persons standing in a situation as *quasi* guardians or confidential advisers. Many of the cases establish the doctrine that, while these connections exist in full vigor, the adviser shall take no benefit to himself, from contracts or other negotiations with the advised: (*Hatch v. Hatch*, 9 *Vesey* 297; *Wood v. Downes*, 18 *Vesey* 126; *De Montmorency v. Devereux*, 7 *Clark & Finelly* 188:) a doctrine intended to supersede the necessity of any inquiry into the means used or the exertion of influence in any particular case, which is often difficult, if not impossible from the very nature of things: *Welles v. Middleton*, 1 *Cox R.* 125; *Wright v. Proud*, 13 *Vesey* 137. Other authorities, where the transaction is one of contract and sale, conceding that it may not be absolutely void *ipso facto*, throw upon the agent the burden of establishing its perfect fairness and adequacy, and that it was the deliberate act of the confiding party, after being fully informed of his rights, interests, and duties, and put upon his guard against even the suggestions of his own inclinations. It must appear affirmatively that no advantage has been taken of the client; and if this be not absolutely established *uberrima fide*, equity will treat the case as one of constructive fraud. An attorney, or other confidential adviser, is not permitted to avail himself either of the necessities of his client, or of his good nature, liberality, or credulity, to obtain undue advantages, bargains, or gratuities; and it has been said, there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hand, if it were not so: *Gibson v. Joyes*, 6 *Vesey* 278; *Montesquieu v. Sandys*, 18 *Vesey* 313; *Jones v. Thomas*, 3 *Y. & Coll.* 498. A judicious writer on this subject has observed, that equity "does not so much consider the bearing and hardship of this doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means secret and inaccessible to judicial scrutiny, from the dangerous influence arising from the confidential relations of the parties." 1 *Story's Eq.*, sec. 311.

Where the question agitated is of a gift, the rule would seem to be more stringent than where the advantage flows from a contract or mutual arrangement. In *Wright v. Proud*, Lord ELDON said, an attorney shall not take a gift from his client while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature; a *dictum* which Lord BROUGHAM observed was afterwards reduced, in *Hatch v. Hatch*, to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of showing that every thing was voluntary and fair, and with full warning and perfect knowledge:

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Hunter v. Aikens, 3 M. & Keen 113; and see Edwards v. Meyrick, 2 Hare R. 60-68.

This well considered and well settled doctrine is to be applied here. Under its operation it is impossible the declaration in favor of the trustees should stand. At the date of the transaction the creator of the trust was a very old woman, in a great measure dependent for advice and direction in her pecuniary affairs upon those in whom she placed her confidence. Unacquainted with legal forms and unused to the transaction of legal business, it is highly improbable she could have made herself acquainted, without assistance, with the long, dry, and tedious details of the two deeds, though they might have been left with her for several days, as the answers aver. No one of those who constantly surrounded her ever saw her perusing them, or in any way attempting to master the contents; and there is no shadow of independent proof that any one offered to assist her in this irksome task. To be sure, two of the answers allege, in substance, that the deeds were read to her by Mr. Bouvier, and that at the time of their execution, either Judge Baldwin or Alderman Pettit explained to her the nature of them. On the other hand, Mr. Rush, in his answer, positively avers the papers were neither read nor explained to her; Judge Baldwin having expressly declined to do so. But were we, after a general replication, at liberty to accept the two first answers as proof, they do not go far enough. I think it may be said, without hazard of error, that to uphold such a claim as is made here, by these trustees, it is not enough to show, generally, that the instruments were read to the party, or to aver broadly that the contents were explained to her, or that she admitted her knowledge of them. Under the wholesome rules I have brought to view, at the very least it ought to be proved the attention of the party was called to the very provision, with full and candid explanations of its character and effect; and that, after taking it into her "fair, serious, and well informed consideration," she assented to it uninfluenced by those who are to be benefited by it. In saying this, I have borrowed the idea of Lord ELDON, and quoted some of his language in Hatch v. Hatch, when speaking of a gratuity, by way of remuneration, offered by an emancipated ward to his late guardian, for the care and labor exerted in the management of his estate; and he added: "But the court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given; and recollecting that in discussing whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a court of justice; that instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind misled by undue kindness, or forced by oppression, &c. And, therefore, if the court does not watch these transactions with a jealousy almost invincible, in a great majority of instances

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it will lend its assistance to fraud." These remarks are full to our purpose. Looking to the whole case, as it is presented by both proofs and pleadings, the questions may be asked, was Mrs. Greenfield aware that by the terms of the declaration, her estate was to be burdened with the payment of \$40,000 as compensation to the trustees? Did she know that this sum was payable though each of the trustees might decline the burden of the trust within a year after its creation? She might have been acquainted with the first provision without being cognizant of the last, for they are widely separated in the deed. Who shall say it was not so? And yet to sustain them, I repeat it must be clearly established she not only knew of, but comprehended both, thoroughly. The answer, at most, aver that she suggested the amount of compensation herself; but was she made aware of the clause under which it might be reduced to a mere gift? It is extremely difficult to believe she understood and deliberately assented to this. The doubt is sufficient to invalidate the provision. It was said, on the argument, that all the cases in which donations and gratuities were disallowed, are either cases where no service was rendered, or of past services, which, it is thought, differ in principle from those where the services are prospective. I am not aware of any instance in which this distinction is taken. But, as in our case, the declension of all service and responsibility was optional with the trustees, I am disposed to regard the sums dedicated to them rather in the light of a gift than as payment, and to submit it to the rigidity of inquisition to which such gifts are always exposed. Under such a scrutiny, it must necessarily fail. The trustees acting in this matter through Bouvier, as their representative, who himself was the attorney of the donor, they all stand in the category of confidential advisers who have attempted to secure a benefit to themselves, through the influence appertaining to their confidential positions. It is impossible to discriminate between them. Each is so intimately dependent on the others, that the fall of one necessarily drags down all.

Before concluding this part of the case, I ought perhaps to notice that something was said, on the argument, about a subsequent confirmation. But *Morse v. Royal*, 12 *Vesey* 373, shows that in these cases, an asserted confirmation is regarded with the same spirit of jealousy as attaches upon the original transaction, and that it is required to stand upon the clearest evidence. Of confirmation, in the particular under consideration, we have not the slightest testimony. Indeed, it is not asserted the old lady ever saw the papers after they were executed.

This conclusion necessarily leads to an inquiry as to the legal effect of a decree declaring invalid the trust created in favor of the trustees. Does it invalidate the whole transaction? This has not been insisted, and I am unaware of any reasonable ground upon

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which it can be pretended that such a decree ought to affect innocent third persons, whose interests, under the deeds, are distinct from and independent of those claimed by the trustees as beneficiaries. As we have seen, very different considerations are applicable to these several interests, and the rights flowing from them are to be measured by very different rules. Each may stand without the other, and thus the declaration of trust may be established in respect of those dispositions not obnoxious to an avoiding principle, while those entitled to a less favorable construction may be declared void. This power of discrimination is entirely within the province of a court of equity, where a trust is divisible into distinct parts. In the exercise of a sound discretion, regarding distinct individuals as independent parties, it may uphold all of a transaction free of the taint of fraud, actual or constructive, while it decrees the destruction of those portions of it open to such an impeachment.

In denying to the defendants the specific sums ascertained by their declaration, we do not mean to say they are entitled to no compensation for their care, labor and responsibility in the management of the estate committed to them. This we leave to be ascertained, as in other cases of trust, by the proper tribunal.

It is unnecessary to add any thing to the reasons given at *Nisi Prius*, for denying the plaintiff's claim to the profits of the estate which have accrued since the death of Mrs. Greenfield. It suffices to say, we entirely concur in that reasoning and the conclusion to which it conducted the court below.

February 22, 1851, decreed as follows: This cause having been argued by counsel for the parties, and their respective proofs and allegations having been read and heard, the Court do order and decree, that the decree dismissing the plaintiff's bill with costs be reversed; and do further order and decree, that the indenture, dated the 15th day of December, 1834, recorded, &c., made between Elizabeth Greenfield of the one part, and Joseph Howell, Charles Roberts, John Bouvier, and Samuel W. Rush, of the other part, together with the deed poll of same date recorded in deed book, &c., executed by the said Joseph Howell, Charles Roberts, John Bouvier, and Samuel W. Rush, declaratory of the trusts upon which said first-mentioned deed was executed and delivered, constitute but one transaction, and are to be held as but one instrument of writing, and sufficient to pass to and vest in the grantees in the first-mentioned deed, all the estate real and personal therein purporting to be granted and conveyed, together with all the arrears of the rents, interest, dividends, income, and accumulation thereof, whether already received by and in the hands of said grantees, or are still due and unpaid, save that so far as respects the third clause or paragraph of the fifth item in said last-mentioned deed or declaration of trust, which is in the words

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following, to wit, "To pay to each of us, the said Joseph Howell, Charles Roberts, John Bouvier, and Samuel W. Rush, the sum of \$10,000 for our services, and after paying all the above," and the provision in said clause or paragraph made in favor of said Joseph Howell, Charles Roberts, John Bouvier, and Samuel W. Rush, be, and the same are hereby declared void, and it is ordered and decreed that said clause or paragraph, as well as all other parts of the said deed or declaration of trust, as refer to the payment in said clause or paragraph mentioned, be cancelled and struck out of said deed or declaration of trust; and that the compensation to which the said Joseph Howell, Charles Roberts, John Bouvier, and Samuel W. Rush may be entitled for their care, labor, and responsibility in the management of the estate committed to them, be left to be ascertained by the proper tribunal as in other cases of trust.

The question of the payment of the costs which have accrued in this proceeding, is reserved for the further order of the court, and the prothonotary is directed to tax the same, and ascertain the amount thereof, distinguishing the costs which have been made by the plaintiff and defendants respectively.

Corson *versus* Hunt and Abrahams.

1. When property in goods levied on by a constable, is claimed by another than the defendant, the constable is not bound to proceed to the further execution of the writ without sufficient indemnity; but having demanded and accepted indemnity, he must proceed, and rely on his bond for indemnity.

2. The measure of damages in such an action is the value of the property, when it does not equal the amount of the debt.

3. Whenever the defect in a declaration is such as is amendable by leave of court, it is cured by the verdict. A neglect to aver in the declaration, in a suit against a constable for not executing an execution, that the alderman had jurisdiction of the case in which the execution was issued, is a defect merely in form, which might have been amended.

ERROR to the Common Pleas of *Philadelphia county*.

This was an action commenced by Samuel Hunt and Isaac Abrahams against George Corson, (as constable of Seventh Ward, Northern Liberties, Philadelphia county,) under the 12th section of the act of March 20, 1810, (last edit. of *Purd. Dig.* p. 688, sec. 22.) This section directs that "on the delivery of an execution to any constable, an account shall be stated in the docket of the justice, and also on the back of the execution, of the debt, interest, and costs, from which the said constable shall not be discharged but by producing to the justice, on or before the return day of the execution, the receipt of the plaintiff, or such other return as may be sufficient in law; and in case of a false return,

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or in case he does not produce the plaintiff's receipt on the return day, or make such other return as may be deemed sufficient by the justice, he shall issue a summons, commanding the constable to appear, &c., and show cause why an execution should not be issued against him, &c."

Samuel Hunt and Isaac Abrahams had obtained a judgment, before Alderman Laws, of the county of Philadelphia, against one Martin Sausman, February 27, 1847, for \$87.69. An execution on that judgment was issued March 29, 1847, "to George Corson, constable," and delivered by the alderman to Corson. It seems that "some short time afterwards," Corson "said he had levied, but that some person had claimed the property." A bond of indemnity was given to him at his request, which he accepted, expressing himself satisfied therewith. After Corson received the bond, the alderman said, "I found this execution on my table." The twenty days after the issuing having expired, suit was brought before the same alderman against Corson, under the section of the act above cited.

On appeal by Corson to the Common Pleas, the plaintiffs declared in debt, reciting in the first count the recovery of the judgment against Sausman, the delivery of the execution to Corson, setting it forth particularly, reciting the stating of the account by the justice in his docket, as required by the section above mentioned, and averring that Corson had not the moneys before the alderman on the return day, that he did not produce to the alderman the plaintiffs' receipt, or any other return; nor did he (Corson) pay the said sum to the plaintiffs, &c.

The second count recited the same facts as to the judgment and execution, averring that Corson, on the 14th day of April, 1847, did return the execution "with the following false and insufficient return endorsed thereon, to wit:

"Returned for want of sufficient indemnification.

(Signed) GEORGE CORSON, Constable.

"April 14, A. D. 1847."

The count then sets forth that the return was false; that Corson had levied; that he had demanded indemnity; that the plaintiffs had given him full, ample, complete, and sufficient indemnification," (setting forth the bond at length,) and that it was taken, "accepted and, received by Corson, as and for a full, complete, and sufficient indemnification." Yet having so accepted, he falsely returned as above set forth; that he had not the moneys, &c.

The case was tried, September, 1848, before KING, President Judge, who charged as follows:

If the jury are satisfied from the evidence that the defendant, after making his levy, demanded indemnity before proceeding to the further execution of his writ, that such indemnity was given to him,

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with which he was satisfied, he was bound to proceed to sell the goods levied upon in satisfaction of the debt; and his neglect or omission to do so, rendered him responsible to the plaintiffs for the amount of the execution which is the demand in this case. Whether such demand of indemnity, previous to proceeding to sale, was made by the defendant, and whether a sufficient indemnity was tendered by the plaintiffs, and received as such by the defendant, are questions of fact for the jury; but if the jury are satisfied of them in the affirmative, and if they are satisfied that the defendant afterwards neglected or refused to execute his writ, the verdict should be for the plaintiffs to the extent of their demand.

Verdict for plaintiffs for \$96.37.

Error was assigned to the charge of the court in saying,

1. That it was not material whether the property Corson levied on was Sausman's.
2. That if Corson accepted an indemnity to sell, and did not, the plaintiff was entitled to the whole claim.
3. The declaration is defective in not showing that the alderman had jurisdiction in the suit wherein the execution issued to Corson.
4. The court below erred in rendering judgment for plaintiffs.

The case was argued by *Johnston*, for plaintiff in error.

F. C. Brewster, with whom was *Goodman*, for defendant in error.—It was alleged as to the 1st and 2d assignments of error, that the judge did not use the language objected to.

The opinion of the court was delivered by

ROGERS, J.—The declaration contains three counts, on two of which at least, the second and third, the plaintiffs are entitled to judgment. The second is for a false return, the third for refusing or neglecting to sell the goods levied on, the constable having accepted an indemnity. It is in full proof that an execution was put into the hands of the defendant, who was a constable, by the justice, and that a short time afterwards, he said he had levied, but that some person had claimed the property. A bond of indemnity was then given to him, at his request, which he accepted, expressing himself satisfied therewith. Notwithstanding which, the constable made the following false return: "Returned for want of sufficient indemnification." On this undisputed state of facts, the court ruled that if the jury were satisfied from the evidence that the defendant, after making his levy, demanded indemnity, before proceeding to the further execution of his writ, that such indemnity was given to him with which he was satisfied, he was bound to proceed to sell the goods levied upon in satisfaction of the debt, and his neglect or omission to do so rendered him responsible to the plaintiffs for

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the amount of the execution, which is the demand in this case. If, as the constable said, property in the goods was claimed by another, he was not bound to proceed, unless sufficient indemnity was given; but having demanded and accepted indemnity, the situation of affairs is entirely altered. He is compelled on his part to proceed to a sale of the goods, and must look to his bond for indemnity. The constable is estopped from showing that the goods belonged to another. As between the plaintiff and the constable, it must be taken to be the property of the defendant in the execution: *Fidler v. Fossard*, 7 *Barr* 541; *Hall v. Galbraith*, 8 *Watts* 220; *Miller v. Com.*, 5 *Barr* 294; *Watmough v. Francis*, 7 *Barr* 215. So that even admitting what is denied, that the court charged that it was not material whether the property Corson levied on was Sausman's, yet we perceive no error.

It is however said, the court erred in charging that the plaintiff was entitled to recover to the extent of his demand. That there is an inaccuracy in the language of the judge must be admitted; for the measure of damages is not always the amount of the execution, but the value of the property levied, when it does not equal the amount of the debt. This furnishes the true rule. But the presumption here is that the value of the goods was at least equal to the amount claimed in the execution. That seems not to have been questioned, and if so, no injury was done to the defendant. This court reverses for real, not imaginary or possible injuries.

The defendant contends the *narr.* is defective in not showing that the alderman had jurisdiction in the case in which he issued execution.

That the *narr.* is so defective as not to stand the test of a general or special demurrer may be admitted; but yet, in Pennsylvania, it is a defect which is cured by verdict. It would be a waste of time to examine the decisions of other courts in other States, on questions of amendment. We have a system of our own, depending on our own statutes, which have always received a liberal construction. The rule I take to be this, that whenever the defect in the declaration, &c., is such as would be amended in the court before whom the trial is had, it is cured by verdict. The court uniformly considers the error as waived. We consider that as done which might have been done. It will be remarked that the defect here, is not that the alderman had no jurisdiction, but that the declaration contains no averment that he had jurisdiction. This is a defect in form, which would have been immediately amended by the Court of Common Pleas, had their attention been called to it.

Judgment affirmed.

Trauger *versus* Sassaman.

1. The uniform, undisturbed, and exclusive use in common with others, of a piece of ground adjoining a church, for the fastening therein the horses of the worshippers, for above seventy years, will give title thereto by the statute of limitations.

2. For obstruction in the use of such a privilege or easement, an action of trespass will lie.

3. Where one tenant in common is ousted from his possession by his co-tenant, he may maintain trespass.

4. The open space of ground in dispute having been encroached upon under pretence of enlarging the graveyard, it was competent for plaintiffs to show that they had offered to give for that purpose, a share of a lot which had been purchased for a graveyard; this, in order to show that there was no necessity for the encroachment on the ground in question.

ERROR to the Common Pleas of *Bucks county*.

This was an action of trespass *quare clausum fregit* brought to February term, 1849, by Trauger and Campbell, trustees of the Lutheran Church of Nockamixon, against Sassaman and others, for the erection of a wall and cutting some trees in a grove or vacant space in front of the church above referred to. Testimony was given to the effect that the ground in question had been occupied by the Lutheran and a German Reformed congregation for more than seventy years. The two congregations worshipped in the same church. The ground was used for hitching horses and placing carriages by those attending church, and in attending at funerals. The defendants enclosed the premises by a wall, and cut some trees upon it. The trustees showed no conveyance of the premises, but relied on a possession for above twenty-one years, and claimed for above that period an exclusive possession.

The defendants claimed under a patent from the Penns, and conveyances down to Lawrence Pearson, who by his will, dated in 1801, and proved 12th April, 1803, directed all his lands (on the part of defendants, alleged to include the ground in question) to be sold at public sale, by the executors of his will, after the death of his widow. The *defendants* offered in evidence a deed from the executors of Lawrence Pearson to the *heirs* of the said Pearson, for the *locus in quo*, dated 7th August, 1821, and recorded 5th April, 1828. It did not appear from the face of the deed, that the sale was a public one, nor was it shown by extrinsic evidence that such was the case. The *habendum* in the deed being "*to the heirs* of Lawrence Pearson, deceased, and their heirs for ever, for the entire use of said heirs, for shade and hitching their horses, &c., when convenient."

Plaintiffs objected to this deed. Objection overruled, and plaintiffs excepted.

Defendants claimed as or under heirs of Pearson.

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On the part of defendants, testimony was given that Pearson's heirs and both congregations used the ground in common, since 1815; that it cannot be used since the erection of the wall, as it was used before; that no attempt was made to drive away Pearson's heirs before the wall was built; that the heirs frequently go to the German Reformed church, and sometimes to the Lutheran church.

On part of plaintiffs, it was offered to prove that the Lutherans purchased a graveyard, and offered half to the German Reformed party. Objected to, rejected, and exception on part of plaintiffs.

The part of the will of Lawrence Pearson which is material in this case, is as follows:

"And it is my will, if my said wife should survive me, that my executors shall rent the messuages or tenements and plantation situate in the said township of Nockamixon, whereon I now live, and the rent thereof to be applied to, and made use of, for the maintenance, &c., of my said wife in a comfortable manner during her natural life, in lieu of her dower; also, it is my will that if my said wife should survive me, that immediately after her decease, or should I survive her, that after my decease, that my executors, or the survivor of them, do, as soon as may be advisable and prudent for them or him so to do, to sell at public sale or vendue, all my lands and tenements of which I may be lawfully seized at the time of my death. First giving due and timely notice hereof by printed handbill or advertisement, setting forth the time and place of said sale," &c.

On the part of plaintiff, various points were proposed, the second of which was—

That if the plaintiffs, in common with the other congregation, and in common with persons claiming to be the heirs of Lawrence Pearson, have mutually used and occupied the property in dispute for a common purpose, for a period of twenty-one years and upwards, they are entitled to recover.

3d. That if the plaintiffs used and occupied the *locus in quo*, together with the members of the German Reformed church upwards of twenty-one years previous to the deed made by the executors of Pearson to the heirs of Pearson, and from that time down to the time of committing the alleged trespass, they are entitled to recover in this action.

4th. That the deed to the heirs being for a special purpose, they had no power or right to transfer or devote it to any other purpose or use, than that mentioned in their deed.

5th. That a grant of the right to use this property for hitching horses, may be presumed to be made to the plaintiffs from the free and undisturbed possession of it for a period of twenty-one years, together with the evidence of their having contributed to the

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repairs of that part of the grove connected with and adjoining the *locus in quo*.

KRAUSE, J., in relation to the second point, charged that for the interruption of an easement, an action of trespass cannot be maintained. As to the third point, he charged, that if the possession was held by plaintiffs in common with the heirs of Pearson, and the heirs had the title, the law was otherwise than as stated in the point. To the fourth, that if some of the heirs of Pearson are defendants in the case, the plaintiffs have no right to complain of the property being devoted to a different purpose from that stated in the deed. As to the fifth, that if the plaintiffs have no more than an easement, they cannot recover in this action, and must resort to some other remedy.

Verdict for defendants.

It was assigned for error :

1. The court erred in receiving in evidence the deed from the executors of Pearson to his heirs.

2. The court erred in rejecting evidence to prove that the Lutheran congregation purchased a graveyard and offered half of it to the German Reformed.

3. The court erred in their answers to the several propositions made by the counsel for plaintiffs.

The case was argued by *Wright* and *Du Bois*, for plaintiffs in error, who were plaintiffs below.—The power in the will of Pearson was to sell at *public* sale, and a private sale, under such a power, is void: 7 *Barr* 87.

The evidence to prove that we had offered to divide the lot purchased for a graveyard, was to show that there existed no necessity for enclosing the ground which the defendants alleged was necessary for that purpose.

That plaintiffs below were entitled to the premises by possession: 3 *Ser. & R.* 511; 2 *Whar.* 427; 8 *Watts* 51; 7 *Barr* 473; 1 *Whar.* 124; 2 *Saun. Ev.* 867; 3 *Burr.* 1824; 5 *East* 480; 5 *Term Rep.* 333.

Michener, for defendants.—To make a complete title, the possession and right of property must concur: 6 *Ser. & R.* 23; and that there was not in this case an *exclusive* and adverse possession.

If the deed was void, the title was in the heirs by the intestate laws. The declaration is not for an interruption of a privilege, but for breaking the close of plaintiffs, thus claiming a right in the land; but if damages were claimed, case and not trespass would be the remedy: 7 *Barr* 476.

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The opinion of the court was delivered February 5th, by

COULTER, J.—The evidence shows, with entire certainty, that the two congregations had been in possession of the grove and vacant space in front of the church, the *locus in quo*, for upwards of seventy years, as a place to put their carriages upon, and a place to hitch their horses; a convenience, or easement, or right, whatever it is called, without which the church itself would be useless in a country place.

They used it uniformly and exclusively, for there is not a scintilla of testimony that any body else claimed possession in all that lapse of time, or had any kind of possession or occupancy, or claimed to have it, in opposition to them. This possession on the part of the congregations would have given a right by prescription in England, even before the late statute on that subject; and in this State, there can be no doubt, but that the congregations acquired a title under the statute of limitations. The deed from the executors of Lawrence Pearson to his heirs is of no manner of consequence in the case. The will of said Pearson does not authorize his executors to sell the *locus in quo*, but to sell the lands and tenements of which he shall be lawfully seized at the time of his death. Now, the *locus in quo*, which he had never claimed in his life, and which had been in possession of the church many years before his death, and for near half a century before the date of the deed, was not by any fair or legal intendment embraced in the power to sell; which power was given for the purpose of paying debts and legacies. The *locus in quo* could contribute nothing to that purpose, and was sold twenty years after testator's death, to his heirs collectively, without naming them, as a place for shade, and for hitching their horses when convenient. It could not divert, hinder, or obstruct the right of the plaintiffs, acquired long before that deed was made. This was the rock on which the court below was wrecked. That deed was evidently made for some sinister purpose, perhaps the very purpose to which it is now attempted to use it, as the heirs appear to belong to the Reformed church. But the congregations have enjoyed, possessed, and asserted exclusively the right to possession for more than twenty-one years after the making this deed, such as it is, and before the trespass complained of. The congregations were, if the testimony is believed, tenants in common of the *locus in quo*, having been in the undisturbed use and possession of it under a claim of right for more than twenty-one years, in the only way in which they could possess it, and for the only use and purpose for which they needed it, and no one else claiming or possessing during that time, in opposition to their right. The plaintiffs, as tenants in common, the church itself being held by them as tenants in common, and also the graveyard, were also tenants in common of this accessory right, and when they were ousted by their co-tenants, were entitled to

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the action of trespass *quare clausum fregit*. There is no dispute as to the plaintiffs being ousted. The defendants built a wall which effectually excluded them from placing their carriages or hitching their horses in the *locus in quo*. In general, tenants in common cannot maintain trespass while the relation is acknowledged by the parties, because the possession of one is the possession of both; but when one is ousted unequivocally, he may maintain trespass for the injury. I may state here, that the evidence offered by the plaintiffs in relation to the graveyard ought to have been admitted, because it went to show that there was no necessity of enlarging the graveyard, under which pretence the defendants built the wall complained of. Nor did the defendants derive any superior right from the permission of the heirs of Pearson, or some of them, to enlarge the graveyard by building the wall. Even by the tenor of their deed from the executors, they were only entitled to the benefit of shade and the privilege of hitching their horses when convenient. But neither the heirs nor the defendants, some of whom are of the family of Pearson, had any right to build the wall, if the testimony is believed, for any purpose whatever.

On the other ground mooted in the court below, they were wrong in their instructions to the jury.

The court seemed to admit that plaintiff had an easement, but decided that an action of trespass would not lie for the disturbance of an easement. But there they were in error; for the disturbance or obstruction of a right of way or of water over another man's land, an action of trespass will lie. There is no reason why it ought not to lie as well as case, for such obstruction, that I can perceive. It is a direct injury to the plaintiffs' right of property; for a man may have property in an easement; and it has been frequently determined in England, that the action of trespass would lie for such an injury. As it is a question resting on authority, I cite 3 Burr. 1824; 2 Saund. Ev. 866-8; 5 Term. Rep. 333; 5 East 480. The same thing has often been decided in our courts: 1 Whart. 124, Hart v. Hill.

Judgment reversed and *venire de novo* awarded.

Juvenal *versus* Jackson.Jackson *versus* Juvenal.

1. A vendee who under the terms of his deed has a covenant against encumbrances which were known to him, and a covenant for quiet enjoyment, cannot withhold the purchase-money as a further security against them; a purchaser of a lot on ground-rent is within the rule, and is bound to pay the ground-rent though the encumbrances by mortgage are not satisfied, and though the lot is vacant and unproductive.

2. Where the vendor had agreed to *advance* to the vendee, in order to build on the premises sold, in consideration of which, the rent was to be increased, and he failed to make the advancement, the vendee may defend to the extent of the increased rent; and the assignee of the rent having notice before acceptance of the deed of assignment and payment of the consideration to the vendor, will be affected by the omission of the latter to make the advancement.

3. The recording of a deed is but evidence of delivery, and it is not conclusive; the vendee may reject the deed, though it be recorded, if not previously accepted.

4. If an assignee of ground-rent receive notice from the purchaser of the land which is subject to the ground-rent, of an equitable defence to the payment of the rent after the assignee had made partial payments to the vendor, but before payment of the whole purchase-money, the assignee will be affected by the notice. If the whole purchase-money be paid by the assignee before notice, the latter will be protected for the whole; if but part be paid, he will be protected only to that extent, and a proportionate abatement of the rent will be made for the residue.

ERROR to the District Court, Philadelphia.

These were cross writs of error. The first was a writ of error taken by *Jacob Juvenal*, in an action of covenant which had been brought in January, 1849, in the District Court, in which *Louisa C. Jackson* was plaintiff, and *Jacob Juvenal* was defendant. The plaintiff declared in covenant on a ground-rent deed, dated 16th October, 1845, recorded 18th November, 1845, by which *Sears C. Walker* granted, bargained, and sold to *Jacob Juvenal*, his heirs, and assigns, a vacant lot situate in the District of Penn, in the county of Philadelphia, at the N. E. corner of Girard Avenue and Eleventh street, reserving thereout an annual rent of \$241.66, payable on the first days of July and January to said Walker, his heirs and assigns.

The plaintiff also averred that on the 17th October, 1845, Walker granted to her the said rent in fee. This deed appears to have been acknowledged November 18th, and recorded 26th December, 1845. The *narr.* further set forth that, by virtue of the said last deed, the plaintiff was seized of the rent, and assigned for breaches that on the 1st January, 1849, \$845.81, for rent for three years and six months, (being arrears claimed as due January and July,

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1846, 1847, 1848, and 1st January, 1849,) became due, and so remain.

The *ground-rent deed* contained a covenant by defendant to erect a brick building on the lot to secure the rent, and the provision that if defendant should within ten years pay the principal of the rent to Walker, his heirs, and assigns, that the rent should be extinguished.

It also contained a covenant in these words:

And the said Sears C. Walker, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree, to and with the said Jacob Juvenal, his heirs and assigns, by these presents, that the said Jacob Juvenal, his heirs and assigns, paying the said yearly rent and taxes, or extinguishing the said rent by purchase, and performing the covenants and agreements aforesaid, shall and may at all times hereafter, for ever, freely, peaceably, and quietly have, hold, and enjoy, all and singular the premises hereby granted, with the appurtenances, and receive and take the rents and profits thereof, without any molestation, interruption, or eviction of him the said Sears C. Walker, his heirs, or any other person or persons whomsoever, lawfully claiming, or to claim, by, from, or under him, them, or any of them, or by or with his, their, or any of their act, means, consent, or procurement.

The case was tried before STROUD, J. After the plaintiff had read the deeds set out in the *narr.*, the *defendant* gave in evidence two mortgages executed by Walker, whilst owner of the ground out of which the rent was reserved, one dated 16th October, 1844, for \$1400, the other was dated 22d November, 1844, for \$1133.33. Both mortgages were recorded before the date of the deed to Juvenal. These mortgages having been purchased by R. H. Bayard, he, on 26th December, 1848, released the ground in question from the lien of the mortgages. This action was brought after the mortgages were released.

The defendant afterwards offered to show, that immediately before the execution of the deed from Walker to Juvenal, Walker proposed to defendant, verbally, to sell him said lot at \$2 per foot ground-rent; that in order to induce the defendant to purchase at that price, the rent should in the deed be reserved at \$2.50 per foot, and that Walker would advance and pay to defendant, in order to enable him to place buildings on the lot, according to the usual building covenant, the principal of the said extra 50 cents per foot, or \$805.50. That Walker further represented to defendant, at same time, the existence of said two mortgages as liens on said lot, and requested the defendant to permit them to remain until Walker should sell the ground-rent, to be reserved as aforesaid, and promised and agreed with him, if he would so permit the mortgages to remain, that he, Walker, would hold the purchase-money of said rent, whenever he should sell the same, for the pay-

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ment and satisfaction of said mortgages, and pay off the same out of said purchase money, whenever, and as soon as he should effect a sale of said rent. That the defendant agreed to that proposition, and took and executed the counterpart of said deed, trusting to the promises and representations of Walker.

That *before* the deed, by which the rent was assigned to the plaintiff, *was delivered to her, or accepted by her*, the defendant called and told her he had called to speak with her in relation to certain ground-rents, held by Walker. That plaintiff then referred defendant to R. H. Bayard, Esq., who she said was her agent or attorney, that he attended to her business, and would attend to that for her. That the defendant, then and *before the deed by which the rent was assigned to the plaintiff was delivered to, or accepted by her*, gave notice to said Bayard, the agent or attorney of the plaintiff, of the facts hereinbefore set forth, and of the then existing agreement of Walker, both as to the advance of the sum of \$805.50, and the satisfaction of the mortgages, and of the confidence and trust reposed by defendant in Walker, and that the plaintiff, if she should purchase said rent, would take it subject to said contract of Walker, and said trust in favor of the defendant.

That the defendant further offered to show, that he commenced building houses on the lot, in compliance with his covenant, and proceeded with them until the walls were raised to the height of the joist on the first floor, when *Walker* became insolvent, and unable to make the advance of \$805.50. That he never advanced or paid any portion of that money. That the plaintiff, after the assignment of the rent to her, had not paid it, but always refused to do so. That the plaintiff, although, immediately after the assignment of the rent to her, requested by defendant to satisfy the mortgages or remove their lien from the said land, refused to do so, and thus, so long as they remained unsatisfied, prevented the defendant from getting any income or profit from the land, while the said liens remained—that is, till December 26th, 1848.

That the *plaintiff* paid no money for the rent, or for or on the conveyance thereof to her. But that the consideration for the same *was certain moneys due from Walker to her*, which she had intrusted to him as her agent, and for the securing which to her the plaintiff took the conveyance of the rent, with notice, as above stated.

All this offer, on objection, was overruled by the court.

The plaintiff had brought *a former action* against the defendant, to recover the arrears due January and July, 1846.

In that case, the District Court, after argument in banc, rendered judgment for defendant. The judgment in that case was pleaded and given in evidence. Plaintiff's counsel then offered to prove by the notes of the judge's charge, that said former verdict and judg-

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ment for said defendant in said suit for the recovery of said first two instalments of ground-rent due January 1 and July 1, 1846, were rendered solely on the ground of the existence of encumbrances on the land, (to wit, the said mortgages,) which in the judgment of the court constituted an equitable suspension of the remedy for the recovery of said ground-rent until removed; and also offered to prove that said encumbrances had been removed on the 26th December, 1848, before this suit was brought.

Which offer was objected to, rejected, and exception taken.

STROUD, J., charged the jury that that judgment barred the plaintiff from recovering the arrears sued for in that action. But as to the residue, he charged that the plaintiff might recover, as the mortgages were released, with interest only from the date of the release.

Verdict was rendered for plaintiff for \$625.95.

In the case of Juvenal v. Jackson, error was assigned:

1. To the refusal of the offer.
2. To the charge directing a verdict for plaintiff for the five last instalments of rent.

In the case of Jackson v. Juvenal, it was assigned for error:

1. The judge erred in rejecting the evidence offered by the plaintiff to show the grounds on which the verdict and judgment in the former action for the first two instalments of ground-rent had been rendered.
2. In charging the jury that the plaintiff could not recover the said two instalments, as she was barred by the former verdict and judgment.
3. In charging that the plaintiff was not entitled to interest on any of the instalments of ground-rent, except from the 26th of December, 1848.

The cases were argued by *McIlwaine*, for Juvenal, plaintiff in error.—He contended that Juvenal, the defendant, was entitled to defend on the ground of failure of consideration: 5 *Ser. & R.* 205; *Hart v. Porter*, 1 *Watts* 248. The purchaser in this case could not sell whilst the encumbrances existed, or build safely. The vendor would have been bound, on tender of the purchase-money, to give a clear title to the premises, and is equally bound to do so before the rent can be recovered.

This action having been brought *after the release of the mortgages*, the defence is available to the claim for the arrears of rent accruing during the time the mortgages bound the land. Also, before Walker could enforce a claim for rent, he was bound to fulfil his agreement to advance money to build on the premises.

Further: Is the plaintiff, as the assignee of Walker, affected by the agreement of Walker as to advancing money and satisfying

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the mortgages? The offer was to show notice of it to her agent before the deed *was delivered to her*. The deed of Walker to her was dated before the notice, but it was offered to show that the deed was not delivered till after notice: 4 *Yeates* 278; 2 *Dal.* 214. The case of *Patterson v. Juvenal*, 10 *Barr* 282, was decided on the ground that the plaintiff was a *bona fide* purchaser *without notice*.

Defendant's offer was further to show that Walker induced the defendant to suffer the mortgage to remain on the land till the rents should be sold by him, by entering into an agreement that Walker, in the event of selling, would apply the purchase-money to the satisfaction of the mortgages, and that plaintiff had notice of this before she purchased.

He therefore contended—1. That the consideration of the rent has failed, to the extent of 50 cents per foot, or one-fifth of the rent, in consequence of the failure by Walker to pay the \$805.50, and that plaintiff having taken with notice of that fact, can claim only at the rate of \$2 per foot.

2. That she can claim no rent for the time during which the encumbrances remained on the ground.

J. P. Montgomery and Rawle, for defendant in error.

The opinion of the court was delivered February 7th, by

GIBSON, C. J.—A vendee who takes a covenant against a known defect in the title, shall not detain the purchase-money as a further security against it, for the reason that the covenant would be nugatory if he did. This rule is firmly settled both in England and in this country. Now a sale on ground-rent differs from an ordinary sale only in this, that the consideration in the first is an annual sum perpetually charged on the land, instead of a gross sum paid or secured, as in the second. In this instance, the vendee, knowing that the ground was encumbered by mortgages, took a covenant against encumbrances, and a covenant for quiet enjoyment; and his case therefore, is distinctly within the rule. The argument for him is, that he could neither sell nor build while the property was in mortgage; that it remained vacant and unproductive by reason of the vendor's default; and that the vendee ought not to pay arrears for the time when the property gave him no profits: and had he not taken a covenant, there would have been plausibility, if not force, in it. But the obstacle to building was the failure of the vendor to furnish the stipulated subsidy—not the mortgages—for he continued to build till his money was exhausted. No one would contend against positive words in the deed, that a quit-rent reserved out of vacant ground begins to accrue only when the property begins to yield profits. Rent, therefore, is recoverable here, for every year but the two included in the previous action;

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and not for those because the verdict and judgment, though it ought to have been for her in that, concludes her in this.

But another part of the consideration had undoubtedly failed. The *redditus* or render, in compensation of the ground, was estimated by the original parties at two dollars the foot; but, to compensate a sum the vendor agreed to advance for building, fifty cents the foot were added to it. No part of the sum was advanced, and there was a proportional failure. This would indisputably be matter of defence between the vendor and the vendee; but the plaintiff claims to be a purchaser of the legal title for valuable consideration and without notice. The facts in evidence are that while the deed was in the office, recorded but not put into her hands, the defendant called on her to give notice, and actually gave it to the agent to whom she referred him. It is settled that recording is evidence of delivery, but inconclusive; and it would consequently leave the vendee at liberty to reject the deed if it were not previously accepted; consequently, notice before acceptance would be good. It will be then for a jury to say, whether the plaintiff had so far accepted the conveyance as to preclude herself from throwing the property back upon the vendor's hands. But what if the notice was received before delivery? To protect a purchaser, by the English rule there must be execution and payment of the entire purchase, for there is no protection for partial payments; by our own, as it was held in *Youst v. Martin*, 3 Ser. & R. 430, it is otherwise. If then it turn out that the plaintiff had paid the whole purchase-money when notice was received, she will be protected for the whole: if she had paid a part, she will be protected for so much, just as if it had been paid by the vendor to the ground tenant, and a proportionate abatement of the rent will be made for the residue: if she had paid nothing, she will be protected for nothing.

Judgment reversed and *venire de novo* awarded.

Smith *versus* Philadelphia Bank.

1. A negotiable note drawn in Philadelphia and payable at the Bank of the State of Missouri at St. Louis, was endorsed by third persons, and was discounted by a bank in Philadelphia for the payees under an understanding that the note was to be paid in *funds current at St. Louis*. When due, payment was offered at the bank where payable by the drawers, in *current funds*, which were refused: the endorsers were thereby discharged.

2. After the tender and refusal, and return of the note, the payees drew a draft on the drawers for the amount of the note, payable in *current funds*, which was endorsed by the same endorsers, and given to the bank who held the note, but the draft was not accepted or paid; the endorsers having been previously discharged by the refusal to receive current funds, there was *no consideration* for their endorsement of the draft, (which, being payable in depreciated funds, was not negotiable,) and they are not liable upon it, or on a promise to pay the amount of it.

ERROR to the District Court, *Philadelphia*.

This was an amicable action in case, in which the Philadelphia Bank was plaintiff, and Garret Newkirk and Stephen S. Newkirk, trading under the firm of G. Newkirk & Son, were defendants. G. Newkirk was the surviving partner, and dying, Smith (it was said on the record) was substituted for Isaac Dunton, the executor of his will. He had been appointed executor, but had not acted.

The action was brought to recover \$2111.98, less the sum of \$500, which the plaintiff admits has been paid, with interest on the balance.

The *narr.* contained seven counts:

1st count.—On a promissory note, dated March 13th, 1839, drawn by Baird & Farrel in favor of Heberton & Hibler, payable in twelve months at the Bank of the State of Missouri, at St. Louis, current rate of exchange to be added. Amount of note, \$2111.98. Endorsed by Heberton & Hibler and G. Newkirk & Son.

2d count.—On a note of the same description, but without the words “current rate of exchange to be added.”

3d count.—On a note of the same description, but omitting the words “payable at the Bank of the State of Missouri,” and also the words “current rate of exchange to be added.”

4th count alleged that the defendants, in consideration that the plaintiffs, at their special instance and request, would lend to Heberton & Hibler the sum of \$2111.98, on the security of a promissory note such as described in the first count, promised to pay the said sum of money in case of the non-payment thereof by the said Heberton & Hibler and the said Baird & Farrel.

5th count alleged, that whereas Heberton & Hibler were indebted to the plaintiffs in the sum of \$2111.98 for money loaned, that in consideration of the same, and that plaintiffs would receive a draft

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drawn by Heberton & Hibler, dated March 30th, 1840, for the sum of \$2111.98 in favor of defendants, and by them endorsed—said draft drawn on Baird & Farrel, merchants of St. Louis—and would forbear and give time for the payment of said sum of money, said defendants undertook and promised to pay said sum of money in case of the non-payment of the same by Baird & Farrel or Heberton & Hibler; the payment to be in current funds.

6th count.—Corresponding with the preceding count in all respects, except that it omits the words “in funds current at St. Louis.”

7th count.—Common count—money lent and advanced.

The defendants pleaded *non-assumpsit*—payment—set-off, with leave to add, alter and amend—and also special pleas, as follows:

1. That said note being payable at the Bank of the State of Missouri, which bank at the time of the drawing received current funds in payment of notes falling due there—the said bank, before the maturity of the note, resolved to receive only specie, or its own notes in such payments—of which resolution plaintiffs had notice, and thereupon undertook and agreed, at the request of defendants, to deposit said note elsewhere for collection, but neglected so to do—by reason whereof, current funds being tendered in payment, were refused, and the note protested.

2. Tender.

Plaintiff's counsel offered in evidence the following note:

“\$2111.98

Philadelphia, 13th March, 1839.

“Twelve months after date, we promise to pay to the order of Heberton & Hibler twenty-one hundred and eleven dollars $\frac{1}{100}$ without defalcation for value received, payable at the Bank of the State of Missouri at St. Louis, (current rate of exchange to be added.)

(Drawn)

BAIRD & FARREL,

(Endorsed)

HEBERTON & HIBLER,

Do.

G. NEWKIRK & SON.”

Also the following draft:

“\$2111.98.

Philadelphia, March 30th, 1840.

“At one day's sight, please pay to the order of Messrs. Garret Newkirk & Son, at the Perpetual Gas Light Insurance Office, in current funds, twenty-one hundred and eleven $\frac{1}{100}$ dollars, being the amount of your note attached hereto.

HEBERTON & HIBLER,

(Endorsed)

G. NEWKIRK & SON.

“Messrs. Baird & Farrel, Merchants, St. Louis.”

Plaintiff's counsel then admitted the receipt by plaintiff of \$500 on account of their claim, and exhibited a receipt for the same, dated June 13, 1841.

Plaintiff's counsel then offered as a witness *J. B. Trevor*, who, being affirmed, said:

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I am cashier of the Philadelphia Bank, and was so in 1839 and 1840. (Being shown the note, he said) This note was discounted by the bank for Heberton & Hibler, in November, 1839, near the beginning of the month. It was discounted on the faith of the endorsement by G. Newkirk & Son. It would not have been discounted on the credit of Heberton & Hibler alone, without another satisfactory endorsement. We knew nothing about the drawers. It was returned protested from the Bank of the State of Missouri, to whom, *as our correspondent*, the note had been sent for collection. After its return, one of the firm of Heberton & Hibler called at the bank and stated that the parties in St. Louis would pay the note in current funds, if sent on again. The bank agreed to return the note with a draft drawn by the same parties for a similar amount at one day's sight on the drawers of the note. The draft was sent on to our correspondent, the Perpetual Insurance Company of St. Louis, for collection. It was returned protested. We agreed to indulge the parties to the note until we could make another trial by sending the draft to St. Louis. By indulge, I mean we agreed not to sue.

Being cross-examined :

The bank in discounting deducted interest and a certain amount of exchange. The amount of the exchange deducted was greater than the difference of exchange between a specie-paying and a non-specie-paying place.

The plaintiff having closed his case, the defendant moved for a *nonsuit*, on the ground that the evidence offered by plaintiff would not sustain a recovery under any count of the declaration.

The judge refused to *nonsuit* the plaintiff, whereupon the defendant then and there excepted.

Defendant's counsel, to maintain the issue on their part, then offered the following evidence.

J. B. Trevor—before sworn for plaintiff, and now recalled by the defendant—says: Neither of the firm of Newkirk & Son were at the bank when the proposal for discount was made. I think Mr. Hibler presented the note for discount: Mr. Hibler brought the note with one or two more, to get a discount. *It was the understanding of the parties that the note was to be paid in funds current at St. Louis.* At that time, I presume, the notes of the Bank of the State of Missouri were current there; also, notes of the banks of adjoining States. The banks had suspended specie payments. The amount of discount was this: we took off the interest for the time the note had to run, and seven per cent. exchange. The total amount deducted was \$193.25.

He further said, *inter alia*, no money was furnished by the bank when the *draft* was drawn. The note was discounted for Heberton & Hibler. The bank paid no money to Newkirk & Son. Their name was on the note when originally presented for discount.

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On the part of the defendant, Farrel, one of the drawers of the note, was offered, and a release by defendant to him was tendered to him. Objected to on part of plaintiff, that he was one of the drawers of the note. Objection overruled, and exception on part of plaintiff. He stated, *inter alia*, that the firm of Baird & Farrel, then doing business in St. Louis, received a notice from the Bank of the State of Missouri, and at the maturity of the note that he tendered such funds as were then current in St. Louis, such as those of banks of Illinois, Indiana, and Kentucky, in payment, with the addition of the exchange on Philadelphia. They said they did not take those funds in payment, and refused them. That the firm continued to pay responsibilities for some time, but subsequently stopped payment. * * * Don't think we had any notes in 1839 that we did not pay.

It was testified by the teller of the bank, that the Bank of the State of Missouri, on the 12th November, 1839, adopted a resolution exacting the payment of all sums due or becoming due at said bank on such notes in specie or its own paper, that the resolution was made public on that day, and was acted on till the 1st March, 1841; and that the Bank of the State of Missouri notified all who had deposited notes for collection, both banks and individuals, that the bank would not collect for them, except in conformity to resolution of 12th November, 1839; and the result was, that in almost every instance, the collection paper maturing was transferred to other institutions.

The note in suit was protested on 16th March, 1840. Other testimony being given, defendants' counsel offered William Worrell, who testified, that he was a director in the Philadelphia Bank in 1839 and 1840. That "Garret Newkirk called on me, in February or the beginning of March, 1840, to have some notes transferred from the Bank of the State of Missouri to some other institution for collection, giving for reason, that that bank would receive only specie or its equivalent for notes left there for collection. I called on the president on the subject, and stated Mr. Newkirk's wish. The notes referred to were the one in suit and a note of Dyer."

JONES, J., in his charge, stated that the note was endorsed by Heberton & Hibler, and afterwards by C. Newkirk & Son for the accommodation of Heberton & Hibler; and he put the case to the jury on the *fifth* count, saying that there was not evidence to support the other counts.

See assignments of error.

Verdict for plaintiff, for \$2214.94 damages.

It was assigned for error:

1. The court erred in charging the jury that a sufficient consideration was alleged in the fifth count of the declaration to sustain

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a recovery, if such consideration were proven to the satisfaction of the jury. And,

2. In not charging the jury that a recovery could *not* be sustained under any count of the declaration.

3. The court erred in charging the jury that the averment in said fifth count, that Heberton & Hibler were indebted to plaintiff for money loaned at the time of the drawing of the draft of March 30th, 1840, was sustained by the evidence, and that such indebtedness, accompanied by an agreement to forbear suit on the note of March 13th, 1839, was a sufficient consideration in law to sustain the promise alleged in said count.

4. And in not charging the jury that there was no consideration whatever for the draft, and no evidence of any agreement to forbear suit.

5. The judge erred in refusing to charge the jury, that both by the neglect of the bank to transfer the note from the Bank of the State of Missouri to an institution where "current funds" would be received, as they had agreed to do, and by the actual tender of "current funds" by the drawers of the note, and their refusal, the endorsers were for ever discharged, so that no consideration whatever could exist for the draft.

6. And in not charging the jury that neither the draft nor the note were negotiable instruments, and that neither of them created a responsibility in the endorsers.

The case was argued by *Cuyler*, for Smith, plaintiff in error.—He alleged that Newkirk & Son endorsed the note for the accommodation of Heberton & Hibler. He contended that the note was not negotiable, and hence the endorsement created no liability. That the note contained the words "current rate of exchange to be added;" that thus it was not for a sum certain, which was an essential property of a negotiable note: *Chitty on Bills* 153; *2 Miles* 442, a decision on this note. A note payable in current funds is not negotiable: *10 Ser. & R.* 94; *4 Watts* 400; or one payable in foreign bills: *4 Mass.* 245; *6 id.* 188.

But the drawers made a lawful tender, and the tender and refusal exonerated the endorsers: *5 Watts* 262.

The endorsement of the draft created no liability; no money was furnished at the time, and the draft was not negotiable. The attending circumstances, however they may affect Heberton & Hibler, created no liability as to Newkirk and Son. They never communicated with the bank in relation to the draft. As the tender and refusal discharged the endorsers, there was no consideration on which to found a liability as to them. Forbearance, where there is no right of action, is not a consideration for a promise to pay.

McCall and Read, for the Bank.—It was contended that there
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was a new consideration on the part of the endorsers as to the draft, viz. the giving time to Heberton & Hibler, who were liable on the original consideration for the money advanced to them on the discount of the note. They got the money, and were liable to the bank for money paid and advanced.

It is said that they were discharged by the tender by the drawers. This rests on two grounds: 1. That the note was payable in current funds. 2. That tender of current funds discharged the debt. Parol evidence was not admissible to show that the note was payable in any thing but legal currency. The note being payable at St. Louis, must be governed by the law of Missouri; and a case in 9 *Missouri Rep.* 697, decides that a note payable in the currency of the state, is payable in gold or silver, or with notes of the Bank of Missouri. The notes should have been brought into court. Cited 18 *Law Journal* 222; 19 *id.* 268.

Cuyler, in reply.—To pay in currency was the contract. The note being drawn and endorsed in Pennsylvania, the law of this State applies to it. Currency, generally, means *current funds*; in Missouri, currency means specie or currency of Missouri.

The opinion of the court was delivered February 7th, by

GIBSON, C. J.—The note which induced the promise in suit, was in the usual commercial form, and consequently negotiable. The agreement of the plaintiff with the payee, in discounting it, to receive depreciated paper in payment of it, was collateral to the note itself, and could not change its commercial character. According to the uncontradicted testimony of the cashier, there was in fact such an agreement; and it was, consequently, the duty of the plaintiff to instruct its agent at the place of payment to receive such funds as were afterwards tendered at the day and rejected. It is unimportant that the bank of collection had given notice to its correspondents that it would thereafter receive nothing but specie; or its own notes in payment of notes remitted to it for collection. It was the duty of the remitting bank, in this instance, to instruct it to receive payment of this particular note in current paper, as a special deposit; and, as it neglected to do so, or else its correspondent disregarded its instruction, the endorsers are not the parties to bear the loss consequent upon it. It was the duty of the bank here to have the agreement executed on the spot; and it must bear the consequences of its default. It is a principle not merely of commercial law, that prevention of performance by the party entitled to it, is equivalent to performance itself; and to this, the rejection of money, as regards a principal debtor who cannot be injured by it, is, perhaps, the only exception. In this case, the debt would have been paid in discharge of the endorsers who are substantively sureties; and the discounting bank was answerable

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for the act of its correspondent to their prejudice. When the bill was subsequently drawn on the makers of the note, therefore, not only the defendants, but Heberton and Hibler, were discharged from all responsibility whatever.

As it was expressly drawn against depreciated funds, it was not negotiable; but the endorsement of it by the defendants is said to be evidence of a contingent promise. Possibly it may be so; but what consideration was there to support such a promise? Forbearance to sue Heberton and Hibler was no better than forbearance to sue the defendants themselves. But forbearance to sue where there was no right of action, is no consideration at all. It is neither a benefit to the one party nor a prejudice to the other. The compromise of a contested claim is a consideration; but in this instance there had been no contest. The drawers and endorsers of the bill for their benefit and convenience, never suspected that they were not liable on their endorsements of the note. In compromising a contested claim, each party gives up something for the sake of peace; but the plaintiff gave up nothing. It relinquished no right of recourse to the endorsers, and took its chance of being paid on the bill. Nothing could be more unlike a compromise. If the bank here can have recourse to any one—and probably it cannot—it is to its correspondent, the Bank of Missouri.

Judgment reversed.

Drysdale's Appeal.

1. An administrator who has had real estate purchased in for him, when sold on a judgment entered at his instance on a bond in favor of his intestate, and who advances only the costs of the proceeding, the purchase-money being credited on the judgment, is chargeable with a proportion of the amount of the re-sale by him of the premises, in favor of such of the heirs of the intestate as have not confirmed his purchase.

2. The administrator is not entitled to commissions on such re-sale as against the heirs from whom the proceedings were concealed: he is however entitled to credit for a reasonable fee paid to the counsel who conducted the proceeding on the judgment.

3. Though an auditor appointed by the court to audit and settle an administration account also reported a *distribution* of the fund, which part of the report was set aside, the court may decree distribution on the facts reported by him.

4. In the distribution of an intestate father's estate, the statute of limitations may be interposed by the children to claims on simple contract, which were due by them to their father.

5. Where an individual conveys his interest in land to a trustee for payment of certain creditors, and the balance to his wife: *Held*, that after the lapse of more than twenty-two years the law will presume the debts to have been paid and the trust executed, so far as respects the creditors.

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APPEAL from the decree of the Orphan's Court of *Philadelphia county*, by William Drysdale.

Alexander Turnbull, senior, was the owner of eleven tracts of unseated land in Luzerne county, Pennsylvania, upon which, in May, 1826, he went to reside. He had little personal property, and at the time of his death in July, 1826, he had no money. He died intestate. He left a widow and four children, viz. James, Alexander, Margaret, and Jane the wife of William Drysdale, the appellant. James and Alexander had been in partnership in Philadelphia as grocers, and in the spring of 1823, were insolvent. Their father had incurred responsibilities and paid debts for them before that time, and they had executed to him a bond with authority to confess judgment, conditioned for the payment of \$4000 in ten days from the date thereof. The son-in-law, William Drysdale, had taken the widow and unmarried daughter to live with him free of charge, and the widow died there in 1832.

Before the proceedings hereafter referred to were had upon the said bond, Drysdale, the administrator, had filed an administration account on the estate of the said deceased. The balance claimed on its face to be due to the accountant, was \$77.15.

On the 22d February, 1827, judgment was entered on the bond aforesaid, by virtue of the warrant of attorney, in the Common Pleas of Luzerne county, and in August, 1827, the interest of James and Alexander Turnbull, the defendants, in the eleven tracts of land, was sold by the sheriff by execution on the judgment, to the counsel of Drysdale, for twenty-five dollars for each tract. The whole amount of the purchase appears to have been computed at \$250, no part of which was paid in money, except the costs, \$41.71; for the remaining \$208.39, the counsel, as the attorney of plaintiff, subscribed a receipt, as for so much on account of the debt. On the 14th April, 1828, the sheriff executed a deed to the attorney, who, by deed endorsed on the sheriff's deed, conveyed the premises to Drysdale in fee, Drysdale paying him a fee of \$40. The consideration expressed in the deed was \$290, but the administrator appears to have paid no more than the amount charged for costs and the fee to the counsel. The deed from the counsel to Drysdale was put on record.

At this time, the land was not known to contain coal. The discovery was afterwards made, and by deed dated August 24th, 1835, Drysdale and wife and her sister Margaret conveyed the whole of five of the eleven tracts to Dr. Moore in fee. The consideration expressed in this deed, and receipted for at the foot of it, was \$26,320. The accountant never settled any formal account with Margaret Turnbull, but she stated before the auditor that she had received \$3000 in money and her share of a mortgage of the purchaser of the land.

In August, 1826, before the sheriff's sale aforesaid, *James Turn-*

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bull, one of the sons, executed a *sealed* writing, which set forth that during the time he was in business with his brother, they had received from their father upwards of \$6000, which had been received by them for the purpose of carrying on their business, and which he took and considered as full satisfaction and payment of his full share, part, or dividend of the real and personal estate of his father, and he therefore released, acquitted, and discharged his father's widow, the other heirs and *administrator* from the said share, &c., and all actions, &c. The date of this paper is the same with that of the oath of the appraisers, who valued the articles in the inventory filed by the accountant with the register. The daughter testified that none of the family at this time, or for a long time afterwards, entertained a belief that the real estate was of any value proportioned to the price afterwards realized.

In November, 1827, *Alexander Turnbull*, the other son, executed an assignment to William King, Esq., for the consideration of one dollar, and other good causes and considerations, conveying all the real estate of him, the said Alexander Turnbull, whatsoever and wheresoever situate, together with all the goods, wares, merchandise, whatsoever and wheresoever the same may be, whereof the said Alexander is possessed, in trust to sell the same, &c., for the benefit of creditors. At the ensuing term, Alexander applied to the Court of Common Pleas of Philadelphia county, for the benefit of the insolvent laws, and on the 31st December, 1827, he was discharged. He afterwards died in the hospital of Philadelphia, in 1835, about the time of the sale of the Luzerne lands by Drysdale and others. The accountant, however, it is alleged, treated him with kindness. There was no evidence before the auditor that he knew of the sale or intended sale of the lands, and of their improvement in value.

By deed of 1st April, 1840, Mr. King, the trustee under the assignment of 5th November, 1827, for the consideration of one dollar, assigned all the interest in the property of Alexander Turnbull, Jr., vested in him, to Mary Hubber, the former wife of Alexander Turnbull, in trust for her son, James Turnbull, Jr.

The one-half of the land sold in 1835, by Drysdale and others, to Moore, was not involved in this inquiry; the other two-fourths only were the subject of controversy.

Drysedale was cited to settle a further account, and in January, 1839, he filed in the register's office, Philadelphia, a supplemental administration account on the estate of Alexander Turnbull, senior, in which he charged himself with cash received, \$22.39

With the nett proceeds of a judgment and execution in Luzerne county, against Alexander and James Turnbull, 207.39
Balance due administrator, 453.53

\$683.31

6250-
41.57
6250-41.57

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He asked credit for the balance on his first account,	\$77.15
For cash paid on a judgment against intestate,	75.19
For counsel fees, paid in 1827,	100.00
For a payment of a claim of one Mussi, paid in 1827,	150.00
For a payment in March, 1829, to Alexander Hampton, of	113.50
And other payments, the account resulting in a balance in his favor of	\$453.53.

This account was referred to an auditor, who decided that the administrator was chargeable with one-half of the nett proceeds of the resale of the lands, viz. \$13,160; but stating an account between the sons and the estate, in which they were charged with an indebtedness to the estate of the intestate, he reported a sum against the administrator, in favor of James Turnbull, son of the intestate, of \$829.16, and in favor of Mary Hubber, trustee of James Turnbull, Jr., son of Alexander Turnbull, of \$829.16.

Exceptions were severally taken to this report, on the part of James Turnbull, Jr., William King, and the accountant.

The Orphans' Court of Philadelphia made the following decree:

The court, having read the report of the auditor, and heard the arguments of counsel on the same, direct that it be set aside, and order and decree that the administrator of the estate of Alexander Turnbull, deceased, to wit, William Drysdale, be charged with the sum of twelve thousand three hundred and eighty-three dollars ninety-three cents, being the one-half of the proceeds of the real estate referred to in the auditor's report. That the said Drysdale be permitted to retain out of that amount the sum of nine thousand seven hundred and fifty-six dollars, twenty-one cents (\$9756.21,) for himself, in right of his wife and Margaret Turnbull. That he be charged with interest on the one-half of that sum, to wit, four thousand eight hundred and seventy-eight dollars, sixty and one-half cents, from the twenty-fifth day of August, eighteen hundred and thirty-five, to the twenty-fourth day of December, eighteen hundred and forty-seven, to be paid to Margaret Turnbull. That he pay to James Turnbull, or his representatives, the sum of one thousand three hundred and thirteen dollars, eighty-five cents, with interest on the same from said twenty-fifth day of August, to said twenty-fourth day of December, making in all two thousand two hundred and eighty-six dollars (\$2286). That he pay to Alexander Turnbull, or his representatives, the sum of one thousand three hundred and thirteen dollars, eighty-five cents, with interest on the same, from the said twenty-fifth day of August, to the said twenty-fourth day of December, making in all two thousand two hundred and eighty-six dollars (\$2286); and that he pay the costs of the audit, and of the court in these proceedings.

December 24th, A. D. 1848.

An appeal was taken from the decree of the Orphans' Court, and

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the following exceptions were filed on the part of William Drysdale, the appellant :

1. That the said Orphans' Court decreed that said Drysdale be charged with the sum of \$12,383.93, and with interest on \$4878.61 $\frac{1}{2}$, from the 25th of August, 1835.

2. That the said Orphans' Court decreed that said Drysdale pay to James Turnbull, or his representatives the sum of \$1313.85, with interest, from August 25th to December 24th, 1847, in all \$2286, and that he pay to Alexander Turnbull, or his representatives, the sum of \$1313.85, with interest, from August 25th, to December 24th, 1847, in all \$2286, and that he pay the costs of the audit, and of the court.

The case was argued by *Budd* and *Ingraham*, for the appellant.—It was contended that the court below, and the auditor, fell into several errors, from disregarding the facts of the case before them. It is entirely clear, from the auditor's report and the accounts of Drysdale, that the estate of the decedent, Turnbull, was in debt to him in a sum exceeding the purchase-money of these lands. Drysdale, therefore, as purchaser, would have paid money to the sheriff, which, as administrator, he would have had the right to take out and retain for his own use, which the law did not require. *Griffith v. Chew*, 8 *Ser.* § *R.* 17.

Even the judge below, in the decree, credits the administrator with \$453.53 as the balance due to him, so that he did not "purchase the land with the money of the estate," an assumption on which the whole decision and decree is founded. That this error is carried through the whole case is apparent from the authorities referred to by the judge: 1 *Ashm.* 309; 3 *Bin.* 59; 4 *Bin.* 43.

The true state of the case is, that Drysdale, as administrator of A. Turnbull, sold, at sheriff's sale, the interest of Alexander Turnbull, Jr., and James Turnbull—their estate—the estate of *third* persons, not of the decedent. He claimed to purchase it with his own money, and has from the time of his purchase disavowed that he did purchase for the estate. The principle that a trustee cannot buy of *himself* is not applicable to the case of a judicial sale like this, made by the sheriff or other judicial officer. The law appoints the sheriff to make the sale, "and no principle of law or equity invalidates the title of a trustee to land which the law has taken out of his hands, and which he purchased from one appointed by the same authority to sell it." *Prevost v. Gratz*, *Pet. C.C. Rep.* 378; *Fisk v. Sarber*, 6 *W.* § *Ser.* 18.

The fact of the purchase for himself was open and notorious in the place where it was made; the parties, who it is alleged had a right to disturb it, acquiesced for nearly eleven years. One of them never disturbed it at all, nor did his assignee; and the other,

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with a full knowledge of all the circumstances, released all claims, if any he had. A court of equity will not disturb a transaction against which nothing but an artificial rule can be set up, after such a length of time, and with the view to a profit arising eight years after the sale, out of a circumstance unknown to everybody when it occurs.

G. M. Wharton and *Scott*, for the appellees, contended that the first account of the administrator *Drysedale* was of certain personal estate of the decedent, and did not profess to be a final account. The balance claimed on its face was but \$77.15. It was settled before proceedings were had in Luzerne county. The supplemental account was not filed till January 17th, 1839, nearly eleven years after the period at which the accountant alleged himself to have been a creditor to the amount of \$453.53.

There was no acquiescence by any of the appellees. There was no proof of any debts due to the intestate, by the sons, except the judgment, and claims long barred by the statute of limitations.

That the court below had the right to decree distribution : 5 *Watts* 303, *Leisenring v. Black*; 7 *Ser. & R.* 230, *Riddle v. Murphy*.

That a person acting in a fiduciary capacity cannot purchase the trust estate for his own benefit : 5 *Watts* 304, *Leisenring v. Black*; 4 *W. & Ser.* 426-431, *Kinley v. Hill*; 6 *id.* 18-21-27; 10 *Watts* 320; *Fox v. Heffner*, 1 *W. & Ser.* 376.

The general principle of equity is, that if a receiver, executor, factor, or trustee lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money may follow the same, and consider the purchase as made for his use and the purchaser as his trustee : 7 *Barr* 175; 3 *Bin.* 59; 4 *Bin.* 43; 1 *Ashmead* 309.

That an unfaithful trustee is not entitled to compensation : 2 *W. & Ser.* 566, *Dyott's Estate*; 2 *Bro. C. C.* 400, *Fox v. McGrath*; *Hill on Trustees*, 558; 5 *Barr* 413, *Stehman's Appeal*; 7 *Barr* 56, *McCahan's Appeal*.

The opinion of the court was delivered April 30th, 1850, by

ROGERS, J.—That the administrator is chargeable in account with the value of the lands purchased at the sheriff's sale, is a question devoid of difficulty. The administrator, through the medium of the attorney of the estate, purchased the property at the sheriff's sale, as a trustee, for the benefit of the heirs. This is the legal implication arising from the whole transaction. It was paid for with their money, the purchase-money being liquidated by a receipt given to the sheriff on account of the judgment, and no money paid by the administrator out of his own pocket, except the costs and the attorney's fee, afterwards brought into the admi-

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nistration account. The principle of law, in its application to the facts of this case, is plain and simple. An attorney at law, as is held in *Leisenring v. Black*, 5 *Watts* 303, conducting the sale on an execution, cannot purchase land for his own benefit, to the prejudice of his client, for a less sum than the amount of the claim for which it was sold. In the case cited, he is declared to be a trustee. Judge KENNEDY, who delivered the opinion of the court, observes, that "no rule seems to be better settled than that, wherever confidence is reposed in a person, who, from his being placed in such a situation, has it in his power to gain an advantage without the certainty of discovery, by sacrificing the interests of those he is bound to protect, he shall not be suffered to enjoy it except by their consent, and not even then, unless they be competent to part with the right to protection." This is an honest and salutary principle, serving as a check and a protection against fraud. Of the wisdom of the rule, this case affords a striking example. *Leisenring v. Black* is the case of an attorney, and, under the rule there established, it will not be pretended that Mr. Cunningham, the purchaser at the sale, could have held it against the heirs; and it is difficult to discover any reason why an administrator, who also acts in a fiduciary character, can be placed in a better position. It must be remarked, that Mr. Cunningham was the attorney of the estate, and not the attorney of Mr. Drysdale. He was therefore their trustee, and not his; and the same trust attaches to Drysdale, who afterwards took a conveyance in his own name. In addition to *Leisenring v. Black*, may also be cited to the same point, *Riddle v. Murphy*, 7 *Ser. & R.* 230; *Campbell v. Pennsylvania Life Insurance Company*, 2 *Whar.* 53; *Kinley v. Hill*, 4 *W. & S.* 426; and *Fisk v. Sarber*, 6 *id.* 18.

We concur with the court in disallowing the commissions, on the authority of *Swartzwelder's Accounts*, 4 *Watts* 77; *Dyott's Estate*, 2 *W. & S.* 506, and other cases. We have a right to require honesty and fair dealing from every description of trustees. Here all the proceedings were studiously concealed from the parties in interest. Instead of informing them, as he ought in all fairness to have done, that he purchased the property in his own name and for his own use, but with the funds of the estate, he attempts to conceal it from them and afterwards appropriates to his own benefit the profits made by a re-sale of the premises.

We are of opinion that the fee paid to the attorney ought to be allowed the accountant. He was the attorney, as before remarked, of the estate, and not of the administrator personally. We have no reason to believe the attorney was other than he assumes to be on the record, or that he was cognizant of the fact, at the time the services were rendered, that the administrator had any intention to deal improperly with the heirs. Nor is it clear that, at the time

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of the purchase, Drysdale himself intended any thing except what was fair and honest in regard to the estate.

It is objected, that the court erred in decreeing distribution of the fund on the facts reported by the auditor, though they had set it aside because he was not authorized to make it. But in this we perceive neither inconsistency nor error. If, as seems to be conceded, the auditor had no authority to make distribution, there was nothing wrong in setting it aside. But although the auditor had no power, yet it does not follow the court had not. They have, beyond question, ample authority to make distribution; and whether properly exercised in this case, is the only question. The auditor says, that in the course of the hearing before him, the counsel and the parties on both sides treated the case as if he had been authorized to report a distribution of the amount, if any, which might be found due by the accountant. On this point, both parties were heard; nor was it alleged there or here, that there are any additional facts to be produced, which will in any way affect the result. Why, then, send the case to another auditor, if the court have the necessary facts to enable them to make a final decree?

We concur with the Orphans' Court, that all the accounts between the father and his sons, Alexander and James, except the judgment, are barred by the act of limitations. We see no peculiar equity which will debar them from availing themselves of their legal defence to those claims. In the distribution of the fund, they are only to be charged with the amount of the judgment, after deducting the sum for which the land sold at the sheriff's sale.

As to the amount to be distributed, we agree with the Orphans' Court, with the exception of the disallowance of the fee to the attorney. The other parts of the decree are confirmed.

The only remaining question is as to the distribution of the fund. The intestate left two sons, Alexander and James; and two daughters, Margaret, and Jane the wife of Mr. Drysdale. If this were all, the estate would be divided equally between the brothers and sisters. But the difficulty is as to the right of Alexander and James to participate in the fund. Alexander, (since deceased, leaving a son, James Turnbull, Jr.,) on the 5th November, 1827, assigned all his estate, of whatever kind, real or personal, to William King, in trust that he would sell the same, and apply the proceeds to certain creditors therein named, in the order specified; and in further trust, to apply them to the payment, in equal and ratable proportions, to all his creditors, according to their respective debts, and that the trustee, after paying the aforesaid debts and expenses of executing the trust, do and shall pay the balance which may remain to Mary Turnbull, his wife, (afterwards Mary Hubber.) Thirteen years afterwards, viz. 1st April, 1840, William

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King conveyed to Mary Hubber, to whom the balance of the estate is directed to be paid, all the right, title and interest of the property vested in him by the conveyance or assignment, to have and to hold the same, to her, in trust for James Turnbull, Jr., his heirs, executors and administrators. After a lapse of more than twenty-two years since the assignment, the law presumes the debts have been paid and the trust executed, so far as respects the creditors. There is, therefore, nothing in the way of James Turnbull, Jr., for whose benefit the property is held by his mother, Mary Hubber. This disposes of the interest of Alexander Turnbull in favor of his son, James Turnbull, Jr. He unquestionably has such an interest in the estate as entitles him to call for an account.

Next, as to the interest of James Turnbull.

James Turnbull, the 23d August, 1826, reciting that he had received from his father, in his lifetime, upwards of six thousand dollars, which he considers as full satisfaction and payment of all such sums of money, shares, purparts and dividends, on account of his full share, part or dividend of the real and personal estate of the deceased, releases, acquits, and for ever discharges Margaret Turnbull, (widow of the deceased, herself since dead,) the other heirs and administrators, of and from his share and dividend of the estate. It must be remarked, in the first instance, there is nothing in the objection of want of consideration; for apart from the motive which caused the execution of the instrument, as recited in the deed, the seal imports a consideration, as is ruled in *Wentz v. De Haven*, 1 *Ser. & R.* 317; *Coe v. Hutton*, 1 *id.* 408; *Campbell's Estate*, 7 *Barr* 100; *Pratt v. Crocker*, 16 *Johns.* 270, and other cases which might be cited. It being under hand and seal, it requires no proof of any consideration to support it. It is a valid instrument, unless proof be given of fraud in obtaining it. Of this there is no allegation made. The operation of the deed is the same, whether it be viewed as a release, as passing an estate, or *mitter l'estate*, 2 *Black. Com.* 324, as in case of the release of one of two co-parceners who releases her right to the other, that being deemed a privity of estate between the releasor and releasee, or an agreement to convey, which a chancellor would hold it to be, in order to effectuate the manifest intention of the parties. Viewed in either aspect, it passes a fee-simple in this whole estate to Margaret Turnbull and Mrs. Drysdale, the wife of the accountant. From this, it follows that the fund must, in the first instance, be divided into three parts, one-third to James Turnbull, the son of Alexander Turnbull, one-third to Margaret Turnbull, and the remaining third to Mrs. Drysdale. But Margaret Turnbull, the widow of the deceased, being dead, her interest under the conveyance by James, being the one-fourth of one-third, must be divided between all the children, including James himself, who is entitled as one of the heirs and representatives of his mother. In ascer-

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taining the amount due to each, one-twelfth of the fund must be deducted on account of James, the residue divided between Margaret, Mrs. Drysdale, and James Turnbull, Jr., son of Alexander, one-third to each.

The case is referred to the prothonotary to make necessary calculations on the principles stated, in order to a final decree for the distribution of the fund. [He declining, it was referred to B. Gerhard, Esq., who subsequently reported, viz. in June, 1850, and the decree reported by him was afterwards, viz. January 28, 1851, after argument, entered as the decree of this court.]

Heacock et al. *versus* Fly.

Where a conveyance of land was executed to a trustee for the sole and separate use of a married woman, and the latter alone executed a bond and mortgage of the premises for the balance of the purchase-money; as the bond and mortgage were void in law, equity will *rescind* the contract, and the vendor may recover the land on repaying to the feme covert the part of the purchase-money paid by her.

ERROR to the Common Pleas of *Bucks county*.

This was an action of ejectment brought by Anthony Fly against William Heacock, John Alshouse and Susanna Alshouse his wife.

John Alshouse died after judgment was entered in the court below, but before this writ of error was sued out; and his death was suggested upon the record in the court below before this writ was issued. The material facts of the case appear in the special verdict, which is stated in the opinion of his honor Justice BURNSIDE.

The case was tried before KRAUSE, J., by whom judgment was entered in favor of the plaintiff.

It was assigned for error, that the court erred in entering judgment on the special verdict in favor of the plaintiff, when it should have been entered in favor of the defendants.

The case was argued by *Roberts*, for plaintiffs in error.—He contended that where the vendor of land executes and delivers a deed to the vendee, the legal title vesting in the vendee, the vendor cannot sustain ejectment for the land: 3 *Whar.* 19. That the special verdict does not find fraud, mistake, surprise, or accident. But if the parties did mistake *the law*, this would not be sufficient ground to set aside the deed and sustain the action: 7 *W. & Ser.* 253, *Good v. Herr*; 1 *Story's Eq.* 137; 8 *Wheaton* 211; 12 *Peters* 82, 35, 56.

Du Bois, for Fly, defendant in error.—That the contract being made with a married woman, who stipulated to do what the law

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prevented her from doing, was void *ab initio* for the want of proper parties. The conveyance was to a married woman for her separate use, and she attempted to secure the balance of the purchase-money by an inefficient instrument: 6 *Bin.* 427. That this case differs from the case of *McGargel v. Saul*, 3 *Whar.* 20, in the particular that the *bond* in the case under argument is invalid. In this case the mortgage, instead of being executed by the husband and wife, with the separate examination of the wife, or perhaps, by the trustee, was executed by her alone, and not under a separate examination.

The question as to what extent an ignorance of the law will furnish a demand upon the interposition of chancery, is a vexed one, and not very clearly settled in the books. The distinction laid down in 1 *Story Eq.* sec. 115, seems to be this. If the security taken, turns out to be ineffectual, not by fraud or accident, or because it is not what the parties intended it to be, but because, conforming to that intention, they, in executing it, innocently mistook the law, a court of equity would not grant relief, for it was the very security the parties selected, but, by unforeseen events, was not as good a one as they might have selected. But if, on the other hand, there had been a mistake in the instrument, so that it did not carry out the intention of the parties, then he says, it would form a very different case; for where an instrument is drawn and executed, which professes or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or to law, does not fulfil that intention, equity will correct the mistake. See also sec. 118. *Story* refers to *Hunt v. Rousmanier*, 8 *Wheaton* 211.

In sec. 136, *Story* also says, there are some other cases in which relief has been granted in equity, apparently upon the ground of mistake in law. But they will be found upon examination rather to be cases of defective execution of the intent of the parties, from ignorance of law, as to the proper mode of framing the instrument.

In this case, the parties intended to secure the payment of the purchase-money by this mortgage, which, by mistake of the scrivener, did not execute their intention. It was not a mistake as to the legal effect of a mortgage, but a mistake in fact, as to the formality required in its execution, and as to the proper parties necessary to execute it; and in conclusion we would say, that it never could be tolerated in a court of equity, that a vendor of lands shall hold them and also the price agreed to be paid for them.

The opinion of the court was delivered February 6th, by

BURNSIDE, J.—This ejectment was brought by Anthony Fly, against Heacock, John Alshouse and Susanna Alshouse his wife. On the trial, a special verdict was found by the jury, under the

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direction of the court, in which all the material facts are stated. The jury found that Anthony Fly and wife, being seized of the premises in dispute, on the 23d day of November, A. D. 1839, executed a deed of conveyance for the same, consisting of a lot of land of about seven acres, to William Heacock, in trust, to and for the sole and separate use of the said Susanna Alshouse, wife of John Alshouse, and to her heirs and assigns, for the sum of \$500. That at the time of the execution of said deed, the defendant paid to the said plaintiff the sum of one hundred and fifty dollars in cash; and the said Susanna Alshouse at the same time executed a mortgage upon the said tract or lot of land, dated November 23d, 1839, to secure the payment of three hundred and fifty dollars, the balance due on the purchase of said property, together with a bond of even date, *pro ut* mortgage and bond. The said Susanna Alshouse was at the time of the execution of the deed and mortgage aforesaid, and still is a *feme covert*, being the wife of the said John Alshouse; that the said jury in point of law are ignorant on which side they ought upon these facts to find the issue; that if upon the whole matter the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff upon this condition, that if the said defendants shall pay to the said plaintiff the sum of four hundred and fifty-six dollars and fifty cents, on or before the first day of April, 1850, with its interest, then the said verdict shall be void and of no effect; but if the court shall be of an opposite opinion, then they find for the defendants.

The court were right in the opinion that the plaintiff had no remedy on the bond and mortgage, because given by a *feme covert*, without joining her husband, but they reasoned themselves into the belief that the purchase-money mentioned in the bond and mortgage, which they very properly declared to be void, might be recovered in this action of ejectment, and entered a judgment for the plaintiff on this special verdict, which is, that unless the defendants paid the plaintiff \$450.50, with interest, on or before the first of April, 1850, they lose the land. The entering of the judgment is the error assigned in this court.

It would seem to be settled in Pennsylvania, that an ejectment cannot be maintained by the vendor of land against his vendee, or any person claiming under him, to enforce payment of the purchase-money, where a conveyance has been made, and a bond taken for the purchase-money: *McGargel v. Saul*, 3 *Wharton* 19. Nor will ejectment lie in this State to enforce a provision in a deed for the support of the grantor, which was part of the consideration, and amounting to a covenant, but not a condition: *Cook v. Trimble*, 9 *Watts* 15. The court are bound to notice the real parties litigating: 1 *Yeates* 20. Here the defendant in error had parted with his title, and he took a void security for his balance of purchase-money. He cannot recover in this form of action, unless a chan-

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cellor would rescind the whole contract. We use the ejectment in Pennsylvania, instead of a bill in equity. Would a chancellor rescind this contract, and administer justice between the parties? Here they were both mistaken. The vendor got no security that he could enforce either at law or in equity. The vendee believed she gave a lien on the land in question, to secure the balance of purchase-money. Equity will grant relief against acts done and contracts executed under a mistake of facts: *Champlin v. Layton*, 18 *Wend.* 407; and in such cases it is extended as well to the refunding of money paid under the contract as to the annulling of the contract: 18 *Wend.* 407-8, and the cases there cited. I am aware that the civilians are divided on the question, whether money paid under a mistake of law is liable to restitution; with us it is well settled that money paid with a full knowledge of all the circumstances, cannot be recovered back on the ground that the party was ignorant of the law: 7 *W. & Ser.* 253, *Good v. Herr*; 2 *East* 469; *Doug.* 467; 12 *East*. In Kentucky, relief may be granted for mistakes in law: *Fitzgerald v. Peek*, 4 *Littell Rep.* 127. And the law to the same effect is ruled in South Carolina: *Lowndes v. Chisolm*, 2 *McCord's Ch. Rep.* 455. In the latter State, where they are so fond of splitting hairs, they have taken a distinction between ignorance and mistake of the law: *Lawrence v. Beaubien*, 2 *Bailey's S.C. Rep.* 623. Here it is manifest the parties were led into error by the conveyancer. Justice requires that the contract should be rescinded. Their mistake was mutual; and when it is again tried, let there be a verdict for the plaintiff, on his paying Mrs. Susanna Alshouse the \$150 without interest, before an execution of *hab. facias* issues. This is the equity and justice of the case.

Judgment reversed and *venire de novo* awarded.

Pottsville Borough *versus* Norwegian Township.

The law directing that a bridge, which is to be erected on the boundary line of two adjoining townships, shall be erected at the joint and equal expense of the two townships, either township erecting the same, after notice to the other and refusal to join, may recover from the other the one-half of the reasonable expense of erecting a proper bridge.

ERROR to the Common Pleas of *Schuylkill county*.

This was an action on the case, brought by the borough of Pottsville against the township of Norwegian, to recover half the cost of a bridge built on a public road, over a creek, which is the dividing line between the borough of Pottsville and Norwegian township.

The plaintiff, on the trial of the cause, gave evidence proving that the road is one of the great thoroughfares to and from the

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borough of Pottsville; and that there had been a public road and bridge in the same place, over the creek, for more than twenty-one years; and that in the year 1831, a State road from Pottsville to Mauch Chunk had been laid out on the site of the old road, and over the bridge that was then standing over the creek. In the year 1846, this bridge, which was built, like the common canal-bridges, of wood, the timbers resting on log abutments, having become ruinous and dangerous for travelling, the town council of the borough of Pottsville undertook the repair of it. Upon examination, the old bridge was found to be so much decayed, and the travelling over the road so great, that a stone bridge was required as well for safety as economy. The old bridge was therefore removed by the town council of the borough of Pottsville, and a substantial stone bridge, such as the public convenience and safety required, erected in its place. The amount paid for building the bridge was \$1320.

Evidence was given that one of the supervisors of Norwegian township had been consulted, and that he had concurred in opinion with the borough authorities that a stone bridge was necessary, and that he did not object to the building of it.

KIDDER, J., after adverting to the facts of the case, charged the jury that the plaintiff could not recover. The bridge erected was a new structure, and so far as relates to the expenditure of money on the part of Norwegian township, required the action and deliberation of both supervisors. It appears that but one of them, William Robinson, was consulted. We do not learn that Fox, the other supervisor, had any knowledge of the transaction. The principle decided in 8 *Watts* 125 rules this case, and we direct a verdict for the defendant.

Plaintiff excepted to the charge of the court, and asked that the same may be filed.

March 23, 1849, verdict for defendant.

See sections 10 and 34 of act of June 13, 1836, relating to roads, highways, and bridges.

It was assigned for error:

That the court erred in charging the jury that the plaintiff could not recover.

The case was argued by *Parry*, for plaintiff in error.—The building and maintaining the bridge being an equal charge on the borough and township, either was indictable for neglect, and the public interest is not to suffer while private disputes are discussed: *Woolrich on Ways*, 4 *Law Lib.* 163; 13 *Mass.* 294.

The neglect of the township did not excuse the borough: 5 *Burr.* 2594; 12 *East* 192; 1 *Harris* 88; *Platt on Cov.* 274, 3 *Law Lib.* 121; and 6 *Term Rep.* 354.

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The borough being *bound* to repair, can recover a fair proportion of the cost of such a bridge as ought, under all circumstances, to be built: 3 *Bos. & Pul.* 354; 2 *East* 353. In the case in 8 *Watts* 125, *there was no obligation on the township to do the work*, viz. to erect the wing-walls of a bridge, and therefore a contract by one supervisor was not binding on the township.

The building of the bridge was a ministerial act, and one supervisor was bound to act, if the other refused: 9 *Barr* 272. The law favors a thing which is for the public good: *Noy's Maxims* 32.

Campbell, for defendant.—This is not the case of the ordinary repairs of a bridge, but the erection of a new, expensive stone structure, on the site of an old wooden bridge. The act of Assembly relative to county and township officers, whenever it enjoins duties, or confers powers, speaks of commissioners and supervisors, and requires their joint action and deliberation: *Act 15th April*, 1834. The erection of the bridge in question was an act requiring deliberation on the part of the township supervisors. It was a *deliberative*, and not a *ministerial* act. It was said by the court, in *Cooper and Grove v. Lampeter Township*, 8 *Watts* 125, the supervisors must determine whether the creek, rivulet, or gully is such as to require a bridge for the safety and ease of travellers; and in the first instance, decide whether the erection of such bridge requires more expense than the township can reasonably bear, &c.; and this can only be done on deliberation and consultation, and with the express assent and consent of both supervisors. And in the same case, *PER CURIAM*, "It will hardly be pretended that one supervisor could authorize the erection of a bridge without the assent of the other supervisor." In the present case, it does not clearly appear that *one* assented. Signing a township due-bill is a ministerial act; it requires no deliberation: *Dull v. Ridgway*, 9 *Barr* 272.

The opinion of the court was delivered by

COULTER, J.—The case of *Cooper and Grove v. Lampeter Township*, 8 *Watts* 125, does not govern this case.

There one supervisor entered into a contract as to a matter which was a county and not a township concern, without consultation with the other; and in regard to a matter which did not concern the safety of travellers or security of their property. The contracting supervisor, therefore, transcended the authority vested in him by law, and his contract bound himself only. But the case in hand shows a different aspect. The supervisors of both townships were bound by law to build, *maintain*, and keep in repair the bridge in question, inasmuch as the run or creek, over which it is built, is the dividing line between the two townships: *Dunlop* 648. The safety of travellers and the public generally, and the security

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of property required this duty, resting on them all, to be performed. If one was recusant or backsliding, that did not excuse the others. The supervisors or officers of the borough gave notice to one of the supervisors of Norwegian, that the bridge must be repaired, and that the best way to maintain it was to build a new one. He did not object, but said the township was poor, and not in funds, but agreed that the bridge was necessary; moreover, it had been an ancient bridge, over which multitudes of people with their vehicles were accustomed to pass.

It was not necessary, therefore, for the authorities of the borough to wait while the supervisors of Norwegian were higgling about the matter. The safety and convenience of the public required the work to be done. And I commend the promptitude of action in doing it. It is the law which throws the burden on the township of Norwegian, and not the contract of its supervisors; and it must redeem the legal obligation. When the corporation of a township enters into a contract which requires judgment, deliberation and consultation, then it will not be bound unless those who represent it lawfully have assented. Here, however, the duty is prescribed by the higher power of the State, and the execution of it is ministerial. When, therefore, it was done by those on whom the duty rested, although others were bound to contribute, they have a right to recover from those bound to contribute, although they did not assist in the work. The law raises and implies the assumpsit.

But, under the circumstances, the borough authorities may have maintained and erected too expensive a bridge for the *equal* participation of Norwegian, if, as alleged, she is poor. Two things, then, are to be determined: is the bridge necessary; and, secondly, what would be the fair amount of cost for the erection or maintenance of the bridge, consulting permanency and economy, which ought to go together.

These questions ought to be submitted to the jury. The borough has a right to recover a *quantum meruit*, one-half of the fair and reasonable expense of erecting and maintaining a suitable bridge, consulting prudence, economy, and the advance of the county in improvement. What would have been well enough thirty years ago would not be suitable now. The court below erred in deciding that the plaintiff had no right to recover.

Judgment reversed and a *venire de novo* awarded.

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ABANDONMENT.

1. Where one has made a settlement on land west of the Allegheny river, and afterwards leaves it, the law will not presume an *abandonment* at the end of *four* years: and if, at the end of that period, and for several years immediately succeeding it, the land be assessed as unseated, and sold for taxes, in the name of the settler, the purchaser will be entitled to the claim of the improver.—*McCall's Heirs v. Anchors and Smith*, 253.
2. Where a settlement, as required by law, has been made on land in that section, for five years, the commonwealth alone can take advantage of its abandonment; it cannot be alleged by an intruder, in defence of his own possession.—*Id.*

As to ABANDONMENT, see *Hughs v. Pickering*, 297.

ACTION. See LIMITATION, 2.

1. Money lent in Jersey to be bet upon the presidential election, may be recovered in Pennsylvania.—*Scott v. Duffy*, 18.
2. Where the legislature provides a specific remedy for the recovery of damage for injuries sustained by the construction of a work of internal improvement, by a corporation, a party injured cannot have recourse to a common law action.—*McKinney v. Monongahela Navigation Co.* 65.
3. In an action of trespass against three, one of whom plead the general issue, but the others, though appearing to the suit, did not plead: the jury were sworn to try the issue joined, and a verdict was rendered for plaintiff. This is equivalent to the entry of a *nolle prosequi* as to those not pleading, or to a verdict in their favor; and an entry on the *minutes* of the court, stating that the jury were sworn in a suit against the defendant, who plead, and others, cannot be treated as a part of the record, or as inconsistent with it. The presumption is that the jury were properly sworn, and this will not be controlled by the loose entry on the minutes.—*Breidenthal v. McKenna*, 160.
4. In a suit against three, and judgment against one only, an execution against all the defendants is erroneous.—*Id.*
5. Where land was taken at a valuation in the Orphans' Court, by A for himself, and in trust for B, and both subsequently sell to C, who is afterwards appointed executor of the will of A, and in that capacity settles an account in the Orphans' Court; in that account the individual liability of C to B, or his vendee, for the purchase-money, was not involved, and the decree of the Orphans' Court on the account, will not preclude the assignee of B from recovering from C in his individual capacity, any amount due by him on account of his purchase of the land; and, in that suit, the proceedings on his account as executor, were not admissible in evidence.—*Work v. Work*, 316.

ACTS OF ASSEMBLY. See GROUND RENT, 2; CORPORATION, 18.

The act of 10th April, 1849, relative to party walls, does not operate retrospectively upon a suit for compensation for the use of a party wall, instituted before its passage.—*Dannaker v. Riley*, 435.

ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

ADMINISTRATION BONDS.

1. The limitation to an action against sureties of executors or administrators, prescribed by the proviso to the second section of the act of 4th April,

1797, (3 *Smith* 397,) is not applicable to an original administration bond taken by the register, but only to an additional bond given by order of the Orphans' Court.—*Miltenberger v. Com'th*, 71.

ADULTERY. See CONSPIRACY.

AFFIDAVIT. See WRIT OF ERROR.

AGENT.

A clerk in a *retail* store, without the assent of his employer, has no right to sell the goods *by wholesale*, in payment of a debt of his principal, whether due or not due; and such a sale, will not divest the title of the principal. *Hampton v. Matthews and Shaw*, 105.

ALDERMAN. See JUSTICE OF THE PEACE.

AMENDMENT.

1. Where on appeal from the judgment of a justice of the peace, in a suit against A. B. Seitz & Co., the court, before trial, gave leave to amend by substituting the trustee of defendants as party, such alteration is not erroneous.—*Seitz & Co. v. Buffum & Co.* 69.
2. The declaration being against the defendants in their partnership name, there is no such variance between the *narr.* and judgment, after amendment, as will be error. The amendment goes to the whole record. That it was not actually made in the declaration, is not material.—*Id.*
3. That the suit was against defendants, without naming the members of the firm, is cured by verdict.—*Id.*
4. The court may permit the Christian name of a defendant to be added, when he has been sued by his surname only.—*Porter v. Hildebrand*, 129.
5. Amendments in the pleadings are allowable at any time during the trial, if the ends of justice will thereby be promoted, and this must be left, in a great measure, to the discretion of the court.—*Hellings v. Wright*, 373.

APPEAL. See COURT, 1; ARBITRATION, 3.

ARBITRATION AND AWARD.

1. Irregularities in the proceedings of arbitrators under the act of 1836, when apparent on the record, may be corrected by writ of error; but not those which are made apparent by *extrinsic proof*. They can be corrected only by the court below.—*Taggart v. McGinn*, 155.
2. If more be awarded than is due, the remedy is an appeal; not a writ of error.—*Id.*
3. When all the costs taxed are paid on appeal from an award of arbitrators, the appeal is not to be struck off, because afterwards more costs appear to be due. The remedy is an order for payment, which the court may enforce by attachment.—*Williams v. Hazlep*, 157.
4. The agreement of an attorney at law to submit a question of boundary to the action of arbitrators who have been chosen in a suit between the parties, is binding on his client, where the award is not appealed from, the right of appealing having been provided for: and where the question of submission is disputed, parol evidence as to it should be submitted to the jury.—*Babb v. Stromberg*, 397.
5. If the award includes a matter not submitted, it is so far void.—*Id.*

ARTICLES OF AGREEMENT.

In the case of articles of agreement, leasing land with the right to purchase, though such right rests solely with the purchaser, it may be enforced by the purchaser, and such optional right may be transmitted to his vendee: *notice* of this right will be imputed to a second purchaser from the original vendor, by actual possession of the land agreed to be sold, which is consistent with the contract.—*Kerr v. Day*, 112.

ASSIGNMENT.

1. Where an heir agreed that a portion of his interest in real estate, which was about to be sold under proceedings in the Orphans' Court, should be applied to the payment of a debt for which another was his surety; but before the return of sale, he assigned to two others, to whom he was

indebted, a portion of the proceeds of sale, after the payment of the former transfer, and in case the sale be set aside, then he transfers to them his right, title, and interest in the land, or money made by its sale, to the said amount: *Held*, that the second instrument was not a conveyance of the land, but a mere transfer of the land or money to the amount of the indebtedness; and that though the *first sale was set aside*, that still the second transferees took subject to the first agreement.—*Dimond's Estate*, 323.

2. An indenture by which a party covenants and agrees to convey to the parties with whom the agreement is made, or the survivor of them, all his real and personal estate when required by them, in trust to sell the same and apply the proceeds to certain creditors named in a schedule annexed, is a voluntary deed, and not having been recorded within thirty days, is void against creditors by the fifth section of the act of 24th March, 1818.—*Thomas v. Lowber*, 438.
3. An absolute deed between the *same parties*, made subsequent to the agreement in trust, will not avail against a vendee at sheriff's sale, on a judgment against the grantor obtained subsequent to both instruments on a cause of action existing prior to the trust agreement.—*Id.*

ASSUMPSIT.

1. A female, living with her stepfather, whilst in her minority, is not entitled, after arriving at full age, to recover from him wages for services rendered, without proof of a contract, express or implied. Such a contract will not be implied, as to one standing in *loco parentis*, merely from the fact of such service having been thus rendered.—*Lantz v. Frey and Wife*, 201.
2. Where one takes the personal property of another, the owner may waive the tort and maintain assumpsit for its value.—*McCullough v. Same*, 295.

ATTACHMENT.

1. In a proceeding by *foreign attachment*, it is error for the jury to find against the garnishees for a definite sum, without also finding what goods or effects, if any, were in their hands, at the time the attachment was executed, or afterwards, and also the value thereof.—*Hampton v. Matthews*, 105.
2. In an action in assumpsit, on book account, the plaintiff may take judgment at the third term, for default of appearance, in pursuance of the 53d section of the act of 13th June, 1836; and by the 73d rule of the District Court of Allegheny county, the prothonotary may liquidate the amount.—*Id.*
3. *Foreign attachment* will not lie upon a demand founded in *tort*. It will not lie to recover from common carriers, damages for the loss of a trunk, where the declaration was *in tort*, and not *in contract*.—*Porter v. Hildebrand*, 129.
4. A writ of foreign attachment in Pennsylvania, executed upon *real estate*, binds the same from the time of its execution and before judgment, as well against subsequent judgments as against purchasers and mortgagees.—*Schacklett & Glyde's Appeal*, 326.
5. In the case of a proceeding by attachment under the 27th section of the act of 12th July, 1842, to abolish imprisonment for debt, where the justice had entered a non-suit on account of a copy of the attachment not having been served upon defendant, a bond given under the proviso to that section, is binding on the sureties of the plaintiff in the proceeding, even though the latter clause, as to *failure in the action*, has been omitted in it.—*Hibbs v. Blair*, 413.
6. Nor is such a bond void against a surety of the plaintiff merely because the penalty to a small extent exceeds double the amount of the plaintiff's claim.—*Id.*
7. Where such an attachment has been levied on property of the defendant therein, and a non-suit has been entered, by the justice on account of defendant not having been served with a copy of the attachment, the

condition of the bond of the plaintiff and his sureties is thereby broken, and the defendant in the original proceeding may recover upon it.—*Id.*

8. It is not necessary that the principal in such a bond be first pursued, and his liability fixed, before a surety in the bond can be sued.—*Id.*
9. In a suit on the bond by the defendant in the former proceeding against the surety in the bond, it is not error to refuse to permit the surety to show that the plaintiff in the suit trying obtained credit from the plaintiff in the former suit, by false representations as to his means of payment; nor in overruling an offer on part of the surety to prove that the plaintiff in the suit trying, had confessed judgments in favour of other creditors than the plaintiff in the former suit in which the bond was given, and had requested them to issue execution. Such evidence is irrelevant to the issue in the suit on the bond against the surety.—*Id.*

ATTORNEY. See DEED, 9.

1. An attorney at law, without special authority, has no right to take land for the debt of his client; and an agreement by him with a debtor, to buy in the land mortgaged and release him from the debt, for which agreement no consideration was paid, and the declining to do which produced no injury to the debtor, is no defence by the debtor, to the payment of the debt.—*Stackhouse v. O'Hara's Executors.*—88.
2. The agreement of an attorney at law to submit a question of boundary to the action of arbitrators who have been chosen in a suit between the parties, is binding on his client, where the award is not appealed from, the right of appealing having been provided for: and where the question of submission is disputed, parol evidence as to it should be submitted to the jury.—*Babb v. Stromberg*, 397.
3. If the award includes a matter not submitted, it is so far void.—*Id.*

AUDITOR. See ORPHANS' COURT, 8.

AWARD. See ARBITRATION AND AWARD.

BAIL. See ATTACHMENT, 5—9; also, PRINCIPAL AND SURETY.

BANKRUPT.

- A surety, who, after the discharge of his principal as a bankrupt, pays instalments of a debt of the principal, which became payable since the discharge, but for which the surety was bound before the application of the bankrupt, is not entitled to recover the same from his principal.—*Fulwood v. Bushfield*, 90.

BILL OF EXCEPTIONS.

1. This court will confine its attention to what is presented in the bill of exceptions, and its proper appendages.—*Forsyth v. Matthews*, 100.
2. A bill of exceptions may contain a recital *in extenso* of the evidence, or may consist of a condensed statement of such of the facts proved, or which the testimony tended to prove, as is necessary to comprehend the points ruled, and the instructions to the jury.—*Id.*

BILL OF EXCHANGE. See PROMISSORY NOTE.

BRIDGE.

The law directing that a bridge, which is to be erected on the boundary line of two adjoining townships, shall be erected at the joint and equal expense of the two townships, either township erecting the same, after notice to the other and refusal to join, may recover from the other the one-half of the reasonable expense of erecting a proper bridge.—*Pottsville v. Norwegian*, 543.

CHANCERY. See COURT, 1; CONTRACT, 3.

A court of chancery will grant an injunction to restrain and prevent a nuisance, when the facts are not doubtful and the threatened injury irreparable; and the chancery powers of the District Court of Allegheny county authorize the issue of an injunction in such a case.—*Com'th v. Rush*, 186.

CHURCH. See LIMITATION, 8.

COLLATERAL INHERITANCE TAXATION. See **TAXES.**

COMMONWEALTH. See **TAXES.**

COMMON CARRIERS.

A carpenter may recover from carriers, the value of tools contained, with clothing, in his trunk, which has been lost by the carriers, the jury having found that they were the reasonable tools of a carpenter.—*Porter v. Hildebrand*, 129.

CONSIDERATION. See **PROMISSORY NOTE**, 11.

CONSPIRACY.

Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act. There is no such offence as a conspiracy between a man and a woman to commit adultery.—*Shannon v. The Com'th*, 226.

CONSTABLE.

1. When property in goods levied on by a constable, is claimed by another than the defendant, the constable is not bound to proceed to the further execution of the writ without sufficient indemnity; but having demanded and accepted indemnity, he must proceed, and rely on his bond for indemnity.—*Corson v. Hunt*, 510.
2. The measure of damages in such an action is the value of the property, when it does not equal the amount of the debt.—*Id.*
3. Whenever the defect in a declaration is such as is amendable by leave of court, it is cured by the verdict. A neglect to aver in the declaration, in a suit against a constable for not executing an execution, that the alderman had jurisdiction of the case in which the execution was issued, is a defect merely in form, which might have been amended.—*Id.*

CONSTITUTIONAL LAW.

The 8th section of the act of April 25th, 1850, relative to actions for enforcing the payment of *ground-rent*, is constitutional as it respects actions then pending; because it operates on the *remedy*, not the *right*.—*Taggart v. McGinn*, 155.

CONTRACT.

1. Where a clock is sold to be paid for at the expiration of a year, on condition that it performs to the satisfaction of the vendees, the vendees to be relieved must return the clock, or offer to return it, with notice of their dissent, within a reasonable time; and if foreign residence in the vendor be alleged by them, the vendees must prove it; if he lives in a sister State, they must prove that they had attempted to reach him through the post-office; and if his residence was *unknown*, they must show that they had endeavored to discover it. Failing in these respects, the contract to pay will be absolute.—*Dewey v. Erie Borough*, 211.
2. Where there is an agreement to give a person work for a year, but he is discharged, before its expiration, without good cause, he is entitled to recover the amount of damage sustained.—*Stewart v. Walker*, 293.
3. Where a conveyance of land was executed to a trustee for the sole and separate use of a married woman, and the latter alone executed a bond and mortgage of the premises for the balance of the purchase-money; as the bond and mortgage were void in law, equity will *rescind* the contract, and the vendor may recover the land on repaying to the feme covert the part of the purchase-money paid by her.—*Heacock v. Fly*, 540.

CORPORATION. See **TURNPIKE.**

1. Where the legislature provides a specific remedy for the recovery of damage for injuries sustained by the construction of a work of internal improvement, by a corporation, a party injured cannot have recourse to a common law action.—*McKinney v. Monongahela Nav. Co.*, 65.
2. A municipal corporation is liable for the contracts of its officers, even when not expressly authorized, when such contracts were entered into publicly and in such a manner as to be within the knowledge of the corporators. The City of Allegheny is, therefore, liable for scrip under the

denomination of five dollars, issued by its corporate officers, with twenty per cent. interest thereon, by the provisions of the act of 12th April, 1828, forbidding the circulation of small notes.—*Allegheny City v. McClurkan & Co.*, 81.

3. The act of 12th April, 1828, is not repealed by the resolution of 1st June, 1842: this latter merely increased the penalty for issuing such notes.—*Id.*
4. Municipal corporations are within the provisions of the act of 1828.—*Id.*
5. A suit against such a corporation, for issuing small notes, is not barred by the 6th section of the act of March 29, 1785, because not brought within two years after the issuing of the notes: the 20 per cent. is not a *forfeiture*, incurred at the time of issuing the notes.—*Id.*
6. Though the holders of such notes may have distinct remedies against the corporation and the officers who signed the notes and gave them currency by their names, they can have but one satisfaction.—*Id.*
7. The appointment of watchmen or night police for the city of Pittsburgh, exists in the city councils, and not in the mayor.—*Com'rs v. The Mayor of Pittsburgh*, 177.
8. The charter of a municipal corporation is not liable to forfeiture for the misconduct of its officers, not affecting the rights of the public. The usurpation of authority may be corrected, or disputes between its functionaries settled, by appropriate proceedings, without disturbing the charter.—*Id.*
9. In a proceeding against a municipal corporation, to show cause why a writ of *quo warranto* should not issue to appear and show by what authority it exercised certain franchises, the court can pronounce no other judgment than a forfeiture of franchises and of the charter.—*Id.*
10. By the term *law*, in the fifth section of the act of 8th April, 1833, relative to the mayor of Pittsburgh, the legislature meant not *ordinances or by-laws of the corporation*, but the public laws or statutes, which conferred important powers on the mayor, as for example, as a conservator of the public peace.—*Id.*
11. Municipal corporations may perform portions of their business through the instrumentality of committees.—*Id.*
12. The common or public square in the city of Allegheny is dedicated to specific public uses, as mentioned in the 4th section of the act of 1787; and although not a common public highway, yet the public have rights and interests therein of which they cannot be deprived.—*Com'rs v. Rush*, 186.
13. That although the legal title to said square is vested in the corporation of the city of Allegheny, they hold subject to the trusts in favor of the community, and are but the conservators of the title and soil, and have no power or authority to sell and convey the same for private purposes.—*Id.*
14. That the erection of a private dwelling-house on said square is a public nuisance, and cannot be justified by any title or authority derived from the city corporation, but is indictable in a criminal court.—*Id.*
15. In a suit by the Mahoning Navigation Company, for subscription for stock, proof of the act of incorporation, the certificate of the commissioners, and the letters-patent, are sufficient to establish the right to sue. The organization by the election of officers, need not be proved, though laid in the declaration; being unconnected with the plaintiffs' right to sue, and not entering into the foundation of the action, it might have been stricken out, as surplusage.—*Grubb v. Mahoning Nav. Co.* 302.
16. *Immaterial* matter which must be proved, if laid, is that which enters into the *foundation of the action*. For distinction between immaterial and impertinent averments, see the opinion in this case.—*Id.*
17. In a suit not for the *penalty* prescribed, but for the amount of subscription, previous notice to pay need not be proved, in order to recover.—*Id.*
18. In the case of a writ of error by a corporation, the affidavit required by law may be made by an agent of the corporation, though he is not

expressly deputed for that purpose. The fourth section of the act of 22d of March, 1817, relative to suits brought by or against corporations, is not repealed, as respects such affidavits, by the third section of the act of 11th June, 1832, relative to affidavits in suing out writs of error. — *Academy of Fine Arts v. Power*, 442.

COSTS. See **ARBITRATION**, 3; **TRESPASS**, 1.

1. In actions of trespass *quare clausum fregit*, the forty shillings prescribed as the minimum of damages, which will entitle a plaintiff to full costs, is to be reckoned in *Pennsylvania* currency, and not in sterling money. — *Chapman v. Calder*, 357.

COURTS. See **PRESUMPTION**, 1.

1. A court of chancery affects no superiority over a court of law, or its officers; and on appeal to this court from a decree, dismissing a bill, which prayed the court for an order on its sheriff to deliver a deed, this court will not interfere with the decree of the lower court. — *Stephens v. Forsyth*, 67.
2. A judgment of a court is not conclusive, unless it be upon the same subject-matter. — *McClure v. McClure*, 134.
3. The Circuit Court of the United States is not a *foreign* tribunal. Its seal proves itself, in our courts, like the seal of our own State courts. The authentication of its proceedings is not within the provisions of the act of Congress relative to authenticating records and judicial proceedings. — *Williams v. Wilkes*, 228.
4. The Supreme Court possesses an inherent power to revise the proceedings of all inferior jurisdictions, in order to correct errors on their face, but not to rejudge their judgments on the merits. This revisory power has been taken or withheld from it, by the act of July 2d, 1839, to provide for the election of prothonotaries, &c.; the determination of the Common Pleas, as to the election of a prothonotary, being, by the 5th section of that act, final. — *Carpenter's Case*, 486.

COVENANT. See **GROUND-RENT**.

1. In *Pennsylvania*, specific enforcement of a contract by ejectment depends upon the equity and justice of the case. — *Remington v. Irwin*, 143.
2. Though time may be made material by the express stipulation of the parties, even as to the payment of money, yet where no material change has taken place before tender of performance, as to the value of the property, or the condition of the parties, and where the time admits of compensation, the mere non-payment of the purchase-money on the day fixed, and delay for a month, will not excuse the vendor from performing his contract. — *Id.*
3. Where the covenants are mutual, and to be performed at the same time, the vendor, desiring performance, must perform or tender performance of his part of the contract, at the time fixed; and if, on non-compliance by the vendee, the vendor desire to terminate the contract, he should then so notify the vendee. If he does not do so, the contract may be enforced by the vendee, notwithstanding the payment of the purchase-money be, for a short time, delayed, no material change having taken place in the value of the property, or the condition of the parties. — *Id.*
4. A written agreement for the sale of land cannot be altered by a *subsequent* parol agreement. In equity, a written agreement may be rescinded by parol, but to rescind, the party desiring it must place the opposite party in the situation he occupied when the contract was made. — *Espy v. Anderson*, 308.
5. If a judgment remaining unsatisfied on the judgment-docket is actually paid, it is to that extent a compliance with the agreement to convey clear of all encumbrances, though the judgment remains open on the judgment-docket. — *Id.*
6. A tender of the *whole chain of title* is not necessary to enable the vendor to recover the purchase-money; the tender of the deed alone is sufficient. — *Id.*

7. Where the plea of defendant in an action of covenant, does not deny the title, it lies on him to prove it defective.—*Id.*
8. A covenant to convey in fee simple clear of all encumbrances is satisfied by a deed in fee simple with special warranty—a general warranty is not necessary.—*Id.*
9. Where a conveyance of a lot of ground and the buildings on it is made with covenant of general warranty of title, and another person afterwards lawfully removes from the premises a building erected before the conveyance, under a previous agreement with the grantor's agent, a right of action does not accrue to the grantee till the building has been removed: and the limitation does not begin to run till the building has been removed.—*Stewart v. West*, 336.
10. A covenant of *seisin* may be broken as soon as the deed is delivered; but under a covenant of warranty of title, a right of action does not accrue till the paramount owner has entered or exercised his right of ownership to the prejudice of the vendee.—*Id.*

CUSTOM. See EVIDENCE, 19.

DECEDENTS. See JUDGMENT, 2, 3.

1. The limitation, by the act of 24th February, 1834, of the lien of a decedent's debts to a period of five years, is extended to a period of ten years, by an action brought and judgment recovered against the personal representative alone, within the first period.—*Schwartz's Estate*, 42.
2. An action of debt, professedly based on the first judgment, but to which the heirs of the decedent are made parties, may be regarded as an original action, in which the parties are bound to set up every available defence, and a judgment recovered for want of a plea, will preclude them from afterwards averring payment before the second judgment, in a collateral proceeding.—*Id.*
3. The second action being brought within five years after the decedent's death, is of itself sufficient to continue the lien of his debts for the second period of five years.—*Id.*
4. A judgment creditor, who, as the agent of the widow, received rents to which she was entitled under the will of her husband, is not liable to account for them, by crediting them on his judgment.—*Id.*
5. A non-joinder of any of the heirs, must be taken advantage of by plea in abatement.—*Id.*
6. That a minor was *personally* summoned, constitutes no objection on the part of other defendants; and that the wife of the judgment creditor was not joined in the proceeding on the judgment, is not a ground of objection by the other heirs.—*Id.*
7. Under the 34th section of the act of 24th February, 1834, relating to executors and administrators, in order to divest the interest of heirs in real estate, by sheriff's sale, it is necessary to make them parties to the proceeding, even though the suit on which the sale took place was commenced against the administrator *before* that act was passed. The case is not within the exception in the 70th section of that act.—*Warden v. Eichbaum*, 121.
8. As to decree for *specific performance*, see ORPHANS' COURT, 2, 3.
9. A judgment before a justice of the peace against the administrator of an heir to real estate, with notice by the summons, to his widow and the guardian of his children, which is not entered in the Common Pleas, is not a lien either on the land or the fund produced by its sale.—*Diamond's Estate*, 323.
10. After judgment against the executor, *scire facias* may be issued thereon against the devisee, under the 34th section of the act of 24th Feb. 1834, relating to executors, in which proceeding judgment may be entered against the devisee.—*Moore v. Skelton*, 359.

DECEIT.

In an action on the case for a deceit in recommending one as responsible, who was not so, the suppression of the indebtedness of the individual, is not a *legal* fraud. It is *evidence* of actual fraud, but not conclusive;

and actual fraud is necessary to maintain the action.—*Bokee & Co. v. Walker*, 139.

DECLARATION.

1. Immaterial matter which must be proved if laid, is that which enters into the foundation of the action. For distinction between immaterial and impertinent averments, see the opinion in this case.—*Grubb v. Mahoning Nav. Co.* 302.
2. Whenever the defect in a declaration is such as is amendable, by leave of court, it is cured by the verdict.—*Corson v. Hunt*, 510.

DEED.

1. The delivery of a deed may be inferred from circumstances, the actual manual investiture of it need not be proved. The signing, attestation, and the acknowledgment by the grantor, and the recording of it, are *prima facie* evidence of delivery.—*Rigler v. Cloud*, 361.
2. Where a deed, made by a husband in Pennsylvania, to a resident in Trenton, New Jersey, in trust for the use and benefit of his own wife and her heirs, and attested by one witness, is acknowledged by the grantor before the Mayor of the city of Trenton, whose certificate is subscribed with his name and the seal of the city affixed; this acknowledgment is a substantial compliance with the provisions of the acts of 28th May, 1715; act of 23d March, 1819, and of 16th April, 1840, in relation to the acknowledgment of deeds.—*Id.*
3. It does not lie with the grantor, fifteen years after the execution and acknowledgment of a deed, to object to a mere irregularity in his acknowledgment, and especially where no subsequent alienee for value is interested.—*Id.*
4. A deed and declaration of trust made at the same time are to be treated as one transaction.—*Greenfield's Estate*, 489.
5. When a gift of real and personal estate is executed or otherwise fixed in the beneficiary, either by a direct conveyance of the estate or the creation of an use, it is beyond the power of the donor or his representative to revoke it. If fairly made and carried into effect, uninfluenced by fraud or circumvention, it cannot be subsequently impeached.—*Id.*
6. A voluntary conveyance of real estate made by one not indebted, or who reserves sufficient to pay his existing debts, cannot be impeached by *subsequent* creditors, unless it were made in anticipation of future indebtedness.—*Id.*
7. The difference between a deed and a will is not in the form but effect of the instrument; which, if it convey an estate *in presenti*, cannot be a *will*, for that operates only *in futuro*.—*Id.*
8. The general rule is that a party executing a legal instrument is presumed to be acquainted with its contents. Where it is unconnected with suspicious circumstances and uninfluenced, actually or presumptively, by the relation between the maker of it and the party to be benefited by it, the burden of disproving the presumption lies on him who would impeach the deed.—*Id.*
9. A provision in a voluntary deed in favor of the counsel who drew or advised it, for his services to be performed as a trustee under it, with the further provision that the said trustee may resign the trust to the other trustees without forfeiting the compensation, is void, at least unless it be proved that the grantor knew of the particular provisions, and, without influence from those interested, assented to them. *If a doubt exists* in this respect, the provision for compensation is invalid; and the provision in favor of the other trustees who acted in the arrangement of the matter, through the counsel, or in connection with him, is also invalid. The trustees may, however, be decreed compensation by the proper tribunal.—*Id.*
10. The invalidity of the provision in favor of the trustees does not invalidate the trust in other respects which are distinct and separate from the interests of the trustees.—*Id.*
11. Where, by the terms of the instrument by which the trust is created, the

trust is to include whatever of the income and profits from the estate are unappropriated by the grantor at her death, the administrator of the estate of the grantor is not entitled to the unexpended balance of the income and profits.—*Id.*

12. The recording of a deed is but evidence of delivery; and it is not conclusive; the vendee may reject the deed, though it be recorded, if not previously accepted.—*Juvenal v. Jackson*, 519.

DEMURRER.

1. On a demurrer to evidence, the party demurring admits all the facts which the evidence tends or conduces to prove in the slightest degree, or which the jury might, with the least degree of propriety, have inferred from it; and no testimony can be considered, which impugns its truth.—*Davis v. Steiner*, 275.
2. On a demurrer to evidence, exceptions as to variances between the declaration and proof, will not be very critically examined.—*Emerick v. Kroh*, 315.

DEVISE. See WILL.

DOWER.

To defeat a widow's right of dower, the proof must be clear.—*Gangwer's Estate*, 417.

EJECTMENT. See COVENANT, 1, 2, 3.

1. The declaration of a former owner of land, adjoining to that in dispute, made in the presence of his adjoiner at the time of the running of the line between their lands, that a certain tree was a corner between them, is evidence in an ejectment between the adjoiner and another.—*Mills v. Buchanan*, 59.
2. In an action of ejectment, a former claimant and occupant, whose possession was necessary to make up the continuity of adverse possession for twenty-one years, is competent to show that he did not hold adversely to the adjoining owner of the land in dispute in the case.—*Id.*
3. Where two marked trees exist, and the line from a known corner, by the course of the original survey, will not strike both of them, it is to be run diagonally between them.—*Id.*
4. In Pennsylvania specific enforcement of a contract by ejectment depends upon the equity and justice of the case.—*Remington v. Irwin*, 143.
5. When time is material, see above case, 143.
6. In the case of an ejectment where part of the land is claimed under a legal title, and part under a parol sale without delivery of possession, but where the sale is testified to, on the part of the plaintiffs, by the heirs who made the parol sale, and affirmed by them, it does not lie with the defendants, who claim merely by possession less than twenty-one years, to object that the parol sale is avoided by the statute of frauds and perjuries. Where the vendors acquiesce in the sale, it is not allowable for an intruder to plead claim in them, in defence of his own possession.—*Christy v. Brien*, 248.
7. Where two persons purchase land by article of agreement and make partition between themselves, and one of them being in possession of the share of his co-tenant, under a lease from his widow, whom the heirs had agreed might enjoy the land during her life, an ejectment is brought against him, by the vendor, to recover the balance of the purchase-money remaining unpaid on the share of the co-tenant, and he pays the same; he is not bound to deliver up the possession till he has been reimbursed his advances for payment of the purchase-money, with interest, and the costs of the said ejectment:—He cannot, however, retain the possession as a security for other debts of the intestate, paid by him as administrator of his estate.—*Leitch v. Little*, 250.
8. Where a dispute exists as to whether marked trees, then existing, were corners of surveys, or whether the corner was at another tree which has been destroyed, great respect will be paid after the lapse of three-fourths of a century to the return of the deputy surveyor. Slight evidence as

- to lines and corners supposed once to have existed, will justify a jury in presuming that the survey was made as returned.—*Wray v. Miller*, 289.
9. Where a trespasser on land commences an improvement, and makes a gift of his right to another, or authorizes a sale of it, and leaves the possession, and it is sold, and the vendee takes possession in pursuance of the contract, the possession of the trespasser can be tacked to his own, so as to give title to the vendee, by the statute of limitations.—*Hughes v. Pickering*, 297.
 10. Where the possession of a trespasser is *abandoned*, the law casts the possession on the legal owner; but to constitute abandonment and create a vacancy to produce that effect, the title of a subsequent holder must be *unconnected* with the title of the previous holder; but when the entry of the subsequent holder is with the permission of the previous holder, the former may tack the one possession to the other: and *actual possession* by the *first* holder at the time of the entry by the second, is not necessary to authorize that result.—*Id.*
 11. If a settler designate his boundaries by the lines of the surrounding surveys, his vendee can claim the land within those boundaries; if otherwise, he can claim only the part actually enclosed and improved.—*Id.*
 12. In an ejectment by a vendor against a *purchaser from the vendee*, to enforce the payment of purchase-money due by the vendee, where the vendee has not paid to his vendor any part of the purchase-money or made valuable improvements, the defendant cannot set up the weakness of the title of the first vendor, in defence of his own possession. He must either pay the purchase-money or relinquish the possession, unless fraud has been practised upon him. Nor can he set up an outstanding title in another, or an adverse title in himself; and his payment of part of his purchase-money to the vendee will not affect the claim of the vendor, unless he was connected with the vendee in the second sale.—*Jackson v. McGinness*, 331.
 13. The act of 21st April, 1846, relating to equitable actions of ejectment to enforce the payment of purchase-money, limiting a vendee to one ejectment, applies only to actions *founded on the contract*; and the act does not apply where the purchase-money has been paid by the vendee before he institutes an action of ejectment.—*Paul v. Oliphant*, 342.
 14. *Query*: Whether an award of arbitrators is equivalent to the verdict of a jury under that act?—*Id.*
 15. Whether the record of an action of ejectment is conclusive, under the act of 1846, must be judged of from the record alone. If not, on its face, such a conditional verdict as the act requires, the omission cannot be aided by parol evidence.—*Id.*
 16. Where a record was received in evidence for one purpose, it will not be allowed in this court a different quality, not asked for it in the court below.—*Id.*
 17. Where, after the institution of an action of ejectment by a vendor, to enforce the payment of purchase-money and judgment therein, a person, in contemplation of becoming trustee for creditors of the vendee, pays the purchase-money and acquires the legal title, he cannot afterwards set up that title to defeat the trust.—*Id.*

ELECTION. See PROTHONOTARY.

EQUITY. See CHANCERY.

ERROR. See WRIT OF ERROR.

1. If in an action trying, it be agreed that the court should decide the law on the *undisputed* facts, yet, if evidence offered by defendant be erroneously rejected, this court cannot say, had the disputed evidence been admitted, that it would not have been disputed, or the whole case submitted to the jury. Whether the court adjudicated on the excluded evidence or not, the judgment must be reversed.—*Hopkins v. Forsyth*, 34.
2. A party objecting to evidence, is to be confined to the ground of objection taken in the court below.—*Mills v. Buchanan*, 59.

3. A party is entitled to such an answer, to a point, as is intelligible to the jury.—*Id.*
4. This court will confine its attention to what is presented in the bill of exceptions and its proper appendages.—*Forsyth v. Matthews*, 100.
5. Where the direction of the court tends to withdraw the attention of the jury from the conflict of testimony which it was the province of the latter to dispose of, it is error.—Therefore, where a dispute existed as to the height of water raised by a dam, and the court referred the jury, as to its cause, to changes in the bed of the stream above the dam, which this court consider impossible, the judgment was reversed.—*Bovard v. Christy*, 267.
6. The expression of an opinion by the court as to the insufficiency of evidence, which is, however, referred to the jury, is not error.—*Schoneman v. Fegley*, 376.
7. Where the answer of a witness works no injury, the court will not reverse on account of the question being allowed to be put.—*Id.*
8. If an inaccuracy in the charge of the court may have led the jury to a false conclusion, it is not an answer to suggest that probably, the jury understood the instruction differently from that which the language used indicated.—*Brown v. Clark*, 469.

EVIDENCE. See PROMISSORY NOTES, 3; also, WILL, 2, 5, 6; ACTION, 4; PARTNERSHIP, 1—10.

1. The quantity of land which passes by a sheriff's sale to the purchaser, is to be ascertained by the extent of the levy.—*Hoffman v. Danner*, 25.
2. The right of construing the written return of the sheriff generally belongs to the court, and the quantum of estate conveyed by a sheriff's deed is usually referable to the court alone; but where, from the generality of the terms used or from uncertainty of description, a doubt is raised as to the boundaries of the levy or the position or limits of the land sold, evidence aliunde may be resorted to, and where such evidence is received, it is error for the court to direct peremptorily how the verdict is to be rendered.—*Id.*
3. A party objecting to evidence, is to be confined to the ground of objection taken in the court below.—*Mills v. Buchanan*, 59.
4. That a deed was rejected on a former trial between the same parties is no conclusive objection to its admission on a subsequent trial, especially where the evidence, as to its execution, is different and improved. And where its execution is proved by the subscribing witnesses, and also by the declarations of the grantor, and there is evidence of its being and having been in the possession of the grantee, though this be not conclusive, it is proper to submit the question of its delivery to the jury.—*Harden v. Hays*, 91.
5. That the memory of a witness has been strengthened by time, may detract from its credit, but does not affect its competency.—*Id.*
6. Where the declarations of a grantor are offered to be proved, in order to show, that at the time of making them he was *non compos mentis*, and to raise the inference that he was insane about twelve years before, when a deed was executed, and the adverse party admits that the grantor was insane at the time he made the declarations, it is not error to reject the declarations: Besides, the declarations of one, admitted to be insane at one time, are no evidence that he had not, at a former time, executed the deed.—*Id.*
7. The order of evidence is within the discretion of the court, before which the cause was tried.—*Id.*
8. Where it was offered to be proved that a deed was executed in pursuance of a parol contract: *Held*, that there was no inconsistency between the claim of title by deed and the title by parol. If the first failed, the party had the right to rely on the other, if proved.—*Id.*
9. In an action of trespass against a sheriff for selling the goods of A, on an execution against B, B is a competent witness to prove that the goods belonged to A.—*Forsyth v. Palmer*, 96.

10. In such an action, the sheriff may show, in mitigation of damages, that the goods were bought in for the plaintiff *at an under price*. The measure of damages is the extent of the loss sustained by the plaintiff;—what it cost him to redeem them.—*Id.*
11. The court is to judge of evidence offered to prove the incompetency of a person offered as a witness, who is objected to as being a partner with the plaintiff.—*Lyon v. Daniels*, 197.
12. The mere fact of evidence being *in writing* does not entitle the court to interpret its meaning conclusively. Where it is unaffected by parol evidence, it is within the province of the court to interpret it; but where the question is not on the interpretation of the writing, but on its effect as evidence of a collateral fact, it is to be submitted to the jury.—*Reynolds v. Richards*, 205.
13. Where an article of agreement was made for the sale of land, part of which to be paid in cash, and part in work, and a note was given for the latter amount, on the payment of which the title to be made; an order by the vendor to execute the deed, is not so conclusive as to the payment of the note, as to raise a legal presumption of its payment; it is presumptive evidence of payment, which is to be submitted to the jury.—*Id.*
14. Where a record was received in evidence for one purpose, it will not be allowed in this court a different quality, not asked for it in the court below.—*Paul v. Oliphant*, 342.
15. In an action by a husband for a conspiracy to induce his wife to leave him, the declarations of the wife, made on the day previous to her departure, of *former* causes of complaint against her husband, are not evidence on the part of defendants, as *res gestæ*.—*Kidder v. Lovell*, 214.
16. The seal of a Circuit Court of the United States proves itself, like the seal of our own State courts. The authentication of its proceedings is not within the provisions of the act of Congress, relative to authenticating records and judicial proceedings.—*Williams v. Wilkes*, 228.
17. The declarations of a vendor, made in the absence of the vendee, that he had sold the personal property in question for the purpose of preventing his creditors from collecting their debts, are not admissible against the vendee: nor that he would not pay a particular creditor.—*Scott v. Heilager*, 238.
18. Nor can evidence be given by a witness, of his belief that it was generally known at a furnace, at which the vendor and vendee worked, at the time of the purchase, that the vendor was in debt, it not proving fraud in the purchaser.—*Id.*
19. When a witness disclaimed knowledge of the fact whether a receipt had been given by him for a note, the fact could not be proved by evidence of a general practice on his part.—*Schoneman v. Fegley*, 376.
20. Where the object of offering entries in a book was not to prove a sale and delivery of goods, but as memoranda to identify the subject of them, where the question was as to whether the sale was conditional or absolute, and they were embodied in the deposition of the witness who made and verified them, the entries were admissible in evidence.—*Füller v. Eyre*, 392.
21. A *transcript* of the docket entries of a justice of the peace as to a proceeding before him, proved by the justice, is admissible in evidence in a suit between the defendant in an attachment proceeding, and a surety in a bond given in that case: though the docket is the best evidence, it need not be produced.—*Hibbs v. Blair*, 413.
22. Where a justice of the peace is offered as a witness to verify a transcript made by him, and he testifies that he was at the time of the proceeding a justice of the peace, no other evidence of his official character will be required; the court will take judicial notice of the fact.—*Id.*
23. The fact of witnesses being nearly related to a party, is to be weighed in a doubtful case, but should not be allowed altogether to destroy their credit, when they swear positively and are otherwise unimpeached.—*Gangware's Estate*, 417.

24. An inquisition of lunacy finding the party a lunatic without lucid intervals is *prima facie* evidence, but not conclusive: and a petitioner for the proceeding is not estopped from asserting the truth against it, and showing that the party had lucid intervals.—*Id.*
25. An act done in a lucid interval by one who has been found to be a lunatic, is binding on him, but the proof of the lucid interval in which it was done, must be clear.—*Id.*
26. It is not a sufficient objection to evidence that of itself it is not sufficient to prove the fact which it is offered to establish; if it is illustrative of other facts, which point to the main result, it should be received.—*Brown v. Clark*, 469.
27. An open space of ground adjoining a church, which had been used for above seventy years for fastening therein the horses of those attending worship, having been encroached upon under pretence of enlarging the graveyard, it was competent for plaintiffs to show that they had offered to give for that purpose, a share of a lot which had been purchased for a graveyard; this, in order to show that there was no necessity for the encroachment on the ground in question.—*Trauger v. Sassaman*, 514.
28. The sheriff need not make a deed for leasehold property sold by him. His return is evidence of the sale of a chattel, whether real or personal.—*Sowers v. Vic*, 99.

EXECUTION. See SHERIFF'S SALE.

1. In the case of an appraisement of property by a jury of inquiry, notice by plaintiff to defendant of permission to take the property at the valuation, given several months after the holding of the inquisition, is merely irregular; and the defendant can take advantage of it only before the acknowledgment of the sheriff's deed for the property.—*Shields v. Wittenberger*, 76.
2. The signing of such a notice by the attorney of the plaintiff, instead of by the sheriff, is a substantial compliance with the provision of the act.—*Id.*
3. As to what defects may be cured by the acknowledgment of a sheriff's deed, see the opinion in this case.—*Id.*
4. The return of the sheriff is evidence of the sale of a chattel, whether real or personal.—*Sowers v. Vic*, 99.
5. Where one engaged in agriculture has in his possession *two* yoke of oxen, one yoke of which he had sold, but had received back the possession of them on the same day, to break them for the vendee; though this sale be void as to his creditors, it is valid as to the vendor, and divests him of the ownership; and the *other* yoke, still owned by him, is not liable to levy and sale, being protected by the exemption act of 22d April, 1846.—*Hedrick v. Campbell and Crum*, 263.
6. The want of approval by the court, of the inquisition of condemnation of real estate, as provided for by the sixty-first section of the act of 16th of June, 1836, relating to executions, is a mere irregularity, of which none but the defendant can take advantage, and he, only within a proper time.—*Cranford v. Boyer*, 380.
7. If a purchaser of real estate has bid under a misapprehension as to his rights, his remedy is an application to the court to set aside the sale.—*Id.*

EXECUTORS AND ADMINISTRATORS. See DECEDENTS, 7, 10; ORPHANS' COURT, 5.

1. As to the form of a certificate of a balance due by administrators to be filed as a lien or notice of the balance due, under the 29th section of the act of 29th March, 1832, relating to Orphans' Courts: see the certificate in this case: the act requires only an abstract, or a condensation of the substance of the account.—*McCracken's Heirs v. Graham*, 209.
2. Where in the case of a sale for the payment of debts made under an order of the Orphans' Court, which did not prescribe the terms of sale, the administrator reported a sale in gross for a particular sum, and afterwards he settled an administration account, in which he charged

himself with the nett balance of the proceeds of the sale; in the next year he petitioned for a review as to the charge for portions of the purchase-money outstanding, which the Orphans' Court refused to grant: on appeal from this decree, it was *held* that he was chargeable with the amount of the sale before the same had been received by him, notwithstanding the existence of an usage in the county to sell for part cash and part on credit.—*Davis' Appeal*, 371.

3. A ground-rent is *real estate*; and where a testator devised one-third of all his property whatever to his wife, and the other two-thirds to be equally divided among his children, and appointed his wife and certain of his sons executors of his will, and authorized and empowered them to sell such part of his real estate as they shall think necessary and proper: *Held*, that the power was given to them *as executors*, and that under the act of 24th February, 1834, relating to executors and administrators, the power survived, and the survivor of the executors could maintain suit for the arrears of ground-rent accruing after the decease of the testator.—*Cobb v. Biddle*, 444.
4. The employment of a bidder merely to raise the price at a sale of real estate made under an order of the Orphans' Court, is a fraud upon the purchaser. The case of *Steel v. Ellmaker*, 11 *Ser. & R.* 86, overruled.—*Pennock's Appeal*, 446.
5. One of several administrators may bid at a sale of real estate, made by them under an order of the Orphans' Court, subject, in the event of a sale to him, to the power of disaffirmance by heirs or creditors: other bidders have no right to disaffirm the act, where the bidding was in good faith.—*Id.*
6. An administrator who has had real estate purchased in for him, when sold on a judgment entered at his instance on a bond in favor of his intestate, and who advances only the costs of the proceeding, the purchase-money being credited on the judgment, is chargeable with a proportion of the amount of the re-sale by him of the premises, in favor of such of the heirs of the intestate as have not confirmed his purchase.—*Drysdale's Appeal*, 531.
7. The administrator is not entitled to commissions on such re-sale as against the heirs from whom the proceedings were concealed: he is however entitled to credit for a reasonable fee paid to the counsel who conducted the proceeding on the judgment.—*Id.*

FOREIGN ATTACHMENT. See ATTACHMENT.

FRAUD AND FRAUDULENT SALE.

1. Where there is conflicting evidence as to a change of possession of personal property, after a sale of it, it should be referred to the jury.—*Forsyth v. Matthews*, 100.
2. Though actual possession be taken, yet if the sale were made to defraud creditors, it is void as to them; but whether this were so or not, is a fact for the jury.—*Id.*
3. The transfer by a son, in failing circumstances, of his personal property to his father, may excite suspicion of fraud; but it is not fraudulent *per se*. Whether fraudulent or not, is for the jury.—*Id.*
4. That personal property is transferred by a formal instrument of writing, is usually but a slight circumstance in the question, as to the existence of fraud in the transaction.—*Id.*

FRAUDS AND PERJURIES.

In order to take a parol gift of lands out of the statute of frauds, possession must be taken in pursuance of the gift. A *previous* possession will not have that effect.—*Christy v. Barnhart*, 260.

GROUND-RENT.

1. One who has purchased the title of the tenant on ground-rent, which had been sold at sheriff's sale, but who has made a gift of the premises and delivered possession before the rent in arrear accrued, but who has not conveyed, and is the owner of the mere legal title, without possession

or right of possession, or perception of profits, is not liable, in covenant or other action, to the ground landlord, for the ground-rent in arrear.—*Wickersham v. Irwin*, 108.

2. The eighth section of the act of April 25th, 1850, relative to actions for enforcing the payment of *ground-rent*, is constitutional as it respects actions then pending; because it operates on the *remedy*, not the *right*.—*Taggart v. McGinn*, 155.
3. A ground-rent is *real estate*.—*Cobb v. Biddle*, 445.
4. If an assignee of ground-rent receive notice from the purchaser of the land which is subject to the ground-rent, of an equitable defence to the payment of the rent after the assignee had made partial payments to the vendor, but before payment of the whole purchase-money, the assignee will be affected by the notice. If the whole purchase-money be paid by the assignee before notice, the latter will be protected for the whole; if but part be paid, he will be protected only to that extent, and a proportionate abatement of the rent will be made for the residue.—*Juvenal v. Jackson*, 519.

GUARDIAN.

1. A grandfather cannot, by his will, appoint a guardian of the persons of his grandchildren in derogation of the right of the father, but he may devise an estate to them on condition that a certain person be their guardian, and he may commit the management of the estate to a person indicated in the will: and if there be a gift to the father in the will, and he submits to it, and enjoys the bequest, the Orphans' Court should not afterwards appoint a guardian, on his application, to the prejudice of the interests of his children.—*Vanartsdalen v. Same*, 384.
2. Reasonable diligence on the part of a ward to call his or her guardian to account, will be required: and if the husband of a female ward delays to ask for a citation for nearly nineteen years after an alleged settlement between him and the guardian, and for fifteen years after the ward came of age, and until after the death of the guardian, the settlement of an account will not be decreed, merely on the suggestion that no account has been filed, no sufficient reason having been assigned for the delay; ignorance alone on the part of the husband being assigned, and that probably resulting from his own supineness; there being nothing in the case showing that the guardian placed difficulties in the way of the investigation, or practised artifice to mislead inquiry.—*Gress' Appeal*, 463.

IMPROVEMENT. See EJECTMENT, 9, 11.

INDICTMENT. See CONSPIRACY.

INDORSER. See PROMISSORY NOTES.

INSURANCE.

Where the constitution and by-laws of a mutual insurance company do not require from an applicant for insurance, a statement as to the condition of the property desired to be insured; but where the by-laws provide for a survey at the instance of the company, the policy is not void, by reason of omission, on the part of the insured, to state a fact material to the risk, where no inquiry is made of him on the subject.—*Mutual Ben. Ins. Assoc'n v. Satterthwaite*, 393.

INTESTATE.

Trust estates are not within the provisions of the intestate law of the 8th April, 1833. Therefore, a husband who has conveyed real estate to another *in trust* for his wife, is not entitled to the trust estate, on her death, as tenant by the curtesy.—*Rigler v. Cloud*, 361.

JAIL.

The respective counties are bound to furnish fuel to keep comfortable prisoners in jail; and if they do not do so, and the sheriff furnishes it, the county commissioners are bound to reimburse him.—*Richardson v. Clarion County*, 198.

JUDGMENT. See PRESUMPTION, 1; LIEN, 1, &c.

1. Where a joint judgment is entered against two, and the judgment is subsequently, on motion, opened as to one of the defendants, it is error to permit execution to issue against the other defendant, until the issue as to the liability of the first has been disposed of.—*Struthers v. Lloyd*, 216.
2. The lien of a judgment obtained against one in his lifetime will not be divested in favor of *his heirs or devisees*, as to the lands bound by it at the death of defendant, merely by reason of the lapse of above nineteen years from his death, without *scire facias*.—*Konigsmaker v. Brown*, 269.
3. A sale by executors, under power in the will to sell for payment of debts, will not discharge, *in favor of the heirs or devisees of a testator*, the lien of a judgment existing against him at his death, where the proceeds of sale have been applied to the payment of subsequent liens.—*Id.*
4. After judgment against the executor, *scire facias* may be issued thereon against the devisee, under the 34th section of the act of 24th Feb. 1834, relating to executors, in which proceeding judgment may be entered against the devisee.—*Moore v. Skelton*, 359.

JUSTICE OF THE PEACE.

1. Two transcripts of the same judgment obtained before a justice of the peace, entered in the Common Pleas, constitute but *one* record.—*Williams v. McCandless*, 185.
2. Where a justice of the peace is offered as a witness to verify a transcript made by him, and he testifies that he was at the time of the proceeding a justice of the peace, no other evidence of his official character will be required; the court will take judicial notice of the fact.—*Hibbs v. Blair*, 413.

LANDLORD AND TENANT.

1. Where an owner of a farm agrees with another to permit him to occupy and clear a part of the woodland of the same, during a certain period, the owner reserving the use of the timber on the clearing, except what may be necessary for the buildings and rails for the premises, and firewood of the occupant, the owner is entitled to the timber cut on the part cleared.—*Callen v. Hilty*, 286.
2. The landlord who is entitled, under the 83d section of the act relating to executions, to rent not exceeding one year, out of the proceeds of sale of goods of a tenant sold by a sheriff under an execution, is the *immediate* landlord of the party whose goods have been sold.—*Bromley v. Hopewell*, 400.

LEGACY AND LEGATEE.

1. Where pecuniary legacies are to be paid *only* out of certain real estate, the sale and conveyance by the testator of the real estate, after the making of the will, is in law an ademption of the legacies.—*Balliet's Appeal*, 451.
2. As to specific and demonstrative legacies, see this case.—*Id.*

LEGISLATURE. See CONSTITUTIONAL LAW.

LIBEL.

Though in an ordinary action for slander or libel, defendant cannot give evidence under the general issue alone, of facts tending to prove the charges; yet, in the case of a *privileged communication*, the rule is different; probable cause is in bar of the suit; and in an action for a libel for such a communication, such evidence is admissible under the general issue alone, for the purpose of showing probable cause for the complaint.—*Chapman v. Calder*, 365.

LIEN. See DECEDENTS; also STEAMBOAT, 2; JUDGMENT, 2, 3, 4.

LIMITATION AND STATUTE OF LIMITATIONS.

1. To take a case out of the statute of limitations, the acknowledgment need not refer to the *amount of the debt*. It is necessary, however, that there be no uncertainty in the acknowledgment, as to the debt referred to.—*Davis v. Steiner*, 275.
2. A suit was brought before a justice of the peace, against two defendants, and service upon *one* only, and judgment against him. A suit after

wards brought before *another justice of the peace*, against the party who was not served, is not a continuation of the first suit, and will not avoid the plea of the statute of limitations.—*Wann v. Pattengale*, 313.

3. Where, in a meeting for settlement of accounts, an item was admitted as a ground of charge, but no balance was struck, nor the account adjusted; this is not an acknowledgment that such an item was a present existing debt, so as to toll the statute as to that item, or from which a promise to pay it is to be inferred.—*Nixon v. Brownfield*, 319.
4. Where a conveyance of a lot of ground and the buildings on it is made with covenant of general warranty of title, and another person afterwards lawfully removes from the premises a building erected before the conveyance, under a previous agreement with the grantor's agent, a right of action does not accrue to the grantee till the building has been removed: and the limitation does not begin to run till the building has been removed.—*Stewart v. West*, 336.
5. A covenant of *seisin* may be broken as soon as the deed is delivered: but under a covenant of warranty of title, a right of action does not accrue till the paramount owner has entered or exercised his right of ownership to the prejudice of the vendee.—*Id.*
6. To take a case out of the operation of the statute of limitations, the acknowledgment must contain an unqualified and direct admission of a previous debt, which the party is willing to pay.—*Kensington Bank v. Patton*, 479.
7. It must be a promise to pay on demand; an immediate unqualified promise to pay, without restriction or conditions. Per ROGERS, J.—*Id.*
8. The uniform, undisturbed, and exclusive use in common with others, of a piece of ground adjoining a church, for the fastening therein the horses of the worshippers, for above seventy years, will give title thereto by the statute of limitations.—*Trauger v. Sassaman*, 514.
9. In the distribution of an intestate father's estate, the statute of limitations may be interposed by the children to claims on simple contract, which were due by them to their father.—*Drysdale's Appeal*, 531.

LUNATIC.

1. A committee of a lunatic may maintain ejectment in his own name, to recover the possession of the real estate of the lunatic.—*Warden and Alexander v. Eichbaum*, 121.
2. The receipt, by the committee of a lunatic, of purchase-money of the interest of a lunatic in real estate, illegally sold at sheriff's sale, will not estop a future committee of the lunatic from recovering the possession of the property, even though valuable improvements have been made upon it since the sale.—*Id.*
3. An inquisition of lunacy finding the party a lunatic without lucid intervals is *prima facie* evidence, but not conclusive; and a petitioner for the proceeding is not estopped from asserting the truth against it, and showing that the party had lucid intervals.—*Gangwere's Estate*, 417.
4. An act done in a lucid interval by one who has been found to be a lunatic, is binding on him, but the proof of the lucid interval in which it was done, must be clear.—*Id.*

MARRIAGE AND MARRIAGE CONTRACT.

1. As to whether a marriage contract executed on *Sunday* be legal, the court were divided.—*Gangwere's Estate*, 417.
2. To defeat a widow's right of dower, the proof must be clear. If a *marriage contract* be alleged, its existence, and its whole contents must be clearly proved.—*Id.*
3. Where a marriage contract was entered into for the purpose of quieting the children of the husband, but with a promise by the husband that after showing it to his children he would destroy it, and where the husband afterwards got it from the trustee for the purpose of destroying it, and declared at the time that it should be null and void: this may be equivalent to a destruction of the paper, and it is not material that it was kept for years without its actual destruction.—*Id.*

4. The actual destruction of the contract by the husband is binding on him, and if ratified by the wife, after his death, it is binding on her.—*Id.*

MECHANIC'S LIEN.

1. A claim filed November 6, 1847, stating the amount of it, for 16,836 brick, furnished within six months last past, for and about the erection and construction of a building, describing it, and appurtenances, and annexing a bill of particulars, with a single date, viz. 3d June, 1837, is sufficiently certain.—*Calhoun v. Mahon*, 56.
2. On the trial of a *scire facias* on a mechanic's lien filed against the owner and two contractors, it is not competent for the owner and one of the contractors to release the other contractor from liability for costs, and render him a competent witness for the defence.—*Haworth v. Wallace and Lyon*, 118.
3. Buildings erected by a lessee for years, on the ground leased to him, are not subject to a mechanic's lien.—*Id.*
4. A claim, stating the amount, for stone, mason-work, &c., and materials, to wit, stone, lime, sand, &c., done and furnished within the six months last past, to wit, between the 1st June, 1848, and 1st April, 1849, is sufficiently definite as to time.—*Bayer v. Reeside*, 167.
5. A claim filed for a specified amount, against a dwelling-house, for work and labor, to wit, carpenter-work done, and materials furnished in and about its erection and construction, "within six months last past, the said work having been commenced on or about the 10th day of December, A. D. 1847, and finished on or about the 6th day of May, A. D. 1848, a bill of which is hereto annexed," and having annexed "Dr. to carpenter-work done to house \$248.02, May 6, 1848," is sufficiently definite.—*Hill v. McDowell*, 175.
6. If work, in erecting a building, be done under a special agreement that it should be paid for at a certain standard of prices, the contract may be proved by parol evidence; and it need not be first shown that defendants agreed to pay the specific amount claimed.—*Id.*

MILLS AND MILL DAM.

Where the direction of the court tends to withdraw the attention of the jury from the conflict of testimony which it was the province of the latter to dispose of, it is error.—Therefore, where a dispute existed as to the height of water raised by a dam, and the court referred the jury, as to its cause, to changes in the bed of the stream above the dam, which this court consider impossible, the judgment was reversed.—*Bovard v. Christy*, 267.

MILLERS.

Under the 38th section of the act of 15th April, 1835, relating to inspections, and the 2d section of the supplement thereto, of 31st March, 1836, a miller is required to have his brandmark entered with the clerk of the Quarter Sessions only when the flour barrelled is intended for exportation out of the State, *except* by the Delaware or Susquehanna, or their branches; when shipped by either of those streams or their branches, to a market out of the State, *but within the United States*, the brandmark need not be entered: and the question of intention is for the jury.—*Nicholls v. Johnston*, 279.

MORTGAGE.

When premises, subject to a mortgage, which is the *first* lien, are sold under a junior judgment, the mortgagee, purchasing the premises, has no right to a deed from the sheriff, on crediting the amount of his bid in satisfaction of his mortgage, when there was no stipulation to that effect in the conditions of sale, or any such arrangement with the sheriff.—*Crawford v. Boyer*, 380.

NON-SUIT. See ATTACHMENT, 7.

The court have no right to direct a *non-suit*.—*Lyon v. Daniels*, 197.

NOTICE. See PROMISSORY NOTE; ARTICLES OF AGREEMENT, 1.

NUISANCE.

1. A court of chancery will grant an injunction to restrain and prevent a nuisance, when the facts are not doubtful and the threatened injury irreparable, and the chancery powers of the District Court of Allegheny county authorize the issue of an injunction in a like case.—*Commonwealth v. Rush*, 186.
2. Where the facts are admitted by the pleading, and the damage of that kind which the law calls irreparable, the plaintiff is entitled to have the injury complained of restrained and prevented by a perpetual injunction.—*Id.*
3. Where a raft lodged in a small stream and interrupted the channel, and caused another raft to lodge, the owner of the second raft, which is in danger from other rafts, may lawfully cut away a portion of the first, after allowing for the removal of the obstruction as much time as circumstances permit, and doing no unnecessary damage.—*Philiber v. Matson*, 306.

OFFICIAL BONDS.

1. The limitation to an action against sureties of executors or administrators, prescribed by the proviso to the second section of the act of 4th April, 1797, (3 *Smith* 297,) is not applicable to an original administration bond taken by the register, but only to an additional bond given by order of the Orphans' Court.—*Millenberger v. Com'th.* 71.
2. In an action in the name of the Commonwealth for the use of the person aggrieved, on an official bond, the judgment is, by the act of 14th June, 1836, relative to official bonds, to be, first, for the Commonwealth for the amount of the penalty; and secondly, for the plaintiff in interest, in the amount of damages assessed by the jury.—*Id.*
3. Where the *narr.* in such an action, concludes to the damage of the plaintiff, this is merely the formal allegation of nominal damage, and not on account of the damages sustained by the party for whose use the action was brought.—*Id.*
4. As to the *narr.* in such an action, and the allegation of a devastavit, see this case.—*Id.*

ORPHANS' COURT. See GUARDIAN, 2.

1. As to certificate of balance due by administrators on the settlement of their account, the act of 29th March, 1832, requires only an abstract or condensation of the substance of the account.—*McCracken's Heirs v. Graham*, 209.
2. In the case of an application to the Orphans' Court, to decree specific performance of a parol contract for the purchase of land, by the fifteenth section of the act of 24th February, 1834, relating to executors and administrators, notice must be given to the heirs of the decedent to appear in court on a day certain, and answer such bill or petition; and if it appear from the record that such notice was not given, the proceedings are void.—*McKee v. McKee*, 231.
3. The only final decree to be made by the Orphans' Court, under the said act, in the case of a parol contract, is for specific performance. A decree adjudging the proof sufficient, and that it be endorsed upon the petition and certified, is not such a decree.—*Id.*
4. Where in the case of a sale for the payment of debts made under an order of the Orphans' Court, which did not prescribe the terms of sale, the administrator reported a sale in groes for a particular sum, and afterwards he settled an administration account, in which he charged himself with the nett balance of the proceeds of the sale: in the next year he petitioned for a review as to the charge for portions of the purchase-money outstanding, which the Orphans' Court refused to grant: on appeal from this decree, it was held that he was chargeable with the amount of the sale before the same had been received by him, notwithstanding the existence of an usage in the county to sell for part cash and part on credit.—*Davis' Appeal*, 371.
5. After the lapse of above twenty years from the time an account of an ex-

cutor has been confirmed, and credit allowed for a claim outstanding, and acquiescence during that period by the heirs interested, the account will not be opened in order to charge the executor with the amount credited, upon an allegation that it might have been collected. The decree, after twenty years, will be held to be final and conclusive.—*Pennypacker's Appeal*, 430.

6. The employment of a bidder merely to raise the price at a sale of real estate made under an order of the Orphans' Court, is a fraud upon the purchaser. The case of *Steel v. Ellmaker*, 11 *Ser. & R.* 86, overruled.
7. One of several administrators may bid at a sale of real estate, made by them under an order of the Orphans' Court, subject in the event of a sale to him to the power of disaffirmance by heirs or creditors: other bidders have no right to disaffirm the act, where the bidding was in good faith.—*Pennock's Appeal*, 446.
8. Though an auditor appointed by the court to audit and settle an administration account also reported a *distribution* of the fund, which part of the report was set aside, the court may decree distribution on the facts reported by him.—*Drysdale's Appeal*, 531.

OVERSEERS OF THE POOR. See POOR.

PARENT AND CHILD. See GUARDIAN.

PAROL GIFT.

In order to take a parol gift of lands out of the statute of frauds and perjuries, possession must be taken in pursuance of the gift. A *previous* possession will not have that effect.—*Christy v. Barnhart*, 260.

PAROL EVIDENCE. See EVIDENCE, 2.

Where ambiguity exists in a written contract, arising from its reference to extrinsic objects, it may be explained by parol testimony as to the situation and character of those objects at the time of the contract; and such evidence is for the jury. But the law arising on the contract, as thus explained, is for the court.—*McCullough v. Wainwright*, 171.

PARTITION.

1. A judgment in partition does not decide title, or create new title. It dissolves tenancy in common, but it does not divest title in common, until payment of the shares of the other owners.—*McClure v. McClure*, 134.
2. A judgment of a court is not conclusive, unless it be upon the same subject matter; therefore, a judgment in partition is not conclusive in an action of ejectment, pending at the time of the judgment, between the same parties, to enforce the payment of the purchase-money of part of the land, which was the subject of the partition.—*Id.*

PARTNERSHIP. See STEAMBOAT, 1, 2: Also, AMENDMENT.

1. The shareholders or joint owners of a steamboat are not necessarily *partners* in it. They are not so where there is no other relation between them than that which arises from joint ownership.—*Hopkins v. Forsyth*, 34.
2. In a suit against one of a former firm on a negotiable note given in renewal of a former note drawn by the partnership, it is not sufficient that the holder knew of the dissolution of the firm *before the note in suit was given*. To affect the holder, the knowledge must have been possessed by him before the *original* note was given.—*Brown v. Clarke*, 469.
3. If an inaccuracy in the charge of the court may have led the jury to a false conclusion, it is not an answer to suggest that, probably, the jury understood the instruction differently from that which the language used indicated.—*Id.*
4. When the dissolution of a firm and the knowledge of it by the holder of a note signed by the firm name is material, it is not sufficient evidence thereof that the store of the firm was transferred, and that the firm ceased to do business, inasmuch as the firm may exist for the purpose of closing the concern.—*Id.*
5. The stock of a former firm having been sold and transferred by them to a new firm, of which one of the old firm was a member, before the date

of a note in suit signed with the name of the old firm, the new firm transacting the same kind of business in the same place, the new firm having the books of the former one, collecting moneys due them, and paying debts of theirs from the proceeds; these circumstances are not sufficient to enable a jury to infer from them a *dissolution* of the old firm, before the date of the note in suit, so as to affect with notice of the fact the holder of the note, or him from whom his title was derived, inasmuch as they are not inconsistent with the existence of the partnership for the purpose of winding up the concern.—*Id.*

6. To affect the community with knowledge of the dissolution of a partnership, the evidence of the dissolution should be clear, distinct, and unambiguous, and the notice of it be by means sufficient to give it.—*Id.*
7. It is not a sufficient objection to evidence that of itself it is not sufficient to prove the fact which it is offered to establish: if it is illustrative of other facts, which point to the main result, it should be received.—*Id.*
8. When the time of the commencement and continued existence of a partnership is in question, a witness may, in relation to it, refer in his testimony to an advertisement of the partners published in his newspaper.—*Id.*
9. The collection of the debts of a firm by another firm, and the payment from the proceeds of the debts of the former, is evidence to be referred to the jury that the former firm was in existence for the purpose of winding it up.—*Id.*
10. In a suit on a note signed by the partnership name, against one of the partners who alleged its execution *after the firm had ceased*, evidence may be given of the existence of another note signed by the partnership after its dissolution, and a payment by the defendant on account of it, though it does not appear which of the firm signed the note, as the payment by defendant may be evidence of ratification, though not executed by him. Though open to explanation, it is evidence, as the transactions of the alleged partners with third persons may tend to prove the continued existence of the partnership.—*Id.*
11. In a suit against the drawers, on a negotiable note endorsed in blank, the defendants have no concern with the question of the actual ownership of the note, except where the defence turns upon points involving the personal conduct of the true owner or of those who preceded him, inasmuch as the owner of such a note may fill it up with what name he pleases, and the person, whose name is inserted, is deemed the legal owner, for the purposes of the action.—*Id.*

PARTY WALLS.

Before the act of 10th April, 1849, relative to the right to compensation for the use of party walls, the claim for the use of a party wall did not pass from the first owner by his conveyance of the house and lot: and that act does not operate retrospectively, upon a suit for compensation for the use of the wall instituted before its passage.—*Dannaker v. Riley*, 435.

PLEADING. See ACTION, 3, 4; LIBEL; REPLEVIN, 1; AMENDMENT.

In a suit against one as executor, counts for a claim against the *testator* cannot be joined with a count against defendant for money received by him as executor, for the use of the plaintiff, and alleging a promise to pay the same when he, as executor, should be requested. The counts are incongruous, requiring different judgments, the first *de bonis testatoris*, the other *de bonis propriis*.—*Seip v. Drach*, 352.

POOR.

A pauper gains a settlement in a district by residing therein, in one or more tenements, for one year, and, during that time, paying \$10 rent. Whether he paid all the rent which he contracted to pay, is not material.—*Allegheny v. Allegheny*, 138.

POSTMASTER.

A postmaster is not liable to suit by the publisher of a newspaper, for refusing to give to him the publication of the list of letters uncalled for, even

though he acted maliciously. A public duty is not enforceable by a private action, except when it has been specifically given by statute.—*Fosters v. McKibben*, 168.

PRACTICE. See ACTION, 3, 4.

PRESUMPTION.

1. Where on the trial list, in the handwriting of the president judge, there is entered, in an action of debt pending, "*Judgment for plaintiff; sum to be liquidated by the prothonotary*," it will be inferred that the court gave judgment after argument, or with the acquiescence of the parties.—*Hays v. The Com'th*, 39.
2. Where an individual conveys his interest in land to a trustee for payment of certain creditors, and the balance to his wife: *Held*, that after the lapse of more than twenty-two years the law will presume the debts to have been paid, and the trust executed, so far as respects the creditors.—*Drysdale's Appeal*, 531.

PRINCIPAL AND SURETY. See ADMINISTRATION BOND, 1; ATTACHMENT, 5—9.

The surety in a recognisance for stay of execution, is not discharged merely by reason of a *fi. fa.* on the original judgment having been stayed by plaintiff's attorney before levy.—*Morrison v. Hartman*, 55.

PROMISSORY NOTES. See PARTNERSHIP.

1. The assignment of a promissory note *without recourse*, instead of merely endorsing it in blank, is not such a departure from the usual course of business, as to put the transferee on inquiry as to equities between the original parties.—*Bisbing v. Graham*, 14.
2. The fact of the transferee being the son-in-law of the payee or endorser, is not sufficient to authorize a jury to presume fraud, as between the two.—*Id.*
3. The wife of the payee is a competent witness for a subsequent holder, in support of the note.—*Id.*
4. In the case of a note *lost* after suit brought upon it, it is not necessary for the plaintiff to give indemnity against it, before judgment; the court may, however, restrain the *execution*, till indemnity be given.—*Id.*
5. A note which, on its face, points to the terms of another instrument, by which it was payable in work, is not a *negotiable note*, and a suit upon it must be in the name of the payee. If it has been transferred, and the name of the transferee is endorsed on it, in blank, the note being sued in the name of the payee, a recovery by him and payment by the drawer, will protect the latter against any further demand on the note.—*Reynolds v. Richards*, 205.
6. A *due-bill* is a sealed acknowledgment of a debt, and a promise to pay it.—*Emerick v. Kroh*, 315.
7. In proving notice to an endorser of demand and refusal which was sent *by mail*, it should be distinctly proved where the notice was sent, and when.—*Schoneman v. Fegley*, 376.
8. The act of 5th April, 1849, as to demand of payment and acceptance of promissory notes and notice to parties, does not apply to notes which had matured and as to which the rights of the parties had become fixed before its passage.—*Id.*
9. A mistake in a notice to an endorser by which he could not have been misled, is immaterial. Hence, where a notice was served on an endorser on the 25th May, setting forth that a note endorsed by him was due on that day, which was the day on which the note in suit actually fell due, but which notice was dated May 26th, the notice was held to be sufficient, the note only being misdescribed, and the endorser, if he had chosen, might have inquired as to it.—*Tubey v. Lennig*, 483.
10. A negotiable note drawn in Philadelphia and payable at the Bank of the State of Missouri at St. Louis, was endorsed by third persons, and was discounted by a bank in Philadelphia for the payees under an understanding that the note was to be paid in *funds current at St. Louis*. When

due, payment was offered at the bank where payable by the drawers, *in current funds*, which were refused: the endorsers were thereby discharged.—*Smith v. Philadelphia Bank*, 525.

11. After the tender and refusal, and return of the note, the payees drew a draft on the drawers for the amount of the note, payable *in current funds*, which was endorsed by the same endorsers, and given to the bank who held the note, but the draft was not accepted or paid; the endorsers having been previously discharged by the refusal to receive current funds, there was *no consideration* for their endorsement of the draft, (which, being payable in depreciated funds, was not negotiable,) and they are not liable upon it, or on a promise to pay the amount of it.—*Id.*

PROTHONOTARY.

The Supreme Court possesses an inherent power to revise the proceedings of all inferior jurisdictions, in order to correct errors on their face, but not to rejudge their judgments on the merits. This revisory power has been taken or withheld from it by the act of July 2d, 1839, to provide for the election of prothonotaries, &c.; the determination of the Common Pleas, as to the election of a prothonotary, being, by the 5th section of that act, final.—*Carpenter's Case*, 486.

PURCHASER. See MORTGAGE.

RAFT.

Where a raft lodged in a small stream and interrupted the channel, and caused another raft to lodge, the owner of the second raft, which is in danger from other rafts, may lawfully cut away a portion of the first, after allowing for the removal of the obstruction as much time as circumstances permit, and doing no unnecessary damage.—*Philiber v. Matson*, 306.

RAILROAD.

1. The right to enter upon *land* and to appropriate as much thereof as may be necessary for its railroad, granted to The Ohio and Pennsylvania Railroad Company, by the Ohio act, adopted by the Pennsylvania act of 11th April, 1848, includes the right to remove a *dwelling-house*.—*Brocket v. Ohio and Penna. Railroad Co.* 241.
2. Where it is required by an act of Assembly that a report of viewers assessing damages for the taking of ground for the construction of a railroad, shall set forth the value of the property taken, or damages done to the property, the amount of benefit conferred, and the difference between the damages done to the property taken, an award stating that the viewers, taking into consideration the advantages and disadvantages, found a gross sum due to the owner, but without referring to the advantages to the owner, is not sufficient.—*Ohio and Penna. Railroad Co. v. Wallace*, 245.

RECOGNISANCE.

1. In a *scire facias* on a recognisance for stay of execution, the principal debtor is not a competent witness for the defendant, who was surety in the same.—*Morrison v. Hartman*, 55.
2. The surety in a recognisance for stay of execution, is not discharged merely by reason of a *fi. fa.* on the original judgment having been stayed by plaintiff's attorney before levy.—*Id.*
3. A recognisance of bail, on an appeal from the judgment of an alderman, in which the recognisor is "bound as absolute bail in the sum of twenty dollars, or such sum as may be necessary to pay all costs that have or may accrue in this case, in prosecuting this appeal," is sufficient. The recognisance was acknowledged since the act of 20th March, 1845.—*Seidenstriker v. Buffum*, 158.

RECORD AND RECORDING ACTS.

1. Parts of a record attested and certified, may be attached together and attested and certified as a true copy and exemplification of the whole record, without recopying the same; and when certified by the clerk, to comprise full and perfect transcripts of all the records and judicial

proceedings in the case, and the seal of the court annexed and certified by the judge, styling himself president judge of a judicial circuit, which circuit includes the county from which the record comes, and the presiding magistrate of the Court of Common Pleas for that county, contains every requisite of the act of Congress of 26th May, 1790.—*Erb v. Scott*, 20.

2. The record of an action in a court founded on the common law, consists of the writ, declaration, pleas, and judgment; and an exemplification of these is sufficient on which to found an action of debt. An exemplification of the executions is not necessary. Per GIBSON, C. J.—*Id.*
3. Two transcripts of the same judgment obtained before a justice of the peace, entered in the Common Pleas, constitute but *one record*; and a removal of the record on the second transcript, into another court, legally made, effects a removal of the whole record.—*Williams v. McCandless*, 185.

REFERENCE. See ARBITRATION AND AWARD.

REPLEVIN.

Where an owner of land left the possession, and a trespasser entered and cultivated the land, and afterwards the land was sold on a judgment against the owner, obtained after the grain was sown by the trespasser; the purchaser issued a landlord's warrant under which the grain was levied on, and the trespasser replevied, the purchaser avowed for rent in arrear, and the trespasser plead *non tenuit*, &c.: *Held*, that the purchaser was not estopped from pleading *property*, and claiming as *purchaser* the grain levied upon.—*Hellings v. Wright*, 373.

RIVER.

The *bank* of a stream is the continuous margin where vegetation ceases, and the *shore* is the pebbly, sandy, or rocky space between that and low water mark.—*McCullough v. Wainwright*, 171.

SALE.

As to the employment of a puffer, see *Pennock's Appeal*, 446.

SCIRE FACIAS. See RECOGNISANCE.

SEDUCTION.

1. In an action for seduction brought by the father of the female, the marriage of the defendant with the female, after the birth of the child, may mitigate the damages, but is not a bar to the recovery of exemplary damages.—*Eichar v. Kistler*, 282.
2. In such a suit, the acquittal of the defendant on an indictment for seduction, by reason of his marriage with the female, may mitigate the damages, but is not a bar to the recovery of exemplary damages. The jury are not to be limited to the value of the actual loss of her service.—*Id.*

SEQUESTRATION. See TURNPIKE.

SETTLEMENT. See ABANDONMENT.

SHERIFF. See JAIL.

1. In an action by a joint owner of a chattel against the sheriff for a portion of the balance of proceeds of sale of it, it being sold on an execution against some only of the joint owners, the averment of the sheriff in his return to the execution, that he had paid over the balance of proceeds to one of the owners and agent of the others, was not a legitimate part of the return, and did not estop the plaintiff from showing the truth. The remedy was not by action for a false return.—*Hopkins v. Forsyth*, 34.
2. Though the captain of a boat has authority to sell all the shares of the owners in the same, the *sheriff*, on an execution against some only of the owners, the captain being one, can sell only *their* interests.—*Id.*
3. On an execution against some of the owners of a chattel, the sheriff can, in addition, sell the interests of any others of the owners, who agree that their shares be sold, and all such are entitled to claim out of the balance of the proceeds. Others of the owners, who were not defend-

ants, and did not so agree, still retain their interests, and cannot claim any part of the proceeds.—*Id.*

4. In an action of trespass against a sheriff for selling the goods of A, on an execution against B; B is a competent witness to prove that the goods belonged to A.—*Forsyth v. Palmer*, 96.
5. In such an action, the sheriff may show, in mitigation of damages, that the goods were bought in for the plaintiff *at an under price*. The measure of damages is the extent of the loss sustained by the plaintiff;—what it cost him to redeem them.—*Id.*
6. The sheriff need not make a deed for leasehold premises sold by him. His return is evidence of the sale of a chattel, whether real or personal.—*Sowers v. Vie*, 99.

SHERIFF'S DEED.

As to what defects may be cured by the acknowledgment of a sheriff's deed, see opinion in *Shields v. Millenberger*, 76.

SHERIFF'S SALE. See MORTGAGE; EXECUTION.

1. A sheriff has no right to impose terms of sale, on a *venditioni exponas*, different from those which the law imposes.—*Wood v. Lewis*, 9.
2. When, at such a sale, the sheriff declared that the purchaser would not have to pay more than the amount of his bid, when, in fact, a mortgage existed on the premises, which the sale would not discharge: *Held*, that the remedy of the purchaser was by application to the court, after the return of the writ, and that he was not entitled to defend, on that account, on a proceeding on his bond for part of the purchase-money.—*Id.*
3. The quantity of land which passes by a sheriff's sale to the purchaser, is to be ascertained by the extent of the levy.—*Hoffman v. Danner*, 25.
4. The right of construing the written return of the sheriff generally belongs to the court, and the quantum of estate conveyed by a sheriff's deed, is usually referable to the court alone; but where, from the generality of the terms used, or from uncertainty of description, a doubt is raised as to the boundaries of the levy or the position or limits of the land sold, evidence aliunde may be resorted to, and where such evidence is received, it is error for the court to direct peremptorily how the verdict is to be rendered.—*Id.*
5. Leasehold property need not be sold *on the premises*.—*Sowers v. Vie*, 99.
6. A sheriff's deed for *leasehold* premises need not be acknowledged, nor is it necessary that there be a deed at all. His return is evidence of the sale of a chattel, whether real or personal.—*Id.*
7. Where a deputy sheriff purchases property at the sheriff's sale, and there is no fraud, the owner of the property may disaffirm the sale, but must repay the purchase-money.—*Jackson v. McGinness*, 331.

SLANDER. See LIBEL.

SPECIFIC PERFORMANCE.

1. In the case of an application to the Orphan's Court, to decree *specific performance* of a parol contract for the purchase of land, by the fifteenth section of the act of 24th February, 1834, relating to executors and administrators, notice must be given to the heirs of the decedent to appear in court on a day certain, and answer such bill or petition; and if it appear from the record that such notice was *not* given, the proceedings are *void*.—*McKee v. McKee*, 231.
2. The only final decree to be made by the *Orphans' Court*, under the said act, in the case of a parol contract, is for *specific performance*. A decree adjudging the proof sufficient, and that it be endorsed upon the petition and certified, is not such a decree.—*Id.*

STATUTE OF LIMITATIONS. See LIMITATION.

STEAMBOAT.

1. The shareholders or joint owners of a steamboat are not necessarily *partners* in it. They are not so, where there is no other relation between them than that which arises from joint ownership.—*Hopkins v. Forsyth*, 34.

2. The captain of a steamboat has no lien for advances ; and the sheriff has no right to satisfy his claim out of the proceeds of sale of it.—*Id.*

STOPPAGE IN TRANSITU.

1. The right of stoppage *in transitu*, by the vendor, on the insolvency of the vendee, exists until the goods have arrived at the end of their destination, or into the possession or actual control of the vendee ; and the delivery to a mercantile house, merely for transmission, by a forwarding house, to the vendee, does not amount to a delivery to the vendee.—*Hays v. Mouille*, 48.
2. The seizure of the goods under writs of foreign attachment, on their way to the vendee, does not prevent the vendors exercising their right of stoppage, through a writ of replevin.—*Id.*
3. It is not necessary that the charge or lien of the carriers, for freight, be paid before the writ of replevin be issued ; it is sufficient if it be paid before the goods are taken from their possession.—*Id.*
4. The purchaser's notes given for the price of the goods, need not be tendered back, before stopping the goods *in transitu*.—*Id.*

SUBROGATION AND SUBSTITUTION.

1. Where A has the earliest judgments against a debtor, who was owner of two separate properties, the one in town, the other in the country, and B obtains a subsequent judgment against the same debtor ; two persons desiring to purchase the town property, agree with A, that if he will release the same, from the lien of his judgments, a judgment which A was to take from the debtor, in lieu of his two former judgments, should be the first lien on the country property. If on the sale of the country property, the judgment of B be taken out of the proceeds, A has a right to subrogation to the judgment of B as to the town property, as against the purchasers, who made the agreement, and to whom and others it was conveyed by the debtor, after the said agreement. He is not obliged to resort to his personal covenant with them.—*Dunn v. Olney*, 219.
2. That A has purchased the country property at the sheriff's sale, and sold it at an advance, will not affect his right of subrogation.—*Id.*

SURETY. See BAIL ; and PRINCIPAL AND SURETY.

SURVEY. See WARRANT AND SURVEY.

TAXES.

Where a man dies intestate unmarried, and without leaving lawful issue, but leaving collateral heirs and an illegitimate son, who is legitimated by an act of the legislature, giving to him the benefits and rights of a child born in lawful wedlock, as if he had been born in lawful wedlock, which act, however, was not approved till the day *after* the decease of the intestate ; such act does not divest the right of the commonwealth to collateral inheritance tax on the whole estate.—*Galbraith v. The Com'th*, 258.

TENDER.

A tender of the whole chain of title is not necessary to enable a vendor to recover the purchase-money ; the tender of the deed alone is sufficient. *Espy v. Anderson*, 308.

TENANT IN COMMON.

Where one tenant in common is ousted from his possession by his co-tenant, he may maintain trespass.—*Trauger v. Sassaman*, 514.

TIME.

When time is material, see *Remington v. Irwin*, 143.

TOLLS. See TURNPIKE.

TRESPASS. See ACTION, 3 ; ASSUMPSIT, 2.

1. In actions of trespass *quare clausum fregit*, the forty shillings prescribed as the minimum of damages, which will entitle a plaintiff to full costs, are to be reckoned in *Pennsylvania* currency, and not in sterling money.—*Chapman v. Calder*, 257.

2. Trespass will lie for an obstruction in the use of a piece of ground adjoining a church, which had been used exclusively by the members of two churches with others, for above seventy years, for fastening therein their horses, whilst attending worship.—*Trauger v. Sassaman*, 514.
3. One tenant in common, when ousted from his possession by his co-tenant, may maintain trespass.—*Id.*

TRIAL. See ERROR, 1, 2, 3.

TRUST AND TRUSTEE. See EJECTMENT, 17; ASSIGNMENT, 2; DEED, 4—11; EXECUTORS AND ADMINISTRATORS, 7.

1. Trust estates are not within the provisions of the intestate law of the 8th April, 1833. Therefore, a husband who has conveyed real estate to another *in trust* for his wife, is not entitled to the trust estate, on her death, as tenant by the curtesy.—*Rigler v. Cloud*, 361.
2. A trustee appointed by the court, in the room of the trustee to whom the said conveyance was made, is not such as is required to give security by the provisions of the act of 14th June, 1836, relating to assignees.—*Id.*

TURNPIKE.

1. To maintain an action for tolls for passing on a turnpike road, an express undertaking to pay is necessary; and a written admission of defendant that a certain amount is due by him to the company, for tolls, is sufficient evidence of such a contract.—*Beeler v. Turnpike Co.* 162.
2. An action for such tolls, during their sequestration under the 73d, 74th, and 75th sections of the act of 16th June, 1836, relating to executions, must be brought in the name of the company, not in that of the sequestrator.—*Id.*

UNSEATED LAND.

1. Unimproved lots of ground separated by a sale by former owners from a larger piece of enclosed ground, but remaining enclosed with such other ground by an outside fence, and not separately enclosed, and cultivated before and after assessment, but not in cultivation when assessed, cannot legally be assessed as *unseated*, and sold for taxes.—*McKibbin v. Charlton*, 128.
2. By the act of 14th April, 1840, relative to unseated lands, the owner of a mortgage upon a lot afterwards sold for unpaid taxes, is entitled to the surplus remaining after payment of the taxes and costs; and a proceeding in foreign attachment after the sale, against the last owner, in which the obligor of the bond for the surplus was made garnishee, and the bond attached, will not entitle the attaching creditor to the surplus, in preference to the mortgage creditor.—*Kelso v. Kelly*, 204.
3. The purchaser, who was garnishee, had a right to defend for the mortgage creditor.—*Id.*
4. In the case of a sale of *unseated* land by the commissioners, if the purchaser fail to comply for several years, and before payment is tendered by him the owner of the land pays to the commissioners the taxes and costs and receives from them a deed for the land, the vendee of the owner may recover the possession from the purchaser.—*John and Paull v. Rush*, 339.
5. It is essential to a sale of land, made in 1836, for taxes, that it has been assessed and returned as unseated, or, where it has been returned as a *seated* tract or lot, that it be transferred to the *unseated* list by the county commissioners, or their authorized agents, with notice to the owner, if practicable, before sale.—*Commercial Bank v. Woodside*, 404.

VARIANCE.

1. Where the declaration alleged the suit to be on a promissory note or due bill in writing, and the evidence was of a note *under seal*, there is no substantial variance.—*Emerick v. Kroh*, 315.
2. A *due bill* is a sealed acknowledgment of a debt, and a promise to pay it.—*Id.*

VENDOR AND VENDEE.

1. A written agreement for the sale of land cannot be altered by a *subsequent parol* agreement. In equity, a written agreement may be rescinded by

parol, but to rescind, the party desiring it, must place the opposite party in the situation he occupied when the contract was made.—*Espy v. Anderson*, 308.

2. If a judgment remaining unsatisfied on the judgment docket is actually paid, it is to that extent a compliance with the agreement to convey clear of all encumbrances, though the judgment remain open on the judgment docket.—*Id.*
3. A tender of the whole chain of title is not necessary to enable the vendor to recover the purchase-money; the tender of the deed alone is sufficient.—*Id.*
4. Where the plea of defendant in an action of covenant, does not deny the title, it lies on him to prove it defective.—*Id.*
5. A covenant to convey in fee simple clear of all encumbrances is satisfied by a deed in fee simple with special warranty—a general warranty is not necessary.—*Id.*
6. In an ejectment by a vendor against a purchaser from the vendee, to enforce the payment of purchase-money due by the vendee, where the vendee has not paid to his vendor any part of the purchase-money or made valuable improvements; the defendant cannot set up the weakness of the title of the first vendor, in defence of his own possession. He must either pay the purchase-money or relinquish the possession, unless fraud has been practised upon him. Nor can he set up an outstanding title in another, or an adverse title in himself; and his payment of part of his purchase-money to the vendee will not affect the claim of the vendor, unless he was connected with the vendee in the second sale.—*Jackson v. McGinness*, 331.
7. A vendee who under the terms of his deed has a covenant against encumbrances which were known to him, and a covenant for quiet enjoyment, cannot withhold the purchase-money as a further security against them; a purchaser of a lot on ground-rent is within the rule, and is bound to pay the ground-rent though the encumbrances by mortgage are not satisfied, and though the lot is vacant and unproductive.—*Juvenal v. Jackson*, 519.
8. Where the vendor had agreed to advance to the vendee, in order to build on the premises sold, in consideration of which, the rent was to be increased, and he failed to make the advancement, the vendee may defend to the extent of the increased rent; and the assignee of the rent having notice before acceptance of the deed of assignment and payment of the consideration to the vendor, will be affected by the omission of the latter to make the advancement.—*Id.*

VERDICT.

1. A special verdict should find the facts on which the court is to pronounce judgment. If the court state to the jury certain facts as *undisputed*, and direct a special verdict as to disputed facts, and the jury so return a verdict, it is error. The undisputed facts should be incorporated into the special verdict.—*Wallingford v. Dunlap*, 31.
2. A suit being against one & Co., as partners, without naming all the members of the firm, is cured by verdict.—*Seitz & Co. v. Buffum & Co.* 69.

WAGES.

A female, living with her stepfather, whilst in her minority, is not entitled, after arriving at full age, to recover from him wages for services rendered, without proof of a contract, express or implied. Such a contract will not be implied, as to one standing in *loco parentis*, merely from the fact of such service having been thus rendered.—*Lantz v. Fry and Wife*, 201.

WAIVER.

Where one takes the personal property of another, the owner may waive the tort and maintain assumpsit for its value.—*McCullough v. Same*, 295.

WARRANT AND SURVEY. See EJECTMENT, 8.

Where an official survey was made of land claimed by several settlers, and designating their several claims, including the portion in dispute, it is, as to it, a sufficient compliance with the act of 1792, requiring a settler to designate the boundaries of his settlement.—*McCall's Heirs v. Anchors*, 253.

WIDOW. See DOWER.

WILL.

1. Where a testator has devised his real estate in fee, a mortgage afterwards executed by him to the devisee, upon the estate devised, payable after the death of the testator, is not an absolute revocation of the devise, but is a revocation merely *pro tanto*.—*McTaggart v. Thompson*, 149.
2. Declarations of a testator, though made after the execution of his will, are admissible as evidence of imbecility of mind.—*Id.*
3. It is not necessary, in order to set aside a will, that *derangement* of intellect be proved. Imbecility of mind, short of insanity, is sufficient for that purpose.—*Id.*
4. A will may be set aside for a less degree of insanity in the testator, than is necessary to be proved in order to acquit him of a crime or misdemeanor.—*Id.*
5. The subscribing witnesses to a will are not always the best to prove the sanity of the testator.—*Id.*
6. In a case involving a question of sanity or insanity in a testator, the facts in evidence ought not to be presented to the jury in an isolated manner, but should be submitted as a connected whole.—*Id.*
7. A ground-rent is *real estate*; and where a testator devised one-third of all his property whatever to his wife, and the other two-thirds to be equally divided among his children, and appointed his wife and certain of his sons executors of his will, and authorized and empowered them to sell such part of his real estate as they shall think necessary and proper: *Held* that the power was given to them *as executors*, and that under the act of 24th February, 1834, relating to executors and administrators, the power survived, and the survivor of the executors could maintain suit for the arrears of ground-rent accruing after the decease of the testator.—*Cobb v. Biddle*, 444.
8. When both real and personal estate are devised, the sale and conveyance of the real estate by the testator after the making of the will, is a revocation of the will as to the *real estate only*, not as to the personal estate.—*Balliet's Appeal*, 451.
9. Where pecuniary legacies are to be paid *only* out of certain real estate, the sale and conveyance by the testator of the real estate, after the making of the will, is in law an *ademption of the legacies*.—*Id.*
10. As to specific and demonstrative legacies, see this case.

WITNESS. See RECOGNISANCE.

1. In a *scire facias* on a recognisance for stay of execution, the principal debtor is not a competent witness for the defendant who was surety in the same.—*Morrison v. Hartman*, 55.
2. In an action of trespass against a sheriff for selling the goods of A., on an execution against B., B. is a competent witness to prove that the goods belonged to A.—*Forsyth v. Palmer*, 96.
3. A witness cannot remove an appearance of interest in himself by his own oath.—*Banks v. Clegg*, 390.
4. Declarations by a first assignee of a judgment made subsequent to the assignment to him when the judgment was about to be marked to the use of another, that he took the first assignment merely as the agent of the latter person, are not *res gestæ* as it respects the first assignment, and do not remove the apparent interest existing in him, so as to render him a competent witness to rebut the defence made.—*Id.*

WRIT OF ERROR.

1. In the case of a writ of error by a corporation, the affidavit required by law may be made by an agent of the corporation though he is not expressly deputed for that purpose. The fourth section of the act of 22d of March, 1817, relative to suits brought by or against corporations, is not repealed, as respects such affidavits, by the third section of the act of 11th June, 1832, relative to affidavits in suing out writs of error.—*Academy of Fine Arts v. Power*, 442.

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