1895

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Wilson C. Kress

PENNSYLVANIA

STATE REPORTS.

VOL. 168.

CONTAINING

CASES ADJUDGED

IN THE

Supreme Court of Pennsylvania.

BY

WILSON C. KRESS,

STATE REPORTER.

CONTAINING

CASES DECIDED AT JANUARY AND MAY TERMS, 1895.

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1895.

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JUSTICES

OF THE

SUPREME COURT OF PENNSYLVANIA

DURING THE PERIOD OF THESE REPORTS.

Chief Justice,	JAMES P. STERRETT.
Justice,	HENRY GREEN.
Justice,	HENRY W. WILLIAMS.
Justice,	J. BREWSTER MCCOLLUM.
Justice,	JAMES T. MITCHELL.
Justice,	JOHN DEAN.
Justice,	D. NEWLIN FELL.

ATTORNEY GENERAL.

MR. H. C. MCCORMICK.

JUDGES OF THE COURTS BELOW

DURING THE PERIOD OF THESE REPORTS.

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1st—Philadelphia County.

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No. 1: JOSEPH ALLISON, P. J.; CRAIG BIDDLE and F. AMÉDÉE BRÉGY, JJ.

No. 2: J. I. CLARK HARE, P. J.; SAMUEL W. PENNYPACKER and MAYER SULZBERGER, JJ.

No. 3: THOMAS K. FINLETTER, P. J.; JAMES GAY GORDON and HENRY REED, JJ.

No. 4: M. RUSSELL THAYER, P. J.; MICHAEL ARNOLD and ROBERT N. WILLSON, JJ.

Orphans' Court.

WILLIAM B. HANNA, P. J.; WILLIAM N. ASHMAN, CLEMENT B. PENROSE and JOSEPH C. FERGUSON, JJ.

2d—Lancaster County.

JOHN B. LIVINGSTON, P. J.; H. CLAY BRUBAKER, J.

3d—Northampton County.

W. W. SCHUYLER, P. J.; HENRY W. SCOTT, J.

4th—Tioga County.

JOHN I. MITCHELL, P. J.

5th—Allegheny County.

Courts of Common Pleas.

No. 1: EDWIN H. STOWE, P. J.; FREDERICK H. COLLIER and JACOB F. SLAGLE, JJ.

No. 2: THOMAS EWING, P. J.; JOHN W. F. WHITE and CHRISTOPHER MAGEE, JJ.

No. 3: JOHN M. KENNEDY, P. J.; WILLIAM D. PORTER and SAMUEL A. MCCLUNG, JJ.

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WILLIAM G. HAWKINS, JR., P. J.; JAMES W. OVER, J.

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FRANK GUNNISON, P. J.

7th—Bucks County.

HARMAN YERKES, P. J.

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CLINTON R. SAVIDGE, P. J.

9th—Cumberland County.

EDWARD W. BIDDLE, P. J.

10th—Westmoreland County.

LUCIEN W. DOTY, P. J.; ALEX. D. MCCONNELL, J.

11th—Luzerne County.

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CHARLES E. RICE, P. J.; STANLEY WOODWARD, and JOHN LYNCH, JJ.

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JOHN W. SIMONTON, P. J.; JOHN B. MCPHERSON, J.

13th—Greene County.
ALLEN P. DICKEY, P. J.

14th—Fayette County.
NATHANIEL EWING, P. J.; S. L. MESTREZAT, J.

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WILLIAM B. WADDELL, P. J.; JOSEPH HEMPHILL, J.

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J. H. LONGENECKER, P. J.

17th—Union County and Snyder County.
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E. HEATH CLARK, P. J.

19th—York County.
JAMES W. LATIMER, P. J.; JOHN W. BITTENGER, J.

20th—Huntingdon County and Mifflin County.
W. MCKNIGHT WILLIAMSON, P. J.

21st—Schuylkill County.

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GEORGE S. PURDY, P. J.

23d—Berks County.

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JAMES N. ERMENTROUT, P. J.; GUSTAV. A. ENDLICH, J.

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1721. Aug. 26. Fireworks. 1 Smith's Laws, 129. Heidenwag v. Philadelphia, 72.

1810. March 10. 5 Sm. L. 105. Fees of offices—Repealed. Com. v. Mann, 290; Com. v. Allegheny Co. 303.

1817. March 22. P. L. 128. Bail for costs. Young v. Colvin, 449.

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1836. June 13. P. L. 543. Poor laws. Bellefonte v. Somerset Co., 286.

1842. Ap. 5. P. L. 236. Fees of public officers—Repealed. Com. v. Mann, 290.

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1871. April 6. P. L. 476. Fees of county officers. Com v. Allegheny Co., 303.

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1887. May 13. P. L. 108. Liquor law. Com. v. Heckler, 575.

1889. May 14. P. L. 217. Street railways—Municipal consent. Plymouth Township v. Ry., 181.

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1893. June 10. P. L. 419. Election expenses. Evans v. Willestown Twp., 578.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

Patrick McGonigle *v.* Susquehanna Mutual Fire Insurance Company of Harrisburg, Appellant.

Patrick McGonigle *v.* Aurora Fire Insurance Company.

168 1
168 15
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178 636
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216 270

Insurance—Fire insurance—Sub-agent.

Where a duly authorized insurance agent in the due prosecution of the business of his company employs another as a sub-agent to solicit insurance, the acts of the sub-agent have the same effect as if done by the agent himself.

Insurance—Proof of loss—Total loss.

Where there is a total loss of an insured building, of which the insurance company has been immediately notified, no further technical proof of loss is necessary.

Where a total loss has occurred and the secretary of the company, who also acts as general manager and adjuster, goes promptly to the ground, has appraisers appointed according to the terms of the policy, and promises immediate payment on the finding of the appraisers, the company cannot afterwards set up as a defense the failure of the assured to make proof of loss.

In such a case a waiver of a condition in the policy against incumbrances may also be inferred.

Argued April 19, 1895. Appeal, Nos. 455 and 478, Jan. T., 1895, by defendants, from judgments of C. P. Luzerne Co., March T., 1895, No. 180, and on report of referee. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ. Affirmed.

Assumpsit on fire insurance policy.

The case was referred to Garret M. Harding, Esq., as referee, who reported as follows:

"First. The Susquehanna Mutual Fire Insurance Company established an agency at Wilkes-Barre, Pa., and appointed Mr. I. W. Miller as agent. Mr. Miller, besides personally soliciting insurance for his principal, accepted the assistance of one George W. Thomas, who seems to have been a sort of an itinerant solicitor of insurances in the near vicinity of Wilkes-Barre. He looked up properties to be insured, took verbal applications from the owners, brought them to Mr. Miller, who, after reducing them to writing, forwarded them to his company at Harrisburg, and when they were accepted, and policies issued thereon and sent to him, he usually delivered them to the assured, but sometimes he handed them to Mr. Thomas to be delivered to the assured on the receipt of premiums. In the present instance, however, both Mr. Miller and Mr. Thomas had solicited the insurance of Mr. McGonigle, both had been on the premises, and the former had been through the house. They seem to have had a conférence on the subject later, and Mr. Miller directed Thomas to take the insurance. Accordingly the latter, after obtaining from McGonigle, at another interview, further information concerning the premises, and after a satisfactory inspection of them himself, communicated to Miller the result. Miller reduced the same to writing, and signing it himself, forwarded it as an application to his company. It was accepted, and a policy of the character and extent as before indicated was issued and sent to Miller. He delivered it himself to McGonigle at the home of the latter in Plumbtown. McGonigle paid to him a part of the premium and a part of it to Thomas. That the defendant company in due time subsequently received the amounts thus paid, is not denied.

"Second. The valuation put upon the property at the time the application was made out by Miller was fixed by Thomas. He was upon the premises many times, and during his negotiation for the insurance, McGonigle told him what he had paid for the property originally, land included, and also what amount of insurance he wished put upon it. He made known to him the fact that there was an incumbrance on the premises held

by the executor of an estate. Thomas communicated the knowledge thus obtained to Miller, and fixed the valuation at $3,500. Miller was satisfied, and, indeed, according to his own testimony, he had 'dropped in to see McGonigle' whenever he went down to Plumbtown before the insurance was taken; and after it was taken and before the loss occurred, he further testified that he 'was down there and looked the building over; it looked nice and I thought everything was all right, and Mr. McGonigle a very nice man.' In reference to the incumbrance, his testimony was that 'Thomas said he didn't ask McGonigle if the property was mortgaged, or, if so, to what extent;' and further, that Thomas said 'that's a good property down there at McGonigle's; he's making lots of money, and I don't believe he's got anything on it.' Miller says he replied, 'Well, mark it no incumbrances.'

"McGonigle himself testified that he had put improvements on the property since he purchased it, and that it was worth $5,000. This valuation, as I understood it, related to the property as a whole, land included. Under all the testimony in this connection, the referee cannot escape the conclusion that an insurance of $2,300 was not an overinsurance on the building proper; it was at least within the limit of two thirds of the value of the building at the time the policy was issued.

"Third. On the morning of Aug. 30, 1892, before daylight, a fire broke out in the village of Plumbtown in a house but a few doors distant from the premises of the plaintiff. The intervening buildings were of wood, built close together, and of course readily inflammable. Awakened dwellers, having only the few facilities for quenching fire common in a country village, were powerless to stay the flames. The plaintiff's insured property was soon reached and burned up.

"Fourth. On the day following the morning of the fire, McGonigle notified Miller, the local agent at Wilkes-Barre, of the loss, and the latter presumably notified his principal forthwith, for about ten days afterwards Mr. B. K. Huntzinger, who besides being secretary of the defendant company seems to have been the general manager of its affairs and especially the adjuster of its losses, appeared on the ground at Plumbtown accompanied by Miller, the local agent. Mr. Huntzinger was also president of another insurance company—the Aurora Insurance

Company of Harrisburg, Pa.,—which likewise had issued a policy on Mr. McGonigle's property, and hence was interested in the results of the fire. He seems to have occupied a relation to this company altogether similar to that occupied by him in respect to the defendant company, at least as far as the adjustment of losses was concerned. The loss in this case having been total, Mr. Huntzinger declined to exercise the right to build, but desired that the extent or measure of the loss, as respected each of the companies named, be appraised in accordance with the provisions of the policies, promising that each would pay its proportionate amount just as soon as appraisers should reach a finding in the premises. He made no demand whatever for proof of loss at this time. The ashes and débris seemed to furnish all the evidence required upon this point. Some difficulty or difference, however, occurred between the plaintiff and himself in the selection of appraisers satisfactory on the one side and the other, but this was shortly overcome and an agreement reached in this respect. . . .

"The appraisers at once commenced their investigation, and on the succeeding day reached and delivered an award as follows:

"'To the Susquehanna Mutual Fire Insurance Co., of Harrisburg, Pa., and the Aurora Fire Ins. Co.

"'Having carefully estimated and appraised the property, also the loss and damage by fire to the hereinabove described property of Patrick McGonigle agreeably to the foregoing appointment, and having carefully examined all the property referred to, we hereby report that after taking into consideration the age, condition and location of the property at the time of the fire, and making proper deductions for all property saved in a damaged condition, also making suitable deductions for depreciation on account of age, use and otherwise to said property, we have appraised and determined and do report the actual cash value to be one thousand eight hundred ninety-one and $\frac{35}{100}$ dollars, and the actual cash loss on same to be seventeen hundred and eighty-five and $\frac{52}{100}$ dollars.'

"Fifth. A few days after the completion of the appraisement, Mr. Huntzinger had an interview with the plaintiff. The former did not carry out the promise to pay to the latter the proportionate amount found to be chargeable under the award

to the defendant company. On the contrary, Mr. Huntzinger then set up, as a cause of delay and as a reason why the company would not pay, the fact that 'a man named Jones had an attachment on the place.' At a still later day he called at the house of Mr. McGonigle in Plumbtown, and invited him to come to Wilkes-Barre, saying that 'he would settle the loss.' Indeed, on several occasions subsequent to the award of the appraisers, Mr. Huntzinger assured the plaintiff that 'he was willing and satisfied to pay the loss.' Payment, however, was not made. Some months of further delay intervened. Mr. Huntzinger added to the reasons already made for nonpayment the declaration that the defendant company 'was short of funds.' Along in December of that year, Hon. W. H. Hines, at that time counsel for the plaintiff, wrote directly to the defendant company at Harrisburg, Pa., asking for compliance with the promises made on their behalf. To that letter, which appears in the attached exhibits, Mr. Huntzinger returned the following reply, which also appears in the attached exhibits.

"'SUSQUEHANNA MUTUAL FIRE INSURANCE COMPANY.

"'Incorporated 1873. Charter Perpetual.

"'HARRISBURG, Pa., Dec. 10th, 1892.

"'W. H. HINES, ESQ., Wilkes-Barre, Pa.

"'Dear Sir:—Replying to your letter of the 9th inst. touching loss of Pat. McGonigle, will say that you are misinformed both as to promises of payment, and as to time when losses are payable. All promises made in this case are what the policy sets forth, and as they are conditional, the time has not yet arrived to say anything about payment other than what the policy itself contains.

"'As I am also interested in the Aurora Fire Ins. Co., the above applies to your letter, of the same date, to it.

"'Yours truly,

"'B. K. HUNTZINGER, Secy.'

"Sixth. A short time after the correspondence above noted, Mr. Hines called personally at the office of the defendant company, in Harrisburg, with a view to aid the interests of Mr. McGonigle in respect to his loss. Mr. Huntzinger, speaking for the two companies hereinbefore named, did not predicate the delay of adjustment on the fact that no proof of loss had

been furnished, but stated that attachments had been served, and that the claim on the building could not be adjusted until the attachments were released, and further, that this was the cause of the delay. The public duties of Mr. Hines as a member of congress obliged him to forego further professional effort in Mr. McGonigle's behalf, and thereupon John McGahren, Esq., was employed by the plaintiff as counsel.

"Seventh. There was no dispute on the trial as to the existence of an incumbrance on the property at the time I. W. Miller, the local agent, formulated the application for insurance, nor that it continued at the date of the issuing of the policy; nor was it denied that the plaintiff informed Thomas of the incumbrance when the latter solicited the insurance. It was further conceded that on the 3d of September following, an attachment execution was issued on the incumbrance, and service of the same was had four days afterwards on the defendant company as a garnishee.

"Eighth. In January following, Mr. McGahren, counsel for the plaintiff, wrote to Mr. Huntzinger in behalf of Mr. McGonigle. This letter appears in the attached exhibits. Inclosed therein was forwarded to the defendant company a certificate from the proper record in Luzerne county, showing that the attachment in question had been dissolved. Replies of Mr. Huntzinger to several letters written by Mr. Hines and Mr. McGahren to the defendant company directly, and to Mr. Huntzinger himself as the recognized agent, appear in the attached exhibits. All promises of payment other than those conditioned in the policy seem to have been unrecognized by Mr. Huntzinger. At a later date, or on the thirteenth of February, 1893, proofs of loss were duly made and forwarded to the defendant company. Payment of the claim was nevertheless still refused, and on the 23d of the same month this action was instituted.

"John McGahren, Esq., counsel for the plaintiff, claims that under the facts as developed in the trial, and under the law, Mr. McGonigle is entitled to recover the sum of $1,009.20, the proper amount due from the defendant company under the terms of the policy based on the finding of the appraisers, together with the interest on the same from the date of such finding.

"Hon. Henry W. Palmer, counsel for the defense, insisted that there should be a general finding, under the facts and the

law, in favor of the defendant company. He further requests the referee to find the following facts:

"1st. That the representations upon which the policy in this case was issued, were made to the agent of the company by George W. Thomas, an insurance broker, who was not an agent of the defendant company.

"2d. That Thomas represented the property to be worth $3,500, when in fact it was not worth more than $1,895.

"3d. That Thomas represented that he did not know whether the property was incumbered, but told the agent of the defendant to put it down as unincumbered, and it was so represented to the defendant company.

"4th. That the action of the secretary of the defendant company in viewing the premises and having appraisers appointed to estimate the loss, is not sufficient to show a waiver of the proofs of loss.

"5th. That under all the evidence the defendant company did not waive proofs of loss.

6th. That plaintiff furnished proofs of loss Feb. 16, 1893, and brought suit in less than ninety days thereafter.

"7th. That the property was represented as a dwelling house and saloon and storeroom for liquors, when in fact it contained a hall used for public entertainments, shows, theaters and suppers.

"8th. That the rate charged by insurance companies on property used for purposes of public entertainments is higher than the rate charged plaintiff.

"As to questions of law Mr. Palmer desired the referee to find as follows:

"1st. The plaintiff is not entitled to recover in this case because, by the terms of his policy, all representations made before the insurance was effected are warranted to be true, and certain ones have been found to be false; therefore, the plaintiff cannot recover.

"2d. Because the suit was brought before the money was due under the terms of the policy.

"In support of the views thus entertained of the facts and the law in the premises, Mr. Palmer directed the attention of the referee to the following provisions in the policy, and desired that they should be considered in disposing of the case:

"'No. 1.

"'*Duty of Secretary.*

"'He shall, upon the occurrence of any loss, view the premises as soon as practical, investigate the cause of the loss, and make report to the board at their next meeting, or may appoint some other competent person to act in his stead.

"'No. 1½.

"'*Duty of Agents.*

"'It shall be the duty of local agents or surveyors to make surveys and receive applications for insurance, to transmit the same to the secretary, to receive the cash premiums for the same, the reward thereof, and the interest payments when furnished with proper receipts therefor, and in case of any loss occurring within his agency, he shall as soon as possible go to the place of such loss and examine into the circumstances attending the same, and report to the secretary the result of such examination. But no agent is to be empowered to make insurance, nor to waive any condition of the policies or by-laws either before or after a loss without special authority from the company in writing.

"'No. 1¾.

Who is an Agent?

"'In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed an agent of this company.

"'No. 2.

"'*Time Limit for Bringing Suit.*

"'Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided; and the amount of loss for which this company shall be liable pursuant to this policy shall not be payable until ninety days after the notice, verification and delivery of the proof and claim at the office of the company in the manner and time herein required.

"'No. 3.

"'*Appointment of Appraisers.*

"'In the event of disagreement as to the amount of loss, the

same shall, as above provided, be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit the differences to the umpire; and the award of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisement and umpire.

"'NOS. 4 AND 5.

"' *Waiver by Company—Appraisal—Proofs of Loss—Time for Bringing Suit Limited.*

"'This company shall not be held to have admitted any liability, or to have waived any provision or condition of this policy, or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until ninety days after the notice, ascertainment, estimate and satisfactory proofs, of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

"'No suit or action on this policy for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within eight months next after the fire.

"'NO. 6.

"' *Warranty—No Waiver by Agent.*

"'The insured, by the acceptance of this policy, hereby warrants that any application, survey, plan, statement or description connected with the procuring of this insurance, or contained in, or referred to in this policy, as well as all representations made by the insured, or the representative of the same, are true and shall form a part of this policy, whether signed by the insured or not; also that the property herein described has not been over-valued, and that no fact or circumstance concerning this insurance or the subject thereof has been concealed or omitted to be made known to said company; and this com-

pany shall not be bound under this policy by any act of, or statement made to or by any agent or other person, which is not contained in this policy or in any other written paper above mentioned.

"'No. 7.

"' *Amount of Insurance Allowed.*

"' The aggregate amount of insurance in this and other companies shall not exceed two-thirds of the actual value of the property insured. This limit may, however, by special indorsement on the policy be extended to three-fourths of the real value.'

"'No. 8.

"' *Policy Subject to Conditions.*

"' This policy is made and accepted subject to the foregoing stipulations, conditions and by-laws, together with such other provisions, agreements, conditions or statements as may be indorsed hereon or added hereto, whether signed by the assured or not; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, by the secretary of the company, or by an agent authorized thereto in writing by the president or secretary of this company, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

"'No. 9.

"' *Policy Void if Premises Used for Anything but Dwelling House and Hotel.*

"' This entire policy shall be void if the insured had concealed or misrepresented, in writing or otherwise, any fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein; or if during this insurance.the above mentioned premises shall be used for any trade, business or vocation,

or for storing, using or vending therein any class of article other than those named, or if the occupation of such premises be changed except as herein specially agreed to in writing upon this policy.'

"To the first request of the counsel for the defense as to the finding of facts, the referee cannot yield unqualified assent as a whole, and therefore must deny it. It is true that Mr. Thomas was not the *appointed* local agent of the defendant company at Wilkes-Barre, but he was a solicitor of insurance for Mr. Miller, the duly appointed agent at that place; he looked up properties to be insured, took applications, verbal and otherwise, for such insurance, brought them to Mr. Miller who, after reducing them to writing or putting them in proper form, forwarded them to the companies for which he was agent. In the present case both Miller and Thomas were solicitors for this particular insurance, both examined the property, both were satisfied with it in every respect. Miller himself was shown through the house; he instructed Thomas to take the insurance, thus, apart from what he himself did directly in the premises, making the act of Thomas his own act. His principal recognized his work, issued a policy in conformity with it, received the premium therefor, never challenging any part of the preliminary transactions until the day of trial upwards of seventeen months thereafter. The features of the case in some respects are closely analogous to those of Massachusetts Ins. Co. v. Eshelman, 30 Ohio State, 647, where it was held, substantially, that where an agent, in the due prosecution of the business of his principal, employs another in a branch of the business, the acts of the sub-agent have the same effect as if done by the agent himself. This doctrine was quoted approvingly by our Supreme Court in Swan v. Watertown Ins. Co., 96 Pa. 37.

"The second and third requests on the part of the defense must be denied also, except in so far as relates to the voluntary and unauthorized representation as to incumbrances made by Miller, the local agent himself, to his principal.

"And denial must likewise be had of the fourth and fifth requests. Where there is a total loss of the insured building, and the insurance company has been immediately notified as was done in this case, no further technical proof of loss is

necessary. Besides, when an insurance company bases its neglect or refusal of payment on the ground that attachments of the claim have been served upon it, or that it is short of funds, or, indeed, on any ground other than the absence of technical proof required by the policy, particularly when the loss has been total, and notice of it has in due time been given to the company, such conduct amounts to a waiver of technical proofs of the loss: Roe v. Dwelling House Ins. Co., 149 Pa. 94; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568, and many other authorities which the referee does not deem necessary to mention herein.

"Again, an insurance company may waive a condition requiring proof of loss by notifying the insured, in case of a total loss, that the insurance would be paid in full: Stauffer v. Manheim Mut. Ins. Co., 150 Pa. 531. The present case differs from this immaterially. Here the loss was total, notice was given to the insurance company at once, the adjuster (secretary), and general manager of the company—all in one—was promptly on the ground, had appraisers appointed according to the terms of the policy, and promised payment forthwith on the finding of the appraisers. This finding having been reached, delay of complainee was not predicated upon a want of proofs of loss, but upon the fact that the claim had been attached in the company's hands. Indeed, the mutual appointment of appraisers to adjust the loss, and they having made their finding which was not objected to by the company's recognized adjuster and agent, is competent evidence to submit to a jury or referee, whether the provision in the policy requiring proof of loss to be furnished within a certain specified time had been waived: Fritz v. Lebanon Mut. Ins. Co., 154 Pa. 384.

"The sixth request of the defense is accorded. The hope of realizing for his loss without litigation, induced perhaps by the contemporaneous letters of the secretary of the company hereinbefore referred to, may have led the plaintiff to furnish proof of loss at the late date indicated. It is immaterial, however, what the reason was. We have already seen that under the law and the evidence, the company had, upwards of four months previously, waived this provision of the policy. The plaintiff's action was therefore not premature.

"Nor can the seventh and eighth requests on the part of the

defense be favorably entertained. Certainly if the plaintiff had made false representations at the time the insurance was solicited as to the condition of his property, or its surroundings, or the uses to which it was then, or was to be in future, subjected, or had concealed any matter material to the risk, a different view might well be taken. The evidence, however, exhibits the contrary. He made no representations whatever in the respects referred to; his building was free to the inspection of both Miller and Thomas, and one of them at least was shown through the house; nothing was said on either side at any time about a hall in the house or its uses, but the general use of the premises as a whole was apparent to any ordinary observer. So far as the hall was concerned the evidence shows that its size was 22 by 56, in the second story of the building, and that it was used as occasion offered, for church suppers, church festivals, amateur performances and dances. Even though such uses might increase the risk and be cause for a higher rate of insurance ordinarily, still there is no evidence of concealment on the part of the plaintiff as respects the hall, no evidence that he knew such use did increase the risk, and no evidence that he knew that a higher rate of insurance was chargeable where buildings of this character were used for the purposes last mentioned. Knowledge as to both these particulars must be brought home to the insured before his recovery for a loss, otherwise well founded, can be defeated: Lebanon Mut. Ins. Co. v. Losch, 109 Pa. 100; Rife v. Lebanon Mut. Ins. Co., 115 Pa. 530.

"As already stated, Mr. Palmer for the defense further requested the referee to find the following conclusions of law:

"'1st. That the plaintiff is not entitled to recover in this case, because by the terms of his policy all representations made before the insurance was effected, are warranted to be true, and certain ones have been found to be false; therefore, the plaintiff cannot recover.

"'And 2d. Because the suit was brought before the money was due under the terms of the policy.'

"These requests must be denied. That the policy contains conditions of a very stringent character as to liability on the part of the company in case of loss, must be admitted, but to say that these conditions, or any of them, can only be waived as prescribed in the policy, would be an assertion not warranted

under the law. For example, a policy providing that it should be void if the property be sold, conveyed, incumbered or mortgaged is not rendered invalid by the existence of liens against it when the policy was issued, about which no questions were asked and no statements made: Insurance Co. v. Hoffman, 125 Pa. 626. In the present case the unauthorized statement of Miller, the local agent, respecting liens, cannot affect the insured who answered truthfully upon this point. It was not competent evidence, even though admitted at the hearing to save time, but under the protest of plaintiff's counsel: Act of May 11, 1881, P. L. 20. And again, if the insured informed the agent that there was a lien against the property, and a policy was subsequently issued which failed to note that fact, it will be presumed that the company waived the condition in the policy as to the lien: Gould v. Insurance Co., 134 Pa. 570. And further still, a waiver of the condition in a policy against incumbrances may be inferred from the appointment of appraisers after the fire and an adjustment of the loss, the negotiations lasting nearly five months; and this, too, though the policy contained a condition that nothing less than a specific agreement, clearly expressed and indorsed on the policy, should be construed as a waiver of any of its conditions: McFarland v. Insurance Co., 134 Pa. 590.

"Conditions in a policy of insurance are not meaningless, however; they may all be enforced under proper circumstances. As a general proposition they all stand practically upon a common plane, no one of them being more sacred or binding than another. And in the case at hand, if the company had remained passive after the fire had occurred, waiting full compliance on the part of the insured with the conditions contained in the policy, very likely there would have been no cause of action against them. But such was not the case. The company did not remain passive. Their action in the premises through their recognized agent after the fire, as disclosed by the evidence in the case, is competent for a jury, or for a referee standing in the place of a jury, and warrants the inference of a waiver on the part of the company of all the conditions in the policy to which attention has been called by the counsel for the defense, and which are hereinbefore noted at length. Hence, a finding accordingly must follow. Whereupon judgment is directed to

be entered against the defendant company and in favor of the plaintiff for the sum of $1,136.69, that being the proportionate amount based on the finding of the appraisers as returned, together with interest up to Oct. 23, 1894."

Exceptions to the referee's report were overruled, and judgment entered for plaintiff.

Errors assigned were in overruling exceptions to referee's report, and entering judgment for plaintiff.

H. W. Palmer, for appellant: Swan v. Watertown Fire Ins. Co., 96 Pa. 37; Pottsville Mut. Fire Ins. Co. v. Horan, 11 W. N. C. 198; Blooming Grove Mut. Fire Ins. Co. v. McAnerney, 102 Pa. 335; German-American Ins. Co. v. Hocking, 115 Pa. 398.

John McGahren, for appellee, cited: Bredin v. Dubarry, 14 S. & R. 27; Kelsey v. Nat. Bank, 69 Pa. 426; Wright v. Burbank, 64 Pa. 247; Mass. Ins. Co. v. Eshelman, 30 Ohio, 647; Curry v. Fire Office, 155 Pa. 467; McFarland v. Ins. Co., 134 Pa. 590; Snowden v. Kittaning Ins. Co., 122 Pa. 502; Ins. Co. v. Todd, 83 Pa. 272; Ins. Co. v. Dougherty, 102 Pa. 568; Roe v. Dwelling House Ins. Co., 149 Pa. 95: Ins. Co. v. Erb, 112 Pa. 149.

PER CURIAM, April 29, 1895:

There appears to be no substantial error either in the learned referee's findings of fact or in his conclusions of law. His very able and exhaustive report is an ample vindication of his rulings. There was therefore no error in overruling the exceptions and directing judgment for plaintiff in accordance with the referee's findings.

Judgment affirmed.

McGONIGLE v. AURORA FIRE INSURANCE COMPANY.

PER CURIAM, April 29, 1895:

By writing, signed by counsel for the parties and filed in this case, it was agreed that the decision to be rendered in Patrick McGonigle v. Susquehanna Mut. Fire Insurance Co., No. 455, January term, 1895, shall control and determine the appeal in this case, and be decisive of all questions arising out of the same.

In an opinion, just filed in that case, the judgment has been affirmed; and pursuant to the terms of said agreement the judgment in this case should also be affirmed.

Judgment affirmed.

Hugh McNeile v. Martha H. Cridland and Ella Cridland, Appellants.

Principal and agent—Representations by agent—Sale of real estate—Defense to purchase money mortgage.

When an agent acts contrary to his instructions his principal will be bound by his acts which are within the scope of the authority which the agent was held out to the world to possess

In an action upon a purchase money mortgage, the case should be submitted to the jury where the evidence for the defendants tends to prove that in purchasing the mortgaged premises, defendants relied upon representations of plaintiff's agent who negotiated the sale to the effect that the house was well built on solid ground; when instead thereof it was actually erected on made ground which gradually settled to such an extent as to cause the sinking, cracking and bulging out of the front wall and other damages, and that a large expenditure of money would be required to repair the damages thus occasioned.

Argued Jan. 16, 1895. Appeal, No. 89, July T., 1894, by defendants, from judgment of C. P. No. 2, Philadelphia Co., March T., 1893, No. 70, on verdict for plaintiff. Before STERRETT, C. J., GREEN, WILLIAMS, McCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Scire facias sur mortgage. Before PENNYPACKER, J.

At the trial, it appeared that defendants purchased from plaintiff a house, 2220 North Sixteenth street in the city of Philadelphia, upon representations made by plaintiff's agent, William F. Locker. The substance of these representations are stated in the opinion of the Supreme Court.

The court charged as follows:

"Unfortunately, in this case, the vendee has made a purchase of a house which has not been satisfactory. If we may believe the evidence, it is described as cracked, the stairways have given away and the wall has bulged out. We cannot under-

take to upset contracts which people make except for good reasons. As I view the testimony in this case, the defense has not made out a case. It is a suit upon a mortgage and no legal defense has been shown. I instruct you, therefore, you will have to find your verdict for the plaintiff for the amount of the mortgage."

Verdict and judgment for plaintiff. Defendants appealed.

Error assigned was in directing the jury to find a verdict for plaintiff for the amount of the mortgage.

Joseph W. Shannon, for appellant.—Locker's representations to the defendants that the house was built on solid, and not on made ground, was the actual inducement to the purchase of the property.

The defendants have made a full and complete defense by proving through their experts that the aforementioned representations are material and false in fact: Keough v. Leslie, 92 Pa. 424; McFeely v. Little, 19 W. N. C. 97; Caley v. Phila. & Chester County R. R., 80 Pa. 363.

There was a want of consideration for the bond which was given, which is a legal defense to this suit: Penn. Nat. Gas Co. v. Cook, 123 Pa. 170; Hessner v. Helm, 8 S. & R. 178.

The evidence offered by the defendants presented an issue of fact, which was a question for the jury: Gates v. Watt, 127 Pa. 20; McGrann v. Pittsburg & Lake Erie R. R., 111 Pa. 171; 12 Am. & Eng. Ency. of Law, 926, 931.

H. Gordon McCouch, for appellee.—The execution of the deed and mortgage was a fulfillment of all previous bona fide stipulations between the parties, and the writings by which the evidence of their agreement is to be perpetuated are supposed to contain the whole contract: Stubb v. King, 14 S. & R. 206.

The scienter must not only be alleged, but proved, and the evidence must be such as would satisfy a jury that the appellee made the alleged statement, knowing it to be false or with such conscious ignorance of its truth as to be equivalent to falsehood: Dilworth v. Bradner, 85 Pa. 238; Duff v. Williams, 85 Pa. 490; McCandless v. Young, 96 Pa. 289.

While fraud may be proved like any other fact by evidence

tending to establish its existence, yet it is a serious accusation and is not to be lightly inferred: Mead v. Conroe, 113 Pa. 220; Kern v. Middleton, 24 W. N. C. 393.

OPINION BY MR. CHIEF JUSTICE STERRETT, May 6, 1895:

In directing a verdict in favor of plaintiff for balance due on the purchase money mortgage in suit, the learned trial judge evidently proceeded on the assumption that the testimony introduced by defendants was wholly insufficient to sustain any defense whatever to plaintiff's claim or any part thereof. This assumption we think was unwarranted. The testimony referred to presents questions of fact which should have been submitted to the jury. It tends to prove, among other things, that in purchasing the mortgaged premises the defendants relied on representations made by plaintiff's agent, Locker, through whom the sale was negotiated, to the effect that the house was built on solid and not on made ground, a well-built house, etc.; that, instead of being well built and on solid ground, it soon became apparent that the house was erected on filled-in or made ground which gradually settled to such an extent as to cause the sinking, cracking and bulging out of the front wall and other resultant damages described by defendants' witnesses, and that an expenditure of seven or eight hundred dollars would be required to repair the damages, thus occasioned, and put the building in proper condition.

It is unnecessary to refer in detail to the testimony tending to prove the allegations of fact relied on by defendants. It is sufficient to say that, if believed by the jury, they would have been warranted in finding that the alleged misrepresentations were in fact made by plaintiff's agent Locker; that they were not only untrue, but, in the circumstances, they were calculated to deceive and did deceive the defendants to their injury. This being so, the case should have been submitted to the jury with proper instructions as to the law applicable to such a state of facts as defendants' testimony tended to prove. It was the exclusive province of the jury to consider and pass upon the testimony, and, if they found defendants' allegations were substantially true, then to ascertain the damages sustained by them, and, if they were less than plaintiff's claim, to deduct the same therefrom, etc.

It is well settled that the principal is bound by the acts of his agent within the scope of the authority that he is held out to the world to possess, even notwithstanding the latter acted contrary to instructions. One who authorizes another to act for him, in a certain class of contracts, undertakes for the absence of fraud in the agent acting within the scope of his authority. Among other cases, recognizing this and kindred principles, are the following: Brooke v. Railroad Co., 108 Pa. 529; Smalley v. Morris, 157 Pa. 349; Keough v. Leslie, 92 Pa. 424; Caley v. Railroad Co., 80 Pa. 363; Hessner v. Helm, 8 S. & R. 178; Stubbs v. King, 14 S. & R. 206; Penn. Nat. Gas Co. v. Cook, 123 Pa. 170. In the latter it was said: "There is a long series of cases—some of them very recent, ... —that when an agent exceeds his authority, his principal cannot avail himself of the benefit of his act and at the same time repudiate his authority. This principle rests upon the solid foundation of natural justice and common honesty."

It follows from what has been said that the learned trial judge erred in directing a verdict for the plaintiff.

Judgment reversed and a venire facias de novo awarded.

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George A. Port v. Huntingdon & Broad Top R. R., Appellant.

Railroads—Eminent domain—Causeways—Measure of damages—Act of Feb. 19, 1849, sec. 12.

Under the act of Feb. 19, 1849, sec, 12, P. L. 84, providing for the construction of a causeway where a railroad severs a tract of land, the conditions of the ground must be considered as to whether the causeway shall be overhead, under grade, or at grade.

A causeway within the meaning of the act is an internal improvement or arrangement intended to afford the means of getting from one part of the land to the other, and has no reference to road crossings, or to the means of getting off the premises to market or elsewhere.

The measure of damages in such a case is the inconvenience which the landowner has suffered in the enjoyment of his property arising out of the failure to construct a causeway. The injury to the land caused by its being severed, or by the inconvenient shapes of the severed parts, or by excavations or embankments, or by obstruction of access to public or private ways cannot be considered, as such injury is provided for in the assessment of damages for the original taking of the land.

Argued April 22, 1895. Appeal, No. 91, July T., 1894, by defendant, from judgment of C. P. Huntingdon Co., May T., 1892, No. 238, on verdict for plaintiff. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Petition for appointment of viewers to assess damages for an injury caused by the failure of defendant to construct a causeway. Before FURST, P. J.

At the trial it appeared that the defendant's railroad was located across the land now owned by plaintiff, but then owned by James Hight and J. D. Hight. Viewers were appointed upon petition of the Messrs. Hight in 1855, and damages to the amount of $910 were awarded to the owners. These damages were fully paid by the railroad company. The northern boundary of plaintiff's property is bounded by the towing path of the Pennsylvania canal, now owned by the Pennsylvania Railroad Company. The western boundary is the right of way of the Huntingdon & Broad Top Railroad Company. The southern boundary is the Juniata river, and the eastern, a mill race. The Huntingdon & Broad Top Railroad is located so as to cut off a small section in the northwestern corner of the tract from the main portion of the land. On this corner a small dwelling house is erected.

The court charged in part as follows:

"As we have stated the railroad is located across the northwest corner of this lot, and by a view of the diagram you will notice that such a location of the road, separating a part of the premises from the residue, would naturally produce in the minds of the jury or of any person viewing the premises an impression favorable to damages, because of the separation of the parcels of the land and the fact of the owner or occupant having to cross and recross the railroad in going to and from it.

"In the consideration of the case that you are trying, whatever damages were or are occasioned to this lot by the location of the road there, separating the pieces, cutting off this triangle from the residue of the lot, you are not to consider. The owners of this property were paid for that. Whatever damage was done to this property in the location of the road has been settled for and is not, and cannot be, a claim before this jury. Up to somewhere in the summer of 1891, the owners of this property

were accustomed to go to and from the premises by traveling upon the towing path of the canal and passing under the bridge of the railroad company or between the trestles of the road. In 1891, the Pennsylvania Railroad Company straightened their tracks in this borough; and the result was that they changed the location of their road and occupied premises further south. The Broad Top Railroad Company then began to reconstruct their roadbed, that is, that which before had been a trestlework was filled up by a solid embankment. After these changes by the Pennsylvania Railroad Company, the Huntingdon & Broad Top Railroad Company made a solid roadway for their road, and they had a right to do so, as that was within the corporate powers of the company and for the benefit and safety of the public; and whatever damages the construction of that road caused, are not before this jury to be assessed. But the plaintiff alleges and claims that at that period of time, in 1891, by changing the trestlework into a solid embankment, a necessity arose to build upon these premises a causeway, so that Mr. Port might pass with ease and convenience from one portion of his premises to the other, in the occupation and enjoyment of the land; and he claims that he requested the Broad Top Railroad Company to establish a causeway for him and that they refused; and therefore the damages arise which you are to assess in this case for the failure to build that causeway so as to afford convenience of travel over and across the line of this railroad for the accommodation of the occupant and owner of the premises.

"A causeway according to lexicographers is a way raised above the natural level of the ground by stones, earth, timber, etc., as a dry passage over wet or marshy ground. That was the original idea of a causeway. Applying it to railroad construction under the act of assembly to which we will presently call your attention, it would seem to be, and we think is, a means, a way, graded so as to make it convenient to cross the track of the road. Whether it be at, above or under grade, we will refer to again hereafter. But it is a means of approach, constructed in whatever suitable manner it may be required, so as to make a passage across the railroad from one side to the other; and whether it be called a causeway or an archway, or a bridge or any other artificial term, it comes down to a passageway across the line of the track. It is that thing

that this company refused to do, according to the allegations of the plaintiff; and for the failure to do it damages are sought here. . . .

"[This first question, as we have already said, for you to determine is: Have this company refused to build a causeway? You will have no trouble in coming to the conclusion that the company have failed to build a causeway; and that failure, under the evidence, we feel perfectly safe in saying to you can be regarded by the jury as a refusal to build a causeway.] [15]

"The second question then is whether there was a necessity to build a causeway. You have heard the evidence on that subject. [If you come to the conclusion that there was a necessity to build this causeway, the next important question for you to determine is: Was it practicable to build one—could one be built on the premises of Mr. Port?] [14] In this connection, we say to you Mr. Port has no right to require the railroad company to build him a causeway on any other person's land than his own. If he wants exit to other people's land, that he must obtain in a different way. If you find that it was necessary and that it was practicable, then the last question for you to determine is: What damages has Mr. Port sustained by the failure of the company to build that causeway?

"Damages are an allowance in law for an injury inflicted by one person upon another or upon his property. Damages may be either compensatory or punitive. Compensatory damages are the actual damages that a man sustains. Punitive damages are damages that are in their nature of a vindictive character, that is 'smart money' to punish a man for doing or not doing a particular thing. The character of the damages involved in this case is that of compensatory damages. If Mr. Port is entitled to damages, they are simply such damages as are given under the act of assembly; and I, therefore, reread that portion of the act in connection with what I have said to you:

"'The said company shall be liable to pay any person aggrieved thereby all damages sustained by such person in consequence of such neglect or refusal.'

"In order to ascertain the damages, you must take into consideration the situation of the property, the enjoyment and use

to the occupant of the property and the relative value of the one section and the other. A causeway is in the nature of an internal improvement within the premises themselves. What damages did Mr. Port sustain by the failure of the company to build that causeway? He alleges and has adduced testimony to show that he is cut off from that triangle, that he cannot use the triangle in connection with the residue of his property; and that is the gravamen or gist of his action and must be under the law, because his damages do not arise from the location of the road.

If the Broad Top Railroad Company had located its road along the northern line of Mr. Port's property and had built an embankment there ten feet high, whatever damages Mr. Port or the owner of the property would have sustained by reason of that embankment, would not have been damages resulting from the failure to build a causeway; but they would have been damages arising from the construction of the road in that manner upon his premises, excluding him from the public; and for such a construction his damages would be assessed under the 11th section of the act, which provides for the taking of property for public use. Damages for the failure to build a causeway are in the nature of internal damages to the property, rendering its use and occupation inconvenient. Therefore, you must take into consideration the relation that this triangle, cut off from the other part of the lot, bears to the other part of the lot, with the two used together. Is it inconvenience to Port to be deprived of the use of the triangle in connection with the residue of the property? If he did not so use it, if it was leased or in the possession of another so that he was not using it as part and parcel of his slaughtering establishment, then of course it would most materially affect the amount of damages, because, if he is not damaged in its use and enjoyment or in the convenient use and enjoyment, it goes to the very basis of the claim for damages. Because any witness may swear that the damages are $5,000 or $500 or any other sum, you are not to allow that sum. You are not to allow damages based upon that theory. It is the real, actual inconvenience to the owner of the property that you are to consider. How much in dollars and cents does that inconvenience amount to? You do not estimate it by the profits of the business, be-

cause you cannot go into the question of whether there will be a profit or a loss upon a man's business. It is the inconvenience or, in a certain sense, the burden that is cast upon the property by the failure to build a causeway there to connect the two parts together, so as to conveniently enjoy them as they might be enjoyed with a causeway there. That is the real basis of the plaintiff's claim in this case, and it is with reference to that that you must ascertain the damages; and so that you may understand the trial of this case, a great many propositions as to damages were submitted and rejected by the court, because none of them, in the mind of the court, brought the evidence to the real question that underlies this case. You are not to consider, as the measure of damages in this case, the fact that Mr. Port did not have free access to the town, going off his premises. That would enter into the question of damages arising from the construction or location of the road, and they have been assessed and paid; but it is the internal enjoyment and occupation of the premises that is involved in the failure to build a causeway that you notice. Under the act the purpose is stated to be to enable the occupant or occupants of the land to cross or pass over the same with wagons, carts and implements of husbandry. This act would seem primarily to apply to the same plantation that is used in agriculture, so that the owner of the farm may pass from one side of the farm to the other, across the line of the road, with his carts, wagons and implements of husbandry; and wherever he is impeded by the locations of the road so that he cannot pass from the one to the other without a causeway, it is the duty of the railroad company to furnish a causeway; and, if they fail to do it, they are to pay the owner whatever damages he sustains by that inconvenience."

Defendant's points are among others as follows:

"9. The railroad company had no power and was under no obligation to go through the lands of Horace Dunn or any other person to make Mr. Port a road; and if it was impracticable to make him a causeway on his own land, or he declined to have such a causeway made on his own land, then he cannot recover in this proceeding. *Answer:* This point is predicated upon the testimony of Mr. Port himself. We have reserved the question involved in this point for further consid-

eration and as a reserved point; and, in connection with this reservation, we have also reserved the question whether there is any evidence upon which the plaintiff is entitled to recover. That we reserve for future consideration."

"13. A railroad company is not obliged to provide the owner or occupant of land through which its road passes with a way under its road to enable him to pass from one part of his land to another. *Answer:* We reserve for further consideration, in connection with our answer to the ninth point, the question whether the railroad company would be bound to make a causeway under the line of their roadbed."

Verdict for plaintiff for $425. The court subsequently entered judgment for the plaintiff on the reserved points. FURST, P. J., filing the following opinion:

"The verdict in this case is so reasonable that it seems to us to be a very fair adjustment of the case, and it ought not to be disturbed except for manifest error.

"Upon the trial of this case we reserved two questions of law, the first in answer to plaintiff's second point, and the second in answer to the same point, and to defendant's ninth and thirteenth points. We also reserved the question whether under the evidence the plaintiff was entitled to recover.

"Plaintiff's second point and defendant's thirteenth point relate solely to the question whether the 12th section of the railroad act of 1849 contemplates a causeway under the railroad. We affirmed plaintiff's point, reserving the question as stated for further consideration.

"We are of opinion that the character of the causeway must be determined by the location of the railroad where the necessity requires the causeway to be constructed. If the railroad is built at grade, a causeway can be built at grade. If the railroad is elevated as by a heavy fill, it is clear that the cheapest and best causeway would be under the railroad; if the railroad is depressed then an overhead crossing would be proper, so that the conditions of the ground must be considered as to whether the causeway shall be overhead, under, or at grade.

"The ninth point we affirm. The causeway is intended to connect the several parts of the tract, so that access may be had from the one part to the other on plaintiff's own land, and not elsewhere. The question whether it was practicable to build

one so as to connect the triangle with the main lot was left to the jury. The jury found that it was.

"The last question is predicated upon the testimony of the plaintiff alone. Whether under his testimony a recovery can be had, etc. This is the question upon which our mind is not clear.

"If what plaintiff testified on the stand has to be considered as 'fact,' and not 'opinion,' we would be compelled to hold that he, by his own testimony, defeats his case. But upon a careful reading of his testimony, we are inclined to the view that the greater part of his evidence on this branch of the case is matter of opinion only, influenced by the fact that plaintiff's preference was to have a causeway over the lands of defendant rather than over his own. The character of the petition for viewers rather leaves such impression on the mind.

"We however differed from counsel upon this view of the law, and we held on the trial and still hold that the causeway is intended to be rather an internal improvement or arrangement, so as to afford the means of getting from the one part of the land to the other, and it does not comprehend a means of getting off the premises to market, etc.

"While the plaintiff did express his opinion strongly on the subject of location of the causeway, defendant called a witness, John L. Isenberg, who testified that it was practicable to construct the causeway on the premises. That at the abutment a passageway could be made under the roadbed.

"When we remember that this portion of plaintiff's lot is spanned by an iron bridge, from six feet high and upwards, and that there are open spaces between the bents, it is not difficult to find that an under way can be made so as to cross the road. We are satisfied that we directed the jury properly upon the subject of damages, and the difference is the damages under the 11th and 12th sections of the act.

"The fixed rule for the assessment of damages incident to the taking of land for the location and construction of a railroad, under the right of eminent domain, vested in the corporation, is well defined in the 11th section of the act of 1849, general railroad law, and in many decisions of the Supreme Court.

"The rule as announced in Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411, has been followed down to the latest

case. That rule is: The value of the property as a whole immediately before the injury, or the construction of the railroad; its value immediately after the construction as affected by it. The difference, if any, is the true measure of damages.

"Any burden cast upon the land by the construction of the railroad, which detracts from its value, is to be considered by the jury in estimating the damages. The way in which the railroad cuts the tract or lot as diagonally, by a curve or otherwise; the inconvenient shape in which the remaining part is left, the depth of excavations, or height of embankments; the obstruction or entire interruption of access to public or private ways; the division of the tract or lot into different parts, so that persons or cattle cannot pass from one to the other; or, if at all, only with greater or less difficulty and danger, etc., are all proper subjects, matters and things to be considered by the jury of view in assessing the damages, and these are to be considered once for all, under the 11th section of the act, and having been so considered, they are not the subject of consideration again in the present proceeding: Pierce on Railroads, pages 210, 211; Schuylkill Navigation Co. v. Farr, 4 W. & S. 362; Searle v. Lackawanna & Bloomsburg R. R. Co., 33 Pa. 57; Patton v. N. C. R. R., 33 Pa. 426; Watson v. Pittsburg & C. R. Co., 37 Pa. 469; East Penn. R. Co. v. Hiester, 40 Pa. 53; Brown v. Corey, 43 Pa. 495; East Penn. R. Co. v. Hottenstine, 47 Pa. 28; Harvey v. Lackawanna & Bloomsburg R. R. Co., 47 Pa. 428; Hornstein v. Atlantic & G. W. R. Co., 51 Pa. 87; Western Penn. R. R. v. Hill, 56 Pa. 460; Wilmington & Reading R. R. Co. v. Stauffer, 60 Pa. 374; East Brandywine & Waynesburg R. R. Co. v. Ranck, 78 Pa. 454; Penn. & N. Y. R. R. Co. v. Bunnell, 81 Pa. 414; Hoffer v. Penn. Canal Co., 87 Pa. 221; Pittsburg etc. R. R. Co. v. Bentley, 88 Pa. 178.

In East Penn. Railroad v. Hiester, 40 Pa. 53, supra, the third assignment of error was to the court's answer to defendant's second point. The answer allowed the jury to consider the damage incident to the taking of the land, arising from inconvenience in crossing the road and interference with crossings already established. The Supreme Court held this was correct, saying, in this particular, damages should not be included for making the crossings themselves, for they are to be made by the company, but for damages by reason of their not having

been constructed. As it was the duty of the company to construct them in the first instance, without any demand, damage for not so doing commensurate with the injury is an incident of the taking, and may be allowed. It is plain that all such damages are to be assessed as incident to the original taking, and hence are presumed to be included in the assessment made in 1855.

"Nevertheless the company under the 12th section of the act is required to make one causeway for each property through which the railroad passes if necessary and if demanded, and for failure to do so the company would still be liable in the manner pointed out in the general law in the 12th section.

"Such causeway as we understand the law means a crossing so as to afford access to the lands separated by the railroad. It has no reference to the road crossings, as they are provided for independent of this requirement. If the evidence shows no necessity for the causeway for such purpose, and if it further shows by the testimony of the landowner himself, that such causeway cannot be built over or under the railroad, then the company cannot be considered in default for not so doing, as the law never requires the doing of a vain or impossible thing; and if it further appears by the plaintiff's own testimony, uncontradicted by any testimony, that the causeway sought in the proceeding is not to get to such part of his land, but that he virtually seeks a road to get from his land over lands belonging to others, and thence over the line of the railroad into the streets of the town. Since in default of such road or causeway, as termed by plaintiff, damages are to be assessed against the company, then it is apparent to our mind that plaintiff is seeking a second assessment of damages, which in this case were assessed in 1855 and duly paid. Such damages are in our opinion incident to the original taking and cannot be again assessed. Neither do such damages belong to this plaintiff whose title to the lot did not originate until twenty years or more after the construction of the railroad. The question of the necessity of the causeway, etc., was carefully submitted to the jury and their attention was called to the true rule of damages, so that there should be no double assessment. That the measure of damages was the inconvenience plaintiff suffered in the enjoyment of his premises arising out of a failure to con-

struct a causeway, the amount of the verdict indicates to our mind that the jury so considered the case and allowed for such damages only.

"If, however, we are wrong in our views of plaintiff's testimony, the case is in proper shape for the Supreme Court to so declare, and thereupon to enter a different judgment upon the reserved questions.

"In order to end litigation and to have the case speedily reviewed by the Supreme Court we have arrived at the above conclusion without proper time to fully state our views, as we otherwise would have done if we had more time to devote to the case. We, therefore, refuse a new trial, and we direct judgment to be entered upon the verdict in favor of the plaintiff and we seal defendant a bill to this ruling."

Defendant appealed.

Errors assigned among others were, (5, 7) in entering judgment for the plaintiff on points reserved, quoting points; (14, 15) portions of charge as above, quoting them.

Samuel T. Brown, of *Brown & Brown*, *John M. Bailey* with him, for appellant.—The remedy given by the 12th section of the act of Feb. 19, 1849, P. L. 84, refers to the period of construction, and whether it always does so or not, it clearly does so in this case: Phila. & Reading R. R. v. Reading & Pottsville R. R., 2 Pa. Dist. Rep. 857; Ambler's App., 17 W. N. C. 433; Campbell's App., 22 W. N. C. 81; East Penna. R. R. v. Hiester, 40 Pa. 53; Del. R. R. v. Burson, 61 Pa. 369; Heise v. Penna. R. R., 62 Pa. 68.

George B. Orlady, for appellee.—The viewers in 1855 could only assess damages in view of the taking by the company in accordance with their declared plans as submitted; they could not speculate upon a possible subsequent alteration: Campbell's App., 22 W. N. C. 81; act of February 19, 1849, sec. 12, P. L. 84; Dubbs v. P. & R. R., 148 Pa. 66; Ill. Cent. R. R. v. Willenborg, 117 Ill. 203; Lance's App., 55 Pa. 16; Thornton on Railroads, 469.

The damages assessed do not cover cost of crossings or causeways, as it is the statutory duty of the company to construct

and maintain them: Watson v. R. R. 37 Pa. 469; Traut v. N. Y. C. & St. L. R. R., 22 W. N. C. 540; Thornton on Railroads, 413; P. W. & B. R. R. v. Trimble, 4 Wh. 47; Mills on Eminent Domain, 219; Wabash Ry. v. McDougle, 9 Am. St. R. 544; P. V. & C. R. R. v. Rose, 74 Pa. 362; O'Brien v. Phila., 150 Pa. 589; Gilmore v. P. V. & C. Ry., 104 Pa. 275; Jones v. R. R., 151 Pa. 30; Boyd v. Negley, 53 Pa. 387; C. & W. I. R. R. v. Coggswell, 31 Am. Law Reg. 526; Barnes v. M. A. L. Ry., 65 Mich. 251; Carpenter v. E. & A. R. R., 24 N. J. Eq. 250; s. c., 26 N. J. Eq. 168.

PER CURIAM, May 6, 1895:

An examination of this record with special reference to the specifications, discloses no substantial error. The questions involved,—so far as they are material,—have been sufficiently considered and correctly decided by the learned president of the common pleas. It is unnecessary to add anything to what has been said by him in his opinion on the questions of law reserved, etc., and on that opinion the judgment is affirmed.

Judgment affirmed.

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W. L. Shellenberger et al., Appellants, v. F. G. Patterson et al., and The Altoona, Clearfield & Northern R. R. Co.

Railroads—Stock subscription—Estoppel.

Where a stock subscription is made by an agent of a railroad company for the purpose of obtaining a loan from a third party, and such subscription is recognized by the stockholders and directors of the company, who accept the loan with a knowledge of such subscription, and presumably with a knowledge that without such subscription the loan would have been invalid and contrary to law, the stockholders and directors of the company are estopped from asserting that the subscription is invalid because not made in writing and in the prescribed form.

Where a person has subscribed to the unissued stock of a corporation, which corporation has accepted the subscription without offering to allot such stock amongst the stockholders, a stockholder has no remedy in equity to compel the issue of any portion of such stock to himself, or to have the subscription of the one who subscribed to the stock declared invalid. If injured, he has his remedy at law to recover damages for such injury.

It seems that in such a case a stockholder cannot complain where it appears that no stockholder offered to take or was willing to take the stock at par, or that it would have sold for more.

Corporations—Acts of officers de facto.

Acts of officers de facto of a corporation are not valid when such acts are for their own benefit, because they cannot take advantage of their own want of title, of which they must be cognizant. It is only where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defects of title, that their acts are good.

Argued April 22, 1895. Appeal, No. 204, July T., 1894, by plaintiffs, from decree of C. P. Blair Co., Equity Docket A, No. 212, dismissing bill in equity. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Bill in equity to restrain issuing stock of a corporation.

The case was referred to J. S. Leisenring, Esq., as master, who reported the facts to be as follows:

"1. That in the month of September, 1891, F. G. Patterson, acting as agent of the Altoona, Clearfield & Northern Railroad Company, subscribed for and directed S. J. Westley, treasurer of the company, to note his subscription to six hundred shares of the company's capital stock. That such stock so subscribed for was not an increase of the stock of said corporation, as alleged in plaintiffs' bill, but was a part of the original capital stock of said company.

"2. That no entry was made at that time of such subscription upon any book or record of the company, nor upon any subscription list or memorandum of any kind.

"3. That the company kept no subscription book in which such entries of subscription so made by any one were noted.

"4. That no money of any amount whatsoever was then paid or offered to be paid, neither ten per cent of the par value nor any other amount.

"5. That no offer was made by said F. G. Patterson to pay anything upon said subscription until the 6th day of January, 1893, when Mr. Patterson tendered to Mr Westley ten per cent, or three thousand dollars ($3,000), of the par value of the six hundred shares so subscribed for, and which was refused by Mr. Westley, and that, subsequently, on Feb. 23, 1893, Mr. Patterson tendered to Mr. Westley, as treasurer of the company,

a check of Theo. H. Wigton, cashier of the Altoona Bank, for thirty thousand dollars ($30,000), in payment of the par value of the six hundred shares of capital stock so previously subscribed for.

"6. That the money covered by said check for thirty thousand dollars ($30,000) was to be furnished by S. M. Prevost, general manager of the Pennsylvania Railroad Company, and was the money of that company, and that an arrangement or agreement existed between F. G. Patterson and the said S. M. Prevost for the assignment or transfer of the said certificate for six hundred shares to the said S. M. Prevost, for the use of the Pennsylvania Railroad Company.

"7. That both the stockholders and directors of the Altoona, Clearfield & Northern Railroad Company had knowledge of the subscription so directed or made by F. G. Patterson to the six hundred shares of stock, and, with such knowledge, they, the stockholders, voted an increase of the company's indebtedness, and the directors instructed and empowered the president (Mr. Patterson) and the secretary to issue bonds and execute the mortgage of the company for sixty thousand dollars ($60,000).

"8. That said subscription so made by Mr. Patterson was made for the advantage of the company and to enable the company to increase its indebtedness and issue the bonds and execute the mortgage as aforesaid, and was made as agent of the company.

"9. That under the decree of the court of common pleas of Blair county, in certain quo warranto proceedings, the plaintiffs herein were placed in possession and control of the Altoona, Clearfield & Northern Railroad Company on the 29th day of August, 1893, and so continued in possession until the 16th day of November, 1893, in the management and control and operation of said road.

"10. That the plaintiffs herein, while in possession, control and management of the road as aforesaid, did, by the action of the acting, or de facto, board of directors, declare illegal the subscription of F. G. Patterson to the six hundred shares of stock, and did, by a minute adopted, order and direct that notice be given to each and all of the stockholders that they are entitled to subscribe to an issue of six hundred shares of stock in proportion to their holdings of stock already subscribed and paid

for, and that notice was actually given to all of said stockholders, and that two hundred and eighty-seven (287) shares of the six hundred shares claimed by plaintiffs to have been illegally issued by F. G. Patterson to himself were subscribed for.

"11. That for the two hundred and eighty-seven (287) shares of company's stock so subscribed for and issued to the several stockholders of the company subscribing, nothing was paid of value, but the alleged payment was consummated or accomplished by an exchange of checks between the company and the stockholders so subscribing, and the certificates for the stock so subscribed for were acquired by the several stockholders without value.

"12. That no indebtedness of the company of any certain or positive character due the stockholders, and to whom were given the company's checks, is shown to exist, and that as far as the evidence goes such checks were without consideration.

"13. That the de facto board of directors, by whom such allotment, or distribution of stock was made, were members of the company, and either stockholders or directors at the time the company acquired knowledge of the original subscription of Mr. Patterson to the six hundred shares of stock, and at the time the stockholders voted an increase of the company's indebtedness, and directed the issuing of the bonds and the execution of the mortgage for $60,000.

"14. That the Altoona, Clearfield & Northern Railroad is a narrow gauge road, commencing at Altoona and extended by its charter line to Fallen Timber, on the Cresson & Coalport Railroad, a distance of about seventeen (17) miles, and that it is at this time constructed and operated as far as Dougherty's, a distance of about twelve (12) miles from Altoona.

"15. That the Cresson & Coalport road extends from Cresson, in Cambria county, to Irvona, in Clearfield county, and that the distance from Cresson to Fallen Timber is about twenty (20) miles, and that the road is of standard gauge.

"16. That the Cresson & Coalport Railroad connects at Cresson with the main line of the Pennsylvania Railroad, and that the distance via the Pennsylvania Railroad from Cresson to Altoona is about fourteen (14) miles.

"17. That the Cresson & Coalport Railroad is a leased line of the Pennsylvania Railroad Company, and is by said company

operated and managed, and that there is no traffic connection or contract between the Pennsylvania Railroad and the Altoona, Clearfield & Northern Railroad, either at Altoona or at Fallen Timber.

"18. That there is now in progress of construction a railroad known as the Altoona & Philipsburg Connecting Railroad, extending from Philipsburg station, on the Beech Creek Railroad, in Clearfield county, Pennsylvania, and immediately adjacent to the borough of Philipsburg and the Tyrone & Clearfield Railroad, southwesterly to Janesville, in Clearfield county, and in the direction of, and five miles distant from, Dougherty's on the Altoona, Clearfield & Northern Railroad.

"19. That the Tyrone & Clearfield Railroad is owned and operated by the Pennsylvania Railroad Company, and is a part of its system, and that Philipsburg is a point on the Tyrone Clearfield Railroad, and that Altoona is a point on the Pennsylvania Railroad.

"20. That the extension or construction of the Altoona, Clearfield & Northern Railroad from Dougherty's to Fallen Timber, the terminus fixed by its charter, does not make it a competing line with the Cresson & Clearfield Railroad for either freight or passenger traffic originating at Altoona to be shipped and carried to Fallen Timber, or the country tributary thereto, nor for freight and passenger traffic originating at Fallen Timber and the country adjacent, to be shipped and carried to Altoona. Nor are the Cresson & Coalport and the A., C. & N. R. R. parallel to each other.

"21. That the Altoona & Philipsburg Connecting Railroad, as now projected, is not, in any sense, a competitive line, either with the Cresson & Coalport Railroad, the Pennsylvania Railroad, nor the Tyrone & Clearfield Railroad nor their branches, for freight or passenger traffic coming from the Beech Creek & Reading Railroad from Philipsburg, Osceola Mills, Houtzdale or Ramey or any other points in Clearfield county to Altoona, nor with the Pennsylvania systems between New York and Philadelphia, nor points in Eastern Pennsylvania, nor in New Jersey to Altoona and vice versa.

"22. That after the reinstatement of the defendants in the control of the Altoona, Clearfield & Northern Railroad by resolution, as appears in the minutes of the board of directors, the

subscription to the six hundred shares of stock made by F. G. Patterson was recognized, confirmed and ratified, and that the treasurer of the company was requested to sign a certificate for such shares, which certificate had been issued by F. G. Patterson to himself on the 23d of February, 1893, upon the payment to the treasurer of the thirty thousand dollars ($30,000), being the par value of the said six hundred shares of stock.

"23. That at the same meeting the board of directors declared the shares of stock allotted or distributed by the de facto board to be wholly unlawful and illegal, and the solicitors of the company were instructed to take such steps as were necessary to cancel such certificates and cause the same to be returned to the office of the company.

"24. That said F. G. Patterson, as president of the Altoona, Clearfield & Northern Railroad Company, did, in his annual report of December, 1892, recommend a 5 per cent dividend to be paid to the stockholders, and that this portion of his report was stricken out by action of the board of directors at a meeting held on the —— day of January, 1893."

The master's conclusions of law were as follows:

"1. That the action of the stockholders and board of directors of the Altoona, Clearfield & Northern Railroad Company, voting an increase of the indebtedness of the company, and in directing an issue of the bonds and the execution of the mortgage for the said sixty thousand dollars ($60,000), with a knowledge of the previous subscription of F. G. Patterson to the six hundred shares of stock, was a ratification of his act, and placed in him the title to such stock, which could not subsequently be questioned or disturbed by any future action of the company or its board of directors, and this, whether at the time of subscribing the ten per cent of the par value of the stock or any other amount was paid by him or not. As between the company and Mr. Patterson the regularity and legality of his act cannot be questioned.

"2. That it became the duty of S. J. Westley, the treasurer of the company, to accept from F. G. Patterson ten per cent, or three thousand dollars ($3,000), tendered him on the 6th day of January, 1893, and to accept from him a check tendered on the 23d day of February, 1893, for thirty thousand dollars ($30,000), and to countersign at that time the certificate of stock for the six hundred shares.

"3. That the action of the de facto board, in allotting, or distributing, the two hundred and eighty-seven (287) shares of stock was an irregular and illegal act, and this, whether the stock so allotted or distributed was actually paid for or not, and the certificates so issued are void.

"4. That the action of the defendants' board of directors, in recognizing, confirming and ratifying the subscription of F. G. Patterson to the six hundred shares of stock, placed in said Patterson a title to said stock which could not be questioned or disturbed, upon his paying to the treasurer the par value of the said six hundred shares of stock, even supposing that the action of the stockholders of the company in voting an increase of the company's indebtedness, and the issuing of the bonds and the execution of the mortgage, was not a ratification of the prior subscription of Mr. Patterson.

"5. That the Cresson & Coalport Railroad is not a competing line with the Altoona, Clearfield & Northern Railroad, nor are the Tyrone & Clearfield Railroad and the Pennsylvania Railroad competing lines with the Altoona & Philipsburg Connecting Railroad.

"6. That the agreement or understanding or arrangement between F. G. Patterson and the Pennsylvania Railroad Company through S. M. Prevost for the transfer or assignment of the six hundred shares of stock or any other shares of stock to the Pennsylvania Railroad Company is not prohibited by the provisions of the constitution nor by any existing law."

Exceptions to the master's report were dismissed by the court, METZGER, P. J., of the 29th judicial district, specially presiding, delivering the following opinion:

"After carefully considering the evidence in this case, we are unable to discover any substantial error in the master's finding of the material facts. In this, as in all other cases where the master was also the examiner, before whom the testimony was taken, we feel that he is better qualified to judge of the credibility of the witnesses than the court, who has had no opportunity of hearing them deliver their testimony or of observing their manner on the witness stand. We are, however, satisfied from an examination of the testimony filed, that there was sufficient evidence to warrant the conclusion to which the master came.

"The principal question involved is the validity of F. G.

Patterson's claim to the ownership of six hundred shares of the capital stock of the Altoona, Clearfield & Northern Railroad Company.

"It appears that in the month of Sept., 1891, F. G. Patterson, who was then the president of the company, directed S. J. Westley, the treasurer, to note his subscription for six hundred shares of the capital stock of said company. Mr. Patterson was then acting as the agent of the company to secure a loan for it of sixty thousand dollars.

"This loan could not be secured without this subscription, as otherwise the indebtedness of the company would have been in excess of the amount of stock subscribed, which would have been in violation of the act of assembly of May 8, 1876. By making this subscription the loan was obtained, and the mortgage of the company to secure it given to the Pennsylvania Trust Company, of Reading, Pa., dated Oct. 1, 1891, which recited a resolution of the company passed Sept. 22, 1891, authorizing the increase of the indebtedness in said sum and the borrowing of an amount not to exceed the amount of the capital stock subscribed. The master finds as a fact that at the time of the special meeting of the stockholders, at which it was voted to increase the indebtedness of the company, and at or before the meeting of the board of directors held Oct. 1, 1891, at which authority was given the president and secretary of the company to execute and deliver a series of bonds and execute the mortgage for sixty thousand dollars, that both the stockholders and directors had knowledge of said subscription of F. G. Patterson.

"It is true, nothing was at this time paid on his subscription, but, subsequently, on the 6th day of January, 1893, he tendered the treasurer ten per cent thereof, which was refused by the treasurer, who alleged that the subscription was illegal. Subsequently, in February, 1893, Mr. Patterson tendered the entire amount of the subscription to the treasurer, which was also refused.

"This stock was part of the untaken, authorized capital stock of the company and not an increase of said stock. The entire authorized capital stock was fifteen hundred shares, and less than nine hundred shares had at this time been issued. The complainants contend that this subscription is void because not

in writing and not made in the manner prescribed by law. It may be conceded, as a general rule, that a subscription for stock must, in order to bind the parties, be made in the prescribed form and must be in writing. It does not follow, however, that an oral subscription may not, under certain circumstances, be binding. Where, as in the case at hand, a subscription was made by an agent of the company for the purpose of obtaining from a third party a loan, and such subscription was recognized by the stockholders and directors of the company, who accepted the loan with a knowledge of such subscription, and, presumably, with a knowledge that without such subscription the loan would have been invalid and contrary to law, can it be said that either party under such circumstances would be permitted to deny the validity of such subscription, notwithstanding all the requisites prescribed had not been complied with? Having received the benefit of this subscription and taken advantage of it, the stockholders and directors of the company are estopped from denying or questioning it. Their acts, if not such as to be an express ratification of the subscription, are at least such as to have that effect and prevent them from now questioning its validity in this or any other proceeding. But it would seem that this subscription was as regular as some other subscriptions for stock of this company. There was not at that time any regular subscription book kept in the office of the company or elsewhere.

"Persons were solicited to subscribe by stockholders, and sometimes upon agreeing verbally to take a certain number of shares, the same were issued. Some of the stockholders had books in which to note subscriptions, but they were in no sense such subscription books as would be required to comply with all legal formalities. We do not think it is necessary, in order to sustain the validity of Mr. Patterson's claim, to rely on the fact that a lawfully constituted board of directors, by resolution of Nov. 17, 1893, expressly ratified the subscription, for we have a sufficient ratification of it by the company without this. This resolution, however, shows that a legally constituted board of directors of the company recognized the claim of Mr. Patterson, and that there is no disposition on the part of either Mr. Patterson or the company to avoid it.

"What standing in this case, then, have the complainants

who are seeking to nullify it? They, in common with the other stockholders, received the benefit and advantage of this subscription. At the time it was made and in effect ratified by the corporation and its stockholders, none of the complainants are shown to have offered or been willing to subscribe for this stock. No request was made by them for an allotment of it among the stockholders, and it appears it had been acquiesced in by them from October, 1891, until the 19th of October, 1893, a period of upwards of two years. Under such circumstances it is too late for them now to contend that this stock was unlawfully disposed of, because no allotment of it was made among the stockholders. If the stockholders were at any time entitled to an allotment, they have waived such right by their act, and their acquiescence in and recognition of Mr. Patterson's subscription. But it seems to us that the question of whether the stock should have been allotted among the stockholders, and they given an opportunity to subscribe for it in proportion to the shares of stock held by them, does not in any way affect the legality of the subscription of Mr. Patterson, and really does not arise in this case. There is nothing in any of the authorities cited by counsel which rules that, if no allotment is made giving all the corporators an opportunity to subscribe for untaken stock, that the subscription of any shareholder or other person would be illegal. They hold no more than that untaken stock is held by the corporation in trust for the corporators and must be disposed of for the benefit of all; that it cannot be disposed of unequally to the corporators, and if so disposed of each corporator injured may have his action against the corporation. There is no case that decides that any stockholder, after the stock has been disposed of, even if done by the corporation in violation of the rights of such stockholders, has any remedy in equity to compel the issue of such stock to him, or to have the subscription of the one who subscribed to this stock declared invalid. If injured, he has his remedy at law to recover damages for such injury. But, as was said in Curry v. Scott, 54 Pa. 276, it is a sufficient answer in this case to say that there is no averment in the bill that at the time Patterson subscribed for this stock that the complainants or any of them offered to take or were willing to take the stock at par, or that it would have sold for more. Without such

averment no injury can be shown to have been sustained by the complainants.

"For the reasons given we think the master did not err in finding that F. G. Patterson was legally entitled to this six hundred shares of stock.

"It follows, therefore, that the action of the de facto board of directors in attempting to cancel the certificates of stock issued to Patterson and in authorizing an allotment of this stock and issuing certificates for two hundred and eighty-seven shares of it was illegal. The subscription of Mr. Patterson left but eleven shares of the authorized capital stock untaken. But we have no doubt of the illegality of the action of the board of directors for other reasons. This board, which has been termed the 'Langdon board,' was not a legal board of directors, and, as a de facto board of directors, it needs no argument to show that they could pass no resolution which could affect the Patterson stock, for, as we hold, his claim thereto was valid. De facto officers of a corporation clearly have no right to do any act whereby any stockholder of the corporation would be prejudiced. It is equally clear to our mind that they could not legally issue certificates for this two hundred and eighty-seven shares of stock. 'Acts of officers de facto are not valid when such acts are for their own benefit, because they cannot take advantage of their own want of title, which they must be cognizant of. It is only where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defects of title, that their acts are good:' Commissioners of Franklin v. McKissan, 2 Rawle, 140. They cannot invoke the aid of their own acts as officers de facto to promote their own individual interests, hence the allotment of stock by the complainants to themselves was illegal, invalid and void, even if they had paid for it; but the master finds as a fact that there was no value given for the stock allotted; that they paid for it merely by an exchange of checks. In our judgment they are neither legally nor equitably entitled to this stock, and we have no hesitancy in holding that the certificates for these two hundred and eighty-seven shares of stock are illegal and invalid.

"The question of the right of F. G. Patterson to sell his stock to the Pennsylvania Railroad Company, or to S. M. Prevost, general manager of said company, has been fully discussed by the master.

"It is alleged by the complainants that some of the leased lines of the Pennsylvania Railroad Company are parallel and competing with the line of the Altoona, Clearfield & Northern Railroad Company. The master has found that they were not parallel or competing, and we think he was fully warranted by the evidence in so finding. We might add that it is more than doubtful, however, whether this issue is properly raised by the pleadings in this case. There is no allegation in the bill that any of the leased lines of the Pennsylvania Railroad Company are parallel or competing with the said A., C. & N. R. R.

"Neither is it alleged nor shown how the complainants can be injured by the transfer of the stock. This bill being filed by private parties we can only consider their individual rights, and have nothing to do with the rights of the public. If the rights of the public are invaded, it can be remedied only by a bill filed by the attorney general in the name of the commonwealth.

"For the reasons given and others that might be given, we think the bill of the complainants in this case must be dismissed. The only remaining question is as to the form of the decree suggested by the master.

"It may be contended that as no relief is prayed for by the bill other than the granting of an injunction, and as no cross bill has been filed by the defendants, that no affirmative relief can be given the defendants other than that prayed for in the bill. This would seem to be the general rule, and is so laid down in Story's Equity Pleadings, 10th ed., note, bottom of page 352. But in this case, in view of the fact that it appears from the order of court made at the time the master was appointed, and from the testimony and the manner in which the case was presented by counsel on both sides, that it was the intention of the parties to determine in this proceeding the title of F. G. Patterson to the six hundred shares of stock, and also the legality of the certificates for the two hundred and eighty-seven shares of stock allotted or distributed by the de facto board of directors, and as the bill and answer squarely raised these issues we can see no harm in making such a decree as will settle these questions between the parties.

"Under the circumstances in this case, we feel that it is proper that we should decree that to be done which we find

clearly ought to be done to prevent further litigation and to effectually accomplish what was evidently intended by the parties in this case to be accomplished by this proceeding.

"And now, to wit, July 3, 1894, this case came on to be heard upon the report of the master and exceptions thereto, and after hearing the argument of counsel for the respective parties, and thereupon upon due consideration thereof the exceptions are dismissed and the report confirmed, and it is ordered, adjudged and decreed:

"1. That complainants' bill be dismissed with costs.

"2. That the treasurer of the Altoona, Clearfield & Northern Railroad Company be and is hereby directed to countersign the certificate for six hundred shares of stock issued by F. G. Patterson to himself on Feb. 23, 1893, upon his paying into the treasury of the company the sum of thirty thousand dollars ($30,000), being the par value of said six hundred shares of stock; or in lieu of countersigning such certificate, another to be issued, countersigned and delivered to F. G. Patterson for six hundred shares, upon payment by him of the said sum of thirty thousand dollars to the treasurer of said company, whereupon the title in F. G. Patterson shall in all respects and for all purposes become vested.

"3. That the certificates for the two hundred and eighty-seven shares of stock allotted or distributed by the de facto board of directors be canceled and the holders thereof be restrained from assigning, transferring or otherwise disposing of such shares to any other person or persons whomsoever."

Error assigned amongst others was decree as above, quoting it.

David L. Krebs, *H. M. Baldrige* with him, for appellants.—No agreement to take stock in a railroad corporation in this state is valid unless there is a memorandum in writing signed by the party, and ten per centum paid in money at the time the agreement is made: Pittsburg & Connellsville R. R. v. Thaw & Clarke, 29 Pa. 152; Pittsburg & Steubenville R. R. v. Gazzam, 32 Pa. 349; Morawetz on Corp., secs. 69 and 55; Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188; Fanning v. Ins. Co., 37 Ohio, 339; Thames Tunnel Co. v. Sheldon, 6 B. & Cress. 341

Phœnix Warehousing Co. v. Badger, 67 N. Y. 294; act of April 4, 1868, sec. 4, P. L. 62; Hibernia Turnpike Co. v. Henderson, 8 S. & R. 217; Leighty v. Susquehanna & Waterford Turnpike Co., 14 S. & R. 434; Graff v. P. & S. R. R., 31 Pa. 489; Boyd v. Peach Bottom Ry., 90 Pa. 168; Bucher v. R. R., 76 Pa. 306; Garrett v. Dillsburg & Mechanicsburg R. R., 78 Pa. 465.

There can be no ratification by the board of directors and stockholders of the alleged agreement by Mr. Patterson to take the six hundred shares of stock under the facts found: 2 Morawetz on Corp. sec. 619; Taylor on Priv. Corp. sec. 292; 1 Am. & Eng. Ency. of Law, 430; Shisler v. Vandike, 92 Pa. 447; Seylar v. Carson, 69 Pa. 88; Supervisors v. Schenck, 5 Wall. (U. S.) 772; Marsh v. Fulton County, 10 Wall. 676; Crum's App., 66 Pa. 445; Moore v. Patterson, 28 Pa. 505.

No stockholders of the corporation can be estopped from questioning the alleged subscription, which is in direct violation of a statute and against public policy: Brightman v. Hicks, 108 Mass. 246; Langan v. Sankey, 55 Iowa, 52; Washabaugh v. Entriken, 36 Pa. 513; Miranville v. Silverthorn, 48 Pa. 147; Cuttle v. Brockway, 32 Pa. 45; Diller v. Brubaker, 52 Pa. 498; McKerrahan v. Crawford, 59 Pa. 390; Reel v. Elder, 62 Pa. 308; Salt Lake City v. Hollister, 118 U. S. 263; Bank v. Lauth, 143 Pa. 53; Pittsburg Melting Co. v. Reese, 118 Pa. 355; Millward-Cliff Cracker Co.'s Est., 116 Pa. 157; Reese v. Montgomery Bank, 31 Pa. 78; Wilson v. Montgomery Bank, 29 Pa. 537; Taylor on Private Corporations, sec. 569.

The Pennsylvania Railroad Company has no right directly or indirectly to purchase the stock of the A. C. & N. Railroad: Act of March 23, 1853, P. L. 219; act of April 11, 1859, P. L. 512; act of May 16, 1857, P. L. 519; act of May 20, 1857, P. L. 598; act of Feb. 17, 1871, P. L. 55; act of March 12, 1873, P. L. 253; Franklin Co. v. Lewiston Savings Inst., 68 Me. 43; Bank v. Wilcox et al., 24 Conn. 150; Morawetz on Corp. sec. 421; Pearson v. Concord R. R., 62 N. H. 537; Pierce on Railroads, sec. 505; act of April 23, 1861, P. L. 410.

A bill in equity may be maintained by a single stockholder to restrain acts ultra vires or acts contrary to public policy: Sandford v. R. R., 24 Pa. 378; Gratz v. Penna. R. R., 41 Pa. 447; Manderson v. Bank, 28 Pa. 279; Gamble v. Queens

County Water Co., 123 N. Y. 91; Francis Water Co. v. Pattee, 3 Am. R. R. & Corp. Cases, 558.

Daniel J. Neff and *Thomas H. Greevy*, *F. G. Patterson* with them, for appellees.—Having received the benefit of this subscription and taking advantage of it, the stockholders and directors of the company are estopped from denying or questioning it: Pittsburg & Connellsville R. R. v. Stewart, 41 Pa. 59; Langdon v. Patterson, 158 Pa. 476; Wood's Field on Corporations, secs. 147, 149 and 150; Angell & Ames, Cor. secs. 284 and 304; Addison on Contracts, sec. 60; Story on Agency, secs. 239, 244, 250, 253; Gulick v. Grover, 33 N. J. L. 463; Briden v. Debarry, 14 S. & R. 26; Gordon v. Preston, 1 W. 285; Bank of Penn'a v. Reed, 1 W. & S. 101; Kelsey v. National Bank of Crawford County, 69 Pa. 426.

It was not necessary that the subscription should be in writing. Under the circumstances of this case the oral subscription was valid: Cook on Stock and Stockholders, 52; P. W. & B. R. R. v. Cowell, 28 Pa. 329; Bates County v. Winters, 112 U. S. 325; Hibernia Turnpike Co., v. Henderson, 8 S. & R. 219; Boyd v. Peach Bottom R. R., 90 Pa. 168; Garrett v. Dillsburg & Mechanicsburg R. R., 78 Pa. 465.

Whenever an act done by an officer de facto has been declared to be valid, it is when some third person claims an interest or title in the act done, and there is no decision where such act has been considered valid in an action by the officer de facto claiming for an act done by himself: Riddle v. Bedford County, 7 S. & R. 392; Baird v. Bank of Washington, 11 S. & R. 415; Franklin County Commissioners v. McKissan, 2 R. 140; Cook on Stocks & Stockbrokers, 713; Taylor on Corporations, sec. 188; Zearfoss v. F. & M. Institute, 154 Pa. 454; Maganan & Brewer v. Freemont, 9 Lawyers' Rep. An. 790.

If Patterson owns the stock he has an undoubted right to dispose of it as he could dispose of any other property he owns. His right to transfer it to S. M. Prevost or any other person cannot be questioned: Gummere v. Lehigh Valley R. R., 1 Pa. Dist. Rep. 591; Kimball v. Atchison, T. & S. F. R. R., 46 Fed. Rep. 888.

PER CURIAM, May 6, 1895:

A careful consideration of this record has led us to the con-

clusion that there is no substantial error in the findings of the material facts, or in the conclusions drawn therefrom. There does not appear to be anything in either of the questions involved that requires other or further consideration than is given thereto in the opinion of the learned president of the 29th judicial district, who specially presided at the hearing. The only modification of the decree that suggests itself to us as proper, is the addition to the second paragraph thereof, of the following words, viz: Provided that the said sum of thirty thousand dollars shall be paid within sixty days from the date of our decree.

As thus modified, the decree of the court below is affirmed on said opinion, and the appeal is dismissed with costs to be paid by the appellants.

Jacob Sandcroft's License. Jacob Sandcroft's Appeal.

Liquor laws—Refusal of license—Record—Review.

Where the record in an application for a liquor license shows that the case was heard, considered and refused by the court for the reason "that there is no necessity for the house to be licensed," and there is nothing else upon the record, the Supreme Court will not assume that the license court acted arbitrarily, or that the reason assigned for its action in refusing the license had no existence in fact.

Argued April 24, 1895. Appeal, No. 486, Jan. T., 1895, by Jacob Sandcroft, from order of Q. S. Centre Co., refusing a retail liquor license. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Petition for a retail liquor license.

The record showed that the petition was indorsed as follows:

"March 12, 1895, it appearing to the court that there was no necessity for the house to be licensed, the license is refused."

On April 3, 1895, the court filed the following paper:

"The testimony of the applicant and others, showed that the village of Casanova, in Rush township, where the house is located for which the license is applied for, consisted of about thirteen small houses; there are no stores or places of business

therein; that in Clearfield county, just across the Moshannon creek, is the town of Munson, and surrounding the town of Munson there are a number of coal mines in Clearfield county; that the court of Clearfield county granted one hotel license and one restaurant license in the town of Munson, deeming that was all that was necessary.

"It appeared to the court from the testimony and information he received from other sources, that the object of the license applied for at Casanova was largely to supply the people of Munson and the mines with greater hotel bar facilities. The granting of the license was protested against by the superintendent of the Beech Creek Railroad and others. The village of Casanova is right near the railroad station at Munson of the Beech Creek Railroad Company. The court, therefore, under the facts presented in court, and the information possessed by the court, received from reliable sources, refused the license, it appearing that there was no necessity for the same."

Error assigned was above order, quoting it.

Wilbur F. Reeder, *George W. Zeigler* with him, for appellant, cited, Johnson's License, 156 Pa. 322; Kelminski License, 164 Pa. 231; Mead's License, 161 Pa. 377.

No paper-book filed or argument offered for appellee.

PER CURIAM, May 6, 1895:

It is conceded that appellant's application for a retail liquor license was heard, considered and refused by the court for the reason "that there is no necessity for the house to be licensed." The fact of the refusal and the reason therefor, above quoted, are both recited in the assignment of error.

In the absence of anything on the record to justify us in so doing, we have no right to assume that the court acted arbitrarily, or that the reason assigned for its action in refusing appellant a license had no existence in fact.

Decree affirmed and appeal dismissed with costs to be paid by appellant.

168 47
179 411

Platt, Barber & Co., Appellants, *v.* Johnson & Petersen.

Landlord and tenant—Lease—Public policy—Sheriff's sale.

A stipulation in a lease for years that if the lessee shall become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, the whole rent for the balance of the term shall become due and payable in advance of other claims, is not against public policy, and will be sustained in favor of the landlord on a distribution of the proceeds of a sheriff's sale of the lessee's property, to the extent of giving the landlord priority for one year's rent.

Argued April 24, 1895. Appeal, No. 103, Jan. T., 1895, by plaintiffs, from order of C. P. Clearfield Co., Dec. T., 1893, No. 574, sustaining exceptions to report of auditor. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Exceptions to auditor's report, distributing fund raised by the sheriff's sale of personal property.

The facts appear by the opinion of the Supreme Court.

Errors assigned were in sustaining exceptions to the report of the auditor.

David L. Krebs, *Howard B. Hartswick* with him, for appellants.—The landlord can only claim priority for rent actually due: Act of March 21, 1772, 1 Sm. Laws, 373; Ege v. Ege, 5 Watts, 134; Wickey v. Eyster, 58 Pa. 502; West v. Sink, 2 Yeates, 274; Binns v. Hudson, 5 Binney, 505; Morgan v. Moody, 6 W. & S. 333; Case v. Davis, 15 Pa. 80; Moss's App., 35 Pa. 162; Bank of Pennsylvania v. Wise, 3 Watts, 402; Hepburn v. Snyder, 3 Pa. 72; Cross and Gault's App., 97 Pa. 475; Owens v. Shovlin, 116 Pa. 376.

W. C. Pentz, for appellees.—A landlord is entitled to claim rent payable in advance out of the proceeds of a sheriff's sale of the tenant's goods upon the demised premises: Collins's App., 35 Pa. 83; Beyer v. Fenstermacher, 2 Whart. 95; Purdy's App., 23 Pa. 97.

A judgment creditor stands on the footing of his debtor:

Cover v. Black, 1 Pa. 493; Shrewsbury Savings Institution App., 94 Pa. 309.

The whole rent for the term might have been made payable in advance, and there exists no reason why it might not be payable at any time during the remainder of the lease upon the happening of any contingency: Goodwin v. Sharkey, 80 Pa. 153.

The right of distress is incident only to that which is strictly rent; it cannot be applied to that which is not rent: Latimer v. Groetzinger, 139 Pa. 207.

Under the act of June 13, 1836, P. L. 777, a landlord has a right to payment out of a fund to an amount not exceeding one year's rent: Timmes v. Metz, 156 Pa. 384.

OPINION BY MR. CHIEF JUSTICE STERRETT, May 6, 1895:

The fund for distribution in this case was the net proceeds of Johnson and Petersen's personal property—principally store goods—seized on the premises leased by them from J. S. Seyler & Bro., appellees, and sold on executions in favor of Platt, Barber & Co., the appellants. The only complaint is as to the $714, awarded to said lessors as balance of one year's rent due them by their lessees, the defendants in the executions. It is contended by appellants that the extent of the landlord's claim on the fund was $250. This sum was awarded to them by the learned auditor, but on exception thereto the learned judge was of opinion that, upon a proper construction of provisions in the lease, making the entire rent due and payable in advance, they were entitled to one year's rent, less tenants' claim of $36.00, on account of stable, etc., and he accordingly awarded them the said sum of $714.

The lease of the storeroom etc. occupied by Johnson & Petersen is for the term of thirty-three months from July 1, 1893, at the monthly rental of $62.50 payable in advance; but it contains the following clauses by which, in certain contingencies, the rent for the entire term would become due and payable: 1st. The lessees agree "that if they shall at any time during the continuance of this lease attempt to remove or manifest an intention to remove their goods and effects out of or off from the said premises without having paid and satisfied the party of the first part in full for all rent which shall become due dur-

ing the term of this lease, then and in such case such removal or attempt to remove shall be considered fraudulent, and the whole rent of this lease shall be taken to be due and payable, and the said party of the first part shall proceed by landlord's warrant or other process to distrain and collect the whole in the same manner as if by the conditions of this lease the whole rent were due and payable in advance."

2d. "It is agreed and understood that if second parties become embarrassed, or make an assignment for the benefit of creditors, or are sold out by sheriff's sale, then the rent for balance of term shall at once become due and payable, as if by the terms of the lease it were all payable in advance, and shall be first paid out of proceeds of such assignment or sale, any law, usage or custom to the contrary notwithstanding."

It was claimed by the lessors that upon the happening of the lessees' embarrassment, seizure and sale of their personal property,—contingencies specified in the last quoted clause,—the entire rent became due and payable out of the proceeds of the sale, so far as the fund would reach.

There is nothing illegal or contrary to public policy in either of the above quoted provisions. As was said in Goodwin v. Sharkey, 80 Pa. 149, 153, "the whole rent for the term might have been made payable in advance, and there exists no reason why it might not be made payable at any time during the running of the lease, upon the happening of any contingency. The right of distress would immediately arise," upon the happening of the specified contingency; and that right might be exercised by the lessor to the extent of collecting more than one year's past due rent, provided the rights of execution creditors have not previously attached. If they have, the act of June 13, 1836, limiting the lessor's right to payment out of such fund to an amount not exceeding one year's rent, becomes operative in favor of the execution creditors. That a landlord is entitled to claim rent payable in advance out of the proceeds of a sheriff's sale of the tenant's goods upon the demised premises, provided his claim does not exceed one year's rent, is well settled: Beyer v. Fenstermacher, 2 Whart. 95; Purdy's App., 23 Pa. 97; Collins' App., 35 Pa. 83; and in his claim he is not restricted to the current month or year: Richie v. McCauley, 4 Pa. 471; Mickey v. Eyster, 58

Pa. 501; Weltner's App., 63 Pa. 302; nor does it make any difference that, as in this case, no more than a month's rent was originally made payable in advance, if, by force of express covenants in the lease, the whole rent becomes due and payable, in advance, upon the happening of certain contingencies, one or more of which have actually occurred before the rights of execution creditors attached: Goodwin v. Sharkey, supra; Owens v. Shovlin, 116 Pa. 371.

In this case, the lessees undoubtedly became financially embarrassed before the lien of plaintiffs' executions attached, and thus at least one of the contingencies, on which the entire rent became due and payable in advance, actually happened.

Without pursuing the subject further, we are clearly of opinion that there was no error in awarding to the landlords one year's rent, less the $36.00 set-off, etc. There is nothing else in the case that requires further comment. The action of the court below is amply vindicated in the opinion sent up with the record.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

Robert McKnight, Appellant, *v.* Edward Bell.

Ejectment—Parol partition—Evidence.

In an action of ejectment where the plaintiff sets up a record title, and the defendant offers evidence tending to show that plaintiff and his brother, who was defendant's predecessor in title, divided the land which they held as tenants in common by a parol partition; and that in pursuance of this partition, plaintiff's brother entered into possession of the land in controversy, which testimony is contradicted on the part of plaintiff, the case is for the jury.

Argued April 25, 1895. Appeal, No. 143, Jan. T., 1895, by plaintiff, from judgment of C. P. Blair Co., June T., 1887, No. 71, on verdict for defendant. Before STERRETT, C. J., GREEN, MITCHELL and FELL, JJ. Affirmed.

Ejectment for a tract of thirty-nine acres and sixty perches of land in Antis township. Before LANDIS, P. J.

At the trial it appeared that Robert McKnight, Sr., died in 1860, leaving a farm, the north end of which became vested in his two sons, Robert and William, as tenants in common. The land consisted of about eighty acres, and through its center ran a lane in a northwesterly direction, dividing the land about equally. Robert, the plaintiff, claimed to recover an undivided one half interest in the land north of the lane. Defendant claimed that Robert and William had made a parol partition, and that William had taken possession of the northern part, and Robert the southern part of the land. Defendant claimed under a sheriff's deed of the northern part of the land, which had been sold as the property of William McKnight. Further facts appear by the charge of the court, which is in part as follows:

"The plaintiff, to make out his prima facie case, showed the facts we have already narrated, leading up to the title vesting in him and brother William, thus making them equal tenants in common of both ends of the eighty-acre piece, and consequently the owner of the undivided half of the north end, now in possession of Edward Bell, the defendant in this suit. This suit was brought by Robert McKnight to recover the possession of the undivided one half of this thirty-nine acres, or north end piece, and having shown title in himself, he would be entitled to recover here if there were nothing more in this case.

"Resting on this, we turn to the defendant to learn his reply, and we find that he claims to own that which is claimed by the plaintiff by reason of what took place after the title had vested in Robert and William.

"He says that true it was that the title properly vested in Robert and William, but that after that they made an amicable division or partition of the eighty-acre piece, that they agreed to do this by William taking and retaining for his own exclusive use the north end, and Robert taking and retaining for his own exclusive use the south end of the piece, agreeing that the lane should form the line of division, and that ever after each should hold these respective pieces of land in severalty, and no longer as tenants in common.

"To support this they call several witnesses. First they call Blair McKnight, who says that he and Robert and William were to take the farm, and then Robert and William would

take the western half and he the eastern half. It was also at the same time understood that when the division should be made that Robert and William should divide the western part by William taking all north of the lane, and Robert taking all south of it. He says that this was often talked over by all the heirs and thoroughly understood.

"John P. McKnight is called, who says substantially the same as Blair; that it was for some time understood by all the heirs that this method of division should be adopted, and was actually carried out. The partition of the eighty acres between William and Robert was not evidenced by any writing, but they agreed it should be so, and it was done so; that William took possession of his piece, and Robert of his piece, the lane dividing the two pieces. William built a house on his piece, and Robert built a barn on his piece, and later commenced the erection of a house on his piece, though he never completed it, and sold off the materials prepared for it. He says he rented from William one year and paid him the rent. Robert had nothing to do with it, and never spoke about it; always saw Robert work the south end, and never saw either doing anything on the land of the other. He says each used and worked each piece separately, and as two persons who owned separate lands.

"[Blair McKnight says that the partition was first amicably agreed on, as stated by John, and then William was to take in severalty the north half of the eighty acres, and Robert the south half, the lane being the line; that he rented for one year from William, and Robert had nothing to do with it, and was not consulted. He raised corn, potatoes and 'truck,' and saw Robert working the other side of the lane.] [1]

"[Scott Gwin says he was employed by Wilson to survey the farm for the heirs; divided it into pieces by the old township road, and then divided the eighty acres on the west side by the lane. When he ran the lines of these two thirty-nine-acre pieces Robert was there, and all the heirs were there during the work. He made no objection to the line of the lane, and made copies of his survey, and gave each of them a copy. It shows this subdivision by the lane, and is in evidence. His bill was $20.00—$5.00 to Robert and William each, and $10.00 to Wilson and Reuben, whose land he had also divided into two parts.] [2] Only $15,00 were paid.

"W. J. Estep was the assessor, and in 1879 called and saw all the four sons; met Robert in the lane, and he gave him the thirty-nine acres south of the lane, and saw William, who gave him the thirty-nine acres north of the lane. Both Robert and William told him that they had divided the pieces by the lane, and each owned on each side. The assessment books in evidence it is claimed corroborate Mr. Estep, as they show just such assessments. They further show the same assessment down as late as 1884, after both pieces had changed ownership.

"[A. J. Irvin lived near the land, and says Robert told him the land was divided between him and William, but he (Robert) had in 1880 or 1881 offered to sell him his piece; that he rented the north end from William, and Robert had nothing to do with it; that Robert had commenced the erection of a house, but did not finish it, but a stable was built on it; and a new house on William's end; saw Estep one day talking to William in the field.] [3]

"[Thomas Thompson saw Robert fixing or preparing the foundation for a new house on his piece. He talked with him at the time, and Robert said he and William had parted the land between them, and he was now going to build a house on his end. Lumber, stone, etc., were there. He never saw any one but Robert work on the south end, and never saw him work on the north end.] [5]

"Louis Reigh was passing and saw Robert and talked with him. Robert said it was his land, and that he had built a barn and planted an orchard on it. He pointed to the north side and said William owned that side; this was about 1879. He has seen each working on his own side.

"John P. Bell says that he cut the lumber for Robert's house and cropped the land for him, and William had nothing whatever to do with it. At that time I think William was improving his own land.

"A. L. McCartney had a conversation in 1879 or 1880 with Robert; he went to collect a debt. Robert said he would sell him his end; McCartney said he would not want it unless he could get both pieces; then Robert said William would sell him his end. He never had any knowledge that Robert claimed any interest in the north end. Have heard him say that he and William had divided it. He afterwards bought at sheriff's sale the north end—William's end.

"Edward Bell, the defendant, says Robert told him he and William had divided the eighty acres, and that Robert had taken the south side and William the north side. He knows each farmed or controlled his own side. William asked him several times to buy his land, as he was embarrassed with debts. This was after Robert's piece had been sold by the sheriff, and after that William remained on his side. When McCartney bought the north end at sheriff's sale Robert made no claim, and William neither did nor said anything admitting Robert's right.

"The next spring Mr. Bell bought from Mr. McCartney and paid $900 for it—more than it was worth. In the following September he heard for the first time of Robert's claim to the undivided half of it, and you will remember what took place between them in regard to Robert's turning in his stock; in which a verdict against Robert was rendered in favor of Mr. Bell. The record of this is in evidence here now.

"Mr. Bell finally says he bought this property from McCartney because he understood from Robert that he and William had divided the land, and he observed that for six years thereafter each occupied and exhibited an ownership consistent with the statement of Robert that there had been an actual partition. This statement made by Robert, defendant claims by his counsel, estops plaintiff from afterwards creating a title to the north end, but as to this we refer further on.

"Defendant further points to the description of the lines in the sheriff's sale of both the north and south ends, to show that the metes and bounds are those of separate pieces, and as fixed by the surveyor, and each piece is called for as an adjoiner to the other.

"The defendant then puts in evidence a judgment against William, on which there are proceedings in execution, resulting in a sale by the sheriff, June 20, 1884, of the north end, or William's piece, as it is called, to A. L. McCartney, who, by his deed, also in evidence, dated June 15, 1885, conveyed to Edward Bell, the defendant in possession of the land in controversy.

"[This is the defendant's case, and it will be observed, if defendant's witnesses are believed, that there was an amicable division or partition of the eighty-acre piece between William

and Robert, and this being under the law equivalent to a release of title by Robert in the north end to William, would give William the absolute title to the thirty-nine acres and fifty perches comprising the north end, and when the sheriff levied on William's interest therein and sold it in 1884 to A. L. McCartney, he sold and conveyed to McCartney both the interests of William and Robert, or the whole title to the north end, and Robert would have no right to recover in this suit.] [5]

"But if there was no such partition, then Robert's interest to the extent of one half in the north end had never passed out of him, and the sheriff's sale to McCartney only passed William's interest in the north end, which would be one half, leaving the other half still in Robert, and in that event Robert would be entitled to recover that undivided half in this suit.

"In support of this contention, and in reply to defendant's witnesses, the plaintiff introduces rebutting testimony, and calls several witnesses.

"He calls first, Wilson McKnight, who says he was one of the sons, and they did all talk and agree upon an amicable partition, but it was that Blair, William and Robert should take the farm; that Blair should take the ninety-six acres east of the old road, and William and Robert the eighty acres west of the old road; that the necessary indentures and conveyances for effecting this object were duly executed, but he knows of none between William and Robert dividing the eighty acres; that it was not agreed in this conversation that they would do so, that he never heard them say they would do so, and that they never did so. Furthermore they farmed it together; he gave them the privilege of using the old barn for their hay and grain; that they jointly and at joint expense put up the stable and the house; that they shared the proceeds, the hay and other products sold in Altoona; that William claimed to own an interest in the south end; that Willam owed Robert a judgment note of $580, and to pay this off and lift it he, with the other heirs, conveyed his interest in the north end; that Edward Bell told him he knew nothing about Robert claiming an interest in the north end then owned by him (Bell); that he, Bell, would give Robert $300 for his interest in it. He further said that Mr. Bell recognized that Robert had his interest in the north end.

"Mrs. Baitland says she lived at the homestead in 1879, and saw Estep, the assessor; he came in and asked for ink, as he had forgotten his. This is to contradict Estep when he says he assessed Robert and William each with thirty-nine acres given to him by each, and wrote it down outside in their presence. She also says Robert farmed on both sides of the lane, and cut hay on both sides.

"William McKnight repeats substantially Wilson's story as to the partition, and that he and Robert never did agree to divide the eighty acres, but they talked as though they might some day do so, but had not divided it, and could not, because the incumbrance on the whole eighty acres would have prevented it; that the improvements were done by them jointly, and located so that in case of a division they would be found suitable; they raised hay principally and sold it in Altoona and divided the proceeds; he denies that he gave Estep thirty-nine acres for assessment, and denies he ever told Edward Bell he owned the north end and Robert the south end; he also states substantially what Wilson says about his conveying his interest in Robert's half to lift his note, but he says it still left Robert owning the undivided half of the north end; that he did try to sell to Edward Bell, but he was acting for both, and wanted to get the debt paid, and Robert allowed him to make any sale he could; he also denies that his share of the timber sold off his and Robert's eighty acres, amounting to $500, lifted the note, and you will remember all that he has said.

"Then they call the two Mrs. McKnights, Mrs. Alloway, Joshua Pate, the two Mr. Alloways, who testify that they saw the two pieces farmed by the two brothers in 1879 and 1880, that they saw them do it together, and one witness, Mrs. Alloway particularly, said it was done jointly and not severally.

"Finally Robert McKnight takes the stand and relates the agreement of partition as already shown, and affirms that he and William never parted their eighty acres. They talked about it, and expected to do it some day, and so managed the land with a view to doing so in the future, but had not yet done it. He says they farmed it together as tenants in common, and divided the proceeds; that they joined in making all improvements and planting the orchard, and as to building a house on the south side, he never intended to do so, and did not begin

to do so, as alleged by defendant's witnesses. He contradicts defendant and many of his witnesses; he says he never saw Mr. Estep, and further never gave in thirty-nine acres for taxation; that he never met Scott Gwin, the surveyor, nor received a draft. He denies meeting Mr. McCartney and telling him he and William had divided the land. He denies all the statements made by Edward Bell that he, Robert, had told him in 1875 that he and William had divided the land. He denies that he ever told Gwin the same thing, and denies ever seeing Gwin on the place. He denies also that he told Thompson of this partition. He denies also that he told Mr. Shaw that it was not necessary to have a deed from the heirs to give him the title to the north end. In short, he denies all the material allegations of defendant's witnesses touching his admission of the land having been divided.

"To this the defendant rejoins by calling Mr. Shaw, who says Robert told him a deed was not necessary, because Robert told him he was the absolute owner of the south end as his share, in connection with one half of the eight acres, in his father's estate.

"Mr. Estep says he never collected any tax off William.

"John McKnight says William told him that it was his share of the timber money from the eight acres that lifted the judgment note, thus showing, as defendant says, that it was not the conveyance of William's interest that enabled him to lift the note.

"Mr. Bell also denies that he agreed to pay Robert for pasturage, or that he admitted to Robert when he bought from McCartney he was buying a lawsuit, or that he ever offered to pay him $300 for his interest.

"Thus it is seen that plaintiff claims there was no partition, that he and William owned and used the land jointly and divided the profits, that though they thought of dividing the land they never did so, and furthermore that he never told any person that they had divided it; that he always claimed his half interest in the north end, and in order to perfect an absolute title to the south end he bought out William's interest therein with a judgment note William owed him; and that all his acts have been consistent with his continued ownership, and he still owns the undivided half of the north end, and is entitled to recover.

"[On the other hand the defendant says, by himself and a large number of witnesses, that since 1875 Robert and William have not only used and treated the land as divided by the lane, but that both William and Robert have told those who have come here as disinterested witnesses that they had parted the land, and one owned the north end and the other the south end; that plaintiff's witnesses are mostly interested or relatives; that all the acts of Robert subsequently, building stable and house, place of living, etc., all point to his separate ownership; that the consideration for the deed from him to Robert was not the judgment note, but the timber money; that the land was surveyed by Scott Gwin making the lane the line, and Robert was then present when they fixed a post corner at the lane, and that Robert received from him a draft showing his piece and William's piece; that after that both Robert and William gave in to assessor Estep each the two pieces corresponding with the survey; that the subsequent levies by the sheriff, and sheriff's sales, sheriff's deeds and other deeds all described the separate pieces, one being held as the land of William, and the other as the land of Robert; [6] and finally, that defendant has already had a verdict in a trespass suit tried in this court.

"Now, gentlemen, this is substantially the evidence, and an abstract of the respective claims of the parties on this question of an amicable partition. [When tenants in common of land desire to make partition of it, it is not absolutely necessary it should be evidenced in writing. If they run a line, mark it on the ground, or if there be such a line upon the ground as may be understood and identified as a division line, and they agree upon that line, and they then actually take possession of their respective parts in pursuance thereof, and the partition is fully executed between them, it is sufficient to vest the title in severalty.] [7]

"This is called a parol partition, and is held by the law to be efficacious to set apart a definite interest in severalty to all who are parties to it, and who have a common ownership in the land. Such action severs the common title to the whole, and vests in each in lieu thereof an entirety of title to a fixed and designated portion of the tract. The marked line and the actual possession proclaim to all the actual dominion of the several owners.

"If the weight of the evidence satisfies you there was no amicable or parol partition of those eighty acres between William and Robert; that they did not agree to divide and fix upon the lane as the division line, and in pursuance thereof occupy and possess respectively the pieces on the north and south sides of the lane, then the undivided interest of Robert remains in the north end, and when McCartney, and afterwards Edward Bell bought William's interest in it, then only the undivided one half of William passed by the sale, and Robert's interest would be left in it, and it being still there, Robert would be entitled to recover it, and your verdict should be for the plaintiff for the premises described in the writ.

"[On the other hand, should the weight of the evidence satisfy you that there was a partition agreed on by and between William and Robert; that they made the lane the division line, and in pursuance thereof each actually took possession of the piece respectively selected by them, viz: William the thirty-nine acres north of the lane, and Robert the thirty-nine south of the lane, then you should find there was such partition of the land as vested the title in each in severalty, and in that case when William's interest was sold at sheriff's sale the interest of both William and Robert to the north end passed and afterwards vested in Edward Bell, the defendant, and your verdict should in that case be for the defendant.] [8]

"We have been asked by defendant's counsel to say, if you believe Robert told Mr. Bell in 1875 or 1876 that he owned the south end, and that William owned the north end, in pursuance of a division of the land between them, and so understanding it, he afterwards bought the land in 1885, that Robert would now be estopped from denying the alleged partition, and setting up such a denial in this suit as against Edward Bell, the defendant.

"We refuse to instruct you. In 1875, when Bell was talking to Robert, it was an accidental meeting, and not one sought to derive information in order to make a purchase. There was no privity of relation between Robert and Bell; Robert owed Bell no duty, nor was the situation such that he should either speak or be silent. Nobody was then misled. Bell did not then wish to buy, nor did he then buy. The statement is remembered for ten years, and with many changes since occur-

ring in the history of the land, and without further or later inquiry, in view of the information then obtained, it is invoked as an estoppel ten years later to operate with all the vigor of 1875. It is doubtful if it could have operated then. Does the passage of ten years give it any greater efficacy? To rest for that length of time before the purpose to act is formed, and then to risk the certainty of the title upon the admission, is to invest the doctrine of estoppel with a character which does not attach to it. For these reasons we refuse to instruct you as requested.

"But whilst we say that Robert is not estopped from bringing this suit and setting up this claim, we do say that [the admissions of Robert to McCartney, Bell, Gwin, Estep, Irvin, Thompson and others are evidence for your consideration, tending to show that there was an amicable partition between him and William, and you will therefore determine, in view of this and all the evidence in the case showing the acts and conduct of the parties, whether they did or did not make the alleged amicable partition; and as you determine this question you determine the case.]" [9]

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (1–9) above instructions, quoting them.

Daniel J. Neff, *J. D. Blair* with him, for appellant.—There was not sufficient evidence to support a parol partition: Johnston v. Goodwin, 27 Vermont, 288; Ebert v. Wood, 1 Binn. 216; Rider v. Maul, 46 Pa. 378; Maul v. Rider, 51 Pa. 382; Mellon v. Reed, 114 Pa. 653; Wolf v. Wolf, 158 Pa. 629.

A. A. Stevens, for appellee.—The evidence was sufficient: McKnight v. Bell, 135 Pa. 370.

PER CURIAM, May 6, 1895:

This action of ejectment was brought to recover possession of the undivided half of the northerly half of eighty acres of land, part of a larger tract of which, inter alia, the plaintiff's father, Robert McKnight, Sen., died seized in 1860. A prima facie case for plaintiff was made out by showing that in 1875, in the division of his father's lands, the eighty-acre tract was

allotted and conveyed, by the other heirs, to himself and his brother William McKnight.

In substance, defendant's contention was that at or about the time of said division, the plaintiff Robert McKnight and his brother William made a parol partition, between themselves, of said eighty acres, adopting as their division line a lane which, crossing the tract about midway, divided the same into two very nearly equal parts of about forty acres each; that in pursuance of said partition and possession taken and held thereunder plaintiff became sole owner of the southerly part of said tract, and his brother William sole owner of the northerly part, —the land now in controversy; that the last mentioned piece, thus acquired in severalty by William McKnight, was afterwards sold by the sheriff, as his property, and conveyed to A. L. McCartney under whom defendant claims. In support of this contention considerable testimony, direct as well as circumstantial, was introduced by the defendant; and on the other hand the plaintiff introduced rebutting evidence, tending to show that no parol partition of the eighty-acre lot had ever been made between him and his brother William. The alleged parol partition, on which defendant relied, thus became the controlling question of fact in the case. It is not our purpose to either review or summarize the testimony bearing on the subject, but an examination of the record has satisfied us that the cause could not have been withdrawn from the jury. The question was fairly submitted to them by the learned trial judge in a clear and able charge, which, considered as a whole, is free from any substantial error. We find nothing in the record that would justify us in reversing the judgment.

Judgment affirmed.

Agnes Plummer, Appellant, *v.* New York & Hudson River R. R.

Negligence—Railroads—Crossings—"Stop, look and listen."

In an action to recover damages for personal injuries received at a grade crossing, a compulsory nonsuit is properly entered where the evidence for plaintiff shows that, in approaching the crossing, she stopped about three hundred feet from it, where she had a view of the railroad; that she then proceeded to the crossing; that for a distance of fifty-five feet along the highway from the crossing there was an unobstructed view of the railroad for a distance of five hundred feet; that when about to go upon the crossing, a hand car approached and frightened her horse, causing him to wheel suddenly, upsetting the buggy, and causing her injuries.

Argued April 26, 1895. Appeal, No. 433, Jan. T., 1894, by plaintiff, from judgment of C. P. Clearfield Co., Feb. T., 1894, No. 305, entering nonsuit. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Trespass for personal injuries. Before GORDON, P. J.

At the trial it appeared that on Nov. 11, 1893, plaintiff was injured by being thrown from a buggy at a grade crossing of defendant's railroad. The evidence for plaintiff showed that she was driving with her brother in a buggy, and that at a point about two hundred and ninety-three feet from the crossing they stopped, looked and listened. At this point the railroad could be seen for a considerable distance. They then drove on, and without further stop approached the crossing, and were about to drive upon it when a hand car approached. The hand car was stopped sixteen feet short of the crossing, but plaintiff's horse became frightened and wheeled sharply around, upsetting the buggy, throwing plaintiff upon the track, and injuring her. There was no collision between the hand car and the buggy or horse. It also appeared that for a distance of fifty-five feet along the highway from the crossing there was an unobstructed view of the railroad as far as the track continued straight, which was about five hundred feet. Several witnesses for the plaintiff testified that the point where the plaintiff stopped was not the usual place for stopping.

The court entered a compulsory nonsuit which it subsequently refused to take off.

Error assigned was refusal to take off nonsuit.

David L. Krebs, *Wm. Paterson* with him, for appellant.—The plaintiff was not guilty of contributory negligence: North P. R. R. v. Heileman, 49 Pa. 60; Penna. R. R. v. Beale, 73 Pa. 504; Cent. R. R. of New Jersey v. Feller, 84 Pa. 226; Lake Shore Ry. Co. v. Frantz, 127 Pa. 297; McGill v. Ry., 152 Pa. 331; R. R. v. Whitman, 156 Pa. 175; Neiman v. D. & W. Co., 149 Pa. 92; Urias v. R. R., 152 Pa. 326.

There was negligence on part of defendant: Ellis v. R. R., 138 Pa. 506; Del. etc. R. R. v. Jones, 128 Pa. 308; Phila. & Trenton R. R. v. Hagan, 47 Pa. 244; Kay v. Penna. R. R., 65 Pa. 269; Reeves v. Del. Co., 30 Pa. 454; Penna. R. R. v. Goodman, 62 Pa. 329; P. F. W. & C. R. R. v. Dunn, 56 Pa. 280; Penna. R. R. v. Barnett, 59 Pa. 259; Penna. R. R. v. Hope, 80 Pa. 373; Hoag v. R. R., 85 Pa. 298; P. & N. Y. Cent. R. v. Lacey, 89 Pa. 458; Oil Creek & Alleghany River R. R. v. Keigron, 74 Pa. 316; Kohler v. R. R., 135 Pa. 357; School Furniture Co. v. Warsaw School District, 122 Pa. 501.

Thomas H. Murray and *M. E. Olmsted*, *Allison O. Smith* with them, for appellee, cited: Ellis v. R. R., 138 Pa. 522.

Cited on the question of contributory negligence: Blaker v. R. R., 30 N. J. Eq. 241; P. & R. R. R. v. Ritchie, 102 Pa. 432; Aikin v. P. R. R., 152 Pa. 326; Urias v. P. R. R., 152 Pa. 326; Derk v. N. C. R. R., 164 Pa. 243: Myers v. B. & O. R. R., 150 Pa. 386; Penna. R. R. v. Beale, 73 Pa. 509; Schofield v. C. M. & St. P. R. R., 114 U. S. 615; Durbin v. Ore. Railway & Nav. Co., 32 Am. & E. R. R. Cases, 149.

On the question of defendant's negligence: Titus v. R. R., 136 Pa. 618; Kehler v. Schwenk, 144 Pa. 348; Reese v. Hershey, 163 Pa. 253; Lake Shore & M. S. R. v. Frantz, 127 Pa. 297; Goshorn v. Smith, 92 Pa. 435; Rothchild v. R. R., 163 Pa. 49; Pittsburg Southern Ry. v. Taylor, 104 Pa. 306; Penna. R. R. v. Barnett, 59 Pa. 259; Drayton v. N. P. R. R., 10 W. N. C. 55; Fouhy v. P. R. R., 17 W. N. C. 177; Kelley v. Shanley, 140 Pa. 213; Flint v. N. & W. R. R., 110 Mass. 222.

PER CURIAM, May 6, 1895:

The learned court was clearly right in refusing to take off

the judgment of nonsuit. Viewing the evidence in its most favorable light for the plaintiff, there is nothing in it that would justify a jury in finding that defendant's alleged negligence was the proximate cause of her unfortunate injury.

Judgment affirmed.

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George H. Hall v. Clearfield & Mahoning Railway Company and The Buffalo, Rochester & Pittsburg Railway Company, Appellants.

Contract—Agreement to sell land—Deed—Railroads—Crossings—Equitable ejectment.

In an executory contract to sell land to a railroad company for right of way, it was stipulated that the railroad company "shall construct and maintain a good and sufficient crossing over the right of way on said premises." The railroad company tendered a deed which contained no reference to the crossing. The landowner tendered a deed to the railroad company containing the following clause: "Excepting and reserving unto the said parties of the first part, their heirs and assigns, forever, a good and sufficient right of way, causeway or railroad crossing over and across the said Clearfield & Mahoning Railway on the said premises of the parties of the first part, so that the occupant or occupants of the said premises of the parties of the first part may cross or pass over the said railroad on the premises with wagons, carts and implements of husbandry, as the occasion may require; said causeway or railroad crossing to be maintained by the said party of the second part; its successors and assigns." *Held*, that the landowner was entitled to have inserted in the deed the above provision and that he could maintain an equitable ejectment to compel the acceptance of such a deed by the railroad company.

Argued April 26, 1895. Appeal, No. 444, Jan. T., 1895, by defendants, from judgment of C. P. Clearfield Co., Feb. T., 1894, No. 314, on verdict for plaintiff. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Ejectment for a tract of land in Lawrence township. Before BELL, P. J., of the 24th judicial district, specially presiding.

At the trial it appeared that this was an action of equitable ejectment to enforce the specific performance of a written agreement on the part of the Clearfield & Mahoning Railway Company to purchase a strip of land from plaintiff for its right of

way for $499. The agreement was dated June 18, 1892, and contained a stipulation "that said railway company shall construct and maintain a good and sufficient crossing over the right of way on said premises." The railway company constructed its railway on the land, and before suit was brought also constructed a crossing over its track on the premises of plaintiff. Prior to the construction of the crossing the railway company tendered to plaintiff a deed in which no mention was made of the crossing. Plaintiff refused to accept the deed, and in turn tendered to the railway company a deed containing the following clause: "Excepting and reserving unto the said parties of the first part, their heirs and assigns forever, a good and sufficient right of way or railroad crossing over and across the said Clearfield & Mahoning Railway on the said premises of the parties of the first part, so that the occupant or occupants of the said premises of the parties of the first part may cross or pass over the said railroad on the premises with wagons, carts and implements of husbandry, as the occasion may require; said causeway or railroad crossing to be maintained by the said party of the second part, its successors and assigns."

The court charged in part as follows:

"[The deed which the railroad company asked Mr. Hall to have executed contained no reference to this constructing and maintaining of a good and sufficient crossing over the right of way on said premises, but the railroad company, in order to satisfy Mr. Hall on this point, at the same time agreed to give to him a memorandum or receipt which would show hereafter that this provision about the construction and maintenance of the road in the agreement had not merged in the deed or lapsed. The paper which they proposed to give him to show that the agreement about the road had not lapsed was this: 'Received of George H. Hall deed from himself and wife to The Clearfield & Mahoning Railway Company, dated
for land in Lawrence township, Clearfield county, Pennsylvania. The delivery and acceptance of this deed shall not abridge nor abrogate the covenant as to crossing, contained in the agreement between the said Hall and said company, dated June 18, 1892, recorded in Clearfield county in Deed Book "M," page 333.' Now, the railroad company claimed that that was all they were obliged to give Mr. Hall to show that there

was any agreement about the construction and maintenance of this road or crossing, but we instruct you as a matter of law that they were obliged to do more than that; they were obliged to make a proper reference in the deed which they prepared for execution by Mr. Hall; they were obliged in such deed to make a proper reference to the construction and maintenance of said crossing, and we instruct you as a matter of law that they did not fulfill their duty on this point when they simply contented themselves with giving Mr. Hall this receipt or offering to give him this receipt.] [7]

"Mr. Hall was not satisfied to execute the deed which the railroad company had prepared for him, and then he prepared a deed which he did execute. That deed has been offered in evidence before you to-day and is called Exhibit 'B,' H. B. G., 2–25–95, and is a deed by George H. Hall and wife to the Clearfield & Mahoning Railway Company. In this deed Mr. Hall had inserted the following provision in relation to the construction and maintenance by the railroad company of said crossing: 'Excepting and reserving unto the said parties of the first part, their heirs and assigns, forever, a good and sufficient right of way, causeway or railroad crossing over and across the said Clearfield & Mahoning Railway on the said premises of the parties of the first part, so that the occupant or occupants of the said premises of the parties of the first part may cross or pass over the said railroad on the premises with wagons, carts and implements of husbandry, as the occasion may require; said causeway or railroad crossing to be maintained by the said party of the second part, its successors and assigns.' In the deed which Mr. Hall had prepared by his attorney that is the clause which he had inserted, and we say to you as a matter of law that Mr. Hall had a right to insert such a provision in this deed, and that the railroad company when he tendered them this deed, if they had no other objection to it than the insertion of that clause, were bound to take the deed.

"The railroad company objected to taking the deed and they now object to the deed in this court; they say that the agreement which was entered into between Mr. Hall and themselves about this crossing, to wit, a clause about the crossing in the agreement of 18th day of June, 1892, was a personal agreement alone, that its benefits inured to Mr. Hall alone and did

not inure and would not inure to his heirs and his assigns, and the attorney for the defendant has argued very learnedly and very ably too that this is a reservation, that this clause about the construction and maintenance of this crossing is a reservation, and being a reservation it would inure simply to Mr. Hall alone, because it contains no words of inheritance, no words 'heirs and assigns;' and if this clause occurred or was found in a legal conveyance, that is a deed which was the end of the negotiations—a legal conveyance—we would say that the contention of the defendant's counsel was correct; but, as we view the matter, this paper of the 18th day of June, 1892, whereby Mr. Hall agreed to convey, was simply an executory conveyance or rather an executory paper; it was not a conveyance, it was only an agreement to convey, therefore it is what the lawyers term an executory paper; and being an executory paper the strict rules in regard to the use of the word 'heirs' and 'heirs and assigns,' in order to insure perpetuity of any rights, were not necessary to be used; and, as we view the matter, we say to you that it was not necessary that the words 'heirs and assigns' should occur in this reference to or agreement about the construction and maintenance of this road.

"[If this paper had been what is known as a legal conveyance the words 'heirs and assigns' should have been inserted, but being an executory paper, not a conveyance but only an agreement to convey, we do not think the words 'heirs and assigns' were necessary, and we instruct you as a matter of law that the railroad company should have accepted the deed which we have referred to, prepared by Mr. Hall and offered this day in evidence, and which is marked 'Plaintiff's Exhibit "B," H. B. G., 2-25-95.'] [8]

"[We instruct you further that the plaintiff has a right to have this question raised and determined in the present equitable ejectment. Here was a dispute between these two parties as to what kind of conveyance should be executed by Mr. Hall. How could such a dispute be settled? In England it would have been settled by bill in equity, but prior to recent years in Pennsylvania we had no court of equity and therefore we were obliged to work out these equitable questions by verdicts of juries in ejectments, and hence arose in Pennsylvania the custom of equitable ejectments. As we view the matter, the

plaintiff had a right to have this matter decided in this equitable ejectment; and, as we view the matter, the plaintiff also had a right to execute the deed in the form in which he tendered it to the defendant; and, as we view the matter, the defendant was wrong in insisting upon the plaintiff executing a deed which had no reference to the obligation on the part of the defendant to construct and maintain this crossing, and as the defendant was wrong in this matter it results that the verdict should be against the defendant.] [9]

"The defendant has submitted to us certain points which we will read and which we will answer.

"'The court is respectfully requested to charge the jury:

"'I. It appearing from the facts admitted in this case that the defendant company, prior to the bringing of this suit, did construct a crossing for the use of the plaintiff over its tracks and right of way purchased from the plaintiff, and has maintained the same to the satisfaction of the plaintiff, and on the 28th of July, 1894, did make a legal tender to the plaintiff of five hundred seventy-one and fifty one hundredths dollars ($571.50), purchase money, with interest and costs of this suit accrued at that date, and has kept up said tender, the money being considered in court, the defendant has complied with the agreement made with the plaintiff and dated the 18th of June, 1892, which is recorded in the office of the recorder of deeds for Clearfield county in Miscellaneous Book "M," page 333, the plaintiff is not entitled to recover in this action and your verdict must be in favor of the defendant.'

"This point is denied. [1]

"'II. It appearing from the undisputed evidence in the cause that the Clearfield & Mahoning Railway Company, defendant, went into possession of the premises described in the writ in pursuance of the contract dated June 18, 1892, and began the construction of its road within the time specified therein, and that it has complied with the said contract according to the terms and tenor thereof; and on the 28th of July, 1894, did make a legal tender of the purchase money, with interest due on that date, and with costs of suit then accrued, and did at that time, by writing duly executed by the said Clearfield & Mahoning Railway Company and then offered to the plaintiff, admit that the provision in said agreement, which was then

recorded, relating to the crossing, should not be abridged or abrogated, because the provision as to the crossing was not mentioned in the deed from plaintiff to defendant; the plaintiff cannot, by means of this action of ejectment, require or compel the said Clearfield & Mahoning Railway Company to accept a deed with another covenant relating to the construction and maintenance of said crossing, and that before any breach of the said contract, dated June 18, 1892, on the part of the Clearfield & Mahoning Railroad Company, has been committed, and your verdict must be in favor of the defendant.'

"This point is denied. [2]

"III. The provision of the contract dated June 18, 1892, relating to the crossings being in these words: 'It is further agreed that the said railroad company shall construct and maintain a good and sufficient crossing over the right of way on said premises,' created a mere personal right in the plaintiff to use said crossing. The same is a right of way, in gross, across defendant's right of way and tracks for the use of the plaintiff, and it cannot be by the plaintiff assigned to another or transmitted by descent, and the plaintiff cannot, by means of an action of ejectment, compel and require the defendant company to insert a provision in the deed for the land sold to the defendant company, which would run with the land and become appurtenant to it, and your verdict must be for the defendant.'

"This point is denied. [3]

"'IV. The Clearfield & Mahoning Railway Company, defendant, having by writing, duly executed, acknowledged that the provision relating to the crossing in the contract already recorded should not be merged or abrogated by reason of the same not being mentioned in the deed of conveyance for said land purchased from the plaintiff as aforesaid, and the said defendant having fully complied with all its undertakings and stipulations by it to be done, kept and performed in said agreement, the plaintiff cannot, by means of this action of ejectment, compel the defendant company to accept a deed with another covenant relating to said crossing, and your verdict must be for the defendant.'

"This point is denied. As we have instructed you in our general charge, we do not think that the defendant, the railroad company, complied with the article of agreement and was

carrying out the article of agreement, which referred to the construction and maintenance of this crossing, by simply giving to Mr. Hall a paper stating that the agreement in this respect should not be merged in the deed; because, as we view the matter, if the defendant company in the future should sell their rights to some other railroad company, the railroad company buying the rights of the present defendant could go to the record, and not seeing any reference in this deed from Mr. Hall to the defendant railroad company, in regard to the keeping and maintaining of this crossing, they would be or might be absolved from the duty of maintaining this crossing. Therefore, as we have said in our general charge, we think there should be some reference to the duty of the railroad company to construct and maintain this crossing in the deed itself. [4]

"'V. That there is no covenant in the agreement between the plaintiff and the Clearfield & Mahoning Railway Company, dated June 18, 1892, requiring the defendant to accept a deed containing any provision relating to the construction or operation of any crossing, and there being no evidence that the defendant ever agreed to accept a deed containing such provision, the verdict must be for the defendant.'

"This point is denied. [5]

"'Lastly. That under the provisions of said contract, dated June 18, 1892, the plaintiff cannot compel or require the C. & M. Ry. Co., by means of an action of ejectment, to accept a deed with a covenant requiring the defendant to maintain a crossing for the heirs and assigns of the plaintiff, such as is contained in plaintiff's deed, tendered and offered in evidence. This point is likewise denied.'" [6]

The court gave binding instructions for plaintiff. [10]

The jury returned the following verdict, upon which judgment was entered:

"We find for the plaintiff the land described in the writ, to be released, however, if the defendants, within sixty days after the filing in court of the deed hereinafter referred to, pay to the plaintiff the sum of four hundred ninety-nine dollars ($499), with interest from April 6, 1893. The deed to be so filed being the deed this day offered in evidence by plaintiff and marked Plaintiff's Exhibit 'B,' H. B. G., 2-25-95. This deed, properly sealed, to be filed in court for the use of the defendant."

Errors assigned were (1–10) above instructions, quoting them.

Frank Fielding, *C. H. McCauley* with him, for appellants.—The provision about the crossing was a reservation and not an exception: 2 Thomas' Coke Litt. 412; Whitaker v. Brown, 46 Pa. 198.

It is a private right of passage and nothing more: 3 Kent's Commentaries, 420; Kister v. Reeser, 98 Pa. 1.

The agreement being recorded containing the stipulation about the crossing, it would not be merged in the deed made in pursuance of the agreement: Brown v. Moorhead, 8 S. & R. 571; Anderson v. Long, 10 S. & R. 55; Wagner v. Wenrich, 1 Woodward, 35.

The plaintiff cannot, by means of an action of ejectment, compel the defendant company, under the terms of the written agreement, to accept a deed containing the covenant set forth in the plaintiff's deed.

Oscar Mitchell, for appellee, was not heard, but cited in his printed brief: 1 Sharswood's Blackstone's Commentaries, 299; Mitchell on Real Est. & Conveyancing in Pa. 430; Walton's App., 9 Atl. Rep. 922; Moody v. Alexander, 145 Pa. 571; Richardson v. Clements, 89 Pa. 503; Phillips v. Swank, 120 Pa. 76; Ogden v. Brown, 33 Pa. 247; Gaule v. Bilyeau, 25 Pa. 521; 19 Am. & Eng. Ency. of Law, 1004; Avery v. N. Y. C. & H. R. R., 106 N. Y. 142; Gunson v. Healy, 100 Pa. 42; Daubert v. Penna. R. R., 155 Pa. 178.

PER CURIAM, May 6, 1895:

The subjects of complaint in the first six specifications are the learned court's answers to the defendant's points for charge recited therein, respectively. We are satisfied from an examination of the record that there is no substantial error in any of said answers. Neither of said points, as presented, could have been affirmed, and hence they were rightly refused. Nor do we think there is any error in either of the excerpts from the learned judge's charge, recited in the seventh to the ninth specifications, inclusive, or in directing a verdict for plaintiff as complained of in the tenth specification. There is nothing in either of the assignments of error that requires special notice.

The learned judge is substantially correct in his construction of the agreement of June 18, 1892, on which this action is founded, and also in regard to the kind of conveyance therein provided for. The agreement is executory, and evidently contemplates the execution and delivery of a deed, in due form, expressed in such apt words as will secure to each party, respectively, the rights and privileges mentioned in the agreement or intended to be granted or reserved. The construction contended for by the defendants is unreasonable and wholly untenable. Their covenant to "construct and maintain a good and sufficient crossing over the right of way on said premises," is not independent of and unconnected with the right of way acquired by the defendant, but a covenant running therewith, and thus securing to plaintiff the "good and sufficient crossing" intended to be appurtenant to his land on either side of said right of way.

Inasmuch as the time, fixed in the verdict and judgment of the court, within which the $449 consideration money should be paid, has expired, the same is hereby extended for sixty days from the date of filing this opinion. With this single modification, we think the judgment on the conditional verdict should be affirmed.

The judgment, as above modified, is accordingly affirmed.

John J. Heidenwag, Appellant, v. Philadelphia.

[Marked to be reported.]

Negligence—Municipalities—Independent contractor—Fireworks.

Where by the terms of a written contract with a municipality to furnish a display of fireworks, a contractor undertakes to purchase the fireworks, set them off and do the whole work for a designated sum for the entire service, he is an independent contractor, and the municipality is not liable for injuries caused to a person by the contractor's negligence in performing his contract.

A company agreed, in consideration of a lump sum, to furnish a display of fireworks on one of the public bridges of a city, to furnish "expert artisans" to do the firing and to pay all claims for damages for injuries to persons or properties resulting from the fireworks. The specifications showed that the pieces to be displayed were so large that scaffolding was

necessary. The company erected scaffolding upon the sides of the bridge, but the cartway was not obstructed, and cars, wagons and pedestrians were permitted to traverse it. While plaintiff's infant son in charge of his aunt was crossing the bridge, part of the scaffolding fell and killed him. *Held*, that the municipality was not liable for the injury.

Municipalities—Fireworks—Act of August 26, 1721.

The act of Aug. 26, 1721, sec. 4, providing a penalty of five shillings for setting off fireworks in the city of Philadelphia without the governor's special license, applies only to individuals, and not to the city acting in its corporate capacity.

Argued Jan. 9, 1895. Appeal, No. 505, Jan. T., 1894, by plaintiff, from judgment of C. P. Phila. Co., June T., 1893, No. 561, entering nonsuit. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Trespass to recover damages for death of plaintiff's son. Before FINLETTER, P. J.

At the trial it appeared that on the afternoon of July 4, 1893, plaintiff's son, a boy eight years old, was killed by a large piece of timber falling upon him from a scaffold erected on the sidewalk of Girard Avenue bridge, in the city of Philadelphia, which is one of the principal highways of the city crossing the Schuylkill river. At the time of the accident the boy was walking on the bridge in company with his aunt. The scaffolding had been erected by the Consolidated Fireworks Company under a contract with the city of Philadelphia to furnish a display of fireworks on the evening of July 4, 1893, on the Girard Avenue bridge. The company, under its contract, undertook to do the whole work, including the purchase and setting off of the fireworks for a designated sum to be paid for the entire service. It agreed to furnish "expert artisans" to do the work of firing and also to pay all claims for damages for injuries to persons or properties resulting from the fireworks. The contract further provided that the company should be paid the sum of $8,000 for the display. In pursuance of this contract, scaffolding was erected on the south sidewalk, extending the whole length of the bridge. The other sidewalk was obstructed by guy ropes, and the roadway, in part, by boxes and fireworks. Cars were, however, permitted to traverse the roadway, and large numbers of pedestrians crossed the bridge following the cars.

The Consolidated Fireworks Company was made a party defendant, but the summons could not be served upon it, and the case proceeded to trial against the city of Philadelphia, alone.

The court entered a compulsory nonsuit which it subsequently refused to take off, FINLETTER, J., filing the following opinion:

"On the afternoon of July 4, 1893, certain persons were completing a scaffolding upon and along the whole of the south sidewalk of Girard Avenue bridge. The east and west ends and entrances of the sidewalk were closed. The north sidewalk was not obstructed, and the north side of the roadway was free for travel. The cars were running on both tracks.

"The plaintiff offered in evidence a contract entered into by the city with the Consolidated Fireworks Company of America for furnishing and setting off fireworks on Girard Avenue bridge on the night of July 4, 1893.

"It may be fairly inferred from the evidence that the scaffolding was erected for the purpose of carrying out this contract. But the evidence does not show by whom or for whom the work was done. There can be, however, no presumption that it was done by or on account of the city.

"It was contended by the plaintiff that, under the act of assembly of Aug. 26, 1721, Smith's Laws, 129, 208, and the ordinance of councils of Sept. 23, 1864, the discharge of fireworks was unlawful, and that the city was therefore liable for any injury that might happen in consequence of the performance of the contract.

"It was further contended that, as the scaffolding was an unlawful obstruction of the highway, it was per se a nuisance, and the city was liable for any injury which resulted therefrom.

"If the city had erected the scaffolding or permitted it to be erected for the discharge of fireworks, it was not an unlawful act. It is the discharge of fireworks which is or may be unlawful, and not the preparations for that purpose.

"When the city or an individual temporarily uses a portion of the highway for a purpose which is not unlawful, the obstruction is not per se a nuisance.

"As this work was supervised by the park guard and police officers, the presumption is that it was lawful.

"But, even if it was unlawful and a nuisance, it imposed no responsibility on the city for its existence, and no duty for its abatement. It is no part of the business or duty of the city to enforce the laws and ordinances, even when they relate to the highways.

"The only duty imposed upon the city in regard to the highways is to keep them ordinarily safe for travel, and in proper repair for that purpose. This duty relates only to construction and repair.

"As the contract required the fireworks company to furnish and set off fireworks on the Girard Avenue bridge, and as the scaffolding was for that purpose, and as there is no evidence that the city had anything to do with that work, it may be inferred that it was done by the company under the contract, and therefore the city is not liable.

"It does not appear from the evidence that there was any negligence in the performance of this work, either in the competency of the workmen or in the materials or implements, or in the manner of their use, nor does it appear that they were not such as are ordinarily used for such purposes.

"Whilst the work was not in itself dangerous, it might be to those who came near it. The public were prevented from entering upon the footway at both ends and entrances. The park guards and police were there to warn and keep the people away. This was notice of the danger of coming near the scaffolding.

"When the boy was struck his aunt had hold of his hand and was going to the footway upon which the scaffolding was erected. She had placed one foot upon the curb. Under the circumstances this was negligence, and as she had the care and custody of the child, the father cannot recover.

"The motion to take off the nonsuit is therefore refused, and the rule is discharged."

Error assigned was the refusal to take off nonsuit.

Edmund Randall, *James A. Flaherty* with him, for appellant.—The erection of these derricks, several hundred feet along one sidewalk, the obstruction of the other by guy ropes and the roadway by mortars, boxes, fireworks and sand piles

should have been declared by the court to have been a nuisance, per se, unless they were for some proper municipal purpose, in which case the defendant should have properly guarded the public from danger: Born v. Allegheny etc. Plank Road Co., 101 Pa. 334; Norristown v. Moyer, 67 Pa. 355; Dillon on Munic. Corp. 1030; Smith v. Simmons, 103 Pa. 32.

The acts of Feb. 26, 1721, and of Feb. 9, 1750, 1 Sm. L. 129 and 208, are not obsolete: Homer v. Com., 106 Pa. 221.

The city ordinance of Sept. 23, 1864, also declares the discharge of fireworks in the highway to be a nuisance: Brightly's City Dig. 725, 815.

No usage or custom will justify an encroachment on a public highway, or the presence thereon of an obstruction which renders it unsafe for the uses for which it is dedicated: McNerney v. Reading, 150 Pa. 611; Scranton v. Catterson, 94 Pa. 202.

Whether the obstruction was a nuisance or not, was for the jury, and not for the court to decide: Fritsch v. Allegheny, 91 Pa. 226.

The city can only shift the responsibility to an independent contractor where the work to be done is legal and necessary (laying water pipe): Painter v. Pittsburg, 46 Pa. 213; Susquehanna v. Simmons, 112 Pa. 384.

Leonard Finletter, assistant city solicitor, *Charles F. Warwick*, city solicitor, with him, for appellee.—The city of Philadelphia may make a display of fireworks upon the 4th day of July, if she contracts with a responsible firm to do all the work, without making herself liable for any damages that may arise to any one in the erection of whatsoever scaffolding, or other apparatus, the contractor may choose or adopt for use in displaying the fireworks: Act of Feb. 2, 1854, P. L. 21; Craig v. Philadelphia, 89 Pa. 265; Norristown v. Moyer, 67 Pa. 355; Scranton v. Catterson, 94 Pa. 202; Frisch v. Allegheny, 91 Pa. 226.

The custodian of the child having rashly put herself and the child in a position of danger, the appellant must suffer the consequences: Matthews v. Phila. & Reading Co., 161 Pa. 31; Baker v. Westmoreland, 157 Pa. 593; Foreman v. R. R., 159 Pa. 541; Irey v. Penna. R. R., 132 Pa. 563.

OPINION BY MR. JUSTICE GREEN, May 13, 1895:

If the scaffolding erected on the Girard Avenue bridge, from which the timber fell which killed the plaintiff's son, was an unlawful structure, the city was guilty of negligence in authorizing its erection, and cannot shield itself from liability by showing that the death of the boy was due to the negligence of an independent contractor. We are very clear that under the contract which was made between the city and the contracting company which did the work, the contracting company was an independent contractor. By the terms of the contract the company undertook to do the whole of the work, including the purchasing and setting off of the fireworks, for a designated sum to be paid for the entire service. It is true that nothing is said in the contract specifically about the erection of a scaffolding, but the specification annexed to the contract does stipulate that the display is to be made from Girard Avenue bridge, and the mere inspection of the list of piéces to be exhibited proves conclusively that without a scaffolding the exhibition could not take place. The city under the contract could not exercise any control over the work to be done. None of its servants or agents could intervene to take any part in the erection of the proper works, or in the exhibition of the various pieces and designs. On the contrary the company agreed to furnish "expert artisans" to do the work of firing, and they also agreed to pay all claims for damages for injuries to persons or property resulting from the fireworks.

In the case of Painter v. The Mayor etc. of Pittsburg, 46 Pa. 213, the subject of corporate municipal liability for work done, and the payment of damages for injuries inflicted, by independent contractors, was thoroughly reviewed in an exhaustive and able opinion by Mr. Justice STRONG. He showed most clearly that the city, in the circumstances of that case, was not liable. He said amongst other things, "Is the city liable? We think not. The wrong was not done by any servants of the defendants. There is no room for the application of the principle 'respondeat superior.' The defendants had no control over the men employed by the contractors, or over the contractors themselves. They could not dismiss them or direct their work. The excavation was not illegal, and there was a superior to the workmen, to wit, the contractors. There cannot be more than

one superior legally responsible. . . . It is now settled in that country (England) that defendants, not personally interfering or giving directions respecting the progress of a work, but contracting with a third person to do it, are not responsible for a wrongful act done, or negligence in the performance of the contract, if the act agreed to be done is legal."

In the case of Smith v. Simmons, 103 Pa. 32, this subject again came before us. A ditch was dug in a public street by the license of a borough to lay a water pipe for a citizen. The action was against the owner to recover damages for a personal injury suffered by a woman who fell into the ditch at night because it was insufficiently guarded, and the question was whether the owner was liable or his independent contractor who did the work. We held that the contractor was liable and the owner not. Mr. Justice GORDON, delivering the opinion, said: "Was the digging of the ditch in the public street of the borough of Susquehanna a nuisance per se? If not, if it was such a necessary work as was properly licensable by the borough council, then, as the second question, was the defendant chargeable with the negligence of his contractor who had charge of the work? . . . . If the ditch, dug for and at the instance of, Dr. Smith, was a public nuisance, then he and all engaged in sinking it were responsible for all damages resulting from it, and the doctrine of respondeat superior is out of the case."

It will thus be seen that if the work itself is without legal authority, the principal is liable as well as the independent contractor, and the question arises what is the character in this respect of the work which was being done? It is alleged for the plaintiff that the scaffolding was an unlawful structure, and being erected in a public highway was a nuisance per se. The basis of this contention is an ancient enactment passed in the year 1721, when the state of Pennsylvania was an English province. By the 4th section of the act of August 26, 1721, Brightly's Purdon, 814, pl. 1, it is provided that, "If any person or persons, of what sex, age, degree or quality soever, shall fire any gun or other fire-arms, or shall make or cause to be made, or sell or utter, or offer to expose to sale any squibs, rockets or other fire-works, or shall cast, throw or fire any squibs, rockets or other fire-works within the city of Philadelphia, without the governor's special license for the same, of which

license due notice shall first be given to the mayor of the said city, such person or persons so offending, and being thereof convicted before any one justice of the peace of the said city, either by confession of the said party so offending, or by the view of any of the said justices, or by the oath or affirmation of one or more witnesses, shall for every such offense, forfeit and pay the sum of five shillings." The remainder of the act provides a method of collecting the fine by distress and sale of the offender's goods, and if that is unavailable, then, by the imprisonment of his body. Doubtless there were reasons in those days, when Philadelphia was a small town and the governor resided within its limits, for requiring that his special license should be obtained whenever fire crackers were to be exploded, or fireworks exhibited. But in the present state of our population and our business affairs it seems rather ludicrous than otherwise, that such a requirement should be considered necessary as preliminary to every display of fireworks that may be contemplated by the city or by private persons. It is doubtful whether any license under this antiquated statute has ever been issued in the history of our commonwealth, and it is certain that it is universally disregarded. The subject is certainly a matter of mere police regulation, and is doubtless within the entire control of the municipal authorities, and it seems quite odd that when a municipal corporation sees fit to authorize such a display it should be reminded of its lack of power by a reading of this old law which, if it be in force, would subject the city to a fine of five shillings and a distress of its goods, and a possible imprisonment of somebody, for a violation of its provisions.

It is true that this court has decided that this act is still in force, and that its provisions must be observed. In the case of Homer v. Comlth., 106 Pa. 221, we decided that parties who engaged in manufacturing fireworks in the city of Philadelphia, without a license from the governor to do so, were guilty of a violation of this law and became subject to its penalties. But that decision related to another clause of the act than the one in question, and it concerned only the action of individual persons who were transgressing the provisions of the law. In this case it is the city itself acting in its corporate capacity that is the subject of consideration. There is nothing unlawful intrin-

sically in the preparation and exhibition of fireworks by a city acting as a municipality. Unless therefore the terms of the act of 1721 apply to incorporated cities and include them within the prohibitions designated, the erection of the scaffolding in question was not unlawful. We think it very clear that the act was not intended to apply to cities when acting in their corporate capacity. The prohibition of the act extends to "any person or persons of what sex, age, degree or quality soever." It will hardly be pretended that such a description embraces municipal bodies. It includes individual persons, living human beings, only. In providing the penalties the act directs that "such person or persons so offending" shall be prosecuted and convicted before a justice of the peace and upon conviction shall pay a fine of five shillings. The act further provides for the collection of the fine by a distress and sale of the offender's goods if he have any, and if not, then by the imprisonment of his body. These penalties and their collection are entirely appropriate to the cases of individual persons, but entirely inappropriate in the case of cities or other municipal bodies. We therefore hold that the act of 1721 does not, in this respect, apply to cities, and that exhibitions of fireworks when conducted under their authority are not unlawful, and hence the work of preparing for them is not unlawful. It was claimed that the city was negligent in not having policemen or other agents at the bridge to warn people off and protect them from danger. But unless it was the duty of the city to prevent any travel on the bridge while the scaffold was being erected, we cannot see how negligence can be imputed in this regard. We certainly do not think it was the duty of the city to suspend all travel on the bridge because an ordinary wooden scaffold was being erected on one side of the bridge. If we should say that in this case, consistency would require that we should say the same thing as to the erection of scaffolds along the streets in any other part of the city, which of course could not be done without practically suspending all the building operations which require the use of scaffolds. The evidence shows that many thousands of persons passed to and fro over the bridge while the scaffolding was being erected, and yet no other accident than this is shown to have occurred. It certainly was not the duty of the city to have policemen on hand to conduct each

foot passenger across the bridge. That would have been impossible on account of numbers, and it would have been ineffective to protect against this accident in any event. No policeman could know, any better than any other person, that this particular accident would or might happen, and therefore could not warn anybody against it. The sidewalks were closed at the ends but the roadways were open, and both railway cars and foot passengers were constantly passing and repassing. The stick that caused the death of the child fell in the roadway while it was being handled by the contractors' workmen. While this may be a very good reason for holding the contractors liable we can discover no reason for holding the city liable. The case bears no analogy to the cases in which permanent or dangerous obstructions to travel are permitted by city authorities to remain in positions where the safety of travelers is imperiled.

Judgment affirmed.

STERRETT, C. J., WILLIAMS and DEAN JJ., dissent.

C. A. Burr, Committee of A. E. Burr, Appellant, v. John Kase and H. Stone.

168 81
195 328

Mortgage—Parol mortgage—Evidence—Lost paper.

In order to convert a deed absolute on its face into a mortgage, or to create a parol secret trust as against such deed, the evidence must be clear, precise and indubitable.

In an action of ejectment it appeared that defendant, who had been a judgment creditor of plaintiff, bought plaintiff's real estate at a sheriff's sale, entered into possession and continued to occupy it for a period of twelve years, and up to the time the suit was brought. Plaintiff claimed that defendant had agreed in writing, at the time of the sheriff's sale, to reconvey the land to him when the debt should be paid, and that the writing was lost. He was permitted to testify to its contents. His evidence was that the writing contained an agreement on the part of defendant to reconvey the property when the debt was paid, but he could not give the specific terms of the agreement or the amount of the debt, nor could he remember that any provision was made for taxes, repairs or other expenditures. He did not pretend to remember the full contents of the paper. The alderman who, according to plaintiff's testimony, had prepared the paper was called, but he testified that he had only a faint recollection of

drawing some paper for the parties and he could not recall the contents. The defendant positively denied that he had ever executed any such paper. Evidence was offered and admitted however, that he had made declarations both before and after the sheriff's sale that he only wanted his money out of the property and that he intended to return the property when he got sufficient money out of it to pay his debt. It appeared from the testimony that large sums of money were spent by defendant for improvements upon the land. The evidence showed that, about a year after the sheriff's sale, the property burned down and that defendant received enough of insurance money to pay his debt, and that plaintiff then made no claim upon him to reconvey the property. *Held*, that the evidence was insufficient to entitle plaintiff to recover.

Argued March 1, 1895. Appeal, No. 298, Jan. T., 1895, by plaintiff, from judgment of C. P. Lackawanna Co., Sept. Term, 1891, No. 10, on verdict for defendants. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Ejectment for a tract of land in Carbondale township.

The facts appear by the opinion of the Supreme Court.

The court charged in part as follows:

"[It is necessary for you to find, before you can render a verdict for the plaintiff in this case, that H. Stone, the other defendant, had knowledge of this agreement between Dr. Burr and John Kase. If Stone was a bona fide, innocent purchaser for value of this property, without any notice, at or before the time of the purchase, of this secret arrangement between Dr. Burr and Mr. Kase, then he is not chargeable with that arrangement, and your verdict will have to be for the defendant.]" [1]

Plaintiff's points were among others as follows:

"2. That even if H. Stone did not have notice of the agreement between Dr. Burr and John Kase, which converted the sheriff's deed into a mortgage, if the jury find that such an agreement was made before he purchased of Kase, it appearing that only a portion of the purchase money was paid, he would be entitled to protection to the extent of the money he had actually invested in the property before notice of Dr. Burr's claim, either by way of purchase money or improvements with interest thereon, and it is for the jury to find this amount from all the evidence in the case. *Answer:* This point is refused." [2]

"7. A bona fide purchaser is entitled to protection only to the extent of the money paid before notice. Therefore H. Stone is entitled to protection in this case, even if the jury find he was an innocent purchaser for value, provided they find for the plaintiff as to the trust arrangement, only to the extent of the money he expended prior to Nov. 27, 1891, and this amount the jury is to fix upon all the evidence in the case. *Answer:* This point is refused."

Defendant's points were among others as follows:

"3. If the jury should find from all the evidence that there was a written agreement made prior to said sheriff's sale between John Kase and A. E. Burr, by which John Kase agreed upon certain conditions to reconvey said property to A. E. Burr, and that said conditions had been fulfilled at the time suit was brought, and should further find from all the evidence that the said defendant, H. Stone, had no notice at the time or prior to his purchase of the land in question of John Kase, there can be no verdict against the defendants. *Answer:* I affirm this point." [4]

"4. If the jury find from all the evidence in the cause that H. Stone was an innocent purchaser without notice of any equities in the plaintiff, A. E Burr, the plaintiff cannot recover, and the verdict must be for the defendants. *Answer:* If you find that H. Stone was an innocent purchaser for value and without notice, the verdict must be for the defendants. With this qualification I affirm this point." [5]

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (1–5) above instructions, quoting them.

A. A. Vosburg and *Everett Warren*, *W. S. Hulslander* with them, for appellant.—To entitle an alleged bona fide purchaser to absolute protection free and clear of secret trusts, he must show that he paid all the purchase money before notice: Pomeroy's Equity, 751; Union Canal Co. v. Young, 1 Wh. 410; Griffiths v. Sears, 112 Pa. 530; Hoffman v. Strohecker, 9 W. 183; Boynton v. Winslow, 37 Pa. 315; Filby v. Miller, 25 Pa. 264; Deckers v. Temple, 41 Pa. 234; Juvenal v. Jackson, 14 Pa. 519; Coxe v. Sartwell, 21 Pa. 486; Youst v. Martin, 3 S. & R. 433; Bolton v. Johns, 5 Pa. 151; Lloyd v. Lynch, 28 Pa.

435; Rogers v. Hall, 4 Watts, 362; Merritt v. N. R. R., 12 Barb. 605.

An unrecorded defeasance changes a sheriff's deed into a mortgage: Gaines v. Brockerhoff, 136 Pa. 175; Saunders v. Gould, 134 Pa. 445; Sweetzer's App., 71 Pa. 264; Beck v. Uhrich, 13 Pa. 636.

A bona fide purchaser without notice must aver and prove not only that he had no notice of the plaintiff's rights before his purchase, but that he had actually paid the purchase money before notice: Jewett v. Palmer, 7 Johns. Ch. 65; Maccauley v. Smith, 132 N. Y. 532; Jackson v. McChesney, 7 Cow. 360; Stone v. Welling, 14 Mich. 514; Wormley v. Wormley, 8 Wheat. 450; Birdsall v. Cropsey, 45 N. W. Rep. 921; Rush v. Mitchell, 71 Iowa, 333; Wood v. Rayburn, 22 Pac. Rep. 521.

W. W. Watson, *W. S. Diehl* with him, for appellee.—A bona fide purchaser for value of the land conveyed without notice of the circumstances alleged against the validity of the title holds it discharged from equities between the parties: Pancake v. Cauffman, 114 Pa. 113; Shaw v. Read, 47 Pa. 96; Ebner v. Goundie, 5 W. & S. 49; Poth v. Anstatt, 4 W. & S. 307; Hood v. Fahnestock, 8 Watts, 489; Meehan v. Williams, 48 Pa. 238; Scott v. Gallagher, 14 S. &. R. 333; Bracken v. Miller, 4 W. & S. 102; Twyne's Case, 1 Smith's Leading Cases, 108.

Opinion by Mr. Justice Green, May 13, 1895:

The counsel of the parties made an agreement which is printed in the Appendix, to the effect that the appellant need not print any more of the testimony than such as related "to the transaction between John Kase and H. Stone together with the charge of the court and so much of the record evidence and exhibits as the appellant may see proper to print in his paper book." It is stated in the agreement by way of recital that, "the only question raised by the assignments of error is to what extent H. Stone is entitled to protection as an innocent purchaser without notice of any equities in the plaintiff, A. E. Burr, absolutely or only to the extent of the money actually paid before notice."

If the case depended only upon the solution of that question an agreement such as the foregoing might not be subject to

objection. But in this case there is another question of far greater importance than this, the decision of which cannot be determined or even promoted by the solution of this. If the plaintiff's claim of title was of such a character that it cannot be sustained under all the evidence even against Kase, the sheriff's vendee of the title, it is only a waste of time to inquire to what extent an innocent purchaser from Kase can be protected against the plaintiff's claim. It is unfortunate that the testimony relating to the inception of Burr's claim of title was not printed in the paper-books, as it has nearly doubled our labor to discover it in a most voluminous record of 332 pages of type-written matter. After a wearisome expenditure of most precious time which we cannot afford to spare, we have reached the conclusion that the plaintiff's claim cannot be sustained in any point of view. It is grossly lacking in every element which is essential to its existence, and we could not possibly give it sanction without disregarding, and practically overruling a long line of decisions, the wisdom and justness of which have been demonstrated by a constantly recurring experience of more than half a century.

In 1879 and prior thereto the plaintiff was the owner of the surface of a small tract of land containing about twenty-five acres near Carbondale in Lackawanna county. It was incumbered with two mortgages amounting together to $3,500 and a judgment in favor of John Kase, one of the defendants. The plaintiff alleges that prior to the sheriff's sale of the property, which occurred in May, 1879, he made a written agreement with Kase whereby it was agreed that the property should be sold at sheriff's sale under Kase's judgment for $500, and that at the sale Kase should buy the property and thereafter hold it until he was repaid all his expenditure on account of the property, and when he was fully repaid he should reconvey the property to the plaintiff. The plaintiff's abstract of title contains no reference to this agreement, but in an amendment to the abstract the agreement is alleged substantially as above stated, and at the end of the amendment the plaintiff's claim is stated as follows: "That the sheriff's deed and the written agreement between A. E. Burr and John Kase formed part and parcel of the same transaction, and as the agreement was not recorded, the whole constituted an unrecorded mortgage, and was security for the said debt of $3,500."

The claim of the plaintiff, therefore, is that Kase held the title as a mortgagee only. Very often in this class of cases the attempt is made to hold the sheriff's vendee liable as trustee upon a trust arising ex maleficio. But our decisions have been perfectly uniform since Kellum v. Smith, 33 Pa. 158, decided in 1859, and indeed long before that, that a resulting trust cannot be created in that way, that "the fraud which will convert the purchaser at a sheriff's sale into a trustee ex maleficio, of the debtor, must have been fraud at the time of the sale. Subsequent covin will not answer, any more than subsequent payment of the purchase money will convert an absolute purchase into a naked trust. When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late." From this decision we have never departed.

Looking now at the claim that Kase held title only as a mortgagee under an unrecorded defeasance, it will be at once perceived, that the first and indispensable requirement is that there was a written agreement duly made and executed by the parties containing the terms of the alleged contract upon which the property was sold. The sale by the sheriff was made on May 3, 1879, and on the 8th day of May following the sheriff's deed to Kase was acknowledged in open court and entered in the prothonotary's office in sheriff's deed book. It is an undisputed fact that Kase went into possession of the premises immediately after the sale and continued therein until 1886, when he sold the property to Stone, for $2,250, and Stone took possession at once and has occupied the premises ever since. This action of ejectment was brought June 1, 1891, twelve years after the sheriff's sale to Kase. On the trial the learned court below submitted to the jury two questions of fact, to wit, whether there ever was such an agreement between Burr and Kase as was claimed by Burr, and whether Stone was an innocent purchaser for value without notice. The jury found a verdict for the defendant, and presumably, they did not sustain the contention of the plaintiff upon either fact, but as it is possible they may have found for the defendant Stone because he was an innocent purchaser for value without notice, it cannot be positively assumed that they found that the agree-

ment alleged to have been made between Burr and Kase was never made.

This makes it necessary for us to review the testimony in order to learn whether we, sitting as chancellors, could determine whether the whole evidence was sufficient to change the absolute deed from the sheriff into a mortgage. The plaintiff stakes his case upon the allegation that there was an agreement in writing which established the defeasance. On the trial he did not produce any writing but said he had lost it and could not find it after diligent search. He therefore undertook to prove its contents by parol. He produced no witnesses but himself to testify to the contents, and this is his testimony on that subject: "Q. Now, Doctor, without trying to give us the exact language, I wish you would tell us the substance of this paper. A. It set forth the agreement entered into between myself and Mr. Kase in regard to this property, setting forth the facts. Q. What facts did it set forth? A. The fact that I owed him so much on this property and that all he wanted, all he ever claimed to want, was simply his money out of it, and when that was paid that the property should be reconveyed to me. Q. What if anything was said in the paper about a sheriff's sale? A. It stated the property was to go to him for the present. I forget just how it was worded. Q. I mean the substance of it. A. I cannot repeat it verbatim. I can only repeat the substance of the paper, what it was got up for. Q. Just tell the substance of it again. A. That when he received his money what was due him that was all he wanted. Q. Did the paper state what was due him? A. I think it did or about the amount. Q. Do you know what amount was stated in the paper as being due him? A. I think it was the amount of the mortgage. Q. Which was how much? A. $3,500."

This was his testimony in chief. On cross-examination he was asked: "Q. Now will you again state as near as you can what that alleged paper contained? A. Well, as I stated before, it contained an agreement between myself and Mr. Kase in regard to this property, agreed to let him have it on this note which he had paid to save costs to myself; that I was going to have the benefit of it. Q. Was this all in the paper? A. I don't know as it was; that was our agreement. Q. I am ask-

ing you what was in that paper? A. It was an agreement to this effect; it was an agreement that Kase gave me to satisfy me that he didn't want to take any advantage of me; that when he received what he had against that property, that it should be deeded back to me. Q. Was that in the paper? A. Yes. Q. That was in the paper? A. That was in the paper; it may not have been just in these words, but in substance that is what it was drawn for, all that he wanted; he didn't want to take any advantage of me. Q. Was that in the paper, that he didn't want to take any advantage? A. I don't know as it was, but when the paper was signed the paper was drawn up on that basis, so that I would have something to show. Q. Doctor, will you tell me what was in the paper? A. Well, I was telling. Q. I don't want you to tell outside of it. A. Well, I will tell you as near as I can; it was an agreement with Mr. Kase, I couldn't tell you verbatim; I can only tell you the purport of the paper; that whenever he got what was due him that I should have the property, that he would transfer the property back to me and that the reason why it was sold the way it was, was on that paper or I wouldn't have let be sold. Q. I want to know what was in the paper? A. Well, I have told you. Q. What was there about anything else? A. Well, I don't know, it was the usual paper drawn up by Alderman Thompson I suppose in these cases as an agreement between me and Mr. Kase that I should have the property at any time he got his money out of it, or I paid him the money. Q. It didn't mention about anything else, any other fact? A. Well there may have been, I can't give you just the words of the paper. Q. Can you tell now, Doctor, any other fact that you say was in that paper? A. Well it mentioned something about the amount. Q. Was he to have back his expense? A. There wasn't anything said about that; I don't think there was. Q. Anything said about taxes? A. I don't remember anything being said about taxes. Q. Anything about repairs? A. I don't remember anything about repairs."

The foregoing is practically the whole of plaintiff's testimony as to the contents of the alleged agreement. When it is considered that the effort of the plaintiff is to take away the title to land held by virtue of a sheriff's deed conveying an absolute title, by means of a lost written instrument, the only

proof of whose contents is the testimony above indicated, it will at once be seen how utterly deficient it is in all legal requirements as to that kind of testimony. A criticism that pertains to the whole of it is, that it does not purport to be a statement of the actual contents of a written instrument at all. It does not designate a subject-matter by any kind of description; it does not contain the slightest attempt to repeat any of the actual words of the instrument or even to give the meaning of words actually used; it states no terms of any kind; it contains no statement or even description of the amount of money which Kase was entitled to obtain before any obligation to reconvey arose, nor does it furnish any means of determining what that amount should be; it expressly ignores all knowledge as to whether certain important matters of expenditure were included, such as the expenses incurred by Kase, the taxes on the property, and repairs made. The whole of the testimony leaves the subject of Kase's right of recoupment in a state of hopeless uncertainty. The witness has but one idea as to the paper and that is, that in some way, or at some time, the property was to be conveyed back to him. In other words the plaintiff's testimony, instead of being a statement of the literal contents of the paper or its substance, is nothing but the declaration of his opinion as to its legal effect. He was to have back the property when Kase got what was due him. When however he was subsequently asked what indebtedness there was due from himself to Kase he was entirely unable to tell. He denied that he owed anything on the $500 judgment, he admitted that he owed him sums which he could not state, and he made no attempt to define either the aggregate amount which he owed, or the sums or kinds of indebtedness which Kase was entitled to have reimbursed out of the land. It would not be possible for any chancellor to decree the specific performance of such an agreement or to frame a decree which would do justice between the parties. The evidence is entirely too meager.

As an illustration of the strictness required in proving the contents of lost instruments the following cases are instructive.

In Dennis v. Barber, 6 S. & R. 420, an important letter was lost. A witness was offered who had made an extract or copy from it, but not of the whole, and he offered to testify that the copy or extract was all of the letter that related to the business

in question, and that the remainder of it had no connection with that business. The offer was rejected, and this court, GIBSON, J., said, sustaining the court below, "Mr. Levy did not pretend that either the extract offered, or his own recollection embraced even the substance of *the whole* letter. But it is urged that his offer to prove that the rest of it related, in no respect, to any matter in the cause, was equivalent to proof of the contents not comprised in the extract. A decisive answer is, that for all this we have only the opinion of a witness who undertakes to say what the letter did not contain, without pretending to give an account of what it actually did contain; and although we would, in the present case, rely on Mr. Levy's judgment with implicit confidence, yet, as every rule of evidence must be general, we would if such evidence were competent, often be compelled to give credit to witnesses who could not claim anything like an equal degree of respect. There can seldom be a sound construction of written evidence, without adverting to all the parts and considering the operation of the whole; but the operation of the several parts on the exposition of the whole is seldom if ever perceptible to any but a professional eye; and the danger would therefore be that the court, while they thought they were deciding on a view of the whole, would be giving a garbled construction of but a part. . . . Every day's experience must bring home to the conviction of all men the insecurity of relying on men's recollection; and I care not therefore how strictly the construction of written evidence may be protected from the insidious influence of parol proof. In this we have already relaxed too far." These words of wisdom are especially applicable to this case. The plaintiff claims that he is entitled to a reconveyance of land from the defendant which he says is worth from twelve to fifteen thousand dollars. The defendant has a sheriff's deed for an absolute fee simple title to the land. The action is not brought until after twelve years from the date of the deed, and during every moment of that time the vendee of the sheriff and his assignee have been in adverse possession of the land. The plaintiff says he has lost the paper under which he claims a reconveyance, and although he admits he made no search for it during three years before the case was tried he was allowed to give parol evidence of its contents. He does not pretend to

recollect the contents or any portion thereof. He gives what is really nothing but his own opinion of the meaning of the writing. He does not for a moment state upon what terms and conditions, or at what time, or in what circumstances, he was entitled to have a reconveyance under the agreement, and he admits entire ignorance as to whether certain important items of disbursement which necessarily accompanied the holding of the land were to be repaid to the grantee before he could be required to transfer the title. He cannot state the amount of his indebtedness to the grantee though he concedes that the whole of his indebtedness was to be first received by the grantee. He denies that he owed anything to the grantee on account of the judgment of $500 which the grantee held against him, and he admits that he owed the grantee other sums of money the amounts of which he is unable to state. On what possible basis could a reconveyance be ordered by a court without having, first, full knowledge of the precise terms of the agreement of defeasance, and second without knowing the exact amount of the indebtedness which the plaintiff owed to Kase for which the latter was entitled to be reimbursed. It is simply and utterly impossible to make any such decree in such a state of the proof.

In McCredy v. The Schuylkill Nav. Co., 3 Whart. 424, we held that evidence of the contents of an instrument alleged to have been lost cannot be given without previous proof of its due execution which includes proof of its delivery; and where a witness called to prove the former existence of an instrument, testified that it had been put into the hands of A as an escrow, and A on his examination testified that he could not recollect on what occasion, or with certainty, to whom it was given up, and that he should not have given it up without the consent of both parties, it was held, that evidence of the contents of the instrument was properly rejected.

In Kerns v. Swope, 2 Watts, 75, GIBSON, C. J., said, "The rule of law which requires the best evidence to be produced is nowhere more rigidly enforced than in proving the contents of a lost deed. There are but two ways of doing this in the circumstances of the present case. Before a copy can go to the jury it must be proved to be such by one who compared it with the original; and it is even then inadmissible if there be a counterpart."

In Coxe v. England, 65 Pa. 212, AGNEW, J., said, speaking of a witness who was offered to prove the contents of a lost letter, "She cannot say that she remembered any sentences of the letter word for word as they were written or read aloud. Her account evidently shows a hasty glance only at the letter, while the true source of her recollection was the utterance of her husband. . . . In addition to this she does not profess to give the whole contents and does not even state that this portion of the letter was all that related to the subject of the timber. On this point her testimony falls far short of the evidence of the contents offered in Dennis v. Barber, 6 S. & R. 420, a case which rules this in respect to the proof of contents."

We hold that the proof of contents in this case was altogether short of the requirements of the law, and that it cannot be considered as sufficient to establish any right of recovery in the plaintiff as upon an agreement in writing. The plaintiff admitted on the trial that he had made no search for the paper within three years before the trial, and, in our opinion, the offered proof of contents should not have been received for that reason.

But there is a still more important objection to the validity of the claim, and that is the want of sufficient proof that there ever was such an agreement. The plaintiff testified that the agreement was written by an alderman named J. G. Thompson living in Carbondale, and that he attested it as a witness and took the acknowledgment of the parties to it. The alderman was called as a witness by the plaintiff, but he entirely failed to establish either the preparation or the execution of such a paper. After stating that he knew both Dr. Burr and John Kase he was asked: "Q. Did you do any business for them about 1879? A. Yes. Q. Do you remember drawing any paper between them relating to the cottage property in 1879 in the spring? A. Well, I cannot recollect anything very particular about it. I have some recollection of drawing some paper, a faint recollection of drawing some paper for Mr. Kase and Mr. Burr. Q. Can you give us the contents of that paper at this time? A. I cannot." The remainder of his testimony was no improvement upon the foregoing. No other testimony was offered by the plaintiff as to the execution of any written agreement between Burr and Kase.

When Kase was called as a witness on his own behalf, he denied in the most positive and emphatic manner that he ever made any written agreement, or any other agreement, with Burr for the purchase of the property and the reconveyance of it, as alleged by Burr. After saying that Alderman Thompson never drew any paper between him and Burr relating to this property he was asked: "Q. State whether or not you ever signed any paper? A. No, I never did. Q. Whether you ever signed any paper agreeing in any way to reconvey this property upon any conditions whatever to Dr. Burr? A. No, I never did. Q. State whether at any time before, at the time or since the sheriff's sale you ever made any agreement in any way to reconvey this property to Dr. Burr upon any condition? A. Not any. Q. State whether Dr. Burr ever demanded of you to make any conveyance of this property to him? A. No, he never did."

His subsequent testimony made no change in the foregoing. So far then as the making of an agreement in writing is concerned the case stands upon the testimony of Burr on the one side and Kase on the other. There was some attempt made on the part of the plaintiff, as is usual in this class of litigations, to show admissions in conversations by Kase of having made some kind of agreement with Burr to reconvey. Mrs. Catharine Lee was one of these witnesses, and she said: "I heard Mr. Kase and my husband talking about the cottage property at that time. Mr. Kase as I understood it wanted to get his share out of the property. It is so long ago that I can hardly remember the conversation fully. That is all he wanted, to get his share out of it, or something like that." As this would be entirely consistent with the idea that Kase wanted to get his money back by a sale of the property as his own, and as nothing was said about any reconveyance of the property to Burr, the testimony was absolutely useless in support of the plaintiff's claim.

M. B. Simrell, a witness for the plaintiff, testified to a conversation with Kase which occurred in 1879, fifteen years before the time when he testified. After saying that he was at Kase's store and was talking with Kase about the property he was asked: "Q. Tell us what the conversation was? A. I asked him if it was going to take all Mr. Burr had to satisfy

this judgment, and he says, 'Oh, no! he will be left all right.' And I says, 'How is this?' 'Well,' he says, 'I have got some money involved there, and when I get my money out I am satisfied and shall return the property to him.' Q. What else? A. And I says, 'How is this, has he got any bonds for that?' and he says, 'He has got a paper to protect him.' Q. Is that all the conversation? A. I think that is the sum and substance of it that day." On cross-examination he gave this version of the same conversation: "Q. What was said next? A. I said, 'How is it, you have got him advertised and you are going to sell him out by the sheriff,' and he said, 'That is all right.' I said, 'Aint that going to ruin him, aint that going to take all he has got?' He said, 'He has enough there to pay me, and after I get that that is all I want.' Q. Was there any thing else said; do you remember any thing more that was said about this? A. Nothing particular."

The discrepancy between the testimony of this witness in chief, and on cross-examination, is enough to condemn it for any purpose in a case of this kind, where the whole fate of the case depends upon clear, precise and indubitable testimony to the very matter in controversy, without considering its lack of detail as to most essential matters, or the fact that the defendant positively denied the whole conversation. On his examination in chief he simply said that Kase said, "when I get my money out I am satisfied and shall return the property to him." This of course means no more than a simple declaration to a stranger of an intention that when he got his money out he should return the property to Burr. He does not say that he had made any contract to reconvey but simply that he would reconvey. In other words he had the intention to reconvey, which of course he might change at any moment. Dr. Burr was not present and therefore it was not in any degree the expression of a contract to reconvey. Then the witness, in reply to the next question, said, "He has got a paper to protect him." What kind of a paper? The witness does not say. Was it a bond of indemnity, or an agreement to hold the property in trust and ultimately, if either Burr should pay the debt he owed Kase, or Kase should recoup himself out of the proceeds of the property, that would protect him? And what money was Kase to get out of the property? Was it all

the debts Burr owed him, or only the liens on the property, and was it to include expenditures for taxes, repairs, expenses and costs? The witness says nothing as to any of these particulars. But in his cross-examination the witness says nothing about any agreement to reconvey or any paper that would "protect him," and the question is which version is correct. It is a sufficient reply to the whole of this that it is too indefinite, too uncertain and too contradictory for any court to rely upon as the basis of a decree.

The only other witness to conversations is Philo Lee, and this is his testimony: "I and Mr. Kase got talking, and I asked Mr. Kase how he and Mr. Burr was getting along; he said he thought they would get along all right, that all he wanted, he says, was to get what belonged to him, if he gets that he would be perfectly satisfied." There is nothing here of any agreement to reconvey or any intent to do so, and as to getting what belonged to him it is altogether consistent with getting his money by means of a sale on his own account. This is all the testimony in the case on the part of the plaintiff upon this subject, and it is so lamentably short of the kind of testimony required for such a case, that it will only be necessary to state the rule which has been established for quite half a century in this commonwealth, to make out a right of recovery in this class of cases.

The cases in which it is held that in order to convert a deed absolute on its face into a mortgage, or to create a parol secret trust as against such a deed, the evidence must be clear, precise and indubitable, are so numerous, and the profession is so familiar with them, that only a brief reference to a few of them will be necessary.

In the case of Fisher v. Witham, 132 Pa. 488, we said, "While a deed absolute on its face, executed prior to the act of 1881, may be converted into a mortgage by parol proof, it is well settled that the evidence must be clear, explicit and unequivocal. It must show an agreement in the nature of a defeasance, contemporaneous with the execution and delivery of the deed. Subsequent admissions alone are not sufficient. The evidence in this stale case falls far below the required standard, and we therefore think the court below was clearly right in sustaining exceptions to the master's report and dismissing the bill."

In Rankin v. Simpson, 19 Pa. 471, Mr. Justice WOODWARD, commenting upon this class of cases said, "If a party call on courts to execute parol contracts for land in spite of the statute of frauds and perjuries, let him prove a contract. Because he can find persons who remember the owner's loose or casual declarations indicative of a sale, shall he have a decree in disregard of the statute and in opposition to his own declared convictions? The chancellor has never lived who would tolerate such a demand. Patents and deeds and wills would be a solemn mockery if they might be trifled with and set aside in this manner."

In Nicolls v. McDonald, 101 Pa. 514, we said, "When a party sets up a title against a deed absolute in its terms and seeks to convert it into a mortgage the proof of the alleged agreement necessary to change its character must be clear, explicit and unequivocal. It should not rest on the subsequent admissions and declarations of the alleged mortgagee only." . . . "When the attempt is made he claims as a mortgagor seeking to redeem. Although the action may be ejectment in form, yet in substance it is a bill in equity to compel a reconveyance of the land from the mortgagee in possession. . . . If the parol evidence be insufficient to move a chancellor to decree a reconveyance, it is insufficient to justify a recovery in ejectment. . . . If he be of opinion that the evidence does not make out a case which would induce a chancellor to decree a conveyance, it is his duty to give the jury binding instructions to that effect."

To show by parol that a deed absolute on its face is a mortgage the proof must be clear, explicit and unequivocal: Plumer v. Guthrie, 76 Pa. 441.

To convert a deed absolute on its face into a mortgage by parol evidence it must be clear, precise and indubitable, sufficient to satisfy the mind of a chancellor, otherwise it is error to submit it to the jury: Pancake v. Cauffman, 114 Pa. 113; Rowand v. Finney, 96 Pa. 192; Saunders v. Gould, 134 Pa. 445.

It is unnecessary to multiply the citations. Applying the principle to the present case it is seen at once that the plaintiff's claim is destitute of merit. His oath is met by the contrary oath of the defendant Kase. If we look for corroborating circumstances they are absent, but they are present against his claim with great force. For instance in the very next year after

Kase received his sheriff's deed some of the buildings on the premises took fire and were burned to the ground. Kase received almost $4,000 of insurance money and according to the plaintiff's theory Kase was thereby fully paid all the money that was due him. Yet the plaintiff took no steps to enforce his equity. If he held a written agreement such as he alleges, then was the time to present his demand, and if refused, to take immediate steps to enforce it. Then everything was fresh in the memory of parties and witnesses, the written agreement was in the plaintiff's possession according to his statement, and his remedy was simple and easy. It is absolutely inexplicable why he did not do this, and no explanation worth speaking of is attempted. He stood by and did nothing. Finally Kase, being in possession constantly for seven years, sold the property to Stone, who was undoubtedly an innocent purchaser for value without notice. Stone took possession at once and spent some $1,500 in improvements, according to the testimony. Meanwhile Burr gave him no notice of his claim of title but allowed the improvements to be made without any objection or demand, or offer of indemnity. It is simply impossible to reconcile such conduct with the integrity of the plaintiff's claim. At last after delaying all efforts to assert his title for twelve years he brings the present action without making any demand upon Stone, or giving any notice of his title, or making any offer to pay him the money he had expended. This is gross laches which is fatal to any claim in an equitable proceeding.

In our opinion no chancellor would decree a conveyance in such circumstances as these and therefore we hold that Burr cannot recover either against Kase or Stone.

The assignments of error are all dismissed.

Judgment affirmed.

John H. Palethorp's Estate. Angelina Palethorp's Estate. Appeal of Harriet Palethorp, Administratrix of Estate of Edward J. Palethorp, deceased.

Decedents' estates—Family settlements.

Where the distributees of an estate, without inventory, appraisement or account filed, make forty-six settlements among themselves of the income and principal of the estate, during seventeen years, the orphans' court will not set aside the settlement at the instance of a widow of one of the distributees, who was also one of the executors who assisted in making distribution, where no fraud appears, and where the estate has in the opinion of the auditing judge been managed with honesty and integrity.

Argued April 8, 1895. Appeal, No. 222, Jan. T., 1895, by Harriet Palethorp, from decree of O. C. Phila. Co., July T., 1893, No. 245, dismissing exceptions to adjudication. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Exceptions to adjudication.

FERGUSON, J., filed the following adjudication:

"John H. Palethorp died in November, 1860, more than thirty years ago, having first made his will, dated the 30th day of August, 1854, whereby he left part of his estate to his wife Angelina absolutely, and the balance to her for life, to support herself, and to support, maintain and educate their children during minority, and, if she should save out of the same any money, it was to be for her own use and benefit to do as she pleased. There was no inventory or appraisement or account in this estate ever filed, until this present one, which was filed under the pressure of a citation.

"Angelina Palethorp, the widow, died in 1877, more than seventeen years ago, having first made her will, dated the 30th day of August, 1873, whereby she first gave all her estate to be divided equally among all of her children. She desired that her children would continue to live as they then did. She gave them authority to sell all or any portion of her real and personal estate. If her daughter Angelina becomes a widow, she desired that she should avail herself of the home she in

her said will provided for the single children. If her daughter Caroline remains unmarried, and desires to keep house, 'I give her all my household goods, furniture, etc., of every description to keep house with, and my house, No. 1931 Arch street, where we now reside, at an annual rent of $700 per one year, commencing one month after my death, each of my children not living at home is to have her or his share of said rent.

"'If my daughter Caroline dies before my daughter Angelina W. Hey, all my silver and plated ware, coffee and tea sets, waiters, goblets, boxes, dinner and tea knives, are to be given to my daughter Angelina, also the cake baskets. The old family silver is to be divided among all my children. I further give my daughters all my wardrobe to be equally divided, velvets, India shawls, jewelry and diamonds, except those diamonds which I direct all my children to share.'

"To her son, Henry B., she gave all the property in her stable and coach house, except the family coach, phaeton and sleigh, which were to be sold and proceeds divided.

"She directed that her children should have no arbitration in their accounts, but themselves and the majority of her children to have full power to rent or sell her estate.

"The inventory and appraisement of this estate was as follows:

Furniture, mirrors, curtains, lambrequins, carpets etc.,	$ 7,350 00
Silver and plated ware and fancy china,	3,500 00
Diamonds and jewelry,	3,675 00
Wardrobe,	4,250 00
United States bonds,	1,500 00
City sixes,	3,500 00
Claim in suit for rent,	20,000 00
Cash on hand,	1,000 00
Rents and note,	1,335 00
Bonds and mortgage,	2,500 00
Carriages, sleigh, horses, harness, etc.,	3,889 26
$14,000 Tennessee state bonds,	0000 00
	$52,499 26

"This appraisement appears to be a very extravagant one,

but as almost all the articles mentioned in it were specifically bequeathed this fact does not make much difference, as the articles were long ago delivered to the legatees. The furniture, silverware, diamonds and jewelry, wardrobe and contents of stable etc., were all specifically bequeathed. This suit for rent, appraised at $20,000, realized only $8,848. This practically left only a few items to be accounted for, and these Henry B. Palethorp, one of the executors, testified were divided equally among all the children within a year after their mother's death.

"During their mother's lifetime, she took the whole of the income on the father's estate, and when she died it went to the children, they with one exception, a daughter who was married, continued to live together in the premises No. 1931 Arch street. Edward J., the brother, whose widow has raised this controversy, living with them. When their mother died, they divided their father's personal estate between them, and when they sold a piece of real estate the proceeds were also divided, so that whatever came into their hands in the way of cash, whether it was principal or income, was forthwith divided. There was put in evidence the receipts, showing forty-six settlements of this kind since the death of the mother in 1877, in every one of which Edward J. Palethorp participated and took the same share of cash as the other children; besides, he was one of the executors of his mother's estate, and one of the persons who made the distribution; certainly, if he were alive, he could not gainsay or dispute these forty-six settlements made by him during a period of seventeen years, much less can his widow now do so.

"These settlements were of the affairs of both the estates of John H. and Angelina Palethorp, because they have both been run together during all this time, and therefore this adjudication is made to cover both, as it is impossible to adjudicate them separately. The receipts were in this form:

"'Received from the Executors of John H. Palethorp's estate and Angelina Palethorp's estate the sum of ——— dollars, being 39th settlement in full for my share of money from both estates from July 20, 1890, to October 20, 1890, inclusive.

Signed, "'EDWARD J. PALETHORP.'

"If there was a special dividend from the sale of a property, or the verdict in the suit against Bergner, it was so specified.

"Now, while the accounts of these two estates have not been

kept separately, and, perhaps, have not been kept with the skill and accuracy of an accountant, yet it must be borne in mind that these children of John H. and Angelina Palethorp were only accounting to each other without any expectation of any interference from any outside source. They were entirely satisfied with the accounts, they made their settlements for forty-six times, the last of which was only a few weeks before Edward J. Palethorp's death. Now there is nothing which the law regards as more sacred than these family settlements, and it would have to be a very strong case indeed, which would justify any court in setting them aside, particularly where they have been continued uninterruptedly for so many years,—nothing short of gross fraud, of which there is no evidence in this case. In the opinion of the auditing judge everything connected with the management of these estates shows, undoubtedly, honesty and integrity, and a desire to carry out the wish of their mother to settle everything among themselves.

"As before stated the account shows that everything which came into the hands of the accountants, whether principal or income, or whether belonging to the estate of John H. or Angelina Palethorp, has been distributed down to April 20, 1893, when the forty-sixth settlement was made. The account has since been brought down to the date of the death of Edward J. Palethorp, July 1, 1893, and shows a balance for distribution of $2,058 74

Less

Register of wills' filing account, . . .	$28 50	
" Angelina Palethorp's estate, .	18 50	
Clerks' costs, John H. Palethorp's est., .	20 00	
" " Angelina Palethorp's est.,	20 00	87 00
Leaving a balance for distribution of . .		$1,971 74

The court dismissed the exceptions to the adjudication.

Error assigned was dismissing exceptions to adjudication.

W. A. Manderson, for appellant.

Robert Palethorp, for appellee.

PER CURIAM, May 13, 1895:

The decree of the court below in this case is affirmed on the opinion of the learned auditing judge. If the Tennessee bonds have not been accounted for, they can be reached by a supplemental account to be hereafter filed.

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168 102
194 413

Harriet Palethorp, Widow and Administratrix of Edward J. Palethorp, Deceased, *v.* Robert Palethorp et al.

The court of common pleas has jurisdiction to entertain a bill in equity for partition of real estate, filed by a widow of one of the tenants in common, claiming title under a will.

Where the case is heard upon bill and answer and plaintiff alleges sufficient interest to sustain the bill, the cause must be proceeded with and the rights of all the parties will be determined by subsequent proceedings.

The refusal of the court to dismiss a bill and the ordering that it be proceeded with before a master is not a final decree.

Argued April 8, 1895. Appeal, No. 204, Jan. T., 1895, by defendants, from decree of C. P. No. 3, Phila. Co., June T., 1894, No. 1702, awarding partition. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Bill in equity for partition.

From the bill and answer it appeared that John H. Palethorp died in 1861, leaving to survive him a widow, Angelina Palethorp, and seven children, one of whom was Edward J. Palethorp. The widow, Angelina Palethorp, died without remarrying in July, 1877. Edward J. Palethorp died on July 1, 1893, intestate, without issue, leaving a widow, the complainant, surviving. At the time the bill was filed, proceedings to distribute the personal estate of both John H. and Angelina Palethorp were pending in the orphans' court.

John H. Palethorp, the testator, by the second item of his will, declares inter alia, as follows: "But in case my said wife should die before my youngest child living at the time of her decease having arrived at the age of twenty-one years, then it is my will that my executors shall carry out my intentions

that the said youngest child must arrive at the age of twenty-one years. At that time I authorize and direct to sell and dispose of all my real and personal estate, and divide the same share and share alike among my children or their legal issue, unless if at the time my youngest child arrives at the age of twenty-one years, it should be unfavorable to sell, on account of the depreciation of value in real estate or any (other) cause, then I will and direct that in conjunction with my said executors, three persons be chosen by my children to make partition of my said estate among all my children all their legal issue then living, each child of mine to receive an equal share.

"But if my children prefer, when they arrive at the age of twenty-one years, and after my said wife's death, to not sell or make division of my said estate, but to receive the incomes, rents and dividends arising from said estate, then it is my will that they keep the property in good repair and punctually pay all interest and taxes thereon, and pay to each of my children an equal share as often as said share becomes respectively due, of all my rents, dividends and incomes of said estate."

By the third item of his will, however, he provides:

Item. "I give and bequeath to each of my children, after my said wife's death, their entire share of my whole estate for their own sole and separate use, with the exception of twenty (20) thousand dollars worth of property of each of my children's share, the said twenty thousand dollars, they are only to receive the interest and incomes arising from such, as it is my will, the principal of said twenty thousand dollars, shall be entailed on each of my children and their legal heirs; and if either of my children die without lawful issue, then his or her share reverts back again to my estate, and becomes a part of said estate, and is to be equally divided the same as the other amongst all my surviving children."

Angelina Palethorp, by the first item of her will, directed as follows:

Item. "I give and bequeath to each of my children their entire share of all my real estate, city and country, all my bank stock, or stocks of any kind, dividends on said stocks, mortgages and ground rents, and monies on hand, to be equally divided share and share alike for her and his own separate use."

By the 4th item of her will, however, she did direct as follows:

Item. "If my daughter Angelina becomes a widow or any unforeseen circumstances should invade her present happy home, I request that she will avail herself of the home I herein provide for my single children. If my daughter Caroline remains unmarried and desires to keep house I give her all my household goods, furniture, etc., of every description to keep house with, and my house 1931 Arch street where we now reside at an annual rent of seven hundred dollars for one year commencing one month after my death; each of my children not living at home is to have her or his share of said rent, all repairs, taxes, water rents, insurance and sewer rents to be paid by my executors during said term."

The case was heard on bill and answer, and the court entered the following decree:

"And now, Dec. 17, 1894, the above cause having been heard on bill and answer, the court orders, adjudges, and decrees that the complainant is entitled to partition of the real estate as prayed for in said bill, and directs that the cause be proceeded with before the master to final determination."

Errors assigned were (1) above decree, and (2) refusal to dismiss bill.

Robert Palethrop, for appellants, cited as to jurisdiction of the orphans' court: Miller's Estate, 159 Pa. 573; Scott on the Intestate Law, 159, 180; DeNoiles' App., 8 Wright, 243; Bayley's App., 60 Pa. 354; Johnson's App., 114 Pa. 132; Drennan's App., 118 Pa. 176; Overman's App., 88 Pa. 276; Milne's App., 99 Pa. 483; George's App., 12 Pa. 262; Dresher v. Allentown Waterworks, 52 Pa. 225; Johnson's App., 114 Pa. 132; Hoffner's App., 161 Pa. 344.

W. A. Manderson, for appellee, cited on the question of jurisdiction: Act of March 17, 1845, P. L. 160; Gourley v. Kinley, 66 Pa. 270; Bishop's App., 7 W. & S. 251; Brown's App., 84 Pa. 457; Steel's App., 86 Pa. 222; Griffins' Est., 30 Pitts. L. J. 60.

PER CURIAM, May 13, 1895:

While we do not regard the decree appealed from in this

case as a final decree, we are very clear that the common pleas has jurisdiction of the case and the parties. That court now possesses all the power of a court of equity in partition cases. We cannot now discuss the merits of the controversy, but we are of opinion that the plaintiff's interest is sufficient to sustain a bill and that the rights of all the parties can be determined in the subsequent proceedings.

Decree affirmed.

Philadelphia to use of W. H. Yost v. Odd Fellows Hall Association, Owners, etc., Appellant.

Sewers—Assessments—Private sewers.

The fact that a landowner constructed a private sewer sufficient for his property with the consent of the municipality, will not relieve him from assessments for a public sewer subsequently constructed by the municipality under the street upon which his property abuts.

In such a case it is immaterial that the sewer clerk of the city issued permits allowing other properties to be connected with the private sewer, and that a schoolhouse owned by the city was connected with the private sewer.

Argued April 9, 1895. Appeal, No. 224, Jan. T., 1893, by defendant, from judgment of C. P. Sept. T., 1890, No. 846, M. L. D., on case stated. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Case stated to determine the liability of defendant for a sewer assessment.

The material portions of the case stated appear by the opinion of the court below, by JENKINS, J., which was as follows:

"This was a claim for a sewer, made by the city of Philadelphia, along Brown street, in front of defendant's premises, which are situate at the northwest corner of Third and Brown streets. The parties have agreed upon a case stated, which sets out the construction of the sewer. That the defendant, in the year 1864, obtained permission from the city of Philadelphia to construct, and did construct, a private sewer or drain along Brown street, from Third street to Fourth street; 'that

after the construction of the said sewer, the sewer clerk of the department of surveys of the city of Philadelphia issued permits to the owners of property on Brown street to connect with the same, and collected sewer rents therefor; it being, however, a custom of the said department, as stated by the said sewer clerk, to grant such permits regardless of whether or not there was any public sewer with which the property owner could connect, it being understood that the said property owner applying for such permit took the chance of finding a sewer or drain, public or private, the city in no wise undertaking to warrant that the sewer with which he was authorized to make connection was public;' that 'the city of Philadelphia erected in the twelfth school section of the said city a schoolhouse on Third street, above Brown, and in 1875 the school section, by direction of the board of education of the said city, made connection with the said sewer on Brown street constructed by the defendants, whereby said schoolhouse has since used said sewer for drainage purposes. There was no ordinance of city councils passed directing the school board to make said connection.' The case stated also set out the ninth section of the ordinance of June 20, 1863, page 190, and the eighth section of the ordinance of May 12, 1886, p. 145.

"Upon the argument the defendants claimed that, as the private sewer was laid by permission of the city of Philadelphia, and under the supervision of the district surveyor, the city of Philadelphia, when it constructed the sewer along Brown street, in front of the defendant's property, could not claim from the defendant any portion of the costs of such sewer, because the sewer would be of no benefit to the defendant's property, as the private sewer already constructed was ample for the uses of the defendant's property. The question raised by the defendant has been determined adversely to it by this court, in the case of City v. Cadwalader, 20 W. N. 14, where, on a scire facias sur municipal claim for a sewer laid along Oxford street, west of Broad, the affidavit of defense set up, 'that some years ago the owner of the premises against which this claim is filed, by the authority of the board of surveys, laid a sewer on Oxford street, in front of said premises, leading east and connecting with a sewer on Broad street, which affords ample drainage for said premises; that the sewer for which the

claim is made is not used by or of any value to said premises.' Upon a rule for judgment for want of sufficient affidavit of defense, this court, in making the rule absolute, said: 'As this is taxation the public discretion to improve is paramount and merely voluntary improvement, for the owner's own convenience cannot relieve him from his share of the cost where the city makes a general improvement.' The case of City v. Verner, 20 Phila. 292, was cited by the defendant's counsel as being a decision of the court of common pleas No. 4, of this county, as adverse to the decision in City v. Cadwalader, supra. An examination of the case, however, will show that the private sewer referred to was laid subsequently to the said ordinance of May 12, 1866; and the opinion in the case cites without disapproval the said case of City v. Cadwalader. Whether or not this court would follow City v. Verner, supra, if a case identical to that were before us, we need not determine; it is sufficient now to show that the present case differs from it.

"We consider that when the defendant in the present case was allowed to lay a private drain, a mere license was granted. When the time arrived for constructing sewers affecting the locality in which the defendant's property is situated, the city constructed the sewer for which the claim is filed. This sewer was the first owned by the city constructed in front of the defendant's property. The drain the defendant laid was its individual property. For defects in that drain the defendant could be liable: Vanderslice v. Phila., 103 Pa. 102.

"Now until the present sewer was laid was there a sewer in front of the defendant's property, which was part of the general sewer system of the city? When it was laid, the direct benefit to the defendant's property accrued, and the city, under its power of taxation, had a right to assess a due proportion of the cost of the sewer against the defendant's property by reason of the said benefit: Stroud v. Phila., 61 Pa. 255; Hammett v. Phila., 65 Pa. 146; Harrisburg v. Segelbaum, 151 Pa. 172.

"Of the necessity of the present sewer we cannot, of course, speak, nor are we required to do so. The councils are the sole judges of the necessities of sewers, and their judgment is conclusive: Michener v. Phila., 118 Pa. 535, 540.

"What is said in the case stated regarding the practice of the 'sewer clerk' issuing 'permits,' regardless whether or not any sewers existed, can have no effect in the determination of the present question, because it is not pretended that such clerk has the power to estop the councils of the city of Philadelphia from exercising their power of taxation. So, too, the action of the board of education, in connecting a schoolhouse with the defendant's private drain might have given the defendant a right of action against the city, but could in no way interfere with the right of the councils to lay public sewers and to assess their costs against properties specially benefited.

"Judgment is, therefore, entered in favor of the plaintiff upon the case stated."

Error assigned was in entering judgment for plaintiff on case stated.

Joseph L. Tull, for appellant, cited: Ordinance of June 20, 1863, sec. 9, page 190; Ordinance of May 12, 1866, sec. 8, page 145; City v. Verner, 20 Phila. 292; Phila. v. Potter, 5 Pa. C. C. 324; Harrisburg v. Segelbaum, 151 P. & R. 172.

Howard Wurtz Page, of Page, Allinson & Penrose, for appellee, cited: City v. Cadwalader, 20 W. N. C. 14; Weln v. Phila., 99 Pa. 330; City v. Tryon, 35 Pa. 401; Michener v. Phila. 118 Pa. 535; Stroud v. Phila., 61 Pa. 255; Phila v. Thomas, 152 Pa. 497; Hammett v. Phila., 65 Pa. 146; Erie v. Russell, 30 W. N. C. 26; Kosmak v. Mayor of New York, 22 N. E. Rep. 945; act of April 21, 1855, sec. 20, P. L. 269; Dillon on Municipal Corporations, 4th. ed., secs. 449, 465, 520 and 542; Addis v. Pittsburg, 85 Pa. 379; Bladen v. Phila., 60 Pa. 464; Reilly v. Phila., 60 Pa. 467; Hague v. Phila., 48 Pa. 527; McCracken v. San Francisco, 16 Cal. 591; Cross v. Morristown, 18 N. J. Eq. 305.

PER CURIAM, May 13, 1895:

The judgment in this case is affirmed on the opinion of the learned court below.

Rebecca McNeal, Appellant, *v.* G. Rebman & Co.

Alleys—Deeds—Boundaries.

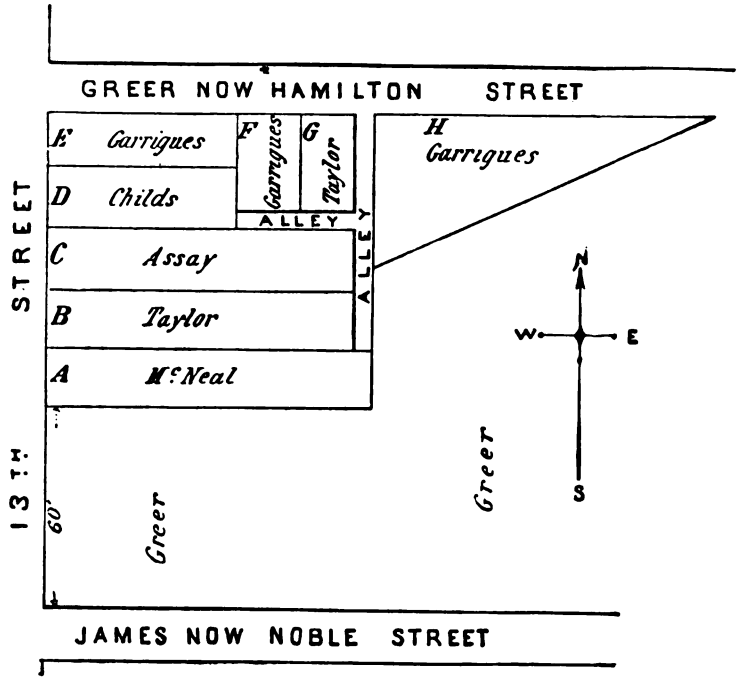
An owner of land having divided it into lots, conveyed several of the lots, with the right to the use of an alley lying to the east of them. Subsequently he conveyed the fee simple title to the soil of the alley, together with a lot lying to the west of the alley, reciting the reservation of the right to use the alley granted to the owners of the lots lying on the westerly side of it. After this deed was executed he conveyed to plaintiff's predecessor in title a lot at the head of the alley and to the south of it, no part of which was on the westerly side of the alley. Defendants obtained title to all of the lots lying to the west of the alley and built a fence across its outlet. The court charged that, under the deed plaintiff had no right in the alley, but left it to the jury to say whether, at the time the deed to plaintiff's predecessor in title was executed, the alley was notoriously used as an alleyway appurtenant to the ground now owned by plaintiff. *Held*, not to be error, and that a verdict and judgment for defendants should be sustained.

Argued April 9, 1895. Appeal, No. 282, Jan. T., 1895, by plaintiff, from judgment of C. P. No. 2, Phila. Co., Dec. T., 1893, No. 213, on verdict for defendants. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Trespass for obstructing an alley. Before JENKINS, J.

At the trial it appeared that prior to 1836, Edward B. Garrigues owned a lot of land at the corner of Thirteenth and Hamilton streets in the city of Philadelphia. He divided a block of this land into seven building lots shown by the plan on the following page.

On April 7, 1836, he conveyed lot G to Stacy Taylor, describing it in the deed as being bounded "eastward by three feet wide alley leading northward . . . . together with the use and privilege of said three feet wide alley at all times hereafter forever." On the same day he conveyed lot B to Stacy Taylor, with similar description and provisions as to the alley. On May 2, 1836, Garrigues conveyed lot D to Henry J. Childs, by deed, which contained after the description of the lot as follows: "Also a strip or piece of ground three feet wide situate at the rear end of the above described lot of ground at the distance of thirty-three feet from the south side of Greer street, and extending thence the same breadth eastward twenty-seven feet to the strip of ground three feet wide to be used as an alley and next hereinafter to be described and granted; bounded on the west



by lot of ground first above described; northward by ground of Edward B. Garrigues and partly by ground of Stacy Taylor; eastward by the said three feet wide alley; southward by the said Jonathan Stratton's ground; also the strip or piece of ground above mentioned and described as the three feet wide alley leading northward into Greer street aforesaid, beginning at a point seventy-two feet from the south side of said Greer street and ninety-seven feet eastward from the east side of said Thirteenth street; thence extending northwardly parallel with said Thirteenth street, seventy-two feet to Greer street; then eastward along said Greer street three feet; thence south seventy-two feet to a point; thence westward three feet to the place of beginning; the said described strip of ground having been reserved by said Edward B. Garrigues to be left open and as an alley, passage, and water course for the common and uninterrupted use and privilege of the owners and occupiers of the ground bounding on the westerly side thereof, together with the free and uninterrupted use, right, liberty, and privilege of said alley, passage, and water course in common with the owners and occupiers of the lots respectively situate on the

westerly side thereof so long as the same shall be used as an alley or passage aforesaid."

Lot A was conveyed by Edward B. Garrigues to Charles McNeal in fee, by deed dated Sept. 20, 1836.

The premises were described as situate on the east side of Thirteenth street at the distance of sixty feet northward from the north side of James street (now Noble street), containing in front on said Thirteenth street eighteen feet, extending in depth eastward between lines parallel with said James street one hundred feet; bounded northward partly by ground granted on ground rent to Stacy Taylor, and partly by the head of three feet wide alley leading into Greer street; southward and eastward by ground of Isaac Davis, and westward by Thirteenth street aforesaid; "together with the free use and privilege of said three feet wide alley at all times hereafter forever."

Lot C was conveyed by Edward B. Garrigues to Abraham M. Assay in fee, by deed dated March the 13th, 1837, and describing the premises as a lot of ground situate on the east side of Thirteenth street, ninety-six feet north of James, eighteen feet front and ninety-seven feet deep, and bounded eastward by a three feet wide alley leading northward into Greer street (now Hamilton street); "together with the free use and privilege of said three feet wide alley at all times hereafter forever."

Lot H belonged to Edward B. Garrigues, but was not laid out in connection with the other lots, and was situate on the easterly side of the alley in controversy.

Lots B, C, D, E, F, and G, by sundry mesne conveyances became vested in the defendants prior to the institution of this action.

Lot A was conveyed by Charles McNeal and Rebecca his wife, to Henry Krier in fee, "together with the free use and privilege of said three feet wide alley at all times hereafter forever," by deed, dated Jan. 18, 1843; and by deed, dated June 23, 1862, Henry Krier and wife conveyed lot A in fee, "together with the free use and privilege of said three feet wide alley, at all times hereafter forever," to Rebecca McNeal, wife of Charles McNeal, who is the plaintiff in the pending action.

The defendants built a wall across the foot of this alley on Hamilton street in 1893, appropriating the whole surface of the alley to their own use, and thereby preventing the plaintiff from using the alley, whereupon this action was brought.

The court charged in part as follows:

"[Now Mr. Garrigues, who made this conveyance, would be bound by that conveyance, and the lot of ground on the north of the seventy-two feet, that is, the lot of ground which is now owned by Mrs. McNeal, would have no right to use that strip of ground as an alley unless at the time of that conveyance by Garrigues to Childs it was notoriously used as an alleyway appurtenant to the lot of ground that now is owned by Mrs. McNeal.] [1]

"While you have no evidence of that directly before you, yet you do have some evidence of its being there at that time or shortly after the time of the conveyance to Mr. McNeal, but the lot was unimproved, as Mrs. McNeal says. She says she went through that alley. Well, she might have gone through that alley, but that does not necessarily say that the alley was appurtenant to this lot of ground, and here was the conveyance made by Garrigues to Childs, in which Garrigues speaks of this strip of ground and says it is left open for the use of the lots adjoining on the west. [The only question of fact for you to determine is whether or not that alley in 1836, at the time of the conveyance to Childs, was notoriously used as an alleyway appurtenant to this lot of ground owned now by Mrs. McNeal, and so notoriously used that Childs was bound to take notice of it, notwithstanding what is said in this deed, because so far as the deed was concerned he was only bound to take notice that that alley was to be used by the lots of ground bounding it on the west.] [2] Garrigues would be bound by that deed, and Garrigues' grantee, who is McNeal, would be bound by that deed, and of course Mrs. McNeal would be bound by that deed because she claims through her husband. This is the only question which you have to determine.

"There is other testimony in the case which is perhaps of some weight with regard to that question, and that is that this alleyway was really fenced off so that the people who were occupying the property that was owned by Mrs. McNeal could not use it. There is testimony of one or two of the witnesses upon the part of the plaintiff that they did go through that alley, but you do not have the testimony that it was notoriously open and people going through, except as being so long ago you may infer it from the fact that these people say they went through. You have the testimony, however, of a number of

other witnesses upon the part of the defense that it was impossible to go through there; that the alley was fenced off; that it was not used as an alley. One man said that part of it was used by him as a dog kennel. Others say it was used as a place to put waste, refuse, or rubbish—that it was not used as an alley. [That evidence, so far as the user of that alley or nonuser of that alley, I am simply leaving to you, as it may or may not bear upon the question, so far as you are concerned, as to whether this alley in 1836, at the time of the conveyance to Childs, was notoriously open and being used as an appurtenance to the property that is now owned by Mrs. McNeal.] [3]

"I hope I have made myself plain to you. [It is an extremely narrow question which you have to pass upon. The deed to Childs binds Garrigues unless you find that at the time of the execution of that deed this alley was notoriously being used as an appurtenance to the McNeal property.] [4]

"There is a principle of law that does allow a man when he conveys, if he has left a way open, to say he did not intend to give up the right of way by the words of his deed, but the words of the deed by Garrigues to Childs are such as leave a very small loophole for anybody claiming through Garrigues to claim a title to this alley as appurtenant to the lot owned by Mrs. McNeal.

"As I have said to you, the only question for you to pass upon is, was that notoriously open at that time, so that Garrigues would be presumed by you as not having intended to say it was not to be used by him as appurtenant to the McNeal lot which he retained, but by this deed he conveys a strip of ground, conveys it as a strip of ground, and then speaks of it as having been reserved by him as an alleyway for the lots bounding on it on the west. [If you find that this lot of ground was notoriously used so as Garrigues ought not to be bound by the words of the deed, then you ought to find a verdict for the plaintiff for, say, six cents damages; but if you find that it was not notoriously known so that Garrigues should be bound by the deed to Childs, then of course your verdict ought to be for the defendants.]" [5]

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned were (1–5) above instructions, quoting them.

M. Hampton Todd, for appellant, cited: Salisbury v. Andrews, 19 Pick. 250; Cox v. Freedley, 33 Pa. 124; Miner's App., 61 Pa. 283; Lacy v. Green, 84 Pa. 514; Meigs v. Lewis, 164 Pa. 597.

William W. Porter, *Frederick J. Geiger* with him, for appellee, cited: Kirkham v. Sharp, 1 Wharton, 323; Lewis v. Garstairs, 6 Wharton, 193; Shroder v. Brenneman, 23 Pa. 348; Shurtz v. Thomas, 8 Pa. 359; Van Meter v. Hankinson, 6 Wharton, 307.

PER CURIAM, May 13, 1895:

It cannot be doubted that when the former owner, Garrigues, on May 2, 1836, conveyed the fee simple title to the soil of the alley to Childs, he deprived himself of all right or power to grant to any one, by a subsequent conveyance, any easement in the alley in question. Having no ownership of the land he could confer no right to use it. But the case in this regard is strengthened by the consideration that in the same deed to Childs he recited his previous reservations of the right to use the alley granted to the owners and occupiers of the ground bounding on the westerly side of the alley, and repeated the grant of the same privilege to Childs, with the same limitation to the lots on the westerly side of the alley. These grants necessarily excluded the plaintiff's lot which abutted on the south at the end of the alley. There is no occasion to resort to any extrinsic testimony to explain the meaning of these several conveyances, as they are perfectly free from doubt. The plaintiff's predecessor took his title with full record notice of all the prior grants and was bound by them. When the learned court below left to the jury the question of the notorious use of the alley by the occupiers of the McNeal lot at the time of the conveyance to Childs, every opportunity to recover that was possible was extended to the plaintiff. But the jury found against her and disposed finally of any such aspect of the case. There was no proof of title by adverse user, but on the contrary it was fully proved that the alley had been closed by high board fences for very many years. We discover no merit in the plaintiff's claim in any point of view.

Judgment affirmed.

Rebecca Hughes, Appellant, *v.* Caroline Keichline, Executrix.

Decedents' Estates—Claim for services—Evidence—Declarations—Will.

In an action against a decedent's estate for services, where plaintiff relies upon declarations of the deceased that the services were to be paid for, a will showing a legacy to the plaintiff is admissible in evidence.

In such a case it is proper for the jury to know what had been given to plaintiff by the deceased,—whether during her life, or by her will, to take effect after her death. Such evidence is not conclusive upon the plaintiff, but it is for the jury to say what effect should be given to it.

Argued April 9, 1895. Appeal, No. 152, Jan. T., 1895, by plaintiff, from judgment of C. P. No. 1, Phila. Co., Dec. T., 1891, No. 470, on verdict for defendant. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Assumpsit for services as nurse and attendant. Before BREGY, J.

From the record it appeared that plaintiff claimed for services as nurse and attendant rendered to Mary Louisa Buechle in her lifetime for 372 weeks at $20.00 per week. Plaintiff relied upon declarations of Mrs. Buechle to the effect that the services would be paid for.

At the trial the will of the decedent was admitted in evidence under objection and exception, in which it appeared that Mrs. Buechle had left Miss Hughes $150. [1, 2]

The court charged as follows:

"You will have to determine from this testimony whether whatever services this plaintiff rendered to the deceased lady were the acts of courtesy, kindness and friendship, which all of us receive and many of us render every day of our lives, or whether they were that kind of services which was the result of a contract, and which entitle her to compensation. Of course, if you find that whatever she did for this deceased lady was simply the ordinary, kindly, courteous acts of people living in the same house, that were rendered without expectation of receiving pay, and without expectation of being paid for, your verdict ought to be for the defendant, and the plaintiff ought not to receive any verdict. But if, on the other hand, her services were the result, as is claimed, of a contract, then she is entitled to receive for the period that is not barred by the

statute of limitations such compensation as you believe her services are reasonably worth, according to the market price of such services. . . .

"If she was, in other words, engaged as the nurse of this lady, she is entitled to be paid for her services, if she has not been paid. [There is a legal proposition or presumption that people who are ordinarily employed by the week are paid by the week. As most people do not take the trouble of getting receipts from their ordinary household servants, the presumption is that they have been paid by the week. And so it would apply to almost all of these relations in life.] [3] If this woman was employed, and if you are satisfied that she has not been paid, then she ought to be paid, and as there is no evidence of any contract at a certain price, then she ought to be paid that which you are satisfied from this evidence is the market price of that labor. That is all there is in the case. The case is entirely for you."

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were, (1, 2) rulings on evidence, quoting the bill of exceptions; (2) instruction as above, quoting it.

John F. Keator, *William W. Wiltbank* with him, for appellant.

Theodore F. Jenkins and *George Pierce*, for appellee, were not heard.

PER CURIAM, May 13, 1895:

The learned court below fairly submitted the question of employment and payment of wages on the basis of a quantum meruit to the jury, and the jury has found against the plaintiff on these questions of fact. The will of the testatrix was clearly admissible because the evidence in support of the plaintiff's claim under a contract consisted merely of loose declarations of the deceased and, as we held in Barhite's Appeal, 126 Pa. 404, such declarations may mean a provision by will. It was competent for the jury to know what had been given to the plaintiff by the deceased whether during her life or by her will to take effect after her death. It was not conclusive upon the plaintiff, but it was for the jury to say what effect should be given to it.

Judgment affirmed.

Andrew Sommer to use of Mary F. Lathrop, Administratrix of John Lathrop, Deceased, Appellant, v. William J. Gilmore, Garnishee of Ransom Rogers.

Charge of jury—Mistake—Review.

The Supreme Court will not reverse a judgment on a verdict where all the testimony offered was admitted and submitted to the jury on the ground that the trial judge made a misstatement of a fact in his charge, which was corrected before the jury left the court room.

Argued April 10, 1895. Appeal, No. 244, Jan. T., 1895, by plaintiff from judgment of C. P. No. 4, Phila. Co., Sept. T., 1870, No. 1919, on verdict for defendant. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Assumpsit on a promissory note.

The facts appear in the charge of the court by ARNOLD, J., as follows:

"It appears that on Nov. 26, 1870, a man named Andrew Sommer obtained a judgment against a man named Ransom Rogers, which was afterwards assigned to John Lathrop.

"On June 26, 1875, a judgment was entered in the court of common pleas No. 2, of this county, in favor of Ransom Rogers, against William J. Gilmore.

"On Oct. 10, 1882, about seven years afterwards, Mary F. Lathrop, the administratrix of John Lathrop, the owner of the Sommer judgment against Rogers, learning of the judgment in favor of Rogers against Gilmore, attached the debt which, according to the records, appeared to be due by Gilmore to Rogers.

"The case now presented for your determination is, whether or not Gilmore owed Rogers at the time of the attachment the amount of that judgment, and whether there is anything due by Gilmore to Rogers to apply to the claim which Mr. Lathrop's administratrix has against Rogers.

"It appears that about a year before this attachment, some time in 1881, Rogers left the city, and that he has not been back since.

"[Mr. Gilmore, who was the defendant in the suit of Rogers

against Gilmore, in which a judgment was entered, filed a petition in the court of common pleas No. 2, alleging that while the judgment appeared to be good on its face, yet it was not, and that the note was not given for a bona fide debt, but was given as security to Rogers for the faithful conduct of Rogers' business by Gilmore, in the management of the theatre at Tenth and Callowhill streets.] [1] Upon that petition he obtained what is called in law a rule to show cause why judgment should not be opened, and the defendant let in to a defense.

"Upon this rule depositions were taken—that is, the testimony of witnesses was taken out of court before a commissioner or notary public. Quite a volume of such depositions were taken, as you have seen, occupying some time, and upon being presented to the court of common pleas No. 2, the court opened the judgment, and awarded an issue to ascertain whether Gilmore did owe Rogers anything.

"The case came on for trial, and on Nov. 12, 1888, a verdict was found in favor of the defendant, Gilmore, that he did not owe the $5,381.21, or any part of it.

"[The record of that suit has been offered in evidence, and it shows that the issue came on to be tried before Judge HARE and a jury, all the parties being represented; that is to say, Rogers had a lawyer there, Gilmore had a lawyer, and the firm of Reeve L. Knight & Sons, who were also interested in holding the judgment, were represented in that court.] [2]

"[The case was there tried, the testimony of witnesses being taken, and, as I said before, it was found that Mr. Gilmore did not owe Rogers anything, and a verdict was found in his favor.] [4]

"Notwithstanding that verdict and the judgment thereon, the plaintiff in this suit alleged that the trial in common pleas No. 2 was a sham trial; that the verdict was obtained by collusion and by combination between Rogers and Gilmore for the purpose of heading off attachment creditors like the plaintiff in this suit, and [to overcome that verdict, and to prove that it was not a bona fide verdict rendered upon a bona fide trial, but was obtained by collusion and combination, the plaintiff has offered in evidence a certain letter, written by Ransom Rogers to Mr. David B. Taylor, dated Dec. 5, 1881]. That was written after the judgment was entered, and seven years

before the trial of the issue in common pleas No. 2, to ascertain whether it was a good judgment or not.

"In that letter Mr. Rogers speaks of having a judgment against Gilmore. He asks Taylor what arrangement he proposes to make in regard to the judgment against Gilmore and he thinks that one half would be too liberal fee to collect it. He says that judgment is already obtained on a judgment note with a waiver, all of which is true; for at that particular time, to wit, Dec. 5, 1881, there was a judgment subsisting in common pleas No. 2. You will remember that it was entered on June 26, 1875, and was not opened until a great many years afterwards. The trial did not take place until Nov. 12, 1888, which was more than thirteen years afterwards.

"Therefore, it is submitted to you as jurors to say whether you believe, upon that letter and the other testimony, the trial, the verdict, and judgment in common pleas No. 2, that there was something due upon that judgment, or that the whole amount of it was due.

"[As I have stated to you before, when the case was tried in common pleas No. 2, three parties were represented; Rogers, the plaintiff of record; Gilmore, the defendant, and other attachment creditors, to wit, Reeve L. Knight & Sons. They were present, and were parties in that suit, admitted to prosecute, and were there during the trial.] [3]

"Now, if you believe upon the testimony that the trial in common pleas No. 2, which was had before a judge and a jury, at which every person at that time interested was present — if, notwithstanding that, you believe there was a fraudulent combination and collusion between Rogers and Gilmore, and that Gilmore did owe Rogers $5,000 and upwards, then you may render a verdict in favor of the plaintiff in this suit for the amount claimed, or as much as you may find that Gilmore owed Rogers at the time of the attachment.

"If, on the other hand, you believe that the judgment note was given simply as security for Gilmore's conduct of the business of Rogers at the theatre, Tenth and Callowhill; that after the business was turned over by Gilmore to Rogers, and the accounts settled, nothing was due by Gilmore to Rogers, and the note should have been satisfied, but was not, and that the trial in common pleas No. 2 upon the note was a fair and bona fide

trial between parties who were actually and actively litigating with each other, then there is nothing due by Gilmore to Rogers, and consequently nothing can be recovered by the plaintiff in this suit on her attachment against Gilmore.

"The main question in the case is this: Was there an actual bona fide debt by Gilmore to Rogers of $5,381.21, which this judgment note represents, or was it simply given as security for anything which might be found to be due upon a settlement of accounts? If it was given as security and the parties settled their accounts, and found nothing due by Gilmore to Rogers, then, of course, the note itself is worth nothing.

"If, on the other hand, you believe that it represented an actual bona fide debt owing by Gilmore to Rogers; that the trial in common pleas No. 2, which found otherwise, was conducted by combination and collusion between the parties, so that the plaintiff might lose the suit, and thereby defraud attaching creditors, and that there is enough of that money yet due by Gilmore to Rogers to pay the plaintiff's claim, to wit, about $3,000, then you may find a verdict in favor of the plaintiff for that amount. It is a pure question of fact for you to determine what was due by Gilmore to Rogers. If nothing was due, the verdict should be for the garnishee; but if something was due, and it was enough to pay this debt, you may render a verdict that the garnishee pay the plaintiff the amount claimed; or if there was less due, you will ascertain how much less, and out of that the plaintiff can collect part of her judgment.

"Counsel have called my attention to the statement that Reeve L. Knight & Sons were not in court at the time of the trial referred to. They were not actually present in court, taking part in the suit, but the record shows that they had petitioned the court for leave to intervene in that case, and they had a right to be present, and could have been present if they had seen fit."

Verdict and judgment for garnishee. Plaintiff appealed.

Errors assigned were (1–5) to portions of charge as above, quoting them; (6–10) in giving undue prominence to defendant's testimony and in not presenting all the evidence impartially to the jury.

J. S. Freeman and *John F. Keator*, *O. B. Jenkins* with them, for appellant.

John H. Shakespeare, for appellee.

PER CURIAM, May 13, 1895:

We see no reason for reversing this case. The learned court below followed our decision when it was last here and all testimony offered was admitted. There was nothing involved in the controversy but matters of fact which had to be submitted to the jury as was done. The jury has found for the garnishee as two other juries had done before. There certainly should be an end of such litigation. We do not think the charge is fairly subject to the criticisms made upon it. The mistake in the statement as to the presence of the other creditors at the trial was fully corrected before the jury retired.

Judgment affirmed.

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168 121
32 SC 290

John McConaghy *v.* Pemberton & Co., Appellants.

Contract—Mutual covenants—Damages—Speculative damages.

Plaintiff and defendants entered into a written agreement containing mutual covenants by which defendants were to convey to plaintiff twenty-four lots, "clear of incumbrances; taxes and water rents to be apportioned; sewer, gas, water, curb and street pavement to be put in" by defendants; and plaintiff was to convey to defendants a number of properties, and to build houses on the lots conveyed to him by defendants "within one year." Defendants failed to put in the curb and street pavement. The city did the work, and filed liens against the properties which plaintiff was compelled to pay. Plaintiff did not begin the construction of houses until after the street improvements were put in, and until more than a year after the execution of the contract. In an action to recover the amount of the municipal liens paid by plaintiff, *held*, that he was entitled to recover, (1) because he was not bound to build the houses before the curbing and paving were done; (2) because the damage, if any, suffered by defendants from plaintiff's failure to build the houses within a year were not the subject of set-off for the reason that they were speculative, and not in contemplation of the parties when the contract was made, and not such as arose naturally from the breach.

Argued April 12, 1895. Appeal, No. 271, Jan. T., 1895, by defendant, from judgment of C. P. No. 3, Phila. Co., March T.,

1892, No. 318, for plaintiff on report of referee. Before GREEN, WILLIAMS, McCOLLUM, DEAN and FELL, JJ. Affirmed.

Assumpsit to recover damages for breach of a written agreement.

The agreement upon which suit was brought was as follows:

"This agreement, made the fourth day of August, A. D. one thousand eight hundred and ninety, between Pemberton & Co., of the first part, and John McConaghy, of the second part:

"Witnesseth, that the said parties of the first part, for the consideration hereinafter mentioned, do hereby for themselves, their heirs, executors, and administrators, covenant, promise, and agree with the said party of the second part, his heirs and assigns, that they the said parties of the first part shall and will, on or before September 1st, 1890, at the proper cost and charges of the said John McConaghy, his heirs and assigns, by a good and sufficient deed of conveyance, grant, convey, and assure unto the said party of the second part, his heirs and assigns, all those twenty-four lots on the south side of Clifford street, between Thirty-first and Thirty-second streets, in the Twenty-ninth ward, the total front being three hundred and ninety-five feet, and the depth ninety feet to Hollingsworth street. Subject to building restrictions, clear of incumbrances, taxes and water-rents to be apportioned; sewer, gas, water, curb, and street pavement to be put in by the parties of the first part front and rear and side streets, *together* with all and singular the buildings and other improvements and appurtenances thereunto belonging. And the said party of the second part, for himself, his heirs, executors, and administrators, does hereby covenant, promise, and agree with the said parties of the first part, their heirs and assigns, that he, the said party of the second part, shall and will well and truly convey unto the said parties of the first part, their heirs and assigns, the following properties: 1933 Federal street, 1109 to 1119 South Twenty-sixth street inclusive, 2501 to 2517 Ellsworth street inclusive, 2516 to 2530 Alter street, 2534 to 2538 Alter street, 2533 to 2539 Alter street, 2543 Alter street, subject in all to twenty-nine thousand four hundred dollars, otherwise clear of incumbrances, taxes, water-rents, and interest on ground-rents, to be apportioned, leases to be assigned, settlement to be as of September 1st, 1890,

houses to be built on Clifford street lots by party of the second part within one year."

The case was referred to Charles B. McMichael, Esq., as referee, who reported as follows:

"The controversy in this case arose out of a sale or exchange of real estate between the plaintiff and the defendant's firm. The agreement in reference to this was reduced to writing, and this memorandum of agreement in writing was dated the fourth day of August, 1890. Amongst other things, it set forth that the street pavement was to be put in by the parties of the first part on front and rear and side streets; and also an agreement on behalf of John McConaghy that houses were to be built on Clifford street by the party of the second part within one year. Some of the street improvements, such as water pipes and sewers, were put in by Pemberton & Co.; but the paving bills, which was the most expensive part of the street improvements, were not paid by Pemberton & Co; a lien was filed against the property, which had been acquired by Mr. McConaghy, and he was obliged to pay the bills. For the amount of these bills he brought suit against Pemberton & Co., and filed a statement, in which he alleged as follows: 'Plaintiff sues the defendants to recover money paid out and expended to their use under the following circumstances: Plaintiff bought from the defendants in the autumn of 1890, 24 lots of ground on the south side of Clifford street, in the Twenty-ninth ward of the city of Philadelphia, between Thirty-first and Thirty-second streets, having a frontage of 395 feet on Clifford street and extending in depth 90 feet to Hollingsworth street, the defendants agreeing to pay for the sewer, gas, water, curb and street pavement on all the aforementioned streets. Subsequently the said Clifford street was paved and curbed in front of the said lots, and the defendants refused and neglected to pay for the said curbing and paving as agreed; whereupon liens were filed against the said lots for the money due for the said curbing and paving, and the plaintiff was thus compelled to pay for the same, and did so pay. He now claims to recover from the defendants the sum of $4,375.98, being the amount paid by him for said paving and curbing, together with interest from Feb. 25, 1892. Plaintiff avers that he has never been paid this sum or any part of it, and that it is all justly due and payable.'

"To this the defendants pleaded and gave notice of special matter as follows: 'And now, March 31st, 1892, defendants by Elias P. Smithers, their attorney, plead "non assumpsit," "set-off."

"'NOTICE OF SPECIAL MATTER.

"'To Messrs. Lewis and Landreth, attorneys for plaintiff.

"'SIRS:—Please take notice that under the plea filed in the above case the defendants will offer to prove as special matter:

"'That the defendants, being the owners of about twenty-four acres of land in the Twenty-ninth and Thirty-second wards of the city of Philadelphia, and being desirous of improving the same by the erection of houses thereon and thereby increasing its value, at the time mentioned in the statement in consideration and upon the express condition that the plaintiff, for the purpose of aiding them in improving their said ground as aforesaid, should and would within one year from the date of the sale erect on each of the said twenty-four lots to be sold to him a substantial three-story brick dwelling-house, did sell to plaintiff part of said twenty-four acres, to wit, the said twenty-four lots mentioned in the statement, at a fair price and clear of all incumbrances then existing, and did agree to take in payment therefor thirty-two houses and lots on Federal, South Twenty-sixth, Ellsworth, and Alter streets in the twenty-sixth ward of the city of Philadelphia, at a price above their cash value, and subject to incumbrances amounting to $29,400, and for the consideration and upon the express condition aforesaid, to wit, that the plaintiff would within one year from the time of said sale erect on each of said lots so sold to him, a substantial three-story brick dwelling-house, for the purpose of aiding defendants in developing their said land, the defendants as one of the terms of said sale did agree that they would pay for the sewer, gas, water, curb and street pavement when the same should be done on the streets on which the lots sold to plaintiff fronted.

"'That the said plaintiff did not within one year from the date of said agreement, and hath not since, erected a substantial three-story brick dwelling-house or any other building on said twenty-four lots, or on either or any of them, and hath not otherwise improved the same, and that the said defendants have expended large sums of money in improving their remaining part of their said twenty-four acres on the faith of said

agreement with plaintiff, and did pay for certain of said street improvements, which were done within one year from the date of said agreement, divers sums of money amounting to $797.27 for water-pipe and sewers. That by reason of the failure of said plaintiff as aforesaid to keep and perform the said condition and stipulations of said agreement of sale which were to be kept and performed by him that defendants have suffered damages as follows, to wit: In the sum of $797.27, paid for water-pipe and sewer in front of said property so sold to plaintiff, in the sum of $4,300, paid by them to carry the remaining property which they were unable to sell by reason of plaintiff not having kept his agreement as aforesaid, in the sum of $3,000 for injury to market value of their remaining property caused by plaintiff not having built on the lots sold him as aforesaid, and in the sum of $5,750 in the excessive value paid for said property conveyed to them by plaintiff as an inducement to said agreement with plaintiff, making total damages suffered by defendants by the failure of plaintiff to perform his part of said agreement the sum of $13,847.27. Which sum defendants intend to defalk against the plaintiff's demand in the suit.

"'Total amount of damages to defendants .	$13,847 27
"'Amount sued for by plaintiff . . .	4,374 98
"'Amount due defendants .	$9,471 29

"'Said defendants will demand upon the trial of said cause a verdict and a certificate against the plaintiff for said sum as justly and legally due the said defendants according to the statute in such case made and provided. Very respectfully yours, (Signed) ELIAS P. SMITHERS, Attorney for Defendant.'

"Issue was joined and the case was referred to Charles B. McMichael by agreement of the parties.

"The plaintiff, who was first called to the stand, testified that he bought from the defendants, in the autumn of 1890, twenty-four lots of ground on Clifford street, in pursuance of an agreement, and this agreement was in writing and was offered in evidence and a copy of it is annexed to this report, marked 'C. B. M., Exhibit No. 1, May 13, 1892.' He further testified that street improvements were, at the time he testified, made, but that the defendants had not paid for them. Pro-

ceedings had been instituted against him, and a lien entered by the parties who made the improvements; and that he subsequently paid the amount and took a receipt for the same, which receipt was offered in evidence and marked 'Exhibit C. B. M., No. 2, May 13, 1892,' the amount paid being $4,375.98.

"Mr. Landreth, on behalf of the plaintiff, also put in evidence a deed of Clifford Pemberton, Jr., et al., to John McConaghy, for twenty-four lots of ground, Twenty-ninth ward, Philadelphia, dated Sept. 20, 1890, and recorded in Deed Book G. G. P., No. 682, page 252, marked 'C. B. M., Exhibit No. 3, May 13, 1892.'

"The plaintiff was cross-examined at considerable length, and more particularly upon the point that his attention had been called, prior to the agreement in writing, to the covenant which was afterwards put into the agreement, that houses should be built within one year; and his attention was called also to a letter dated March 14, 1892, inquiring of him when he expected to begin the erection of the twenty-four houses, and stating that the agreement of Pemberton & Co. to put in street improvements depended upon plaintiff's building within a year. The plaintiff did not, however, recollect distinctly the conversations to which his attention was called; nor did he recollect receiving the letter referred to. He was also asked why he did not build houses as he agreed to do, and he gave two reasons; (1) that he thought there were too many houses in the neighborhood, and (2) that as he had paid fully in the trade for the street improvements, he was not bound to build the houses until the street improvements were in, and that he thought it just that the street improvements, as long as he paid for them, ought to be done first. He also testified that the building of houses could not go on while street improvements were being made.

"Plaintiff here rested his case, and, in the opinion of the referee, he made out a prima facie case which entitled him to be reimbursed for the outlay upon street improvements he had made.

"A very large amount of testimony, covering a great many pages and taking up a great deal of time, was taken on behalf of the defendants, to a large amount of which objection was

made and exceptions noted; and the referee admitted most of the testimony offered, thinking it proper that, as his opinion and decision was to be reviewed by the court, testimony, about which there might be grave doubt as to the propriety of its admission, should be taken, subject to such objection and exception that his errors might be corrected by the appellate court. There were two lines of testimony, however, upon which the referee decided adversely to the defendants' right to take the testimony. First, the defendants offered to show that the properties which Mr. McConaghy had exchanged for the unimproved lots of Messrs. Pemberton & Co., under the agreement of Aug. 4, 1890, were not worth the values placed upon them by McConaghy, and a large amount of the claim of set-off was based upon the theory that the defendants had a right to show that the properties which they had taken in barter or exchange for their own land were not worth what they thought they were when they took them. As there was no pretense of any fraud or imposition upon the part of the defendants, as they were, according to their own testimony, experts in the real estate business; had been engaged for a considerable period of time in large operations; were sui juris, and abundantly competent to look after their own interests; and as the agreement, so far as the exchange of land for houses was concerned, was fully executed before any dispute arose between the parties; and as no complaint had ever been made of any unfairness in the dealings in this regard, the referee felt bound to reject, when objection was seriously made to it, all testimony tending to show that the properties traded by Mr. McConaghy for land of Messrs. Pemberton & Co. were worth less than both parties seem to have thought them worth at the time of the trade. Second, a large number of experts were called on behalf of the defendants, and while the referee admitted their testimony generally upon the questions of improvement to a neighborhood by the building of houses, yet he excluded their opinions as to the amount of damage suffered by the defendants in this particular case.

"The testimony of Mr. Clifford Pemberton, Jr., was to the effect that he was a member of the firm of Pemberton & Co., and that he had made an agreement of exchange with Mr. McConaghy on Aug. 4, 1890; that Mr. McConaghy had not

complied with the clause of that agreement that he was to build houses on the lots within a year. Mr. Pemberton also testified at considerable length as to the tract of ground which he and his partners were improving and developing, and that, in his view, the balance of his property was damaged by the failure of Mr. McConaghy to build houses within a year; that, in his opinion, the cost of carrying a certain number of houses should be charged to Mr. McConaghy for his failure to build houses according to his agreement. On page 49 of the type-written notes of testimony, he says: 'The cost of carrying property, including houses and lots unsold on account of Mr. McConaghy's failure to build, was seven houses at $400, making $2,800, and twenty-six lots, twelve on Clifford street and fourteen on Thirty-first street, with interest, $1,500, making a total of $4,300. Then, general damage to the value of the balance of our houses and lots, $3,000.' And he says further, in explanation, that the development of the property was retarded by the failure of McConaghy to build, to the extent of that amount of money. He also testified that there was another item of $797.26, actual cash paid out for street improvements, which he thought should be recovered back. Mr. Pemberton was also cross-examined at great length.

"Then Mr. Frank Mauran, one of the defendants, was examined. His attention was called to the clause in the agreement: 'Houses to be built on Clifford street lots by the party of the second part within one year,' and he also stated that Mr. McConaghy had not complied with that stipulation in the agreement; that he broke ground on April 14, 1892. Mr. Mauran testified further that McConaghy's attention was called, before the agreement was executed, to the stipulation that houses were to be built within one year; and after that the agreement was executed his attention was called to it.

"Then the testimony of quite a number of experts was taken as to the effect of building or not building houses in a neighborhood. The plaintiff was heard in rebuttal of some of the points testified to by the defendants, and expert witnesses were called on behalf of the plaintiff, who expressed opinions differing from those of the experts for the defendants.

"This is a brief view of the case as presented before the referee.

"Notwithstanding the amount of testimony taken the questions in the case narrow themselves down to two.

"It is undoubted that the plaintiff is entitled to recover the amount expended for street improvements, unless there was a breach of a covenant by the plaintiff and damages flowed from the breach of the plaintiff's covenant. These damages, the defendants claim, exceeded in amount the value of the street improvements paid for by the plaintiff, and the defendants claim that they have a right to set off these damages in this case and to have a certificate for an amount in excess of the plaintiff's claim for nearly $10,000, or, to speak exactly, $9,471.29; and it seems equally clear to the referee that the plaintiff may have been excused for his breach of covenant by the breach on the part of the defendants of a mutual and dependent covenant.

"Let us examine the contention of the defendants. The agreement between the parties was executed by mutual conveyances. The lots owned by Messrs. Pemberton & Co. were conveyed to McConaghy, subject to certain building restrictions which do not appear in the agreement of sale, and which do not affect that agreement. And McConaghy conveyed the real estate he had agreed to convey, subject to certain liens, which were known to Pemberton & Co. The putting in, by the parties of the first part, of the street improvements, which it was known to the parties would amount to a considerable sum, was part of the consideration moving from Pemberton & Co. to McConaghy, to induce the trade or barter of houses for their land, and the building of houses within one year by McConaghy on the Clifford street lots seems to have been also part of the consideration moving to Pemberton & Co. from McConaghy for the exchange by Pemberton & Co. of land for the houses of McConaghy. And to a certain extent they were mutual and dependent covenants.

"McConaghy, the plaintiff, did not deny that there was a specific covenant on his part to build houses within one year, and that that covenant had been broken, but he alleged, as an excuse, that the street improvements—that is, the street paving—were not completed until about September, 1891, and that he was, therefore, excused for non-compliance with his covenant to build houses within a year, for, as he had paid,

by way of exchange or barter of houses, for all the street improvements, he was entitled to wait until they were completed before he began to build the houses.

"This seems to the referee a reasonable view to take of this matter, and that Messrs. Pemberton & Co. cannot take advantage of the failure of McConaghy to build houses within one year, while they themselves were behindhand, or in fault, in regard to the street improvements. It may be that this was a matter not entirely within their own control, but it certainly was a matter of great importance to McConaghy that the street improvements should either have been put in or have been in a fair way to be finished by the time his houses were finished; otherwise he might have houses on his hands which he could not sell or rent, property without any pavement or roadway not being desirable. The opinion of the referee is, therefore, that these two conditions or covenants were mutual and dependent one upon the other, but that the plaintiff, McConaghy, is excused for his non-performance of his covenant to build houses within one year by the failure of Messrs. Pemberton & Co. to put in the street improvements. After the street improvements were finished, although they were not paid for as agreed by the defendants, Messrs. Pemberton & Co., McConaghy went on with reasonable promptness to build houses, and houses have been built by him upon the lots in question.

"The referee is of the opinion, and so reports, therefore, that in the view of the case that the covenant on the part of Pemberton & Co. that the sewer, gas, water, curb, and street pavements would be put in by them on front and rear and side streets, and the covenant on the part of McConaghy that houses were to be built on Clifford street lots by McConaghy within one year, were mutually dependent upon each other, McConaghy was excused for non-compliance with his agreement to build houses in the time specified, because Pemberton & Co. had failed to carry out their agreement to put in street improvements within that time.

"And the decision of the referee is that the plea of the defendants is not sustained, and he, therefore, gives judgment for the plaintiff.

"There is another view of the case, however, and one on which the greatest reliance was placed by the counsel for the

plaintiff. That is, that regarding the covenant to build houses within one year by McConaghy as a binding covenant on him, and admitting that there had been a breach of that covenant, and that damages might be recovered for that breach if any actual damages were proved, no sufficient testimony had been brought before the referee from which he could find that the defendants, Pemberton & Co., had suffered any loss from the failure of McConaghy to build houses within one year.

"However reluctant the referee might be to decide the case upon such a theory, if the equity were on the side of the defendants, yet a careful examination of the agreement itself, and of the testimony given on behalf of the defendants, and of the rules of law and adjudicated cases, he is of opinion that no damages have been proved to have flowed from the breach of this covenant, except those speculative and remote in their character. The contention of Messrs. Pemberton & Co. is, that houses were to have been built and finished on all the lots within one year, or at least this is the result of the propositions advanced by their learned counsel for them, for it was contended that if houses had been built on these lots, the neighborhood would have been improved and Messrs. Pemberton & Co. would have been enabled to sell their other houses at good prices, but as the lots remained vacant they could not sell the houses at any price. But this view requires us to read into the covenant words which are not there. Certainly, Mr. McConaghy would have complied with the letter and spirit of his agreement if he had commenced the building of two or three houses. He had not agreed to build all the houses within one year; the simple agreement was that houses were to be built within one year; and even the opinions of the experts have hardly gone so far as to contend that the erection of two or three houses would have affected the sale of a number of other houses in the neighborhood in a dull and off year for building operations, as this year was testified to have been; nor does the referee think, with all respect to the opinions of the defendants themselves and all the experts who have been called, that any damages have been satisfactorily proved to have resulted from the failure on the part of McConaghy to build houses within one year.

"The plaintiff requested the referee to rule that the defendants had made out no legal and valid defense, and that judg-

ment must, therefore, be entered for the plaintiff for the full amount claimed. And this point on behalf of the plaintiff is sustained.

"Both the plaintiff and defendants submitted briefs of authorities to the referee, and the cases have been examined by the referee, but he is of opinion that the decision of the present cause must depend more upon the construction of the agreement which was in evidence before him, and the facts proven before him, than upon the citation from cases where the exact point has not arisen.

"A few of the cases directly in point, and referred to by counsel, are, however, respectfully called to the attention of the court as having guided the referee in reaching his decision. They are Byrne v. Stewart, 23 W. N. C. 363, where it was held that 'an over-estimate by a vendor of the value of an article which he sells does not create a cause of action against him, nor is it a defense to a suit for the price agreed to be paid,' the view of the Supreme Court in that case being that where the vendee has an equal opportunity with the vendor to look into the matter and form an opinion as to the value, evidence should not be admitted as to what the actual value was, although if there were any facts within the knowledge of the vendor which have been concealed the rule is varied. Representations made by the vendor to the vendee which were false, and which induced him to buy the property, would be a partial defense to an action for the value of the property, and might be evidence as to the value.

"Upon the point that speculative damages cannot be recovered or set off: Bank v. McKee, 2 Pa. 318; Sitgreaves v. Griffith et al., 2 W. N. C. 705; Sloan v. Chamberlain, 7 W. N. C. 536; Van Kleck v. Pickering et al., 11 W. N. C. 238, were cited and relied on.

"Upon the point that the defendants are bound to show actual absolute loss occasioned by the failure to build within a time certain, 1 Sedgwick on Damages, 245, 246; Adams Expr. Co. v. Egbert, 36 Pa. 360; Fleming v. Beck, 48 Pa. 309; Griffin v. Colver, 16 N. Y. 489, were relied on.

"Upon the points that damages must not be speculative; that profits are only recoverable when they are reduced to a certainty, and that the opinions of witnesses, whether expert or

not, are not to be received as to the amount of damages, the following cases were cited: Imp. Coal Co. v. Pt. Royal Coal Co., 138 Pa. 45; Duffield v. Rosenzweig, 144 Pa. 520, 537, also 150 Pa. 543; Bank v. McKee, 2 Pa. 318; Mitchell v. Allison, 29 Ind. 43; Bissell v. Wert, 35 Ind. 55; Schemerhorn v. Tyler, 11 Hun, 551; Cook v. Brockway, 21 Barb. 331; Willcox v. Leake, 11 La. Ann. 178; City v. McMillen, 49 Ind. 493; Van Deusen v. Young, 29 N. Y. 9; Robinson v. Kinne, 1 Thompson & Cook (N. Y.), 60; McGean v. Railroad, 117 N. Y. 219; Avery v. Railroad, 121 N. Y. 31; Atkins v. Railroad, 10 N. Y. Supp. 432; Gilbert v. Cherry, 57 Ga. 128; Railroad v. Varner, 19 Ala. 185: Norman v. Wells, 17 Wend. 137; Lincoln v. Railroad, 23 Wend. 425; Brown v. Railroad, 12 R. I. 238.

"The defendants' counsel cited in support of a proposition that, as the parties had in contemplation at the time the agreement was made the benefits to accrue to the defendants by the building of the houses by the plaintiff within a certain time, the damages arising from the breach were not too remote: 6 Am. & Eng. Ency. of Law, page 5; Fleming v. Beck, 48 Pa. 309; Coal Co. v. Foster, 59 Pa. 365; Rogers v. Bemus, 69 Pa. 432.

"In Fleming v. Beck, Judge AGNEW, in delivering the opinion of the court, said: 'There is no error in the charge that loss of profits, as consequential damages, could not be recovered,' and after stating the facts of the particular case before him, he goes on as follows: 'Mr. Sedgwick, in his work on Damages, page 78, says: "Both the English and American courts have generally adhered to the denial of profits as any part of the damages to be compensated, and that whether in cases of contract or tort." He further says: "Independent, however of all authority, I am satisfied upon principle that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community," the reasoning for which he then proceeds to give. The same doctrine is stated in 2 Parsons on Contracts, 458, 459. I think the rule in such cases is well stated in the case of Hadley v. Baxendale, 9 Exch. Rep. (26 Eng. L. & E. 398). There ALDERSON, B., says: "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect

to such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."'

"The inference of the defendants' counsel from this rule that Mr. McConaghy could fairly be inferred to have had in his mind at the time he made the contract that if he did not build houses within a year he would be chargeable with a large part of the cost of carrying Messrs. Pemberton & Co.'s building operation is hardly reasonable.

"In the case of the Pittsburg Coal Co. v. Foster et al., 59 Pa. 365, the plaintiff contracted to furnish the defendant, on the 1st of February, an engine to draw coal cars on a track of unusual width; the engine was not delivered until May; the defendant gave evidence that an engine for such track could not be hired, and that he had to transport his coal by horses. In that case it was held that evidence of the difference of cost of transportation between horse power and by the engine during the delay on the part of the defendant was admissible on the question of damages. Judge AGNEW, delivering the opinion of the court, says: 'The true inquiry which arose under these circumstances, was whether the damages thus claimed were the necessary consequence of the failure to perform the contract in time, and whether they were presumptively in the view of the plaintiffs at the time of making their contract to finish and deliver the engine in running order on the defendant's track by the 1st of February. The damages ordinarily recoverable are those necessarily following the breach, which the party guilty of the breach must be presumed to know would be the probable consequence of his failure. The rule is well expressed by STRONG, J., in Adams Exp. Co. v. Egbert, 12 Casey, 364. They must be a proximate consequence of the breach, not merely remote or possible. There is no measure for losses of the latter kind.' And after discussing the rule at considerable length, he says that the loss in the case before him was immediate, and the necessary consequence of nonfulfillment.

"The referee in the present case is unable to reach the conclusion that such damages as were attempted to be proved

before him were even presumptively in the mind of Mr. McConaghy at the time he made his agreement with Pemberton & Co.

"In the case of Rogers v. Bemus, 69 Pa. 432, cited on behalf of the defendants, AGNEW, J., delivering the opinion of the court, while he reversed the court below for excluding evidence of what a mill would fairly have rented for, which the defendants, by their breach of contract to lay foundations had delayed the plaintiffs from operating, restricted the testimony as to damages to that which was the direct result of the neglect and refusal of the defendant to perform his covenant."

Exceptions to referee's report were dismissed by the court.

Error assigned was dismissing exceptions to referee's report.

Pierce Archer, *Elias P. Smithers* with him, for appellants.—The covenant to build within one year, and the covenant to pave and curb the highways, were mutual and dependent covenants. The building was to precede the paving. Time was there of the essence of the contract, and made so by the parties; while as to the paving, it being a matter subsequent to the building, it was not a condition precedent to McConaghy's performance of the whole of his contract before Pemberton's duty began: Thorpe v. Thorpe, Lord Raymond, 662; Wilks v. Smith, 10 M. & W. 355; Mattock v. Kinglake, 10 Ad. & E. 50; Baily v. Clay, 4 Rand. (Va.) 346; Cunningham v. Morrell, 10 Johns. (N. Y.) 204; Shinn v. Bodine, 60 Pa. 182; Schilling v. Durst, 42 Pa. 126.

Plaintiff's covenant to build houses on the lots within one year was a condition precedent to the defendant's undertaking to put in street improvements, and the plaintiff having broken his covenant cannot now recover for a breach of theirs by the defendants: Benninger v. Hankee, 61 Pa. 343; Parshall's App., 65 Pa. 224; Cleveland v. Sterrett, 70 Pa. 204; Carter v. Phillips, 144 Mass. 100; Wilson v. Roots, 119 Ill. 379; Cincinnati etc. R. R. v. Bensley, 6 U. S. App. 115.

John G. Johnson and *Lucius S. Landreth*, *Francis A. Lewis* with them, for appellee.—The covenant by the appellants to do the street paving and curbing, and that by the appellee to

erect buildings, were separate and independent: Anson on Contracts, 2d ed. 379; Mill Dam Foundry Co. v. Hovey, 21 Pick. 417; Long v. Caffrey, 93 Pa. 526; Obermyer v. Nichols, 6 Binn. 159; Quinlan v. Davis, 6 Whart. 169; Fame Ins. Co.'s App., 83 Pa. 396; Brown v. Foster, 51 Pa. 165.

The appellee was not obliged to erect buildings until after the street paving and curbing had been done by the appellants.

Even though there had been an unjustifiable failure by the appellee to build within one year, he was responsible to the appellants by reason thereof only for such damages as wholly resulted therefrom.

There was a failure by the appellant to establish, by legal proof, the fact that they had sustained any damages: Hutchinson v. Snider, 137 Pa. 1; 1 Sedgwick on Damages, secs. 177, 256; Duffield v. Rosenzweig, 144 Pa. 520.

PER CURIAM, May 13, 1895:

The very able argument of the learned counsel for the appellants has failed to convince us of any error in the report of the referee. His report is so well sustained by the treatment he has given of the questions at issue that after a most patient and attentive reading of it in connection with the arguments of counsel, we have reached the conclusion to affirm the judgment upon the findings and conclusions contained in the report.

Judgment affirmed.

Violet A. I. Huston, Appellant, v. Philippa Harrison, The Pennsylvania Company for Insurance on Lives and Granting Annuities, Philippa Harrison, Executrix of the Estate of Teresa L. C. Anderson, and The Fidelity Trust and Safe Deposit Company.

Equity—Evidence—Responsive answer.

Where a bill in equity against the executrix of the estate of plaintiff's mother was filed nearly eight years after the account of the executrix had been adjudicated by the orphans' court, which averred the fraudulent appropriation by the executrix of certain property belonging to the dece-

dent, in which plaintiff has an interest as heir and legatee, and the fraudulent omission to include it in the account; and that the facts alleged in the bill became known to plaintiff only recently before filing the bill, and the answer of defendant directly and explicitly denied the averments of fraud in the bill, and claimed ownership of the property by the defendant, the burden is on the plaintiff to meet the responsive answer and overcome it with two witnesses, or with one witness and corroborative circumstances.

Argued April 12, 1895. Appeal, No. 272, Jan. T., 1895, by plaintiff, from decree of C. P. No. 4, Phila. Co., Dec. T., 1892, No. 610, dismissing bill in equity. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Bill in equity for an account.

The case was referred to John C. Grady, Esq., who reported as follows:

"FINDINGS OF FACT.

"1. The defendant, Philippa Harrison, was first married in England to a sea captain, named George Dani, who died Nov. 28, 1856. Dani left several properties in Brunell street, Liverpool, and some shares of stock in the Royal Insurance Company. Prior to his death Teresa L. C. Francis, (afterwards Teresa L. C. Anderson mentioned in the bill,) who was a niece of the defendant, Philippa Dani, lived with her in England. Dani having died, his widow married in England John Harrison, in April, 1858, and shortly afterwards they, with Miss Francis, removed to Philadelphia. For a while the Harrisons conducted a saloon or tavern on Twentieth street, below Callowhill street, until about 1860, when they opened a cloak store at No. 20 South Eighth street. Afterwards, in 1863, the business being prosperous, the Harrisons established another store at No. 60 North Eighth street under the name of Francis & Co., in which Miss Francis was stationed with other girls as a saleswoman. The manufacturing, however, was done at the lower store, and it was clearly established by the testimony that Miss Francis was not interested in the business, except as an employee, her name being used merely as a device to keep the customers from suspecting that the two establishments were in reality but one.

"About three years afterwards, in 1866, Miss Francis married Oliver H. Anderson, a house painter by trade, who, for

awhile, followed his business as a journeyman, but shortly fell into dissolute habits which caused him to leave the home of the Harrisons with whom he and his wife had continued to reside. Mr. and Mrs. Anderson had two children, Clara, born Nov. 25, 1866, married Harry R. Stoops, April 30, 1890; and Violet, the complainant, born in 1870, and married W. M. Huston, in March, 1886. Mrs. Anderson continued to live with Mrs. Harrison until her death, in December, 1883, and her children continued to live with Mrs. Harrison, who assumed their education and care, until their respective marriages. Anderson himself died in 1888, but it appears had not supported his family for many years.

"About 1870 the health of John Harrison, the head of the entire establishment, began to fail. In 1871, the Harrisons disposed of the upper store, 60 North Eighth street, to Mrs. Bush, and in 1872 they disposed of the lower store, 20 South Eighth street, to Mr. Marter, and retired from business with a handsome competency. In the following year the entire family went to England and lived abroad until 1876, when they returned to Philadelphia and resided here until John Harrison's death, April 28, 1882. His will was dated in England as far back as 1862, apparently at the time of his visit to obtain funds with which to establish the store at 60 North Eighth street. In it he made his wife, Philippa Harrison, executrix and tenant for life of his personal estate, and at her death bequeathed it to Mrs. Anderson for her life, then to her children. His personal estate was inventoried at $134,014, and did not include any of the bonds or securities now in dispute. On the day following the probate of the will, Mrs. Harrison appointed The Pennsylvania Company for Insurances on Lives and Granting Annuities her agent for the collection of the income.

"Mrs. Anderson was about twelve years younger than her aunt, Mrs. Harrison, who is now about sixty-seven years of age. In 1882 their respective ages were therefore about forty-three and fifty-five years. Mrs. Anderson was not only younger, but better educated and more accustomed to writing than Mrs. Harrison, and for some time had been in the habit of attending to the business matters of the whole family. John Harrison for a number of years had rented a box in the safe deposit vaults of the Pennsylvania Company for Insurances on Lives and

Granting Annuities, in which were kept not only his own securities, but also those of his wife and those belonging to Mrs. Anderson; and also the $7,000 of City Loan and other registered securities in the name of himself and Mrs. Anderson as trustees for the latter's children.

"Toward the close of his life the active management of affairs was surrendered to Mrs. Anderson, who, together with Mrs. Harrison, had the right of access to the said deposit box. Of this right Mrs. Anderson did not avail herself until March 25, 1880, when she began collecting the coupons. Except in this way, Mrs. Anderson never had possession of the bonds.

"Shortly after Mr. Harrison's death, his widow, accompanied by Mrs. Anderson and the two children, sailed for Europe, having first arranged with the Pennsylvania Company for Insurances on Lives and Granting Annuities to collect and remit the income of nearly all the securities in the box. On a certain day it appears that Mrs. Anderson arranged the details with Mr. Jarvis Mason, trust officer of the Pennsylvania Company for Insurances on Lives and Granting Annuities, and gave him instructions for remittance in a written paper prepared by Mr. Mason, dated June 6, 1882.

"Mrs. Harrison expected to be absent four years, so four years' or four and one half years' coupons were cut from most of the securities belonging to Mrs. Harrison, and a power of attorney was given by Mrs. Anderson for the collection of the interest upon certain securities registered in her name, including those held in trust for her children. Mrs. Harrison also executed powers of attorney for the collection of interest upon the securities of John Harrison's estate, to which she was entitled for life.

"During her stay abroad Mrs. Harrison was in negotiation with the heirs at law of her husband, whose will disposed only of his personal estate. Considerable correspondence on the subject passed between Mrs. Harrison and her counsel, E. Cooper Shapley, Esq., in which Mrs. Anderson, as usual, acted as her amanuensis and assistant.

"Mrs. Harrison, Mrs. Anderson and the children remained abroad, however, but a little over a year, returning in September, 1883. Shortly afterwards Mrs. Anderson died, on Dec. 2,

1883, leaving a will dated June 9, 1882, drawn by Mr. Shapley, in which she devised a property in Asbury Park to Mrs. Harrison for life; bequeathed an annuity of $300 per annum to her husband, and the residue to the Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustee for her children. She also directed that Mrs. Harrison should take care of her daughters during their unmarried minority. Mrs. Harrison was appointed executrix of the will, and letters were issued to her. The first visit she made to the safe deposit box after Mrs. Anderson's death was on Dec. 10, 1883, when she took with her the two grandnieces, who were then seventeen and thirteen years of age. Their care, education and maintenance devolved upon Mrs. Harrison, who, having no children of her own, looked upon them as fully supplying the place. They were liberally educated, clothed, and well provided for, until, and in a measure in the case of Clara, for some time after their marriage.

"In 1885 Mrs. Harrison filed her account upon the petition of Oliver H. Anderson, the husband of Mrs. Teresa L. C. Anderson, who had been separated for some years but was entitled to a small annuity of $300, under the will. The account was prepared by E. Cooper Shapley, Esq., and in it the accountant charged herself with $12,500, the amount of the inventory, but claimed no credits, adding in place of the usual credits the following 'memorandum.—Inasmuch as any deductions for payments or charges would affect the amount eventually due the daughters of the decedent, the accountant has entered nothing on the debit side of the account.'

"The husband of the decedent, who was represented by counsel, endeavored to surcharge the accountant and the audit adjourned for the purpose of allowing the accountant to file a supplemental account, which took the form of an agreement between the parties to a surcharge of one registered bond of the city of Pittsburg, $1,000, and a deposit in the Philadelphia Savings Fund of $456.05. Mr. Anderson was paid the arrears of his annuity and the balance was paid over to the trustee.

"In reference to this surcharge the master, after an examination of the record of the orphans' court and the testimony taken at the audit, is not surprised that the accountant, either from a well grounded belief that the items of surcharge actu-

ally belonged to her, or from a bona fide lack of knowledge that they did not, failed to include them in her account.

"The record shows that the account was adjudicated by the orphans' court and in due time confirmed absolutely.

"The city loans held in the names of John Harrison and Teresa Anderson for Clara were duly transferred to the Pennsylvania Company for Insurances on Lives and Granting Annuities as substituted trustee shortly after Clara came of age, and the loan held in trust for Violet was also transferred to the Pennsylvania Company for Insurances on Lives and Granting Annuities as trustee shortly after her marriage. The latter event, which took place in March, 1886, removed Violet from Mrs. Harrison's household. The marriage was a clandestine one without Mrs. Harrison's knowledge or consent, and was the first interruption of the domestic harmony.

Clara, in 1890, married Harry R. Stoops. Since her mother's death Clara had been accustomed to attend to Mrs. Harrison's business for her, and Mr. Stoops even before his marriage advised with Mrs. Harrison as to investments, made purchases of securities and was given powers of attorney for the collection of interest. This relation between Mrs. Harrison and Mr. and Mrs. Stoops continued until June, 1892, when a dispute arose between them as to the $34,000 City of Cincinnati bonds. Upon Nov. 2, 1892, Mrs. Harrison filed a bill in equity against Mrs. Stoops and the Fidelity Ins. Trust & Safe Deposit Co. in the court of common pleas No. 1, as of September term, 1892, No. 638, where she alleged that, reposing special confidence and trust in her grandniece, Clara H. Stoops, the complainant nominated and appointed her deputy or agent, which gave her full and free access to and control over the contents of her safe deposit box in the Fidelity Insurance, Trust and Safe Deposit Company; that in said box, among certain other papers and securities were the $34,000 City of Cincinnati 7 3-10 per cent coupon bonds belonging to the complainant, and that, afterwards, without the knowledge or permission of the complainant, the said Clara H. Stoops rented another box in her own name, in which she placed these $34,000 bonds, refusing the said Philippa Harrison a key to the same.

"The answer of Clara H. Stoops admits that she rented a box of the Fidelity Insurance, Trust and Safe Deposit Com-

pany, and that she deposited the said bonds therein; but denied that they belonged to the complainant and claimed that she, the defendant, was the owner and had been the owner since June 15, 1888, by gift, from the complainant. She also admits that she retained the keys of the box and refused access thereto to the complainant. This bill is yet pending.

"Shortly afterwards, on Jan. 15, 1893, the present bill was filed by Violet A. I. Huston.

"II. The master now proceeds to the determination of the disputed ownership of the bonds mentioned in the bill. The contention of the plaintiff is based chiefly upon the memorandum or letter of instructions drafted by Mr. Mason and signed by Mrs. Anderson, dated June 6, 1882.

"By this letter the Pennsylvania Company for Insurances on Lives and Granting Annuities is directed to collect, under powers of attorney to it given, the interest from certain loans registered in the name of Mrs. Anderson, and also to collect 'the interest coupons which I have cut from the following bonds, and deposited with them to hold for my account.'

"As before stated, this arrangement was made just prior to the departure for Europe of Mrs. Harrison and Mrs. Anderson and the children, in order to provide for remittances during a contemplated absence of four years.

"After a careful consideration of the testimony the master is clearly of opinion that in making this arrangement with Mr. Mason, Mrs. Anderson was not acting for herself alone, but for Mrs. Harrison and the whole family in preparation for a sojourn abroad. The memorandum standing by itself is not sufficient to prove ownership in her, even if it were distinctly intended as a claim of title, as it would be merely a declaration by Mrs. Anderson in her own interest in the absence of Mrs. Harrison. But the master believes, and so finds, that this was unintentional on Mrs. Anderson's part, for it seems plain enough that her whole mission and object was to have the income collected from their joint securities in one agreement, and that she never intended to claim ownership or provide a pretext for litigation against her aunt, because, to the credit of both of them, there is no evidence of any quarrel or misunderstanding. The paper was drawn by Mr. Mason from a mere memorandum furnished him of the securities, and Mr. Mason's own impression was that Mrs. Anderson was acting for Mrs. Harrison.

"It was most conclusively shown that Mrs. Anderson acted as agent and amanuensis for Mrs. Harrison in all her other business matters. Not to multiply instances, it is impossible to read the correspondence between Mr. Shapley and Mrs. Anderson, and the letters which the latter wrote to Mr. Mason without seeing that she was accustomed in speaking of Mrs. Harrison's business and property to use the first person without the slightest apparent intention of causing any confusion of proprietorship. Mrs. Anderson used to write the letters, and sometimes Mrs. Harrison would sign them; sometimes Mrs. Anderson would sign them for her.

"Thus, for example, Mrs. Anderson wrote to Mr. Shapley July 25, 1882: 'Aunt wishes me to say will you be kind enough to get the house appraised [for collateral inheritance tax] as soon as you can, as she wishes it all settled up as early as possible, and please do it as reasonable as you can, as *I* shall have to stand the expenses.' And in Mrs. Anderson's letter she says, in speaking of the buying out of the shares of the collateral heirs of John Harrison in the Spring Garden street house, 'I am going to give them ten thousand dollars for a clear title.' Exhibit 26, signed by both Mrs. Harrison and Mrs. Anderson, the latter writes, again in reference to the proposed conveyance, 'I hold the reins in my hands, and I can do as I like,' etc. 'I thought my marriage settlement was lost or destroyed,' etc. 'My husband sold out my bonds, and with that money he bought the house,' etc. And 'I will not sell the house, and do not want to pay them a dollar.' All through her correspondence Mrs. Anderson identified herself completely with her aunt Mrs. Harrison, and used the '*I*' and the '*my*' with a perfectly innocent intention.

"No doubt is left in the master's mind that Mrs. Anderson was acting and writing as the 'business man' of the family.

"The complainant was not able to show that Mrs. Anderson was in fact possessed of the securities in dispute, or indeed of any property other than that accounted for by her executrix. Some city directories were produced to show that Mrs. Anderson was a partner of Harrison at the upper store, 60 North Eighth street, which store was conducted under the name of Francis & Co. This, however, as a mere ex-parte compilation of names is not competent evidence of the fact of partnership;

and, moreover, the entries in the directory are not invariable, most of them omitting the name of Terella Francis altogether. But the evidence produced by the defendant leaves no doubt in the mind of the master that the business name of Francis & Co. was only a trade artifice, and that Mrs. Anderson was merely a 'saleslady' or employee, differing only from the other employees in that she was a member of the Harrison household. It did not appear what salary she received, if any, but the other girls in similiar positions did not receive more than $10.00 a week.

"The question of this alleged partnership the master regards as important in the determination of the case. The burden of proof was, of course, upon the complainant, who averred that Mrs. Anderson was possessed of this large estate, to prove the fact, and the question of its derivation naturally arose. Her husband was intemperate, and contributed but little, if any, of his earnings as a house painter to his wife, and that she derived nothing from her family clearly appears from the evidence of her sister, Mrs. Beach, Where, then, did Mrs. Anderson derive this fortune? In answer to this pertinent inquiry, the complainant attempted, as stated, to show upon the authority of a few entries in the old city directories that Mrs. Anderson was a partner in the business.

"The defendant, on the other hand, produced a large number of witnesses who clearly proved that Mrs. Anderson was not a partner, but simply an employee, and so far from being wealthy in her own right, was all her lifetime dependent on the bounty of Mrs. Harrison, her aunt.

"The master will refer briefly to the testimony on this head. Thus, G. W. Marter, one of the complainant's own witnesses, said (p. 136) that Mrs. Anderson told him that she was simply a saleslady. Mr. Marter's father was the purchaser of one of Harrison's stores in 1872, and was especially interested, as he said, in ascertaining the fact. J. C. Hutchins, another of complainant's witnesses, who knew the Harrison family since 1862, and whose store on Eighth street was next door, testified that Mrs. Anderson was a saleslady. Mrs. Gardeicke, who was an employee at the store and knew Mrs. Anderson like a sister said she was only a saleslady. Michael A. Durrell, Mrs. Mary W. Asay, Mrs. Isabella Neely, who were all co-employees with

Mrs. Anderson and knew her well, testified positively to the same effect; and Mrs. Eveleth, who acted with her mother, Mrs. Bush, in purchasing the lease of No. 60 North Eighth street, testified that Mrs. Anderson did not conduct herself as a partner.

"In addition, Mr. Edwin R. Hawkins, Theodore Wernwag, Henry M. Steel, Aaron DeWald, D. W. Chambers, David M. Chambers, and Edward Brown, who were old business friends and associates of Harrison, testified that Mrs. Anderson was not known as a partner or reputed as such.

"The learned counsel for the complainant moved to strike out this testimony, but the master regarded it as cumulative and corroborative of the fact, and therefore refused the motion.

"And finally, Mrs. Susan C. Beach, a sister of Mrs. Anderson, testified, emphatically, that Mrs. Anderson was not a partner in the business. She was not only qualified to know by reason of her relationship, but she was also employed as a saleslady herself in the store.

"It is true that the upper store was run in the name of Francis & Co.—Francis being the middle name of Mrs. Anderson. But it would be rash to infer from that circumstance that Mrs. Anderson was a partner, even if it were not so clearly explained by the witnesses, Mrs. Gardeicke, Mrs. Asay, Mrs. Neely, and Mr. Durell, who were employees of the establishment, testified that this was but 'a trick of the trade,' frequently practiced where two or more retail establishments were under the same management, and Mrs. Anderson frequently spoke of the arrangement as having been made with that end in view.

"The cumulative effect of this mass of disinterested testimony is irresistible, and the master therefore finds as a fact that Mrs. Anderson was not a partner in the business, and that no source appeared from which she could possibly have derived the property in dispute.

"The defendant's evidence, moreover, went much further than this. She not only showed that it was impossible that Mrs. Anderson could have accumulated the large fortune claimed in the bill, and that during her lifetime she never claimed an estate of such magnitude, but it was shown that Mrs. Anderson herself stated, shortly before her death, the amount of her savings corresponding to the sum actually

accounted for by her executrix. Mrs. Gardeicke was one of Mrs. Anderson's most intimate friends, beginning at the time of her employment as a saleslady at the upper store with Mrs. Anderson; was so intimate with her as to be bridesmaid at her marriage; visited her socially during her business career, and at times afterwards, considering herself almost as one of the family, particularly at a very important time in Mrs. Anderson's latter days, when she was considering a proposition to live with her husband. From this testimony it is not doubtful that if Mrs. Anderson had really possessed this alleged estate she would have accepted her husband's proposition; but as the income from $15,000 would not, in her mind, after maintaining a home including her husband, leave sufficient to defray the expenses of her daughters' education, she decided to remain with the Harrisons. How important then is Mrs. Gardeicke's testimony.

"'Q. You were, of course, employed on a salary yourself? A. Oh, yes! and I always understood that Mrs. Anderson was; she always told me that she had a salary, but she never told me just how much she had. Q. Do you remember any conversation with Mrs. Anderson as to the amount of money which she had saved? A. Oh, yes! I distinctly remember one day she came down to my house; she was quite sad that day; and we had a conversation with regard to her staying with Mrs. Harrison. I believe Mr. Anderson wanted her to come and live with him. Q. Did they live together at the time? A. Oh, no! and I advised her to go with Mr. Anderson, and we had a long conversation about it, but she did not think she could afford to go with Mr. Anderson because her aunt would disinherit her.'

"And again: 'Q. Did you then have any conversation with Mr. Anderson at that time relative to her property? A. Well, at that time I advised her to go with Mr. Anderson, and I asked her how much money she had when she said she could not afford to go. I said, "Have you not enough to live on?" and she said, "No." "Well," I said, "Terella, how much have you got?" She told me she had only $15,000, and I said, "Well, that is enough to get bread and butter, and I would go, and I think Mrs. Harrison will forgive you; it will be all right after a while." Q. What did she reply to that? A. She said no;

her children had to be educated and she could not educate them as she wanted them educated.'

"That conversation occurred in 1882.

"And, again, in Mrs. Gardeicke's testimony, Mrs. Anderson is quoted as saying, 'She told me repeatedly she had no one to thank but her aunt, Mrs. Harrison.'

"The probabilities of the case are on other grounds strongly with the defendant. Thus, it seems incredible that Mrs. Anderson's husband, the father of complainant, should not know the existence of his wife's fortune, and if he possessed that knowledge how strange it is that its existence should not have been disclosed at the time in order that he might be entitled to a third of the fortune instead of $300 a year. He was represented by counsel and was endeavoring to get all he could. Mr. Anderson and his wife had lived together at the Harrisons' home when business was prosperous and money-making. It is not easy to believe that he did not understand their affairs. He must have had knowledge of the condition of his wife's finances, but neither he nor any one else seems to have considered her wealthy.

"Again, the conduct of Mrs. Harrison is not easily reconcilable with the complainant's theory of the case. According to this, Mrs. Harrison, as soon as her niece, Mrs. Anderson, died, took possession of a large estate, appropriated it and the income thereof to her own use, concealed her fraud from her innocent victims, and for years has been leading a life of fraud, treachery and hypocrisy. On the contrary, the first visit made by Mrs. Harrison to the safe deposit box after Mrs. Anderson's death was about one week thereafter on December 10, and she was accompanied by both her grandnieces; and on the 18th of the month she appointed Clara her deputy on the books. Ever afterwards Clara took her mother's place as assistant or agent, and even before her marriage to Mr. Stoops, the latter was accustomed to collect her interest and make her investments. She consulted Mr. Stoops about her deed of trust before she made it, and he himself testified he handled all of the estate. It is hardly possible that Mrs. Harrison, if engaged in the perpetration of a fraud, should have selected as her agents and confidants the persons most of all concerned to prevent it.

"Again, when Mrs. Harrison filed her account she claimed

no credits or commissions because she did not wish to diminish the daughters' inheritance. If her object was avaricious, she might easily have claimed the usual allowances. This account, as well as Mrs. Anderson's will, was prepared by E. Cooper Shapley, Esq., a careful and highly reputable member of the bar, who had no idea he was innocently assisting in the perpetration of a gross fraud.

"So, too, it was established by the testimony that Mrs. Anderson and her daughters were supported by Mrs. Harrison and treated with great indulgence. It is hardly likely that a woman possessed of such a large estate would be supported in this way or consent to live upon the bounty of another.

"It not only appears from what has been said that Mrs. Anderson was not possessed of any independent fortune and had no more than what was derived from the savings of her wages and gifts from Mrs. Harrison, but it further appears to the satisfaction of the master that Mrs. Harrison had means of her own independent of her husband. It was testified to by numerous witnesses that Mrs. Harrison derived a not inconsiderable estate from her first husband, Dani, which was used either as capital in the business, or lent to her husband. According to Mrs. Gardeicke's testimony, it was a generally known fact, and Mrs. Anderson had always said so. Mr. Durell, another employee, testified that Mrs. Anderson told him Mrs. Harrison had lent her husband the money. Mrs. Asay, to the same effect. Mrs. Anderson herself in her letter to Mr. Shapley states that the house was bought with Mrs. Harrison's money. H. H. Brown testified that Mrs. Anderson told him she brought Mrs. Harrison's money to America because it could be used to better advantage. Mrs. Beach to the same effect. The latter, who was a sister of Mrs. Anderson, said, 'My Aunt Philippa had property in England left her by her first husband. About the time that the premium on gold was three for one of green backs, my sister Teresa (Mrs. Anderson) went to England and disposed of some of the property and brought the money back to Philadelphia. The amount I do not know, or the amount for which the property was sold. The money she brought back was put into the business conducted by John Harrison. Whether the money was given or lent I do not know.'

"The amount of Mrs. Harrison's separate estate did not ap-

pear with exactness from the testimony. A good deal was said about a marriage settlement made between Mr. and Mrs. Harrison at the time of their marriage, and some of the witnesses testified to a portion at least of its contents as tending to show what property belonged to Mrs. Harrison. This marriage settlement was claimed to have been lost, but the counsel for the complainant moved to strike out all the testimony relating to it on the ground that its loss or destruction did not sufficiently appear from the evidence to enable secondary evidence to be given. In the opinion of the master it matters but little whether it is stricken out or not. Although secondary and perhaps defective, yet it is probably the best the defendant could secure, as she was herself incompetent and not permitted to testify as to matters occurring before Mrs. Anderson's death. However, it is sufficiently demonstrated otherwise, and the master finds as a fact that Mrs. Harrison's separate estate provided the capital, and so far as the evidence goes all the capital which established both stores on Eighth street, out of which the money now in controversy was derived, while John Harrison contributed his skill and business knowledge which, with the coöperation of his wife, led to the success of the business. The master accordingly, after a careful consideration of the evidence and the probabilities of the case, and the exhaustive arguments of counsel on both sides, is of opinion, and so finds, that the defendant, Philippa Harrison, has shown herself in opposition to the claim of the plaintiff, to be the actual owner of the disputed property.

"There was a further claim made by the plaintiff against Mrs. Harrison which was, strictly speaking, hardly pertinent to the issue, nor in fact raised by the bill. The master, however, will discuss it rather than appear to have passed it without notice.

"It appeared, after Mrs. Anderson's death, Mrs. Harrison, as her executrix, collected the interest upon the securities included in her account until, in accordance with the decree of the orphans' court, she transferred the securities to the trustee under the will. This interest and the interest upon the city loans, etc., registered in trust for Clara and Violet were not included in Mrs. Harrison's account. The defendant has the technical defense that the adjudication of her account was conclusive, and she could not in this proceeding be surcharged with this

interest. But she had also the very substantial defense on the merits that, as it was shown before the master, she had after their mother's death expended far more upon the maintenance, support and education of the children, than she had received from Mrs. Anderson's small estate. Had she filed a strict account, the estate would have been much decreased, and she omitted to do so. The account was filed by Mr. Shapley, as her attorney and under his advice. This claim of surcharge is not made in the bill, but the master has given it careful consideration and reports it to be without merit.

"What has been said substantially disposes of the case upon its merits. There were several other questions argued at length before the master, as to which he begs leave to submit his

"CONCLUSIONS OF LAW.

"First. The burden of proof is upon the complainant to show that Mrs. Anderson at the time of her death was the owner of the securities in question. The usual rule is, that he who asserts ownership must prove it, and the rule is the same in equity as at law: Pusey v. Wright, 31 Pa. 387. The complainant's testimony, in the opinion of the master, has failed to overcome this burden. The agreement is insufficient, because it was not intended to operate as an assertion of ownership; because it was not even written or dictated by Mrs. Anderson, but by a third party; because it was never shown to or seen by Mrs. Harrison and is therefore incompetent to affect her, and because it is explained by a mass of evidence to have been made by Mrs. Anderson in behalf of Mrs. Harrison and to save trouble to her.

"Nor is the burden of proof overcome by Mrs. Anderson's possession of the coupons. At most that would only be proof of the ownership of the coupons, and it would not follow that she was therefore the owner of the bonds from which they were cut. But in fact her possession of the coupons was Mrs. Harrison's possession, as the whole evidence leads to the conclusion that in this matter she was merely an agent so far as Mrs. Harrison's securities are concerned.

"In considering the question of the burden of proof the master has laid no stress upon other considerations which, were it necessary, might be held important. In his opinion,

it should require a very high standard of evidence to prove that after the lapse of ten years an executrix, incompetent herself to testify, has been guilty of gross fraud, embezzlement and perjury. But the master does not think that the complainant has produced sufficient evidence to prove title in Mrs. Anderson, even if the issue were directly between Mrs. Anderson and Mrs. Harrison herself, under circumstances which precluded both from testifying, and if the fact involved were very recent instead of having occurred many years previously.

"Second. In respect to the effect of the answer as responsive to the bill.

"The bill alleged that certain property belonged to Teresa L. C. Anderson, and charges that the defendant as executrix of Mrs. Anderson fraudulently misappropriated it. The answer in the most direct and explicit fashion denies the charge and avers that the ownership of the securities is in the defendant, Mrs. Harrison. The burden of proof was on the complainant to meet the responsive answer and overcome it with two witnesses or one witness and corroborative circumstances. This, in the master's opinion, the complainant has failed to do. Even if the Mason agreement of June 6, 1882, be considered as a corroborative circumstance or consistent with Mrs. Anderson's ownership of the bonds, yet there is not the testimony of a single witness to show that Mrs. Anderson was the owner of them. On the contrary the evidence of the witnesses is the other way.

"It is not necessary for the master to enter into any exhaustive review of the cases upon this familiar rule of equity. The master, however, refers to Eberly v. Groff, 21 Pa. 251, where the answer denied, as in this case, the fraud charged in the bill; and also to Eaton's App., 66 Pa. 483, and the cases which follow it: Rowley's App., 115 Pa. 150; Priestley's App., 127 Pa. 420; Bell v. The Bank, 131 Pa. 318, and particularly Cresson's App., 91 Pa. 168.

"The master thinks that the rule applies in this case, and reports that the bill should, if only for this reason, be dismissed.

"Third. It was urged by the learned counsel for the complainant that Mrs. Anderson was shown to have been in possession of the bonds in dispute, and that this fact of possession settled the question of title or ownership. Under certain cir-

cumstances possession is undoubtedly prima facie evidence of title, but the evidence in this case removes it from the class of cases to which the learned counsel refers. It is evident from a consideration of the circumstances attending the possession of these securities by Mrs. Anderson that she was merely acting as the agent for Mrs. Harrison, and that she was prevented by the fiduciary relation which undoubtedly existed from acquiring by means of such possession or right to handle the securities any adverse title. It shows that Mrs. Anderson had not the possession of these bonds except as representing Mrs. Harrison.

"Fourth. The defendant raised the question of the jurisdiction of this court, claiming that Mrs. Harrison, as executrix, was accountable only in the orphans' court. Her counsel referred to several cases in support of this proposition, but as the case was heard and argued upon its merits the master prefers to decide it in the same manner. The defendant also argued the similar proposition, that the account of Mrs. Harrison being a final account, and having been adjudicated and confirmed as such, was conclusive.

"In support of this were cited Weiting v. Nissley, 6 Pa. 143, and Helfenstein's Est., 135 Pa. 300. These cases appear to the master to sustain the defendant's position. The account purported to be a final account, and the adjudication thereof is a final decree. There were no exceptions and no appeal. It is now too late for a bill of review in the orphans' court under the act of Oct. 13, 1840 (Br. Purdon, 447), and the decree is conclusive. The account is regular on its face, is upon a subject-matter over which the court had jurisdiction, and if this executrix, who has settled her account, had the same adjudicated and confirmed, and paid over the balance ascertained to be due, is to be compelled after the lapse of years to state a new account as a defendant in a bill in equity, no executor or administrator can consider himself finally relieved from responsibility.

"The master, however, having fully considered the case upon its merits, does not think it necessary to pass upon this question, as the parties desired a decision upon the merits.

"The parties to the case agreed that the stenographer's charges should be taxed as part of the costs, and it was subse-

quently agreed that the amount should be $250, of which each party has advanced one half. The master, upon the conclusion of the testimony and argument, requested the counsel for the parties to agree upon the amount of his fee as examiner and master in the cause. They reported to him that they were unable to agree upon the amount, and the master is therefore obliged to fix a sum which should be proper under all the circumstances. The examiner and master began to hold his meetings on March 27, 1893, and held over thirty meetings. The testimony was taken stenographically and the type-written notes number some 500 pages. Five meetings were held for argument which was concluded May 22, 1894. In view of the large amount of testimony, the importance of the questions involved in the case, and the labor and attention bestowed by the master upon it, he considers that a fee of fifteen hundred dollars is a proper one under all the circumstances, and he fixes that amount.

"Upon the question of the liability for costs the master sees no reason for departing from the usual rule, that they shall be imposed upon the unsuccessful party to the litigation. The defendant, in the opinion of the master, has not acted with any fraudulent intent and has been subjected to the expense and annoyance of defending a claim devoid of merit. The master thinks that the costs of the suit should be paid by the party responsible for it."

Exceptions to the master's report were overruled, and a decree entered dismissing the bill.

Errors assigned were in overruling the exceptions and dismissing the bill.

John Walker Shortledge and *Thomas R. Elcock*, for appellant, cited as to the insufficiency of the master's findings, Worrall's App., 110 Pa. 362; Rhoades' App., 161 Pa. 549; Gaines v. Brockerhoff, 136 Pa. 195; Kutz's App., 100 Pa. 79.

As to Mrs. Harrison's ownership of the securities, McDermott's App., 106 Pa. 366; Wormley's Est., 137 Pa. 109; Parvin v. Capewell, 45 Pa. 93; Herr's App., 5 W. & S. 494, 499.

As to the insufficiency of the evidence, Kittel's Est., 156 Pa. 449; Phillips' App., 68 Pa. 138; Holland v. Kindregan, 155 Pa. 158.

As to jurisdiction, Delbert's App., 83 Pa. 473; Harrisburg

Nat. Bank's App., 84 Pa. 384; Willard's App., 65 Pa. 267; Ake & Feay's App., 74 Pa. 119; McBride's App., 72 Pa. 484; Odd Fellows S. Bank App., 123 Pa. 364; Marshall's Est., 138 Pa. 300; Watts's Est., 158 Pa. 13; act of Feb. 24, 1834, P. L. 86; Dundas Est., 73 Pa. 481; Gilliland v. Bredin, 63 Pa. 396; Adams's App., 113 Pa. 455; Evans v. Goodwin, 132 Pa. 146; Myers v. Bryson, 158 Pa. 255; Dickerson's App., 115 Pa. 205; Flickwir's Est., 136 Pa. 374; Townsend's App., 106 Pa. 273; Armstrong v. Walker, 150 Pa. 589; Hall's App., 112 Pa. 55; Weiting v. Nissley, 6 Pa. 143; Kuhns's App., 87 Pa. 103.

As to Mrs. Anderson's possession of the securities, Sawtelle's App., 84 Pa. 306; Black v. Nease, 37 Pa. 439; Cumming's App., 153 Pa. 401; Marsden's App., 102 Pa. 202; Miller v. Springer, 70 Pa. 274; Stewart's Est., 137 Pa. 187.

John G. Johnson, *John Marshall Gest* with him, for appellee, cited on the conclusiveness of the master's findings, Mengas' App., 19 Pa. 221; Bull's App., 24 Pa. 286; Dellinger's App., 71 Pa. 425; Packer v. Noble, 103 Pa. 188; Fahnestock's App., 104 Pa. 46; Yohe's App., 55 Pa. 121; Stehman's App., 5 Pa. 413; Bedell's App., 87 Pa. 510; Stocker v. Hutter, 134 Pa. 19; Sharpsburg Borough v. Saint, 6 Cent. Rep. 142; Coulston's Est., 161 Pa. 151; Brotherton v. Reynolds, 164 Pa. 134.

As to the responsive answer to the bill, Everly v. Groff, 21 Pa. 251; Eaton's App., 66 Pa. 483; Pusey v. Wright, 31 Pa. 387; Burke's App., 99 Pa. 350; Cresson's App., 91 Pa. 168; Priestley's App., 127 Pa. 420; Bell v. Farmers' Bank, 131 Pa. 318.

As to estoppel, Malone's Est., 8 W. N. C. 179; Miller's App., 84 Pa. 391; Eichhorn's Est., 24 W. N. C. 364; King's Est., 12 W. N. C. 109; McDermott's App., 106 Pa. 358.

PER CURIAM, May 13, 1895:

An examination of the master's report in this case, and a careful reading of the testimony in connection therewith, convinces us beyond question that the findings of fact contained in the report are fully sustained by the evidence. The plaintiff's case is entirely devoid of merit, and we affirm the decree of the learned court below upon the conclusions and findings of the master and upon the reasoning contained in the report, the costs of this appeal and all other costs to be paid by the appellant.

Geraldine H. Hickok, Appellant, *v.* Albanus C. Still, Trustee, etc.

Trusts and trustees—Power of sale.

A trustee cannot be permitted to deprive himself of a power conferred upon him for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust.

Testatrix by her will directed as follows: "I authorize and empower my executor at any time during the lifetime of my husband with his assent, and I direct him immediately upon the decease of my said husband, or so soon thereafter as may be, to sell the whole or any part of my real estate for cash, upon credit or ground rent," etc. On Oct. 20, 1890, the executor who was also the husband agreed with the plaintiff as follows: "That if Geraldine H. Hickok desire to become a purchaser of that piece of ground or land, with house and appurtenances thereon . . . . —of which she is now lessee and occupier—at any time during her leasing of the property she may do so for the sum of nine (9) thousand dollars, to be paid as follows," etc. The plaintiff was then in possession under a lease from the executor which did not end until May 1, 1894. The husband died on Feb. 13, 1892, and on Dec. 3, 1893, plaintiff notified the administrator d. b. n. c. t. a. of her intention to purchase under the agreement. *Held*, that she was not entitled to a specific performance of the contract.

The vice of the agreement was that it bound the trust estate no matter what the detriment to it might be, without giving it any corresponding advantage. This was not a use of the power, but a surrender of it for the time. It suspended the exercise of the discretion which had been given the executor and defeated the direction in the will for an immediate sale upon the husband's death.

Argued Jan. 29, 1895. Appeal, No. 5, Jan. T., 1895, by plaintiff, from judgment of C. P. No. 2, Phila. Co., March T., 1894, No. 1028, for defendant, on case stated in equity. Before GREEN, MCCOLLUM, MITCHELL and FELL, JJ. Affirmed.

Case stated in the nature of a bill in equity for specific performance.

The facts appear by the opinion of the Supreme Court.

Error assigned was in dismissing plaintiff's bill.

George Stuart Patterson, for appellant.—This contract of sale was a valid exercise of the power of sale given the exec-

utor under the will: Jones v. Wood, 16 Pa. 25; Lancaster v. Dolan, 1 Rawle, 231; King v. Merritt, 67 Mich. 194; Demarest v. Ray, 29 Barbour, 563; Ex parte Huff, 2 Pa. 227; Shippen v. Clapp, 29 Pa. 265; Corson v. Mulvany, 49 Pa. 88.

There are no American authorities, so far as the counsel for the appellant knows, which impeach the validity of such a contract. There are two English cases, however, which may be urged on behalf of the position of the appellee: Clay v. Rufford, 5 De Gex & Smale, 768; Oceanic Steam Navigation Co. v. Sutherberry, L. R. 16 Ch. Div. 236. These however may be distinguished.

A court of equity will grant specific performance of the contract: Cathcart v. Robinson, 5 Peters, 263; Marble Co. v. Ripley, 10 Wall. 339; Franklin Tel. Co. v. Harrison, 145 U. S. 459; Corson v. Mulvany, 49 Pa. 88; Smith's App., 69 Pa. 474; Childs v. Gillespie, 147 Pa. 173; Green v. Low, 22 Beavan, 625; Weeding v. Weeding, 1 J. & H. 424; Moss v. Barton, L. R. 1 Eq. Cases, 474; Mills v. Haywood, L. R. 6 Ch. Div. 196; Nicholson v. Smith, L. R. 22 Ch. Div. 640; Mortlock v. Buller, 10 Vesey, 292; Ord v. Noel, 5 Maddock's Ch. Rep. 266; Goodwin v. Fielding, 4 De G. M. & G. 90; Dykes's Est., L. R. 7 Eq. 337; King v. Roney, 5 Ir. Ch. Rep. 64; Dowell v. Dew, 1 Y. & C. C. C. 345.

John G. Johnson, for appellee.—The agreement executed by Charles Still, Jr., executor, was not a valid exercise of his power to sell: Clay v. Rufford, 5 De Gex & Smale, 768; Oceanic Steam Navigation Co. v. Sutherberry, L. R. 16 Ch. Div. 236.

A decree enforcing specific performance of the agreement executed by Charles Still, Sr., would not be in accordance with the principles of equity: Fry on Specific Performance, sec. 389; Perry on Trusts, vol. 2, sec. 787.

Opinion by Mr. Justice Fell, May 20, 1895:

The case stated is intended to take the place of a bill in equity to enforce the specific performance by the defendant of a contract for the sale of real estate made by his predecessor in the trust. The primary question is whether the agreement entered into by Charles Still as executor was a valid exercise

of the power of sale conferred upon him by the will of Sarah K. Still. The power given is in these words: "I authorize and empower my executor at any time during the lifetime of my husband with his assent, and I direct him immediately upon the decease of my said husband, or so soon thereafter as may be, to sell the whole or any part of my real estate for cash, upon credit or ground rent" etc. On Oct. 20, 1890, Charles Still, executor, agreed with the plaintiff in writing as follows: ". . . . that if Geraldine H. Hickok desire to become a purchaser of that piece of ground or land, with house and appurtenances thereon . . . . of which she is now lessee and occupier at any time during her leasing of the property she may do so for the sum of nine (9) thousand dollars, to be paid as follows," etc. The plaintiff was then in possession under a lease from the executor, which did not end until May 1, 1894. Charles Still died Feb. 13, 1892, and letters of administration de bonis non cum testamento annexo were granted to Albanus C. Still, the defendant in the case stated, and the appellee. On Dec. 3, 1893, the plaintiff notified the defendant of her intention to purchase under the agreement.

The power conferred is an authority to sell during the life of the husband, and a peremptory direction to sell immediately after his death. As the husband of the testatrix was the executor, and during his life the sole possessor of the power, he might have made a sale deferring the time of settlement. This however he did not do. He did not sell the property, but entered into an agreement with the plaintiff which gave her the privilege of buying at any time within three and a half years. By this agreement she was entirely free; she was not bound to purchase. But he, and in the event of his death his successor in the trust, was bound to sell to no one else during the period fixed. The vice of the agreement is that it bound the trust estate, no matter what the detriment to it might be, without giving it any corresponding advantage. This was not a use of the power, but a surrender of it for the time. It suspended the exercise of the discretion which had been given the executor, and defeated the direction in the will for an immediate sale upon his death. A trustee cannot be permitted to deprive himself of a power conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust.

We do not find that the question involved has been decided in our cases, but it has been considered in two English cases, Clay v. Rufford, 5 De Gex & Smale, 786, and Oceanic Steam Navigation Co. v. Sutherberry, L. R. 16 Ch. Div. 236, which, while differing somewhat in their facts from the one under consideration, are decided upon principles which are fully applicable to it. Although they are against his contention, our notice has been directed to these cases by the learned counsel for the appellant with the highly commendable purpose of aiding the court in the examination of a question which is almost barren of authority.

We are of opinion that the contract made with the plaintiff by Charles Still was not a valid exercise of the power of sale conferred upon him by the will of Sarah K. Still, and the judgment of the court of common pleas is affirmed at the cost of the appellant.

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168 158
222 65 Frederick Rohrbacher's Estate. Ferdinand Hormann's Appeal.

Partnership—Decedents' estates—Specific performance—Option of survivor to buy deceased partner's estate.

Two partners entered into an agreement providing that in the event of the death of either the survivor should have the right to purchase the deceased partner's interest. The agreement provided that bills receivable should be taken by the survivor at their face value, materials in stock at cost, good accounts at a discount of five, and manufactured articles at a discount of ten, per cent. The agreement then continued: "It is agreed that all property . . . . such as lands, buildings (subject to the encumbrances now thereon being three several yearly ground rents) . . . . stationary fixtures of all kinds . . . . patterns, plates, wagons, horses, carriages, and all tools . . . . shall be valued at the sum of Twenty five thousand dollars, and if anyone or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm . . . . then said sum of Twenty five thousand dollars shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises. And if any portion of the premises in the name of the firm shall be sold or encumbered . . . . then said sum of Twenty five thousand dollars shall be reduced in amount the sum realized from the sale or encumbrance thereof." *Held*, that the increase provided for was

that which would result from the extinguishment of ground rents and the purchase of other premises, but it did not include moneys spent on new buildings and additions and improvements to the plant of the firm.

Argued Jan. 30, 1895. Appeal, No. 21, July T., 1894, by Ferdinand Hormann, from decree of O. C. Phila. Co., July T., 1892, No. 20, dismissing petition for specific performance. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Reversed.

Petition for specific performance.

From the record it appeared that Frederick Rohrbacher and Ferdinand Hormann were partners in the business of manufacturing of glassware. On Oct. 2, 1880, an agreement was made between them, that in the event of the decease of either the survivor should have the option of purchasing the business of the firm. The option was to be exercised within fifteen days. The material portions of the agreement were as follows:

"Cash on hand and in bank, bills receivable, the withdrawal value of all building association stock or stocks, all accounts in the ledger that in their judgment may be considered good, deducting from said accounts so marked good five per cent. of their value. All the manufactured ware that may be in stock, deducting also therefrom ten per cent. of the market value of the same. All material in stock or store for which bills have been rendered or received, such as soda ash, sand, lime, lead or litharge or glass makers' materials, and box boards, boxes and barrels for packing, hay or straw, clay, pots &c., rating them all as near as possible to the actual cost thereof, and finally all the liabilities due by the said firm, not including, however, the principal of any ground rent or rents that the property may be subject to. And the parties, after making the aforesaid statement, shall, after the same is concluded and the amount of the assets have been ascertained, deduct the liabilities therefrom.

"And it is hereby further mutually agreed that all property not enumerated or specified in the aforesaid statement, such as lands, buildings (subject to the incumbrances now thereon, being three several yearly ground rents, amounting in the aggregate to the sum of $300.12 per annum), stationary fixtures, boilers, engine, machinery of all kinds and descriptions,

decorating machines and all things belonging thereto, patterns, plates, wagons, horses, carriages and all tools and implements belonging to the manufacture of glass or the different departments in which we are engaged, shall be valued at the sum of $25,000, and if any or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm after the execution of this agreement, then said sum of $25,000 shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises. And if any portion of the premises in the name of the firm shall be sold or incumbered after the execution of this agreement, then said sum of $25,000 shall be reduced in amount the sum realized from the sale or incumbrance thereof."

Rohrbacher died in April, 1892, and, within the fifteen days specified in the agreement of 1880, Hormann notified the executors under the will, in writing, that he would take the property mentioned in the agreement. Mrs. Rohrbacher, as one of the executors, refused to comply, whereupon a petition for a citation to her and to A. J. Weidner, two of the executors, to show cause why an order should not be made upon them to execute and deliver to Ferdinand Hormann, as the surviving partner of the late firm of Rohrbacher & Hormann, a good and sufficient deed of conveyance of premises No. 2657 Salmon street and 2656 Salmon street, was filed in the orphans' court.

In this petition he set forth the fact that he had duly notified the executors of his deceased partner, who were the widow, one A. J. Weidner, and himself, of his determination to exercise the option to take, given to him by this agreement; that a yearly ground rent amounting to $5,452.09 had been caused to be extinguished by the firm; that premises, in addition to those owned at the time of the agreement of 1880, had been purchased for the sum of $2,000; that he had requested the executors to make a deed to him of their testator's share of the said premises upon payment to them of one half of the value of $32,452.09; and that the executors had declined to make this conveyance. He prayed an order on the executors, ordering them to make such conveyance upon payment of one half of the consideration money mentioned in the agreement and of the additional expenditures as aforesaid.

Citation was duly issued to the parties in interest. The widow, as executrix, answered that amounts had been expended, subsequently to 1880, in the improvement and betterment of the partnership property, by additions and alterations, to an amount, exclusive of the sum paid for ground rent extinguishment and for purchase of new property, equal to $16,145, and that she had refused to make the conveyance unless there was paid one half of $48,597.09.

The petition and answer were referred to Joseph Mellors, Esq., as master, who found that an amount had been expended to the extent, and for the purposes, set forth in the answer, and that it was the duty of the petitioner, under the agreement of 1880, to pay one half of this. He reported a decree dismissing the petition. Exceptions, filed to his report, were overruled, and the court in banc dismissed the petition at appellant's cost, FERGUSON, J., filing the opinion of the court.

Error assigned, among others, was in dismissing petition.

Joseph L. Tull and *John G. Johnson*, for appellant.—The circumstances surrounding the parties at the time of making the agreement of Oct. 22, 1880, should be considered: Dubois v. Bigler, 95 Pa. 203; Church v. Clime, 116 Pa. 146; Barnhard v. Riddle, 29 Pa. 92; Gould v. Lee, 55 Pa. 99; Jackson v. Litch, 62 Pa. 451; Real Est. Title Co.'s App., 125 Pa. 549; Koch v. Dunkel, 90 Pa. 264; Everhart v. Dolph, 133 Pa. 640; Warfel v. Knott, 128 Pa. 528.

The subsequent conduct of the parties should also be considered.

We cannot but feel that the court below guessed at an intention of the parties, and failed to interpret their words. It seemed to it unjust that the survivor should take for $25,000 property upon which, after the agreement, an expenditure of some $16,000 had been made. Its duty, however, consisted merely in reading the agreement and in interpreting its words. Courts cannot guess at an intent: Elphinstone on the Interpretation of Deeds, 36; Rickman v. Carstairs, 27 Eng. Common Law Rep. 147; Grey v. Pearson, 6 H. of L. Cases, 104; Abbott v. Middleton, 7 H. of L. Cases, 114; Ex parte Chick, L. R. 11 Ch. Div. 731; Smith v. Lucas, L. R. 18 Ch. Div. 531; Frazier v. Monroe, 72 Pa. 169; Hancock's App., 112 Pa. 541.

The intent of the parties was defeated by the lower court's interpretation: Harbster's App., 125 Pa. 1; Essex v. Essex, 20 Beavans, 442.

J. Henry Williams, for appellees.—Specific performance is not a matter of right, but of sound discretion: Oil Creek R. R. v. Atlantic & Great Western R. R., 57 Pa. 65; Hammer v. McEldowney, 46 Pa. 334; Kisor's App., 62 Pa. 428.

The construction of this agreement should be made by the writing itself.

The age of the contract should have some weight in the consideration of its construction.

The equities are with the appellees.

A contract is to be construed by what it says in the writing itself. And if there be any doubt as to the subject-matter, evidence may be introduced to show what the subject-matter was, but the appellant does not and cannot cite any authority to show that evidence is permitted to explain the meaning of a word. Nor to show that "purchase" does not mean purchase but means to sell. Nor can he show any authority that premises do not mean land and all that is upon it: Book v. Nail Co., 151 Pa. 499; Boyertown Bank v. Hartman, 147 Pa. 558; Zentmyer v. Mittower, 5 Pa. 403.

The findings of a master on questions of fact, approved by the court below, will not be set aside by the Supreme Court, except for error, even where the testimony is conflicting, and the merits may appear contrary to the master's conclusion: Stocker v. Hutter, 134 Pa. 23; Brotherton Bros. v. Reynolds, 164 Pa. 134.

The decree of the court below should be affirmed: Wistar's App., 80 Pa. 484; Maguire v. Heraty, 163 Pa. 381.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

The proceeding in the orphans' court was to require the specific performance of an agreement entered into by the decedent and the appellant. In 1869 Frederick Rohrbacker and Ferdinand Hormann entered into a partnership for the purpose of manufacturing glassware. On October 22, 1880, they made an agreement which provided that in the event of the death of either the survivor should have the option of purchasing the

business. Rohrbacker died in April, 1892, leaving a will made in December, 1880, in which his executors were directed to carry out and fulfill the agreement made with his partner. The option was properly exercised, and upon the refusal of the executors to convey, a petition for a decree for specific performance was presented. This petition was referred to a master, and after hearing on exceptions to his report was dismissed.

The contention relates to the construction to be given to that part of the agreement by which the valuation of the real estate and plant is to be determined. The agreement provides: first, that bills receivable shall be taken by the survivor at their face value, materials in stock at cost, good accounts at a discount of five and manufactured articles at a discount of ten per cent. It then proceeds: "And it is hereby further agreed that all property not enumerated or specified in the aforesaid statement, such as lands, buildings (subject to the encumbrances now thereon, being three several yearly ground rents amounting in the aggregate to the sum of $300,12 per annum), stationary fixtures, boiler, engine, machinery of all kinds and descriptions, decorating machines and all things belonging thereto, patterns, plates, wagons, horses, carriages and all tools and implements belonging to the manufacturing of glass in the different departments in which we are engaged, shall be valued at the sum of $25,000, and if any or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm after the execution of this agreement, the said sum of $25,000 shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises, and if any portion of the premises in the name of the firm shall be sold or encumbered after the execution of this agreement, then said sum of $25,000 to be reduced in amount the sum realized from the sale or encumbrance thereof. And the executor or administrator shall by good and sufficient deed grant and convey unto the party so surviving all the property not enumerated or specified in said statement, and the surviving party shall make and execute and deliver unto the executor or administratrix of the one so dying for the benefit of his estate a bond and mortgage to the sum of one half of the aforesaid sum of $25,000, or the one half of the sum so increased or diminished as above set forth."

The dispute relates to this part of the agreement. During the period of eleven years and a half between the making of the agreement and the death of one of the partners ground rents had been extinguished, more land purchased, additions and improvements added to old buildings, and new buildings erected. The petitioner concedes that the valuation of $25,000 should be increased by $5,452.09 paid for the extinguishment of ground rents and also by $2,000 expended in the purchase of additional real estate. The executors claim that to these amounts should be added about $16,000 used by the firm after 1880 in the erection of new buildings and in making additions and improvements to the plant.

The first part of the agreement provides for the valuation in detail of what was personal property pure and simple, the notes, accounts, manufactured articles and raw material, the actual value of which was easy of ascertainment. The second part of the agreement provides for the valuation in bulk of all the remaining property of the firm. This was property used in carrying on the business. It consisted of real estate, and fixtures, machinery, tools and implements, patterns, plates, horses and wagons. The value of the different items of personal property which went to make up the whole would vary from time to time, as the old became worn out and were replaced by new, and the value of the whole would vary with the fluctuations of business. Additions to fixtures, machinery and tools would become worn and useless, and at their best their value to the business was their value in place and for the uses for which they were designed. This was the case, differing in degree only, with the additions to the buildings. Of the things of material value used in the business and named there was but one which had anything like a stable value for other purposes. That was the real estate. It had a value irrespective of its use in the business, and a value that would be permanently increased by addition to it or by the extinguishment of ground rents, and lessened by the incumbrance or sale of any portion of it. This change in value was provided for in the agreement, and it seems to have been the only change contemplated by the parties.

Omitting the parts of the agreement which do not aid in ascertaining its meaning, and preserving the phraseology, it

would read: "It is agreed that all property . . . . such as lands, buildings (subject to the incumbrances now thereon being three several yearly ground rents) . . . . stationary fixtures of all kinds . . . . patterns, plates, wagons, horses, carriages and all tools . . . . shall be valued at the sum of Twenty five thousand dollars, and if anyone or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm . . . . then said sum of Twenty five thousand dollars shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises. And if any portion of the premises in the name of the firm shall be sold or encumbered . . . . then said sum of Twenty five thousand dollars shall be reduced in amount the sum realized from the sale or encumbrance thereof." The increase provided for is that which would result from the extinguishment of ground rents and the purchase of other premises; the decrease that which would be caused by the incumbrance or sale of part of the premises. An intention that the cost of new buildings should be added cannot be gathered from the words used unless by the "purchase of other premises" was meant the cost of erecting new buildings. This was the construction adopted. The word premises was used to denote the thing which might be purchased, sold or incumbered. Its natural and ordinary use in this connection would seem to be to denote an estate in lands purchased, sold or incumbered. It might well be supposed that the firm would buy materials and construct buildings, but not that it would purchase, sell or incumber them as buildings merely; and any acquisition or disposition of them as real estate was expressly provided for. The words, the context and the subject-matter all indicate that they were speaking of the real estate only, and no provision was made for a change in its value except as they here stipulated. A considerable part of the sum of $16,000 which it is claimed should be added was expended in alterations of old buildings, the largest item being "cost of new and improved furnace and alterations and improvements to the factory, $5,629.32."

Prior to 1880 an inventory of the assets and liabilities had been made annually. The value of $25,000 fixed by the agreement of October of that year was not based upon the appraised

value of the things enumerated. In 1879 they had been appraised at over $54,000. It was a value fixed irrespectively of the actual value, which would change from year to year, and which they considered it just that the survivor should pay and the estate of his deceased partner receive. Neither could know to whom the option to purchase would fall; and if during the running of the agreement, because of large additions or deductions, the price might become inequitable either party had the remedy in his own hands, as without his assent they could not be made. The agreement was in force over eleven years before the death of one of the parties. During this time the annual net profits varied from $20,255.25 in 1882 to $4,424.50 in 1889. In 1880, the year of the agreement, they were over $15,000. During all these years the salable value of the plant was affected by the conditions of the business.

A careful examination of the testimony has led us to the belief that the learned judge before whom the account was audited was misled by the auditor's report in finding as evidence of the construction which the parties themselves placed upon the agreement that after Oct. 20, 1880, a real estate account was opened, the first item of which was the agreed value of $25,000, and that to this were added various items of expense, to the end that it would show the correct value of the plant at the death of either of the partners. Such an account appears as an exhibit attached to the answer to the petition, but it does not appear on the books of the firm. It was made up from entries culled from the books. The cash expenditures for improvements and new buildings were carried to the ledger and posted under different heads. The entry of $25,000 appears neither in the books nor in the inventories subsequently made. Annual inventories were made after 1880 as before, and the price fixed by the agreement did not enter into them. In the inventory made Jan. 1, 1881, the real estate was carried at $26,225. All of this together with personal property appraised at about $14,000, making an aggregate of over $40,000, had by the agreement of the previous October, and for the purpose of that agreement, been valued at $25,000. Subsequent inventories followed the same form, and from time to time the original lots were carried at an increased valuation. As to these it must be conceded that there could be no addition for increased value These

inventories furnish no ground for an inference of an intention that the valuation fixed by the agreement was to be departed from. The account referred to represented the opinion of the witness who made it, but not the views of the partners. It is therefore of no value as indicating their understanding of the agreement.

We are left then to the construction of the agreement as it is written. Considering the condition of the property at the time, the mutual interest of the parties and the end they had in view, their desire to make certain the price at which the survivor could take and their knowledge that the cost would not be a criterion of the value, we think that they meant to say that the valuation of $25,000 was to remain, subject only to the conditions which they imposed, the fixed value for the purpose of the agreement. What is of much more and of primary importance in interpretation, we find that this is what they did say.

We see no want of equity in the agreement, nor any hardship to result from its performance which should lead a chancellor to deny the prayer for specific performance. There was no inequality of terms; it applied to both alike, and the advantage to be gained by the survivor was not more certain than that which would result to the estate of the deceased. The parties, with full knowledge of the condition of the firm property, acquiesced in the agreement for over eleven years, and when in 1892 its enforcement was asked the net profits of the business were but one third as large as they had been in 1880, when the agreement was made.

The order of March 24, 1894, dismissing the petition of Ferdinand Hormann is reversed and set aside, and the record is remitted in order that a decree may be entered in the orphans' court in accordance with this opinion.

S. Wertheimer, Appellant, v. Wm. H. Thomas and Celestine D. Thomas.

Vendor and vendee—Covenants in lease—Notice—Collateral agreement.

As between the vendor and vendee of land the latter is held to have had notice of the covenants of an existing lease of which he knew but had not examined, and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement.

A lease gave the tenant an option to buy the demised premises at a certain price. Before the termination of the lease the owner of the land agreed to sell it to plaintiff who knew of the lease, but did not know that it gave the tenant an option to purchase. Before plaintiff received his deed the tenant exercised his option, and the deed was made to the tenant. Plaintiff subsequently bought the land at an advanced price and sued the vendor for the difference. The court gave binding instructions for defendant. *Held*, to be error.

Argued Jan. 31, 1895. Appeal, No. 137, July T., 1894, by plaintiff, from judgment of C. P. No. 4, Phila. Co., Sept. T., 1892, No. 702, on verdict for defendants. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Reversed.

Assumpsit for breach of contract to sell real estate. Before THAYER, P. J.

At the trial it appeared that defendants agreed in writing to sell to plaintiff the premises No. 33 North 11th street in the city of Philadelphia. At the time of the sale there was a lease on the property which still had several years to run. In the lease was a clause giving the lessee the option to purchase the property for $12,000. Plaintiff knew of the lease but had no knowledge that it gave to the tenant an option to purchase the property. The lessee subsequently exercised his option and a deed was made to him. Plaintiff purchased the property from the tenant's grantee, paying $4,500 over and above the amount which he had agreed to pay defendants. For this sum he brought suit.

The court charged as follows:

"This action is brought upon a written agreement of sale. By the terms of the written agreement of sale it was made subject to this lease to Price, and, in my judgment, that means subject to every covenant contained in the lease to Price, and among

these covenants in the lease to Price was a covenant that he should have the property if he chose to buy it during the tenancy for $12,000; and when Price insisted upon the performance of that covenant, the defendant made a conveyance to him, notwithstanding the agreement which he had signed with the plaintiff, but inasmuch as the agreement which he had signed was made expressly subject to the lease, I think the plaintiff took the agreement subject to everything contained in the lease, and if he chose to take it subject to a lease which he did not read, he is bound by that.

"Therefore you ought to find a verdict for the defendant in this case."

Verdict and judgment for defendants. Plaintiff appealed.

Error assigned was in giving binding instructions for defendants.

George P. Rich, for appellant.—Where it appears that there was an incumbrance upon the land, or some defect or deficiency in the title, quantity, quality, description, or other matters touching the estate, unknown to the purchaser at the time the agreement of sale was executed, the purchaser is entitled, if he chooses, to have the contract specifically performed, so far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for the defect or deficiency: Burk's App., 75 Pa. 141; Riesz's App., 73 Pa. 485; Rineer v. Collins, 156 Pa. 342.

A purchaser to whom the vendor has agreed to make a deed of conveyance is bound to take notice of the kind of covenants usual and customary to be inserted in deeds of conveyance, to wit, a covenant of special warranty, and cannot insist on a covenant of general warranty or any other extraordinary and unusual covenant: Espy v. Anderson, 14 Pa. 308; Lloyd v. Farrell, 48 Pa. 73.

Wendell P. Bowman, for appellees.—Where it is stated upon a sale, even by auction, that the estate is in lease and there is no misrepresentation, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country: 1 Sugden on Vendors, 8th

Am. ed. 10; 2 Sugden on Vendors, 8th Am. ed. 561; Boggs v. Warner, 6 W. & S. 469; Kerr v. Day, 14 Pa. 112; Corson v. Mulvany, 49 Pa. 88; Peoples St. Ry. v. Spencer, 156 Pa. 85.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

The general rule is that notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. If with knowledge of a lease he buys without examining it he cannot afterwards object that he had no notice of a particular covenant. The equity of a tenant in possession may extend still further, and notice of unusual covenants and even of a collateral agreement to purchase may be imputed to the vendee. This equity however rests upon the fact of possession, which is notice to the purchaser of the occupant's title and of the fact that the property is affected, and imposes upon him the duty of inquiry. The purchaser is therefore chargeable with notice not only when the evidence raises a presumption that he knew, but also when there is just ground for inferring that reasonable diligence would have led him to discover the truth. But this rule of constructive notice by tenancy does not apply to controversies between the vendor and the vendee. Facts which in a controversy with a third party whose rights have been prejudiced by the sale would affect the vendee with constructive notice will not charge him with defects in the vendor's title: Leading Cases in Equity, vol. 2. part 1, p. 145. While the vendee is put to inquiry as to the tenant's title, the duty of inquiry arises because of the possession. In protection of innocent parties the doctrine of implied notice has been carried to its fullest extent. As between the vendor and the vendee, the latter is held to have had notice of the covenants of a lease of which he knew but had not examined, and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement.

When the agreement in this case was made the plaintiff's agent knew that the property purchased was in the possession of a tenant under a lease from the defendant. The agreement was made expressly subject to this lease. Actual notice of the lease carried with it constructive notice of all its covenants and conditions relating to the tenure or intended to secure or enforce the rights and duties of the parties to it as landlord and

tenant; but there does not seem to be ground as between the parties for carrying the implication of notice further. The agreement giving the tenant an option to purchase, although incorporated in the lease, was not a part of it. It was a distinct agreement having no necessary connection with the lease. It was unusual and not to be expected. Had this agreement been separate and distinct from the lease in form as it was in substance, it clearly would not have been as between the parties to this action notice of the tenant's equity.

We are of opinion that the case should not have been withdrawn from the jury on the ground that the plaintiff was charged with notice of the agreement to sell. That his agent had actual notice, or purposely avoided it, and in fact secured by the agreement only the right to take title to the property in the event of the failure of the tenant to do so, the jury might well have found from the testimony.

The judgment is reversed and a venire de novo awarded.

Daniel Steinmetz's Estate. Martha S. Duffield's Appeal.

168 171
168 176
168 171
194 46

Will—Trusts and trustees—Separate use trust.

Where the purpose to create a separate use trust is clear, no particular form of words is necessary.

Testator by his will directed that during the life of his wife his real estate should remain undivided and unapportioned, and that one third of the net income should be paid to her and the remainder divided equally among his children, naming them. He further directed as follows: "This arrangement I desire to continue during the life of my wife . . . . At her decease it is my will that my children do as they think best. It is, however, my will (should my children agree to a division of my estate after the death of my wife) that the separate portions of my daughters . . . . shall be separately secured to them and to their use beyond the dictation of the husband of either of them." The daughters were all married at the date of the will. *Held*, that the daughters took a valid separate use trust which went into effect upon the death of the widow.

The intent of the testator was to secure the shares of his daughters to their separate use, and the contingency of the widow's death, and the partition by the children of the common estate did not go to the creation of the separate use but to the time and occasion for putting it into formal execution.

Argued Jan. 31, 1895. Appeal No. 145, July T., 1894, by Martha S. Duffield, from decree of O. C. Phila. Co., April T., 1891, No. 185, dimissing exceptions to adjudication. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Affirmed.

Exceptions to adjudication.

From the record it appeared that Daniel Steinmetz died on Jan. 10, 1891. By his will he directed inter alia as follows:

"*Third.*—It is my will that my real estate remain as at present undivided and unapportioned, the rents to be collected, the repairs to be made and the interest on encumbrances paid, and when the principal of any debt due by my estate becomes due it shall be paid as though I myself acted in the premises and my Executors are hereby authorized to act and are hereby empowered so to act that my real estate may be kept intact as it now is.

"*Fourth.*—It is further my will that after my Executors shall have provided for all bills for repairs, interests for moneys borrowed (due or about to fall due), taxes, water rents and any other demands against my real estate property to be paid, then the net residue shall be distributed as follows, viz.:

"One third of said net amount shall be paid to my said wife Emma G. Steinmetz, and the remainder shall be equally divided between my children, Daniel, Henry K., Philip J., John, Charles G., Burtis, Emma M., Martha G., and Fanny J., share and share alike.

"This arrangement I desire to continue during the life of my wife the said Emma G. Steinmetz; at her decease it is my will that my children shall do as they think best; it is however, my will (should my children agree to a division of my estate after the death of my wife) that the separate portion of my daughters Emma M., Martha G., and Fanny J., shall be separately secured to them and their use beyond the dictation of the husband of either of them.

"*Fifth.*—Is is further my will that no portion of my estate shall be in any way subject to the debts of either of my said children, it is a gift to them for their permanent benefit and intended especially for their use in the absence of other means of support."

Mrs. Emma G. Steinmetz, widow of testator, died Oct. 11,

1892. The daughters were married at the date of the will. Upon the decease of the widow of the testator, his executors filed an account charging themselves with the proceeds of certain real estate sold by them after the death of Mrs. Emma G. Steinmetz. Martha S. Duffield, one of the daughters, claimed that the testator's will did not create a valid separate use trust, and that he therefore died intestate as to his personal estate. The auditing judge held that a valid separate use trust was created under the will for the share of the married daughters, and awarded Martha S. Duffield's share to a trustee for her.

The court in banc dismissed the exceptions to the adjudication. Martha S. Duffield appealed.

Error assigned was decree dismissing exceptions.

William H. Peace, for appellant.—Testator died intestate as to his personal estate. If the testator had limited the separate use to his real estate, it is submitted the court should not interpret the will by any forced construction, so as to embrace unmentioned property.

As to one third of the real estate there is as to the wife under the will, and the well known rules of construction, a fee.

The intent to create a separate use must be clear and beyond the reach of reasonable controversy: Morrison v. Dollar Saving Bank, 36 Leg. Int. 215; 2 Perry, Tr. sec. 647; Hill on Trustees, 611; MacConnell v. Wright, 150 Pa. 275.

As public policy does not favor restraints upon alienation, and as "the incidents of such an estate are peculiar and undesirable" (see Ringe v. Kellner, 99 Pa. 464), the burden is upon those claiming testator intended to create a separate use trust to show this by language clearly indicating such intent: MacConnell v. Wright, 150 Pa. 284.

Henry James Hancock, for Thomas Rutherfoord, assignee of Henry K. Steinmetz, one of the appellees, cited: Lightner's App., 11 W. N. C. 181; Quin's Est., 144 Pa. 454; Hitner v. Ege, 23 Pa. 305; Cochran v. O'Harn, 4 W. & S. 98; Chew v. Commissioners, 5 Rawle, 160; Hays v. Leonard, 155 Pa. 478; Stoolfoos v. Jenkins, 8 S. & R. 175.

Opinion by Mr. Justice Mitchell, May 20, 1895:

Although the testator's direction that his daughter's portion

of his estate should be held on a separate use trust, might seem on his literal wording of it, to depend on a contingency, yet his plain intent to the contrary appears from a view of his whole will together. He directs his real estate to be held "as at present, undivided, and unapportioned" during the life of his widow, and the interest of each child during that time is only in a share of the "net residue" of the income, after payment of taxes, necessary repairs, etc. This arrangement, as the testator calls it, is to continue during the life of his widow, and at her decease his "children shall do as they think best," i. e. as to a continuance of the arrangement, but should they "agree to a division of the estate" then the separate portions of the daughters "shall be separately secured to them and their use beyond the dictation of the husband of either of them." The purpose to create a separate use is thus clear, and where that is so, no particular form of words is necessary. The fact that it is directed on the happening of the contingency of the widow's death and the refusal of the children to continue the joint arrangement, is no more than a direction to put the trust into form when it may become necessary. So long as the estate was held together on the trust to collect and distribute the revenue a formal separate use was not necessary, the daughters got only their shares of net income without it, but when the estate was to be divided so that the daughters' shares should come to them in severalty, freed from the first administrative trust, then the separate use would be required and was directed to be made. The contingency specified by the testator did not go to the creation of the separate use but to the time and occasion for putting it into formal execution.

The claim that the widow took a fee in one third of the realty cannot be sustained. The whole estate is left in an active trust to keep it together, collect rents, make repairs, pay incumbrances, etc., "as though I myself acted in the premises," and the widow was to get one third of the residue, that is, of the net income. Not only is this all that is given in terms to the widow, but the direction that after her death the joint administration of the whole may be continued by the children, or in case they determine to make partition, the daughters' portions shall be put in separate use trust, shows that it is all the testator intended to give.

Decree affirmed.

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223 184

Daniel Steinmetz's Estate. William B. Cobb's Appeal.

Will—Trusts—Separate use trust—Married women—Power of alienation.

A testator, by his last will and testament, having created two trusts, first, for the management and administration of his whole estate, undivided, and the distribution of the net income during his widow's life, and as much longer as the children should agree to continue that arrangement; and secondly, on the severance of the joint management, a separate use trust for his daughters, it was held that his intention was to exclude the husbands of his daughters from both trusts: Steinmetz's Estate. (Next preceding case.)

Where such separate use trust is created for a married daughter and no power of alienation is given by the instrument creating the trust she cannot pass an estate by will, and the devising of such estate to her husband is invalid.

The acts of 1848 and 1887 apply only to the common law rights of married women over their separate estates at law, and not to trusts in equity for their separate use which are subject to the same rules of equity as heretofore.

Argued Jan. 31, 1895. Appeal, No. 251, Jan. T., 1895, by William B. Cobb, from decree of O. C. Phila. Co., April T., 1891, No. 185, dismissing exceptions to adjudication. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Affirmed.

Exceptions to adjudication.

The material portions of the will and some of the facts appear in Steinmetz's Estate (next preceding case.)

The daughter Emma M. was at the time of the will married to the appellant, William B. Cobb. She died during the lifetime of her mother, leaving a last will, by which she devised all her property, real and personal, to William B. Cobb.

Cobb claimed that his wife died seized of a vested estate in her father's realty, subject only to the life estate of the widow, and that the same passed to him under his wife's will; or if it did not so pass, that he was entitled to the same as tenant by the curtesy.

The auditing judge held that Mrs. Cobb had no power to devise her share; that by reason of her death during the lifetime of the life tenant, she was seized of no estate in which

her husband took any interest by curtesy; and that the other devisees were entitled to divide among themselves the whole proceeds. The court in banc dismissed the exceptions filed by Mr. Cobb.

Error assigned was decree dismissing exceptions.

John G. Johnson, for appellant.—As the contingency upon which a trust was to arise of the share of Emma M. Cobb did not occur prior to her death, her share was never held in trust.

The devise by Emma M. Cobb to her husband of her interest in the real estate of her father vested in him her equitable fee simple: Lancaster v. Dolan, 3 Johns. Ch. 113; Thomas v. Folwell, 2 Whart. 16; Jones's App., 57 Pa. 372; MacConnell v. Lindsay, 131 Pa. 485; Hays v. Leonard, 155 Pa. 478; act of June 3, 1887, P. L. 332; act of April 11, 1848, P. L. 536; 2 Perry on Trusts, 257; Bispham's Eq. 151; act of April 8, 1833, P. L. 249.

The daughters of Steinmetz as to two thirds his estate were subject to no life estate of their mother. The husband took an estate by curtesy therein.

Henry James Hancock for *James Rutherfoord*, assignee of *Henry K. Steinmetz*, one of the appellees.

Opinion by Mr. Justice Mitchell, May 20, 1895:

In Steinmetz's Estate, Duffield's Appeal, opinion filed herewith, it was held that the testator's intent was to secure the shares of his daughters to their separate use, and that the contingency of the widow's death and the partition by the children, of the common estate, did not go to the creation of the separate use but to the time and occasion for putting it into formal operation. The testator created two trusts by his will, first, for the management and administration of his whole estate, undivided, and the distribution of the net income, during his widow's life and as much longer as the children should agree to continue that arrangement, and secondly, on the severance of the joint management, a separate use trust for his daughters. His intention to exclude the husbands of his daughters covered both situations. Under the first trust the husbands had no control, because the daughters were only entitled to their shares of the net income.

In the second situation a formal separate use was established. As the intent to exclude the husbands in both cases is therefore clear, and as that is all that is required, the interest of Mrs. Cobb in her father's estate from the time of his death must be treated as a present interest in net revenue only, and a remainder in fee subject to a separate use trust, and whether her death occurred during the prior life estate of the widow, or after its termination made no difference in the substance but only in the form of the trust, and of her control over the property.

We have therefore the question whether in the absence of express authority given by the instrument creating the trust, a married woman can pass such an estate by will. It has been argued with great force that as the remainder is in fee simple, and the restriction of alienation is in derogation of an essential incident of that estate, it should not be carried beyond the extent actually necessary to reach the end equity has in view,—the protection of the wife from the influence as well as the power of her husband,—and that does not go beyond her life.

The question however is no longer open. It is perhaps somewhat notable that a principle of so much practical importance in its results and of such frequent occurrence should be so little discussed in the case which first decided it, Thomas v. Folwell, 2 Whart. 11, where the conclusion was stated rather briefly as a necessary corollary of Lancaster v. Dolan, 1 R. 231. The latter case however, one of the landmarks in Pennsylvania law, had been decided only a few years before, and the professional mind was so filled with it, controversially and otherwise, that probably a brief reference to it was considered all that was necessary.* Notwithstanding the brevity of the discussion however, Thomas v. Folwell has been followed uniformly from Stahl v. Crouse, 1 Pa. St. 111, down to Quin's Estate, 144 Pa. 444, and is not now to be questioned. Whether in view of the present statutory powers of a married woman to make a will, the reasoning of Thomas v. Folwell would now lead us to the same conclusion if the question were new, is not mate-

* The intensity of professional feeling on the subject is illustrated by Horace Binney who, writing thirty years after, says, "It has taken more than one act of assembly to patch the hole in the law that was made by Lancaster v. Dolan, and it is not well patched yet:" Leaders of the Old Bar, p. 59.

rial, as the cases are clear that the acts of 1848 and 1887 apply to the common law rights of a married woman over her property, not to trusts in equity for separate use: McConnell v. Lindsay, 131 Pa. 476.

Decree affirmed.

Ogontz Land & Improvement Co., Appellant, *v.* Amos Johnson.

Deed—Building restriction—Porch.

A porch built upon brick foundations, roofed, and permanently attached to the whole width of a front of a house, and projecting to within seven feet of the fence line, is an integral part of the building within the meaning of a building restriction in a deed, providing that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line."

Such a structure is a violation of the building restriction, notwithstanding the fact that it is open at the sides and in front.

Argued Feb. 4, 1895. Appeal, No. 1, July T., 1894, by plaintiff, from decree of C. P. Montgomery Co., Oct. T., 1893, No. 7, dismissing bill in equity. Before STERRETT, C. J., GREEN, WILLIAMS, MITCHELL and DEAN, JJ. Reversed.

Bill in equity for an injunction to restrain the construction of a porch.

The bill averred that plaintiff on Sept. 16, 1893, by deed, conveyed to defendant a lot of land in Abington township, Montgomery county, Pa., under and subject to the restriction, "that all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line;" that defendant had erected and was erecting a building upon the said lot, contrary to said restriction and within seven feet of the fence line. The bill alleged irreparable injury and prayed for an injunction.

Defendant in his answer averred as follows:

"It is true that I had erected upon my said lot of land a building as averred in the fourth paragraph of said bill, but I deny that I have erected said building contrary to the agreement or restriction contained in my said deed as aforesaid

within seven feet of the fence line. Upon the contrary I aver that said lot of land has a front of thirty feet on a public street or road and a depth of 100 feet; that before the deed for said lot was delivered to me I commenced the erection of a two and a half story brick dwelling house thereon for the use of myself and family, which was almost completed at the time of the filing of the complainant's bill; that the front brick wall of said house is fifteen feet from the inner street or fence line in strict conformity with the reservation contained in my said deed; that I have built three brick foundation piers in front of my said house to support a frame porch which I propose to attach to the front thereof. I aver that the front line of said proposed porch (which is the foundation of complainant's bill), will be seven feet back from the said inner street or fence line, and that when built and completed will be an open uninclosed porch, which cannot in any way interfere with the adjoining lots of land or in any wise obstruct the view from houses which may be built thereon.

"I deny that the erection of said porch is in violation of the restriction contained in my said deed, or that it is unlawful as averred in paragraph fifth of complainant's bill. On the contrary I aver that such erection will not be in violation of any restriction whatever contained in my said deed, inasmuch as the wall of the dwelling house is not within fifteen feet of the fence or street line of said lot. I further aver that said porch is to be the ordinary uninclosed porch in front of my said house, such as is common in many places, and which cannot in any way affect the use and enjoyment of the owners of adjoining lots of land, and is not in any sense a building within the meaning of said restriction."

The case was heard on bill and answer.

The court, in an opinion by WEAND, P. J., dismissed the bill.

Error assigned, among others, was (5) in dismissing the bill.

Edward F. Kane, for appellant.—A covered porch, like the one in question, having no connection with any other building, would be an ordinary shed and therefore a building: Act of March 31, 1860, P. L. 415; Truesdell v. Gay, 13 Gray (Mass.),

312; Short v. Miller, 120 Pa. 476; Lightfoot v. Krug, 35 Pa. 348; Short v. Ames, 121 Pa. 530.

The porch in question having been built with and attached to the house proper, is part of the house and together they form a single structure or building.

The intention of the grantor, as expressed in the deed, was to prohibit the erection of buildings or any part thereof, within the prescribed limits, and any permanent structure, built within these limits, that will obstruct the view of adjoining owners, violates the conditions of the deed: Means v. Presbyterian Church, 3 W. & S. 312; Wright v. Evans, 2 Abb. Pr. N. S. 308.

William F. Solly, for appellee.—In whatever sense the term piazza is used it does not convey the meaning of a building: Tench v. Rothermel, 4 Kulp, 110.

It may be said that in whatever sense the term porch is used it does not convey the meaning of a building; and that in whatever sense the term building is used it does not convey the meaning of an ordinary open porch to be used only for comfort and convenience.

Where the meaning of an agreement is doubtful, its terms are to be considered in the light thrown on them by proved or admitted illustrative facts: Lacy v. Green, 84 Pa. 514; Meigs v. Lewis, 164 Pa. 597.

When the language making an exception or reservation in a deed is doubtful it should be construed more favorably to the grantee: Whitaker v. Brown, 46 Pa. 197; Richardson v. Clements, 89 Pa. 503; Trout v. McDonald, 83 Pa. 144.

Opinion by Mr. Justice Mitchell, May 20, 1895:

Both the bill and the answer are in very brief and general terms, and the facts in regard to the porch in controversy do not therefore appear with precision as to details. The answer however admits that the porch is to be a permanent part of the house, built upon brick foundations, and projecting to within seven feet of the fence line. Prima facie this is in violation of the building restriction. The terms of this are not in dispute. They are that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line." The inten-

tion of this clause is plain. It is to widen the entire space between the house lines and secure the light, air, and open view incident to a wide street. The language is "all buildings," and that means all substantial parts of all buildings. While merely incidental encroachments on this space by steps, or eaves, or ornamental projections might not amount to violations of the agreement (see City of Phila. v. Presbyterian Board of Pub., 9 Phila. 499) yet a porch extending the whole width of the house as a substantial and integral part of it, is clearly so. If it can occupy eight feet of the reserved space, it could as well occupy the whole fifteen feet to the fence line, and thereby destroy the open uniform general effect meant to be secured.

We agree with the learned judge below that "whether a porch or piazza attached to a dwelling house is a building or a constituent part of the dwelling depends on the manner of its construction, and the uses to which it is to be applied," but we do not think the fact of its being open or inclosed is the ruling factor. It is one item of evidence only, and each case must depend on its own circumstances as shown by the whole evidence. As already said the details as to this porch do not precisely appear, but it is to be gathered from the answer and the arguments of both parties that it is an integral part of the house, built with it, on brick foundations, roofed, and permanently attached to the whole width of the front. The fact that it is open at the sides and in front will not save it from being an obstruction to light, air and uniformity of effect, and as such contrary to the restriction.

Decree reversed, bill reinstated, and injunction directed to be awarded, with costs.

Plymouth Township, Appellant, *v.* Chestnut Hill & Norristown Railway.

Street railways—Municipal consent—Act of May 14, 1889—*Equity.*

The right of local authorities to give their consent or refusal to a street railway company to construct their road is derived from the constitution and not from the act of May 14, 1889, P. L. 217; and the railway company must take such consent upon such conditions as the local authorities may impose, or not at all.

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The provision in the act of May 14, 1889, that the company shall complete its road within two years after the consent of the local authorities, unless the time shall be extended by such authorities, does not prevent the local authorities from making it a condition of their consent that the railway shall be completed within a time less than two years.

Where the time limit is, by express stipulation of the contract, one of the conditions on which the consent is given, time is of the essence of the contract, to protect the public in their right to the prompt enjoyment of the benefits accruing to them from the franchise. If, therefore, the railway company does not complete its railway within the time stipulated, and the local authorities revoke their consent for breach of this condition, they will have a standing in equity to prevent the company from constructing its railway.

Argued Feb. 7, 1895. Appeal, No. 146, Jan. T., 1895, by plaintiff, from decree of C. P. Montgomery Co., June T., 1894, No. 5, dismissing bill in equity. Before STERRETT, C. J., GREEN, WILLIAMS, MITCHELL and DEAN, JJ. Reversed.

Bill in equity to restrain the construction of a street railway.

The case was heard on bill, answer and proofs. SWARTZ, P. J., filed the following opinion, by which the facts appear:

"The defendant company obtained the consent of Plymouth township to build an electric railway upon a public road in said township. The plaintiff contends that the right to build such electric railway expired on July 20, 1894, and this bill was brought to restrain the defendant company from doing any further work upon the public roads of Plymouth township.

"FINDING OF FACTS.

"1. The defendant company was chartered to build a street railway from Barren Hill to Chestnut Hill and from Barren Hill to Norristown, under the act of May 14, 1889, P. L. 217. The proposed road passes through Whitemarsh township, Plymouth township, Springfield township, the borough of Norristown, and enters the city and county of Philadelphia.

"2. Consent by all these municipalities was given to the defendant company to build the proposed railway. The supervisors of Plymouth township gave their consent upon the 20th of May, 1893. The written agreement giving such consent contained the following provision: 'And it is further stipulated and agreed that the said company shall build its said railway

over the roads herein described within fourteen months after the date hereof.'

"3. On the 25th of July, 1894, the supervisors of the said township of Plymouth notified the defendant company that the time for building the railway terminated on July 20, 1894, and that the consent of said township to build said railway was revoked.

"4. On July 3, 1894, the defendant company placed some ties on the Germantown and Perkiomen turnpike road in Plymouth township. The turnpike road was abandoned some years ago and has been under the care of the supervisors of the respective townships through which it passes. The ten or more ties were laid, spaced almost two and one half feet apart, and trenches were dug to receive them, the length of the ties. The ties were covered up and suitably laid with a view to be straightened up when further construction came along. At this time and prior thereto work was being done at the other end of the proposed railway. The survey of the whole road was completed on July 19, 1894, at least to the line dividing Plymouth township from the borough of Norristown. The construction in Whitemarsh began June 30, 1894. The proper mode of construction was at the beginning of the proposed line, that is between Chestnut Hill and Barren Hill.

"5. At the time this bill was filed, the defendant was at work with a large force of men in Plymouth township.

"6. On July 21, 1894, the supervisors of Plymouth township gave their consent to the Conshohocken company to build a passenger railway on the road in question—that is the Germantown and Perkiomen turnpike. This agreement gave said company two years in which to build said railway, and the exclusive right to said township, at least this is the apparent intent of said agreement.

"CONCLUSIONS OF LAW.

"[1. The agreement between the plaintiff and the defendant did not work a lawful change as to the time given by the act of May 14, 1889, in which the railway must be constructed. The defendant had two years in which to complete the construction notwithstanding said agreement.] [1]

"[2. If the defendant failed to comply with the time limit

fixed by the statute, the commonwealth alone can move for a forfeiture for such laches.] [2]

"[3. The violation of the limit of fourteen months, even if such limit is binding on the defendant company, is not ipso facto a forfeiture by the agreement. A breach as to this provision is not made a cause of forfeiture by the agreement.] [3]

"In support of these conclusions we offer our opinion filed refusing the preliminary injunction and add the following:

"We again examined carefully the case of Allegheny v. Millville &c. Railway Co., 159 Pa. 411. It is true the language of the court is broad enough to sustain the right of the turnpike to impose the condition as to the fourteen months, but we must apply the opinion to the case then decided and the facts do not raise the issue now before us. [We admit that the consent may be coupled with conditions that are binding upon the railway company, but can the township make conditions that conflict with the terms upon which the charter was granted? The legislature says you shall have two years to build. The township says, no, you can have but fourteen months. If the township may overrule the legislature in this particular, it may do the same as to any other provision in the act. The township is not hurt; if it does not approve of the act, it may withhold its consent from the chartered company.] [4]

"If a township may ignore any of the provisions found in the act of 1889, its sections, numbering twenty, may as well be stricken down and in their place we should have but a single section, declaring that street railways may be constructed.

"People ex rel. West Side Street Railway Co. v. Barnard, 110 N. Y. 548, does not overrule In re King's County Elevated Railway, 105 N. Y. 114. In the former case the question of power in a municipality to impose conditions repugnant to the legislative grant was not considered.

"[Even if the township impose the condition that the railway be built in fourteen months, it has not in the case before us stipulated that failure to so build shall terminate all rights under the agreement.] [3] Forfeitures are not favorites with the law, and if the township intended a breach of the agreement to have that effect, it would have been an easy matter to say so in the contract: Reck v. Hatboro Mutual Live Stock & Protective Ins. Co., 163 Pa. 443. Here there was an attempt to

forfeit the right of the defendant company without any notice to it. The purpose is manifest. A rival corporation obtains the consent to use the public roads in question. The supervisors grant to it the right to build within two years. It is very evident the township did not consider the fourteen months limit of any consequence. Why stop the active work of one corporation and give the grant to another? If the necessities for a street railway are so great, the action of the supervisors is calculated to bring about still more delay.

"The township has ample protection under the act of 1889. If the road is not built in two years, the commonwealth will, no doubt, afford relief.

"And now, Nov. 5, 1891, the prothonotary will notify the parties or their counsel of the filing of this report and opinion, and if no exceptions are filed thereto within thirty days from the time of the service of such notice, the prothonotary will enter a decree dismissing the bill at the cost of the plaintiff.

The court entered a decree dismissing the bill.

Errors assigned, among others, were (1–5) portions of opinion as above, quoting them, and (15) decree dismissing the bill.

N. H. Larzelere and *John G. Johnson*, for appellant.—The condition imposed upon the appellee, to complete its road within fourteen months, was valid: Allegheny City v. Ry., 159 Pa. 414; Pittsburg's App., 115 Pa. 4.

The appellants were entitled to take advantage of the nonperformance of the condition to complete: People v. Mutual Gas Light Co. of Detroit, 38 Mich. 154; Archbald Borough v. Carbondale Traction Co., 3 Dist. Rep. 751; Elliott on Roads and Streets, 584 and note; Allegheny City v. Millville etc. Street Railway, 159 Pa. 411.

There are no circumstances which should induce a court of equity to relieve the appellee from the consequences of its failure to perform the condition to complete: Booth's Street Railway Law, secs. 46, 47, 61.

Francis Rawle and *H. C. Boyer*, *H. M. Tracy* with them, for appellee.—Equity has no jurisdiction: Lejee v. Continental P. R., 10 Phila. 362; Com. v. Allegheny Bridge Co., 20 Pa. 185;

West Pa. R. R. Co.'s App., 104 Pa. 399; Hinchman v. P. & W. C. Turnpike Road, 160 Pa. 150; Atty. Genl. v. Lombard & South P. R. Co., 1 W. N. C. 489; Rafferty v. Central Traction Co., 147 Pa. 586; Larimer Ry. Co. v. Ry. Co., 137 Pa. 547.

Even where a charter provides a time limit of construction it has always been held that such a provision is not self executory and that on noncompliance with the limit of time, forfeiture must be judicially ascertained and declared: Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524; In re Brooklyn El. R. R., 125 N. Y. 434; Pacific R. R. v. Leavenworth City, 1 Dill. C. C. 393; In re Brooklyn etc. R. R., 72 N. Y. 245; Atchison St. Ry. v. Nave., 38 Kan. 744; Chicago v. C. & W. I. R. R., 105 Ill. 73; Oakland R. R. v. R. R., 45 Cal. 365; People v. Manhattan Co., 9 Wend. 351; Booth on Street Railways, sec. 47; Com. v. Commercial Bank, 28 Pa. 383; 2 Washburn on Real Property, sec. 4; Nicoll v. N. Y. & E. R. R., 12 N. Y. 121; Schulenberg v. Harriman, 21 Wall. 44.

Neither the act of 1889 nor the language of the Plymouth "consent" contains any language that could be construed as a forfeiture or condition subsequent: P. F. W. & C. R. v. Pittsburg, 1 Pittsb. 392; 2 Story's Eq. Jurisprudence, pars. 771, 772, 775, 776; Easton P. R. Co. v. Easton, 133 Pa. 505.

The limitation of fourteen months for completing the appellee's line was invalid as contrary to the act of assembly which gave the appellee two years for that purpose: Com. v. Collins, 8 Watts, 349; Tamaqua etc. Ry. v. Inter-County S. Ry., 52 Leg. Int. 14; Kings Co. El. R. Case, 105 N. Y. 114; People v. Barnard, 110 N. Y. 552.

The appellee was within the time, even under the strictest rule asked for by appellant: Kings County El. R. R. Case, 105 N. Y. 117.

OPINION BY MR. JUSTICE MITCHELL, May 20, 1895:

This case is so clearly within the principle of Allegheny v. Millville etc. Ry. Co., 159 Pa. 411, that it would be sufficient to reverse it with a reference to that decison, in which it was held that the consent of the local authorities is a prerequisite to the construction of a passenger railway, and that if such consent is given upon conditions, the railway company must take it subject thereto or not at all.

As said in that case the right to consent or refuse is "a gift directly from the constitution to the local bodies, and needs no help, nor permits any interference from the legislature." The learned court below overlooked this constitutional character of the local authority, when it held that a condition to the consent, that the railway should be constructed within less time than that allowed by the statute, would be void. If there were the conflict between the conditions of the consent and the statute that the learned judge supposed, the statute, not the consent, would have to give way. How far the legislature may regulate the time or mode of indicating consent or refusal we need not consider, for the legislature has not undertaken to do so. The act of May 14, 1889, sec. 16, P. L. 217, provides that any company proposing to construct a street railway under the privleges of this act, shall in good faith commence within one year after the consent of the proper local authorities, and shall complete it within two years, unless the time shall be extended by the authorities aforesaid. This is not a privilege but a limitation on the privileges or franchise otherwise granted. It is a legislative declaration, as a condition of the grant, that the franchise shall be put in operation within the prescribed time, and not held dormant to stand in the way of the actual attainment by the public, of the benefits to them which are the consideration for the public grant. This limitation being in the fundumental law of the corporation would of itself make the charter liable to forfeiture on failure to comply, and the legislature recognizing that the general rule might be too short for special cases, expressly authorized the local authorities to extend the time. The opposite contingency, that the general rule might be too long for the circumstances or public convenience in other cases did not need to be provided for, because there was no danger in that direction from the fundamental law of the corporation, and the whole subject could safely be left to the control of the local authorities. There is nothing in the statute to indicate that the limitation in the present case to fourteen months was contrary to the legislative intent. The statute does not say "we give you two years whether the local authorities think that too much or not," but "we will not give you more than two years unless the local authorities extend the time." For the latter to curtail the time is not only within

their privilege in consenting, but is in the same line of general policy indicated by the statute itself, that the franchise when granted shall be put into prompt operation.

It is strenuously argued that even if the limitation of fourteen months was valid as a part of the consent, it was at most a condition subsequent and there was no express stipulation for a forfeiture. But the question here is not of forfeiture, but of consent, and a consent revoked in accordance with the terms on which it was originally granted, is the same as none at all. The time limit was an express stipulation of the contract, and one of the conditions on which the consent was given. Time was plainly meant to be of the essence of the contract, to protect the public in their right to the prompt enjoyment of the benefits accruing to them from the franchise. There was no measure of damages for delay and the only way that the public rights could be adequately enforced was by making the time essential. It is said that the township had ample protection in the provisions of the act of 1889, and if the road was not built in two years, the commonwealth would no doubt afford relief. But the township was not bound to wait two years, as already shown, nor was it bound to depend for enforcement of its rights on the favor of the commonwealth. It had the matter in its own hands, by the requirement of its consent, and it protected its rights by giving its consent on condition. When a breach of the condition occurred the consent became revocable, and was revoked. Thereafter it was as if it had never been given.

We find no difficulty about the jurisdiction in equity, nor about the necessary parties. There is no question here of forfeiture of the charter or the franchises of the company. If the revocation of the township's consent does as a practical result prevent the exercise of the franchise and render the charter ineffective, that is nevertheless in law only a collateral incident, and is no more than a refusal of consent would have done in the first place. If the appellee had undertaken to build without any consent at all, it would have been an act without authority, and for which there was no adequate measure of damages at law. Such acts equity always enjoins: Groff's Appeal, 128 Pa. 621. Here the question is legally the same: is the appellee now undertaking to build without consent, because the consent given was conditional and has been revoked for breach of the

condition? The facts found by the learned court below leave no doubt that the answer to this question must be in the affirmative.

Much of the appellee's argument was devoted to the question of good faith on its part, and the hardship of a revocation of consent under the circumstances causing the delay. Those matters are for the township authorities, not for us.

Decree reversed, bill reinstated, and injunction directed to be awarded as prayed, and made perpetual. Costs to be paid by appellee.

F. W. E. Grohmann, by his next friend, *v.* E. C. Kirschman, Appellant.

Malicious prosecution—False imprisonment—Evidence—Judge's direction for acquittal—Justice of the peace.

In an action to recover damages for malicious prosecution, where the plaintiff claims that there was no probable cause for the prosecution, testimony, to the effect that at the trial of the plaintiff the judge directed a verdict of acquittal and instructed the jury to hold the prosecutor liable for costs, is inadmissible.

In such a case the inquiry as to probable cause goes back to the commencement of the prosecution, and it relates to the facts then known and as they then appeared. The remarks of the trial judge were directed to the question of actual guilt as it appeared after a full investigation and after hearing the testimony of both sides. They were based upon a state of facts different from those which led to the arrest, and were therefore irrelevant.

A justice of the peace illegally ordering or causing a person to be arrested, or refusing to accept bail where the offense charged is bailable, is liable in damages to the injured party in an action of trespass under the act of 1887.

Where in such a case the plaintiff's statement avers the original wrongful arrest and a subsequent wrongful committal to prison, but does not aver the refusal to admit to bail, but the latter fact appears by the evidence, a judgment on a verdict for plaintiff will be sustained.

Argued March 4, 1895. Appeal, No. 123, Jan. T., 1894, by defendant, from judgment of C. P. Berks Co., Dec. T., 1891, No. 17, on verdict for plaintiff. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Trespass for malicious prosecution and false imprisonment. Plaintiff's statement was as follows:

"That the defendant maliciously, illegally, oppressively, and without probable cause, being at the time hereinafter stated an alderman of the 9th ward, in the city of Reading, Berks county, in the state of Pennsylvania, to wit: On the 17th day of June, A. D. 1891, being a Wednesday, did authorize, order and direct his constable, one George Miller, serving at that time in that capacity for the ward aforesaid, to swear out and lodge before him, the said defendant, a criminal information against the plaintiff, upon the charge of barratry, based, as the plaintiff is informed, upon the allegations that the plaintiff had previously lodged criminal information against two bawdy-house keepers in the city of Reading, said county and state, which were afterwards by the said plaintiff abandoned; that said constable George Miller complied with the request and command of the defendant, and did swear out and lodge before said defendant a criminal information against the plaintiff on the day and year aforesaid, charging said plaintiff with the commission of the crime of barratry; upon said criminal information of barratry against the plaintiff so sworn out and lodged by the said constable George Miller before the defendant in his magisterial capacity, the said defendant issued a warrant of arrest against the plaintiff, directed to the said constable George Miller, who under and by virtue thereof apprehended and arrested the plaintiff on a certain day, to wit: On said 17th day of June, A. D. 1891, committed the said plaintiff to the Berks County prison, where he, said plaintiff, remained in confinement until a certain day, to wit: a Thursday, the 23d day of July, A. D. 1891, when the plaintiff was released upon his giving bail to answer said charge of barratry at the September sessions, 1891, of the court of quarter sessions of said county of Berks; that afterwards, to wit: On the 18th day of Sept., A. D. 1891, the plaintiff was duly arraigned and tried in said court of quarter sessions of the peace of said county of Berks, upon said criminal charge of barratry; was acquitted by direction of the court, and the costs imposed by the trial jury upon the said George Miller, constable and prosecutor of said criminal charge against said plaintiff.

"By reason of which illegal, malicious, oppressive and false imprisonment of the plaintiff by the defendant, the plaintiff has been greatly and grievously damnified and injured in his good name, fame, reputation and credit, has suffered great material loss and injury both during and as a result of his false imprisonment by the defendant, has been brought into disgrace among his neighbors and others, has suffered great anxiety of mind and pain of body, has been, by reason of the illegal and oppressive conduct of the defendant, deprived of his liberty for the space of forty days, during which time plaintiff languished in said jail in the company of thieves, convicts and other outcasts from society, has been obliged to lay out large sums of money in and about procuring his discharge from said imprisonment and defending himself in the premises, and by means of said false imprisonment has been otherwise greatly injured in his credit, reputation and circumstances, to the damage of the plaintiff of ten thousand dollars."

At the trial before ERMENTROUT, P. J., evidence for the plaintiff tended to sustain the averments of the statement, and further to show that, when plaintiff was brought before the defendant for a hearing, bail was refused.

Counsel for plaintiff offered to show that after the evidence was heard by Judge ERMENTROUT he directed the jury to acquit this man, because there was no evidence to support the charge of barratry against the plaintiff in this case, and directed the prosecutor, George Miller, to pay the costs; this for the purpose of showing that the prosecution was groundless, that there was no probable cause for it, and that it should never have been in court.

Mr. Ruhl: "Objected to as immaterial, irrelevant and incompetent; the opinion of the court does not bind anybody in the manner it is proposed to be proven, and it does not tend to prove or disprove malice or want of probable cause; the record is the best evidence, and the only competent evidence in the case."

The Court: "Admitted; exception for defendant." [2]

A. I might, some. Q. What disposition did he make of it? A. He directed the jury to acquit Grohmann because there was no charge against him; that the charges were not sufficient to hold him. Q. He directed the jury to acquit him? A. Yes,

sir. Q. What did the judge say about the costs? A. He said the suit should never have been brought; and the prosecutor for the costs."

The court charged in part as follows:

"[The plaintiff claims that the defendant, occupying the position of alderman in the city of Reading, abused the powers conferred upon him by the laws of this state, by causing the plaintiff to be arrested upon a charge which the defendant knew to be baseless, or at least had no reasonable grounds for believing to be true, and after the defendant's arrest, by refusing him an opportunity to obtain bail and confining him in the Berks County prison.

"If the jury are satisfied, from a fair preponderance of the evidence, that both, or either, of these allegations are true, then the plaintiff is entitled to recover. In other words, if the jury believe, from a fair preponderance of the evidence, that the defendant, Kirschman, instituted this prosecution knowing it to be baseless, or having no reasonable ground for believing it to be true, or if the jury believe, from a fair preponderance of the evidence, that the defendant, Kirschman, when the plaintiff was arrested and brought before him, refused, or threw obstacles in the way of his obtaining bail, and committed him to the prison without the opportunity of obtaining bail, in either of these cases, and in both of these cases, the verdict of the jury will have to be in favor of the plaintiff.] [3]

"If you believe, from the evidence, that he instigated this prosecution, or refused bail, because of a personal ill-will, or because of any sinister motive toward this plaintiff, then you may find for the latter not only such damages as will compensate him for the injuries he has sustained, but such damages as will punish the defendant for an act so grossly in violation of his duties." [4]

Verdict for plaintiff for $347.91.

On rules for a new trial and in arrest of judgment, ENDLICH, J., filed the following opinion:

"The evidence produced by plaintiff upon the trial of this cause tended to show the following: Defendant is an alderman in the 9th ward of the city of Reading. Plaintiff had instituted, before another alderman, two prosecutions against alleged bawdy-house keepers residing in defendant's ward. While they

were pending, defendant manifested considerable interest in their issue and some animosity towards the plaintiff, concerning whom he declared that, 'if he ever got the —— Dutchman in his clutches, he would put him to jail, where he belonged.' The prosecutions were dismissed,—a fact by which the defendant, at the time, expressed himself much gratified. He then directed his constable to swear out an information before him charging plaintiff with barratry, upon which he issued a warrant and caused plaintiff's arrest.

"When brought before defendant, plaintiff requested permission and offered to enter bail, but defendant refused and ordered the constable to take plaintiff to prison at once, where he remained from June 17 to July 20, 1891. Put upon his trial in September, 1891, he was acquitted by direction of the court, there being no case against him. There was evidence, consisting of the testimony of the defendant and his constable, denying the agency of the defendant in procuring the lodging of the information against plaintiff and the refusal to accept bail, and some other minor matters.

"The jury was instructed that plaintiff would be entitled to a verdict, either if it was true that the defendant had caused the lodging of the information and the original arrest of the plaintiff, knowing that there was no ground for such a proceeding or having no reasonable cause for believing it to be warranted, and that he refused to accept bail from the plaintiff,—or if either of these allegations were found to be sustained, but that they must find for defendant, even though he directed the constable to make information against the plaintiff, if, in so doing, he acted upon reasonable ground of suspicion (explaining, in this connection, that the justification set up by defendant, viz, information conveyed to him by his constable, would, if honestly believed by defendant, constitute such reasonable ground), and had not refused to accept bail. On the measure of damages, in the event of finding for plaintiff, they were told what to consider on the question of compensation, and that they might give punitive damages if not only the want of reasonable ground for suspicion, but the existence of actual malice and ill will towards plaintiff in the instigation of the prosecution by defendant or in the refusal of bail, had been established. The verdict was for the plaintiff. Is it sustainable? and can

a valid judgment be entered upon it? These are the questions involved in the rules I have here to dispose of.

"There is a clear distinction between an action for malicious prosecution and one for false imprisonment, McCarthy v. DeArmit, 99 Pa. 63, 70, and therefore a plaintiff cannot recover in a suit for false imprisonment on proof of a case of malicious prosecution: Herzog v. Graham, 9 Lea (Tenn.), 152; nor vice versa: Baldwin v. Weed, 17 Wend. (N. Y.) 224. The distinction arises from the obvious difference between the defendant's relation to the ultimate wrong sought to be recovered for in the one action and in the other, and the character of the defendant's immediate act in each. It is the lawful right of every citizen to set on foot a criminal proceeding where he believes a crime to have been committed: Cooley, Torts, 180, and the law favors honest efforts to bring the guilty to justice: McCarthy v. DeArmit, ubi supra. Hence, the test of defendant's liability to suit for malicious prosecution, must be his notice, his belief; and as the law presumes in favor of a man's honesty of purpose where the legality of his act depends upon the state of his mind, Schum v. R. R. Co., 107 Pa. 8, 12; Winlack v. Geist, 107 Pa. 297, 301; Duff v. Wilson, 72 Pa. 442, 447; Sissons v. Dixon, 5 B. & C. 785; Mead v. Conroe, 113 Pa. 220, 228, the burden of proving the contrary is upon the plaintiff, and the effect of that proof is for the jury: McCarthy v. DeArmit, ubi supra. But it is not the right of every citizen to arrest another, or to deprive him of his liberty. That right can never exist except a legal justification be shown for the act.

The presumption that men are innocent makes the treatment of them as criminals by another a prima facie wrong, and the effect of an arrest or deprivation of liberty being necessarily harmful to the person affected, and that injury following immediately from the direct agency of the defendant (and not, as in malicious prosecution, only mediately, from his remoter agency in setting the prosecution on foot), the burden, in an action for false imprisonment, of showing that it was by authority of law is cast upon the defendant: Ibid. What constitutes such authority must obviously be a question of law for the court; for the right of arrest or liability to imprisonment must be determined by a fixed and cannot be measurable by

any fluctuating standard. Hence, while it is true that a defendant in an action for false imprisonment may justify upon like principles as protect a defendant in a suit for malicious prosecution, viz, on the ground of probable cause, Id. 71, the question of probable cause in trespass for false imprisonment is a question of law: Id. p. 70;—with this understanding, that, where it rests upon conflicting evidence, the existence of the facts necessary in law to constitute probable cause must be passed upon by the jury: Mitchell v. Wall, 111 Mass. 492. Neither can it be questioned, that, though the gist of the action is the unlawful detention, and therefore no malice except that which is inferable from the want of probable cause is needed to sustain it, McCarthy v. DeArmit, ubi supra, yet, where the lawfulness or unlawfulness of the detention resolves itself ultimately into a question of probable cause, neither proof by plaintiff of express malice on the part of defendant, nor disproof of it by him, is inadmissible. Besides the fact that the former goes to secure, the latter to prevent, punitive damages, Id. p. 72; Neall v. Hart, 115 Pa. 347; Comer v. Knowles, 17 Kan. 436, the plaintiff may, in his evidence, anticipate the defense of probable cause and absence of malice by showing the absence of the one and the existence of the other.

"There can be no doubt that an alderman illegally ordering or causing a person to be arrested may be made liable in an action for damages: McCarthy v. DeArmit, ubi supra; Neall v. Hart, supra. It is equally certain that his refusal to accept bail where the offense charged is bailable constitutes a wrong for which the injured party may have redress against him. The right to be admitted to bail in such cases is absolutely secured to an accused person by the constitution of this state: Art. 1. sec. 14. 'It is clearly agreed to be an offense by the common law as well as by statute, and punishable by indictment as well as by action, to deny, or delay, or obstruct bail where it ought to be granted:' Bac. Abr. 596 (I). To refuse bail, when the party ought to be bailed (the party offering the same), is a misdemeanor, punishable not only at the suit of the party, but also by indictment: 1 McKinney's Justice, (4th ed.), 258 (cit. 2 Hawk., 8th ed. 141). It is a misdemeanor at common law, as an offense against the liberty of the subject, and an action lies at the suit of the party wrongfully

imprisoned: Ibid. (cit. 1 Chitty's Crim. L. p. 103). 'So, also, to refuse bail, or unduly delay granting it, where a right to it exists, is an offense against the liberty of the subject, both at common law and by statute, punishable by civil action, or by indictment, or both:' Rapalje Crim. Procedure, sec. 41 (citing a number of authorities). Whilst, however, the action for an arrest, originally illegal and void, because of a failure of jurisdiction on the facts, was at common law an action of trespass, Maher v. Ashmead, 30 Pa. 344; Baird v. Householder, 32 Pa. 168; Kramer v. Lott, 50 Pa. 495, the proper proceeding for the recovery of damages for a mere refusal to admit to bail was necessarily an action upon the case, Gibbs v. Randlett, 58 N. H. 407, because a mere neglect to do what another has a right to exact, or any other mere nonfeasance does not constitute a trespass: Averill v. Smith, 17 Wall. (U. S.) 82, 91; Smith v. Rutherford, 2 S. & R. 358, 359; McKinney v. Reader, 6 W. 34, 41; and cannot, therefore, make one a trespasser ab initio: Averill v. Smith, supra; Richards v. McGrath, 100 Pa. 389, 399. But where there is more than a mere nonfeasance; where there is, connected with it, a positive wrongful act, in such a way as to make the omission of one thing but a constituent part of the commission of another, merging the former in the latter, I think the rule must be different. Thus, the lodging of an accused person in prison is not, strictly speaking, by virtue of the original warrant of arrest, which simply orders the constable to bring the accused before the magistrate to answer and be dealt with according to law, 1 McKinney's Justice, pp. 187, 188, but by virtue of another order, or commitment, written or verbal, issued by the magistrate after the prisoner has been brought before and examined by him: Id. 232, 233. If, then, the magistrate, in violation of his duty to accept bail offered and thereupon to set the prisoner at large, causes him to be removed in custody of a constable from his office to the prison, such performance constitutes a new and distinct wrong, an illegal act, not merely an illegal omission, and that act, involving positive constraint applied by the magistrate to the prisoner, compelling him to do something and not merely to refrain from doing something, constitutes a trespass, an imprisonment, though there may have been no physical contact and no actual violence: See Cooley, Torts, 170·

Brushaber v. Stegeman, 22 Mich. 266. There is no similarity between such a case and an unavoidable delay in taking bail, which has been held not to constitute a false imprisonment, Cargill v. State, 8 Tex. App. 431, or a mere refusal to discharge upon bail one already confined in prison, or one taken by a sheriff upon a warrant itself authorizing his confinement in prison, as in Gibbe v. Rundlett, supra. Neither does the refusal of bail constitute an abuse or misuse of the original process.

"*Abuse* of process is the employment of it for an unlawful object, a perversion of it, e. g., to extort money, to compel the surrender of a deed or other thing of value, or the like; and *misuse*, simply a malicious use of it where no object is contemplated to be gained by it other than its proper effect and execution: Mayer v. Walter, 64 Pa. 283, 285, 286, the common law remedy for either being, not trespass, but case: See Ibid., and Maher v. Ashmead, supra. But it can scarcely be said with propriety that the refusal to take bail, upon the return of the original process by a production of the prisoner before the magistrate, and the unlawful incarceration of him thereafter by virtue of a new and unwarranted order, is any kind of use of the original process. It is an independent act in excess of authority, and itself the ground of an action of trespass. Yet it is but a step in, and so connected with the whole proceeding, including the issuing of the original warrant, the arrest, and the commitment to prison, as to have the effect of rendering the whole, if otherwise legal, unlawful.

"This conclusion seems to be admitted as correct by the Supreme Court of Oregon in the recent case of Nemitz v. Conrad, 29 Pac. Rep. 548, (though it was there held that, upon a complaint setting up merely an original illegal arrest not sustained by the evidence, there could be no recovery for an arrest rendered illegal by subsequent refusal of bail), and would appear to be supported by principle. It is laid down generally, that if, after execution of civil or criminal process, the person served is subjected to unwarrantable treatment, he has a remedy by action against the officer and against others who may unite with him in doing the wrong: Wood v. Graves, 144 Mass. 365–367. The liability of the person directly executing or causing the execution of the process and also perpe-

trating the wrong in connection with, but subsequently to it, is predicated upon the doctrine that, by that wrong, the whole transaction of which it forms a part becomes unlawful and the actor in it a trespasser ab initio. Such, for instance, is the status of an officer who stays too long in a store where he has attached goods: Rowley v. Rice, 11 Met. (Mass.) 337; Williams v. Powell, 101 Mass. 467; Davis v. Stone, 120 Mass. 228; who keeps a keeper too long in possession of attached property: Cutter v. Howe, 122 Mass. 541; or who places in a dwelling an unfit person as a keeper against the owner's remonstrance: Malcom v. Spoor, 12 Met. (Mass.) 179. Such is the position of a landlord, who, having made a lawful levy under a landlord's warrant, makes a premature and therefore unlawful appraisement: Brisben v. Wilson, 60Pa. 452, or sells without notice or appraisement: Kerr v. Sharp, 14 S. & R. 399. Such again was held to be the position of the defendant in Baldwin v. Weed, 17 Wend. (N. Y.) 224, under facts very instructive here. The plaintiff sued for malicious prosecution. It appeared that he had been indicted in New York, arrested in Vermont upon a requisition procured by defendant, and brought back to New York. But the defendant, who was present at the arrest, had caused the plaintiff to be put in irons, with the purpose and effect of forcing him to pay two small debts owing the defendant. It was held that the action ought to have been trespass for false imprisonment and assault. It has been seen that the common law remedy for abuse of process is not trespass, but case. But one, who by reason of subsequent wrong becomes a trespasser ab initio is suable in trespass: Kerr v. Sharp, supra, 402. The inference is, that the unwarrantable act of the defendant in Baldwin v. Weed, supra, in causing defendant to be put in irons was deemed to render him a trespasser ab initio, and the ruling is treated as so deciding in Wood v. Graves, supra.

"It follows, therefore, that, whether an alderman be charged with false imprisonment by reason of the want of the requisite jurisdictional facts to support the original arrest, or by reason of a commitment of plaintiff to prison in violation of his right and in disregard of his offer of bail, the form of the action, at common law, would be trespass and the measure of damage would be the same; that, where the allegation of false impris-

onment is based upon both of these charges, proof of either must entitle the plaintiff to recover; and that an instruction to that effect cannot be erroneous, if the proofs and pleadings warrant it. A fortiori must this be so, where, as here, the action is not the common law action of trespass, but the action of trespass as created by the practice act of May 25, 1887, P. L. 271,—simply an action ex delicto, which embraces the common law actions of trespass and case.

"But it is urged that the plaintiff's statement complains of illegality only in the original arrest, and that, therefore, the instruction allowing a recovery upon proof of either its original illegality or of the refusal to take bail, was error, in that it introduced as a basis of recovery a cause of action not contained in the pleadings. Granted that, as I have endeavored to show, the commitment in denial of bail vitiated the whole pleadings ab initio, then it is clear that a suit thus grounded must be for false imprisonment beginning with the original arrest, and therefore there can be no question of the introduction of a new cause of action by giving that circumstance its legitimate effect, where the suit is, in fact, brought for false imprisonment in the original arrest and in the subsequent incarceration. If the court is to exercise its ingenuity in criticising the statement, it is its duty, as was said in Smith v. Rutherford, 2 S. & R. 358, 359, to support the verdict, if possible, the cause having been tried on its merits.

"The statement here filed sets forth as grounds of complaint the wrongs inflicted by defendant upon plaintiff, both in the original arrest and in the subsequent confinement in prison. It is true, it does not explicitly aver wherein the distinctive illegality of the latter consisted—does not recite the specific fact of the defendant's refusal to accept bail. But that fact appeared by evidence admitted, as I find, without any such objection as is now raised, and the issue concerning it was actually tried by the jury. If, therefore, the statement was defective in this particular, that would constitute no ground for making these rules absolute, but, under act March 14, 1872, P. L. 25, 1 Purd. 94, pl. 7, the statement would still be amendable before entry of judgment, so as to 'conform to what was tried before the jury and found by the verdict:' Bolton v. King, 105 Pa. 78, 83; or perhaps the defect is to be deemed cured by the ver-

dict, under the rule laid down in Weinberger v. Shelly, 6 W. & S. 336; Corson v. Hunt, 14 Pa. 510; Leckey v. Bloser, 24 Pa. 401; Quick v. Miller, 103 Pa. 67; McLenehan v. Andrews, 135 Pa. 383, and a multitude of other cases. Of course, the motion for a compulsory nonsuit made by defendant at the close of plaintiff's testimony, not specifically directed to this objection, but assuming that no cause of action whatever had been shown, cannot stand in the way of an application of either of these principles. Either is decisive against setting aside this verdict or arresting judgment upon it on the ground I have just discussed.

"The bearing of what has been said upon the principal reasons urged in support of these rules is so obvious that I shall not trouble myself to point it out in detail. The remaining objections may be briefly noticed.

"That the evidence of the plaintiff, if believed, warranted a finding against the defendant because of the illegality of the original arrest can scarcely be seriously disputed. Nor do I think that defendant was injured by the manner in which the question of his liability upon this branch of the case was submitted to the jury. The arrest was made upon a charge of barratry, the crime of being a common barrator. In order to make out that crime, it is generally conceded there must be proof of at least three instances of offending, 2 Whart. Crim. L. sec. 1444, note; 1 Bish. Cr. L. sec. 65, 3; 1 Russ. Cr. 266, note,—though some authorities deem that number insufficient. In this case, there is no pretense that plaintiff had brought more than two prosecutions. There was, therefore, no crime to give the defendant as alderman jurisdiction to issue his warrant. His only chance of escape, then, lay in the answer to the question whether or not he had probable cause for acting as he did. Probable cause is a reasonable ground for belief of guilt, honestly entertained, without regard to what induced the belief, if it be reasonably sufficient: Smith v. Ege, 52 Pa. 419, 421, 422. Of course, if it was true, as plaintiff endeavored to show, that the defendant was the mover and instigator of the prosecution against the plaintiff, being himself either aware of its baselessness in fact and in law or having no reason beyond his own full knowledge of the circumstances for believing the plaintiff guilty, he could not pretend to have had probable cause. If, on the other hand,

as he contended, he got information from his constable, which, however erroneous it may have been, he honestly believed to point to plaintiff's guilt, and directed the prosecution and issued his warrant on the strength thereof, he was protected by the rule of probable cause: Ibid. Whether, under the conflicting testimony, the former or the latter allegation was to be deemed sustained, was for the jury. The defendant got all he could ask when they were told that, if he acted upon (the very words used by STRONG, J., in Smith v. Ege, supra, at p. 422, in stating the test of liability) information received from his constable, honestly believing it to be likely to be true, he was justified in the eyes of the law. They were not told that his ignorance of the law as to what constitutes barratry could not be considered as aiding the probability or reasonableness of his alleged belief in the existence of a cause of prosecution against plaintiff. It has been said, that, where one, in ignorance of the law, causes the unlawful arrest of another, the offense is not the same, nor his liability so great, as though he knew the arrest to be unlawful and acted in defiance of the law: Hill v. Taylor, 50 Mich. 549. Whether this be strictly accurate or not, if there was anything wrong in the omission, the defendant has no reason to complain of it.

"The evidence concerning what took place at the trial of the plaintiff, showing the circumstances of his acquittal, was clearly proper. It was decided in Brant v. Higgins, 10 Mo. 728, that, in an action for a malicious arrest, the verdict in the case in which the arrest was made was competent evidence, though slight, to show want of probable cause,—its weight depending upon the circumstances under which it was rendered, as if given the jury without leaving their seats, etc.

"The objection to the instructions on the matter of punitive damages, is, I think, without merit. The allowance was made dependent upon the finding the defendant was moved to what he did by actual malice and ill will towards plaintiff, in the absence of probable cause. This seems to be the rule as to punitive damages generally as laid down by very high authority, R. R. Co. v. Guigley, 21 How. (U. S.) 202, and in cases of this character particularly: McCarthy v. DeArmit, supra, at p. 72. In point of fact, however, there is nothing punitive about the size of this verdict.

"If there was anything improper in the address of plaintiff's counsel to the jury, it is now too late to remedy it. I have had repeated occasion for pointing out the rule that objections of that kind must be made at the time and cannot be first brought up on an application for a new trial: Barre v. Ry. Co., C. P. Berks Co., No. 54, June T., 1889; Com. v. Buccieri, O. & T. Berks Co., No. 98, Sept. Sess., 1892; and see Moll v. Zimmerman, 1 Woodw. 501; State v. Hawkins, (Or.) 12 Crim. L., Mag. 607; State v. Turner, (S. C.) 15 S. E. Rep. 602.

"The rules to show cause are discharged."

Errors assigned were, among others, (2) ruling on evidence, quoting the bill of exceptions; (3, 4) instructions as above, quoting them.

C. H. Ruhl, of *Ermentrout & Ruhl*, for appellant.—The extra judicial remarks of the judge before whom the case of the Commonwealth v. Grohmann, the plaintiff here, was tried in the court of quarter sessions, were clearly incompetent, and should have been rejected by the court below.

An action against a magistrate for false imprisonment cannot be sustained, where the complaint upon which the accused was apprehended and imprisoned shows upon its face that he had jurisdiction of the person and offense charged: Kramer v. Lott, 50 Pa. 496; Cooley on Torts, 419; Crepps v. Durdon, 2 Smith's Leading Cases, 9 Am. ed. 1041; Neall v. Hart, 115 Pa. 352; Emerson v. Cochran, 111 Pa. 622; Mangold v. Thorpe, 33 N. J. Law Rep. 136.

H. P. Keiser, *W. B. Bcehtel* with him, for appellee.

Opinion by Mr. Justice Fell, May 20, 1895:

Upon the trial of an action for false imprisonment testimony was admitted for the plaintiff to show what had been said by the trial judge in the quarter sessions in submitting the case to the jury. The offer was to prove want of probable cause, and that the prosecution was groundless. The testimony was to the effect that the judge directed a verdict of acquittal and instructed the jury to hold the prosecutor liable for costs.

It was competent for the plaintiff to prove that the prosecu-

tion was ended, and that he had been acquitted of the charge. This was properly shown by the record of the trial, and the plaintiff had the advantage of all the legal consequences of his acquittal.

A verdict of guilty is evidence of probable cause. A verdict of acquittal is evidence, though it may be slight, of the want of probable cause. Courts have differed as to the conclusive effect of a conviction. The true principle seems to be that in the trial of an action of malicious prosecution or false arrest a verdict of guilty is strong prima facie evidence of probable cause, but it may be rebutted by proof that it was obtained by corrupt or undue means: Munns v. DuPont, 1 Am. Leading Cases, 217. The effect to be given to a verdict of acquittal has been made to depend upon the circumstances under which it is rendered. Deliberation by the jury has been held to be evidence of probable cause. Greenleaf on Evidence, vol. 2, sec. 457. A verdict of acquittal rendered promptly and without hesitation has been decided to have additional weight as evidence of the want of probable cause. In our cases proof of a verdict of acquittal has been allowed for the purpose of showing that the prosecution was ended, and ended in favor of the plaintiff, thus establishing the right of action and the basis for recovery in damages. The result of any inquiry behind the fact of the verdict would seem to rest upon very unsatisfactory and unsafe ground. The hesitation of the jury to acquit might be evidence that there were indications of guilt, but it would be of no value unless it clearly appeared that the hesitation was upon the evidence. The prompt action of the jury upon the evidence throws no light upon the real question in issue, whether the prosecutor had reasonable cause on existing facts then known to him. The inquiry as to the probable cause goes back to the commencement of the prosecution, and it relates to the facts then known and as they then appeared. It is not confined to the truth of matters which led to the prosecution, but extends to their appearance as indicating the guilt or innocence of the accused. The jury in the criminal court deals with the question of actual guilt as it appears at the trial, not with the indications of guilt as they appeared at the time of the arrest.

The plaintiff in this case went a step further, and under objection offered testimony of what the judge said at the trial in

the quarter sessions. The remarks of the trial judge were directed to the question of actual guilt as it appeared after a full investigation and after hearing the testimony of both sides. They were based upon a state of facts different from those which led to the arrest, and related to the grounds for conviction or acquittal. We are of opinion that this testimony should have been excluded.

The second assignment of error is sustained. The remaining assignments are sufficiently answered in the able opinion of the learned judge of the common pleas.

The judgment is reversed with a venire de novo.

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168 204 f224 *543

Levi Schwartz's Estate. Sarah Ann Schwartz's Appeal.

Will—Power to partition estate—Vested estate.

Where a testator devises all of his real estate to his wife for life with the power to divide and parcel out the same amongst his five sons, naming them, upon such conditions and terms as she shall deem best and right, the widow may allot a share of the real estate to a daughter of a deceased son.

Will—Power of appointment—Jurisdiction.

No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power.

Argued March 4, 1895. Appeal, No. 98, July T., 1894, by Sarah Ann Schwartz, from decree of O. C. Berks Co., dismissing petition to confirm division and allotment of real estate. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Petition for confirmation of division and allotment of real estate.

The petition of Sarah Ann Schwartz set forth that Levi Schwartz died on May 3, 1889, testate, leaving to survive him his widow and five sons, viz: Reuben Schwartz, Samuel Schwartz, Jonathan Schwartz, George Schwartz and Francis Schwartz, and children of a deceased daughter, Eliza, who was intermar-

ried with Edwin H. Trexler, and children of his daughter Mary, who is intermarried with Manoah S. Long. That by his last will and testament he devised all his real estate to his widow for life, with the power "to divide and parcel out the same amongst his five sons—Reuben, Samuel, Jonathan, George and Francis—upon such conditions and terms as she shall deem just and right." He bequeathed to Edwin H. Trexler (who was intermarried with his daughter Eliza) and his children born of his daughter Eliza $1,200, and to Manoah S. Long (who is intermarried with his daughter Mary) and his children born of his daughter Mary $1,200, which shall be paid by his widow out of its rents, issues and profits, if she can conveniently do so, in biennial payments of $1,200, without interest, and remain a lien on the real estate until the same is fully paid.

That Samuel Schwartz, one of the sons, died on June 8, 1893, testate, leaving to survive his widow, Ellen Schwartz, and a minor child, Bessie Eva Schwartz, of whose person and estate he appointed Charles D. Trexler guardian. Charles D. Trexler, however, refused to accept the trust, whereupon the court appointed the Pennsylvania Trust Company, of Reading, Pa., in his stead.

That Levi Schwartz died, seized in his demense as of fee of and in the following real estate, viz:

No. 1. A farm or plantation, containing 162 acres, which the petitioner valued at $12,325.

No. 2. A tract of woodland, containing 27 acres, which the petitioner valued at $800.

No. 3. A house and lot of ground, containing 5 acres, which the petitioner valued at $700.

No 4. A house and lot of ground, containing 1½ acres, which the petitioner valued at $500.

No. 5. A tract of woodland, containing 6 acres, which the petitioner valued at $150.

That the petitioner, by virtue of the power conferred upon her by the will of Levi Schwartz, deceased, has determined to divide and parcel out the said real estate among the five sons "upon such conditions and terms as to her seems just and right." That she allotted purparts Nos. 1 and 2 to George Schwartz, upon the condition that he pay annually to the widow, during her natural life, $200 (amended to $350) and fur-

nish her with certain quantities of grain and provisions, and pay within one year from April 1, 1894, the following sums of money, to wit:

1. The legacy of $1,200 bequeathed to Edwin H. Trexler and his children.

2. The legacy of $1,200 bequeathed to Manoah S. Long and his children.

3. The sum of $2,275 to Jonathan Schwartz.

4. The sum of $1,575 to Francis Schwartz.

5. The sum of $1,775 to Reuben Schwartz.

6. The sum of $1,500 to Bessie Eva Schwartz, the minor child of Samuel Schwartz, deceased.

That she allotted purpart No. 3 to Francis Schwartz; purpart No. 4 to Reuben Schwartz, and purpart No. 5 to George Schwartz, Reuben Schwartz, Francis Schwartz and Jonathan Schwartz, as tenants in common.

The prayer is that the allotments of the real estate, made as aforesaid, be ratified and confirmed, and that the same be adjudged to the sons respectively and to their heirs and assigns forever, upon the conditions, charges and stipulations above mentioned.

The answer set forth that Sarah Ann Schwartz has no power under the will of Levi Schwartz to allot the real estate in the manner and proportions as proposed by her; that valuation of the real estate made by her is unjust, unfair and inadequate, and that the whole proceeding is illegal and without warrant of law.

The court refused the prayer of the petition. BLAND, P. J., filing an opinion which concluded as follows:

"My conclusions are:

"1. That Sarah Ann Schwartz is clothed with power by the will of Levi Schwartz to divide and parcel out his real estate among his surviving sons, viz: Reuben Schwartz, George Schwartz, Jonathan Schwartz and Francis Schwartz, upon such conditions and terms as she shall deem right and just.

"2. That Bessie Eva Schwartz is not a proper object of the power vested by the will of Levi Schwartz in Sarah Ann Schwartz, and the scheme of division submitted to the court which directs the payment of $1,500 to the Pennsylvania Trust Company is unlawful as in excess of the power.

"3. That a proper exercise of the power requires the allotment of land to each of the said surviving sons of Levi Schwartz, and that the correct mode of execution of the power is by a declaration in writing reciting the power, and assigning to the appointees respectively, by special description, the land intended to be allotted to each in the division made.

"The division proposed by the petitioner being in excess of her power, in giving a part of the valuation money of the land to Bessie Eva Schwartz, the prayer of the petition is refused."

Error assigned was above decree.

D. Nicholas Schaeffer, for appellant, cited: 2 Story's Eq. Jur., sec. 1062; Forsythe v. Forsythe, 108 Pa. 129; Dillon v. Falcoon, 158 Pa. 468; Hemhauser v. Decker, 38 N. J. Eq. 430; Hull v. Culver, 34 Conn. 403; 2 Washb. Real Prop. 313; 1 Sugden on Powers, 511; Graeff v. DeTurk, 44 Pa. 527; Russell v. Kennedy, 66 Pa. 248; 1 Perry on Trusts, sec. 250; Horwitz v. Norris, 49 Pa. 213; 4 Kent, 345; Swaby's App., 14 W. N. C. 554; Ingraham v. Meade, 3 Wallace, Jr. 32; Postlethwaite's App., 68 Pa. 478; Follweiler's App., 102 Pa. 581; McCune's App., 65 Pa. 450; Dyer v. Cornell, 4 Pa. 359; Pennell's App., 20 Pa. 515; 2 Washb. on Real Prop. 317; Bingham's App., 64 Pa. 345; 1 Story's Eq. Jur. sec. 255; 2 Pomeroy's Eq. Jur. sec. 920; Shank v. Dewitt, 44 Ohio, 237.

Fitz Daniel Ermentrout, for appellee, cited: Wickersham v. Savage, 58 Pa. 365; Fidelity Co.'s App., 4 W. N. C. 265; Pepper's App., 120 Pa. 235; Neilson's Est., 17 W. N. C. 158; 2 Jarman on Wills, 5th Am. ed. 704; Supplee's App., 16 W. N. C. 378; Horwitz v. Norris, 49 Pa. 216; Evans v. Knorr, 4 Rawle, 71; 2 Jarman on Wills, 5th Am. ed. 75; Graeff v. DeTurk, 44 Pa. 527; Russel v. Kennedy, 66 Pa. 248; 2 Washburn on Real Prop., 5th ed. vol. 2, p. 707; Tiedeman on Real Prop., secs. 566, 567; Stephenson v. Richardson, 88 Pa. 40.

Opinion by Mr. Justice Fell, May 20, 1895:

We agree with the learned judge of the orphans' court that the will of Levi Schwartz conferred upon his widow, the petitioner in this case, power to divide and parcel out his real es-

tate among his five sons. We do not agree with him in the opinion that no division or allotment could be made by her to Sarah Ann Schwartz, the daughter of one of the sons who died after his father. The mother had a life estate with no testamentary power. The testator's object appears to have been to confer upon her the power, to be exercised at her discretion, to make partition. As a necessary incident of this power to divide upon terms and conditions to be fixed by her she could determine the purparts of each, the amounts to be paid as owelty, and the manner of payment. The gift to the sons, subject to the mother's life estate, is of a fee, the five taking as tenants in common. The power was to distribute and divide among those in whom the estate was vested, and its exercise could not divest an estate or reduce it from a fee to a life estate. Such a construction cannot be adopted in the absence of express words or necessary intendment, neither of which can be found in the will. Upon the death of one of the sons the remainder vested in him by his father's will descended to his daughter, and an apportionment to her was a proper exercise of the power.

Whether under the power to subject the shares to terms and conditions, she could determine the relative proportions of the shares and make an unequal distribution it is unnecessary to consider, as the whole proceeding was outside of the jurisdiction of the court, and any expression of opinion upon the subject would be a mere dictum. The question of jurisdiction was distinctly raised by the supplemental answer to the petition. There is no express grant of power to the orphans' court which will support the decree asked for, and it cannot be sustained as an incidental power. Even a court of general equity jurisdiction does not possess the power here invoked. No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power—as in the case of a sale under a will directing a conversion but not saying by whom it shall be made. In other cases the decree of the court would add nothing to the efficacy of the power if properly exercised, nor give it validity if improperly exercised. Here there is no trust; the power is a mere naked power, purely discretionary with the donee and not subject to the control of any court: Perry on Trusts,

sec. 248, et seq. Whether it has been properly exercised can be determined only when the question properly arises. If after the death of the life tenant proceedings in partition or ejectment should be instituted no decree of the court made now would conclude the rights of the parties.

The order of the court denying the prayer of the petition is affirmed.

A. B. & J. Schaeffer *v.* Philadelphia & Reading Railroad, Appellant.

168 209
30 SC 399
168 209
35 SC 469

Carriers of live stock—Negligence—Presumption—Evidence—Mules.

Injury to the contents of a car may furnish ground for an inference of want of ordinary care in transportation, although there may be no evidence of an injurious accident to the train, nor any direct evidence of improper or negligent handling of the car.

This rule applies with proper limitations to live stock, but has no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other ground than that of negligence in managing the train; nor does it apply in cases of death from natural causes, or causes entirely unknown.

In an action to recover damages for injuries to mules shipped from Kentucky to Fleetwood, Pennsylvania, testimony was presented to show that the animals were in good condition and uninjured when they were received at Harrisburg; that the injuries were of recent occurrence, and not such as the animals would have inflicted upon each other, except involuntarily if they were thrown down and trampled or jammed together by a collision or rough handling of the cars. Witnesses who had been for years engaged in shipping mules, who knew their habits and disposition and the causes likely to lead to their injury while on board cars, and who saw the mules when they were unloaded, were allowed to express their opinion as to the cause of the injuries. *Held* that the evidence was properly admitted.

Common carrier—Negligence—Limitation of liability—Question for jury.

In an action to recover damages for injuries to live stock during transportation, the burden of proof as to any limitation upon the common law liability of the carrier is upon the defendant, and unless such limitation is admitted, or clearly established by proof, the question is necessarily for the jury.

Argued March 5, 1895. Appeal, No. 8, Jan. T., 1895, by defendant, from judgment of C. P. Berks Co., Sept. T., 1891,

No. 5, on verdict for plaintiffs. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Trespass to recover damages for injuries to mules. Before ENDLICH, J.

At the trial it appeared that on Oct. 6, 1890, Wills and Garnett, of Cynthiana, Kentucky, shipped to the plaintiffs at Fleetwood, Berks county, Pa., a carload of forty-two mules and four horse colts. The route was over the Kentucky Central Railroad to Cincinnati, over the Pennsylvania Railroad from Cincinnati to Harrisburg, and over the defendant railroad from Harrisburg to Fleetwood. The animals were properly loaded and were shipped in Kentucky Central car No. 1311, which ran through to Fleetwood. They were fed at Covington, Kentucky. They were unloaded, fed and watered at East Liberty Stock Yards, where they arrived at 8.40 A. M. on October 10. They were all in good condition when they were reloaded on the same car, which was attached to the train leaving at 4 P. M. the same day. They were brought through from East Liberty to Harrisburg without accident, passing Altoona at 4.30 A. M. on October 11, and arriving at Harrisburg at 3.30 P. M., and after the car was turned over to the defendant at Harrisburg the stock was inspected and found in good condition. The defendant's train with the car attached left Harrisburg about 5.10 P. M.

When the car arrived at Fleetwood about 1 A. M. on October 12, the mules presented every evidence of recent rough handling, as though they had been squeezed together. Some were bruised internally and externally, some had most of their hair rubbed or tramped off their backs, some had holes in their legs, one had part of his intestines protruding, one was dead, another died the next morning, and another ten or twelve days afterwards.

There was some evidence that the shipment was made under a special contract that the carrier should be relieved of his common law liability, and should only be liable as a private carrier for hire.

When James D. Schaeffer was on the stand he testified that he had been engaged in the business of shipping mules for six years, and then he was asked this question:

By Mr. Hiester: "Q. State whether or not from your expe-

rience with mules, you believe that these animals would have been injured in this way if the car had been properly handled."

Mr. Snyder: "Objected to as irrelevant and incompetent; we have nothing to do with the belief of the witness."

The Court: "Admitted; exception for defendant."

"A. No, they could not have been injured this way if the car had been properly handled." [2]

When John Hill was on the stand, after testifying that he had been engaged in shipping mules for twelve years, he was asked:

Q. "State whether or not, from your experience with mules, you believe that these animals would have been injured in this way if the car had been properly handled?"

Mr. Snyder: "Objected to, as not competent; it is a mere opinion; the witness described what the injuries were, and he is not competent to testify; the question is a mere inference, a mere guess or belief."

"A. No, sir, they would not." [3]

Plaintiffs' point, among others, was as follows:

"If the jury cannot find that there was a special contract, or what the special contract was, then the defendant was liable as an insurer against all injuries except those arising from the act of God, the public enemy, or from the peculiar propensities of the animals carried. *Answer:* That is the rule, gentlemen, if there was no contract limiting or restricting the liability of the railroad company." [1]

Defendant's points, among others, were as follows:

"1. There is no evidence in this case that will warrant a verdict for the plaintiffs. *Answer:* Reserved." [4]

"2. Under the terms of the special contract made by the plaintiffs' agents, Wills & Garnett, with the Kentucky Central R. R. Co., the verdict must be for the defendant. *Answer:* Declined." [5]

"3. Under all the evidence in the case the verdict must be for the defendant. *Answer:* Declined." [6]

Verdict and judgment for plaintiff for $450. Defendant appealed.

Errors assigned were (1, 4–6) above instructions, quoting them; (2, 3) rulings on evidence, quoting the bill of exceptions.

Jefferson Snyder, of *Baer & Snyder*, *Philip S. Zieber* with him, for appellant.—At common law, a carrier of live stock is not liable for the injury inflicted upon an animal by itself or caused by other animals shipped in the same car, where the injury is brought about without fault on the carrier's part: Louisv., N. O. & Tex. R. R. v. Bigger, 38 A. & E. R. R. Cases, 373; Evans v. Fitchburg etc. R. R., 111 Mass. 142; Maslin v. Balt. etc. R. R., 14 W. Va. 180; Indianapolis etc. R. R. v. Jurey, 8 Ill. App. 160; Hall v. Renfro, 3 Metc. (Ky.) 51.

The burden was on the plaintiffs to show that the injury to their stock was in some way caused by defendant's negligence: Penna. R. R. v. Raiorden, 119 Pa. 577; Buck v. Penna. R. R., 150 Pa. 178; Phœnix Pot Works v. R. R., 139 Pa. 284; Reese v. Clark, 146 Pa. 465; Phila. & Reading R. R. v. Schertle, 97 Pa. 455.

Isaac Hiester, *D. Nicholas Schaeffer* with him, for appellee.—It was not necessary for plaintiff to produce witnesses who saw the rough handling of the car containing the mules, but it was sufficient for them to show that the mules had received such injuries as unmistakably pointed to rough handling of the car as their cause: N. Y. C. & H. R. R. v. Eby, 22 W. N. C. 92; Phœnix Pot Works v. Pittsburg & Lake Erie R. R., 139 Pa. 284.

The expert opinions of the mule dealers was not only relevant but entirely proper for submission to the jury, to assist them in determining whether the condition of the mules was caused by the ordinary accidents of travel, or the propensities of the animals, or by the negligent handling of the car by the defendant.

If there was no special contract, the defendant was liable as insurer, and the jury were properly first called upon to determine whether there was a special contract, and if there was one, what the special contract was.

Opinion by Mr. Justice Fell, May 20, 1895:

Whether the plaintiffs' mules, which were injured while being carried in a car on the defendant's road, had been shipped under a special contract restricting the defendant's liability as a carrier was a question in dispute at the trial. As the action

was founded upon the common law liability of a carrier the burden of proof as to any limitation thereof rested with the defendant, and unless it was admitted or clearly established by proof the question was necessarily for the jury. That the preponderance of evidence was in favor of such a limitation would not have justified the court in treating it as an established fact. The question was properly submitted with full and accurate instructions as to the effect of such an agreement if found to exist. This disposes of the first assignment of error, and the remaining assignments may be considered together. They relate to the admission of testimony as to the cause of the injuries, and to the sufficiency of this testimony to sustain a finding for the plaintiffs.

The plaintiffs had a car load of young mules and colts shipped from Cynthiana, Ky., to Fleetwood, Pa. The car was received by the defendant from another railroad company at Harrisburg. When the car reached Fleetwood a number of the mules were found to be seriously injured. To meet any defense based upon the ground of a restricted contractual liability the plaintiffs assumed the burden of proving that the injuries resulted from negligence while the car was on defendant's road and in charge of its employees. Testimony was presented to show that the animals were in good condition and uninjured when they were received at Harrisburg; that the injuries were of recent occurrence, and not such as the animals would have inflicted upon each other, except involuntarily if they were thrown down and trampled or jammed together by a collision or rough handling of the cars. Witnesses who had been for years engaged in shipping mules, who knew their habits and disposition and the causes likely to lead to their injury while on board cars, and who saw these mules when they were unloaded, were allowed to express their opinions as to the cause of the injuries. The value of their opinions was for the jury to determine, and we see no valid objection to admitting the testimony.

There was no evidence of an injurious accident to the train, nor was there any direct evidence of improper or negligent handling of the cars. Injury to the contents of a car may however furnish ground for an inference of want of ordinary care in transportation: American Express Co. v. Sands, 55 Pa. 140; Grogan v. Adams Express Co., 114 Pa. 523; Phœnix Pot

Works v. P. & L. E. R. R. Co., 139 Pa. 284; Buck v. Penna. R. R. Co., 150 Pa. 170; N. Y. C. & H. R. R. Co. v. Eby, 22 W. N. C. 92. There is no reason why this rule with proper limitations should not apply to animate objects. It of course would have no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other ground than that of negligence in managing the train; nor in cases of death from natural causes, or causes entirely unknown, as in Penna. R. R. Co. v. Raiordan, 119 Pa. 577.

The case on the facts was one of great doubt, but the jury was not left to mere conjecture. The testimony furnished the basis for an intelligent finding, and its submission was free from error.

The judgment is affirmed.

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168 214
177 217

Richard G. Trexler v. Greenwich Township, Appellant.

Negligence—Townships—Dangerous road—Horses.

In an action to recover damages for personal injuries, it appeared that plaintiff was injured by falling with his team and wagon down a declivity extending seventy feet at the side of a public road eleven feet wide, on the other side of which there was an embankment. The descent for the first ten feet was vertical, and for the rest of the way it was so steep that the plaintiff and his horses rolled down it fifty feet until their motion was arrested by a stump. There was no guard rail or barrier of any kind at this point. The case was submitted to the jury with instructions that if the road was dangerous by reason of its proximity to a precipice it was the duty of the township to exercise common prudence to insure the safety of travelers, and to erect barriers if they were necessary for that purpose. *Held*, that a judgment on a verdict should be sustained.

The question of safety relates not only to the tendency of the horse to become frightened, but also to the facility with which he can be controlled, and it is too broad a statement to say that country roads must be so kept that "skittish" horses may be driven upon them with safety. There is no duty whatever to provide for the use of vicious, untrained or unmanageable horses, and whoever drives such horses upon the road does so at his peril. Per FELL, J.

Argued March 5, 1895. Appeal, No. 176, Jan. T., 1895, by defendant, from judgment of C. P. Berks Co., Feb. T., 1894,

No. 12, on verdict for plaintiff. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Trespass for personal injuries. Before ERMENTROUT, P. J.

At the trial it appeared that plaintiff was injured by falling with his team and wagon down a steep declivity at the side of a public road. The testimony showed that the road at the point where the accident occurred was only eleven feet wide, with a high bank on one side, and a declivity of seventy feet on the other. The descent for the first ten feet was vertical, and for the rest of the way it was so steep that the plaintiff and his horses rolled down it fifty feet until their motion was arrested by a stump. There was no guard rail or barrier of any kind at this point.

The court charged in part as follows:

"[Citizens are permitted to drive even skittish animals along the highway. Our Supreme Court, in discussing this particular matter, say that the horse is naturally a timid animal, and is so liable to fright that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time. Horses abound, but horses that never frighten or are never fractious are exceedingly rare. If roads were to be constructed only for such animals there must needs be but little traveling upon them. I have, therefore, affirmed the point that 'a highway must be kept in such repair that skittish animals may be employed without risk.'] [5]

"[If, under all these instructions, the jury find that the supervisors were guilty of negligence, that they did not do their duty, that they did not do what was reasonable and practicable to guard against danger by the erection of barriers, and that the accident resulted directly from such negligence, then the next question will be, Did the plaintiff, in any way, help to bring about this accident? Did he contribute to it?] [2] . . .

"[If you find the township guilty of negligence whereby the accident happened, and that the plaintiff did not contribute by his own negligence to bring it about, then you will find a verdict for the plaintiff, and you will assess the damages in accordance with the rules I have laid down. If you find that the township was negligent, and that the plaintiff did contrib-

ute to bring about the accident, then you will find a verdict for the defendant. But if, under all the circumstances, you find that that road was so dangerous by reason of its proximity to this precipice that common prudence required extra precaution in order to insure safety to the traveling public, and that the proper precaution was not taken, and that barriers ought to have been there to prevent the tumbling down of these horses, and if you further find that the plaintiff did not contribute to bring about the accident, then you will return a verdict for the plaintiff and assess the damages in the way I have indicated.]" [3]

Plaintiff's points were, among others, as follows:

"2. If the jury believe that the immediately producing cause of the accident in this case was the unguarded condition of the roadside at the place where the accident occurred, and if that unguarded condition of the roadside was an act of negligence on the part of the township, it follows that the township is responsible in damages to the plaintiff. *Answer:* This point we affirm, provided there is no contributory negligence ascertained by the jury to have existed on part of the plaintiff." [1]

"3. A highway must be kept in such repair that skittish animals may be employed without risk. *Answer:* This point we affirm." [4]

Defendant's point, among others, was as follows:

"4. If the jury find that the plaintiff has been guilty of any contributory negligence, notwithstanding that there were no guard rails along the place where the accident happened, he cannot recover and the verdict must be for the defendant. *Answer:* This point we will affirm if the jury find that the acts com plained of were negligent, and if the jury further find that, under all the facts of the case, the plaintiff was bound to use such instrumentalities as are therein mentioned as proper, safe and expedient under all the circumstances." [6]

Verdict and judgment for plaintiff for $400. Defendant appealed.

Errors assigned were, (1–6) above instructions, quoting them.

D. Nicholas Schaeffer, for appellant.—If it was the negligence of the defendant in not permitting guard rails along the road

side, the instruction given to the jury by the court below was correct. But if it was the fright of the two-year-old horse and its uncontrollable condition that caused the accident, the defendant is not liable for the injury, and the court's instruction was error: Wharton on Negligence, ed. 1874, sec. 103 Hoag & Alger v. Lake Shore R. R., 85 Pa. 293; West Mahanoy Twp. v. Watson, 116 Pa. 344; Lancaster v. Kissinger, 1 Penny. 250; Pittsburg South. R. R. v. Taylor, 104 Pa. 306; Bishop v. Schuylkill Twp., 20 W. N. C. 105; Chartiers Twp. v. Phillips, 122 Pa. 601; Worrilow v. Upper Chichester Twp., 149 Pa. 40; Schaeffer v. Jackson Twp., 150 Pa. 145; Moulton v. Inhabitants of Sanford, 51 Me. 127; Perkins v. Fayette, 68 Me. 152; Heald v. Lang, 98 Mass. 581.

A person who knows a defect in a highway and voluntarily undertakes to test it, when it could be avoided, cannot recover against the municipal authorities for losses incurred through such defect: Forks Twp. v. King, 84 Pa. 230; Crescent Twp. v. Anderson, 114 Pa. 643; Scranton v. Hill, 102 Pa. 378; Hill v. Tionesta, 146 Pa. 11; Gregory v. Inhabitants of Adams, 14 Gray, 242.

John H. Rothermel, of *Rothermel Bros.*, for appellee.—The case was for the jury: Milwaukee etc. R. R. v. Kellogg, 94 U. S. 469; Penna. R. R. v. Kerr, 62 Pa. 353; Am. & Eng. Ency. of Law, vol. 16, p. 436.

It was the duty of the township to keep all places of manifest danger properly guarded, and to maintain the roads in a reasonably safe condition, and the measure of this duty must be determined by the circumstances of the particular case: Finnegan v. Twp., 163 Pa. 138.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

The plaintiff was injured by falling with his team and wagon down a steep declivity at the side of a public road. At the place of the accident the road was only eleven feet wide. On one side there was an embankment, and on the other the declivity extended some seventy feet to a stream. The descent for the first ten feet was vertical, and for the rest of the way it was so steep that the plaintiff and his horses rolled down it fifty feet until their motion was arrested by a stump. There was no guard rail or barrier of any kind at this point.

The case was submitted to the jury with instructions that if the road was dangerous by reason of its proximity to a precipice it was the duty of the township to exercise common prudence to insure the safety of travelers, and to erect barriers if they were necessary for that purpose. This was the real point of the case, and the instructions were correct and adequate. The fourth and fifth assignments relate to the statement that "a highway must be kept in such repair that skittish animals can be employed without risk." These words are almost identical with those found in the opinion in Macungie Township v. Merkhoffer, 71 Pa. 276. They appear in the syllabus but not in the opinion in Borough of Pittstown v. Hart, 89 Pa. 389. They were essential to the decision of neither case, and apply to no question which necessarily arose in either. This definition of duty in the maintenance of a country road is probably broader than was intended, and if it is left unnoticed it may lead to the establishment of a rule which will impose unreasonable burdens upon townships. It should however be distinctly stated that the learned trial judge followed what appeared to be a binding authority.

Whether a horse which is "skittish" in the sense of being easily frightened can be safely driven on an ordinary road depends mainly upon his disposition and training in other respects. It depends not so much upon his liability to become frightened, which is in a greater or less degree common to all horses, as upon what he is likely to do when frightened. A horse that bolts or turns or backs cannot be safely used on any road. If while easily frightened he is also easily controlled he may be safely driven on any ordinary country road. The question of safety relates not only to the tendency of the horse to become frightened, but also to the facility with which he can be controlled, and it is too broad a statement to say that country roads must be so kept that "skittish" horses may be driven upon them with safety. There is no duty whatever to provide for the use of vicious, untrained or unmanageable horses, and whoever drives such horses upon the road does so at his peril. Gutters provided for drainage, banks and depressions at the sides, and any obstacles outside of the beaten path become in such cases objects of danger, and it is utterly impracticable to guard against them.

There is however a reasonable limit to which protection from injury should extend. It is common experience that horses neither vicious nor unmanageable are liable to shy, and while they may be readily controlled they cannot be prevented from stepping aside from the beaten path. This is not ordinarily attended with danger, where the road is of adequate width or where the dangerous places are protected by guards. Where the road is of the ordinary width the driver is not carried by such a departure to a position of danger before he has an opportunity to control the movements of his horse. Where however the road is so narrow that a slight deviation leads to the edge of a precipice or other place of danger the duty to erect guards is apparent. The rule was well stated in Borough of Pittstown v. Hart, supra, where it was said: "The horse is naturally a timid animal, and is so liable to fright that those having charge of the public highways ought to make reasonable provision for a matter so common and so likely to happen at any time."

The duty is to make provision against such dangers as are probable in the use of ordinarily manageable horses, and not in the use of such as are untrained and uncontrollable. This duty is performed when the roads are maintained in a reasonably safe condition for the ordinary public travel. The instruction referred to did the defendant no harm in this case. The place where the accident happened was one of manifest danger, and there is no evidence that the horse was unsafe for use.

The judgment is affirmed.

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168 219
184 261

William E. Lilly *v.* Person & Riegel, Appellants.

Contract—Building contract—Lost paper—Evidence.

Plaintiff contracted in writing with defendants to construct a building for them for $17,550. One of the specifications provided that he should tear down an old building and use such materials in the construction of the new one as were suitable, "the net value of such materials to be reckoned at the amount stated in the contractor's bid, and the said amount to be deducted from the gross contract price." The plaintiff's bid for the new work and for the material of the old building was in writing, but had been lost or destroyed by the defendants, and there was no written evidence

of the amount he had agreed to allow for the old material. *Held*, that it was competent for the plaintiff to show that his original bid was in excess of the amount stated in the contract, and that he wrote below his bid that he allowed the excess for the old building.

Contract—Addition to written instrument after signature—Evidence—Question for jury.

Where an addition to a contract is written on the page following the signatures, and it appears that there was ample room for the addition on the same page with the signatures, and the evidence is conflicting as to whether or not the addition had been made with plaintiff's knowledge before the agreement was signed, the question is for the jury to determine whether or not the addition is binding on the plaintiff.

Building contract—Change in specifications—Delay—Penalty.

A building contract provided that the builder should forfeit a certain sum for each day that the building remained unfinished after the time fixed by the agreement for its completion. The owners reserved the right at any time during the progress of the work to make any alterations in the plans and specifications. The contract provided that any change in the plans "either in quantity or quality of the work" should be executed by the plaintiff "without holding the contract as violated or void in any other respect." During the progress of the work, a change was made in the material for the front of the building from brick and granite to Indiana stone with carved panels and frieze. *Held*, that plaintiff was not responsible for delay necessarily resulting from the alterations in the work directed by the owners.

Argued March 11, 1895. Appeal, No. 79, July T., 1894, by defendants, from judgment of C. P. Northampton Co., April T., 1893, No. 43, on verdict for plaintiff. Before STERRETT, C. J., GREEN, WILLIAMS, MITCHELL, DEAN and FELL, JJ. Affirmed.

Assumpsit on a building contract. Before REEDER, J.

At the trial it appeared that plaintiff and defendants on May 19, 1891, entered into a contract in writing, the material portions of which were as follows:

"That the said party of the first part for and in consideration of the sum of money as hereinafter mentioned to be paid by the said party of the second part, as well as the covenants and agreements hereinafter recited by the said party of the second part to be kept and performed, doth by these presents covenant, promise and agree to and with the said party of the second part as follows, to wit:

"That the said party of the first part shall and will in a good, workmanlike manner, according to the best of his art,

skill and ability, build, erect, finish and complete, and the materials for the same wholly provide, a four-story brick and stone building, for the purposes of a store, offices and lodge rooms on a lot or piece of ground situate on the west side of Main street in the Borough of Bethlehem, Pennsylvania, the whole of said work to be performed and all of said materials to be furnished in conformity with the plans, specifications and elevations of the same as made by A. W. Leh, the architect, hereby appointed by the said party of the second part, which plans and specifications bear even date herewith and are marked by the initials of the parties hereto, and which are to be considered as forming part of this agreement as if herein fully set forth. That the said party of the first part further agrees that the work aforesaid shall be commenced and diligently prosecuted and the materials promptly furnished and the said building shall be wholly completed according to the terms of this contract and ready for use and occupancy on or before the fifteenth day of October next, the store room September 15 next, and that for each and every day the same (store room) remains uncompleted after the said fifteenth day of September next the said party of the first part shall and will forfeit the sum of ten dollars ($10) per day for each of the first ten days after such date, and for each and every day after the ten days following said fifteenth day of September the sum of ten dollars ($10) per day, unto the said party of the second part, which said sum so forfeited shall and may be deducted and retained by the said party of the second part from and out of the final payment to be made unto the said party of the first part under these articles.

"That if the said party of the second part shall at any time alter or change the aforesaid plans or specifications either in the quantity or quality of the work, the said party of the first part will execute the same without holding this contract as violated or void in any other respect, and the value, costs and charges of such alterations shall be agreed upon by the parties and added to this contract in writing before the same are executed, and if so agreed upon and noted the value of such changes or difference shall be added to the amount to be paid under this agreement or deducted therefrom as the case may be, it being expressly understood that no extra work of any

kind shall be performed or extra materials furnished by the said party of the first part unless thereto authorized in writing by the said party of the second part, who may from time to time make such alterations in the aforesaid plans and specifications upon the terms aforesaid as to him shall seem meet.

"And the said party of the second part in consideration of the work and labor being done and materials provided as hereinbefore required, and all other of the agreements, covenants, provisions and stipulations herein set forth being kept and performed by the said party of the first part, doth covenant, promise and agree to and with the said party of the first part, that they will truly pay or cause to be paid unto the said party of the first part the sum of Seventeen thousand Five Hundred & Fifty dollars in manner following, to wit:

"In witness whereof we have hereunto set our hands and seals this the day and year first above written.

"W. E. LILLY. (SEAL)
"M. J. PERSON. (SEAL)
"EDW. E. RIEGEL. (SEAL)

"Alterations on pages 1 and 2 were made before the signing.
"Also addition on page 6.
"Executed and delivered in presence of

"GRANT J. SNYDER.
"F. S. SCHWAB, JR.

"The plans and elevations which form part of this agreement are 10 inches less than the width of the building is intended to be. In all cases the details will be followed in preference to $\frac{1}{8}''$ and $\frac{1}{4}''$ scale drawings."

One of the specifications was as follows:

"Also tear down the present building occupied by Hunt (Hat store) all of the material from the tearing out of the building to belong to the Contractor and to become his property, such material as is suitable and fit to be used in the construction of the new subject to the approval of the Architect or owners, can be used in the new building, the rest to be removed from the premises at once, the net value of such materials to be reckoned at the amount stated in the Contractor's bid, and the said amount to be deducted from the gross contract price."

The following memorandum was subsequently signed by plaintiff at defendants' request:

"BETHLEHEM, Pa.,——— —, 189–.

"I hereby agree to make the following changes in above contract.

"I propose to erect and finish in complete and satisfactory manner a stone front facing (Indiana stone rock faced) and stone carved panels and frieze, where specified terra cotta and brick, for the sum of $324 in addition to the above named contract. W. E. LILLY.

"Witness—FRANK J. SNYDER."

Plaintiff bid for the work before the contract was executed but the bid was lost or destroyed. He claimed that his bid was $17,880 and that he had written below his bid that he would allow $300 for the old building; that defendants then said that if he would throw off $30.00 they would give him the contract; and that by taking off the $300 and the $30.00 the price was reduced from $17,880 to $17,550, and that in that way they arrived at the net amount, $17,550, inserted in the contract. This was denied by defendants, and it was contended on their behalf that the value of the old material was to be deducted from the contract price.

The contract was signed and sealed on the fifth page and plaintiff claimed that the alteration marked on page six, as follows:—"the plans and elevations which form part of this agreement are ten inches less than the width of the building is intended to be. In all cases the details will be followed in preference to $\frac{1}{8}''$ or $\frac{1}{4}''$ scale drawings,"—was not made before or at the signing of the contract, and that his attention was not called to it. He claimed $525, the value of the ten inches additional width and extra work. Defendants contended that under a proper construction of the contract the erection was clearly called for ten inches wider than the original plans, and that an inspection of the agreement and an attestation clause thereof disclosed the fact that the addition on page six was part of the paper, and upon its face showed the assent of the plaintiff thereto.

The defendants claimed to recoup or set off the amount of damages liquidated by the contract at $10.00 per diem for fif-

teen days' delay after Sept. 15, 1891, in completing the storeroom for occupancy, amounting to $150, and also damages for loss of rent suffered through noncompletion of the building from October 15 to December 1, 1891, amounting to $97.52. Plaintiff claimed that the forfeiture of $10.00 per diem after September 15 should not be enforced, because the change in the building, agreed to in writing, by which the front was to be of Indiana stone instead of terra cotta and brick, was the cause of the delay.

The court charged in part as follows:

"[The testimony of the plaintiff is that he bid $17,880, and that he also offered $300 for the old material in the building. These specifications were drawn by the architect for the purpose of having the builders bid upon the building. The bid was so made. He then claims that after the bid was so made they said to him that if he would agree to reduce his bid to $17,550, they would give him the contract. He says that that was deducting the amount that he bid for the old material, and didn't include that; that the bid was so made, and the contract was entered into, which was a separate agreement, one of the conditions of which was that these specifications, upon which the bids were invited, and upon which the bids were made, should be a part of that contract.

"It is claimed by the defendants that the difference of $300, for the material in the old building, shall be accredited upon the contract price, namely $17,550, which would make the amount of cash that he was entitled to receive upon his contract $17,250.

"It is contended upon the part of the defendant that the amount which he was entitled to receive was $17,550 cash, the $300 which he bid for the old material in his contract having been deducted from the gross contract price, and $17,550 being the net contract price after such deduction. This is a question of fact, gentlemen of the jury, for your determination. If you find that that was agreed to be done, and find there was no specific mention made of it in the contract itself, and find it was intended that that should be excluded as a credit upon this contract, that was a mutual omission or a mutual mistake of these parties when they entered into the contract, and therefore the contract could be reformed as to that provision.

If you find that the plaintiff's theory is the correct one, and that his bid for $17,880 was handed in, which was afterwards reduced to $17,550, that the $300 was deducted then for the purpose of ascertaining the contract price, and it was so put in the contract at $17,550, then of course they are not entitled to have it credited now. If it was not a mutual mistake, if the defendants did not so intend it and the contract was entered into for $17,550, they understanding and intending that the $300 should be accredited upon the $17,550, no matter what the plaintiff may have understood about it, they are entitled to have that $300 taken as a credit upon the contract price, as stipulated in the contract, $17,550. That is to say, that if you believe that they, by mutual agreement, deducted the $300 before fixing the $17,550 as the contract price, then they have no right to deduct it now. If you believe it was not the intention of the defendants to deduct it then, but it was their intention and supposition and belief that it would be deducted afterwards, no matter how much the plaintiff may have been under a wrong impression, then it must be deducted and credited as a credit upon this contract price now.] [1]

"[After the building had been staked out, and, according to the testimony of the plaintiff, after he had commenced some work upon the construction of the new building, a change was made. The defendants purchased a strip of property, 10 inches in front, running in depth 150 feet, and 12 inches wide in the rear, from the adjoining property belonging to William D. Luckenbach. After the purchase of this property they desired to extend their building the entire width of the property that they owned; that is, the entire width of the old Hunt property, together with this strip of from 10 to 12 inches that they purchased from Luckenbach. Appended to the contract there is an additional clause upon what was the blank page originally of this contract as drawn, and it bears in writing the number 6.

"The clause reads as follows: 'The plans and elevations which form part of this agreement, are 10 inches less than the width of the building is intended to be. In all cases the details will be followed in preference to ⅛ and ¼ scale drawings,' and on the previous page, page 5, where the signatures and seals of the parties to this contract are attached under the

clause of attestation, we find the following: 'Executed and delivered in the presence of ———. Alterations on pages 1, 2, were made before signing,' (that means interlineations on pages 1 and 2 were made before signing,) 'also addition on page 6.' Then it is signed by two attesting witnesses whose testimony you have heard.

"The plaintiff now seeks to recover for the extra building on this 10-inch additional purchased from Luckenbach. The defendants claim that he cannot recover for that extension of the building for the reason that it is in this contract. If it is in this contract, then I say to you, as a matter of law, he cannot recover. If it is not in this contract, he can recover. It is written in the contract. Had it been written in the body of the contract, so that there would have been no controversy about it, prior to the signing and sealing of this instrument, the plaintiff would have been bound by the contract nominated in his agreement and could not have gotten beyond it, and could have recovered no more than the price stipulated for. If he knew that that was in the contract, or if his attention was called to it and an attempt was made to read it, which he declined to hear, then it was in the contract, and he was bound by it and could not recover for that additional building. If it was put there, no matter whether it was for the purpose to deceive him or not, but if it was put there, and it did deceive him so that he didn't know that that provision was in the contract because of its position, and he signed the contract without his attention being called to it, then it is not part of this contract, and he would be entitled to recover for it.

"The defendants testify that they read it to him. Mr. Person and Mr. Riegel, who are both parties to this contract, say his attention was called to it, and when it was either read in whole or part, the plaintiff said: 'Yes, yes, I understand.' The two subscribing witnesses who were present at the time this contract was signed also testify that Mr. Lilly's attention was called to it, that it was read either in whole or in part, and he said: 'Yes, yes, I understand.' If that testimony is true, then he agreed to build that extension under this contract for the contract price, and cannot recover for it now. If it is not true, and his attention was never called to it, and he never saw it as part of the contract, that it was not part of the contract, and was not in-

cluded in the contract price, and he would have the right to recover whatever that extension was reasonably worth.]" [2]

"[The defendants claim that they are also entitled to a forfeiture of $10.00 a day for 15 days from the time of the completion of the contract to the time that they actually took possession. It is provided for in the contract: 'The said party of the first part further agrees that the work aforesaid shall be commenced and diligently prosecuted, and the materials promptly furnished, and the said building shall be wholly completed according to the terms of this contract and ready for use and occupancy on or before the fifteenth day of October next, and that for the store-room September fifteenth next, each and every day the same, the store-room, remains uncompleted after the said fifteenth day of September next, the said party of the first part shall and will forfeit the said sum of $10.00 per day for each of the first ten days after such date and for each and every ten days following said fifteenth day of September next the sum of $10.00 per day.'

"That provision in this contract is a binding provision. If it has been violated by the plaintiff without the consent of the defendants, or without any fault upon their part, then they are entitled to insist upon the forfeiture and have credit for it against the plaintiff's claim.

"The plaintiff claims that this forfeiture should not be enforced for the reason that after the contract was entered into there was a change made in the front of the building. The specifications provide that no change shall be made either in the quantity or the quality of the materials furnished: 'That, if the said party of the second part shall at any time alter or change the aforesaid plans or specifications, either in the quantity or quality of the work, the said party of the first part will execute the same without holding this contract as violated or void in any other respect.' The defendants claim that although the change in front was made by them, yet, nevertheless, that did not affect any other portion of the contract.

"It might be successfully contended by the plaintiff that this was no change in either the quantity or quality of the work, but was a change of the whole scheme and character of a certain portion of the work, namely, the front of the building, and, therefore, did not fall within this clause of the contract.

I do not consider that that is necessary—that it is necessary to determine that question for the purposes of this case. I say to you, as a matter of law, that if the finishing of this contract was delayed, necessarily delayed, by the change in the character of the structure by the defendants, then defendants are not entitled to recover any portion of this per diem forfeiture for any time beyond the necessary delay. That is to say, that if the defendants changed this front from the original contract, whatever delay was occasioned the plaintiff in the finishing of the building was the defendants' delay as well as the plaintiff's delay, and the defendants would have no right to recover for this forfeiture.]" [3]

Plaintiff's points, among others, were as follows:

"12. If the evidence satisfied the jury that the contract, dated May 19, 1891, was signed on that date, that at and prior to the signing nothing was said to the plaintiff about an extension of the building 10 inches northwardly, and he signed the contract, believing that he was undertaking to build only on the front 30 feet, 4 inches, according to his bid, and the elevations and plans before him, that defendants first informed him of their proposed extension about May 29 or 30, after they had bought the 10 inches of Luckenbach on May 26, and then offered to pay defendants for extending the building 10 inches along Main street, then they should allow plaintiff such sum as the extension was reasonably worth. *Answer:* I affirm that by what I have already said in relation to the effect of this alteration or addition to the contract." [4]

"15. If the value of such material was deducted from the amount stated as the gross contract price, and reckoned at the amount stated in the contractor's bid, it cannot be deducted again. *Answer:* That point I can only affirm as qualified by what I have already said in regard to it. If his attention was drawn to this alteration in the contract, he is bound by it; if it was not, and he signed it without knowing it, then he is not bound by it." [5]

Defendants' point, among others, was as follows:

"The jury must disregard all the evidence submitted by plaintiff concerning the value of the 10-inch extension of the width of the defendants' building, and reject that portion of his claim. *Answer:* That point I deny." [6]

Verdict and judgment for plaintiff for $1,235.60. Defendants appealed.

Errors assigned among others were (1–6) above instructions, quoting them.

W. S. Kirkpatrick, *L. R. Meyers* with him, for appellants.—Parol evidence was improperly admitted to change the written contract: Lyman v. United Ins. Co., 17 Johns. (N. Y.) 373; Am. & Eng. Ency. Law, vol. 15, 629; North & West Branch Ry. Co. v. Swank, 105 Pa. 555; Phillips v. Meily, 106 Pa. 536; Cummins v. Hurlbutt, 92 Pa. 165; Sylvius v. Kosek, 117 Pa. 67; Murray v. N. Y., Lack. & West. R. R., 103 Pa. 37.

Every alteration on the face of a written instrument detracts from its credit and renders it suspicious; and this suspicion the party claiming under it is ordinarily held bound to remove. If this alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the instrument is relieved from that suspicion: 1 Greenleaf on Evidence, sec. 564; Greenfield's Est., 14 Pa. 496; Pennsylvania R. R. v. Shay, 82 Pa. 198.

According to the contract itself, the change being in the quality of the front as originally specified in the plans, and expressly subject to the provision that such changes were to be carried out without affecting the other provisions in any respect, the limit of time within which the store was to be ready for occupancy remained as before.

W. E. Doster, *W. C. Loos* with him, for appellee.—The $300 claim was for the jury: Spencer v. Colt, 89 Pa. 314; Thomas & Son v. Loose, 114 Pa. 35; Walker v. France, 112 Pa. 210; Ferguson v. Rafferty, 128 Pa. 356.

Whether interlineations were made before or after execution is for the jury: Haffelfinger v. Shutz, 16 S. & R. 44; Foster v. McGraw, 64 Pa. 464; Farmers' Mut. Fire Ins. Co. v. Blair, 82 Pa. 33.

The defendant claimed through the alteration, and it was beneficial to him only who made it. The burden then was on him to show it was all right: Robinson v. Myers, 67 Pa. 9; McCauley v. Keller, 130 Pa. 69; Wilgus v. Whitehead, 89 Pa.

131; Emerson v. Slater, 22 Howard, 28; Monroe v. Perkin, 9 Pick. 298; Bartlett v. Kingan, 19 Pa. 341.

Defendants had no right to damages for delay: White v. Braddock, 159 Pa. 201; Pennypacker v. Jones, 106 Pa. 237; Seipel v. Internat. Life Ins. Co., 84 Pa. 47; Chitty on Contracts, 89; 2 Parsons on Contracts, 676; Broom's Leg. Maxims, 214; Huckestein v. Kelly & Jones Co., 152 Pa. 631; Bachler v. Cooper, 150 Pa. 533.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

Our labor in reviewing the proceedings of a protracted trial involving many complicated questions of law and fact has been materially lessened by the clear and orderly manner in which the case has been presented by counsel.

The plaintiff contracted in writing with the defendants to construct a building for them for $17.550. One of the specifications provided that he should tear down an old building and use such materials in the construction of the new one as were suitable, "the net value of such materials to be reckoned at the amount stated in the contractor's bid, and the said amount to be deducted from the gross contract price." The plaintiff's bid for the new work and for the material of the old building was in writing, but had been lost or destroyed by the defendants, and there was no written evidence of the amount he had agreed to allow for the old material. The dispute upon this branch of the case was whether the agreed allowance for this material had been deducted from the amount of his bid in ascertaining the contract price or whether it should be deducted from the amount named in the agreement. The plaintiff was allowed to testify under objection that his bid was $17.880, and that he wrote below his bid that he allowed $300 for the old building; that he was then told by the defendants that if he would throw off $30.00 they would give him the contract; that he assented to this, and that the contract was afterwards written and the price named in it, $17,550, arrived at in that way. The issue of fact raised by this testimony and its denial by the defendants' witness was submitted to the jury to determine what the the actual agreement as to price was. We find no error in either the manner in which the issue was raised or the manner in which it was submitted.

The action was to recover on the basis of the price named in the contract. The only written evidence fixed that at $17,550. The plaintiff might have rested upon this agreement. As the bid for the work to be done and the old materials to be purchased had been lost the contract was the only written evidence in the case, and if any deduction was to be made parol evidence must of necessity be resorted to. If the defendants had done this either upon the ground that the contract offered was not the whole of the written agreement or that by mistake the amount of the bid for the old materials had not been deducted from the contract price it would have been competent for the plaintiff to have met the claim by oral evidence in rebuttal. As there was nothing in the agreement to bind him to take less than $17,550 his recovery on that basis could be defeated only by proof of matter outside the agreement. It was competent for him to anticipate such a defense and to explain any matter which suggested a doubt as to his claim.

The second ground of defense relates to the claim made by the plaintiff for additional compensation for constructing a building ten inches wider than the plans and specifications provided for. The agreement was signed at the middle of the last page, and witnessed by two witnesses. The attesting clause reads "Alterations on pages 1 and 2 were made before signing. Also additions on page 6." On the page following with nothing intervening to call attention to it is written, "The plans and elevations which form part of this agreement are ten inches less than the width of the building is intended to be. In all cases the details will be followed in preference to $\frac{1}{8}''$ and $\frac{1}{4}''$ scale drawing." The half of the page below the signatures was blank, and there was ample room to have written this addition there. The testimony was conflicting as to whether the addition had been made before the agreement was signed, and whether the plaintiff's attention had been called to it. The subscribing witnesses testified that it had been made before signing, and that it was read to the plaintiff, and they were corroborated by one of the defendants. The plaintiff denied all knowledge of it and of any intention on the part of the defendants to construct a wider building, until he had commenced work and was consulted by them as to the additional cost and agreed to the change, the cost being left for adjustment when the work

was completed. He was sustained by the corroborating proof that the purchase of the additional strip of ten inches of ground was not made until seven days after the agreement was signed, and that then the architect's attention was first called to the matter and the plans altered. We are concerned with this conflicting testimony only as it gives rise to and affects the legal question involved. The jury was instructed that if the plaintiff did not know of the addition to the contract at the time of signing and was deceived because of the place in which it was written, he was not bound by it. The contract remained in the possession of the defendants from the date of its execution until it was produced at the trial, and during that time was not seen by the plaintiff.

Any alteration of a written instrument detracts from its credit. If the alteration is material and in the interest of the person producing the writing it gives rise to a suspicion which it is incumbent upon him to remove. An alteration may ordinarily be sufficiently explained by the fact that it is noted in the attestation as having been made before the execution, as this virtually incorporates it in the text. "But if any ground of suspicion is apparent on the face of the instrument the law presumes nothing, but leaves the question of time when it was done, as well as that of the person by whom and the intention with which the alteration was made, as matters of fact to be ultimately found by the jury upon proof to be adduced by the party offering the instrument in evidence:" Greenleaf on Evidence, vol. 1, *564; Jordan v. Stewart, 23 Pa. 244. The addition in this case was after the signatures. It was not written on the same page with them, although there was ample room, half of the page being blank. It was written at the top of the following page, where it would not ordinarily be observed. The plaintiff is presumed to have read all that preceded his signature, but there is no presumption that he read what followed it on another sheet. The testimony on this branch of the case raised an issue which was properly submitted to the jury.

The contract provided that the builder should forfeit $10.00 for each day that the building remained unfinished after the time fixed by the agreement for its completion. It also provided that any change in the plans "either in quantity or quality of

the work" should be executed by the plaintiff "without holding the contract as violated or void in any other respect." During the progress of the work a change was made in the material for the front of the building from brick and granite to Indiana stone with carved panels and frieze. The difficulty in procuring a prompt delivery of the stone caused a delay in finishing the building, and the defendants claimed to recoup the stipulated forfeit and set off the loss of rents. By the agreement the defendants reserved the right at any time during the progress of the work to make any alterations in the plans and specifications, and it became the duty of the plaintiff to carry them into effect. The provision that the changed plans should be executed without holding the contract as violated or void in any other respect should be read in connection with this reserved right. The words "in any other respect" exclude the implication of any change in terms except such as would result from the alteration of the plans, but not such changes as would be the necessary consequence thereof. Alterations calling for more work and materials, or work and materials of a different class, might of necessity require more time for the completion of the building. They might be directed so near the end of the work as to make it impossible to complete the building within the time stipulated. In this case the building was in Bethlehem, and the material fixed for the front by the contract could be purchased in an open market and delivered ready for use in one day. The stone required by the alteration could be procured only at the quarries in Indiana, where an order had to await its turn, and after delivery it required weeks of skilled labor to fit it for use in the building. For such delay in the completion of the building as was the necessary consequence of the change of plans by the defendants the plaintiff was not answerable, and for it no forfeiture could be exacted.

The judgment is affirmed.

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Josiah Dowling v. Merchants Insurance Co. of Newark, N. J., Appellant.

Insurance—Fire insurance—Mistake of agent—Description of property.

The fraud or mistake of an insurance agent within the scope of his authority will not enable his principal to avoid a contract of insurance to the injury of the insured who acted in good faith; and the fraud or mistake of the agent may be proved by parol evidence notwithstanding it is provided in the policy that the description of the property shall be a part of the contract and a warranty by the insured.

In an action upon a policy of fire insurance, it appeared that no written application for insurance was made, and that the policy was written by the defendant's agent, and accepted in good faith without examination, and not read by the insured until after the fire. The building insured was built for and used as a boarding house, and was erroneously described in the policy as "occupied by the insured as a dwelling only." The plaintiff fully and accurately described the property to the agent as a boarding house, and it was seen and examined by the agent, and the misdescription was his act alone. *Held*, that plaintiff was entitled to recover.

Insurance—Fire insurance—Proof of loss—Waiver.

A policy of fire insurance required proof of loss to be made within sixty days. On the day of the fire the company's agent was notified by telegraph of the fire, and a few days afterwards inspected the premises and stated to plaintiff that the building was a total loss, and that plaintiff should make out a statement as to the value of the contents of the house, and that he could take his time to make his statement, and hold it until it was called for. Twenty-two days after the fire plaintiff mailed a proof of loss to the agent. About three months after the fire a proof of loss was sent directly to the company. Two months afterwards the company returned the latter proof of loss. *Held*, that the evidence was sufficient to justify a finding by the jury that a proof of loss had been furnished within the time fixed by the policy, and that the company had also waived all irregularities.

Argued March 13, 1895. Appeal, No. 205, Jan. T., 1895, by defendant, from judgment of C. P. Monroe Co., May T., 1893, No. 33, on verdict for plaintiff. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Assumpsit upon a policy of fire insurance.

At the trial it appeared that the policy was for $5,000, covering a dwelling house and household furniture. The building was described in the policy as being "occupied by insured as a

dwelling house only." The evidence showed that the house was used as a boarding house, but that the agent who wrote the policy was fully informed of this fact by plaintiff, and that plaintiff did not read the policy until after the trial. Further facts appear by the charge of the court.

The court charged in part as follows:

"[If Mr. Dowling represented this as a boarding house to the insurance agent, and the insurance agent, by mistake or by design, issued a policy as a dwelling house, for a dwelling house only, if you believe that was a mistake on the part of the agent that he failed to follow out the directions of Mr. Dowling, and if you believe that Dowling was honest in his expression as to what the building was, and what he intended to have insured, we have to say to you that this company is not released from its liability, if Mr. Dowling made a true representation to the company and the company made a mistake, through its agent, in changing the phraseology or the language which Mr. Dowling used toward the agent. So that if you find there was a mistake made by the agent, and that Mr. Dowling did not connive with the agent to perpetrate a fraud upon the company, but he fairly and honestly stated what the building was to be used for and relied upon that in his statement to the company, the company cannot defend if the company itself, or their agent, made a mistake in issuing this policy in the way in which they did.] [5]

"[The second point which the company raises is that they were not furnished with the proofs of loss as required by the company's policy. Upon that point we allowed some testimony to be introduced in order to bear upon the bona fides of the notice, and upon the question whether this plaintiff exercised due diligence, and whether he was led by the conduct of the company to not furnish the proofs of loss within the specified time set forth in the policy. You will recollect the testimony of Henry Smith, the station agent, who lives at Mount Pocono, who tells you that upon the morning of the fire (this fire, as I recollect the testimony, occurred between one and two o'clock in the morning), he telegraphed to Mr. LaRue in reference to the occurrence, and on the Monday following LaRue came up to the place. And you recollect the testimony of Willard Dowling as to what occurred between him and Mr. LaRue in reference to this loss. You will recollect Mr. LaRue, according

to the testimony of Willard Dowling, asked if the building could be rebuilt, asked something about whether it could be rebuilt for $4,500 (I do not now give you the exact language), and what was said about the house being a loss, and what we wanted to get at was the value of the contents of the house. Also what he said about the furnishing of a form and telling him he should make out a list of the loss and make it low enough, and hold it until he could come and see him about it. You recollect what he said about asking him whether he should hold it, and what LaRue responded to him by saying yes, he should. As this is important, I will read what Willard Dowling's testimony is upon that point. This is what he says as the reporter has furnished it to me: 'He, LaRue, said that was all satisfactory, that he knew that was a total loss—that is the building—all we have to get at now is the contents of the building, furniture, etc., which is the only thing to be considered further. And I think he remained on the porch talking about it for a little while, and I asked him whether the building could be rebuilt and whether it was worth more than what it was insured. He asked me for a blank piece of paper and thereon he marked a sort of formula in which to draw the contents of the house, saying right there that we know the house was a total loss and everything about that or something to that effect.

"'And the only question now we want to conclude on is the value of the contents of the house, and without my questioning him any he says, you keep this and you take your time and make it out, and make it low enough. These remarks he made, and take your time, and when you get it completed hold it until we call for it, we or he, I don't know which he said. That was on the Monday following the fire.'

"Then, it seems that some twenty-two days after the fire Dowling mailed a proof of loss to LaRue at Easton, Pa., and put it in the post office. LaRue says he did not receive that letter, but you have the evidence that Dowling did mail this about twenty-two days after the occurrence, and in the ordinary way of mailing a letter. Then, it seems that on Oct. 13, 1892, a letter was mailed to LaRue, which letter you have heard read, and acknowledged by postal. Then nothing seems to have been done until the 8th of December, 1892, when a proof of loss was sent to the company, and on the 4th of February,

1893, this proof of loss was returned to Mr. Dowling by the president of the company, this company refusing to pay it, but stating his grounds why they refused to pay it.

"We allowed this evidence to go in, gentlemen of the jury, in the first place, to show whether the conduct of this company had been such as to waive strict compliance with the conditions of their policy upon this requirement of sixty days for the proof of loss to be furnished. And upon that point you have the testimony of Willard Dowling, the conversation he had with LaRue with reference to this proof of loss and what LaRue said. Then you have those other letters. Do they show a conduct on the part of the company which would lead Mr. Dowling to the conclusion that they had waived a strict compliance with this part of the policy? We say to you that if there was this action on the part of the company, and from that Mr. Dowling was led to believe that there would not be a strict enforcement of this clause of the policy, and if he then gave reasonable notice, as a prudent man, desiring to furnish all the proofs that should be required in the premises, and that he did this for a bona fide and honest purpose, with the purpose of informing the company as to the loss, we say, if you believe those things from the facts in this case, then the company was estopped from setting up a strict compliance with the clause in their policy requiring the proofs of loss to be furnished within sixty days.] [6]

"'[The court is respectfully asked by the defendant's counsel to charge the jury that under the undisputed evidence in this case the verdict should be for the defendant.' That point we negative, because if we were to affirm it, we would be taking the case from your consideration. As we view the case, and under the instructions we have given you, we do not feel as if we were warranted in responding affirmatively to that request.]" [7]

Verdict and judgment for plaintiff for $5,470.83. Defendant appealed.

Errors assigned were among others (5–7) above instructions, quoting them

E. N. Willard, of *Willard, Warren & Knapp*, *A. R. Brittain* with him, for appellant.—When a contract of insurance is re-

duced to writing, prior negotiations of the parties in respect to it are deemed to be merged in the document which, in law, is conceived to be the evidence of the agreement they finally fix upon. Parol evidence is admissible to vary its terms: 2 Biddle on Ins. p. 523; Smith v. Nat. Life Ins. Co., 103 Pa. 184; Martin v. Berens, 67 Pa. 459; Thorne v. Warfflein, 100 Pa. 519; Eilenberger v. Protective Mut. Fire Ins. Co., 89 Pa. 464; Farmers & Mechanics Mut. Ins. Co. v. Meckes, 10 W. N. C. 306.

There was no evidence of waiver: Beatty v. Lycoming Mut. Ins. Co., 66 Pa. 9; Gould v. Dwelling House Ins. Co., 134 Pa. 570; Swan v. Watertown Fire Ins. Co., 96 Pa. 37; Goddard v. Monitor Ins. Co., 108 Mass. 56; Pottsville Mut. Fire Ins. v. Fromm, 100 Pa. 347; Alexander v. Germania Fire Ins. Co., 66 N. Y. 464.

A description of property insured as a dwelling house constitutes a warranty: Merwin v. Star Fire Ins. Co., 72 N. Y. 603; Farmers' Ins. Co. v. Currey, 13 Bush, 312; O'Neil v. Buffalo Fire Ins. Co., 3 Comstock (N. Y.), 122.

S. Holmes, *John B. Storm* with him, for appellee.—The fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by an insurance company, will not enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract: Eilenberger v. Protective Mut. Fire Ins., 89 Pa. 464; Smith v. Farmers' and Mechanics' Mut. Fire Ins. Co., 89 Pa. 287; Kister v. Lebanon Mut. Ins. Co., 128 Pa. 553; Meyers v. Lebanon Mut. Ins. Co., 156 Pa. 420; Susquehanna Mut. Fire Ins. Co. v. Cusick, 109 Pa. 157.

The fact of the delivery of proofs to the insurer may be proved by parol evidence: 2 Biddle on Ins., sec. 1020: Hagan v. Merch. etc. Ins. Co., 81 Iowa, 321; Davis Shoe Co. v. Kittanning Ins. Co., 138 Pa. 73; Universal Fire Ins. Co. v. Block, 109 Pa. 541; Hall v. Ins. Co., 3 Phila. 333; 2 Biddle on Ins. 1053; Wood on Fire Ins. 728.

A waiver may be inferred, where the insurer is the cause of the insured's delay: 2 Biddle on Ins. sec. 1136; Lycoming Ins. Co. v. Schreffler, 42 Pa. 188; Ben Franklin Ins. Co. v. Flynn, 98 Pa. 627; Hutchinson v. Niag. Dist. Ins. Co., 39 U. C. Q. B. 483; 2 Biddle on Ins. sec. 1136; Franklin Fire Ins. Co. v.

Updegraff, 43 Pa. 350; Imp. Fire Ins. v. Murray, 73 Pa. 13; Peoria F. & M. Ins. Co. v. Whitehill, 25 Ill. 466; 2 Biddle on Ins. secs. 1136, 1139; Farmers' & Mechanics' Mut. Ins. Co. v. Meckes, 10 W. N. C. 306; Weiss v. American Fire Ins., 148 Pa. 350; American Cent. Ins. Co. v. Haws, 20 W. N. C. 370; Susq. Mut. Fire Ins. Co. v. Hallock, 22 W. N. C. 151.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

The fraud or mistake of an insurance agent within the scope of his authority will not enable his principal to avoid a contract of insurance to the injury of the insured who acted in good faith, and the fraud or mistake of the agent may be proved by parol evidence notwithstanding it is provided in the policy that the description of the property shall be a part of the contract and a warranty by the insured. This is clear upon principle, and it is abundantly sustained by authority: Smith v. Farmers' and Mechanics' Mutual Fire Ins. Co., 89 Pa. 287; Eilenberger v. Protective Mutual Fire Ins. Co., 89 Pa. 464; Susquehanna Mutual Fire Ins. Co. v. Cusick, 109 Pa. 157; Kister v. Lebanon Mutual Ins. Co., 128 Pa. 553; Meyers v. Ins. Co., 156 Pa. 420.

This case is much stronger for the plaintiff than those above cited. In all of these, written applications had been signed by the insured, and in each case the application was made a part of the contract. In this case no written application was made, and the policy was written by the agent and not read by the insured until after the fire. The building insured was built for and used as a boarding house, and was erroneously described in the policy as "occupied by the insured as a dwelling only." The testimony was clear and uncontradicted that there was no mistake or deception on the part of the plaintiff, who fully and accurately described the property to the agent as a boarding house and spoke to him of its capacity and use. It was seen and examined by the agent, and its use, which was apparent, was fully known to him. The misdescription was his act alone, in the face of light and knowledge, and was unknown to the insured until after the loss occurred. The defendant cannot be released from its contract because the plaintiff acting in good faith accepted without examination the policy written by its agent.

In Swan v. Watertown Ins. Co., 96 Pa. 37, the insured signed an application which had not been finished. He directed another to fill it up, and expressed a doubt as to the manner in which it should be done. It was held that he knew facts to incite him to read the policy, and was charged with knowledge of its contents, and should under the circumstances be presumed to have accepted it as written. No such presumption arose in this case. Having made a full and frank disclosure of the facts to the company's agent, who was empowered to write the policy and who from observation knew the character and use of the building, there was nothing to induce or warn the insured to read the policy unless it was the anticipation of fraud or mistake, and this could impose no duty in protection of the rights of the defendant.

The question as to the furnishing of proofs of loss was properly submitted. There was ample evidence to justify a finding by the jury that they had in point of fact been furnished within the limit of time fixed by the policy, and from which also a waiver by the company could properly be inferred.

The judgment is affirmed.

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P. K. Dickerman v. John Eddinger. Margaret Rockell's Appeal.

Will—Charge on land—Evidence.

A charge on land cannot be created by the mere gift of an annuity, but it may be created without express words and by implication from the whole will that such was the intention.

Testator directed as follows: "My son John he shall settle my personal property as soon it is possible he shall pay of the money from my personal goods the half of the money to my Daughter Marget and what is Left from the Balance of the Thousand Dollars he tookt of for himself my Son John Shall pay to my Daughter Marget an Annually one a Hundred and twenty five Dollars for her Natural Life (for Dowery) time or as Long as she will Liv in this World and my Son John he shall have all my real Estate for his own property as Soon my Daughter is Deased my Son John Shall not pay any Longer not to her heirs and to nobody it be Stopt." Testator was an old man and died within two months of the execution of his will. He had very little personal property. *Held*, that the annuity of the daughter was charged upon the land.

Argued March 14, 1895. Appeal, No. 268, Jan. T., 1895, by Margaret Rockell, from order of C. P. Northampton Co., August Term, 1893, No. 3, distributing proceeds of sheriff's sale. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Reversed.

Exceptions to report of H. J. Steele, Esq., appointed to distribute proceeds of sheriff's sale of real estate.

The property sold was levied upon as the property of John Eddinger. Margaret Rockell claimed $125 as an unpaid installment of an annuity alleged to have been charged on the land by her father, Samuel Eddinger.

The will of Samuel Eddinger was as follows:

"In the name of God I Samuel Eddinger, of Moore Township, County of Northampton, State of Penn. Do make this my Last Will and testament as follows.

that is to Say my Disire
my Son John he Shall have one
thousand Dollars in Advance before
any of the heirs shall have any money
from my Estate personal property
first my Son John Shall Setle up all
my Depts funeral Expence &c.
till all is paid
my Son John he Shall Setle
my personal property as soon
it is posibile
he shall pay of the money from
my personal goods the half of
the money to my daughter Magret and
what is left from the Balence after
the Thousand Dollars he tookt of for himself
my Son John Shall pay to my
for Dowery { Daughter Magret an Anually one a
Hundred and twenty five Dollars for her
Natural Life time or as Long She
will Liv in this World
and my son John he shall have
all my Real Eastate for his own
property as soon my Daughter is Deased

my Son John shall not pay any longer
Dowery interest not to her heirs and to no body
it be stopt.

"Sined Sealed Published and Declared by the testator as and his Last will and testament in the presence of us who in his Presence and at his Request have Subscribed our names as Witness thereto.

Witness presence:
SAMUEL GEISER.
J. G. KOCH, M. D.
} SAMUEL EDDINGER, Sal."

At the time the will was executed testator had very little personal property, amounting in all to about $400. The real estate was valued at $4,000. Testator was of advanced age and died two months after the execution of his will.

The commissioner awarded the sum of $125 to Mrs. Rockell. Exceptions to the report were sustained by the court, and an order entered distributing the fund to the plaintiff in the execution.

Error assigned was above order.

O. H. Meyers, *A. S. Knecht* with him, for appellant.—To charge the land with the payment of debts or legacies requires express words or necessary implications: 13 Am. & Eng. Ency. of Law, 110; Gilbert's App., 85 Pa. 347; Okeson's App., 59 Pa. 100; Cleary's App., 35 Pa. 54; Davis's App., 83 Pa. 353; Deveraux v. Deveraux, 78 N. C. 386; English v. Harvey, 2 R. 305; 2 Jarman on Wills, 525; Hunt's Est., 133 Pa. 260.

Robert I. Jones, *R. E. James* with him, for appellee.—The implication of intention to charge land must be "clear and satisfactory:" Ripple v. Ripple, 1 Rawle, 386; South Mahoning Twp. v. Marshall, 138 Pa. 574; Montgomery v. McElroy, 3 W. & S. 371; Wright's App., 12 Pa. 256; Buchanan's App., 72 Pa. 448; Hackadorn's App., 11 Pa. 89; Cable's App., 91 Pa. 327; Walter's App., 95 Pa. 305; Haworth's App., 105 Pa. 362; Rockell v. Eddinger, 81* Pa. 523.

An implication may arise from blending or mingling personalty and realty in a residuary clause, but this will is distinctly

free from any mingling of personalty with realty and contains no residuary clause of any kind: Brand's App., 8 W. 198; Harper's Est., 2 Pierson, 49; DeWitt v. Elder, 4 W. & S. 414; Cable's App., 91 Pa. 329; Hamilton v. Porter, 63 Pa. 332; Buchanan's App., 72 Pa. 448.

Appellant argues that John had no gift from testator adequate to the personal charge imposed. The testator had in mind the fact that he had just given John one thousand dollars, and that he had in the clause creating the annuity given the one half of the balance of his personal estate for this very purpose.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

The will of Samuel Eddinger was before this court in 1875 on an appeal in an action of ejectment. The contention then was that the will was void for the reason that it was contradictory and unintelligible, or that if susceptible of interpretation the testator's daughter took a life estate in the realty with remainder to his son. It was then held that the intention of the testator could be ascertained: that the real estate was devised to the son, and was not subject to a life estate in the daughter: See Rockell v. Eddinger, 81* Pa. 525. The question now raised, whether the annuity to the daughter was a charge upon the real estate, was not then before the court; and we think that the learned judge of the common pleas was in error in concluding that a construction which denied a life estate to the daughter gave the real estate to the son freed of the charge of the annuity. In the opinion in Rockell v. Eddinger, supra, it is said that the words following the devise to the son did not create a life estate in the daughter, but had reference to her annuity, as there was no devise over and no other intention disclosed. To give them this effect it is not essential that they should form a separate sentence. If a plan of punctuation is adopted by which they do not, there is an express charge upon the land. If they are separated by a period, the reference to an annuity is unchanged, and the connection in which they appear gives strength to the implication of a charge.

The question whether an annuity is a charge upon real estate is one of intention. If the actual intention appears, no form of words is necessary. Unless technical words by which

rules of property are fixed have been used the intention is to be gathered from the whole will. A charge cannot be created by the mere gift of an annuity, but it may be created without express words and by implication from the whole will that such was the intention. As to this rule all our cases agree, and any apparent departure from it in the decisions will be found to have resulted from the difficulty of applying the general rule to the facts of a particular case. In Ripple v. Ripple, 1 Rawle, 386, Chief Justice GIBSON said: "A legacy may be charged on land by implication. No form of words is necessary to produce the effect, and when the intent is manifest courts are bound to carry it into execution." In support of this he cites Nicholas v. Postlethwaite, 2 Dallas, 131; Hassancleaver v. Tucker, 2 Binn. 526; Witman v. Norton, 6 Binn. 395, and Dobbins v. Stevens, 17 S. & R. 13. This has since been followed in numerous cases, among them Gilbert's Appeal, 85 Pa. 347, in which it was said by WOODWARD, J., "While in order to make legacies a charge upon land it must be found that such was the testator's intention, still it is not necessary that its ascertainment should rest upon direct expression."

In this case the intention of the testator appears to have been, first, to give his son one thousand dollars and then to divide the balance of his personal estate equally between his son and daughter; secondly, to give his daughter an annuity of one hundred and twenty-five dollars for life; thirdly, to devise the whole of his real estate to his son. He was a man of advanced age, and died within two months of the execution of the will. His personal estate, after the payment of debts and expenses of administration, amounted to only four hundred dollars, and his real estate was worth about four thousand. The will provided for an immediate distribution of the personalty, and there was nothing left but the realty from which the annuity could be paid. It is true that the mere fact that the testator had no personal estate from which the annuity could be paid is not in itself conclusive of an intention to charge it upon the realty, or alone a sufficient ground for such an inference. But it is a fact to be taken in connection with other facts in arriving at a conclusion, and is of more weight when from the age of the testator and his circumstances in life it is improbable

that he contemplated any change in the character or amount of his estate. The words written on the margin of the will are not without significance in its construction. They were written by the scrivener before signing. The words "for dowery" are more than a mere marginal note. They are connected by a bracket with three lines of the will relating to the annuity, and in the second of these lines is a caret, indicating that their omission from the text was accidental. This makes them a part of the will, and not merely a memorandum of its contents, and they are an aid in ascertaining the meaning of a clause not clear or free from doubt. They were evidently used in reference to a charge on land of the nature of a dower interest, and indicate an intention that the annuity should be a charge of that nature.

The intention to give the daughter an annuity for life is clear beyond doubt. The circumstances of the testator and the nature of his property, the direction for the immediate distribution of the personalty and its insufficiency to sustain a charge, the use of words showing that the testator had in mind a payment secured on land, and the connection in the will of the words making provisions for the daughter with those creating a devise to the son, and the direction that the payment should be made by the executor, who was also the devisee of the land, each indicate an intention to make the annuity a charge on the real estate, and taken together give rise to an implication which we think is sufficiently manifest to sustain the charge.

The order of the court of common pleas of Nov. 12, 1894, is reversed and set aside at the cost of the appellee, Dickerman, and the record is remitted with directions that distribution be made in accordance with the report of the commissioner.

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George S. Barker *v.* A. C. Fairchild et al., Appellants.

Affidavit of defense—Sale—Practice, C. P.

An affidavit of defense is sufficient which denies the grounds of liability averred in the statement and those which arise by implication from the averments made.

While the construction of an affidavit of defense should be in favor of plaintiff and against the party making it, a defendant is under no duty to deny a liability not fairly arising from the statement.

Where a statement avers the sale and delivery of merchandise on a certain day, an affidavit of defense is sufficient which avers that plaintiff did not sell and deliver to defendants the merchandise on the day named, and that the defendants did not receive the said merchandise or any portion of it at any price on the said date or at any subsequent time.

Argued March 18, 1895. Appeal, No. 416, Jan. T., 1894, by defendants, from order of C. P. Bradford Co., Dec. T., 1893, No. 172, making absolute a rule for judgment for want of a sufficient affidavit of defense. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Reversed.

Assumpsit for goods sold and delivered.

The plaintiff in his statement averred as follows:

"Also Geo. S. Barker, the plaintiff in the above case, on the 31st day of October, 1891, sold and delivered to said defendants certain goods and merchandise as follows, and the following is a copy of the book entry thereof, 'Oct., 31st, 1891, 23908 lbs., Onions @ 80c. $189.65.'

"And said plaintiff says that no part of the pay for any of said goods and merchandise has been made by said defendants, and that the whole amount thereof, to wit, the sum of $288.26 with interest thereon from the first day of November, 1891, is yet due to said plaintiff and unpaid. And therefore he brings this suit."

Defendants in their affidavit of defense averred:

"That as to the third claim made in this suit, to wit: the one of the said plaintiff of $189.65, for 23,908 lbs. of onions at 80c, alleged to have been sold and delivered to the said defendants hereinbefore named, that defendants have been informed, verily believe and they expect to be able to prove

upon the trial of this cause, that the said plaintiff never sold and delivered to said defendants, or any of them, on October 31, 1891, 23,098 lbs. of onions at 80c as alleged by him."

Defendants filed a supplemental affidavit of defense in which they averred that they have been informed, verily believe, and they expect to be able to prove upon the trial of this cause, that the said plaintiff never sold and delivered to said defendants, or to the firm of Fairchild, Grace & Co., on Oct. 31, 1891, 23.908 lbs. of onions at 80c, as alleged by said plaintiff, nor that said defendants nor said firm of Fairchild, Grace & Co. ever received said onions, or any portion of them, at any price, on Oct. 31, 1891, or at any subsequent time."

The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Error assigned was above order.

Rodney A Mercur, *Ulysses Mercur* with him, for appellants. —The plaintiff was not entitled to judgment in the statement of claim filed, which is too defective to sustain the judgment. The copy of his book entries does not charge the defendants, Fairchild, Grace & Co. or any one of them, nor does the statement say that the original does so: Fritz v. Hathaway, 135 Pa. 274; Byrne v. Hayden, 124 Pa. 170; Newbold v. Pennock, 154 Pa. 591; Winkleblake v. Van Dyke, 161 Pa. 5.

If the plaintiff's statement was sufficient in form to call for an affidavit; then we say that, even if the first affidavit was insufficient, the supplemental one was sufficient to put the plaintiff to proof.

It is not necessary that an affidavit of defence be drawn with so much nicety as to meet every objection or argument against the defendants' case, which fine critical skill can deduce, and that no critical skill can suggest an objection: Leibersperger v. Reading Savings Bank, 30 Pa. 531; Thompson v. Clark, 56 Pa. 33; McPherson v. Allegheny Nat. Bank, 96 Pa. 139; Kaufman v. Cooper Iron Co., 105 Pa. 542; Hugg v. Scott, 6 Wharton, 274; Kountz v. Citizens Oil Refinery Co., 72 Pa. 396; Lawrence v. Smedley, 6 W. N. C. 43; Rockhill v. Moore, 1 Clark, 392; Markley v. Stevens, 7 W. N. C. 357; Bronson v. Silverman, 77 Pa. 94; Moeck v. Littell, 82 Pa. 356; Noble v.

Kreuzkamp, 111 Pa. 68; Endlich on Affidavits of Defense, secs. 363, 364; Roberts v. Austin, 5 Wharton, 313; Twitchell v. McMurtrie, 77 Pa. 383; Knerr v. Bradley, 105 Pa. 190; Reis v. Herman, 1. W. N. C. 84; Hunsicker v. Arnold, 1 W. N. C. 589.

S. W. Little, *Wm. Little* with him, for appellee.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

It is alleged in the statement of claim filed that "the plaintiff on the 31st of October, 1891, sold and delivered to the defendant certain goods and merchandise as follows, and the following is a copy of the book entry thereof: "Oct. 31st, 1891, 23908 lbs. onions @ 80c. $189.65." The affidavit and supplemental affidavit of defense contain averments that the plaintiff did not sell and deliver to the defendants or either of them or to the firm of Fairchild, Grace & Co., the merchandise mentioned on the day named, and that neither the defendants nor the firm received the said merchandise or any portion of it at any price on the said date or at any subsequent time. The caution with which both parties to the action have avoided entering into the details of the transaction suggests that on each side something material has been kept in the background, and makes applicable the remark of MITCHELL, J., in the opinion in Fritz v. Hathaway, 135 Pa. 280: "It is not always possible to determine whether an affidavit of defense is skillfully drawn to suggest a defense without really swearing to it, or on the other hand whether the statement is with equal skill so worded as to avoid a defense."

The copy of the book account adds nothing to the statement, as it does not show a charge against any one, and the plaintiff's case rests upon the allegation of a sale and delivery of merchandise on a day fixed. These averments are squarely met by the affidavit, and the only suggestion of evasion arises from the fact that the denial is so exact and literal. An affidavit of defense is sufficient which denies the grounds of liability averred in the statement and those which arise by implication from the averments made. While the construction of an affidavit should be in favor of the plaintiff and against the party making it, a defendant is under no duty to deny a liability not fairly arising

from the statement. The defendants deny a sale and delivery of the goods on the day fixed for both in the statement, and their delivery at any subsequent date. They were not bound to make further denial. If the sale was on some other date the defendants were not liable under the statement filed. At a trial no recovery could be had against them without an amendment, and to permit one here with the record in its present state would subject them to the peril of another action for the price of the same goods. There may be a fair presumption that in the course of business the delivery was on a date following the sale, but this is expressly denied, and there is no presumption that the delivery was before the sale. The affidavit of defense, while not full, is quite as full as the statement of claim, and squarely meets all its allegations and all inferences fairly to be drawn from it which impose liability.

The judgment is reversed with a procedendo.

R. Freedman v. Fire Association of Philadelphia, Appellant.

Insurance—Fire insurance—Misrepresentation by insured.

No recovery can be had upon a policy of fire insurance procured upon the representation that the property insured was owned by and in charge of a successful business man, when in fact the title was in a married woman who exercised no supervision over it.

Insurance—Misrepresentations—Waiver.

Waiver is essentially a matter of intention, and cannot arise out of acts done in ignorance of material facts, and its proof is inadequate unless it is shown that the insurer knew of the right of forfeiture at the time of doing the act.

A stock of merchandise was insured in the name of R. Freedman. The insurance was procured by the representation of the owner's agent that R. Freedman was a successful business man. It was owned by Rosa Freedman, a married woman, and was in charge of her brother-in-law. The property was destroyed by fire. The third day after the fire plaintiff's husband and the agent of the insurance company met by appointment, the agent supposing that he was meeting R. Freedman, the insured. Bills were produced to "Mr. R. Freedman" for goods claimed to have been burnt, and after some examination with a view to ascertain the amount of the loss the parties separated. Proofs of loss in which the pronoun

"her" appeared were made out and mailed to the company's office, without any request or suggestion from the officers of the company. Subsequently the special agent of the company wrote a letter to plaintiff addressing her as "madam," calling her attention to the fact that a certificate of the nearest magistrate had not been attached to the proof of loss. The letter contained a distinct statement that liability was neither admitted nor denied. *Held*, that the evidence as to a waiver was insufficient, and that the trial judge should have directed a verdict for the defendant.

Argued March 19, 1895. Appeal, No. 197, July T., 1895, by defendant, from judgment of C. P. Bradford Co., Sept. T., 1892, No. 631, on verdict for plaintiff. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Reversed.

Assumpsit on a policy of fire insurance. Before PECK, P. J.

In addition to the facts stated in the opinion of the Supreme Court, the following letter was admitted in evidence:

"WILLIAMSPORT, Pa., May 28, 1892.

"R. FREEDMAN, Athens, Pa.

"Madam:—We are in receipt of papers purporting to be proofs of loss under policy No. 1,322,576, Tunkhannock, Pa., agency. By reference to your policy you will learn that it is necessary to have the magistrate residing nearest to where the fire occurred furnish a certificate if required by the Association. We now ask you to furnish such certificate, according to the terms and conditions of said policy. Neither admitting nor denying liability under said policy, and holding subject to your orders the papers first above referred to, we remain,

"Yours truly,

"BEN. F. WALKER,

"Special Agent of the Fire Association of Philadelphia."

The court charged in part as follows:

"[If the defendant by the conduct of its agent has caused the plaintiff labor, expense and loss which she would not have otherwise incurred had she been notified that the company intended to claim that the policy was void on the ground of misrepresentations, I am of the opinion that the company would be estopped from setting up that the policy was void. When the defendant learned the truth about this policy, that the plaintiff was a married woman, and if they had been deceived as claimed

by the evidence of Mr. Eastman, they could have adopted two courses: First, they could elect to declare the policy void and notify the plaintiff of that fact; or, second, they could affirm this policy and then adjust the loss, if any, which the plaintiff had sustained. Or, I think, that they might have relied upon both: that the policy was void, and also contest the amount of the loss. But I am of the opinion that if they took the latter course they should notify the plaintiff of their real defense. Because, if this policy is void, that is one thing. If it was in force and required proofs of loss, that would be inconsistent with declaring the policy void, and if they notified this plaintiff that she must produce proofs of loss, after they had knowledge of the true state of affairs, and required her to go to expense in getting copies of bills, making proofs of loss, getting certificates from the nearest magistrate, or any other expenses which she would not have done had they made known to her their real cause of defense, then we think they would be estopped.] " [1]

Verdict and judgment for plaintiff for $2,195. Defendant appealed.

Error assigned among others was (1) above instruction, quoting it.

I. McPherson, *E. Overton* and *E. J. Angle* with him, for appellant.—The applicant for insurance should exercise good faith, and in giving information required, like a witness on a stand, should always speak the truth; Smith v. Ins. Co., 17 Pa. 253; Diffenbaugh v. Union Fire Ins. Co., 150 Pa. 274; 1 Biddle on Ins. sec. 578; Zimmerman v. Farmers' Ins. Co., 76 Iowa, 352; Mead v. Ins. Co., 64 N. Y. 453; Smith v. Ins. Co., 17 Pa. 253.

The court erred in instructing the jury that they might find that the defendant had waived the defense based on the representations, or estopped itself from setting it up, and that they might return a verdict in favor of the plaintiff under the evidence in the case. There is not a particle of proof that the plaintiff was in any way misled by the defendant, or that she was induced to do anything which she would not otherwise have done by any acts or declarations of the defendant: National Ins. Co. v. Brown, 128 Pa. 386; Gould v. Ins. Co., 134

Pa. 570; McFarland v. Kittaning Ins. Co., 134 Pa. 590; Welsh v. London Assurance Corp., 151 Pa. 607; Nat. Ins. Co. v. Brown, 128 Pa. 386; McCormick & Son v. Royal Ins. Co., 163 Pa. 184; Niagara Fire Ins. Co. v. Miller, 120 Pa. 516.

The relation of insured and insurer never existed between the parties in this case. The doctrine applicable to such relation should not be applied.

H. F. Maynard, *I. N. Evans* and *Wm. Maxwell* with him, for appellee.—There was sufficient evidence to go to the jury on the question of estoppel: Western & A. Pipe Lines v. Home Ins. Co., 145 Pa. 346; 2 Wood on Fire Ins. p. 1161; McCormick & Son v. Royal Ins. Co., 163 Pa. 184; Welsh v. London Assurance Corp., 151 Pa. 607; Leb. M. F. Ins. Co. v. Erb, 112 Pa. 572; Bonnert v. Penna. Ins. Co., 129 Pa. 558; Niagara Fire Ins. Co. v. Miller, 120 Pa. 504.

The jury must find as a matter of fact that the representations were material, and in fact influenced the insurer in taking the risk at a lower rate of premium than he would have taken it for, if the real state of risk had been known: Wood on Fire Ins. p. 459, sec. 192.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

The policy of insurance upon which suit was brought was upon a stock of general merchandise in a country store. It was insured as the property of R. Freedman. It was owned by Rosa Freedman, a married woman, and was in charge of her brother-in-law, Louis Freedman, who conducted the business at the store. She resided with her husband some fifty miles distant from the place where the business was carried on, and gave it no supervision whatever. The evidence at the trial was uncontradicted that the insurance had been procured by her agent on the representation made to the agent of the insurance company that "R. Freedman was a successful business man," and that the policy was issued under the belief based upon representations made that the company was insuring a stock of goods owned by a business man who was personally conducting the business, and that the risk would not have been accepted had the truth been known. It was also undisputed that the agents of the company had no knowledge that the representations were incorrect until after the loss.

The jury was instructed that if the defendant accepted the risk because of these representations, and would not otherwise have done so, the policy was void because of the fraud practiced. It was clearly an imposition upon the company to procure a policy upon the representation that the property insured was owned by and in charge of a successful business man, when in fact the title was in a married woman who exercised no supervision over it. The actual business risk because of the want of personal supervision by the owner, and the moral risk, were both greater. Whether greater or less, they were different. It was important to the company to know whose property it was insuring, in whose charge it was, and every fact which affected the risk; and any fraud or imposition in these matters went directly to the foundation of the contract. The charge of the learned judge clearly stated the law on the point involved, and the only question now to be considered is whether there was sufficient evidence upon which to submit to the jury the question of a waiver of forfeiture, after knowledge, by the defendant.

Our cases have gone very far in holding acts of the insurer consistent with or evincing a recognition of liability as sufficient ground for the inference of a waiver of the right of forfeiture. The difficulty has been to give fair effect to the stipulations guarding against fraud without defeating the general purpose of the contract as one of indemnity. A waiver in this case could grow only out of a necessary inconsistency between courses of action adopted at different times by the insurer, upon the faith of one of which the insured has acted or refrained from acting. Waiver is essentially a matter of intention, and cannot arise out of acts done in ignorance of material facts, and its proof is inadequate unless it is shown that the insurer knew of the right of forfeiture at the time of doing the act. We find nothing in the testimony in this case which will sustain a finding that the defendant had waived its right to declare the policy void because of the fraud practiced at the time it was procured, or which justifies the submission of the question to the jury.

The third day after the fire the plaintiff's husband and the agent of the insurance company met by appointment. The agent supposed he was meeting R. Freedman, the insured.

Bills were produced made to "Mr. R. Feedman" for goods claimed to have been burnt, and after some examination with a view to ascertain the amount of the loss the parties separated. Proofs of loss were made out and mailed to the company's office without any request or suggestion from the officers of the company. The parties were standing upon their rights and dealing at arms' length. The insurance had been procured upon the representation that the insured was a business man. In accepting the risk, in issuing the policy, as shown by the pronoun used, in sending a bill for the premium to "Mr. R. Freedman," and in all its dealing up to this time it is clear that the company's agents supposed the insured to be a business man.

It is not pretended that they had any knowledge to the contrary until after the fire, and the only evidence of knowledge in the case is based upon the fact that the special agent after the receipt of the proof of loss wrote a letter to the insured in which she was addressed as "madam." The letter was written under these circumstances: The policy required that a certificate of the nearest magistrate should be attached to the proof of loss, and the proofs furnished were defective in that particular. The special agent of the company wrote to the plaintiff calling her attention to the omission and requesting that the certificate be furnished. In the affidavit which she had previously sent the pronoun "her" was used, and his letter was addressed to "R. Freedman, Athens, Pa.—Madam." This is the only evidence in the case of knowledge by any one acting for the insurance company that the policy had been issued to a woman, and it is the only fact upon which a waiver can be based. Under our cases this would be evidence of a waiver of any defect in the proofs of loss other than the one mentioned, and it might raise the question of the right to defend for the breach of other conditions or for the failure of the plaintiff to take any steps that were merely formal prerequisites to a suit. The trend of our decisions has been to hold insurance companies to good faith and frankness in not concealing the ground of defense and thus misleading the insured to his disadvantage. They may remain silent except when it is their duty to speak and the failure to do so would operate as an estoppel; but having specified a ground of defense, very

slight evidence has been held sufficient to establish a waiver as to other grounds. The most recent case, and one in which the subject is fully considered by the present Chief Justice, is McCormick v. Royal Ins. Co., 163 Pa. 184. In Gould v. Dwelling House Ins. Co., 134 Pa. 570, the cases are classified and the distinction in them between an attempted compliance with the requirements of a policy within the stipulated time and a failure without valid excuse is pointed out by MITCHELL, J.

The question here was the right of the defendant to insist upon a forfeiture of the policy for the reason that it was obtained by fraud. There could be no waiver of this right unless such was the intention, and no act would be evidence of a waiver unless done with knowledge of the imposition. The only evidence of intention or knowledge in this case is the letter referred to. It contains a distinct statement that liability under the policy is neither admitted nor denied; and while it may be evidence that the company had knowledge at that time that the insured was a woman, it indicates no intention to waive any ground of defense. The invalidity of the policy being established, the burden of proof was on the plaintiff to show that with knowledge of the facts upon which it could be avoided the defendant did that which would make it inequitable to enforce the forfeiture.

The charge in this case is a very clear and fair presentation of the issues involved, but we regard the testimony as to a waiver insufficient to sustain a finding for the plaintiff. The learned judge should have gone a step further and directed a verdict for the defendant. The assignments of error touching this question are sustained, and the judgment is reversed.

Judson T. Neilson *v.* Hillside Coal and Iron Co., Appellant.

Negligence—Master and servant—Infant—Contributory negligence—Sudden peril.

Where a coal company employs a boy thirteen years of age as a slate picker, but subsequently directs him to unfasten cars from an endless chain, a work which the evidence showed to be dangerous, it is the duty of the company to see that the boy receives such instructions as will inform him of the dangers which surround him, and enable him as far as practicable to avoid them. Whether this duty was performed by the company is necessarily a question of fact for the jury.

In such a case where the boy without fault on his part is suddenly placed in a position of peril, he cannot be held to the duty of quickly deciding, and acting upon the wisest course to escape the threatened danger.

Argued March 21, 1895. Appeal No. 199, Jan. T., 1895, by defendant, from judgment of C. P. Susquehanna Co., Nov. T., 1892, No. 280, on verdict for plaintiff. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Affirmed.

Trespass for personal injuries. Before SEARLE, P. J.

The facts appear by the opinion of the Supreme Court.

The court charged in part as follows:

"[The plaintiff, by his counsel, claims that the defendant was negligent in two ways: First, in employing a boy of the age of the plaintiff—and it appears from all the testimony, I think, that he was a little under thirteen years of age—in this employment, because it was a dangerous employment in itself, and that the company had no right to employ a boy of that age in it without giving him such instructions as rendered him competent to perform the duties of the place and avoid its dangers, and that the boy had no such experience and knowledge without such instructions as would enable him to perform the duties that he was hired to perform, and avoid the dangers that were inherent in the business.] [9]

"[They also claim that defendant was negligent in employing a boy of the age of Joseph Gallagher, whom the evidence shows was the boy who had charge of the lever which started and stopped this endless chain; that he was a boy between

eleven and twelve years—I think the evidence shows nearly twelve—at the time, and that he was so young that he had not the necessary knowledge, and judgment, and discretion to run that machine, and that the employment of a boy of that age, and that lack of those essential requisites to run machinery, was negligence on the part of the company, and that the accident occurred by reason of the negligence of this boy, and that therefore the plaintiff is entitled to recover on the ground of the negligence of the defendant in this respect.]" [10]

"[It is the duty of employers to exercise ordinary care in the maintenance of proper machinery, and the employment of competent men, and if they do not, and by not exercising proper care in the employment of men, but employ incompetent men, that is negligence for which they are responsible to their employees who are injured by reason of the employment of incompetent men. In other words, to apply it to this case, if the company, with the knowledge of Gallagher's incompetency, if he was incompetent, employed him, and if this accident occurred by reason of that incompetency, the rule in relation to one fellow-servant not being able to recover from his employers on account of the negligence of another fellow-servant, would be abrogated, and in this case the plaintiff might recover on account of the negligence of his fellow-servant by reason of the negligence of the company in not employing a suitable man to handle that machine.]" [11]

"[Was the general service in which this boy was employed of a dangerous character? Were the appliances which he had to use in his employment dangerous in their action and use? If they were not, that would end the case and your verdict should be for the defendant, because this whole case rests upon the dangerous character of the employment. If you find that they were dangerous, that the place he had to work, or the machinery or appliances he was working with, were dangerous, then had this boy the actual experience in the employment from which knowledge of its danger could necessarily be presumed, and the proper discretion to exercise the care necessary to perform it? The presumption, under the age of fourteen, is that he had not. But that presumption is only a presumption that may be overcome by showing that he had proper instructions to enable him to perform the work and to avoid the dangers of

the work. Did the defendant give this boy, if he had not the proper knowledge himself in any way, did the defendant give him suitable instructions as to the manner of using the appliances and proper warning of the dangerous character of the employment, and the hazard of carelessness? Was this warning sufficient, under the circumstances of the case, to enable this boy to understand what his danger was and to guard against it? If it was not, then the plaintiff would be entitled to recover in this action for whatever injuries he received.]" [12]

Verdict and judgment for plaintiff for $3,000. Defendant appealed.

Errors assigned were among others (9–12) above instructions, quoting them.

Everett Warren, Edward N. Willard and *Henry A. Knapp* with him, for appellant, cited, on the question of negligence, Dooner v. Canal Co., 164 Pa. 34; Seddon v. Bickley, 153 Pa. 275; Metropolitian Life Ins. Co. v. Jackson, 1 L. R. App. Cases, 197; School Furn. Co. v. Warsaw Sch. Dist., 122 Pa. 501.

As to the duty of employers of infants, Rummel v. Dilworth, 131 Pa. 509; Kehler v. Schwenk, 144 Pa. 359; Bernhardt v. West. Pa. R. R., 159 Pa. 360; Long v. Pa. R. R., 147 Pa. 343; Kelly v. Bennett, 132 Pa. 218; 16 Am. & Eng. Ency. of Law, 402; City v. Zimmerman, 95 Pa. 295; Schaeffer v. Jackson Twp., 150 Pa. 149; McCauley v. Logan, 152 Pa. 205; Christner v. Coal Co., 146 Pa. 67; Zurn v. Tetlow, 134 Pa. 213; Ford v. Anderson, 139 Pa. 261; Rickert v. Stephens, 133 Pa. 538; Pittston Coal Co. v. McNulty, 120 Pa. 419; Augerstein v. Jones, 139 Pa. 183; Sullivan v. India Mfg. Co., 113 Mass. 396.

C. Smith, L. P. Weideman with him, for appellees, cited on the presumption of plaintiff's incompetency, Reynolds v. Reynolds, 14 Pa. 208; R. R. Co. v. Fielding, 48 Pa. 320; Kehler v. Schwenk, 144 Pa. 360; Crissey v. R. R. Co., 75 Pa. 83; Jones v. Mining Co., 66 Wis. 268; Glassey v. Pass. Ry. Co., 57 Pa. 174.

As to the duty of defendant, Clarke v. Holmes, 7 H. & N. 937: Frazier v. R. Co., 38 Pa. 104; R. R. Co. v. Decker, 84

Pa. 423; Caldwell v. Brown, 53 Pa. 456; Lanning v. R. R. Co., 49 N. Y. 521; Wagner v. Jayne Chemical Co., 147 Pa. 475; Ross v. Walker, 139 Pa. 50; Fisher v. Canal Co., 153 Pa. 379; Coal Co. v. Nee, 13 Atl. 841; Coombs v. New Bedford, 102 Mass. 585; Pa. Canal Co. v. Bentley, 66 Pa. 30; Cooley on Torts, 674; Sullivan v. India Mfg. Co., 113 Mass. 396.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

The plaintiff, a boy under fourteen years of age, was employed by the defendant at its colliery, and at the time of his injury he was stationed at the head of a breaker to assist in the movement of cars. The loaded cars received from the mine were run to the dump or tipple, and after being emptied were drawn back and shifted to another track. An endless chain moved between the tracks and the power was communicated from this to the cars by means of a sling-chain some fifteen feet long, one end of which was hooked to the moving chain and the other to the front of the car. When a car had been drawn back the desired distance the chain was unhooked at both ends and carried back to be used in moving the next car. In order to detach the sling-chain it was necessary to stop the movement of the endless chain. When this was done and the sling-chain had become sufficiently slack it was unhooked from the car by the plaintiff and from the endless chain by another boy. The plaintiff in the performance of this work was required to stand on the front bumper of the car. At the time of the accident, because of the failure of the boy who had charge of the moving chain to stop it at the right time, the plaintiff was unable to unhook the sling-chain from the car with one hand while he held fast to the car with the other. In his effort to unfasten the chain he took hold of it with both hands and attempted to jerk it with one in order to get the necessary slack to unhook it with the other. As a consequence of this when the chain was loosened he fell in front of the car and was injured.

There was testimony that the plaintiff had been employed as a slate picker, and that a month before the accident he had been directed to work on the cars; that his father on account of the dangerous character of this work had objected to his doing it; that he had been sent back to pick slate and remained at that work until two weeks before he was injured, when with-

out his father's knowledge he had again been sent by the foreman to the cars. The testimony was conflicting as to the dangerous character of the employment and whether the plaintiff had been informed of it and instructed how to do the work so as to avoid its danger.

Two grounds of negligence were alleged upon the trial. The first was in placing a boy of the plaintiff's age, without knowledge or experience, at a dangerous work without such instructions as would enable him to understand it and avoid its risk. The second was in placing an incompetent boy in charge of the machinery by which the motion of the endless chain was regulated. The case was submitted on the first ground only, the learned judge instructing the jury that there was not sufficient evidence to sustain a finding that the boy in charge of the machinery was incompetent.

While upon its facts the case is a very close one, it could not have been properly withdrawn from the jury. Both the place and the character of the employment were dangerous. The plaintiff had not reached the age when capacity to see and appreciate danger is to be presumed. Under these circumstances it was the duty of the employer to see that he received such instructions as would inform him of the dangers which surrounded him and would enable him as far as practicable to avoid them. Whether this duty was performed was necessarily a question of fact: Rummel v. Dilworth, 131 Pa. 509; Kehler v. Schwenk, 151 Pa. 505. The only ground upon which the plaintiff under the evidence could be charged with contributory negligence was that he attempted to unhook the sling-chain when he found that the machinery had not been applied so as to slacken it, instead of jumping from the car at once. But this was to be determined in view of his knowledge and judg ment, and the surroundings. Without fault on his part he was suddenly placed in a position of peril, and he could not be held to the duty of quickly deciding and acting upon the wisest course to escape the threatened danger. Even an adult under the same circumstances would not be held to such a duty.

We find no error whatever in the manner in which the case was submitted to the jury. The charge of the learned judge fully covered every point which was presented or arose at the trial, and the instructions were clear and adequate.

The judgment is affirmed.

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Wyckoff, Seamans & Benedict *v.* Samuel P. Ferree, Trading as the Street Railway Advertising Company, Appellant.

Contract—Construction of contract—Advertising in street car.

Defendant, who was engaged in the business of street railway advertising, inserted plaintiffs' advertising card in street cars in accordance with plaintiffs' written instructions as follows: "You are hereby authorized (upon conditions expressed or referred to herein only) to insert our advertisement as per copy to be furnished by us, in one hundred and twenty-four cars as per other side of this contract, to occupy a space of eleven by forty-two". . . . etc. Plaintiffs claimed that defendant had agreed by parol to permit them to substitute the advertisement of other parties. This was testified to by one witness for the plaintiffs, and distinctly denied by defendant. Under a similar contract for the previous year, plaintiffs at their own request were permitted to sublet their space to other parties. *Held*, (1) that the evidence was not sufficient to sustain a finding by the jury, that the written agreement between the parties was changed or modified; (2) that plaintiffs were not entitled to recover damages from defendant on the ground that he refused to permit them to sublet their space.

Argued March 25, 1895. Appeal, No. 179, July T., 1894, by defendant, from judgment of C. P. No. 1, Phila. Co., June T., 1893, No. 270, on verdict for plaintiff. Before STERRETT, C. J., MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Assumpsit for breach of a written agreement.

The agreement was as follows:

"January 22d, 1892.

"STREET RAILWAY ADVERTISING COMPANY, 812 Walnut Street, Philadelphia.

"You are hereby authorized upon conditions expressed or referred to herein only to insert our advertisement as per copy to be furnished by us in the Seventeenth and Nineteenth streets lines (all twenty-five cars), to occupy the space of eleven by forty-two inches, to appear one year at a cost of thirty dollars per month, payable monthly."

The additional material facts will be found in the charge of the court, and in the opinion of the Supreme Court.

The court charged the jury as follows:

"The original agreement of 1892, which was in writing, was not a lease of a certain space in which you might put anything. It was the right to put in the advertisement of the man, and it seems nobody doubted that at the time, for the plaintiff admits that he at once went and made an application for a modification of it, showing that he did not think, or anybody thought, that under that paper he had any right to sublet his spaces.

"But both parties came together and did agree to modify. Now there is no doubt about that. [They both agree that they came together and modified, and the question is, what was the modification?

"Now Mr. Soby contends that they agreed to let him put in such advertisements as he pleased without saying one word about the price; that he considered he had a right, from the conversation with them, to put in advertisements at any price he chose. Mr. Ferree, with whom the agreement was made in 1892, says it was distinctly and positively understood that they were not to underlet for less than seventy-five cents for the short term. Now there is the contradiction between the parties. What was it? Which was the agreement?] [5] [And then in 1893, it apparently being an understanding of the parties that the same thing was to go on—when they went under the agreement of 1893 to ask for the same modification—it then, it is alleged, was brought home to Mr. Taylor for the first time that they were charging sixty cents, and therefore, because they found out they were charging sixty cents, they refused to allow them to insert these other advertisements.] [6] They alleged in 1893 that that was the same stipulation in 1892, and that they in 1893 were not asked the same privilege they had in 1892, but were asked the same privilege, as they understood, of inserting at sixty instead of seventy-five cents.

"Now it seems to me the whole question turns on that. What was the modification of that made? [If the modification was as contended for by Mr. Soby in 1892, that there was to be no restriction on them whatever as to price, then they would have a right to recover. But if, on the other hand, you believe that the stipulation was, as Mr. Ferree says, that they were to pay seventy-five cents for the short term, why, then, in 1893 they had no right to ask for its being granted again, because they deny that they had ever granted such privilege.] [7]

"Now it all turns on that. [If you believe in 1893 they led these people to believe that they had a right to insert these advertisements for them, and charge what they pleased for them —charge sixty cents—then I do not think they had any right to repudiate that. But if they only agreed to seventy-five cents, of course they had a right to repudiate the contract of 1893.

"That is the whole question, and I think you ought to determine just what the arrangement was between the parties.]" [8]

Verdict and judgment for plaintiff.

Errors assigned among others were (5–8) above instructions, quoting them.

M. Hampton Todd, for appellant, cited: Phillips v. Meily, 106 Pa. 536; English's App., 119 Pa. 533; Clarke v. Allen, 132 Pa. 40; Bear's App., 127 Pa. 360; Thomas v. Loose, 114 Pa. 35; Thorne v. Warfflein, 100 Pa. 527; Jackson v. Payne, 114 Pa. 67; North v. Williams, 120 Pa. 109.

Thomas Earle White, for appellees, cited: McDonald v. Longbottom, 1 E. & E. 978; Eng. Com. Law Rep. 102; Barnhart v. Riddle, 29 Pa. 92; Gould v. Lee, 55 Pa. 98; Aldridge v. Eshleman, 46 Pa. 420; Centenary Church v. Clime, 116 Pa. 146; Thorington v. Smith, 8 Wallace, 1.

Opinion by Mr. Justice Fell, May 20, 1895:

The defendant was engaged in the business of street railway advertising, and in 1893 entered into a written agreement with the plaintiffs to place their advertising cards in a number of street cars. During the running of the contract the plaintiffs desired to withdraw their cards and substitute in place thereof the cards of other parties to whom they had sublet the spaces for the summer months. Upon the refusal of permission to do this the plaintiffs gave notice that they would no longer be bound by the contract, and brought this action to recover damages for the alleged breach. Under a similar contract a substitution had been permitted in 1892. It was claimed by the plaintiffs that the agreement of 1893 was made on the faith of

a parol stipulation that a substitution of the advertisements of others would be allowed. This was testified to by one witness called by the plaintiffs, and distinctly denied by the defendant, and the issue of fact raised was submitted to the jury. Whether it should have been submitted under the testimony produced is the only question now to be considered.

The agreement reads: "You are hereby authorized (upon conditions expressed or referred to herein only) to insert our advertisement as per copy to be furnished by us, in one hundred and twenty-four cars as per other side of this contract, to occupy a space of eleven by forty-two" .... etc. This order was prepared by the plaintiffs' agent, sent by mail to the defendant and accepted by him without change. The authority given by the plaintiffs was to insert their advertisement, and this is what the defendant agreed to do. There was no hiring of space to be used as the plaintiffs might elect, but a stipulation that their advertisement of a fixed size should be placed in cars for a fixed time. The agreement gave no right to sublet the space or substitute the cards of other persons. The right claimed was based upon the modification of the agreement of the previous year. The change then permitted was requested by letter; it was not claimed as a right under the agreement, but asked as a favor to enable the plaintiffs to reduce their expenses during a period when it was not advantageous for them to advertise. A compliance with a request in 1892 was made evidence upon which to base a right in 1893. There had been no omission through fraud, accident or mistake; there was no ambiguity in the language of the contract; there had been established no business usage which threw light upon the intention of the parties, and there was nothing to explain. The alleged parol agreement was at variance with the written contract. It was supported by the testimony of one witness only, and denied by that of another. The previous modification, claimed as a corroborating fact, was based upon a request which negatived any claim of right, and its weight would seem to be with the defendant. We are of opinion that this evidence was not sufficient to sustain a finding by the jury which changed or modified the written agreement between the parties, and binding instructions should have been given as requested in the defendant's third, fourth and fifth points.

The first, second, third and fourth assignments of error are sustained, and the judgment is reversed.

Samuel P. Ferree, trading as the Street Railway Advertising Company, Appellant, *v.* Wyckoff et al.

Argued March 25, 1895. Appeal, No. 180, July T., 1894, by Samuel P. Ferree from judgment of C. P. No. 2, Phila. Co., March T., 1894, No. 169, on verdict against him. Before STERRETT, C. J., MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed, with venire facias de novo.

Assumpsit on written contract.

OPINION BY MR. JUSTICE FELL, May 20, 1895:

This action was to recover an amount claimed for advertising under the same contract which was the basis of the suit in Wyckoff, Seamans and Benedict v. Ferree, No. 179 of July T., 1894, (168 Pa. 261,) in which the opinion of the court has been filed. The cases were tried together in the common pleas and argued together in this court. For the reasons stated in the opinion filed the judgment in this case is reversed with a venire facias de novo.

Mary Gangawer, Appellant, *v.* Philadelphia & Reading R. R.

Negligence—Railroads—Grade crossings—"Stop, look and listen."

In an action to recover damages for the death of plaintiff's husband killed at a grade crossing, it appeared that at the point where the accident occurred the general direction of the railroad was north and south. There were two tracks, one for the north- and one for the south-bound trains. The deceased, driving in an open two-horse farm wagon, came from the highway traveling eastward, crossed the south-bound track, and was struck by a train bound north on the other track. In approaching the railroad, he

stopped at a point about forty feet from the track where a train could be seen coming from either direction for eight hundred or one thousand feet. As this distance diminished on nearing the track the view of the railroad was rapidly extended until at the crossing a train could be seen for more than a third of a mile. The undisputed evidence showed that the deceased could have seen the train which killed him, if he had looked when he was fifteen or twenty feet from the track. *Held*, that the deceased was guilty of contributory negligence, and that plaintiff was not entitled to recover.

In such a case the fact that the deceased stopped, looked and listened at a point forty feet from the railroad, did not exempt him from the charge of contributory negligence, if he drove forty feet to the crossing, with an approaching train in view.

Argued March 28, 1895. Appeal, No. 127, Jan. T., 1895 by plaintiff, from judgment of C. P. No. 4, Phila. Co., Dec. T., 1892, No. 289, entering compulsory nonsuit and refusal to take it off. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Trespass for death of plaintiff's husband. Before ARNOLD, J.

At the trial it appeared that Edwin G. Gangawer, plaintiff's husband, was killed on June 11, 1892, at a grade crossing of the Bethlehem division of defendant's railroad, near a station called Bingen. He was driving in an open two-horse farm wagon and was struck by an express train on the north-bound track, after he had crossed the south-bound track. Further material facts, with the description of the crossing and neighboring locality are given in the opinion of the Supreme Court.

Jacob Weaver, a witness, having testified as to the place where signals were given by approaching trains at the time of and prior to the accident, was asked:

Q. "Was there any change made after that?"

Objected to.

Counsel for plaintiff offers to prove that prior to this accident the railroad company gave the signal for this crossing at a point about 1000 feet from this crossing, and that subsequently to the accident they made a change in that respect, and gave their signal and have continued to give their signal for the crossing at a point about 600 feet further from the crossing—that they changed the signal posts a few days after the accident.

Objected to. Objection sustained and exception for plaintiff. [3]

The same witness, having testified to examining the wagon tracks in the road and finding only one broad-tire track such as that made by Gangawer's wagon, was asked:

Q. "Was there anything in that track to indicate that Mr. Gangawer had stopped?"

Objected to. Objection sustained and exception by plaintiff. [4]

Q. "Was the track, as it approached the railroad, continuous, or was there any breaking or irregularity in it?"

Objected to. Objection sustained and exception for plaintiff. [5]

Frank Brinker, a witness, having testified to his familiarity with the road by which Gangawer approached the crossing, was asked:

Q. "Do you know where it is customary for people to stop, look and listen for trains?"

Objected to. Objection sustained and exception for plaintiff. [6]

Q. "You, being a person frequently using this road, what do you think is a proper place to stop, look and listen for trains?"

Objected to. Objection sustained and exception for plaintiff. [7]

The court entered a compulsory nonsuit which it subsequently refused to take off.

Errors assigned were (1) entry of nonsuit; (2) refusal to take off nonsuit; (3–7) rulings on evidence, quoting the bill of exceptions.

Preston K. Erdman, for appellant.—The proper place to stop is a question of fact and the testimony of witnesses is a proper and competent method of establishing it: Ellis v. R. R., 138 Pa. 506; McGill v. R. R., 152 Pa. 331; Groner v. Canal Co., 153 Pa. 390; Newhard v. R. R., 153 Pa. 418; Wharton on Evidence, sec. 21; Schum v. R. R., 107 Pa. 8; Keng v. R. R., 160 Pa. 644; Hoffmeister v. R. R., 160 Pa. 568; Downey v. Traction Co., 161 Pa. 131.

Gavin W. Hart, for appellee.—The deceased was guilty of

contributory negligence: Ely v. R. R., 158 Pa. 233; Carroll v. R. R., 12 W. N. C. 348; Moore v. P. W. & B. R. R., 108 Pa. 349; Bell v. R. R., 122 Pa. 58; Marland v. R. R., 123 Pa. 487; Irey v. R. R., 132 Pa. 563; Kraus v. R. R., 139 Pa. 272; Cleary v. R. R., 140 Pa. 19; Blight v. R. R., 143 Pa. 10; Hauser v. R. R., 147 Pa. 440; Ash v. R. R., 148 Pa. 133; Schmidt v. R. R., 149 Pa. 357; Matthews v. R. R., 148 Pa. 491; Myers v. R. R., 150 Pa. 386; Urias v. R. R., 152 Pa. 326; Smith v. R. R., 160 Pa. 117.

Opinion by Mr. Justice Dean, May 20, 1895:

The plaintiff is the widow of Edwin G. Gangawer. Her husband, while driving a two-horse farm wagon near Bingen station, over a grade crossing of defendant's railroad, about 8 in the morning of 11th of June, 1892, was struck by an express train and killed. The plaintiff averred her husband's death was caused by defendant's negligence in not giving travelers on the highway, at a proper distance from the crossing, warning of the approaching train. The defendant replied by denying its negligence, and averring negligence on part of deceased. When plaintiff closed her evidence, the learned judge of the court below, being of opinion she had not made out a case clear of contributory negligence, directed a compulsory nonsuit, which afterwards, on motion, he refused to take off, and from that judgment we have this appeal.

Appellant prefers here seven assignments of error; three of them to the entry of judgment of nonsuit, and four to rejection of evidence. To warrant the judgment of nonsuit, either plaintiff's evidence must have failed to show negligence of defendant, or, having adduced evidence tending to make out her case in that particular, must also have disclosed the fact that her husband was guilty of contributory negligence. Assuming there was some evidence of negligence on the part of the railroad, and sufficient so far as concerns that question, to have sent the case to the jury, did plaintiff's evidence also show that her husband, by his negligence, contributed to the accident?

The general direction of the railroad at this point is north and south; there are two tracks, one for north, the other for south-bound trains; the deceased came from the highway, traveling eastward; crossed the south-bound track, and was struck

by the train bound north on the north track; at a point about forty feet from the track, a train can be seen coming from either direction for eight or ten hundred feet; as this distance diminishes on approaching the track, the view of the railroad is rapidly extended, until at the crossing, and before getting on it, a train can certainly be seen for more than a third of a mile. There is no dispute as to these facts. There was evidence that two or three cars stood on a siding some distance above the crossing; but the same evidence showed that these did not obstruct the view of the track, as it was approached in the direction from which deceased drove. One of plaintiff's witnesses, Jacob Weaver, testified that he saw the accident when standing alongside the railroad nineteen hundred feet from the crossing in the direction from which the train came. So, assuming that no sufficient warning was given, the train that killed deceased was in full view before he drove upon the track; it is absolutely impossible that he should have been upon the crossing, with too short a time to get off, before the train was in sight; unquestionably, taking the undisputed evidence adduced by plaintiff, the train that killed deceased could have been seen, if he had looked, when he was fifteen to twenty feet from the track; was in sight when he was that distance from danger and could have stopped in safety until it had passed. It is urged that he stopped, looked and listened forty feet from the railroad; let this be so; surely that does not exempt him from negligence, if he drove forty feet to the crossing, with an approaching train in view. It is wholly immaterial, in the face of these facts, whether the deceased stopped, looked and listened at the best place before approaching the track; the law presumes that he did, and, in the absence of other evidence, this presumption would have carried the case to the jury; but the plaintiff went further, and proved that, after stopping where he is presumed to have stopped, he then drove for forty feet to a point where he was bound to know a coming locomotive which he saw would probably strike him. That is not the care according to the circumstances, which the law demands; previous care in stopping does not absolve from subsequent negligence, any more than care at a crossing one day will dispense with care the next.

As to the assignments of error to the rejection of testimony tending to show affirmatively that deceased stopped, looked and

listened at a point forty feet from the crossing, the ruling of the court did plaintiff no harm. The offer was to prove what in the absence of the other undisputed facts, the law presumed. He did stop, and then drove a distance of forty feet, with a train in full view every step of it. The appellant argues, it was for the jury to answer whether deceased was guilty of contributory negligence; this is so, where the plaintiff's case is clear of contributory negligence, and defendant has put in evidence tending to establish it; or even where the plaintiff's evidence, as in Ely v. Railroad Co., 158 Pa. 233, warranted opposite inferences. But this case comes under neither head. Assume, that the speed of this train was the unusual one of a mile a minute, of which there is no proof; then, take the uncontradicted testimony of Weaver, plaintiff's own witness, that standing alongside the rail on which passed the train, nineteen hundred feet from the crossing, he saw and now describes the accident; then deceased, before he was on the north track, must have seen the train coming, when it was nineteen hundred feet distant, where Weaver stood and so plainly saw him. At that time, when it was nineteen hundred feet off, he was somewhere on the forty feet over which he drove to reach the south-bound track, and at any one foot of the forty was safe if he stopped. Why did he drive on, into great peril? The only reasonable theory on which to account for the unfortunate man's conduct is the one which explains many such disasters; ten, fifteen, twenty, or perhaps forty feet from the track, he saw the approaching train; it was then apparently a long distance off; as to a vehicle of like speed as his own, would really have been so; he supposed he could easily clear the crossing before the train reached it; in this he miscalculated, for the train ran nineteen hundred feet while he moved less than forty, and he thus lost his life. The law calls this negligence, and will not permit a jury to call it something else; will not permit them to say that it is care according to the circumstances, for a man to drive in front of a locomotive which he sees, even if he is ignorant of its speed as compared with that of a two-horse wagon.

The case here, on the facts, is not distinguishable from Myers v. Railroad Co., 150 Pa. 386, and Urias v. Railroad Co., 152 Pa. 326, except that the contributory negligence of the injured party, is, if possible, here clearer than in either of those cases.

The judgment is affirmed, and the appeal dismissed.

Frank W. Smith v. Spencer Ervin and Edward D. Toland, Trading as Ervin & Toland, Appellants.

Partnership—Special partnership—Notice—Dissolution.

Where a special partner in a limited partnership formed under the act of March 21, 1836, P. L. 143, gives the notice required by the partnership articles of his intention to withdraw his capital from the firm at a certain time, but afterwards consents to withdraw it gradually, and the firm is not dissolved, he is entitled to participate in profits earned up to the actual dissolution of the partnership following a notice given by one of the other partners.

Smith was a special partner with Ervin and Toland. The partnership articles provided that one partner might dissolve by giving three months' notice to the others before the expiration of any calendar year. In October, 1890, Smith gave three months' notice of his intention to withdraw from the firm. Subsequently he agreed to take out $10,000, and to withdraw the rest of his capital gradually. On Jan. 9, 1891, he received $10,000, and signed the following receipt. "Received from Ervin & Toland ten thousand dollars on account of my capital, the balance of my interest to be settled as soon as possible, when certain accounts that show a shrinkage are closed out, I agreeing to pro-rate equally with Spencer Ervin and Edward D. Toland, my partners, if any loss is sustained in so closing these outstanding accounts." Smith claimed that, notwithstanding the receipt, the partnership still continued. On Sept. 26, 1891, Toland notified Smith in writing that he intended to withdraw from the firm on Jan. 1, 1892. When Toland was on the witness stand he testified as to the notice given by Smith in 1890. He was then asked this question: Q. "But you continued it for another year by agreement of all the parties? A. Yes, with the understanding with Mr. Smith that his capital should be liquidated as fast as possible, commencing with $10,000, January 9th." *Held*, that the evidence was sufficient to sustain Smith's claim that the partnership continued until Jan. 1, 1892.

Argued March 28, 1895. Appeal, No. 93, Jan. T., 1895, by defendants, from decree of C. P. No. 4, Phila. Co., Sept. T., 1892, No. 951, sustaining exceptions to referee's report. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

WILLIAMS and MITCHELL, JJ., dissent.

Bill in equity by a partner against his copartners for an account.

The case was referred to J. Levering Jones, Esq., as referee, under the following agreement:

"That the said parties hereto refer the question of the amount due Frank W. Smith as aforesaid to J. Levering Jones as referee to take testimony, and make a report as to the law and the facts. Such report to have the same force and effect as if a bill in equity had been filed by one of the partners for a settlement of partnership accounts, and had been duly prosecuted to issue, and the said J. Levering Jones had been appointed examiner and master therein. The report of said referee to be final, unless either party within thirty days after receiving notice of such report shall file a bill in equity for the determination of the question in dispute, in which case this agreement may be filed by either party in said suit, and shall have the same force and effect therein as if the case had been prosecuted to issue, and the said report of the referee was a master's report therein."

The facts of the case are fully stated in the opinion of the Supreme Court.

The referee found in favor of defendants. The court, in an opinion by THAYER, P. J., sustained exceptions to referee's report, and entered a decree in favor of plaintiff.

Error assigned among others was decree in favor of plaintiff.

J. Bayard Henry and *Richard C. Dale*, for appellants.

John G. Johnson, *Frank P. Prichard* with him, for appellee.

OPINION BY MR. JUSTICE DEAN, May 20, 1895:

On the 13th of January, 1890, Smith, Ervin and Toland, in firm name of Ervin & Toland, formed a limited partnership as stock brokers, under act of 21st March, 1836, and supplements; the place of business was Philadelphia. Ervin and Toland were general partners, and Smith special. Capital $166,000. Of this, $116,000 was to be contributed by the general partners, and $50,000 by the special partner. The term of partnership was three years, but it was provided that it might be dissolved by any one of the partners giving three months' notice in writing to his copartners of his desire to dissolve at the end of the year. All were to be paid six per cent interest semi-annually, on the capital respectively contributed by them. After

payment of all expenses in carrying on the business, and interest to each partner on the capital contributed by him, the special partner, Smith, was to receive ten per cent of the annual profits, and Ervin & Toland, the general partners, were to have the balance equally; this balance to be ascertained and divided at the end of each year. In addition, each of the general partners had the right to draw each month a sum not exceeding $500 for his personal expenses; this, however, to be charged to their personal accounts.

At the date of the formation of the partnership, the special partner, this plaintiff, paid in $30,000, and within a few months afterwards $16,464, leaving a deficiency in his stipulated contribution, $50,000, of $3,536. During the first year of the business, Ervin & Toland organized the "Reading Syndicate," and undertook to carry on margin for customers, about two hundred thousand shares of Reading Railroad stock; they also took a partnership interest in about seven thousand additional shares of the same stock. In October of the same year, while the partnership was thus involved, Mr. Smith notified the general partners of his intention to withdraw his capital. Sometime after this, the general partners informed him of the condition of the firm's business; that the securities they were carrying had fallen greatly in the market, and the withdrawal of his capital meant heavy loss to all, and insolvency for the partnership. The conferences ran along until the close of the year. The books then showed a net loss of over $37,000. As a result of a thorough examination of the business by Mr. Smith, it was agreed between them that he should be paid ten thousand dollars at once; for this he gave his receipt, thus:

"PHILADELPHIA, Jan. 9th, 1891.

"Received from Ervin & Toland ten thousand dollars on account of my capital, the balance of my interest to be settled as soon as possible, when certain accounts that show a shrinkage are closed out, I agreeing to pro-rate equally with Spencer Ervin and Edward D. Toland, my partners, if any loss is sustained in so closing these outstanding accounts.

"FRANK W. SMITH."

Besides this $10,000, there was paid Smith during the year 1891 $8,000 more. The Reading stock steadily declined, and

that owned by the partnership in June, 1891, showed a net loss of $72,000. In that month it began to go up, and the stock was gradually sold on the advancing market until the last of it was closed out November 9th following. The net loss on this, and some other securities of less amount, footed up $21,942.89.

Mr. Smith then received a statement from the firm of the business of 1891, taking as a basis the results of 1890, of which he had knowledge by personal examination of the books, and which year showed a net loss, according to trial balance, of over $37,000. In this statement he was allowed, for the year 1891, interest at six per cent on $30,000, this sum being estimated as the average amount of his capital in the business for that year; at the same time he was charged with one third the losses on the business of 1890, and credited with ten per cent of the profits of 1891. To this, Mr. Smith made objections; he claimed the business for both years should be considered together, and after allowing to each partner interest on the capital contributed by him, he, as special partner under the partnership agreement of 13th of January, 1890, should be awarded ten per cent of the aggregate profit, as shown at the end of the year 1891. He averred, he had a right to be treated as a partner for the full two years, because there had been no dissolution until January 1st, 1892, when the partnership ended by the formal withdrawal in writing of Mr. Toland. Ervin & Toland alleged the partnership was dissolved on Jan 1, 1891, Mr. Smith having given them notice in October previous of his intention to withdraw, and having actually drawn out thereafter his capital, as fast as a prudent consideration for all their interests warranted.

If the relation of Mr. Smith as partner ended 1st January, 1891, as Ervin & Toland claim, then he gets back the actual capital paid in by him, and about $1,000 more; Ervin & Toland get in profits something over $11,000 each. If there was no dissolution of the partnership until 1st January, 1892, then Mr. Smith gets $5,120 more than Ervin & Toland now admit is his due.

The issue raised is as to the date of dissolution of the partnership, and is purely one of fact; the statement of the account and balance due Smith are determined as we determine that fact.

By agreement of the parties, the whole matter was referred to J. Levering Jones, Esq., to take testimony and make report as to law and the facts, as if a bill in equity for account had been filed. The referee took the testimony, and made a very clear and concise report on the facts. He says:

"The primary question to be considered in this cause is, when did the partnership, made on January 13, 1890, between Spencer Ervin and Edward D. Toland, as general partners, and Frank W. Smith, as special partner, terminate?" He answers, on 1st of January, 1891, and states the account and suggests decree accordingly.

His finding of fact was not approved by the learned judge of the court of common pleas, who, nevertheless, agrees with the referee that "the dispute in the case arises over the question, when was the firm dissolved as regards Mr. Smith?" He then draws the very opposite conclusion from the same evidence on which the referee based his conclusions. His opinion is, that the partnership terminated at the end of the year 1891, instead of at the beginning of it, and he directs the account to be stated accordingly. This leaves to us the duty of determining between them.

At the outstart, it may be conceded the case is a close one on the evidence, and if the referee and court had been in accord, under our well settled rule not to disturb the findings of facts in the court below, unless for manifest error, a decree for either party would probably have been sustained.

There are two leading significant facts; one is wholly inconsistent with the claim now set up by plaintiff, the other with that now set up by defendants.

The receipt for $10,000, signed January 9, 1891, by Smith, is, on its face, susceptible of no reasonable interpretation other than, at that date, by his request and by consent of the others the partnership had terminated; and that he, according to the language of the writing itself, had the right to withdraw all the money he had paid in "as soon as possible, when certain accounts that show a shrinkage are closed out."

The claim of Smith now, that his relation as partner was not severed until nearly twelve months afterwards, is flatly contradicted by this writing.

Then, on the other hand, the act of Toland, on 26th of Sep-

tember, 1891, is an unequivocal assertion that Smith, nine months afterwards, was still a partner, and would so continue until Jan. 1, 1892. On a paper headed with the names of Ervin and Toland as general, and Smith as special partner, dated Sept. 26, 1891, he serves this notice on Smith: "Dear Mr. Smith,—This is a formal notice, that I intend to withdraw from the firm of Ervin & Toland on January 1st, 1892. Yours sincerely, Edward D. Toland."

If Smith had ceased to be a partner, as Toland now claims, nine months before, at the end of the year 1890, judging of the usual operations of men's minds and their conduct in business affairs, there is no reasonable theory which will account for this contradictory act. It is consistent, and only consistent, with the idea that Toland believed Smith to be still a partner, and acting in accordance with stipulation 6, in the partnership articles, desired to terminate the partnership on 1st January, 1892. That stipulation reads thus: "The partnership shall continue for a period of three years from the 12th of January, 1890. Provided, however, that any one partner, whether general or special, may dissolve the said partnership, by giving his copartners three months' written notice before the expiration of any calendar year, of his desire to terminate the same at the end of that year."

That is, the partnership still existed; Mr. Toland desired to end it; he could only do so in the way provided in that agreement; he adopted that very way. On this supposition, only, is this conduct explicable. The explanation given by Mr. Toland, in his testimony, is this: "I simply gave Mr. Smith this notice, as during that period there were certain accounts which were in process of liquidation, in which we were all interested, and this was simply notice to him that I intended to retire from business on 1st of January, 1892." If the act had been equivocal, this explanation would have helped but little in ascertaining its true import; but being manifestly significant of a continuing partnership, the explanation is wholly unsatisfactory. It is within common observation, that a cautious, intelligent business man, not seldom neglects those formalities which are indispensable proof of important transactions; but it is a rare case that such a man will take pains to formally assert a fact which does not exist, a fact, too, highly prejudicial to his own interests. In

effect, this conduct of Toland's was an assertion that Smith was still a partner, and therefore entitled to receive $5,120 more money than Toland now admits was due him.

But Toland's conduct is not more significant of the continuance of the partnership to January 1st, 1892, than Smith's receipt, that it had determined in January, 1891; nor is Smith's explanation of that paper any more satisfactory. He says: "My partners represented to me that if I staid in the firm, and the firm was allowed to go quietly on without disruption, we would undoubtedly, by virtue of new customers and new business which we had acquired, make up our loss, and most likely enjoy a good profit besides during the coming year. . . . I said, if it seems impossible to do any business, and things do not get any better, and there is no business and no money, I will stand by you if I have to stand these losses equally; then they gave me this paper, and I carelessly signed it with that understanding, that the loss that I agreed to stand pro rata with them was a loss that was to be made up, if possible, by a continuation or extension of the partnership which I then had a right to dissolve."

The substance of the explanation is, that, wishing to terminate the partnership, and having the right to terminate it, he consented to its continuance, and then accepted a written agreement which expressed the very opposite. Agreements are presumed to express the assent of two minds to the same thing; this one, according to Smith's explanation, plainly expressed that to which neither assented.

In considering this vague and unsatisfactory explanation, however, we are not without some help from Mr. Toland. This interrogatory is put to him: "Q. I understand, then, that there was a partnership in 1890, which Mr. Smith, giving notice in the latter part of the year, desired terminated? A. Yes, sir. Q. But you continued it for another year by agreement of all the parties? A. Yes, with the understanding with Mr. Smith that his capital could be liquidated as fast as possible, commencing with $10,000, January 9th." Then, further on, this question is put: "Q. In point of fact, the firm of Ervin & Toland, formed under that written agreement of 1890, was not dissolved until December, 1891? A. Well, I don't know about that."

Smith's explanation of his receipt is, that it expressed the

very opposite of what was agreed upon; Toland almost positively corroborates him in some parts of his testimony, and in no part of it contradicts him. Then taking the two statements, in connection with the unequivocal conduct of Toland nine months afterwards, in treating Smith as a partner by giving notice of his intention to terminate the partnership, we are moved, not without some hesitation, to adopt the conclusion of the learned judge of the court below, that, taking all the evidence together, it shows there was no dissolution of partnership until Jan. 1, 1892. The decree is therefore affirmed, and the appeal is dismissed at costs of appellants.

WILLIAMS and MITCHELL, JJ., dissent.

MR. JUSTICE MITCHELL, dissenting.

The matters which led to this controversy having occurred between partners who were on entirely friendly terms, were unfortunately not carried on with the formality and precision desirable in business transactions, and it is not therefore surprising that the parties failed to have the same understanding at the time, and their recollections now differ. But with the written documents as a basis I am of opinion that the substantial agreement is clear. Mr. Smith desired to dissolve the partnership, and had the legal right to do so, but became convinced that it would involve very serious loss not only to his partners but to himself to do so at that time. He therefore agreed that no public change should be made, but as between the partners themselves the notice was not withdrawn and liquidation commenced at the beginning of the year 1891. The receipt shows this beyond all doubt. Smith received $10,000 of his capital and the rest was to be repaid "as soon as possible when certain accounts that show a shrinkage are closed out." The losses on these special accounts were to be equally divided, but it is nowhere said or indicated that general losses, or any losses at all on new business were to be paid in part or in whole by Smith. The business of 1891 was a new business on a new basis, and so far as the partners themselves were concerned, if it had proved a losing one Smith could not have been charged with any share of the losses, and on the other hand he had no claim for any of the profits.

I do not see the difficulty that my brethren find in regard to the notice by Mr. Toland to Mr. Smith in September, 1891. The firm of Ervin & Toland continued during 1891 so far as the public were concerned. The use of the firm heading and paper was therefore not only natural but imperative. A change would have given notice to the public of what the circumstances required should not be known. And as to the partners themselves the firm still continued under the same name so far as Mr. Ervin and Mr. Toland were concerned. It was this latter firm from which Toland desired to withdraw, and his doing so involved the winding up of the business to the public eye as well as in fact between the partners, and therefore the termination of the temporary arrangement which had run through the year 1891. In this arrangement Smith of course was interested and he was entitled to notice of its intended termination. The letter of Toland to Smith was therefore not only a courteous and friendly but a proper business act.

I would reverse this judgment and approve the findings of the referee.

WILLIAMS, J., concurs in this dissent.

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Margaret Fischer to use of J. & P. Baltz Brewing Company, Appellant, *v.* American Legion of Honor.

Beneficial associations—Death of beneficiary—Widow.

The by-laws of a beneficial association provided that "in the event of the death of all the beneficiaries selected by the member, before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws the benefit shall be paid to the widow." A member named his wife as beneficiary. The wife subsequently died, and the member married again. The member afterwards died without having made any change in his certificate. *Held*, that his widow, surviving him, was entitled to the fund.

Argued April 2, 1895. Appeal, No. 230, Jan. T., 1895, by plaintiff, from judgment of C. P. No. 1, Phila. Co., June T., 1894, No. 459, for plaintiff on case stated. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Case stated to determine the ownership of a benefit fund.

The case stated was as follows:

"On or about the 24th day of March, 1888, Charles F. Fischer became a member of the Subordinate Council of the American Legion of Honor, and received a benefit certificate issued by the Supreme Council in the following form:

"'BENEFIT CERTIFICATE.

ISSUED BY

No. 115373 SUPREME COUNCIL, $1000

AMERICAN LEGION OF HONOR.

"'THIS IS TO CERTIFY that Charles F. Fischer is a Companion of the American Legion of Honor, said Companion having made application for second degree membership to Spring Garden Council No. 551, A. L. of H., instituted and located at Philadelphia, in the State of Pennsylvania, and passed the requisite medical examination and been duly initiated into said Council, and this certificate is issued to said Companion as an evidence of the facts in it contained and as a statement of the contract existing between said Companion and the Supreme Council, American Legion of Honor. In consideration of the full compliance with all the by-laws of the Supreme Council, A. L. of H. now existing or hereafter adopted, and the conditions herein contained, the Supreme Council, A. L. of H., hereby agrees to pay Louisa A. Fischer, wife, One Thousand Dollars upon satisfactory proof of the death, while in good standing upon the books of the Supreme Council, of the Companion herein named, and full receipt and surrender of this certificate. Subject, however, to the conditions, restrictions and limitations following:

"'FIRST: That all statements made by the Companion in the application for membership, and all answers to the questions contained in the medical examination, are in all respects true, and shall be deemed and taken to be express warranties.

"'SECOND: That said Companion shall have paid all assessments called to the Benefit Fund within the time and in the manner required by the by-laws of the Supreme Council in force at the time of the issuance of this certificate or as the same may be hereafter amended.

"'THIRD: That all moneys which the Supreme Council, American Legion of Honor, may advance against this certificate by way of relief benefit to the Companion named herein, for sick or disability benefits under existing or hereafter enacted By-laws or Regulations may be deducted, at the death of the Companion, from the amount payable to the beneficiary named herein.

"'FOURTH: That the amount designated by said Companion in his application for membership and stated herein, as a funeral benefit, may be deducted at the death of the Companion, from the amount payable to the beneficiary herein named.

"'FIFTH: That this benefit certificate is issued by the Supreme Council, and accepted by the Companion herein named, for himself and his beneficiary, upon the express condition and agreement that in case of any false or fraudulent statement or misrepresentation or violation of any of the covenants herein contained, the same shall be void.

"'IN WITNESS WHEREOF THE SUPREME COUNCIL, AMERICAN LEGION OF HONOR, has hereunto affixed its corporate seal and caused this certificate to be signed by its Supreme Commander and attested by its Supreme Secretary, at Boston, Massachusetts, this 24th day of March, A. D., 1888.

"'Attest: ADAM WARNOCK,
"'Supreme Secretary.

"'ENOCH S. BROWN,
"'Supreme Commander.'"

"Louisa A. Fischer, the beneficiary named in the said certificate, died on the 31st day of December, 1889, and Charles C. Fischer was appointed administrator of her estate by the register of wills for the county of Philadelphia, on the 12th day of December, 1894.

"The said Charles F. Fischer, subsequent to the death of the said Lousia M. Fischer, married Margaret Fischer, on 19th of October, 1892. Charles F. Fischer, being in good standing in the said order, died on the 19th day of April, 1894, leaving the said Margaret Fischer to survive him, and leaving also one child by the said Margaret Fischer, namely, John W. Fischer, and four children by the said Louisa A. Fischer, namely, Charles C. Fischer, Katie M. Fischer, Louisa V. Fischer, and Carrie S. Fischer.

"By the by-laws of the American Legion of Honor, in force at the time of the execution of the said benefit certificate, it is provided:

"'Sect. 5. In the event of the death of all the beneficiaries selected by the member, before the decease of such member, if no other or further disposition thereof be made in accordance with the provision of Section 3 of this law, the benefit shall be paid to the dependent heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit by the laws of this Order, it shall revert to the benefit fund.'

"By the by-laws of the American Legion of Honor as in force at the time of the death of the said Charles F. Fischer, it is provided:

"'128. In the event of the death of all the beneficiaries selected by the member, before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws, the benefit shall be paid to the widow. If none, then to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit, it shall revert to the benefit fund.'

"The certificate of incorporation of the said order, as issued by the commonwealth of Massachusetts, provides inter alia that it is organized for the purpose of,—

"'1st. To unite fraternally all persons of sound bodily health and good moral character, who are socially acceptable, and between eighteen and sixty-five years of age.

"'2d. To give all moral and material aid in its power, to its members and those dependent upon them.

"'3d. To educate its members socially, morally and intellectually.

"'4th. To establish a fund for the relief of sick and distressed members.

"'5th. To establish a benefit fund, from which on the satisfactory evidence of the death of a member of the Order, who has complied with all its lawful requirements, a sum not exceeding five thousand dollars shall be paid to the family, orphans, or dependents, as the member may direct, and who has complied with the provisions of the statutes of this Commonwealth in such case made and provided, as appears from the certificate of the proper officers and executive committee of said corpora-

tion duly approved by the Commissioner of Corporations, and recorded in this office.'

"The said order has disclaimed all interest in the said sum payable upon the said benefit certificate and has, by leave of court, granted upon the order's own petition and by the agreement of the parties hereto, paid the said sum into a trust company, with the same effect as if it had been paid into court to await the termination of an issue between the parties hereto.

"It is agreed by the parties hereto that if the court shall be of opinion on the above-stated facts that Margaret Fischer, the surviving widow of the said Charles F. Fischer, is entitled to the sum of money provided in the said benefit certificate to be paid, judgment shall be entered on this case stated for the said Margaret Fischer.

"If the court shall be of opinion that the sum of money provided in the said benefit certificate to be paid is payable to the dependent heirs of the said Charles F. Fischer, the judgment shall be entered on this case stated for Margaret Fischer, widow; Margaret Fischer, guardian ad litem of John W. Fischer, Charles C. Fischer, Kate M. Fischer; Charles C. Fischer, guardian ad litem of Louisa V. Fischer, and Charles C. Fischer, guardian ad litem of Carrie S. Fischer, dependent heirs, in equal shares.

"If the court shall be of opinion that Charles C. Fischer, the administrator of the estate of Louisa A. Fischer, deceased, is entitled to the sum of money provided in the said benefit certificate to be paid, judgment shall be entered on this case stated for the said administrator.

"The parties hereto reserve the right to appeal to the Supreme Court from the judgment entered herein."

The court entered judgment for plaintiff on case stated.

Error assigned was entry of judgment as above.

William W. Porter, *Benjamin Alexander* with him, for appellant.—Under the statute law of the state of Pennsylvania, the insurance for the benefit of a wife created a vested interest in her: Act of April 15, 1868, P. L. 103; McCutcheon's App., 99 Pa. 137.

It is equally clear under the decisions of the state that where

insurance is taken out in the name of a wife it creates a vested interest in her which is not affected by her death: Anderson's Est., 85 Pa. 202; DeGinther's App., 83 Pa. 337; Fell's Est., 4 Kulp, 165; Fire Com. v. Com., 75 Pa. 291; Raub v. Masonic Mut. Relief Assn., 3 Mackey, 68; Bergmann v. Association, 29 Minn. 278; Presbyterian Fund v. Allen, 106 Indiana, 593; Com. v. Gill, 3 Wharton, 228; The Case of Philadelphia Savings Institution, 1 Wharton, 461; Phillips v. Allen, 41 Pa. 481; Kentucky Masonic Mut. Life Ins. Co. v. Miller, 13 Bush (Ky.), 489; Legion of Honor v. Perry, 140 Mass. 580; People v. Kip, 4 Cowen (N. Y.), 382.

J. H. Shoemaker, for appellee.—In order to carry out the object of beneficial societies, the beneficiary never acquires an interest in the benefit fund before the death of the member: Grim v. Odd Fellows, 71 Wis. 547; Society v. Lewis, 9 Mo. App. 412; Society v. Burkhart, 7 West. Rep. 527; 2 Am. & Eng. Ency. of Law, 177; Bacon on Beneficial Soc. 306; Splawn v. Chew, 60 Tex. 532; Richmond v. Johnson, 28 Minn. 447; Association v. McAuley, 2 Mackey's Dist. of Columbia, 70; Ballou v. Gile, 50 Wis. 614; act of April 15, 1868, P. L. 103; Dickinson v. Am. O. U. W., 159 Pa. 258; Bacon on Benef. So. sec. 236; Beach on Private Corp., sec. 323.

Opinion by Mr. Justice Fell, May 20, 1895:

Charles F. Fischer was a member of the American Legion of Honor, and at the time of his death held a benefit certificate for $1,000, in which Louisa A. Fischer, his former wife, was named as beneficiary. She died in 1889 leaving children, and he remarried and at his death in 1894 left surviving him a widow, Margaret Fischer, and children of both marriages. No change was made after the death of his first wife in the name of the beneficiary, and at his death the amount due by the defendant was claimed by his widow, the plaintiff, and by the administrator of the estate of his first wife, and by his children as dependent heirs. Upon a case stated judgment was entered by the court for the plaintiff, and this appeal is by the administrator of Louisa A. Fischer.

The American Legion of Honor is a beneficial association, and one of the purposes of its organization is to establish a fund

from which upon the death of a member "a sum shall be paid to the family, orphans or dependents as the member may direct." At the time when Charles F. Fischer became a member the by-laws provided: "Sec. 5. In the event of the death of all the beneficiaries selected by the member before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of sec. 3 of this law the benefit shall be paid to the dependent heirs of the deceased member, and if no person shall be entitled to receive such benefit by the laws of the order it shall revert to the benefit fund." The by-laws in force at the time of his death provided that "in the event of the death of all the beneficiaries selected by the member, before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws the benefit shall be paid to the widow. If none, then to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit it shall revert to the benefit fund."

If the beneficiary first named had a vested interest in the fund payable at the death of her husband her administrator is entitled to recover, otherwise he has no standing. It seems clear that she had no such interest. There is a material and fundamental distinction between philanthropic or beneficial associations, which issue benefit certificates to their members, and life insurance companies, which was pointed out in Commonwealth v. Equitable Beneficial Association, 137 Pa. 412, and has since been recognized in Dickinson v. A. O. U. W., 159 Pa. 258, and in Lithgow v. Supreme Tent, etc., 165 Pa. 292. It appears from the charter and by-laws that the association defendant was organized for social, moral and intellectual purposes and for the relief of sick and distressed members. Insurance is not its only nor its primary object. It limits the persons and classes of persons who may be named as beneficiaries to "the family, orphans or dependents," and provides that in the event of the failure of all such persons or classes of persons the sum due shall revert to the order. The amount secured by the certificate is subject to deductions for relief benefits paid in case of sickness or disability to the member and for his funeral expenses. Where the beneficiary has died the member may name another. These provisions are in en-

tire harmony with the object of the order as a fraternal and beneficial organization, and they are entirely incompatible with the vesting of an interest in the fund in the beneficiary before the death of a member. Such a construction would in many cases by giving the fund to the legal representatives of the beneficiary divert it entirely from the purpose intended by the member and for which the organization was formed.

It was the right of Charles F. Fischer after the death of his first wife to name a new beneficiary within the limits as to persons and classes prescribed. Upon his failure to do so the law of the association fixed the persons to be benefited. Of this law he presumably had knowledge, and his acquiescence in the selection made by it had all the effect of a new appointment by him.

The act of April 13, 1868, P. L. 103, referred to by the appellants, was intended to secure to the wife and children and dependent relatives of the insured, as against his creditors, an insurance taken out or assigned in good faith for their benefit. We do not see that it affects the question involved in this case.

The judgment of the court of common pleas is affirmed.

Overseers of the Poor of the Borough of Bellefonte, Appellant, v. Somerset County Poor District.

Poor laws—Order of removal—Settlement.

Under the act of June 13, 1836, clause V. sec. 9, P. L. 543, an order of removal of an "unmarried person, not having a child," will be quashed, where it appears that although the pauper had acquired a settlement in the district mentioned in the order, he had subsequently acquired a settlement, by being bound and hired as a servant during one whole year, in another district.

Under the act of June 13, 1836, clause V. sec. 9, P. L. 543, describing the manner in which "any unmarried person, not having a child," may gain a settlement in any district, both residence and service in the same poor district is not necessary to acquire a settlement.

From February, 1888, until September, 1889, M. was hired by the Bellefonte Furnace Company, and during that period continued in the service of that company in Spring township; during which time he boarded and

lodged with his mother in the borough of Bellefonte, and paid her for his boarding and lodging. *Held*, that he gained a settlement in Spring township.

Argued April 24, 1895. Appeal, No. 73, Jan. T., 1895, by plaintiff, from decree of Q. S. Centre Co., April T., 1892. No. 28, quashing order of removal. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Appeal from order of removal.

The overseers of the poor of the borough of Bellefonte, by virtue of an order of removal, removed one James McFadden, a pauper, from the borough of Bellefonte to the Somerset county poor district. From this order Somerset county appealed. The only question was the last legal settlement of James McFadden. The evidence tended to show that McFadden had acquired such settlement in Somerset county in 1885; also that his mother was a resident of the borough of Bellefonte from the month of February, 1888, until the month of September, 1890; that she kept a boarding house in said borough, that the said James boarded and lodged with her, paying his board as a stranger; that he was employed by the Bellefonte Furnace Company as a servant about the beginning of February, 1888, and he continued in the service of the company under the same contract of hiring from February, 1888, until September, 1890. The service was performed in Spring township. The court below found that his settlement was in the borough of Bellefonte and quashed the order of removal to Somerset county. From this judgment and decree the overseers of the poor of Bellefonte appealed.

The facts appear by the opinion of the Supreme Court.

Error assigned was quashing order of removal.

Wilbur F. Reeder, for appellant.—If a settlement were gained in Centre county, it could under no aspect of the case have been in Bellefonte: Act of June 13, 1836, sec. 9, clause 5, P. L. 543; Brier Creek Twp. v. Mt. Pleasant Twp., 8 Watts, 432; Heidleberg v. Lynn, 5 Whart. 433.

James A. Beaver, for appellee.—James McFadden acquired

a legal settlement after he left Somerset county. A pauper cannot be removed except to his last place of legal settlement: Jourdan v. Mt. Pleasant, 10 Pitts. L. J. 115.

OPINION BY MR. CHIEF JUSTICE STERRETT, May 20, 1895:

This contention involves the construction of clause V. of section 9 of the poor law of June 13, 1836, prescribing the manner in which "any unmarried person, not having a child," may gain a settlement in any district, viz: that he or she "shall be lawfully bound or hired as a servant, within such district, and shall continue in such service during one whole year:" Brightly's Purdon, 1705, pl. 50.

The 16th section of same act provides that, "On complaint made by the overseers of any district to one of the magistrates of the same county, it shall be lawful for said magistrate, with any other magistrate of the county, where any person has or is likely to become chargeable to such district into which he shall come, by their warrant or order, directed to such overseers, to remove such person, at the expense of the district, to the city, district or place where he was last legally settled, whether in or out of Pennsylvania," etc.: Purd. 1706, pl. 58. Pursuant to these provisions, the overseers of Bellefonte borough,—alleging that James McFadden, the poor person in question, was last legally settled in Somerset county poor district,—on April 16, 1892, obtained an order to remove him to that district; and nine days thereafter the overseers of Somerset, by leave of the court below, appealed from said order of removal.

At the hearing, it was conclusively shown and virtually conceded that McFadden, "an unmarried person, not having a child," had acquired a legal settlement in Somerset county by having served therein, from the spring of 1884 to the fall of 1885, in pursuance of a hiring with Messrs. Collins & Shoemaker; but, it was contended by the overseers of said district that he subsequently gained a settlement in another poor district by hiring as a servant therein and continuing "in such service during one whole year," as required by clause V. above quoted. They thus assumed the burden of proof and introduced testimony from which the court was fully warranted in finding facts establishing a subsequent legal settlement in another poor district, and consequently the order of removal was rightly

quashed. As bearing on the fact of a subsequently acquired settlement the court found substantially the following facts: that, from February, 1888 until September, 1889, McFadden was hired by the Bellefonte Furnace Company, owner of a large furnace in Spring township, Centre county, adjoining the borough of Bellefonte; and, during that period, continued in the service of said company, in said township, under the same contract of hiring; that while said service was thus being performed in Spring township, McFadden boarded and lodged with his mother in the borough of Bellefonte, paying his boarding to her as he would have done to a stranger. These findings of fact were fully warranted by the testimony, and not being excepted to, must be accepted as conclusively established. We thus have a contract of hiring, for service in Spring township, by an "unmarried person not having a child," and his continuance "in such service during one whole year," thus fulfilling, in both letter and spirit, every requirement of the clause above quoted.

There is no merit in the suggestion that there must be both residence and service in the same poor district. While in other clauses of the 9th section of the act residence in the district is made a condition of gaining a legal settlement therein, clause V., under consideration, contains—as we have seen—no such requirement. The construction suggested would require us to read into the clause something that is neither there nor ever intended to be there.

While, upon the established facts of the case, the learned judge was mistaken in locating McFadden's subsequently acquired settlement in Bellefonte, instead of in Spring township, he was nevertheless clearly right in his general conclusion that the order of removal should be quashed on the sole ground that Somerset poor district was not his last place of legal settlement. The sole controlling fact was that he had gained a legal settlement in another poor district after he left Somerset county. That definitely determined the only issue between the two parties then and now in court. To that issue, the overseers of Spring township were not parties, and of course cannot be affected by the decree therein.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

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Commonwealth *v.* William B. Mann, Prothonotary, Appellant.

Commonwealth *v.* William G. Shields Register of Wills, Appellant.

Commonwealth *v.* James W. Latta, Clerk of Court of Quarter Sessions, Appellant.

Commonwealth *v.* Thomas Green, Recorder of Deeds of Philadelphia County, Appellant.

Public officers — Fees — Acts of March 10, 1810, *April* 5, 1842, *and March* 31, 1876—*Statutes—Repeal.*

Where a new statute on the same subject embraces provisions similar to those of the old statute for its enforcement, elaborates them, and introduces a more complete system, with a wholly different purpose, the new statute repeals the old statute.

The act of March 31, 1876, P. L. 13, providing that the fees of county officers shall be paid into the county treasury, and that the officers shall be paid by salaries, repeals the act of March 10, 1810, 5 Smith's Laws, page 105, and its supplement, the act of April 5, 1842, P. L. 236, by which in the county of Philadelphia such fees, after deduction of expenses, were divided between the officers and the commonwealth.

In construing statutes applicable to public corporations the courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time.

Argued April 29, 1895. Appeals, Nos. 16, 17, 18 and 19, May T., 1895, by defendants, from judgment of C. P. Dauphin Co., Jan. T., 1891, Nos. 490, 491, 492 and 493, on appeals from tax settlements. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Appeals by defendants to the court of common pleas of Dauphin county from settlements made by the auditor general and state treasurer on Sept. 24, 1894, charging said defendants with fifty per cent of the fees of their several offices in excess of the salaries of said officers and the amount paid by them for clerk hire.

The cases were tried before SIMONTON, P. J., from whose opinions the following facts appeared:

The defendant, William B. Mann, was, during the year 1893, prothonotary of the courts of common pleas of Philadelphia, and as such received during said year for fees of office the sum of $67,906.06; his salary for said year was $10,000; and his clerk hire was $51,625. The amount of these two sums, deducted from the gross amount of fees received, leaves a balance of $6,281.06; one half of which is claimed by the commonwealth, and charged against defendant in the settlement appealed from.

The defendant, William G. Shields, was during the year 1893 register of wills in and for the county of Philadelphia, and as such received during said year for fees of office the sum of $88,432.22. His salary for said year was $5,000, and his clerk hire was $29,373.12. The amount of these two sums deducted from the gross amount of fees received leaves a balance of $54,059.10, one half of which, being $27,029.55, is claimed by the commonwealth and charged against defendant in the settlement appealed from.

The defendant, James W. Latta, was during the year 1893 clerk of the court of quarter sessions of Philadelphia county, and as such received during said year for fees of office the sum of $86,065.87. His salary for said year was $5,000, and his clerk hire was $16,900. The amount of these two sums, deducted from the gross amount of fees received, leaves a balance of $64,165.87, one half of which, or $32,082.94, is claimed by the commonwealth and charged against defendant in the settlement appealed from.

The defendant, Thomas Green, was during the year 1893 recorder of deeds in and for the county of Philadelphia, and as such received during said year for fees of office the sum of $99,091.95. His salary for said year was $10,000, and his clerk hire was $77,700. The amount of these two sums, deducted from the gross amount of fees received, leaves a balance of $11,391.95, one half of which, being $5,695.97, is claimed by the commonwealth and charged against defendant in the settlement appealed from.

The court entered judgment for the commonwealth in each of the cases.

Errors assigned in each of the cases were in directing judgment for commonwealth.

J. W. Catharine, *James Alcorn*, assistant city solicitor, and *F. Carroll Brewster*, *John L. Kinsey*, city solicitor, with them, for appellants.—The fifty per cent charged by the act of 1810 is not what is technically called a tax. It was charged against the officer: Cohen v. Com., 6 Pa. 111.

The act of 1876 was passed to carry out section 5, article 14 of the constitution. The constitutional provision only refers to fees of officers. It does not refer to taxes due the commonwealth. The exception of taxes due the commonwealth, under the act of 1876, it is submitted, was overcaution, and such taxes could never have been meant by the first part of section one of the act.

The act of 1876 is a general act, as it refers to all counties. The act of 1810 is also a general act. Section 18 of the act of 1876 provides that all laws or parts of laws inconsistent with this act are hereby repealed, etc. A general law repeals by implication another general law with which it is inconsistent, but here are express words of repeal, so that the act of 1810, as far as the fifty per cent of the fees is concerned, must be repealed by the act of 1876; the two acts being in that respect inconsistent.

The best exposition of a statute or any other document is that which it has received from contemporary authority: Endlich on Int. of Statutes, 357; Potter's Dwarris on Statutes, 179; Edwards v. Darby, 12 Wheat. 210; U. S. v. The Recorder, 1 Blatchford, C. C. R. 218.

Benjamin M. Nead, *John P. Elkin*, deputy attorney general, and *Henry C. McCormick*, attorney general, with him, for appellee.—Without the act of 1810 there is nothing to indicate what the legislature meant

By the "fees levied for the state, which shall be to and for the use of the state," in the first section;

By the "fees otherwise belonging to the state" in the ninth section;

By the "fees, mileage or perquisites," other than compensation of the officer, "required to be paid to the state," in the fifteenth section;

By the provision about the "net receipts" in the last clause of the sixteenth section;

Without the act of 1810, all of those provisions must be read out of the act of 1876, otherwise it would be inconsistent with its own terms.

The act of 1810, being necessary to the intelligent consistence of the act of 1876, can in no wise be repealed by that act, either directly by the meaningless repealing clause at the close, as has been contended, or impliedly, through repugnancy. The "two statutes can stand together," therefore "the posterior does not abrogate the prior:" Erie Co. v. Bootz, 72 Pa. 196; Contested Election of Barber, 86 Pa. 392.

The act of 1810 is not inconsistent with the act of 1876, because the latter act fixes a different and a greater salary for the county officer.

COMMONWEALTH v. MANN.

OPINION BY MR. JUSTICE DEAN, May 20, 1895:

It is, perhaps, doubtful whether the party defendant in this case should not have been Philadelphia county; but as the county agreed with defendant to be answerable, in the event of an adverse judgment, he waived his right to object that a suit could not be maintained against him; therefore, we shall consider the case, as raising the question whether either is answerable.

Before the passage of the act of March 10, 1810, the fees of this officer all belonged to him, and out of them he paid the expenses of his office. On that date, however, was passed an act entitled "An act taxing certain offices." The first section of the act directs that, with other county officers, the prothonotaries of the courts of common pleas of the commonwealth, "Shall, from and after the first day of October next, keep or cause to be kept a fair and accurate account of all the fees received for services performed by them or any person employed by them in their respective offices; and shall annually thereafter furnish a copy of such account upon oath or affirmation to the auditor general; . . . . and whenever the amount of any of the said accounts shall exceed the sum of fifteen hundred dollars, the auditor general shall charge the said officers respectively fifty per cent on the amount of such excess; which sum so charged shall be paid by them into the treasury for the use of the commonwealth."

Under this act, the state took one half of the aggregate fees, in excess of $1,500, without any deduction by the officer for clerk hire, stationery, or other expenses incident to the performance of the duties of the office; but by the act of 5th of April, 1842, the officer, in addition to the $1,500, was authorized to deduct these expenses and the state took only one half the remainder. It will be noticed, that the acts of 1810 and 1842 were general acts applicable to every county in the commonwealth. But, by act of April 2, 1868, they were repealed as to all counties except Allegheny, Lancaster, Montgomery, Philadelphia, Beaver, and Washington; so that, as to Philadelphia, the act of 1810, as qualified by the act of 1842, remained in force. The next general legislation on the subject is the act of 31st of March, 1876, passed, as declared in the title: "To carry into effect section five of article fourteenth of the constitution, relative to the salaries of county officers, and the payment of fees received by them into the state or county treasury in counties containing over one hundred and fifty thousand inhabitants."

The first section enacts: "That in all counties in this commonwealth containing over one hundred and fifty thousand inhabitants, all fees limited and appointed by law to be received by each and every county officer therein elected by the qualified voters of their respective counties, or appointed according to law, or which they shall legally be authorized, required or entitled to charge or receive, shall belong to the county in and for which they are severally elected or appointed." This is the first thought or intent of the act; all fees which the officer shall be authorized, required or entitled to charge or receive, shall belong to the county; not one half the fees, over fifteen hundred dollars and expense, but all the fees. There can be no question as to the meaning; they were such fees as had been received by him before the act of 1810, all of which he kept as his own; those received afterwards, $1,500 of which, and half over that amount, he kept as his own; those received after 1842, when in addition he kept as his own an amount equal to his office expenses; all he was "entitled to charge or receive" now belong to and must be paid to the county. Is this manifest purpose qualified by the language which follows in the same section? "And it shall be the duty of each of said officers to

exact, collect, and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the state, which shall be paid to and for the use of the state." When it is remembered, that the act put all county officers in counties of over one hundred and fifty thousand inhabitants in the salaried list, the purpose of the introduction of the words, "except such taxes and fees as are levied for the state," is obvious. Taxes levied for the state on personal property and other objects of taxation are paid to the county treasurer; liquor license fees are also paid to him; the tax on probate of wills, recording of commissions, and the collateral inheritance tax, levied for the state, are paid to the register of wills and the recorder; the tax levied by the act of 1830, on writs for the state, is received and paid over by the prothonotary; and the state might, for economy and convenience, direct that other taxes levied for its use should be paid to these or other county officers, for transmission to the state treasury; hence, the necessity for this exception; but to our mind, it neither qualifies, nor was it intended to qualify, the previous declaration, that all fees the officer was entitled to charge or receive, as a county officer, should belong to the county.

The second section of the act then prescribes how the account of fees shall be kept, and directs that, on the first Monday of each month, the officer shall pay to the county treasurer "all fees so received during the preceding month," and "he shall make oath . . . . that the said transcript contains a true and correct list of all the fees received, earned or chargeable upon the county for services rendered in his office, either by himself, deputies or clerks during the preceding month." Thus, the act still assumes, in accord with the first section, that all the fees pertaining to the office belong to the county, and must be paid by him to the county.

The third and fourth sections declare it a misdemeanor in the officer to neglect to keep accounts, to make returns, or pay over the money, to swear falsely; to neglect to charge fees according to law.

The fifth section enacts, that the officers, their deputies and clerks shall be paid specific salaries, and these shall be paid monthly from the county treasury.

The sixth section provides that the salary of the officer shall

only be paid out of the aggregate of the fees paid into the treasury by him the preceding months, after deducting the amount due deputies and clerks, and if there be not enough left to pay him, then, he shall get only the aggregate of net fees received; but also providing, if there be any excess in subsequent months, the deficit shall be made up from the excess during his term. His compensation cannot be greater than the aggregate of net fees during the term.

The seventh and eighth sections relate to the determination of the number of deputies and clerks, and the fixing of their salaries.

The ninth section provides, that "each of said officers shall make a separate return to the state treasurer of all collateral inheritance taxes collected or earned for the state by him, if any have been so collected or earned, and of all taxes due the state on any writs or legal proceedings or fees otherwise belonging to the state collected or earned by him, and the amount so returned by any of said officers as received by him for the state, shall be separately paid into the state treasury quarterly."

The tenth section provides for access to the books and accounts by the proper officers.

The eleventh directs, that the county, at its own cost, shall provide office furniture, books and stationery.

The twelfth, thirteenth, and fourteenth specifically fix the salaries of the officers.

The fifteenth is a repetition of the first, somewhat elaborated.

The sixteenth and seventeenth sections, declare certain offices county offices, and provide for the quarterly payment of the officers.

The eighteenth and last section, having in mind the fact, that existing laws provide for entirely different means of compensation of county officers, as well as wholly different methods of accounting, directs that: "All county officers affected by it shall settle their accounts under existing laws," up to the expiration of the term of the then incumbents.

We have noticed these different sections of the statute, because they show another scheme, covering all possible phases of the subject embraced by the act of 1810. The act of 1876 takes up the same subject, and by more, as well as more elaborate provisions, undertakes to specifically designate the owner-

ship of the fees, the duty of the officer and the limitation on his salary.

The case turns on the question, whether the acts of 1810 and of 1876 can stand together; they are both legislation on the same subject; both affirmative statutes. This is not exactly the case of a new statute repealing an old one in whole or in part, because of repugnancy; it is a new statute on the same subject, embracing provisions similar to those of the old, for its enforcement; elaborating them, and introducing a more complete system, with a wholly different purpose. Theretofore, the commonwealth had title and right to half the money beyond certain deductions; the officer had title to the other half; he collected and accounted to the commonwealth for her share; she now relinquishes her title to any part, and by unmistakable language, deprives the officer of all title; vests the whole in the county; constitutes the officer the mere channel through which it reaches the declared owner, the county. We are far from intending to infringe on the well settled rule, that a later statute on the same subject will not repeal an older one by implication, unless they be plainly repugnant. But if a statute embrace the essential provisions of an antecedent one on the same subject, and formulate a new system, the intention that the new shall be a substitute for the old is manifest, although there be no expressed intention to that effect. It is so held in Commonwealth v. Cromley, 1 Ash. 179; Goodenow v. Buttrick, 7 Mass. 140; Commonwealth v. Cooley, 10 Pick. 39; Johnston's Estate, 33 Pa. 511, and many other cases.

The constitutional and legislative intention to introduce an entirely new system, as to fees collected by county officers in the large counties, is just as manifest as it was to introduce in Philadelphia a new system as to aldermanic or magistrate's fees. Section 12 of article V. says: "In Philadelphia . . . . they (magistrates) shall be compensated only by salaries to be paid by said county . . . . All fees, fines and penalties in said courts, shall be paid into the county treasury." As to county officers, the same thought is expressed: "All county officers shall be paid by salary," and they "shall pay all fees which they may be authorized to receive into the treasury of the county or state, as may be directed by law." Then as to the latter came the directions of the law: "All fees limited and

appointed by law to be received by each and every county officer . . . . shall belong to the county," with no retransfer of the right to any portion to the commonwealth.

In answering this question, it is proper to have in mind the circumstances which moved the legislature, in 1876, to pass any law on that subject.

The section of the constitution referred to in the title peremptorily directed that: "In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary; and the salary of any such officer and his clerks heretofore paid by fees shall not exceed the aggregate amount of fees earned during his term, and collected by and for him." The same section directed that: "All county officers who are or may be salaried, shall pay all fees which they may be authorized to receive, into the treasury of the county or state, as may be directed by law." Then, immediately following in section six of the same article, is this injunction: "The general assembly shall provide by law for the strict accountability of all county, township, and borough officers, as well for the fees which may be collected by them, as for all public or municipal moneys which may be paid to them." The subject of section six, being so palpably the same as that of section five, it is scarcely separable in thought, and may fairly be treated as part of it.

The purpose of the act of 1876, as disclosed in its title, was to obey the mandate of the constitution. 1. All county officers in counties containing over one hundred and fifty thousand inhabitants, must be paid by salary; no longer by fees. 2. The salary was limited; it must not exceed the aggregate amount of fees earned during the term, and collected by or for them. 3. They must not keep any part of such fees, and credit them on salary, but must pay over all of them into the treasury of the county or state, as may be directed by law. 4. The legislature was to provide by law for a strict accounting by them, not only for all fees collected by them, but for all other public money paid to them.

The act of 1876, following so soon the constitution of 1874, it may be presumed the legislature knew the old law, the mischief or abuses under it, as well as did the members who framed the constitution, and the people who adopted it. The large

compensation of officers paid by fees in large counties, for years before, was felt to be a wrong on the public; though the grievance was not so sore, as farming out the taxes in France before the French Revolution, it was getting to be of the same character; the compensation of the officer and revenues of the state were only limited by the amount of fees the officer could wring from unfortunate litigants. He had every temptation to pile up fees, and then extort them; as the commonwealth halved the money with him, it made no rigid inquiry as to how he got it; individuals were practically defenseless, for lawyers were averse to incurring the displeasure of the officer by resisting illegal exactions from their clients. It is difficult, for those who have come to the bar since, to realize the abuses of the fee system in large counties before that time. But the convention of 1873 understood the matter, and so did the legislature of 1876. The latter, aware of the mischief, was in full sympathy with the convention in legislating the remedy; and in that spirit was framed the act of 1876.

The legislative intention was to sweep away, as directed by the constitution, a pernicious system, by removing, as far as possible, all motive for illegal exactions. It in no way affects the force of the mandate, that it embraces only counties containing over one hundred and fifty thousand inhabitants; the evil, at the adoption of the constitution, was only serious (or thought to be so) in counties of large population. When, as to such counties, the legislature, as part of a new system, declared "all fees," which the county officers were "entitled to charge or receive shall belong to the county in and for which they were severally elected or appointed," it meant, and could only mean, all the fees pertaining to the county office, and which, from the character of the office, the incumbent earned and received. It did not mean one half the fees, over and above a certain amount, or the act would have said so. It did, by exception, save fees and taxes specially levied for the state, but the language of the exception seems to carefully guard against affecting the scope of the words first used: "And it shall be the duty of each of said officers to exact, collect and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the state." This would have been but little more significant if it had said

"except collateral inheritance taxes, state tax on writs, wills, commissions and license fees." And that this is the meaning, is obvious from the provision in section nine; section two had required the officer to keep a special account of all the money received for fees, and pay all the moneys so received monthly into the county treasury, but outside of these fees payable to the county monthly, were other moneys not belonging to the county; so this section directs, the officer "shall make a separate return to the state treasurer of all collateral inheritance taxes . . . . all taxes due the state on any writs or legal proceedings, or fees otherwise belonging to the state," and these shall be paid by him into the state treasury quarterly. He was to account to the county, and pay over, monthly; to the commonwealth, quarterly.

Then comes the last section, which assumes the act is a substitute for prior legislation, by directing that it shall take effect only on the expiration of the terms of those then in office, and they shall settle their accounts under the old system up to that date.

We are of opinion that the act of 1876, as to Philadelphia county, that county having over one hundred and fifty thousand inhabitants, was intended as a substitute, in its application to county officers, for the act of 1810, and that the latter, of necessity, was repealed by it; that, by the act of 1876, all the fees which the defendant, as prothonotary, was entitled to charge or receive, belonged to the county.

It is argued by the learned attorney general, with some force, that this construction of the act of 1876 tends to inequality, because large counties will have the whole excess revenue derived from fees, while the officers in the smaller counties will continue to contribute a share to the commonwealth's treasury. But this inequality is more apparent than real. The larger county becomes answerable, under the act, for all the expenses of the office and all salaries; the nearness of the county to the officer, it having a voice in determining, not only the number of deputies and clerks, but their salaries; and having, to a large extent, control of the expenses, there is established a motive to watchful, economical supervision. Besides, the fact is well known, that litigation tends towards the larger counties. Our courts are courts of the commonwealth; corporations and

large business concerns have offices in the large counties, and can there be easily served with process; there, in personal actions, where the cause has arisen in other counties, suits are often brought and determined. Consequently, the expense of maintaining courts, outside of that which is reimbursed by fees, is heavier in such counties, and the legislature may have thought it but right to relinquish the commonwealth's claim on a share of the fees. But whatever may have been the motive, the legislature, in so doing, had the power to, and, by no uncertain words, did give up to the county what before the act of 1876 the commonwealth had claimed.

While we do not think this interpretation of the act of 1876 at all doubtful, so as to require the aid of contemporaneous construction, the fact that the same construction has been given it, from the time it became a law, for nearly twenty years, by all whose duty it was to construe it, or who were affected by it, is worthy of notice. In speaking of contemporaneous exposition of a statute, Judge ENDLICH, in his valuable work on Statutes, sec. 357, says: "But, further, the meaning given by contemporary or long professional usage (to a statute) is presumed to be the true one, even when the language has etymologically or popularly a different meaning. Those who lived at or near the time when it was passed, may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expression." And further on in the same section, he says: "It often becomes, therefore, material to inquire what has been done under an act; this being of more or less cogency, according to circumstances, for determining the meaning given by contemporaneous exposition." And for the text, he cites many authorities, both in this country and England. And, further, in note to same section, "In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time." In the case before us, as is intimated by the learned judge of the court below, the construction given to the act by the officers or county to be charged, in their own interest, is not entitled to much weight; but, when that construction has been acquiesced in by the commonwealth, from the date of the act until the institu-

tion of this suit, if the construction were doubtful, this would have much weight. The many auditor generals, attorney generals and state treasurers, whose sworn duty it was through all these years to see that the revenues of the state were accounted for and paid over, were grossly neglectful in not exacting payment, if the act of 1810 were still in force. It would be highly unjust to impute to them such neglect; evidently they considered, and rightly so, the act of 1810 repealed by the act of 1876, on the expiration of the term of those then in office; the contemporaneous exposition of the act, and the long uniform practice under it, show that, in their opinion, it took the place of the old act, and that neither the county officer nor the county was longer answerable for one half the excess of office fees, for all were declared to belong to the county.

The appeal is sustained, and the judgment is reversed.

COMMONWEALTH v. SHIELDS.

OPINION BY MR. JUSTICE DEAN, May 20, 1895:

For the reasons given in Commonwealth v. William B. Mann, prothonotary of court of common pleas of Philadelphia county, the appeal in this case is sustained and the judgment is reversed.

COMMONWEALTH v. LATTA.

OPINION BY MR. JUSTICE DEAN, May 20, 1895:

For the reasons given in Commonwealth v. William B. Mann, prothonotary of court of common pleas of Philadelphia county, the appeal in this case is sustained and the judgment is reversed.

COMMONWEALTH v. GREEN.

OPINION BY MR. JUSTICE DEAN, May 20, 1895:

For the reasons given in Commonwealth v. William B. Mann, prothonotary of court of common pleas of Philadelphia county, the appeal in this case is sustained and the judgment is reversed.

Commonwealth v. Allegheny County, Appellant.

Public officers—Fees—Statutes—Repeal—Acts of March 10, 1810, *and April* 6, 1871.

The act of March 10, 1810, 5 Smith's Laws, page 106, requiring county officers to pay over to the commonwealth fifty per cent of all fees in excess of $1,500 was repealed as to Allegheny county by the act of April 6, 1871, P. L. 476, and its supplement, the act of March 6, 1872, P. L. 209, providing that such fees should be paid into the county treasury.

Argued April 29, 1895. Appeal, No. 21, May. T., 1895, by defendant, from judgment of C. P. Dauphin Co., Jan. T., 1895, No. 507, on appeal from tax settlement. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Appeal of the county of Allegheny from an account settled and entered against said county by the auditor general and approved by the state treasurer, on Nov. 14, 1894, for fees of county officers for the year 1893, from Jan. 2, 1893, to Jan. 1, 1894.

The case was tried before SIMONTON, P. J., from whose opinion it appeared that in the fall of 1894 the auditor general and state treasurer settled an account against the prothonotary of the court of common pleas of Allegheny county, against the register of the county, against the recorder of the county, and against the clerk of quarter sessions of the county, in which these different officers were charged, for the year 1893, with the one half of the fees earned and received, less the present salary of the different officers, and the clerk hire of the offices.

The court entered judgment in favor of the commonwealth and against the county of Allegheny as follows:

Prothonotary's fees for 1893, half excess .	$8,046 84
Register's fees for 1893, half excess . .	2,101 40
Recorder's fees for 1893, half excess . .	1,460 54
Clerk of quarter sessions' fees, half excess .	1,589 37
Total	$13,198 15

Error assigned was entering judgment for commonwealth.

D. T. Watson, *Walter Lyon*, *W. J. Brennan* and *N. S. Williams* with him, for appellant.—Where the words of a statute are plain there is no need of construction: Potter's Dwarris on Statutes, 182.

The contemporaneous construction of a statute by those whose duty it is to execute it, especially when this construction has been successfully adopted by all different administrations and officers for twenty-two years, is entitled to great respect: Edwards v. Darby, 12 Wheat. 210; Potter's Dwarris on Statutes, 179; U. S. v. Recorder, 1 Blatchf., C. R. R. 218; Graham's App., 1 Dall. 136; Com. v. Grant, 2 Woodward's Cases, 379.

In Cohen v. Commonwealth, 6 Pa. 111, the Supreme Court, speaking of the act of 1810, said " . . . . the law of 1810 cannot be considered as assessing or laying a tax properly so called."

The act of 1810, so far as Allegheny county is concerned, was repealed by the act of April 6, 1871, P. L. 476, entitled " An act relating to the fees and salaries and duties of certain county officers in Allegheny county:" Banks v. Com., 10 Pa. 447; Norris v. Crocker, 13 How. 429; Potter's Dwarris on Statutes, 154 and note 4; In re Bounty Accounts, 70 Pa. 96; Com v. Grier, 152 Pa. 180; McCleary v. Allegheny County, 35 W. N. C. 193.

The cases in Allegheny county where these statutes of 1871 and 1872 and 1876 have been reviewed are three in number: Bell v. Allegheny, 149 Pa. 381; Com. v. Grier, 152 Pa. 178; McCleary v. Allegheny County, 35 W. N. C. 193.

Henry C. McCormick, attorney general, *Benjamin M. Nead* and *John P. Elkin*, deputy attorney general, with him, for appellee.—The act of 1810 was not repealed: Erie v. Bootz, 72 Pa. 199; Barber's Contested Election, 86 Pa. 392; Plum v. Lugar, 49 N. J. Law Rep. 557; McNeely v. Woodruff, 1 Green (N. J.), 352; 23 Am. & Eng. Ency. of Law, 491; Chicago etc. R. R. v. United States, 127 U. S. 406; Homer v. Com., 106 Pa. 221; Com. v. Hutchinson, 10 Pa. 468; Com. v. Philadelphia, 157 Pa. 558; Com. v. Lehigh Coal & Navigation Co., 162 Pa. 603; Sutherland on Statutory Construction, sec. 307; Endlich on Interpretation of Statutes, sec. 361; R. R. Co's. App., 77 Pa.

429; In re Borough of Pottstown, 117 Pa. 538; Borough of Millvale v. R. R., 131 Pa. 1; R. R. v. Riblet, 66 Pa. 164; Dorsey's App., 72 Pa. 192; Ridge Ave. Pass. Ry. v. Phila., 124 Pa. 219.

OPINION BY MR. JUSTICE DEAN, May 20, 1895:

In 1894, the auditor general and state treasurer settled accounts against the prothonotary, register, recorder, and clerk of quarter sessions of Allegheny county, in which they charged these officers with one half the fees received by them in excess of their salaries and clerk hire for the year 1893. As they had paid all the fees pertaining to their office which had been received by them for this year to the county by agreement, the county assumed the responsibility, and was made party defendant in the suit. The case was tried before the common pleas of Dauphin county, under act of 22d of April, 1874, without a jury. Judgment having been given for the commonwealth, in the sum of $13,198.15, the amount claimed, the county presses this appeal.

Before the act of March 10, 1810, all the office fees of a county officer belonged to him exclusively. But that act, which is entitled, "An act taxing certain offices," required him to pay over to the state fifty per cent of all fees in excess of fifteen hundred dollars. Then, by the act of April 5, 1842, in addition to the fifteen hundred dollars, he was allowed to deduct his expenses for clerk hire and stationery.

When passed, the act of 1810 was a general act, applicable to all the counties of the state, and so continued to be until the passage of the act of April 2, 1868. It was then repealed, as to all counties, except Allegheny, Lancaster, Montgomery, Philadelphia, Beaver and Washington. Then, the act of April 6, 1871, a local or special law for Allegheny county was passed, which directed that all fees limited and appointed by law to be received by the county officers against whom this account was settled, as well as others designated in the act, should belong to the county of Allegheny, and that said officers should not "receive for their own use, or for any use or purpose whatever, except for the use of the county of Allegheny, any fees for any official services whatever." This was, in substance, the provision of the first section of the act; the officer

no longer had title to a single dollar chargeable to litigants under the fee bill, except, by a proviso to the third section, the sheriff and coroner were allowed fees for mileage. By section four, it was expressly provided that the commonwealth's taxes on writs, and its proportion of the fees received, should be paid by warrant on the county treasurer. Section seven of the act directed that the officer, and all his deputies and clerks, should be paid fixed and specific salaries, which were either determined by the act itself, as in case of the principal officers, or, as in case of deputies and clerks, by a board designated to perform that duty. The same section directed that the commonwealth's share of the fees should be deducted from the aggregate sum received, before the salary of the principal officer was paid, and if not enough remained to cover the salary, then he should receive only such proportion as equaled the aggregate of fees earned during his term, after paying the deputies and clerks in full, and the commonwealth.

It will be noticed what a radical change was made in the relations between the commonwealth and the officer, as they had existed under the act of 1810. Before the act of 1871 the officer accounted to the commonwealth for, and paid to her, fifty per cent of the fees in excess of fifteen hundred dollars: he was her debtor, and she looked to him alone for her money; under the last named act, she peremptorily ordered him to pay all fees into the county treasury, and at the same time announced she would look to the county for payment; in effect, the officer was no longer answerable to her, and the county was.

This act was followed by a supplement to it of March 6, 1872, which expressly repealed the fourth section of the act of 1871. The repealed section, as already noticed, directed that the state's share of the fees, instead of being paid as under the act of 1810 by the officer, should be paid by the county by warrant drawn on the county treasurer. The first section of the act of 1871 had declared all the fees should belong to the county, and be paid into the county treasury; the fourth qualified it by declaring that the commonwealth's proportion should be drawn out by warrant; this repeal left unqualified the positive declaration, that all the fees belonged to the county; they were in the county treasury, and by the explicit declaration of the law, in the first section, belonged to the county; then this sweeping

disclaimer of right to any part was restricted by the claim in the fourth section to a proportion of these fees, to be paid by warrant on the county treasury; but now, by the repeal, this claim to a proportion is absolutely abandoned, leaving the unqualified renunciation of any claim to any proportion of such fees, as announced in the first section, standing in full force.

But the act of 1872, as a repealing act, went further: the second proviso to the seventh section of the act of 1871 directed, "That after ascertaining the amount due the deputies and clerks in each office, and the state's share of the fees, if there has not been a sum sufficient from the fees received and paid in, or earned and due by the county for services rendered, to pay the full amount of the salary of the officer holding said office, he shall only receive such proportion of his salary as shall be equal to the aggregate of the fees received and earned during his term of office, after paying the deputies and clerks in full, and after also paying the share of the fees due the commonwealth; and all the moneys accruing from fees above the said salaries and the share of the state, shall accrue to the benefit of the county," excepting, however, officers then in office elected before the year 1870, who should, for the unexpired term of their office, be paid all fees earned after paying the salaries of clerks and deputies, and the commonwealth's share of fees, as provided by act of 1871.

This second proviso, the act of 1872, also expressly repealed, and in lieu thereof it was directed that all salaries, except those of county commissioners, officers elected in 1870, and a part of the salaries of judges of courts, should be paid from the county treasury, out of the fees paid into the treasury, after ascertaining and deducting the amounts due deputies and clerks; and if there were not enough left to pay the salary of the officer, he should only receive such proportion of his salary as equaled the aggregate of the net fees. The proviso directed the officer should receive his salary, after deducting the salaries of deputies and clerks, and the commonwealth's proportion of the fees; it is repealed; he is now to receive his salary, after deducting those of his deputies and clerks only; there is no longer anything to be taken off for the commonwealth.

The court below determined that the act of 1810 was not repealed by the acts of 1871 and 1872, so far as relates to the

right of the commonwealth to one half of the office fees. We are of a different opinion.

The act of 1871 was, manifestly, a substitute for the act of 1810, so far as related to Allegheny county. Could they stand together, or could any material part of the act of 1810 stand, if the act of 1871 were enforced according to its plainly expressed terms?

The act of 1810 made the officer accountable to and debtor of the state; that of 1871 discharges him and accepts the county as debtor; the first, made an allowance to the officer of fifteen hundred dollars, and demanded one half the excess; the second, makes no allowance to the officer. The act of 1810 simply provided that the officer should account for and pay to the commonwealth one half of all fees for services performed by him in excess of the fifteen hundred dollars. When the act of 1871 declared that he should pay all fees into the county treasury, and the county should thereafter pay one half to the commonwealth, without any deduction of a minimum salary for the officer, what was left of the act of 1810 to enforce? If the commonwealth demands from the officer an annual account, as provided in the old act, he replies, I have, as you directed by the second section of the new act, accounted monthly to the county; if she demands payment of any proportion of the fees received, he replies, I have none of them, having paid all, as you directed by the second section of the same act, to the county monthly.

If the mandate of the new statute be obeyed, there is nothing for those of the old to operate on. Nor, is there ambiguity or doubt as to the import of the commands of the new statute; we do not need to wrestle over doubtful construction of dubious words and phrases; they admit of but one construction; are almost as peremptory and plain as the command of the centurion, and were obeyed as implicitly: "I say . . . . to my servant, do this, and he doeth it."

If, then, the act of 1871 was plainly a substitute for the act of 1810, the act of 1872, by its repeal of the fourth section and second proviso to the seventh section, just as plainly relinquished all claim of the commonwealth to any part of the officer's fees. Without this fourth section, and this proviso, under the act of 1871, the commonwealth would have been entitled to nothing

by their express repeal, that act is without them and stands a palpable renunciation of any claim, under the act of 1810, to half the fees. Where the words of a statute are not doubtful, there is no need for construction; it is the duty of courts to follow explicit enactments of the legislature, the taxing power; if it has clearly not taxed, we cannot, by a strained construction, tax.

From 1872 down to 1894, both the county and commonwealth officers assumed the act of 1810 was repealed by that of 1871, and that, by the act of 1872, the commonwealth relinquished claim to any part of the office fees, which theretofore it had demanded. In so doing, they did not adopt one of two doubtful constructions of the law; they only followed its manifest directions. It needs no aid now, from contemporaneous construction; standing on its unambiguous words, it could have received no other construction. The learned judge of the court below admits that he arrives at his conclusion in favor of the commonwealth with a great deal of hesitation,—we arrive at ours with none.

The appeal is sustained, and the judgment is reversed.

Commonwealth *v.* Merchants & Manufacturers National Bank of Pittsburg, Pennsylvania, Appellant.

168 309
227 1176
f227 1178

Taxation—Banks—Uniformity of taxation—Act of June 8, 1891—*Constitution, art.* IX. *sec.* 1.

The act of June 8, 1891, P. L. 240, which provides that any bank incorporated by this state or the United States may, in lieu of all taxation except upon its real estate, collect from its shareholders and pay into the state treasury a tax of eight mills on the dollar on the par value of all its shares that have been subscribed for or issued, and that any bank which fails to do so shall be subject to a tax of four mills upon the actual value of all the shares of its capital stock, is not repugnant to art. IX. sec. 1, of the constitution of Pennsylvania, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The act is not in conflict with the condition upon which the several states are permitted to tax the shares of stock in national banks, namely: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

The act is not in conflict with amendment XIV. of the constitution of the United States, which ordains that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The act provides sufficient means of notice to the shareholders of the stock upon which the tax is imposed.

Argued April 29, 1895. Appeal, No. 8, May T., 1895, by defendant, from judgment of C. P. Dauphin Co., Jan. T., 1894, No. 669, on appeal from tax settlement. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Appeal from tax settlement.

The case was tried before SIMONTON, P. J., without a jury.

SIMONTON, P. J., delivered the following opinion:

"1. Defendant is a national bank, organized under the act of Congress of June 3, 1864, and doing business in the city of Pittsburg, Pennsylvania. Its cashier reported, as required by section 7 of the act of June 8, 1891 (P. L. 242), to the auditor general that the whole number of shares of its capital stock issued was 16,000; the actual value of each share, $65.00; and the actual value of capital stock issued, $1,040,000.

"On this actual value of capital stock issued the auditor general and state treasurer settled an account, Nov. 18, 1893, charging defendant with a tax of four mills on each dollar of said actual value, amounting to $4,160; and from said settlement this appeal was taken, Dec. 28, 1893.

"2. There were, in the city of Pittsburg, during the year 1893, twenty-seven national banks chartered under the same act of congress, and doing the ordinary and general business of a national bank, as was defendant, the aggregate par value of whose shares of capital stock was $11,200,000, its actual market value being largely in excess of the par value and estimated at $21,226,875.

"3. There were in the state of Pennsylvania, during said year 1893, about 336 national banks doing the same kind of business as defendant, the aggregate par value of whose shares of capital stock was about $72,000,000, its market value being much greater, and estimated at about $128,000,000.

"4. Nine of the said twenty-seven national banks doing business in the city of Pittsburg in 1893, having capital stock of the par value of $2,800,000, elected to collect from their share-

holders for the year 1893 a tax of eight mills on the dollar upon the par value of their shares, as provided by section 6 of the act of June 8, 1891. The actual value of all the shares of said banks was more than three times the par value, and the amount of tax paid by said banks was therefore much less than it would have been if they had paid four mills on the actual value of all their shares.

"5. There were in Pennsylvania in 1893, as shown by the report of the superintendent of banking, a number of state banks whose entire capital stock at par amounted to $8,461,559; and as reported by them to the superintendent of banking, their total capital, surplus funds and undivided profits amounted to $14,321,350 and the market value of their shares to $16,000,000, and a number of these, whose aggregate capital amounted to not less than twelve per cent of all the moneyed capital invested in shares of state banks in Pennsylvania, by electing to pay the eight mills under said section 6, paid a less amount of tax than they would have paid if they had been taxed at the rate of four mills upon the actual value of all their shares.

"These facts are found from affidavits presented on the trial and received with the consent of the commonwealth as depositions.

"The learned counsel for defendant have stated in writing the facts as they understand them to be shown by the evidence, and have requested us to adopt their findings as the facts of the case. Some parts of these findings are, however, conclusions of law, and these we do not adopt. But so far as these findings state matters of fact, and are not in conflict with the facts above found by us, we adopt them for the purposes of this case, to show the working of the taxing act in question and the degree to which it produces a lack of uniformity of taxes. They will, therefore, be filed herewith.

"Section 6 of the act of June 8, 1891, provides that any bank or savings institution incorporated by this state or the United States may, in lieu of all taxation except upon its real estate, collect from its shareholders, and pay into the state treasury a tax of eight mills on the dollar on the par value of all its shares that have been subscribed for or issued; and section 7 imposes upon every national bank located within this commonwealth which fails to collect and pay said tax of eight mills a tax of

four mills upon the actual value of all the shares of its capital stock.

"Defendant objects, by its first specification of appeal, that these sections of the act are repugnant to article IX. section 1 of the constitution of Pennsylvania, which ordains that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'

"The contention is, that by the terms of these sections of the act in question some national banks of the state are permitted to elect to pay a less rate of tax than four mills upon the dollar of the actual value of their capital stock, while others are required to pay tax at this rate. This result does actually follow the working of the act, for the reason that the par value of the capital stock of some of these banks is so much less than the actual value that a tax upon the former at eight mills is less than a tax on the latter at four mills would be, and naturally these banks elect to pay the eight mills, while others, whose par value is more nearly equal to their actual value, for the same reason decline to pay the eight mills, and are taxed at the rate of four mills upon the actual value of their capital stock. Therefore, while the right of election is given to all, it is the interest of some to elect and of others not to elect, and thus actual and absolute uniformity of taxation is not attained, and is shown by the finding of facts.

"A discussion of the numerous cases cited by counsel for defendant, in which the courts of other states have considered and passed upon the question of the constitutionality of taxing acts, in view of the requirement in their constitutions that taxation shall be uniform, would serve no useful purpose. Many of them were cited and discussed by counsel and by the court in Com. v. Del. Div. Canal Co., 123 Pa. 594, where the defendant contended that section 4 of the act of June 30, 1885, taxing corporate loans, was unconstitutional, because the taxes imposed by it were not uniform.

"In that case the court below found as a fact (page 597) that 'the nominal or par value of bonds and mortgages issued by corporations is no certain measure of their actual value, which is often either above or below their par value, the actual value being dependent upon the value of the property mortgaged,

the rate of interest, the date of maturity and other conditions, some bonds upon which interest is regularly paid selling as low at fifty cents on the dollar, and others as high as one hundred and fifty;' and in discussing the law, said: 'When, however, the law itself is so framed that it necessarily produces gross inequality of burden, no matter how perfectly it may be administered, it would seem impossible to avoid the conclusion that it violates the mandate of the constitution. . . . But if in one case the value to which the rate is applied is the expression of the judgment of the proper official, and in another a mere arbitrary nominal value, it is in the very nature of the case that the resulting taxes cannot be uniform. There can be no definite proportion between the value of the property of the citizen and the amount of his taxes. And, as the findings of fact show, this would be the inevitable consequence of the enforcement of the law in this case, no matter how faultless its administration might be.' And the court below, therefore, held the taxing section there in question unconstitutional. But on appeal the Supreme Court, in an opinion by the late Mr. Justice CLARK, reversed this decision, and, notwithstanding the fact that some of the securities, taxed at their nominal or face value, sold in the market as low as fifty cents, and others as high as one hundred and fifty cents, on the dollar, held that the taxing section was constitutional, and that the taxes were uniform in the sense of that instrument.

"There was certainly as great a want of actual uniformity in the taxes imposed by that act as there is in those collected under the two sections of the act of June 8, 1891, in question in this case, for, as was shown by the finding of fact quoted above, under it the same amount of tax might be imposed on a bond worth $500 as upon another worth $1,500.

"That case was followed by Com. v. Brush Elec. Light Co., 145 Pa. 147, where the findings of fact showed that under the normal working of section 4 of the act of June 7, 1879 (P. L. 114), the tax imposed by it on corporations ranged in amount from less than two mills to over five mills on the actual value of their respective capital stocks, as will be seen by referring to finding of fact No. 5 on page 149 of 145 Pa., and to the table prepared from the evidence and made part of said finding, which is to be found in the report of the same case in 28 W. N. 529.

"The court below, however, held said section constitutional, on the authority of the Del. Div. Canal Co. case above cited, and this ruling was affirmed by the Supreme Court, Mr. Justice WILLIAMS in the opinion saying: 'This is justified by Com. v. Canal Co., 123 Pa. 594. . . . And the learned judge was right in his conclusion that the provisions of the act of 1879 relating to this subject are not objectionable on constitutional grounds.'

"We are unable to distinguish these cases from the one before us. The want of actual uniformity is, as the findings of fact above referred to show, not greater here than it was in those cases, and we therefore think that they preclude any further discussion of the question raised by defendant's first specification of appeal.

"Defendant has specified in its appeal the further objection that the settlement is invalid, because said sections of the act of June 8, 1891, are in conflict with the condition upon which the several states are permitted to tax the shares of stock in national banks, namely, 'that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state.'

"The learned counsel rest their attempt to sustain this objection upon the proposition, stated in their brief, 'that the words, "other moneyed capital," in section 5219 of the United States Revised Statutes, mean *particularly* other moneyed capital invested in the banking business, that is, the shares of stock in banks, national or state;' and this being so, that as the act of 1891 allows some national banks to pay eight mills on the par value of their shares, while others are taxed at the rate of four mills on the actual value of their shares, the requirement of the statute, that the shares of national banks shall not be taxed at a greater rate than other moneyed capital, is violated.

"But an examination of the cases decided by the United States Supreme Court which are cited by counsel shows that this is not the meaning of the words 'other moneyed capital.'

"Thus in Hepburn v. the School Directors, 23 Wall. 480, the argument on behalf of the plaintiff was that 'moneyed capital in the hands of individual citizens means private investments other than in stocks or securities.' But in answer to this the chief justice, delivering the opinion of the court, said: 'It is contended that the term "moneyed capital," as here used,

signifies money put out at interest, and that as such capital is not taxed upon more than its par or nominal value, the par of these shares is their maximum taxable value.

"'We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are "other moneyed capital." That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term. But even if it were true that these shares can only be taxed as money at interest is, the result contended for would not necessarily follow.' That is to say, stock in national banks is 'moneyed capital,' and other investments in stock and securities are 'other moneyed capital.'

"So in Mercantile Bank v. New York, 121 U. S. 138, when the court, speaking of the meaning of the words 'other moneyed capital,' as used in the statute, say: 'Of course it includes shares in national banks; the use of the word "other" requires this. If bank shares were not moneyed capital, the use of the word "other" in this connection would be without significance;' the meaning is the same. The contrast is between national bank shares, which are moneyed capital, and shares of stock in other institutions and securities of other kinds, which are 'other moneyed capital;' and the true meaning of this section of the revised statute is as stated in Boyer v. Boyer, 113 U. S. 689, on page 702: 'Capital invested in national bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by state authority as the state establishes for other moneyed capital in the hands of individual citizens, however invested, whether in state bank shares or otherwise.'

"The statute does not deal with the question of uniformity of taxation of the shares of different national banks as between themselves, but is simply intended to protect them from taxation at a higher rate than that imposed upon moneyed capital invested otherwise than in the shares of national banks.

"Defendant in its appeal specifies the further objection that the taxing act upon which the settlement appealed from is based provides no means of notice to the shareholders of the stock upon which the tax is imposed.

"The argument is that the tax is in effect a tax upon the

shareholders, and that it is imposed upon them without notice or any provision for notice to them.

"The principle upon which this tax is assessed with respect to notice is the same as that upon which the tax on the capital stock of other corporations is, and has been for half a century, assessed. The settlement is made against the corporation, which is considered for the purpose of taxation the representative of the shareholders. Furthermore, it has been decided in recent cases by the Supreme court that the corporation and the shareholders, as well as the capital stock and the shares of stock, are practically the same: Com. v. Fall Brook Coal Co., 156 Pa. 488; Com. v. Lehigh Coal & Nav. Co., 162 Pa. 603. This being so, notice to the corporation would seem to be, to all intents and purposes, notice to the shareholders. And it has frequently been held that the corporation is not entitled to notice before the settlement is made, but that the requirement of the act of 1811, in relation to public accounts, that a copy of the account settled shall be mailed to the corporation, with the right of appeal from the settlement during sixty days thereafter, is a sufficient provision for notice; and that, where the copy of the settlement was not actually received, an action brought for the amount of the tax is sufficient notice. And the law evidently presumes that the officers of the bank will notify their stockholders, for, prescribing in section 7 the duties of the auditor general in assessing this tax, it declares that 'it shall be his further duty to hear any stockholders who may desire to be heard on the question of the valuation of the shares as aforesaid.' For these reasons we think these objections cannot be sustained.

"Nor do we think this taxing act is open to the final objection specified in the appeal, that it is in conflict with amendment XIV. of the constitution of the United States, section 1, which, in part, is as follows: 'Nor shall any State . . . . deny to any person within its jurisdiction the equal protection of the laws.'

"The question intended to be raised by this specification was, we think, settled by the Supreme Court of the United States in Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, followed by Jennings v. Coal Ridge Improvement & Coal Co., 147 U. S. 147, and it is therefore not now open for discussion.

"We therefore conclude:

"1. That sections 6 and 7 of the act of June 8, 1891, are not repugnant to article IX. section 1 of the constitution of the state of Pennsylvania, which ordains that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.'

"2. That said sections of said act are not in conflict with the condition upon which the several states are permitted to tax the shares of stock in national banks, namely: 'That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state.'

"3. That the taxing act upon which the settlement appealed from is based does not fail to provide sufficient means of notice to the shareholders of the stock upon which the tax is imposed, and said settlement is not invalid for want of such notice.

"4. That said taxing act is not in conflict with amendment XIV. of the constitution of the United States, section 1, which (inter alia) ordains as follows: 'Nor shall any State . . . . deny to any person within its jurisdiction the equal protection of the laws.'

"The commonwealth is therefore entitled to recover as follows:

"Amount of tax as per settlement . .	$4,160 00
"Interest from Jan. 1 to Nov. 22, 1894 @ 12 per cent per annum	401 46
"Attorney general's commission, 5 per cent	208 00
Total	$4,769 46"

Error assigned was entry of judgment for the commonwealth.

John Wilson, *Scott & Gordon* and *Wm. M. Hall, Jr.*, with him, for appellant.—The act of 1891 works great inequality in the taxation of banks: Cooley's Const. Law, 493; People v. Mayor of Brooklyn, 4 Comstock, 420; School District v. Readington Twp., 36 N. J. L. 70; State v. Ruyon, 12 Vroom, 98; State v. Indianapolis, 69 Ind. 378; Exchange Bank v. Columbus, 3 Ohio, 15; New Orleans v. Davidson, 30 La. Ann. 555; Woodbridge v. Detroit, 8 Mich. 301; Porter v. R. R., 76 Ill.

580; Knowlton v. Supervisors, 9 Wis. 389; Marsh v. Supervisors, 42 Wis. 502; Weeks v. Milwaukee, 10 Wis. 186; Philleo v. Hiles, 42 Wis. 527; Com. v. Five Cent Savings Bank, 5 Allen, 436; Santa Clara County v. So. Pas. R. R., 18 Fed. Rep. 385; City Nat. Bank v. Paducah, 1 Thompson's Nat. Bank Cases, 300; State Railroad Tax Cases, 92 U. S. 611; Londonderry v. Berger, 2 Pearson, 230; Fox's App., 112 Pa. 352; Com. v. Del. Division Canal Co., 123 Pa. 594; Com. v. Lehigh R. R. R., 129 Pa. 455; Com. v. Sharon Coal Co., 164 Pa. 305.

This system, containing such actual and gross necessary discriminations, not only violates the state constitution, article 9, section 1, as to uniformity, but also violates the federal statute, section 5219, under which only can any taxation of the shares of stock of national banks be levied and collected: Boyer v. Boyer, 113 U. S. 691; People v. Weaver, 100 U. S. 546; Stanley v. Supervisors of Albany, 121 U. S. 542; Pelton v. National Bank, 101 U. S. 146; Lionberger v. Rouse, 9 Wall. 468; Markoe v. Hartfrant, 6 Am. Law Reg. 487; Com. v. Girard Bank, 6 Phila. 431; Pleish v. Hartfrant, 2 Leg. Gaz. 77; Pittsburg v. First Nat. Bank, 55 Pa. 45; Van Allen v. Assessors, 3 Wall. 573; Del. R. R. Tax, 18 Wall. 206; Farrington v. Tennessee, 95 U. S. 679; McMahon v. Palmer, 102 N. Y. 178; Albany City Nat. Bank v. Maher, 19 Blatchf. 175; People v. Pittsburg R. R., 67 Cal. 625; Welty on Assessments, sec. 4; Mulligan v. Smith, 8 Pac. Coast Law J. 499; Railroad Tax, 13 Fed. Rep. 750; McCulloch v. Maryland, 4 Wheat. 316; Watson v. First Nat. Bank, 8 N. E. Rep. 97; People v. Weaver, 100 U. S. 543; Salt Lake Bank v. Golding, 2 Utah, 1; Macon v. First Nat. Bank, 59 Ga. 648; Austin v. Boston, 96 Mass. 359; Cook on Stocks, sec. 562; Cooley on Taxation, 6th ed. sec. 231; Porter v. Rockford, R. I. etc. R. R., 76 Ill. 561; Farrington v. Tennessee, 95 U. S. 679.

The state has a right to collect the tax, if properly assessed, from the bank: National Bank v. Com., 9 Wall. 353.

The act provides no proper notice to the shareholder: Houston v. New Orleans, 119 U. S. 265; Hagar v. Reclamation District, 111 U. S. 701; Com. v. Lehigh V. R. R., 104 Pa. 102; Com. v. Lehigh V. R. R., 129 Pa. 456.

The act violates the fourteenth amendment of the constitu-

tion of the United States: R. R. Tax Cases, 13 Fed. Rep. 748; Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232.

John P. Elkin, deputy attorney general, and *Henry C. McCormick*, attorney general, for appellee, were not heard, but cited in their printed brief: Com. v. Del. Div. Canal Co., 123 Pa. 594; Com. v. Brush Electric Light Co., 145 Pa. 147; Hepburn v. School Directors, 23 Wall. 485; Mercantile Bank v. New York, 121 U. S. 138; Com. v. First Nat. Bank, 96 Am. Dec. 287; New Orleans v. Houston, 119 U. S. 279; County Santa Clara v. S. P. R. R., 18 Fed. Rep. 410; Davis v. Los Angeles, 86 Cal. 37; Happy v. Mosher, 48 N. Y. 313; Com. v. Lehigh Coal & Navigation Co., 162 Pa. 603; Chester City v. Pennsylvania, 134 U. S. 240; Jennings v. Coal Ridge Imp. & Coal Co., 147 U. S. 147.

OPINION BY MR. JUSTICE WILLIAMS, May 20, 1895:

The complaint of the appellant is against the inequality of burden existing under the operation of the statute providing for the taxation of national banks. The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them that can stand. Absolute equality of burden is theoretically possible but it has not been attained in practice in this state.

It is a reasonable presumption that banks are honestly organized, and that each one enters upon its business career with an actual capital exactly equal to the face value of all its shares of stock. A tax levied at any given rate per cent on the shares would operate for a few months to produce substantially uniform results. But once launched in business each bank is affected by many circumstances and influences that are peculiar to it. One bank may accumulate its earnings in a large surplus fund to be used in the business of the bank. Another may divide its earnings in dividends semiannually among its stockholders. One bank may be managed with financial skill and economy. Another may be conducted in a careless and extravagant manner.

One may be located at an active business center and have a

large line of deposits and discounts, another may be located at an unimportant point where money is scarce and loans few. These and many other circumstances result in decided success in some cases, in the swallowing up of earnings in expenses in others, and in a positive impairment of capital in some others. The law, that operated with practical uniformity of result at first, produces noticeable inequality as the results of differences in location and management begin to develop themselves, until results such as are brought to our attention in this case flow from the application of a uniform rate of taxation to the shares of stock at their par value. The inequalities are due to causes which the legislature could not be required to foresee or provide against, and for that reason they cannot be charged to the law. But the appellant complains that the law furnishes two modes and rates for taxing the stock of national banks, and denies that this can be constitutionally done. But the state finds it convenient and economical to tax its corporations and collect the taxes through its own proper machinery. To induce the banks to make their returns to the auditor general and to pay their taxes into the state treasury the state offers an inducement. It proposes to relieve all the banks from local taxation that elect to pay a certain rate per cent upon their shares of stock directly into the state treasury. All the banks may come into this class. All that do are assessed with a uniform rate per cent which they pay at one time and one place.

Those that elect not to pay this rate are assessed at a lower and uniform rate upon the appraised value of their shares, and upon this valuation the local as well as the state taxes are assessed. We cannot say that this classification is unconstitutional, nor that the rate per cent differs so widely as to invalidate the law. The rate is uniform for each class, and the aggregate of the taxes levied per share in both classes is as nearly the same as could well be estimated in advance of the action of the local authorities, which it is impossible to forecast with accuracy. The banks are themselves responsible for the existence of the second class. They are all invited to deal directly with the state. If they do not it is fair to assume that their action is guided by what they believe to be their own pecuniary interest. Of a want of uniformity which is the re-

sult of their own deliberate action, they certainly ought not to complain. Of a want of equality of burden that results from circumstances affecting particular banks, and is not produced by the application of the law, they cannot complain.

We think the learned judge decided this case correctly and the judgment is now affirmed.

James C. Patton v. Pearson Church et al., Appellants.

Will—Estate during widowhood.

Testator directed as follows: "I give, devise and bequeath unto my wife, Anna B. Church, my homestead lot and buildings thereon, with the appurtenances, situate in the city of Meadville, Pa., and also all my household goods and furniture, horses, cows, carriages, sleighs, harness, and the like to be occupied and used by her as and for a family home during her widowhood." The residue of the estate was devised and bequeathed to the wife and children in such shares and estates as they would take under the intestate laws. *Held*, that the wife took an estate during widowhood, and not in fee.

Argued April 30, 1895. Appeal, No. 50, July T., 1894, by defendants, from judgment of C. P. Crawford Co., Sept. T., 1892, No. 28, on verdict for plaintiff. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Ejectment for an undivided one sixth interest in a lot on the southwest corner of Centre street and Public Square in the city of Meadville. Before HENDERSON, P. J.

At the trial it appeared that Gaylord Church died in September, 1869, leaving a will, the material portions of which were as follows:

"First. I give, devise, and bequeath unto my wife, Anna B. Church, my homestead lot and buildings thereon, with the appurtenances, situate in the city of Meadville, Pa., and also all my household goods and furniture, horses, cows, carriages, sleighs, harness, and the like to be occupied and used by her as and for a family home during her widowhood. . . .

"Eighth. And as to all the rest and residue of my estate I give, devise, and bequeath the same to my wife and to my chil-

dren in such portions, shares and amounts of interest and estate as is directed by the laws of Pennsylvania in cases of intestacy."

In 1888 the plaintiff, James C. Patton, purchased at sheriff's sale the interest of Alfred G. Church, one of the children of the testator. This was during the lifetime of the testator's widow, who never remarried, and who died in February, 1892. After her death the plaintiff's vendee brought this action of ejectment and a verdict was rendered for plaintiff subject to the point reserved, whether the testator's widow took a fee or life estate under her husband's will.

HENDERSON, P. J., filed the following opinion:

"The spontaneous interpretation of the first clause of the testator's will is that it gives to his widow a limited estate and not an estate in fee simple.

"Taking the whole clause together and giving to each word its appropriate sense, the devise to Anna B. Church is during widowhood. The testator was a lawyer of ability and merited distinction, and must be presumed to have understood the significance of the terms used by him. If he had intended to devise a fee to his wife no one knew better than he did how to express that intention in apt and effective words.

"The limitation of the estate devised to the use of the devisee during widowhood was doubtless intended by the testator in the sense in which the language would be ordinarily understood, and as the devisee continued unmarried during the remainder of her life, she took a life estate under the will.

"By the eighth clause of the will all the residue of the testator's estate is devised and bequeathed to his wife and children in such shares and estates as they would take under the intestate laws of the commonwealth.

"It was contended in argument that this clause was inconsistent with the interpretation first given to the first clause. It does not seem so to me, however.

"The wife was to have the homestead during widowhood; if she remarried she would be entitled to dower thereafter in the same property, and in any event the children would be entitled to the remainder.

"No disposition was made in the first clause of the fee, and the eighth clause was inserted to cover all property and estate not specifically devised or bequeathed.

"It is consonant therefore with the first. The interpretation indicated gives effect to all the words of the devise, and judging from the language used by the testator is that which he intended to convey.

"Judgment is accordingly entered upon the verdict in favor of the plaintiff."

Error assigned was in entering judgment for plaintiff.

Pearson Church, for appellants.—The widow took a fee: Smith's App., 23 Pa. 9; Hall v. Dickinson, 31 Pa. 76; Schoonmaker v. Stockton, 37 Pa. 461; Crosky v. Dodds, 87 Pa. 359; Shinn v. Holmes, 25 Pa. 142; Schriver v. Meyer, 19 Pa. 87; Wood v. Hills, 19 Pa. 513; Foster v. Stewart, 18 Pa. 23; Geyer v. Wentzel, 68 Pa. 84; Etter's Est., 23 Pa. 381; Rewalt v. Ulrich, 23 Pa. 388; Letchworth's App., 30 Pa. 175; Burd v. Burd, 40 Pa. 182; Womrath v. McCormick, 51 Pa. 504; Fahrney v. Holsinger, 65 Pa. 388: Biddle's App., 80 Pa. 258; McIntyre v. McIntyre, 123 Pa. 329; Snyder v. Baer, 144 Pa. 278; Anders v. Gerhard, 140 Pa. 154; Widener v. Beggs, 118 Pa. 374; Dilworth v. Gusky, 131 Pa. 344; Coles v. Ayers, 156 Pa. 199.

F. P. Ray, for appellee.—The widow's estate is expressly for widowhood or for life, because it might probably last for life, and in this case did last for life, but is liable to be determined sooner, on the happening of the contingency of her marriage: 2 Blackstone's Com. 121; 4 Kent's Com. 26; Cooper v. Pogue, 92 Pa. 254; Dixon v. Ramage, 2 W. & S. 142; Long v. Paul, 127 Pa. 456; Fox's Est., 1 Pearson, 437; Musselman's Est., 39 Pa. 469; Shirey v. Postlethwaite, 72 Pa. 39; Boyle v. Boyle, 152 Pa. 108.

PER CURIAM, May 20, 1895:

The able argument of the learned gentleman who represents the appellants has not persuaded us that the interpretation of the will of Gaylord Church on the trial in the court below was erroneous. The reasons given in support of his ruling by the learned trial judge are so satisfactory to us that we affirm the judgment on the opinion filed on the disposition of the reserved question.

The judgment is affirmed.

E. K. Range, Executor of Alvira Shearer, Deceased, v. Thomas M. Culbertson, Appellant.

Judgment—Opening judgment.

The refusal of the court below to open a judgment when the testimony is conflicting will not be disturbed by the supreme court.

Argued April 30, 1895. Appeal, No. 75, Jan. T., 1895, by defendant, from order of C. P. Erie Co., May T., 1893, No. 588, discharging a rule to open judgment. Before WILLIAMS, McCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Rule to open judgment.

From the record it appeared that T. M. Culbertson owed Alvira Shearer $621, on a judgment note dated May 1, 1892. Alvira died on April 3, 1893. On July 26, 1893, the judgment note was entered up by the executor. On a rule to open the judgment, defendant offered in evidence a paper dated Oct. 27, 1892, as follows:

"$500.00 LE BOEUFF, Oct. 27, 1892.

"I, Alvira Shearer, promise to give $500.00 to Nancy Culbertson out of note I hold against T. M. Culbertson.

(Signed) "ALVIRA SHEARER, X.

"*Witness:*

"GRANT CULBERTSON."

The execution and delivery of this paper were denied by plaintiff.

Nancy Culbertson was the wife of T. M. Culbertson, and daughter of Alvira Shearer. There was no evidence that at the time the above paper was signed Alvira Shearer owed anything to her daughter Nancy Culbertson.

The court discharged the rule to open judgment. Defendant appealed.

Error assigned was above order.

S. M. Brainerd, Geo. H. Higgins with him, for appellant.

E. A. Walling, *T. A. Lamb* with him, for appellee.

PER CURIAM, May 20, 1895:

This appeal is from the refusal of the court below to open a judgment, and requires an examination of the evidence rather than of any legal question. We have examined the evidence as it appears upon the paper-books. The learned trial judge had the advantage of seeing the witnesses and hearing them. His conscience was not moved by the testimony, and we are not inclined to disturb his conclusion.

The appeal from his refusal to open the judgment is dismissed.

William Galbraith v. Bridges & Williams, Appellants.

Sheriff's interpleader—Lease—Evidence.

On a sheriff's interpleader to determine the ownership of growing crops and corn in crib, the claimant of the property may show by parol evidence that a lease of the farm where the crops were growing, signed by the defendant in his own name, was really signed by defendant as agent for the claimant, and that the defendant had no interest in the property.

Argued April 30, 1895. Appeal, No. 164, Jan. T., 1895, by defendants, from judgment of C. P. Cumberland Co., Feb. T., 1893, No. 234, on verdict for plaintiff. Before WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Sheriff's interpleader to determine the ownership of certain grain in the ground and corn in the crib. Before SADLER, P. J.

At the trial, it appeared that defendants held a judgment against John Galbraith, and that on Dec. 13, 1892, they issued execution, and levied upon the tenant's share of the growing crop, and the corn in the crib on a farm which the plaintiff alleged was leased to him, and not to the defendant in the execution. The evidence showed that the lessee mentioned in the lease was John Galbraith. Parol testimony was offered which tended to show that although the lease was signed by John Galbraith, it was executed by him as agent of his son, William Galbraith; that the farm operations were all conducted by

William Galbraith, and that John Galbraith had no interest in the crops, and was nothing more than an employee of his son.

Defendants' points, among others, were as follows:

"2. The court is respectfully requested to withdraw from the consideration of the jury the testimony of John Galbraith, there being no fraud, accident or mistake alleged in the procurement of the lease of 1890. Parol testimony is incompetent to effect the same, and the court is requested to withdraw the same. *Answer:* This is not a controversy between the parties to the lease, and we cannot hold, under the testimony in the case, that John Galbraith was the tenant and that he did not procure the lease as agent for his son. What the truth is you will have to determine. The plaintiff, in order to recover, must establish his right to do so by the preponderance of evidence, to wit: that the lease was made for William Galbraith and the one half of the crops levied upon were his. [13]

"3. The court is respectfully asked to withdraw from the consideration of the jury the testimony of William Galbraith, in so far as it conflicts with said lease. *Answer:* This request is refused. The testimony of William Galbraith and of his father was that the lease was made for the former and the farming done by him, and the ownership of the tenant's share was in him and not in his father. You will determine what the truth is. If the lease was made and the farming operations conducted by or in behalf of John Galbraith, the plaintiff cannot recover; but if the preponderance of testimony is to the effect that the lease was made for William Galbraith by John Galbraith, as his agent, and that the farming was done by William Galbraith, the verdict may be properly rendered in his favor." [14]

"5. Under the evidence in this case the verdict must be for the defendants. *Answer:* This point is refused. We leave it for you to determine, on the facts in the case, whether the plaintiff is entitled to recover or not." [16]

Verdict and judgment for plaintiff. Defendants appealed.

Errors assigned, among others, were (13, 14, 16) above instructions, quoting them.

R. W. Woods, for appellants.—Parol evidence to vary, add to

or subtract from a lease under seal, can only be given on the allegations of fraud, accident or mistake in the procurement of the same: Wodock v. Robinson, 148 Pa. 503.

The agency for an undisclosed principal in a sealed instrument cannot be proven by parol evidence: Horstman v. Fox, 2 W. N. C. 381; Bellas v. Hays, 5 S. & R. 427; Grove v. Hodges, 55 Pa. 504; Holt v. Martin, 51 Pa. 499; Quigley v. DeHaas, 82 Pa. 267; Seyfert v. Bean, 83 Pa. 450.

The authority of an agent cannot be proved by his declarations: Kaufman v. National Transit Co., 2 Mona. 36; McInnes v. Rittenhouse & Son, 1 Mona. 657.

The construction of a written lease is for the court, and it is incompetent to permit parol evidence to vary the same: Jones v. Kroll, 116 Pa. 85.

J. M. Weakley, *S. M. Leidich* and *M. C. Herman* with him, for appellee.

PER CURIAM, May 20, 1895:

This is an issue under the sheriff's interpleader act. Certain goods were seized by the sheriff as the property of John Galbraith. His son William Galbraith claims to own them, and a question is thus raised between the defendants, who are the execution creditors of John, and William the claimant, as to the ownership of the property seized. There is no reason suggested why this question should not be settled in accordance with the actual fact. If the lessor was proceeding upon his lease, against the man who signed it as lessee, the questions raised by the appellant would require consideration; but the lease establishes no relation between the parties to this issue. It is admissible as evidence bearing upon the question of ownership, but it is not conclusive; and there is no fact appearing that could, by way of estoppel or otherwise, prevent the claimant from showing that the lease was in fact taken for him, and that the farm had been cultivated and the crops raised by him.

The assignments of error are not sustained and the judgment is affirmed.

Theodore Mixel v. Israel Betz, Appellant.

Practice, S. C.—Assignments of error—Evidence.

The Supreme Court will not consider an assignment of error to the rejection of evidence, where the record shows that the exclusion of the evidence was not excepted to at the trial, and that no exception was afterwards allowed.

Practice, C. P.—Charge of court—Review.

Where no exception was taken at the trial to the admission or exclusion of evidence, and no error assigned to the instruction of the trial judge on any legal question, the Supreme Court will not reverse a judgment on a verdict for plaintiff because the trial judge said to the jury, "Take the case then, and under the testimony given before you, and the law as you have heard it, about which there is no difference of opinion between counsel, render such a verdict as you believe will accord with the obligations you have assumed as jurors."

Argued May 1, 1895. Appeal, No. 277, Jan. T., 1895, by defendant, from judgment of C. P. Cumberland Co., on verdict for plaintiff. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Affirmed.

Trespass for malpractice. Before SADLER, P. J.

At the trial it appeared that defendant, a physician, treated a minor daughter of plaintiff for a broken arm. Plaintiff claimed that by reason of improper treatment the fractured bone did not unite, that inflammation ensued, and that the bone between the shoulder and elbow died, and was subsequently removed by another physician. Defendant testified that the arm was properly treated, and that the decay of the bone was caused by the scrofulous condition of the patient.

When Dr. W. G. Stewart was on the stand, defendant made the following offer:

"It is proposed to prove by the witness on the stand that he examined the child in the neighborhood of two years after the accident and that he found that it was affected with a constitutional disease of a serious character."

It was objected "that the witness on the stand has already testified that he knew nothing of the child until two years subsequent to the accident, and the testimony will be incompetent

and inadmissible." The witness had already testified that he did not see the child until it was brought to his office almost two years after the accident.

The court then asked the witness:

"From the examination which you made of this child at the time you first saw her, are you prepared to say that its condition was of a scrofulous character at the time of the accident."

The Witness: "No, sir, I could not say that, the condition might have developed after the accident—the condition in which I found it."

The Court: "We will have to reject the offer."

No exception was taken to the ruling of the court.

The court charged in part as follows:

"[It appears that a little girl of the plaintiff, a child of four or five years of age, fell and broke her arm in November, 1890 or 1891—it does not seem altogether clear whether it was 1890 or 1891, but we do not think it very material—and that Dr. Betz was applied to for medical aid. He treated the patient for several weeks; the fractured bone did not unite, but inflammation ensued. The bone between the shoulder and the elbow died and a year thereafter was removed by Dr. Stewart.] [2]

"[Take the case then, and, keeping in mind all that you have heard from the mouths of the different witnesses, and under the testimony given before you and the law as you have heard it, about which there is no difference of opinion between counsel, render such a verdict as you believe will accord with the obligations you have assumed as jurors.]" [3]

Verdict for plaintiff for $604.75. On a remittitur being filed judgment was entered for plaintiff for $500.

Errors assigned were (1) rulings on evidence; (2, 3) instructions as above; (4) in not directing verdict for defendant.

H. S. Stuart, of *Stuart & Stuart*, for appellant.

J. M. Weakley, *S. M. Leidich* with him, for appellee.

PER CURIAM, May 20, 1895:

We are by no means free from misgivings as to the correct-

ness of the conclusions reached by the jury in this case, but a motion for a new trial is under the control of the court below. Our business is with the alleged errors in the trial. The exclusion of a question asked of Dr. Stewart is the subject of the first assignment of error, but the exclusion was not excepted to at the trial and no exception has since been allowed. The offer is, for this reason, not upon the record and we cannot properly consider it. The second is to the statement made by the learned judge in his charge that it was not very material whether the arm was broken and Doctor Betz was applied to in 1890 or in 1891. We see no error in this. The subject to which the attention of the jury was directed was not so much one of date as one of the character and adequacy of the examination made.

The same must be said of the third assignment. There really was no difference of opinion between counsel about the legal principles applicable to the action.

The plaintiff's right to recover rested on the care or negligence of the defendant. This was a question of fact about which counsel did differ, but on the legal questions the fact that no exception is now taken to the instructions given to the jury upon them, satisfies us that the appellant sees in them nothing of which he can justly complain.

We can sustain neither of the assignments. If the jury reached a mistaken conclusion we have no means for correcting it. The learned judge of the court below seems to have been satisfied with the verdict and we must be.

The judgment is affirmed.

George N. Wilcox, Appellant, *v.* C. M. Derickson and G. M. Derickson, Executors of D. V. Derickson, Deceased, Impleaded with Cyrus Kitchen et al., Partners, as the Meadville Savings Bank.

Partnership—Dissolution—Partner.

The general estate of a deceased partner is not liable for debts contracted after his death unless distinctly made so by the clear language of the partnership ageeement, or by the will of the decedent.

Partnership—Joint stock company at common law.—Dissolution by death—Liability of estate of deceased member.

The articles of a joint stock company at common law, engaged in the banking business, provided that the death of a stockholder should not operate as a dissolution of the association, "but the shares of such decedent shall thereupon vest in his executors, or administrators, or devisees, of said stock, who shall succeed with like effect as provided in case of a transfer upon the books of the association." It was provided in case of a transfer that "the assignee or assignees of such share or shares shall thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto." And it was further provided as follows: "The holders of stock in this association either by an original subscription, transfer or otherwise, shall, by virtue of such subscription, or acceptance of such transfer, be subject to and thereby take upon themselves the several and respective duties and obligations devolved and incumbent upon them as stockholders or directors, as the case may be." A member died, and his executors did not accept his stock. *Held*, that his general estate was not liable for debts contracted by the association after his death.

Argued May 1, 1895. Appeal, No. 416, Jan. T., 1895, by plaintiff, from judgment of C. P. Crawford Co., May T., 1894, No. 28, for defendants on case stated. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Affirmed.

Case stated.

The case stated was as follows:

"In 1867 Cyrus Kitchen and others organized a general copartnership under the name and style of the Meadville Savings Bank, for the purpose of carrying on a general banking business in the city of Meadville, and signed Articles of Asso-

ciation, a copy of which is hereto attached, and marked 'Exhibit A,' and made a part of this case stated.

"On Jan. 20, 1877, five shares of the capital stock of said association, originally issued to A. P. Ingraham, were regularly transferred to D. V. Derickson, and were held by the said Derickson until the date of his death, on July 21, 1891. The said D. V. Derickson never signed said articles of association. He was never a director or officer of said association, and was never advertised as a stockholder. Defendants' testator made no mention in his will of his said stock.

"The said association continued to do business after his death, without any change in the method of keeping their accounts, or any distinction between deposits prior and subsequent to said death.

"On Jan. 13, 1894, the Meadville Savings Bank closed its doors, and on Jan. 23, 1894, made a general assignment to J. W. Smith, for the benefit of its creditors.

"George N. Wilcox, the plaintiff, was a depositor in said bank prior to the death of said Derickson, and on that date there was due him on open account the sum of $1,952.91. Subsequently said George N. Wilcox continued to do business with said bank, depositing from time to time, and checking against his said account; and from March 3, to April 1, 1892, his account was overdrawn. It was again overdrawn from May 6, to May 11, and again from Dec. 6, to Dec. 13, 1892. But on Jan. 13, 1894, when the doors were closed, there was due him on said account the sum of $2,742.27. The executors of said decedent never accepted the said stock of their testator under the said Articles of Association, never took any part in the business of said association, nor in any way admitted or assumed any liability as stockholders.

"If the court be of opinion on the above facts that the plaintiff is entitled to recover, then judgment to be entered in favor of plaintiff and against defendants for such sum as plaintiff is legally entitled to recover; otherwise judgment to be entered for defendants. Either party reserves the right to take an appeal to the Supreme Court from judgment entered hereon."

The material portions of the Articles of Association were as follows:

"We, the subscribers hereto, hereby agree to form ourselves

into an association by the name, style and title of the Meadville Savings Bank, for the purpose of dealing in exchange, bills, notes, bonds and other securities, receiving deposits and generally carrying on like business.

"The capital stock of said association shall consist of five hundred shares of one hundred dollars each, of which the parties have subscribed the number set opposite their respective names, and agree to pay fifty dollars on each share in cash at the time of subscribing therefor, and five dollars on each share on the first day of May next, and a like amount every thirty days thereafter until the whole is paid. The stock and interest of and in said association shall be held as and in the nature of personal and partnership property only, and shall always be liable and deemed to be hypothecated for any indebtedness or liability of the holder thereof to said association, whether presently due or otherwise; and the said stock shall not be assigned or transferred without the consent of the board of directors; and all the property of and belonging to said association, as well lands and tenements as chattels, rights and credits, shall be held by and in trust for said association as partnership or associate property and assets, and for partnership or associate purposes. The stock, shares and interest in said association shall be assignable and transferable only on the books thereof and with the assent of the board of directors, in the presence of the president and cashier, and upon such transfer the assignee or assignees of such share or shares shall thereby, as to such share or shares, succeed and become subject to all the rights and obligations of an original party thereto. Provided, that no stockholder shall be entitled to vote upon more than fifty shares of stock owned by him. Provided, also, that none of the stock of said association shall be held by a minor, either personally or by guardianship, except in pursuance of a devisee, nor by any corporation. And, provided that in case of the refusal of the board of directors to assent to the transfer of any such stock to any person competent to hold the same, then and thereupon the holder thereof shall be entitled to require of said association to receive an assignment of such share or shares of stock and to receive therefrom a sum equal to the par value of such share or shares with the addition of a proportional part of the contingent fund as indicated by the last semi-annual statement of the condition of the association.

"This association shall continue until it shall be declared to be dissolved by the votes of the holders of a majority of the shares of stock entitled to representation at a stockholders' meeting called for that purpose, and no general assignment of the assets of said association shall be made except in pursuance of a like vote, nor shall the death of a stockholder be, nor operate as a dissolution of said association, but the shares of such decedent shall thereupon vest in his executors or administrators or devisees of said stock who shall succeed with like effect as provided in case of a transfer upon the books of the association, except in the case of a minor devisee the stock shall stand in the name of the guardian of such minor. The holders of the stock of this association either by original subscription, transfer or otherwise, shall, by virtue of such subscription, or acceptance of such transfer, be subject to and thereby take upon themselves the several and respective duties and obligations devolved and incumbent upon them as stockholders or directors, as the case may be."

NOYES, P. J., of the 37th judicial district specially presiding, delivered the following opinion:

"On the 20th of January, 1877, D. V. Derickson, the defendants' testator, became a member of a partnership association doing business in the name and style of the Meadville Savings Bank, by a transfer on the books of the association, in the manner prescribed by the articles, of five shares of stock originally held by A. P. Ingraham. He died on the 21st of July, 1891, leaving a will, in which he makes no specific reference to the stock in this bank. The executors have never accepted the stock, or in any manner acted as partners.

"The articles of association of the bank provide that it shall have a capital stock of $50,000 divided into 500 shares of $100 each; that the business shall be transacted by officers elected by the shareholders; that transfers of the stock may be made on the books in the manner provided by the articles; that the death of a member shall not dissolve the partnership; but that his executor, administrator or devisee shall succeed to his rights, in the manner provided in case of a transfer on the books.

"The plaintiff is a depositor and creditor of the bank, which owed him $2,742.27 on the 13th of January, 1894, when the bank failed and closed its doors. All of this indebtedness was con-

tracted by the bank after the death of D. V. Derickson. The question of law presented is whether under these facts and in view of the language of the Articles of Association the executors are liable to the plaintiff for this indebtedness.

"It is, perhaps, not strictly correct to say that the death of one partner works no dissolution of the firm, where by agreement of the partners the business is to be continued notwithstanding the death, for a partnership cannot exist without partners; and a dead man's estate, apart from the persons to whom it has passed by law at his death, has no capacity to fill the place in the partnership made vacant by his death: Parsons on Contracts (1st ed.), 406–451. It is, however, well settled that the usual consequences of a dissolution, whether by transfer of the interest of a partner to another, or by death of one of the partners, may be avoided by suitable provisions in the partnership agreement, or by provisions in the will of the dying partner, if agreed to by the survivors. If such is the agreement the business may be continued after the death as before. The personal representative, or devisee, of the decedent may not demand an account until the termination of the partnership, by the terms of the agreement. And so much of the decedent's estate as is invested in the partnership venture, or is by him subjected to the demands of the partnership business, will pass into the hands of those to whom it is given by the law, clogged with the liabilities thus placed upon it by its former owner. These principles are well settled both in our own state and elsewhere: Gratz v. Bayard, 11 S. & R. 41; Laughlin v. Lorenz, 48 Pa. 275; 17 Am. & Eng. Ency. of Law, 1134; Lindley on Part., 1353, (*605) note 1.

"It seems quite clear that the liability of a deceased partner's estate for debts contracted after his death, whether general or specific, rests not upon the common law of partnerships, or the ordinary liability of partners for firm debts, but upon the special provisions of the agreement made by the deceased partner, or the terms of his last will. A change of partners whether by transfer or by death, necessarily involves a dissolution of the firm; if the business goes on with new partners in place of the old this involves the organization of a new firm. So it was held in respect to transfers of stock in a banking partnership in Christy v. Sill, 131 Pa. 492; and the reason is much stronger

in case of death than of transfer. All the cases which have held a deceased partner's estate liable to creditors of the partnership, whose debts were contracted after the death, have rested the liability either upon the terms of the agreement or the will, and not upon any common-law liability as partner. This being so, we are called upon to determine what liability the defendants' testator assumed when he accepted the transfer of the stock of Ingraham in this partnership. By so doing he substantially agreed to be bound by the terms of the partnership agreement. If the articles expressly declare that the whole estate of each partner shall be considered as embarked in the business and shall continue liable for losses occurring after the death of the partner, then we may enforce the terms of this contract against the defendants, there being no question raised in behalf of creditors claiming prior liens upon the estate. But if the contract is silent upon the particular point involved here, or if its language is ambiguous and uncertain, how shall it be construed? This, in the light of the decided cases, is the real question which we are obliged to determine.

"In Burwell v. Mandeville, 2 How. 560, it was held that nothing short of the most clear and unambiguous language would justify the court in holding the general estate of the testator liable for the debts of a partnership, continued under his will after his death, by reason of the manifest inconvenience of such a rule; Judge STORY citing with approval the case of Ex parte Garland, 10 Ves., Jr. 110, in which the inconvenience was strongly put by Lord ELDON, the lord chancellor. In Stanwood v. Owen, 14 Gray, 195, the Supreme Court of Massachusetts, intimating strongly in the opinion that the general estate of a deceased partner is not liable for firm debts contracted after his decease, although by the articles death was not to dissolve the partnership, held that such debts could not be allowed to share with the individual debts of a decedent in the distribution of his estate.

"By the same court, in Phillips v. Blatchford, 137 Mass. 510, it is again intimated that no general liability to creditors of the firm exists unless representatives of the estate enter into the partnership, and themselves become partners. But it was held that the partnership agreement, in the case then before the court, practically amounted to a covenant on the part of

each partner to indemnify his copartners against the payment of more than a ratable proportion of the partnership debts; and hence that one of the surviving partners, who had paid off more than his share of partnership debts, might recover against the executors for contribution.

"In Stewart et al. v. Robinson, 115 N. Y. 328, the principle announced in Burwell v. Mandeville, supra, was applied to the construction of a partnership agreement; and it was held that the general estate of a deceased partner was not liable, notwithstanding provisions in the agreement, for the continuance of the partnership, in the absence of clear language subjecting the general estate to such liability.

"The statement in the 17 Am. & Eng. Ency. of Law, 1135, that the rule of liability is different in case of a partnership having transferable shares from that applicable to other partnerships, is not in the least sustained by the cases cited. Blodgett v. The Bank, 49 Conn. 9, was a case in which the executors had actually entered into the partnership and become personally liable as partners: Kottnitz v. Alexander, 34 Tex. Rep. 689, was somewhat peculiar in its facts, but the question indicated did not arise, and the one now under consideration is not deliberately treated.

"There is apparent in the cases a consciousness in the minds of the judges of the extreme inconvenience of subjecting estates of decedents to a liability which might unreasonably delay their settlement, and necessitate recalling legacies and devises from the hands of their recipients years after they had been received, to satisfy demands which had no existence at the time of distribution; and a strong reluctance for these reasons to declare such a liability. A possible exception to these cases, is our own case of Laughlin v. Lorenz, supra. In that case, the principal question was not as to debts contracted after the death of a dying partner, but as to the rights of third parties growing out of the settlement, adjustment and winding up of the partnership. Incidentally the liability for such debts was involved and was decided. The language of Judge AGNEW, in his opinion, does contain an intimation that the rule which we have found all but uniform in all other courts, viz, that the general estate is not liable for such debts unless distinctly made so by clear language either in the contract or the will, is not correct;

but the converse of it, viz, that the estate is to be regarded as liable unless expressly exempted by the contract, or the will. But it is not clear that the learned judge really intended to sanction such a departure from the course of decision in other courts, nor that his mind was drawn to its consequences. The conclusion reached by him, and his brethren, may and probably did rest upon other considerations.

"It cannot be true that the general estate is liable unless this liability is limited by the contract, or the will of the dying partner, unless it be also true that such liability flows from the partnership relation and is, in substance, the ordinary common law liability of each partner jointly and severally with each of the others for every debt contracted by the firm. Surely a dead man cannot in the eye of the law have rights or incur liabilities. Nor can his property stand alone, by itself, disconnected from personal ownership and sustain such liability. Nor is it reasonable or logical that a person should be held to be a partner with others without his own agreement to become such express or implied. And indeed our Supreme Court has decided that executors cannot be so regarded in the absence of an agreement: Bank v. Pennock, 2 Mona. 166. Moreover, if such a liability exists by reason of the partnership relation, and the stipulation for its continuance after the death of one of the partners, how can the dying partner by provisions in his will exempt his estate from liability?

"If we are correct, as we think the great weight of authority makes clear, in saying that the liability of the estate of a deceased partner for debts contracted after his death, if any exist, flows from the express covenant or agreement of the decedent, or the express direction in his will accepted and agreed to by the survivors, then it seems reasonable, in view of the departure from the ordinary rule of law and the extreme inconvenience of the contrary rule, that the intention substantially to embark his whole estate in the partnership, or to make it available to the partnership uses, should appear before the general estate should be held liable for such debts. What then is the true construction of the articles of copartnership to which the testator assented when he accepted a transfer of stock?

"The articles provide that the death of a stockholder shall not operate as a dissolution of said association:

"'But the shares of such decedent shall thereupon vest in his executors, or administrators, or devisees, of said stock, who shall succeed with like effect as provided in case of a transfer upon the books of the association.' It was provided in case of a transfer that 'the assignee or assignees of such share or shares shall thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto.' And it was further provided as follows: 'The holders of stock in this association either by an original subscription, transfer or otherwise, shall, by virtue of such subscription, or acceptance of such transfer, be subject to and thereby take upon themselves the several and respective duties and obligations devolved and incumbent upon them as stockholders or directors, as the case may be.'

"While the language of the contract is that the partnership shall not be dissolved by a death, the meaning plainly is that the dissolution caused by death shall not involve the winding up of the partnership business, the settlement of the partnership account, nor the withdrawal of any portion of the capital. An easy means is provided by which a new partnership consisting of the surviving partners and one or more new members who shall take the place of the dead partner may be formed to continue the business. The assignee in the case of a transfer becomes a partner in this new firm by acceptance of the transfer on the books of the association. And it is to be noted that in case of death the executors, administrators and devisees of the stock are mentioned together, the like provision being made as to all.

"Unless we are prepared to hold that one to whom stock in such partnership is devised becomes a partner in the new firm, and subject to liability as such partner by virtue of the devise itself, without any acceptance of it on his part, or acquiescence in any way in the provisions of the partnership agreement, we cannot hold that executors or administrators become so liable merely because they are such. If the stock is accepted and the relation of partner established between the survivors and the executors, the case is free from difficulty. But where it is not so accepted they cannot be charged with liability as partners any more than could the devisee who has not accepted.

"We fail to discover in the language used in this contract

any intention on the part of the contracting parties to subject their estates, in case of their death, to the vicissitudes of the partnership business regardless of the wishes of those to whom the estate descends. Doubtless the right to an account and to withdraw the capital of the testator from the business does not exist, by reason of the partnership agreement to the contrary. And so much of the testator's estate as was invested in the partnership remains and is liable for the debts incurred in the business. Possibly the language of the partnership agreement may be construed as a covenant by each partner with the others to indemnify them against more than their proper share of loss. But there is nothing in the agreement which can give the creditors of the partnership, whose debts have arisen since the testator's death, a right to resort to his general estate. For these reasons we are of opinion that upon the case stated the law is with the defendants.

"Judgment is therefore directed to be entered in favor of the defendants in accordance with the agreement of the parties."

Error assigned was entry of judgment as above.

G. W. Haskins, *H. J. Humes*, *F. J. Thomas* and *John O. McClintock* with him, for appellant.—By express agreement a partnership may continue after the death of one of its members: Phillips v. Blatchford, 137 Mass. 510; Gratz v. Bayard, 11 S. & R. 41; Laughlin v. Lorenz, 48 Pa. 275; Leaf's App., 105 Pa. 505; Gandy v. Dickson, 36 W. N. C. 97; Butler v. Am. Co., 46 Conn. 136; Blodgett v. Am. Nat. Bank, 49 Conn. 9.

The cases of continuation by virtue of a contract are decided upon their own facts: Stewart v. Robinson, 115 N. Y. 328; Robinson v. Floyd, 159 Pa. 177.

But should not this case be determined as in the case of a corporation with general individual liability of stockholders? In a corporation of this kind the estate is held liable for debts contracted after the decease: Bailey v. Hollister, 26 N. Y. 112; Miller v. State, 15 Wall. 497; Cochran v. Wiechers, 119 N. Y. 403.

J. W. Smith, *Geo. F. Davenport* with him, for appellee.—The death of Derickson actually dissolved the partnership, notwith-

standing the stipulation in the articles: "nor shall the death of a stockholder be nor operate as a dissolution of said association:" Pars. on Part., 4th ed. sec. 343; Shamburg v. Ruggles, 83 Pa. 148; Christy v. Sill, 131 Pa. 492; Campbell v. Floyd, 153 Pa. 84; Robinson v. Floyd, 159 Pa. 165, 177; Caldwell v. Stileman, 1 Rawle, 216; Marlett v. Jackman, 3 Allen, 287; Gratz v. Bayard, 11 S. & R. 41; Laughlin v. Lorenz, 48 Pa. 275; Burwell v. Mandeville's Exrs., 2 How. 560; Pitkin v. Pitkin, 7 Conn. 307; Ex parte Garland, 10 Ves. 110; Brasfield v. French, 59 Miss. 632; 17 Am. & Eng. Ency. of Law, 1135; Smith v. Ayer, 101 U. S. 320; Wild v. Davenport, 7 Atl. R. 295; Vincent v. Martin, 79 Ala. 540; Lucht v. Behrens, 28 Ohio, 231; Jones v. Walker, 103 U. S. 444.

PER CURIAM, May 20, 1895:

The pivotal question in this case is whether the stipulation in the articles of association, that death shall not dissolve the relation of the decedent and his estate to the bank, compels an executor to accept the stock that had been held by his testator, and puts it out of his power to abandon it under any circumstances. The learned judge who tried this case in the court below answered this question in the negative.

We are satisfied with the reasons he has given in support of his conclusion and affirm the judgment on his opinion.

Christian Long's Estate. John L. Barner's Appeal.

Appeals—Opening executor's account—Interlocutory order—Executors and administrators.

No appeal lies from an order of the orphans' court opening a decree of confirmation of an executor's account upon an application promptly made by one who was a minor, unrepresented by guardian or otherwise, when the account was filed.

In such case, where the allegations in the petition are specifically denied by the answer, and no testimony is taken to support the averments of the petition, the only matter in dispute which the orphans' court can dispose of on bill and answer is the amount of compensation to which the executor is entitled for his services.

An order opening a decree of confirmation of an executor's account should state as to which items the account is opened and a re-examination allowed.

Argued May 1, 1895. Appeal, No. 310, Jan. T., 1895, by John L. Barner, from decree of O. C. Cumberland County, opening confirmation of executor's account. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Appeal quashed.

Petition to set aside confirmation of executor's account.

From the record it appeared that the executor filed a first and partial account on Feb. 11, 1893, which was confirmed without exceptions being filed on March 14, 1893. In his account he charged himself with $342,793.81, and took credit with disbursements and allowance to himself of $32,150.87. To his account was added a suggestion that he has received payment of the principal of certain items in the inventory in cash $16,735.84, and by conveyance of land $2,844. By the will of Christian Long, J. L. Barner, the executor, was made a trustee to hold almost all the personal estate and a portion of the realty for the period of twenty years, "paying, however, any accumulation greater than may be necessary to pay taxes, insurance, etc., to the six children of the testator or their lineal descendants, should they die before the expiration of said period, and at the termination of said twenty years to sell the same and distribute it as is provided with reference to the income of the property so given in trust."

One of the children of the testator, is Lauretta Loh, who has a minor daughter, named Mabel Wade, who resides in the state of Virginia. On April 11, 1893, Jas. H. Loh was appointed her guardian. On May 18, following, he presented a petition to the orphans' court, setting forth that J. L. Barner, the executor, had claimed and been allowed credits in his accounts which were erroneous and improper. That sums aggregating $1,642 had been paid to Charles Geiger without due proof, and that the same was for exorbitant charges for boarding and so forth. That the compensation for which the accountant took credit, to wit, $15,810.08, was largely in excess of what he was legally entitled to, as not more than $50,000 of the estate had been administered on. That in the debit side of the account upon which the charges for commissions are based is an item of $26,000, which is no part of the general estate, but a trust fund for the use of the children of Ira L. Long, deceased.

"It is further stated in the petition that no part of the fund in the hands of the executor has been distributed, and that at the time of the confirmation of the account said Mabel Wade had no one legally authorized to represent her, and that she had no knowledge of the matters complained of, and she therefore prayed for a rule upon the said J. L. Barner to show cause why his account should not be reviewed and such relief given her as justice and equity would require.

To this petition answer was made by J. L. Barner that "it was not true that the payments made to Chas. Geiger were without due proof or that his charges were exorbitant; but that his bills were carefully examined, the charges found to be moderate and correct, and the estate liable therefor." It was also denied that "the compensation charged by him was excessive or that only $50,000 of the estate had been administered upon, and it is asserted that the accountant charged himself with the whole of the appraisement deducting therefrom certain items specifically set forth, and also charging himself with numerous items received for dividends and so forth, due before the testator's death, but unknown to the respondent at the time of the appraisement; that he reserved the right to ask credit in a future account for such items in the inventory as shall not be collectible, it being impossible at the time to designate them with certainty." He averred that the "whole personal estate on the debit side of the account of the estate has been administered upon and that he never intended to make any future charge for services in relation to any item contained therein." He also stated that "the testator died seized of a large amount of real estate located in different states of the Union for which in the terms of the will he will not be allowed any compensation." He denied "the allegation in the petition in reference to the condition under which a farm was devised to him by the testator." He declared that the item of $26,000 referred to is a part of the testator's estate and has given him unusual labor. He further set forth that $2,147.91 had been paid to the distributees prior to the audit and that during its pendency $2,110 additional had been paid, and that Mabel M. Wade resided near the borough of Shippensburg ever since the first of October, 1892. The answer also averred that J. W. Eckles, Esq., was appointed an auditor on March 14, 1893, to distribute the

amount in the hands of the accountant, and that the auditor met parties interested on April 6 and April 13, 1893, and that Jas. H. Loh was notified of the latter meeting. It was also averred that the report of the auditor was filed and confirmed May 15, 1893, and that the petition of Jas. H. Loh as guardian was not presented until three days after.

To the answer of the respondent was attached a declaration signed by five of the children and three of the grandchildren of the testator to the effect that they were satisfied with the accounts of the executor, disapproved of the proceedings instituted by Jas. H. Loh as guardian, and praying that the same might be dismissed. No depositions were taken.

The court entered the following decree:

"And now the 5th day of January, 1895, the confirmation of the first and partial account of John L. Barner, executor of Christian Long, made on the 14th day of March, 1893, is hereby vacated and set aside and Jas. H. Loh, guardian of Mabel M. Wade, is authorized to file exceptions on her behalf to said account, provided the same is done within twenty days from the date of this order."

Error assigned was above decree.

The appellee moved to quash the appeal.

A. G. Miller, for appellee, in support of motion to quash the appeal.

There is no authority for an appeal from such an interlocutory order in the orphans' court. The practice is to let the parties wait until the power of the court has been exhausted and a final decree made: Eckfeldt's App., 13 Pa. 171; Barbara Gesell's App., 84 Pa. 238; Bishop's App., 26 Pa. 470; Jones's App., 99 Pa. 124.

We have with considerable care made an extended examination of the cases in this state in which appeals have been taken. We have found no case in which there had not been a final decree, either in a sense of a decree against the petitioner and a refusal to grant the bill of review, or where the rehearing was granted and the questions therein were heard and considered and then a final decree made.

The cases may be classified as follows:

1. Cases where there was a refusal to grant the bill of review: Neisly's App., 8 Pa. 457; Hartman's App., 36 Pa. 70; LeMoyne's App., 104 Pa. 321; Green's App., 59 Pa. 235; Kachlein's App., 5 Pa. 95; George's App., 12 Pa. 260; Bunting's App., 4 W. & S. 469; Meckel's App., 112 Pa. 554; Yeager's App., 34 Pa. 173; Russell's App., 34 Pa. 258; Hartz's App., 2 Gr. 83; Keim's App., 125 Pa. 480; Kuhns's App., 87 Pa. 100; Hamill's App., 88 Pa. 363; Milligan's App., 82 Pa. 389; Gosner's Est., 133 Pa. 528; McNeel's Est., 68 Pa. 412; Bishop's Est., 10 Pa. 469.

2. Cases showing that a readjudication followed the opening of the account, and no appeal except from the final decree: Briggs's App., 5 Watts, 91; Simpson's App., 18 W. N. C. 175; Young's App., 99 Pa. 74; Cramp's App., 81 Pa. 90; Whelen's App., 70 Pa. 410; Priestley's App., 127 Pa. 420; Milnes' App., 99 Pa. 483; Scott's App., 112 Pa. 427; Lehr's App., 98 Pa. 25; Kost's App., 107 Pa. 143; Kinter's App., 62 Pa. 318; Jones's App., 99 Pa. 124; Bishop's App., 26 Pa. 470; Riddle's Est., 19 Pa. 431; Stevenson's Exr.'s App., 32 Pa. 318; Stewart's App., 86 Pa. 149; Charlton's App., 88 Pa. 476.

Edward B. Watts, for appellant, contra.

Opinion by Mr. Justice Williams, May 20, 1895:

Christian Long died in January, 1892, disposing by his last will and testament of an estate estimated at about one half million of dollars. The appellant John L. Barner was named as his executor, and after the death of Long proceeded to make probate of the will and take letters testamentary. In March, 1893, he settled an account, which is described in the petition as a partial account, and which was at that time confirmed nisi. It was finally confirmed early in May. On the 18th day of May the petition of Mabel M. Wade of Alexandria, Va., by her guardian James H. Loh, was presented in the orphans' court, asking to have the decree of confirmation set aside or opened, and the account re-examined as to several items specified in the petition. A rule to show cause was granted, upon which the appellant came in and made answer distinctly denying the several allegations on which the prayer for relief in the petition

rested. No testimony seems to have been taken to dispose of the issues so made, but the rule was taken up for hearing on petition and answer and made absolute generally. The order appealed from is thus seen to be an interlocutory one. It opens a decree of confirmation upon an application promptly made by one who was a minor when the account was filed, and unrepresented by a guardian or otherwise. No appeal lies from such an order: Jones' Appeal, 99 Pa. 124. But as we have the papers before us we feel that it is proper for us to speak of the practice in these cases and the course this proceeding ought now to take. The only item among those enumerated as mistaken or erroneous that could be disposed of by the orphans' court without testimony was that of compensation. A distinct issue of fact was raised by the answer as to the others, and upon this issue the answer must stand until overcome by evidence. The only subject that is open to examination therefore under the order now made by the orphans' court is that of the compensation to which the executor is entitled for his services between the probate of the will and the filing of his account.

If the petitioner desires to go further than this he must take up the burden that the answer imposes upon him and satisfy the court by the evidence that he shall produce that such items or some of them should be re-examined; and the order made should state the items as to which the account is opened and a re-examination allowed.

The motion to quash is sustained and the record remitted to the orphans' court, that further proceedings may be had in accordance with this opinion.

Hopewell Hepburn et al., Appellants, v. Peter Spahr Spotts et al.

Trusts and trustees—Fraud—Insolvency of trustee.

A. made a will which contained a schedule of the valuation of his real estate, and directed that his daughter C. should, after his decease, select $25,000 worth of said real estate, according to the valuation set out in the will.

The real estate thus selected was devised to her to possess, occupy and control during life, in trust for her children, and in case of her death

without children then to his heirs at law at the time of her death. After paying necessary expenses and repairs, and affording such proper support for herself and family as she might deem necessary, she was given power to invest whatever income might remain in the real property or interest-bearing securities for the use and benefit of the trust. She was also given power to sell and convey in fee simple any portion of the real estate, and reinvest the proceeds of such sale in other real estate and interest-bearing securities. In accordance with the provisions of the will C. selected portions of the testator's real estate of the value of $25,000.

Among the properties thus selected was a brick yard, where C. carried on the business of brickmaking, and incurred debts in this business and in the improvement of the trust property. C. died largely indebted and her estate was insolvent. The plaintiffs were creditors of C. and, failing to obtain payment in full of their indebtedness out of the estate of C., filed their bill against the administrators and children of C., and sought to hold the trust estate liable for the payment of the balance of their indebtedness due from C. The bill averred that the estate of C. was made insolvent by the use of plaintiffs' money in the improvement of the trust estate, and that their claims were for work done, materials furnished and money expended in making improvements and betterments to said estate, by which the value of the property was largely enhanced, the enhancement exceeding the proceeds of the trust property sold by C. and the unpaid balance of the indebtedness of her estate. The bill did not aver fraud either individually or as trustee on the part of C., or that the work had been done or materials or money furnished by plaintiffs upon any other security than her personal responsibility.

The court below dismissed the bill on the ground that the dealings between the parties were strictly of a business character; that there was no confidential or fiduciary relation existing between them, and the evidence failed to show any artifice, trick or false pretense at the time the indebtedness was incurred. Affirmed by the Supreme Court on the opinion of the court below.

Argued May 2, 1895. Appeal, No. 17, July T., 1895, by plaintiffs, from decree of C. P. Cumberland Co., May T., 1894, No. 2, dismissing bill in equity. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. WILLIAMS, J., presiding. Affirmed.

Bill in equity for contribution.

From the record it appeared that under the will of Peter Spahr, his daughter, Catharine Spotts, was trustee of certain real estate to "possess, occupy and control" during her life for her children. After the death of her father, Mrs. Spotts engaged in business, and contracted a large amount of debts.

In 1888, she made improvements upon the trust property, contracting for such improvements upon her personal credit. Mrs. Spotts died on March 10, 1891, insolvent. Plaintiffs claimed that the trust estate should contribute to the payment of their debts on the theory that Mrs. Spotts's estate had been made insolvent by the use of plaintiffs' money in the improvement of the trust estate, and that the trust estate by the use of their money had been greatly enhanced in value. The case having been heard upon bill, answer and proofs, BIDDLE, P. J., filed the following opinion:

"The only grounds for the alleged liability of the defendants in this action are set forth in paragraphs 8 and 9 of the bill and are in substance that the estate of Catharine Spotts was made insolvent by the use of complainants' money in the improvements of the trust estate, and that their claims are for work done, materials furnished and money expended in making improvements and betterment to said estate, by which the income therefrom was greatly increased and the value of the property enhanced to a very large extent, the enhancement exceeding the proceeds of the trust property sold by Catharine Spotts and the unpaid balance of the indebtedness of her estate. There was no allegation of fraud on the part of Catharine Spotts either individually or as trustee, or that work was done or materials or money furnished by complainants upon any other security than her personal responsibility. Upon what ground then can the trust estate be held liable for the payment of the balance of her debts? We fail to think of any.

"The complainants however contend that constructive fraud on the part of Catharine Spotts is deducible from the allegations in the bill and from the evidence in support thereof, and that they should be permitted to recover upon that ground. But there are insuperable obstacles to sustaining this position:

"1. The dealings between the parties were upon a strictly business basis, and there not being confidential or fiduciary relations of any kind existing, a case of constructive fraud cannot arise under the facts shown.

"2. The final betterments to the trust property were made in the year 1888 and the early part of 1889, and Catharine Spotts did not die until the 10th day of March, A. D. 1891. The court would not be warranted in assuming that she was

insolvent at the time the improvements were made, with no other basis to go upon than that in 1892 upon distribution by an auditor the net balance of her estate was $8,209.05, whilst the claims against it were $11,548.18. The shortage shown at that time under an enforced liquidation of her property would not justify us in making the inference asked for. It is to be noted that the bill does not allege her insolvency in 1888–89.

"3. Even if she were insolvent in 1888–89 (of which we have no evidence except as stated in 2 supra), and knew it (of which there is no evidence), her dealings with complainants were not such a fraud upon them that they could make it the basis of an action at law, unless they also showed artifice or false pretense: Rodman v. Thalheimer, 75 Pa. 232.

"Nor at law would it help their case to further show that at the time the obligations were incurred she did not intend to pay them: Smith v. Smith, 21 Pa. 367; Bughman v. Bank, 159 Pa. 94.

"Clearly the complainants could not have reclaimed from Catharine Spotts in her lifetime the goods and chattels or money furnished by them, and we do not see upon what equitable principle they can now be permitted to recoup from the trust estate the unpaid portion of their bills. This is specially manifest inasmuch as there is no allegation either of fraud or fraudulent intent in the transactions.

"4. The will of Peter Spahr was on record and complainants had notice of its terms. There was neither fraud, accident, secret dealing or mistake on the part of anybody, except that complainants were mistaken in the expectation that Catharine Spotts would pay their bills. No fraud, actual or constructive, is either alleged, shown or implied, and there is nothing in the case of which a court of equity can take cognizance.

"And now, March 26, 1895, the bill is dismissed at the costs of complainants."

Error assigned was decree dismissing bill.

John Hays, *H. S. Stuart* with him, for appellants.

J. W. Wetzel, for appellee, was not heard.

PER CURIAM, May 20, 1895:

After a careful examination of the pleadings and the proofs in this case we are led to concur with the learned trial judge in the conclusions reached by him. The relation of the expenditures made by the trustee to the subsequent inability of her estate to pay her liabilities in full; the extent to which her own individual resources were made use of in the improvements made upon the trust property; and the time when her insolvency actually arose, rest on inference so largely that the facts on which the plaintiffs base their right to recover are left in very great uncertainty.

We think the court below was right in holding that the case actually presented on the pleadings and the evidence did not authorize the decree asked. His reasons are briefly and clearly stated in the opinion dismissing the bill, and they fully justify the decree made.

It is now affirmed at the cost of the appellants.

John M. Renninger, Appellant, v. Dwelling House Insurance Co.

Insurance—Fire insurance—Incumbrances—Charge on land.

A charge upon land created by will is an incumbrance within the meaning of a clause in a policy of fire insurance which provides that "if the property real or personal covered by this policy be or become encumbered by a mortgage, trust-deed, judgment or otherwise, the entire policy shall be void, unless otherwise provided by agreement endorsed hereon or added hereto."

Argued May 2, 1895. Appeal, No. 482, Jan. T., 1895, by plaintiff, from judgment of C. P. Cumberland Co., on verdict for defendant. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Affirmed.

Assumpsit on a policy of fire insurance.

At the trial it appeared that the policy contained the following clause:

"If the property real or personal covered by this policy be or become incumbered by a mortgage, trust-deed, judgment or

otherwise, the entire policy shall be void, unless otherwise provided by agreement endorsed hereon or added hereto."

The policy was upon farm buildings, and the property was described as unincumbered.

The plaintiff derived title from his father's will, the material portions of which were as follows:

"It is further my will that the farm or homestead whereon I now reside, consisting or containing one hundred and thirty-seven acres more or less, with all the improvements thereon, at the value of eight thousand dollars, I give to my son John Martin Renninger, to be paid for by him in the following manner:—

"One year after my death he is to commence to pay out yearly the sum of four hundred and fifty dollars ($450) which said four hundred and fifty dollars is to be divided equally between my three children, namely, John Martin Renninger, Elizabeth Bretz and Catharine Bretz, each the sum of one hundred and fifty dollars yearly, till the whole amount of eight thousand dollars is paid to them or their heirs. Then the farm is to be fee simple to my son John Martin Renninger and his heirs forever."

The charge on the land had not been paid at the time the policy was issued.

The court gave binding instructions for defendant.

Error assigned, among others, was (4) binding instruction for defendant.

G. Wilson Swartz, *H. S. Stuart* and *M. C. Herman* with him, for appellant.—Nothing is covered by the clause in the policy against incumbrance but mortgages, judgments and trust deeds; Bucher v. Com., 103 Pa. 528; Reynolds v. Commerce Fire Ins. Co., 47 N. Y. 597; act of April 9, 1872, P. L. 47; act of June 2, 1881, P. L. 45; Baley v. Homestead Fire Ins., 80 N. Y. 21; Dwelling House Ins. Co. v. Hoffman, 125 Pa. 626; Green v. Homestead Ins. Co., 82 N. Y. 517; Pipe Lines v. Home Ins. Co., 145 Pa. 346; Fire Ins. Co. v. Dougherty, 102 Pa. 572; W. & A. Pipe Lines v. Ins. Co., 145 Pa. 362.

John T. Stuart and *C. H. Bergner*, for appellee, were not heard, but cited in their printed brief: McFarland v. Ins. Co., 134 Pa. 590; Hench v. Ins. Co., 122 Pa. 128; Swan v. Watertown Ins. Co., 96 Pa. 37; Penna. M. F. Ins. Co. v. Schmidt, 119 Pa. 460; Brown v. Fire Ins. Co., 41 Pa. 187.

PER CURIAM, May 20, 1895:

There is but a single question in this case. The plaintiff took under his father's will a farm described as "the homestead," containing one hundred and fifty-seven acres with all the buildings and improvements thereon at the price of eight thousand dollars. This sum was to be paid in annual installments to the testator's other children. The buildings on this farm were insured by the devisee and the property described as unincumbered. The question thus raised is whether the eight thousand dollars charged upon this property by the devisor was an incumbrance upon the title of the devisee. The court below held that it was. No reason for disturbing that conclusion has been suggested to us that would justify us in disregarding the judgment, and it is now affirmed.

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19 SC 504

James Bryson, Appellant, *v.* Home for Disabled and Indigent Soldiers, Sailors and Mariners, of Pennsylvania, at Erie, and the Trustees of The Home, Major W. W. Tyson, Commander.

Pensions—Soldier's Home—Voluntary payment or maintenance.

In an action by an inmate of a Soldiers' Home against the Home, to recover money which he alleged he had been compelled to pay to the Home out of his pension, an affidavit of defense is sufficient which avers that a rule of the Home required the inmates to turn over eighty per cent of their pension money to the treasurer of the Home; that upon the admission of the plaintiff to the Home he signed an agreement binding himself to comply with the rules of the Home of which he knew this to be one; that the payments for which he sued were made by him voluntarily in accordance with the contract executed by him on his admission.

Not decided whether this rule of the Home is authorized or not.

Argued May 2, 1895. Appeal, No. 481, Jan. T., 1895, by plaintiff, from order of C. P. Erie Co., Feb. T., 1895, No. 38,

discharging rule for judgment for want of a sufficient affidavit of defense. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. Affirmed.

Assumpsit to recover moneys alleged to have been improperly exacted from plaintiff.

Plaintiff in his statement of claim averred that he was an inmate of the Home for Disabled and Indigent Soldiers etc., incorporated under the act of June 3, 1885; "that there is no law requiring an inmate, regularly admitted, to pay his board or maintenance, or to assign his pension or any part thereof to the board of trustees of said Home, or any other officers for that purpose. Yet the said plaintiff, being an inmate of said Home, under the provisions of the various acts of assembly, was compelled by the board of trustees, by the commander of the Home, Maj. W. W. Tyson, and other officers, to assign, and to deliver to them an assignment of the pension certificate granted him by the United States government for disabilities received in the service of the United States while in the army, and also to deliver to them his said Certificate of Pension, and when quarterly payments were made on said Certificate of Pension, eighty per cent of the amount was taken out, held and retained by the trustees of the said Home and their agents, servants and employees, by and under the direction of the said board of trustees."

W. W. Tyson filed the following affidavit of defense:

"This deponent did not actually receive the money set forth in the plaintiff's statement of claim, nor any part thereof, although his name is signed to the receipts therefor as commander of the Pennsylvania Soldiers' and Sailors' Home at Erie, Pa. The said money was voluntarily paid by the plaintiff, who was an inmate of the said Home, to Capt. N. W. Lowell, the quartermaster thereof, who, in his official capacity as such quartermaster, received the said money and deposited the same, with other moneys paid to him by the inmates of said Home, in the bank to the credit of this deponent, as commander of said Home. That this deponent, before the commencement of this suit, paid the same over to Gen. Louis Wagner, treasurer of the board of trustees of said Home, and this deponent avers that he did not receive the said money, or any part

thereof, as an individual, but as agent of the board of trustees of said Home, which agency was well known to the plaintiff when he paid said money, and he avers that he is not, and never has been, liable or accountable to the said plaintiff for said money or any part thereof.

"This deponent denies that the said plaintiff was compelled by the board of trustees, or this deponent, as commander of said Home, or any other officer connected with said Home, to assign or deliver to them, or either of them, an assignment of his pension certificate, and this deponent avers that said plaintiff did not assign his pension certificate to him, them, or either of them, and he further denies that eighty per cent of said pension money was retained by the officers of said Home as alleged in the plaintiff's statement of claim, and avers that said money was paid directly to said plaintiff by the U. S. pension agent.

"That the board of trustees of said Home, at a meeting held on the 20th day of December, 1892, adopted the following rule or resolution in relation to pensioners who wish to become inmates of said Home, viz:

"'Resolved, That the members of the Home who are pensioners shall, upon receipt of pension, or within ten days thereafter, pay over to the Commander, or to some officer designated by him, a sum of money equal to the amount which said pensioner may have drawn in excess of four dollars per month; and that when arrearages on original claim for pension, or arrearages accruing from increase of pension, may be paid to the members of the Home, this rule shall apply to such arrearages for the time the pensioner receiving the same may have been a member of the Home; provided, that in special cases the board of trustees may direct that a portion of the money which may have been paid by any member can be expended for the support of the wife or minor children of such member to such amount as the board may deem expedient. Failure or refusal of any member to make payment at the time specified as provided, shall be considered a violation of the rules, and the Commander is hereby directed to give such offending member an honorable discharge from the Home. Any member so discharged shall not be readmitted within six months from the date of his discharge.'

"That before entering the said Home the said plaintiff signed and made affidavit to a written and printed application in which he did agree to abide by and obey all the rules and regulations made by the board of trustees of said Home, or by their order, which said application also contained a copy of said resolution or rule.

"That a copy of said written and printed application is hereto attached and made a part of this affidavit. That said plaintiff had twice been an inmate of the said Home prior to Sept. 30, 1893, the date of said application, and was fully acquainted with said rule in relation to pensioners, and voluntarily complied with the same by paying over his money to the quartermaster as provided in said rule.

"That the said plaintiff, while an inmate of the said Home, received his check for his pension quarterly from the United States pension agent, payable to the order of the said plaintiff, and had entire control of the same, and voluntarily paid the amounts mentioned in the plaintiff's statement to the quartermaster as aforesaid.

"This deponent denies that the board of trustees of said Home or this deponent without authority of law took and retained from the plaintiff the money mentioned in the plaintiff's claim, or any other money or moneys.

"And he further denies that the said pension certificate was assigned and delivered by said plaintiff to said board of trustees or any one for them.

"And the deponent further avers that he is informed and verily believes and expects to be able to prove that the Congress of the United States appropriates annually the sum of one hundred dollars to aid in the support of each inmate in the said Home; that there is deducted from said amount so appropriated one half of any sum or sums retained by the officers of the said Home on account of pensions received from the inmates thereof.

"That one half of the amount paid by the plaintiff as aforesaid, to wit, $55.87, has been deducted from the appropriation made by the United States to said Home to aid in the support of the said plaintiff in accordance with the provisions of the act of Congress in such case made and provided."

The court discharged a rule for judgment for want of a sufficient affidavit of defense.

Error assigned was above order.

J. Ross Thompson, for appellant.—The rule is unauthorized: Act of Congress of Feb. 28, 1883; act of June 3. 1885, P. L. 62, sec. 7.

F. Carroll Brewster, *E. L. Whittelsey* with him, for appellee.—The statements in the affidavit of defense must be taken as true, which shows the payments were voluntary: Kaufman v. Cooper Iron Co., 105 Pa. 537; Church v. Jones, 132 Pa. 462; City v. Bowman, 36 W. N. C. 138; Roberts v. Austin, 5 Whart. 313; Campbell v. Baker, 2 Watts, 83; School District v. Horst, 62 Pa. 301; De La Cuesta v. Ins. Co., 136 Pa. 62; Neely's App., 124 Pa. 406; act of Congress of Aug. 18, 1894; Rozelle v. Rhodes, 116 Pa. 129; Friend in Equity v. Garcelon, 77 Me. 25; Spellman v. Aldrich, 126 Mass. 113; Cavanaugh v. Smith, 84 Ind. 380; Faurote v. Carr, 6 West. Rep. 281; Jardain v. Fairton Sav. Fund Assn., 44 N. J. L. 376; Crane v. Linneus, 77 Me. 59; Robin v. Walker, 82 Ky. 60; Webb v. Holt, 57 Iowa, 712; Triplett v. Graham, 58 Iowa, 135; Kellogg v. Waite, 12 Allen, 530.

Opinion by Mr. Justice Williams, May 20, 1895:

The plaintiff sued to recover certain sums of money which he alleged he had been compelled to pay to the Home out of his quarterly installments of pension money received from the United States. These exactions he alleged were illegal and in plain violation of the spirit if not the letter of the pension laws. An affidavit of defense was made by the commanding officer of the Home, in which he set out the following facts: First, the adoption of a rule by the board of managers of the Home requiring the inmates to turn over eighty per cent of their pension money to the treasurer of the institution. Second, that upon the admission of the plaintiff he signed an agreement in writing binding himself to comply with the rules of the Home of which he knew this to be one. Third, that the payments for which he now sues were made by him voluntarily in accordance with the contract so executed by him on his admission. The learned judge of the court below held this affidavit to be sufficient to prevent a judgment on motion, and this appeal is

from that ruling. The learned gentleman who represents the appellant has argued with great earnestness that the rule under which the money was paid to the treasurer is wholly unauthorized. We are not inclined to decide that question at this time. It is not necessary to the decision of this case. If the payments shall turn out to be voluntary, as is alleged, and in pursuance of an agreement under which the plaintiff's admission was obtained, and that admission depended upon the contract and not upon the positive provisions of the statute organizing this institution, then the plaintiff cannot recover.

The record before us does not afford the means of determining these questions. They will be developed on the trial. Meantime all that we can now decide is that the affidavit is to be taken as absolutely true, and assuming its truth, we think, so far as this record enables us to see, that the court below was right in refusing the motion for judgment, and its action therein is now affirmed.

Philadelphia & Reading Railroad *v.* River Front Railroad, Appellant.

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Railroads—Agreement for joint control of track.

Two railroad companies contracted to build a connecting river front railroad for their joint use. The expense of maintaining the line was to be in proportion to the actual tonnage represented by the two companies. The rules for the management of the joint line were drawn up and signed by the managers of the two railroad companies. *Held*,

(1) The rules, adopted by the joint action of the officers of the companies for the management and maintainance of that part of the River Front Railroad that is the subject of this contention, amount to an agreement or contract upon the subject to which they relate.

(2) Such contract is not irrevocable, but is subject to such modification as circumstances may require in order to promote the purpose in view and the interests of the parties.

(3) Such changes cannot be made arbitrarily at the will of either party, but they require the concurrence of both.

(4) Either party may give suitable notice of its purpose to withdraw from the arrangement at and after a day named. Thereafter, if the parties cannot readjust their relations to each other, the courts must make such ad interim orders as will protect the rights of the parties and secure the preservation and operation of the road.

(5) In disposing of such a question the relative ownership, tonnage, and other relevant circumstances should be considered.

Argued May 2, 1895. Appeal, No. 159, Jan. T., 1895, by defendant, from decree of C. P. No. 4, Phila. Co., Dec. T., 1889, No. 367, on bill in equity. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL and FELL, JJ. WILLIAMS, J., presiding. Affirmed.

Bill in equity to compel the performance of covenants contained in a contract.

The case was referred to Charles E. Morgan, Jr., Esq., as master, who reported as follows:

"By the bill it is averred that the plaintiff, the Philadelphia & Reading Railroad Company, was incorporated under the act of assembly of this commonwealth, entitled 'An act to authorize the governor to incorporate the Philadelphia & Reading Railroad Company,' approved April 4, 1833, under which it constructed and now owns the railroad extending from the city of Philadelphia to various points in the interior of this state; that the terminus of the road is in the city of Philadelphia at a point known as Port Richmond, the southern boundary of the property of said company at that place being Cumberland street, in the Eighteenth ward of said city. That by a supplement to said act of assembly, approved April 12, 1864, entitled 'An act extending so much of the provisions of the act to incorporate the Pennsylvania Railroad Company, approved April 13, 1846, as relates to the making of lateral or branch railroads to the Lebanon Valley and Philadelphia & Reading Railroad Companies,' the right to make lateral or branch roads, leading from the main line of its railroad to places or points in any of the counties into or through which the said main line may pass, was conferred upon the Philadelphia & Reading Railroad Company. That the defendant the River Front Railroad Company, was incorporated on the 15th day of May, 1876, under the provisions of an act of assembly, approved April 4, 1868, entitled 'An act to authorize the formation and regulation of railroad companies,' 'for the purpose of constructing, operating, and maintaining a railroad for public use for the conveyance of persons and property to be located in the

city and county of Philadelphia and to extend from the point of connection with the Pennsylvania Railroad as then located, constructed, and in use at Delaware avenue and Dock street, by such route as should be approved by the select and common councils of the city of Philadelphia, to a point of connection with the Philadelphia & Trenton Railroad at its Kensington depot grounds at Harrison and Leib streets.' That by the twelfth section of said act of April 4, 1868, it is provided that 'no corporation formed thereunder shall enter upon or occupy any street, lane, or alley in any incorporated city without the consent of such city being first obtained.' That in 1877 the River Front Railroad Company and the Philadelphia & Reading Railroad Company each proposed building a branch railroad upon the same streets in the city of Philadelphia, and it was agreed between them that the two companies should build and own jointly a single line between Callowhill and Cumberland streets, and an ordinance of the city of Philadelphia was passed and approved May 21, 1877, entitled 'An ordinance to authorize the River Front Railroad Company and the Philadelphia & Reading Railroad Company to severally and jointly occupy and use certain streets for railroad purposes.' That the legal effect of the ordinance was to give the consent of the city of Philadelphia to both of said railroad companies to enter on and occupy the streets named therein. That in accordance with the agreement aforesaid, and the provisions of the ordinance mentioned, the two railroad companies did construct jointly in the year 1881 a double-track railroad extending from the south side of Cumberland street along Beach street to Shackamaxon street; thence through private property to Delaware avenue and along Delaware avenue to Callowhill street, in the Eleventh ward of the said city, and the cost of construction was borne equally by the said two companies, and the same is owned by them as equal tenants in common. That the said railroad until May 1, 1889, was maintained and operated by both the said companies jointly under the terms of an agreement, a copy of which, marked 'Exhibit D,' is annexed as part of the bill. That at present the River Front Railroad Company is leased and operated by the Pennsylvania Railroad Company, a corporation existing under the laws of this commonwealth, and that the president of the said River Front Railroad Company is one of the vice presi-

dents of the Pennsylvania Railroad Company, and the board of directors of the former company is composed entirely of persons who are also directors of the latter. That the railroad of the River Front Railroad Company extends both north and south of the joint railroad before mentioned, and connects the railroad of the Pennsylvania Railroad Company at Dock street, in the Fifth ward of the city of Philadelphia, with the Philadelphia & Trenton Railroad Company, which is leased and operated by the Pennsylvania Railroad, at a point in the Twenty-fifth ward of said city. That the said railroad between Callowhill street and Cumberland street is also connected with the main line of the Philadelphia & Reading Railroad at a point just north of Cumberland street, and the traffic of said railroad between Callowhill street and Cumberland street is exclusively transported in cars to the separate railroads of the Pennsylvania Railroad and the Philadelphia & Reading Railroad Company. Numerous warehouses, wharves, and other places of business are situated along the line of the common railroad, and since its construction, turnouts and sidings have been constructed connecting the same with said warehouses, wharves, and places of business. That in pursuance of the agreement referred to of May 1, 1882, Exhibit D, the plaintiff and defendant alternated in taking charge of the maintenance of said line of railroad on Delaware avenue up to the 1st of May, 1887, when it became the right of the Philadelphia & Reading Railroad to take charge of the maintenance of said line under said agreement. That said company was then in the hands of receivers, and, at the instance of the River Front Railroad Company, permitted that company to take charge of the maintenance of said line on Delaware avenue from the 1st of May, 1887, to the 1st of May, 1888. That this arrangement was entirely provisional and only had application to the year beginning May 1, 1887, and ending May 1, 1888. That the River Front Railroad continued in charge of said railroad during the year extending from May, 1888, to May, 1889. That prior to the 1st of May, 1889, the plaintiff desired to take charge of the maintenance of the line for the year extending from the 1st of May, 1889, in accordance with said agreement, and notified the River Front Railroad Company of its purpose so to do, and to this end entered into possession of the railroad on Delaware avenue. That the River Front Railroad

Company then, unlawfully and in violation of the terms of said agreement, procured a large number of men, and placed them along the line of the railroad, and forcibly prevented the plaintiff from making the repairs necessary to maintain the line on said Delaware avenue, and further obstructed and interfered with the plaintiff in the exercise of the rights vested in it by the terms of the agreement in regard to the maintenance of said road. That in order to preserve the public peace, the mayor of the city of Philadelphia directed the maintenance of said line on Delaware avenue to be taken in charge of the Department of Public Safety of the city of Philadelphia, and that the road since May 1, 1889, has been maintained by the mayor of the city of Philadelphia, acting through the Department of Public Safety. That the River Front Railroad Company denies the right of the Philadelphia & Reading Railroad Company to take charge of the said road at any time, under said agreement, and the plaintiff is thereby deprived of the rights vested in it under the agreement, including the right to take charge and maintain said road.

"The bill concludes with a prayer for relief, in which the court is asked to decree that the defendant shall keep, preserve, and perform all the terms, covenants, and conditions of the agreement of May 1, 1882, and especially the covenant authorizing the Philadelphia & Reading Railroad Company, in each alternate year, to take charge of the maintenance of the line on Delaware avenue, as set forth in the agreement, and that an injunction be issued restraining the River Front Railroad Company, its officers and agents, from obstructing or interfering with the plaintiff, its officers and agents, in taking charge of and maintaining the said line during said period.

"The defendant in its answer admits the averments of the bill as to the incorporation of both parties to the suit, the passage of the ordinance of the city of Philadelphia of May 2, 1877, the execution and delivery to the city of their joint bond in accordance with the requirements of the ordinance, their joint contract for the construction of the road, the payment by each of one half of the cost thereof, the execution of the agreement for the operation, maintenance, and control of the same, made by them to take effect on May 1, 1882, and the subsequent operation and maintenance of the property thereunder, appar-

ently without dispute until April, 1887, when the correspondence between the parties began, set out in full in the appendix to the bill of complaint, pages 27 to 38, inclusive.

"It is not denied that, as alleged in the bill, at the instance of the defendant, the plaintiff, whose property was then in the possession of receivers appointed by the circuit court of the United States, permitted the defendant to remain in charge of maintenance during the year beginning May 1, 1887, when under the agreement, Exhibit D, plaintiff was entitled to assume control, that the defendant continued in charge during the succeeding year, and that at the termination of the latter period plaintiff notified the defendant of its purpose again to assume the maintenance of the property, which it attempted to carry out, but was prevented from so doing by the refusal of the defendant, and its subsequent resistance by force. Nor that thereupon, for the purpose of preserving the public peace, the mayor of the city took possession of the property, and has continued in possession of it since Feb. 1, 1889, maintaining it through the Department of Public Safety at the joint expense of both parties. It is averred, however, by the defendant, in justification of its assumption of the continuous control of maintenance to the exclusion of the plaintiff—

"1. That the agreement, Exhibit D, of May 1, 1882, was merely tentative.

"2. That the general manager of the plaintiff in his letter of May 17, 1887 (see page 26 of bill), declined, for alleged want of authority, to enter into a new arrangement with defendant as to maintenance of the road.

"3. That inasmuch as under the agreement, which imposed the cost of maintenance on the parties respectively in proportion to the quantity of traffic furnished by each, the defendant was charged with eighty per centum thereof and the plaintiff with but twenty per centum, the control of maintenance ought to be exclusively in the former.

"4. That the acquiescence of the plaintiff in the continuance of the defendant in control during the year ending May 1, 1888, amounted to an agreement or modification of the contract, which vested the right to maintenance continuously thereafter in defendant; the agreement as originally made in all other particulars remaining in full force and effect.

"5. Conduct of plaintiff hostile to the interests of defendant, in endeavoring to afford connection with the road to the owners of a warehouse upon the line alleged to be acting in the interest of the Baltimore & Ohio Railroad Company.

"Each of the railroad companies, parties to this suit, was vested by the legislature with authority to use and occupy the streets of the city of Philadelphia for railroad purposes, provided the consent of the city were first obtained, that consent being an essential condition precedent to the lawful construction and operation by either of a railroad upon the public highways.

"The right of the plaintiff was derived from its charter and the act of assembly of June 9, 1874, P. L. 218, P. D. 1428, which, as construed in Duncan v. The Penna. R. R. Co., 7 W. N. C. 551; s. c., 94 Pa. 435, authorized the extension of its line along the streets of the city of Philadelphia upon receiving consent thereto by the city. This act in terms empowers 'cities, counties, and townships of the state to enter into contracts with any railroad companies whose roads enter their limits, whereby said railroad companies may relocate, change, or elevate their roads.'

"Authority to construct and operate a railroad on the said streets became vested in the defendant also under the General Railroad Laws of 1849, February 19, P. L. 83, P. D. 1417, and 1868, April 4, P. L. 62, P. D. 1414, upon receiving the consent of the city as required by section 12 of the latter statute, by which it is expressly provided that 'this act shall not be so construed . . . . as to authorize any corporation formed under the act to enter upon and occupy any street, lane, or alley in any incorporated city in this commonwealth without the consent of such city having been first obtained.'

"The right of a railroad company incorporated under the acts of assembly of 1849 and 1868, referred to, to locate, build, and open its railroad longitudinally along the public streets of a city upon receiving the assent of the municipal authority, is distinctly recognized in Phila., Germantown & Norristown R. R.'s App., 2 Walker's Cases, 291; Penna. R. R.'s App., 116 Pa. 55; Penna. R. R.'s App., 115 Pa. 525.

"In the case last cited (115 Pa.), on page 525, Mr. Justice TRUNKEY says, after referring to the acts of 1849 and 1868, 'A

company organized under the general statute may locate its railroad on a street or alley, because that statute expressly confers the power.'

"The requisite consent was given to both companies by the ordinance of the city of Philadelphia of May 31, 1877, section 2. (See appendix to bill, page 12.)

"By said section, it is ordained that 'The River Front Railroad Company and the Philadelphia & Reading Railroad Company are hereby authorized to occupy with a single-track railroad for the purposes and privileges mentioned in section 1 of the ordinance (ordinary railroad purposes and uses, or with a double track when the width of the street or avenue shall render the same practicable) the following streets and avenues, viz: Delaware avenue from the south side of Callowhill street to Shackamaxon street, Shackamaxon street from Delaware avenue to Beach street, and Beach street from Shackamaxon street to and across Cumberland street, to such point on the northeasterly side of Cumberland street as may be selected by the said Philadelphia & Reading Railroad Company.' . . . .

"The purpose of the ordinance, as stated at the close of said section 2, was to secure 'the construction and maintenance of a line of railroad for the free use of both railroad companies, so as that all manufacturers and business interests along said line shall have the full benefit of receiving from and delivering property to said roads.'

"Each company was to have the same rights as the other over the line to be constructed irrespective of the amount of traffic which they might respectively furnish for it.

"That the ordinance was so construed and understood by both parties in 1879 is manifested by their conduct.

"On Feb. 5, 1879, they jointly gave the bond required to be given to the city of Philadelphia (see Examiner's Report, page 4), and also jointly executed a contract for the construction of the line, in which each was bound for one half of the total cost. (See plaintiff's bill, Exhibit B, page 11.)

"And also thereafter, on May 1, 1882, entered into a joint contract for maintenance and operation, of which the following is a copy:

"'AGREEMENT BETWEEN PHILADELPHIA & READING RAILROAD COMPANY AND THE RIVER FRONT RAILROAD COMPANY.

"'*Rules for the government of the Railroad on Delaware Avenue, Philada., between Cumberland St. and Callowhill street. Taking effect May* 1*st*, 1882.

"'There shall be appointed a Joint Dispatcher, whose sole duty shall be the traffic management of the line between Cumberland and Callowhill streets, on Delaware avenue.

"'The maintenance of the line shall be divided between the two interests in such a manner that the Engineer's department of the Reading's interest shall have charge of the maintenance of the line for twelve (12) months at a time, and that of River Front Railroad for like periods, neither interest, except by an agreement, to retain charge for a longer continuous period than one year, it being understood that the first year's management, dating from May 1st, 1882, and terminating April 30th, 1883, shall be assumed by the River Front Railroad Company.

"'The intention of the joint ownership is, that the cost of maintaining the line, and all other expenses, except the pay of the Dispatcher, shall be borne in proportion to the actual tonnage represented by the two interests, but the strict enforcement of the actual tonnage method may by mutual consent, be suspended and instead an estimated weight, to be agreed upon, may be applied to each loaded car, which until the removal of the actual weight method shall become the basis for determining the proportion of expenses chargeable to the respective interests, or in lieu of either of the foregoing methods, having in view more especially the avoidance of the expense that would be incurred in keeping an accurate account of cars moved, and so long as it shall be mutually satisfactory, it may be proper to assume that there has been an equal division of the tonnage between the respective interests of the parties to this agreement, and the expenses may be so adjusted, subject, however, to an immediate restoration of the tonnage basis whenever a desire that such be done be expressed by either interest.

"'The adjustment of the tonnage, and all other accounts appertaining to the operation and maintenance of the line, shall be made quarterly through such officers as shall be designated by the respective interests.

"'The pay of the Dispatcher shall be fixed by the joint interests, and each shall bear an equal share of the same, each interest paying direct to the Dispatcher their proportion of the salary, the purpose of this method being that the Dispatcher shall keep in constant mind, that as between the two interests he is a joint representative of a joint ownership; it is also agreed that under no circumstances will it be proper for either interest to pay to the Dispatcher more than one half of the agreed salary, and that an expression of dissatisfaction from either interest shall be considered a good and sufficient reason for the Dispatcher's removal.

"'The charge for tolls and motive power, applying from May 1st, 1882, which each interest shall make and collect from Consignees or Shippers upon cars delivered or taken from private sidings, shall be one dollar ($1.00) per eight wheeled loaded car, which rate shall continue in force until changed by an agreement between the proper officers of the respective interests.

"'All questions as to the Management of the joint line that may arise hereafter shall be referred to the General Managers of the joint interests, or to such officers as they may delegate for that purpose.'

"'The foregoing has been approved and accepted on behalf of the Receivers of the Philada. & Reading Railroad Company

"'By J. E. WOOTTEN, General Manager.'

"'The foregoing has been approved and accepted on behalf of the River Front Railroad Company

"'By O. E. MCCLELLAN.'

"The rights of the companies under the contract were those of tenants in common. Neither had the power to terminate it, or to free itself from responsibility thereunder without the consent of the other, the contract being of a continuing nature, unlimited as to duration, and not containing any express power of defeasance reserved to either. It could therefore be annulled or changed only by mutual consent. See 1 Addison on Contracts, sec. 361.

"'Where two or more persons enter into a contract of a continuing nature, one cannot by his own act discharge himself

from liability and put an end to the contract without the consent of the other.' See also Great Northern Railway Co. v. The M. S. R. R. Co., 18 Law Times, O. S. 344.

"In that case the contract was between two railway companies providing for the right to run cars, etc., over each other's lines, and no term was fixed for the duration of the arrangement.

"The court, Vice Chancellor PARKER, held that the agreement was permanent and could only be terminated by consent of both parties.

"At the argument before the master the learned counsel for the defendant conceded the binding force and effect and permanent character of the agreement referred to, but contended that the correspondence between the parties, commencing with the letter from defendant's general agent to plaintiff's general superintendent, dated April 28, 1887, and their conduct thereafter, constituted a modification of the agreement as to the control of maintenance, and gave to the defendant the right thereto, continuously, from May 1, 1887, said contract in all other respects continuing in full force and effect.

"In the opinion of the master, however, there is no evidence to sustain this contention, or to justify a finding that plaintiff ever agreed to any alteration of the contract.

"Between the date of the agreement, May 1, 1882, and May 1, 1887, the property was maintained by the parties under its terms, each separately exercising control during alternate years.

"Shortly before the close of the year ending May 1, 1887, and while the defendant was in charge of maintenance, Mr. Latta, its general agent, wrote to plaintiff's superintendent the letter, a copy of which is found on page 5 of Examiner's Report, in which he suggests that the defendant remain in charge of maintenance until Mr. Pugh, who was its superintendent, could have a conference upon the subject of proposed alterations with Mr. McLeod, acting for plaintiff. In this letter Mr. Latta writes: 'We will therefore not turn the track arrangement over to your company on the 1st of May, as heretofore, until after the conference, if it is so agreed at that time. Mr. Pugh is absent from the city, and I address you on the matter, asking that you allow the arrangement to stand at present until his

return, which will be on Saturday.' No conference appears to have taken place nor was there any reply to the letter until May 11, 1887, when the vice president of the plaintiff wrote to Mr. Pugh, referring to Mr. Latta's letter of April 28, 1887, stating that the supervisor of the Philadelphia & Reading Railroad Company was directed 'under the provisions of the agreement of May 1, 1882, to take charge of the maintenance of The River Front Railroad for the ensuing year,' calling attention to a reported order issued on behalf of the defendant, directing its supervisor not to transfer maintenance to plaintiff, and concluding with an assertion of the right of the plaintiff to control during the year 1887 and 1888, and a request for 'directions to the River Front Railroad officer, so that our (Reading's) supervisor may be permitted to take charge of the maintenance of this railroad as provided for in the agreement.'

"To this Mr. Pugh replied, May 13, 1887, that the arrangement which had theretofore prevailed, under the agreement (Exhibit D), for alternate control of maintenance had not been satisfactory to The River Front Railroad Company, which company he referred to as the 'owners of the road,' and he further suggested that it seemed to that company 'that it would be better to permit this work to remain in the hands of The River Front Railroad Company continuously.' He closes this letter as follows: 'I will therefore be glad if you can see your way clear to assent to The River Front Railroad Company continuing in charge of the track as suggested.' On May 17, 1887, Mr. McLeod, general manager of plaintiff, replied, denying that The River Front Company was the owner of the road, insisting that the course provided for in the agreement of May 1, 1882, be adhered to, suggesting lack of power in himself as general manager of plaintiff to assent to any substantial variation of the contract without special authority from his company or its receivers, and requesting a discussion of the proposed changes in the contract by Mr. Pugh and himself, and a submission of alterations which they might agree to recommend to the respective companies for action. No change in the situation occurred during the rest of the year ending May 1, 1888, and the River Front Company retained control of maintenance, and continued also during the year following, when, under the agreement, it was entitled to it.

On April 16, 1889, correspondence upon this subject was reopened by the letter of that date from Mr. McLeod to Mr. Pugh, in which he stated that he had presented the matter of maintenance of the property to the board of managers of the Philadelphia & Reading Railroad Company, and that it had been determined 'that the Reading Company, under the provisions of the agreement of 1882, should, as therein provided, take charge of the maintenance of the said railroad on the first day of May next.'

"A letter to the same effect was written by him on April 26, 1889. To this the defendant replied that the agreement of May 1, 1882, was merely tentative; that The River Front Railroad Company contributed about eighty per cent of the traffic on the road, and to use the language of Mr. Pugh, defendant's general manager,—

"'We can see no good reason now for changing the present status of affairs, and we think it wiser that we should continue in charge of its maintenance as we are at present doing.'

"This view of the matter Mr. McLeod refused to adopt.

"Similar correspondence subsequently followed, the plaintiff insisting upon a resumption of control under the agreement and the defendant declining to resign it. And finally an attempt to enforce its claims by taking possession of the tracks was made by the plaintiff and resisted by the defendant. Whereupon on May 17 and 22, 1889, letters were written to the mayor of the city of Philadelphia by each of the parties asking for his interference for the preservation of good order,—requests which were favorably acted upon, the mayor placing in charge of the maintenance of the property an officer belonging to the Department of Public Safety, who has since remained and is now in control.

"There is nothing in this correspondence or the conduct of the plaintiff to prove an agreement or intention on the part of the plaintiff to relinquish the right of maintenance of the railroad secured to it by the contract of May 1, 1882. On the contrary, they plainly show that while it was the desire of the defendant to assume and retain control to the exclusion of the plaintiff, the latter positively refused to surrender it.

"There is no evidence to sustain the averments of the answer as to hostility on the part of the plaintiff towards the

defendant, nor was it attempted to prove that that portion of the contract, Exhibit D, which provided for a division of the cost of maintenance in proportion to the quantity of traffic furnished respectively by plaintiff and defendant, worked inequitably. The defendant rested its case altogether upon the alleged modification of the said agreement.

"In conclusion I respectfully report:

"That the plaintiff is entitled to participate in the control of maintenance of the property with the defendant as in agreement of May 1, 1882, Exhibit D, stipulated.

"And I recommend that the relief prayed for in the bill of complaint be granted, and that a decree be entered for plaintiff, a form whereof is respectfully submitted."

Exceptions to the master's report were dismissed by the court, and the following decree entered:

"And now, Oct. 20, 1894, this cause coming on to be heard upon exceptions on behalf of the defendant to the report of the master, it is ordered, adjudged, and decreed:

"1. That the defendant keep, observe, and perform all the terms, covenants, and conditions of the agreement of May 1, 1882, and especially that it keep and observe the covenant of said agreement authorizing the plaintiff in each alternate year to take charge of the maintenance of the line of railroad described in the bill in equity in this suit.

"2. That the year commencing May 1, 1895, is the alternate year within which, according to the said agreement, the plaintiff is entitled to take charge of the maintenance of the said railroad.

"3. That a perpetual injunction be granted, enjoining the defendant, its officers, agents, and servants, from obstructing or interfering with the plaintiff, its officers, agents, and servants, from taking charge of the maintenance of the said line of railroad during the year commencing May 1, 1895, and during each alternate year thereafter, as provided in said agreement.

"4. That the costs of this suit be paid by defendant."

Error assigned was above decree.

David W. Sellers, for appellant, cited: Canal Co. v. Bonham, 9 W. & S. 28; Youngman v. R. R. Co. 65 Pa. 286; Pennsylvania R. R. Co.'s App., 80 Pa. 265.

Thomas Hart, Jr., for appellee, cited: Bond v. Hilton, Busb., (N. Car.) 308; Curtis v. Swearingen, 1 Ill. (Breese) 207; Kidder v. Rixford, 16 Ver. 169; Western R. R. Co.'s App., 99 Pa. 155; McAboy's App., 107 Pa. 548.

PER CURIAM, May 20, 1895:

We are disposed to affirm this decree upon the record as it is now presented to us. In doing so we think it just to the parties that we state our view of the relations they occupy to each other.

First: The rules adopted by the joint action of the officers of these companies for the management and maintenance of that part of the River Front Railroad that is the subject of this contention amount to an agreement or contract upon the subjects to which they relate.

Second: Such contract is not irrevocable but is subject to such modification as circumstances may require in order to promote the purpose in view and the interests of the parties.

Third: Such changes cannot be made arbitrarily at the will of either party, but require the concurrence of both.

Fourth: Either party may give suitable notice of its purpose to withdraw from the arrangement at and after a day named. Thereafter if the parties cannot readjust their relations to each other the courts must make such ad interim orders as shall protect the rights of the parties and secure the preservation and operation of the road.

Finally, in disposing of such a question the relative ownership, tonnage, and other relevant circumstances should be considered.

We have no doubt the parties will be able to give intelligent attention to all such considerations and arrange for the future without the aid of the courts.

The decree is affirmed subject to such qualification as to its conclusiveness as this opinion indicates.

Sarah Cordelia Smith *v.* Carl Horn and Margaret Horn, Appellants.

Deed—Description—Boundaries—Evidence.

Where the eastern boundary of a lot is described in a deed as "beginning at a point on the south side of the Warren and Franklin road and the north-east corner of . . . . lot, running thence southwardly along said . . . . line ten perches to a post, thence eastwardly eight perches to a post, thence northwardly to a post in said road, thence westwardly along said road to the place of beginning," and there is nothing else in the deed to show what was the lot to the east of the land, and the evidence as to the location of the eastern line is conflicting, the position of the line is a question of fact for the jury.

Argued May 6, 1895. Appeal, No. 6, Jan. T., 1895, by defendants, from judgment of C. P. Warren Co., Dec. T., 1892, No. 42, on verdict for plaintiff. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Trespass for tearing down a gate and removing a fence erected on land claimed by defendants. Before NOYES, P. J.

Both parties claimed under deeds from James T. Magee.

Before Dec. 4, 1849, James T. Magee was the owner of a piece of land, in Tidioute borough, on the south side of Main street, which street is called, in the deed of Magee, the Warren and Franklin road. This strip of land lay between the road and the Allegheny river. Magee sold off lots along the road, at different times, and to different individuals, and the controversy in this cause arises as to the boundaries between two of these lots which adjoin each other.

On Dec. 4, 1849, said Magee and wife conveyed by deed to a Mr. Alger a portion of said land described as follows in said deed: "For and in consideration of the sum of $255 lawful money etc., to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, demised, released, aliened, conveyed and confirmed, and by these presents, doth grant, bargain, sell etc., to the party of the second part, and to his heirs and assigns forever, all that certain piece or parcel of land, situate, lying and being in the Township of Deerfield (now

Tidioute borough), County of Warren and State of Pennsylvania, known and described as follows, to wit:

"Beginning at a point on the south side of the Warren and Franklin road, and the north-east corner of —— lot, running thence southwardly along said —— line, ten perches to a post, thence eastwardly eight perches to a post, thence northwardly to a post on the said Warren and Franklin road, thence westwardly along said road to the place of beginning, containing one half of an acre of land more or less."

Other facts appear by the charge of the court, which were in part as follows:

"The plaintiff shows a legal title by conveyances to a piece of land situate on the south side of Main street, in Tidioute, this county. This piece was conveyed by James T. Magee, to S. H. Evans, and B. T. Hopewell, in February, 1865; and a chain of title from these parties to the plaintiff is shown, and it is shown she is in the occupation of that piece of land. The defendants, Margaret Horn and her husband, were or are in the occupation of a piece of land adjoining on the west. And the real question is, where is the division line between these pieces of land, in the first place; and second, what are the rights of the respective parties in the strip between the two lots, which is claimed by the defendants to be an alley held in common for their common use. It appears that the plaintiff's husband erected a gate across the end of this alley or lane, and that that was the gate which was torn down by the defendants; I believe also he built the fence which was torn down.

"Now, the first question is to determine the limits of the defendants' land, to know whether or not the acts complained of were committed within the lines of her land. Referring to the original deed from Magee, who is admitted to be the common source of title, that is to say, the man who at one time owned both of these pieces, from him the conveyances come from both sides, and therefore we go back to him. We have a deed from Magee to Evans and Hopewell, beginning at the northeast corner of land of Esther Goodrich. Thence south a given number of rods, thence east a given distance to other lands of the grantor, and then north to the road, and then west along the road to the place of beginning. The land of the grantor on the east is not designated so we can find its bound-

aries, therefore we cannot fix the eastern boundary of this land, except by the western, and we cannot fix the western unless we fix the eastern boundary of Esther Goodrich's land. Therefore we are bound to search for the boundaries of Esther Goodrich's. Esther Goodrich is shown by the evidence, without contradiction, to have occupied a piece of ground fronting on the same Main street, a part of the tract conveyed by Magee to Alger. Esther Goodrich claims under a Mrs. Washburn, by deed from her, and Mrs. Washburn traces her title to Madison Alger, who was shown to have occupied a portion of the ground, at least, at quite an early day, somewhere about 1850 perhaps.

"The deed from James T. Magee was given in evidence, but its description is so indefinite that it is impossible to locate it by the deed. The only call in this deed, except the road, is the corner of blank lot, the tract not named, just simply a blank in the deed. It calls thereby for the land of the grantor somewhere probably, but whether it does or not, we are unable to find that tract. The evidence does not disclose to us any tract of land existing at that time as a separate piece that we can identify as the land intended. It is impossible therefore from the calls in the deed, and the evidence showing the situation of affairs at the date of the deed to locate it, except that it must be somewhere on the south side of the Warren and Franklin turnpike at this place. But there is evidence, as I have said, that at the date of the deed to Hopewell and Evans, Esther Goodrich was in occupation of a piece of ground, claiming, as I have said, under Madison Alger as the original owner. This was the eastern part of what had been claimed by Alger, and there is considerable evidence in the case tending to show where Alger claimed his lines to be, or those under him; that is, a fence or other monuments erected along there, and especially of a fence on the eastern side of this piece claimed by Esther Goodrich.

"[From all the evidence you are to determine where the eastern boundary of Esther Goodrich's land, as she claimed it, and occupied it in 1865, was, in order thereby to fix the western boundary of the land conveyed by Magee to Hopewell and Evans.] [1] If prior to that date, in 1865, a fence had been maintained on the eastern side, between Mrs. Goodrich's, and

Mr. Magee's lands, and has been done since by common consent by both owners, it would be fixed. The building of a fence by one party without the consent of the other and its maintenance for a short time would not necessarily fix the line. We have no evidence, that I am aware of, of any actual concurrence of Magee and Mrs. Goodrich, or anybody before her in fixing that line, no evidence, I mean, that they came together at any specified time, and agreed upon any particular monument, or set anything to mark it, but there is evidence of a general character of what was done by the various parties and where they lived, and from all that you must determine, if you can, where Esther Goodrich's line was in 1865, where it was marked upon the ground if it was so marked. If you should find that the line was fixed between Magee and Esther Goodrich, or between Magee and Mrs. Washburn, or between Magee and Madison Alger, the eastern line of the Alger claim fixed and agreed upon by any monument, that would be the line. I do not recall, I say to you, any evidence of that kind. I will not review the evidence. You have heard it commented on by counsel on both sides, and I have no doubt that you will be able to apply the law that I give you to the facts, and thus solve the difficulty.

"[If the tearing down of the fence testified to by the plaintiff, and the removal of the gate or gate post, was within the lines of the plaintiff's land, thus fixed, and outside of the lines of the land of Esther Goodrich as she occupied and claimed it in 1865, then the plaintiff should recover in this case whatever damages she has sustained, unless you find that the defendants had a right to have that particular piece of land unobstructed by gates and fences by virtue of their claim that it was a free and open right of way between them.]" [2]

Defendants' points were among others as follows:

"2. That the only monument on the ground showing the location of the western boundary line of the M. Alger lot is the old line fence, between this lot, and the lot on the west, sold by Magee to James H. Neil, July 3, 1853, and the Alger lot is to be located with its full complement of eight rods east of that line fence. *Answer:* Second, I answer this point in the negative; I leave the location of the Goodrich land, which is the controlling question, entirely to you under all the evidence." [3]

"4. That if the eastern line of the M. Alger lot is east of where the defendant removed the fence, the plaintiff cannot recover. *Answer:* That is affirmed, understanding the M. Alger lot to include and mean the Goodrich land." [4]

"6. If the jury believed that James T. Magee, under whom both the plaintiff and defendants claim, and his grantees, the grantors of the plaintiff, consented for twenty-one years to the location of a lane, and the continuous use of it as a right of way, of a strip along the western boundary of their land, to be used as such way, in connection with a strip of land dedicated to the same use by the grantors of the defendants, from the east side of their land, then the defendants became entitled to the use and enjoyment of such lane as a right of way, and the plaintiff cannot recover in trespass for such use, or for removing obstruction placed therein by the plaintiffs or others. *Answer:* This point you will notice is based upon the actual consent and agreement of the parties; if there is evidence here from which you could find that the parties actually did set apart a certain piece of ground for use of a lane, and they did use it together in common for a time, exceeding twenty-one years, it would be correct. But there is no evidence of any direct and express agreement between the parties concerning this lane." [5]

Verdict and judgment for plaintiff for $10.75. Defendants appealed.

Errors assigned were (1–5) above instructions, quoting them.

W. W. Wilbur, *Wm. Schnur* with him, for appellants, cited: Hastings v. Wagner, 7 W. & S. 215; Hoffman v. Danner, 14 Pa. 25; Hetherington v. Clark, 30 Pa. 396; Harvey v. Vandegrift, 89 Pa. 351; Banks v. Ammon, 27 Pa. 172; Van Horne v. Clark, 126 Pa. 411; Rhea v. Forsyth, 37 Pa. 503; Stoner v. Hunsicker, 47 Pa. 514; McElhone v. McManes, 118 Pa. 600.

D. I. Ball, *C. C. Thompson* with him, for appellee, cited: Mellon v. Davison, 123 Pa. 298; Hammer v. McEldowney, 46 Pa. 334; Soles v. Hickman, 20 Pa. 180; Ferguson v. Staver, 33 Pa. 411.

PER CURIAM, May 20, 1895:

We find nothing in this record that requires us to sustain either of the assignments of error. When considered in connection with other parts of the learned trial judge's charge, and especially in the light of the facts which the testimony tended to prove, the instructions recited in the first and second specifications are substantially correct. The same is true as to his answers to defendants' points, recited in the remaining three specifications. The description in the deed of February 1865, from Magee, who is admitted to be the common source of title, is so vague and indefinite that it was necessary to resort to other evidence for the purpose of determining the location of the dividing line between the lots, etc. It thus became a question of fact for the consideration of the jury, under all the testimony; and the case appears to have been submitted to them with substantially adequate and proper instructions.

Judgment affirmed.

Susan Hale v. Equitable Aid Union, Appellant.

168 377
200 246

168 377
e 35 SC 151
f 35 SC 152
e 35 SC 203
d 35 SC 204

Beneficial associations—By-laws—Amendment—Contract.

Where a benefit certificate in a beneficial association is accepted subject to the right of the association to amend its constitution and by-laws, the contract in so far as it consists of the constitution and by-laws may be changed by an amendment of the constitution and by-laws, but in so far as it consists of something specifically agreed to between the parties at the time, and not necessarily a part of the constitution and by-laws, an amendment changing the contract is invalid.

Plaintiff accepted a benefit certificate subject to the right of the association to amend its by-laws. The certificate provided that plaintiff should become entitled to receive one-half the amount after twelve years "if living, and in good standing." An amendment of the by-laws provided for the payment of one-tenth of the amount specified in the beneficial certificate yearly, upon arrival at the period of expectation of life, and total physicial disability. *Held*, that plaintiff was not subject to the amendment.

Argued May 6, 1895. Appeal, No. 41, Jan. T., 1895, by defendant, from judgment of C. P. Warren Co., Dec. T., 1893, No. 66, on verdict for plaintiff. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Assumpsit on a benefit certificate of a beneficial association. Before NOYES, P. J.

At the trial it appeared that in 1881 plaintiff became a member of the defendant association, and took a benefit certificate which set forth that there "shall be paid to Levi Hale and Thomas Hale, subject to change at pleasure, $1,800, in the event of the death of Susan Hale, a member, while in good standing in the organization, prior to the completed period of expectancy." And further, under the head of "Endowment," "If living and in good standing twelve years from the date hereof, one-half the sum stipulated above, shall be paid to the legal payee of this certificate; the balance at death." Attached to the certificate, and in addition to the constitution and by-laws of the defendant was an application, or copy of one, purporting to be signed by the plaintiff, a medical examination and certain other documents. In the application this clause appeared: "I further agree to accept said beneficiary certificate subject to such laws, rules and regulations as now exist, or may hereafter be adopted, and governing said corporation."

In 1893, the following by-law was passed:

"Sec. 14. All persons holding valid benefit certificates that have been or may be hereafter issued to them who shall live to the period of expectation of life as designated in section 2 of this article 'Synopsis,' and becoming totally physically disabled, shall be entitled to receive yearly a one-tenth part of the amount specified in their benefit certificate."

The court charged in part as follows:

"[But in so far as this contract agrees to pay to Susan Hale, if she is in good standing in the organization twelve years from the date of it, one half of the amount, to wit, $900, that is a matter altogether apart from the by-laws; and they may amend the by-laws as they please to affect all future cases, but such amendment does not invalidate or wipe out that contract.] [1]

"[The benefit certificate was accepted subject to the right of the corporation to amend its by-laws and to change the contract, in so far as the by-laws make it, but not in so far as the contract is made by the benefit certificate itself. For these reasons I think the plaintiff is entitled to recover, under the undisputed evidence, the one half mentioned in the certificate.] [2]

Defendant's points were among others as follows:

"1. The plaintiff, as a member of the corporation, defendant, was bound by the amendment to its by-laws providing for the payment yearly, upon the arrival at the period of expectation of life, and total physical disability, of a one tenth of the amount specified in her benefit certificate, instead of the payment of the one half of the amount specified in said certificate at the arrival of such period. *Answer:* Answered in the negative. [3]

"2. Under the agreement of the plaintiff, contained in her application for a benefit certificate, 'To accept said beneficiary certificate, subject to such laws, rules and regulations as now exist or may hereafter be adopted, and governing said corporation;' and the authority contained in article 6 of the defendant's charter of incorporation, to 'Enact such constitution, by-laws, rules and regulations as from time to time shall be deemed necessary and proper for the government of such corporation including the admission or election of members, their removal or suspension, the payment of dues, fees, penalties, benefits, management of all its funds and property, and from time to time alter and modify the same as shall be therein provided,' the defendant corporation had the power to change the by-laws in force at the time the plaintiff became a member of the defendant corporation, and to adopt in lieu thereof the amendment, section 14, by-laws of 1893, which amended section is in part as follows: 'All persons holding valid benefit certificates that have been or may be hereafter issued to them who shall live to the period of expectation of life as designated in section 2 of this article, "Synopsis," and becoming totally physically disabled, shall be entitled to receive yearly a one tenth part of the amount specified in their benefit certificate;' and such new by-laws, when adopted before the period of expectation of life, became binding upon the plaintiff. *Answer:* As to the second point, I will refer to the general charge for my answer, in which it is fully covered." [4]

"5. Under all the evidence in the case, the verdict of the jury for the plaintiff can only be for the sum of one hundred and eighty dollars, ($180,) with interest from July 21, 1893. *Answer:* I answer this point in the negative." [5]

Verdict and judgment for plaintiff for $963.75. Defendant appealed.

Errors assigned were (1–5) above instructions, quoting them.

D. I. Ball, of *Ball & Thompson*, *W. H. Tennant* with him, for appellant.—An association organized not to do business for profit or gain, but to pecuniarily aid the widows, orphans, heirs and devisees of its members, is not an insurance company: Com. v. Equitable Beneficial Assn., 137 Pa. 412; Bacon on Benefit Soc. and Life Ins., sec. 51; Northwestern Masonic Aid Association of Chicago v. Jones, 154 Pa. 99; act of April 6, 1893, P. L. 7; Dickinson v. Ancient Order of United Workmen, 159 Pa. 258; Fraternal Guardians Assigned Est., 159 Pa. 600; Hamill v. Supreme Council Royal Arcanum, 152 Pa. 537; Beatty v. Supreme Commandery U. O. of Golden Cross, 154 Pa. 484: McAlees v. Iron Hall, 12 Cent. Rep. 415; Johnson v. R. R., 163 Pa. 127.

When the benefit certificate was issued, it was subject to the "medical examination, constitution and laws herewith constituting contract," and attached thereto: Bishop v. E. O. M. A., 112 N. Y. 6; Benefit Assn. v. Burkhart, 110 Ind. 189; Crossman v. Supreme Lodge, 13 N. Y. 596; Munrich v. Supreme Lodge, 24 N. Y. 287; Hellenberg v. District, No. 1, I. O. of B. B., 94 N. Y. 580; Gray v. Supreme Lodge Knights of Honor, 118 Ind. 293; Hesinger v. Home Ben. Assn., 41 Minn. 516; Supreme Lodge v. Knight, 117 Ind. 489; Mitchell v. Lycoming Mut. Ins. Co., 51 Pa. 402; Miller v. Hillsborough Mut. Fire Assurance Assn., 6 Cent. Rep. 324; Diehl v. Adams County Mut. Ins. Co., 58 Pa. 443; 2 Am. & Eng. Ency. of Law, 176.

The power to amend by-laws is as broad as the power to enact them: Boone on Corporations, sec. 56, p. 67; Boisot on By-laws, sec. 16, p. 12; Morawetz on Private Corp. 499; Angell & Ames on Corp., sec. 329; May v. New York Safety Fund Assn., 13 N. Y. 66; Sheeler's App., 159 Pa. 594.

A member of an incorporated beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief: St. Patrick's Male Beneficial Society v. McVey, 92 Pa. 510; McCabe v. Father Mathew Society, 24 Hun, 149; Bacon on Benefit Societies, sec. 236; Ellerbe v. Faust, 25 S. W. 390; Julia Fugure v. The Mutual Society of

St. Joseph, 46 N. H. 362; Masonic Mutual Ben. Soc. v. Burkhart, 110 Ind. 189; Poultney v. Bachman, 31 Hun, 49; Stohr v. San Francisco Musical Fund Society, 82 Cal. 557; Hutchinson v. Supreme Tent K. O. T. M., 52 N. Y. Rep. 199; Sheeler's App., 159 Pa. 594; Becker v. Berlin Ben. So., 144 Pa. 232; Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489; Masonic Relief Association v. McCurdey, 2 McVey (Dist. Columbia), 79.

H. J. Muse, Samuel T. Neill and J. H. Donly, for appellee, were not heard, but argued in their printed brief. The amended by-laws had no retroactive operation: Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 289; West v. Grand Lodge A. O. U. W., 22 Oreg. 271; Supreme Commandery v. Ainsworth, 71 Ala. 449; Becker v. Berlin Ben. Soc., 114 Pa. 232; McDowell v. Ackley, 93 Pa. 277; Hutchinson v. Maccabees, 52 N. Y. 199; Bishop's Admr. v. E. O. M. A., 112 N. Y. 627; Gray v. Pollard Bank, 3 Mass. 364; Kent v. Quicksilver Mining Co., 78 N. Y. 182; Folmer's App., 87 Pa. 133; Black & White Smith's Society v. Vandyke, 2 Whart. 309; Toram v. Howard Beneficial Society, 4 Pa. 519, Society for Visitation, etc., v. Com., 52 Pa. 125; St. Patrick's Male Beneficial Society v. McVey, 92 Pa. 510.

PER CURIAM, May 20, 1895:

The controlling question in this case is, whether the plaintiff was bound by the subsequent amendments to defendant's by-laws providing for the payment yearly, upon arrival at the period of expectation of life and total physical disability, of one tenth of the amount specified in her benefit certificate, instead of the payment of one half of said amount at the time specified in said certificate. This question is to some extent involved in each of the assignments of error, but more particularly in the defendant's first, second and fifth requests for charge recited in the last three specifications; and it appears to have been correctly decided in favor of the plaintiff, not only in the general charge but also in the learned judge's answers to said requests. In the former, he correctly said, among other things, that a contract between an association, such as the defendant, and one of its members cannot be impaired or altered by either

of the parties thereto, except so far as the power to do so is reserved. The benefit certificate was accepted by plaintiff "subject to the right of the corporation to amend its by-laws and to change the contract in so far as the by-laws make it, but not in so far as the contract is made by the benefit certificate itself. For these reasons I think the plaintiff is entitled to recover, under the undisputed evidence, the one half of the sum mentioned in the certificate." We find nothing in the record that would justify us in sustaining either of the specifications; and they are therefore dismissed.

Judgment affirmed.

Mary Fee v. Columbus Borough, Appellant.

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p 19 SC 176

Negligence—Contributory negligence—Boroughs—Defective sidewalk—Evidence—Question for jury.

In an action of trespass against a borough to recover damages for personal injuries suffered from falling upon a sidewalk alleged to be defective, the case is for the jury where the evidence, though conflicting, tends to show that at the point where the accident occurred there were loose planks, and that the sidewalk had been in a defective condition for several months.

In such a case, where there was evidence that plaintiff had previously passed over the walk frequently, it was not error for the court to charge that whether plaintiff ought to have noticed its dangerous condition is for the jury; "she was not bound to the exercise of extraordinary care; but she was bound to use such care as a person of ordinary prudence, situated as she was, under like circumstances would use, and if she neglected that, it would be negligence."

Argued May 6, 1895. Appeal, No. 203, Jan. T., 1895, by defendant, from judgment of C. P. Warren Co., Sept. T., 1893, No. 28, on verdict for plaintiff. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Trespass for personal injuries. Before NOYES, P. J.

At the trial it appeared that on May 10, 1893, plaintiff was injured by falling on the sidewalk on the west side of Main street in Columbus borough. Evidence for the plaintiff tended to show that at the point where the accident occurred the

planks of the sidewalk were worn and loose. One witness testified that the sidewalk had been in a defective condition for six months. Another stated that the planks were rotten, and some were broken off, and that the walk had been in this condition for eleven months. The evidence for defendant showed that plaintiff had walked over the sidewalk daily during the entire spring and winter preceding the accident. Witnesses for defendant also testified that the sidewalk was in good condition.

The court charged in part as follows:

"[Now, gentlemen, any defect which existed in the walk at the time when Mr. Schramling examined it, and which was apparent to a person examining it with ordinary care, of course the borough had actual notice of it; notice to him would be notice to the borough, under those circumstances. This would be an important question for you to determine. What was the condition of the walk at that time? He testifies that there were no such defects as are described by the plaintiff's witnesses at that time; substantially, that there were no broken planks and no loose planks that he discovered.] [1]

"There is evidence, too, that the burgess, Mr. Smith, was accustomed to walk over the walk about every day. That you may consider in respect to the question of actual notice of the defects in the walk. He testifies that he did not discover any such defects as described by the plaintiff, and he thinks he would have discovered them if there had been any there. All this is for you. You must determine from this conflicting testimony what the true facts are. What was the actual condition of this sidewalk at the time when the accident occurred, and how long had it existed prior to that time? If it was actually known, as I have said to you, by the officers that the sidewalk was dangerous, and for an unreasonable time they neglected to repair it, or, if it had been dangerous so long that, considering its situation, the amount of travel over the walk, the public place the walk occupied and all the circumstances in the case, the officers by exercising reasonable and ordinary care should have known of it and failed to repair it, then they were negligent." [2]

"[There is evidence that the plaintiff had passed over the walk frequently. She did not testify as I remember that she

had observed or noticed the dangerous condition of the walk, these loose planks and so on, before this time; but whether she had noticed it—whether she ought to have noticed it is for you. As I have said, she was not bound to the exercise of extraordinary care; but she was bound to use such care as a person of ordinary prudence, situated as she was, under like circumstances, would use, and if she neglected that it would be negligence.] [7]

"[If she fell by reason of loose planks or other defects in the walk which were apparent and should have been seen and repaired, or if the defects had been there long enough so that the borough officers either actually knew of the condition, or should have known its condition by the exercise of ordinary care, and the plaintiff was free from any negligence on her part, she would be entitled to recover.]" [8]

Defendant's points were, among others, as follows:

"4. The notice to the property owners to rebuild the walk is no evidence of express notice on the part of the borough of the alleged defects which caused the injury; and there is no evidence in this case of any express notice to the borough authorities of the alleged dangerous condition of this walk. *Answer:* With these remarks, gentlemen, which cover the subject embraced in the defendant's fourth point, I answer that point in the negative. [3]

"5. Unless the jury find that the alleged dangerous condition of the walk was so open, notorious and apparent as to be noticeable to all who had occasion to pass the place or to observe the premises, and unless they disbelieve all the defendant's witnesses who testify that such was not the case, the verdict should be for the defendant. *Answer:* Also the fifth point is refused, because it assumes that there is no evidence of any kind of actual notice of the condition of the walk, which is not as I view it. [4]

"6. If the jury believe the testimony of the plaintiff and her witnesses upon the points that she was frequently over the walk while it was out of repair, and that the defects were open, notorious and plainly to be seen; and if they believe that by taking the street she could have gone around the place where she fell, and would have reached her destination in safety, then she would be guilty of contributory negligence and cannot re-

cover, and the verdict should be for the defendant. *Answer:* If there was a safe way around the defect in the walk, and this defect was known to the plaintiff, and apparently dangerous, she was guilty of negligence in going over the walk instead of around by a safe way. Reasonable care and reasonable conduct, under all the circumstances, is what you should apply to this plaintiff as well as the defendant's officers." [5]

"3. If the jury believe that the plaintiff was suffering from a rupture before the 10th of May, 1893, there can be no recovery of damages for that cause. *Answer:* Of course, gentlemen, that is correct; she cannot recover for anything which was not caused by the accident. She testifies that she had no rupture prior to that time; if you are satisfied from all the evidence that she did, and that this statement by her, that the rupture was occasioned by the accident, is not true, you will exclude that entirely from the case; and it would go a long way to discredit her testimony in every particular where she is contradicted by other witnesses. If you find that she has testified falsely in respect to that, of course it would make it very difficult for you to believe her wherever she is contradicted by other witnesses as to any other matter." [6]

Verdict and judgment for plaintiff for $700. Defendant appealed.

Errors assigned were (1–8) above instructions, quoting them.

W. M. Lindsey, *J. O. Parmlee* and *Albert B. Osborne* with him, for appellant, cited: 2 Bouvier's Law Dict., p. 189; Burns v. Bradford, 137 Pa. 360; Otto Twp. v. Wolf, 106 Pa. 611; Rapho v. Moore, 68 Pa. 404; Lohr v. Philipsburg Borough, 156 Pa. 246; Erie v. Magill, 101 Pa. 616; Crescent Twp. v. Anderson, 114 Pa. 643; Barnes v. Sowden, 119 Pa. 53; King v. Thompson, 87 Pa. 365; Dehnhardt v. Phila., 15 W. N. C. 214; Robb v. Connellsville Borough, 137 Pa. 42.

W. W. Wilbur of *Wilbur & Schnur*, *Allen & Sons* with him, for appellee, cited: McLaughlin v. Corry, 77 Pa. 109; Lohr v. Philipsburg Borough, 156 Pa. 246; Merriman v. Philipsburg, 158 Pa. 79; Nanticoke Borough v. Warne, 106 Pa. 375; Crumlich v. Harrisburg, 162 Pa. 624; Trickett on Pa. Boro. Law,

449; Kibele v. Phila., 105 Pa. 44; R. R. v. Brandtmaier, 113 Pa. 610.

PER CURIAM, May 20, 1895:

Considered in the light of all the testimony properly before the jury, there is no substantial error in either of the excerpts from the learned judge's charge, recited in the first, second, seventh and eighth specifications; nor do we think there is any error in either of his answers to defendant's requests for charge specified in the remaining four assignments. Questions of fact, necessarily for the exclusive consideration of the jury, were presented by the testimony and properly submitted to them, with instructions which appear to be substantially accurate and adequate. We find nothing in either of the assignments of error that requires special comment.

Judgment affirmed.

Eugene R. Payne et al. *v.* School District of Coudersport Borough, A. B. Mann, President, the County of Potter and Charles Coats, County Treasurer, Appellants.

Constitutional law—Statutes—Title of act—Act of Feb. 8, 1871.

The act of Feb. 8, 1871, sec. 2, P. L. 31, entitled "An act to enable the board of school directors of the borough of Coudersport, in the county of Potter, to establish and maintain a graded school," and providing "that the whole of the territory contained in the East Fork road district, in the county of Potter, is hereby annexed to the said school district of Coudersport, and the board of school directors of said district are authorized and empowered to levy and collect a school tax upon the assessed valuation of all property in said territory, the same as they levy and collect the property within the original bounds of said school district," is defective in title and repugnant to the eighth section of the eleventh article of the constitution of Pennsylvania in force at the time of the passage of the act.

Argued May 7, 1895. Appeal, No. 80, Jan. T., 1894, by defendants, from decree of C. P. Potter Co., June T., 1894, No. 353, on bill in equity. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Bill in equity for an injunction to restrain the sale of certain lands described in the bill for arrears of school taxes, by the county treasurer for the benefit of the school district of Coudersport borough, and for a decree that the defendants refund to the plaintiffs the sum of $925.65 school taxes, unlawfully collected, and for further relief.

A preliminary injunction was granted. An issue being joined, the cause was tried before NOYES, P. J., specially presiding, who filed the following opinion:

"The plaintiffs are the owners of some 14,000 acres of land described in the bill, and situate in the township of Eulalia, county of Potter, and state of Pennsylvania, and distant some sixteen miles from the borough of Coudersport. By virtue of the provisions of the act of Feb. 8, 1871, school taxes and taxes for school buildings were assessed against said lands by authority of the school directors of Coudersport borough school district for the years 1892 and 1893, amounting to $1,524.60. These taxes the plaintiffs have refused to pay, alleging that they are without authority of law, and the defendant Charles Coats, the treasurer of the county, has caused the lands to be advertised for sale. The lands of the plaintiffs are within the boundaries of the East Fork road district, as they are defined in an act, entitled 'An act erecting the south part of Eulalia township, in the county of Potter, into a separate road district,' approved April 3, 1862. They are also among the lands enumerated in an act, entitled 'An act to attach certain lands in Potter county to Coudersport school district for school purposes,' approved April 2, 1867, which last mentioned act was repealed by the act of May 26, 1891, P. L. 132.

"In addition to the taxes above referred to, there was assessed against the lands of the plaintiffs described in the bill for the benefit of the said school district, defendant, for the year 1893, school bond taxes amounting to $925.65. At the request of the plaintiffs, the defendant Coats, the county treasurer, sent to the plaintiffs, before any payment of taxes, a statement of all the taxes assessed against their lands in tabular form, which was marked by the stenographer 'Plaintiffs' Exhibit "A,"' and is made part of this finding. The various kinds of taxes were set opposite the numbers of the several warrants, under appropriate headings, as 'county tax,' 'school tax,' etc. One of these

headings was the word 'bond,' without more. The plaintiffs, not intending to pay any school taxes, included the taxes under this head in their check to the treasurer, and had no knowledge that the taxes under that head were in fact school taxes, until the treasurer returned his receipt, in which the heading was altered to read 'school bond,' and the taxes were so designated in the body of the receipt. The taxes so unintentionally paid were the school bond taxes above referred to, and amounted to $925.65.

"It is conceded that a threatened sale of lands for taxes, where the power attempting to tax has no jurisdiction, or where the taxing authorities are acting contrary to law, will be restrained by injunction: St. Clair's School Board's App., 74 Pa. 252; Miller v. Gorman, 38 Pa. 309; Markoe v. Hartranft, 6 Am. Law Reg., (N. S.), 487. The plaintiffs contend that the second section of the act of Feb. 8, 1871, P. L. 31, which is the only authority for the assessment of the taxes in question, is in conflict with the eighth section of the eleventh article of the constitution of Pennsylvania, in force at the time of its passage, and hence void.

"The section in question is as follows: 'That the whole of the territory contained in the East Fork road district, in the county of Potter, is hereby annexed to the said school district of Coudersport, and the board of school directors of said school district are authorized and empowered to levy and collect a school tax upon the assessed valuation of all property in said territory, the same as they levy and collect upon the property within the original bounds of said school district.' The act from which the above section is quoted is entitled 'A supplement to an act entitled "An act to enable the board of school directors of the borough of Coudersport, in the county of Potter, to establish and maintain a graded school."' The East Fork road district was established by an act of assembly approved April 3, 1869, P. L. 706, entitled 'An act erecting the south part of Eulalia township, in the county of Potter, into a separate road district.' This act provides that certain warrants, including the lands of the plaintiffs in Eulalia township, together with certain other lands in Summit, Abbott and West Branch townships, shall constitute a separate road district, to be known as the East Fork road district.

"It is to be noted that the lands in Eulalia township, affected by the second section of the act of Feb. 8, 1871, had been already 'attached' to Coudersport for school purposes, by the act of April 2, 1867, with like power of taxation as is given in the later act. The act of 1867 was repealed by title in 1891. Either the legislature has accomplished absolutely nothing by this repeal, or it must be construed to abolish the law which it repealed, though contained in a different act from that cited. This construction would repeal the identical law which is contained in the act of 1871. But as the language of the repealing statute is plain, we have no warrant for resorting to construction. We must assume, therefore, even against reason, that the legislature intended precisely what it did, viz, to repeal a law already repealed and supplied by the act of 1871.

"The constitutional provision, which it is alleged this statute violates, is identical in meaning with the third section of the third article of the constitution of 1874. To determine whether an act offends against this provision, we must inquire whether it contains more than one subject; and if not, whether the single subject of the act is clearly expressed in its title. The purpose of the first requirement was to prevent the passage of 'omnibus bills,' or, as it is expressed in the corresponding section of the constitution of New Jersey, 'to avoid improper influences, which may result from intermixing in one and the same act, such things as have no proper relation to each other.' Few bills are so elementary in character that they may not be subdivided under several heads; and no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough. The quotation from the constitution of New Jersey furnishes the proper light in which to define the word 'subject.' Those things which have a 'proper relation to each other; which fairly constitute parts of a scheme to accomplish a single general purpose,' 'relate to the same subject,' or 'object.' And provisions which have no proper legislative relation to each other and are not part of the same legislative scheme, may not be joined in the same act. What was the legislative subject of the act of the 13th of April, 1869, to which the bill in question is a supplement? The title answers, 'To enable the board of school directors of Coudersport, in the county of Potter, to establish and maintain a

graded school.' To this end, its first section authorizes the trustees of the Coudersport academy to convey all its property to the school directors of Coudersport borough, to be used by them for the purpose of establishing and carrying on a common or graded school. The second section repeals certain laws of no moment here. The third authorizes the levy of two per cent upon the valuation of all the taxable property in the district. The supplement in question, in the first section, provides that the school directors may charge tuition in the high school department of the graded school, and in all of the departments except to pupils residing in Coudersport borough, and Eulalia township. And the second section is the one above quoted, annexing the East Fork road district to Coudersport for school purposes. The greater part of the territory contained in the East Fork road district had been, as we have said, attached to Coudersport for school purposes, by a special act of assembly, in 1867. This supplement, therefore, covers actually the subject-matter of two existing acts, that of 1867, and the act to which it was a supplement. Provisions respecting the charge for the tuition of the graded school in Coudersport, and provisions attaching the territory to the school district of Coudersport, seem to have no proper relation. But it is argued with great force and ability, by the learned counsel for the defendants, that the means by which the general purpose of an act of assembly is to be accomplished are included within the subject of the act, and that they need not be specified in the title. This is undoubtedly a correct principle, and, if applicable here, will sustain the provisions of the act attacked by the plaintiffs. But there is in the section in question no allusion to the graded school; nor is there in the original act any reference to the territory outside the boundaries of the Coudersport school district. The taxes to be levied on the lands in East Fork are not directed to be applied to the graded school, and the directors may or may not use them for that purpose. Pupils resident in a portion of the annexed territory, viz, in Abbott, Summit and West Branch townships, are expressly excluded by the terms of the act from all benefit of the graded school, except upon payment of tuition, in the same manner as pupils from other school districts. Doubtless the increase in the amount of taxable property, resulting from annexation of the East Fork

road district, did facilitate the maintenance of the graded school in Coudersport. But can we regard that merely as a means to the end (the maintenance of the graded school in Coudersport) which is broader in its scope than the original object? If to enable the school directors of Coudersport to maintain a graded school they had been authorized to administer all of the school affairs in the county of Potter, such a regulation could hardly be justified as merely means to the end proposed by the bill. Where the means adopted to accomplish the purpose stated in the title of an act is itself a substantive regulation, affecting greater territory and broader interests than are disclosed by the title, the rule invoked by the defendant is not applicable.

"The original act of April 13, 1869, and the first section of the supplement of Feb. 8, 1871, relate only to Coudersport, and to a single school in that borough. The second section of the supplement relates to Coudersport, and the East Fork road district, which includes a part of three townships never theretofore connected in any way with Coudersport school district, and it affects not merely the graded school, but all the schools within the territory mentioned. We are of opinion, therefore, that this section is in violation of the constitutional prohibition as containing more than a single subject. But if it may be fairly said that the two subjects are so related that they might be embraced within a single act, it is clear that the second provision of the constitution has not been complied with. For the title does not set forth any subject sufficiently broad to cover both of these provisions, but merely one of them, viz, that relating to the graded school.

"The title to a bill need not be an index to its contents, but it must be so broad as to cover all the provisions of the act, and not merely some of its subdivisions. One of the tests applied in the cases, to determine the sufficiency of a title to a bill, is the inquiry whether it fairly gives notice by its terms, to all persons interested, of the subject-matter of the act. If by its title it appears to affect only the residents of a certain locality, while in the body of the bill there are provisions affecting other territory, it has been held that the title is misleading and the act unconstitutional: Beckert v. The City of Allegheny, 85 Pa. 191; Philadelphia v. Ridge Avenue Passenger Railway Co., 142 Pa. 484; Ridge Avenue Passenger Railway

Co. v. Philadelphia, 124 Pa. 223. Where the title of a bill imports one subject, and the bill itself shows an additional subject to be its purpose, the title is misleading and the act unconstitutional: Rogers v. The Mfrs. Imp. Co., 109 Pa. 109; Dorsey's App., 72 Pa. 192; Hatfield v. The Commonwealth, 120 Pa. 395. The title of this bill relates only to Coudersport. Assuming that the act of 1867 had made the warrants in Eulalia township part of Coudersport's school district, the title gives no notice that any legislation affecting the inhabitants of Summit, Abbott or West Branch township was intended. If the act was unconstitutional as to those townships, it cannot be sustained as to Eulalia, for the provisions of the second section are not severable. We cannot assume that the legislature would have annexed the warrants in Eulalia alone.

"In the application of plain and unquestioned principles to a great variety of cases, some conflict naturally arises. The judges who decided the later cases had the advantage of a broader view than those who decided the earlier ones immediately following the adoption of that provision of the constitution. The case of Blood v. Mercelliot, relied upon by the defendants, 53 Pa. 391, was one of the earliest decided after the adoption of this provision of the constitution. It has been repeatedly declared to be upon the very border line; and from the remarks which have been made concerning it in subsequent cases, it is by no means certain that the decision would be repeated were precisely the same facts to be again presented. But it is not decisive of the question before us at all events, while the later cases seem to us to clearly point to the unconstitutionality of the section under consideration.

"As to the right of the plaintiffs to recover back the taxes paid inadvertently, the law seems quite clear. The presumption is that the taxes paid to public officers are applied to public purposes, and taxes so paid cannot be recovered back merely because the law under which they are levied is unconstitutional: Peeble v. The City of Pittsburg, 101 Pa. 304. Where the payment is exacted by duress of the person, or distraint of goods, and is made under protest, thus giving notice to the officers that it will be contested, the law will permit taxes illegally collected to be recovered back; but it never permits such a recovery where the payment was voluntary.

"The facts in this case constitute a voluntary payment. There was no duress and no act of the officers which can be justly said to have misled the plaintiffs. The word 'bond' at the head of the column, in the statement of taxes furnished, simply failed to give information sufficient to enable them to determine whether the taxes in that column were school taxes or not. It furnished no reason for presuming that they were not school taxes, and conveyed no erroneous information. Without making further inquiry, the plaintiffs saw fit to pay the taxes, and this was plainly a voluntary payment.

"But even if otherwise entitled to recover back the taxes paid, the plaintiffs have a complete remedy at law; and it is a grave question whether this claim is so related to the controversy in equity as to justify the disposition of it in this suit, as a part of that controversy. Our conclusions of law are the following:

"1. That the second section of the law, entitled 'A supplement to an act, entitled "An act to enable the board of school directors of the borough of Coudersport, in the county of Potter, to establish and maintain a graded school, approved April 13, 1869,"' approved Feb. 8, 1871, is unconstitutional and void.

"That the assessment of taxes upon the lands of the plaintiffs, described in the bill, by the directors of the school district of Coudersport, was without authority of law. And the threatened sale of said lands by the treasurer of the county would be illegal.

"3. That the payment of $925.65 of school bond taxes, by the plaintiffs, although unintentional, was voluntary, and such payment cannot be recovered back in this suit.

"4. That the plaintiffs are entitled to the injunction prayed for in the bill.

"Upon the whole case, it is considered that the injunction now in force be made absolute and perpetual; that the other relief prayed for in the bill be denied, and that the costs of this proceeding be paid by the school district of Coudersport borough."

Error assigned was above decree.

H. C. Dornan, of *Dornan & Ormerod* and *C. L. Peck*, *Larrabee*, *Lewis & Leonard* with them, for appellants, cited on the question of the title of the act: State Line & Juniata R. R. Co.'s App., 77 Pa. 429; In re Borough of Pottstown, 117 Pa. 538; Millvale Borough v. R. R., 131 Pa. 1; In re Church St., 54 Pa. 353; Lea v. Bumm, 83 Pa. 237; Clearfield County v. Cameron Twp. Sch. Div., 135 Pa. 86; Washington Borough v. McGeorge, 146 Pa. 248; Kelley v. Mayberry Twp., 154 Pa. 440; Holl v. Deshler, 71 Pa. 299; Southwestern Turnpike Co. v. Fletcher, 104 Ind. 97.

The legal rule is to sustain that part of the act of which the title gives notice, though the rest be unconstitutional: Dewhurst v. City of Allegheny, 95 Pa. 437; Allegheny City v. Moorehead, 80 Pa. 118; Allegheny County Home's App., 77 Pa. 77; Rothermel v. Meyerle, 136 Pa. 250; Wynkoop v. Cooch, 89 Pa. 450; McGee's App., 114 Pa. 470; Mauch Chunk v. McGee, 81 Pa. 433; Smith v. McCarthy, 56 Pa. 359; Hatfield v. Commonwealth, 120 Pa. 395; Dorsey's App., 72 Pa. 192; Carothers v. Phila., 118 Pa. 468; LaPlume Borough v. Gardner, 148 Pa. 192; Brown's Estate, 152 Pa. 401; Myers et al. v. Commonwealth, 110 Pa. 217; People v. Lawrence, 41 N. Y. 137; Mahomet v. Quackenbush, 117 U. S. 509; McArthur v. Nelson, 81 Ky. 61; Firemen's Association v. Lounsbury, 21 Ill. 511; Hope v. Gainesville, 72 Ga. 416; Pa. R. R. Co. v. Riblet, 66 Pa. 164; Eby's App., 70 Pa. 311; Coosaw Mining Co. v. State, 144 U. S. 550; Cochran v. Library Co., 6 Phila. 492; Mauch Chunk v. McGee, 81 Pa. 433; Commonwealth v. Butler, 99 Pa. 535; Bosidere v. Bank, 29 Am. Dec. 453.

Henry C. McCormick, *James B. Benson*, *L. B. Seibert* and *Seth T. McCormick* with him, for appellee.—It will be noted that the act of 1871 is a supplement to the act of April 13, 1869. We are therefore construing the act of 1869, writing into it section 2 of the act of 1871: Craig v. Church, 88 Pa. 42; Philadelphia v. Ridge Ave. R. R., 142 Pa. 484; Phœnixville Road, 109 Pa. 44. The title must be so certain as not to mislead: Dorsey's App., 72 Pa. 192; Rogers v. Mfg. Imp. Co., 109 Pa. 109; Union Pass. Ry. Co.'s App., 81* Pa. 91; Beckert v. Allegheny, 85 Pa. 191; Penna. R. R. v. Riblet, 66 Pa. 164.

PER CURIAM, May 20, 1895:

There was no error in entering the decree complained of; and for reasons given in the opinion of the court below it should be affirmed.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

Ezra Trim's Estate. W. P. Trim's Appeal.

Will—Charitable use.

A testamentary disposition for the benefit of the poor of a defined locality is a charitable use.

A devise of land specifically described, and all the residue of an estate, "to go to the benefit of the poor of Eldred Township, Warren County, Pa; to have the use and nothing more . . . . for their benefit and use . . . . and when fully proven up to be managed by the overseers of the poor in said county for the benefit of Eldred Township," is a charitable use, and the trustees are sufficiently designated, notwithstanding the fact that their correct corporate name is not given.

Argued May 7, 1895. Appeal, No. 333, Jan. T., 1895, by W. P. Trim, from decree of O. C. Warren Co., Sept. T., 1893, No. 20, dismissing appeal from register of wills. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Appeal from register of wills.

From the record it appeared that Ezra Trim died July 28, 1893, leaving to survive him only collateral kin. The material portion of his will was as follows:

"As soon after my decease as conveniently may be I give and bequeath unto Each and all of my Legal heirs one dollar a piece after the same is fully paid and Satisfied I Give and bequeath all of my real and personal property including Lands and tenements and all personal Effects to Go to the benefit Of the poor of Eldred Township Warren County Pa to have the use and Nothing more

"Said land Situated in Eldred Township Warren County and state of Pennsylvania and known as the homestead farm on tract No. 144 & 145 making One hundred and seventy acres and

one half acres of Land I also Give and bequeath to the poor of Eldred Township one other piece of Land for their benefit and use Situated in Eldred Township Warren Co Pa Tract No. 194 and when fully proven up to be managed by the overseers of the poor in Said County for the benefit of Eldred Township."

Upon the application of the commissioners of the Rouse estate, who are under the act of April 4, 1866, in effect overseers of the poor for the poor district of Warren county, the register appointed John Brightman, administrator c. t. a. The next of kin appealed from the action of the register in granting letters. NOYES, P. J., filed the following opinion:

"The last will of Ezra Trim gives certain lands specifically described and all the residue of his estate 'to go to the benefit of the poor of Eldred Township, Warren County, Pa; to have the use and nothing more . . . . for their benefit and use . . . . and when fully proven up to be managed by the overseers of the poor in said County for the benefit of Eldred Township.' The register appointed the appellee administrator c. t. a., on the nomination of the commissioners of the Rouse estate. If the residue of the testator's estate is well devised to them in trust, then this was right, otherwise the appeal by the next of kin should be sustained, for if as to the residue he died intestate, the administrator should have been selected from the next of kin.

"A testamentary disposition for the benefit of the poor of a defined locality is clearly a charitable use, and will be sustained even although it would fall under the condemnation of some rule of law if it were a private or merely benevolent disposition. Although the objects of the testator's bounty be not in being, yet if they belong to a class so designated by the testator that its members may be ascertained by means of the testator's description, or, if he has given discretion to some person or body of persons to select them, the gift will be sustained: Witman v. Lex, 17 S. & R. 88. The relief of the poor appears among the 'good and godly uses' recited in the statute 1 Edw. VI. c. 14. 'To the poor of Stratford,' was enough to carry the charitable gift of William Shakspeare to his townsfolk; and the poor of Eldred township, a definite municipality, is certain as words can make anything: Lawrence County v. Leonard, 83 Pa. 207.

"Now, is there any doubt as to the trustees designated by the testator? He has not given their correct corporate name, but he has used terms which describe them perfectly, and are applicable to no one else. They are by express provisions of the act incorporating them, 'the overseers of the poor' in said (Warren) county. The words 'for the benefit of Eldred township,' which the counsel for the appellant treat as part of the description of the trustees, are not so intended, but are plainly a repetition of the terms and purpose for which the overseers are to manage the property. It is true that this disposition will enure to the benefit of the taxpayers, but that is the effect of every benefaction which provides for any of the burdens of government; and it is also true that inasmuch as Eldred township is not a poor district, some complication may arise in the administration of this trust so as to limit its benefits to the inhabitants of Eldred township, but these difficulties cannot prevent the vesting of the estate, nor does it appear that they cannot be overcome, without the application of the doctrine of *cy pres*. But if they cannot, the power to apply it in cases in which the testator's intent is clear and lawful is clearly possessed by the courts of this state, not only as part of their common law power, but by the express provisions of the statute law: Act of April 26, 1855, sec. 10 (P. L. 331); act of May 26, 1876 (P. L. 211).

"Notwithstanding the opinion of Judge PENROSE in Alter's Estate, 4 C. C. R. 558, which from his ability and experience is entitled to great respect, I am not convinced that the act of 1885 (P. L. 259) was intended, or did in fact affect the power of the courts at all. The 10th section of the act of 1855 contains two provisions: That no disposition for charitable uses shall fail for certain defined defects, but that the same shall be carried into effect by the courts 'so far as the same can be ascertained and carried into effect, consistently with law and equity;' and second, that such dispositions so far as they cannot be carried into effect shall be understood to be made subject to be disposed of by the legislature, and, failing such disposition, to go into the public treasury. The act of 1885 repeals the *cy pres* power thus assumed by the legislature which existed only in cases where the courts could not sustain the disposition, and directs that in such cases the estate shall

go to the heirs at law. The commissioners of the Rouse estate are a corporation expressly authorized to receive property by devise, and the purpose of their incorporation was to administer a similar charity. The testator's will, though not elegantly expressed, is not ambiguous or doubtful, nor is his disposition illegal; but on the contrary it is highly meritorious—charitable in the broad and legal sense of the word. It is clearly our duty to sustain it.

"The appeal is dismissed and the decree of the register affirmed at the costs of the appellant.

Error assigned was above decree.

J. H. Donly, for appellant, cited: Lawrence Co. v. Leonard, 83 Pa. 207; 3 Am. & Eng. Ency. of Law, 126, 128; Wildeman v. Mayor, 8 Md. 551; Janey v. Latone, 4 Leigh, 351; Russell v. Allen, 107 U. S. 163; act of 1862, sec. 11, P. L. 407; act of 1864, P. L. 438; Jenks v. Sheffield Twp., 135 Pa. 400; Rouse Est. v. Poor Directors, 118 Pa. 1; act of April 18, 1864, P. L. 438; Woolmer's Est., 3 Whart. 476; Gray's Est., 147 Pa. 75; Zeisweis v. James, 63 Pa. 465: Beekman v. Bonsor, 23 N. Y. 308; Tilden v. Green, 130 N. Y. 20; Alter's Est., 4 Pa. C. C. 558.

W. W. Wilbur of *Wilbur & Schnur*, and *W. M. Lindsey*, of *Lindsey & Parmlee*, for appellee, cited: Witman v. Lex, 17 S. & R. 93: Henry v. Deitrich, 84 Pa. 291; Kinike's Est., 155 Pa. 101; Missionary Society's App., 30 Pa. 434; McLain v. School Directors, 51 Pa. 196.

PER CURIAM, May 20, 1895:

The question involved in this appeal was rightly decided by the learned president of the orphans' court. For reasons given in his opinion, the trust created by the will of defendant's testator for "the benefit of the poor of Eldred Township Warren County Pa" should be sustained.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

168 399
174 627
168 399
193 268
1193 269
168 399
33 SC 317

Eliza A. Hall et al., doing business as the Elk County Bank, Appellants, v. D. C. Oyster et al., doing business as the Ridgway Bank.

Attachment under act of 1869—*Dissolution—Discretion—Appeal—Review.*

An order dissolving an attachment issued under the act of March 17, 1869, P. L. 8, is within the discretion of the lower court, and not reviewable on certiorari and appeal to the Supreme Court, where there is nothing on the record to show an abuse of discretion on the part of the court below.

Argued May 8, 1895. Appeal, No. 332, Jan. T., 1895, by plaintiffs, from order of C. P. Elk Co., Sept. T., 1893, No. 171, dissolving an attachment. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Affirmed.

Rule to dissolve attachment issued under act of March 17, 1869.

The attachment was issued on the affidavit of M. S. Kline, which averred:

"That he is one of the plaintiffs above named; that D. C. Oyster, Alfred Short and C. R. Early, surviving partners late doing business under the firm name of the Ridgway Bank, are justly indebted to the said Eliza A. Hall, Jerome Powell, W. H. Hyde, C. H. M'Cauley and M. S. Kline, doing business under the firm name of the Elk County Bank, in a sum exceeding one hundred dollars, to wit, the sum of forty-seven hundred dollars and ninety-five cents upon a certain protested draft drawn by the said Ridgway Bank upon the American Exchange National Bank of New York city, dated June 21st, 1893, for forty-six hundred seventy-nine dollars and thirty-four cents, with interest from June 21st, 1893, and protest fees $1.30.

"That the said defendants at Ridgway, Pennsylvania, on the said 21st day of June, 1893, obtained from the deponent certain checks, notes and acceptances of the value of forty-six hundred seventy-nine dollars and thirty-four cents and then and there delivered the aforesaid draft to the said plaintiffs in payment thereof, well knowing at the time of the making and

delivering of the said draft that the said defendants had no moneys on deposit or credit at the said American Exchange National Bank of New York city, for the payment thereof. That the said defendants then and there well knew that they were insolvent and unable to pay their indebtedness or said draft and that the same was made and delivered as aforesaid with intent to cheat and defraud the said plaintiffs; and the deponent further says that the said defendants then and there in manner aforesaid fraudulently contracted the said debt of forty-six hundred seventy-nine dollars and thirty-four cents for which this suit is brought. And deponent further says that the said D. C. Oyster and Alfred Short have property, stock, moneys and evidences of debt which they fraudulently conceal, with intent to defraud their creditors, and that they are about to dispose of and remove out of the jurisdiction of this court said property, moneys, stock and evidences of debt, secretly, fraudulently, and with intent to defraud this deponent and the other creditors of the said defendants."

On May 31, 1894, G. A. Rathbun, attorney for the defendants, obtained a rule to show cause why the attachment should not be dissolved.

A large amount of evidence was taken, and the court subsequently made an order dissolving the attachment.

Error assigned was above order.

J. Ross Thompson, *Ames*, *Whitmore & Bible* with him, for appellants.

George A. Allen, *Geo. R. Dixon* and *L. Rosenzweig* with him, for appellees.—The dissolution of an attachment under the act of March 17, 1869, is an interlocutory order, resting in the discretion of the court of common pleas, and not reviewable in this court: Hoppes v. Houtz, 133 Pa. 34; Wetherald v. Shupe, 109 Pa. 389; Black v. Oblender, 15 Atl. Rep. 708; Walls v. Campbell, 125 Pa. 346; Bacon v. Horne, 123 Pa. 452; Froley v. Cent. Fire Ins. Co., 9 Phila. 219; Holland v. Atzerodt, 1 Walker, 237.

PER CURIAM, May 20, 1895:

This so called *appeal* is in fact merely a *certiorari*, and must

be so treated. It brings up for review nothing but the record proper, which does not include the evidence on which the court acted in dissolving the attachment. Under the act of 1869, that action of the court below was a matter within its discretion, and we have nothing before us to show that the discretion was abused: Wetherald v. Shupe, 109 Pa. 389; Black v. Oblander, 15 Atl. Rep. 708; Hoppes v. Houtz, 133 Pa. 34.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

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168 401
22 SC 381
168 401
34 SC 239

St. Mary's Gas Company v. Elk County et al., Appellants.

Taxation—Public corporations—Natural gas companies—Real estate—Public use—Equity—Injunction.

Equity has power to restrain the collection of a tax where there is a want of power to tax, or a disregard of the constitution in the mode of assessment.

A court of equity will restrain by injunction the collection of a tax assessed upon the real estate of a natural gas company organized under the act of May 29, 1885, P. L. 29, where the evidence shows that the land is part of its capital stock upon which it pays a tax to the state and is necessary and indispensable to the company in carrying out the public purpose for which the company was incorporated.

Argued May 8, 1895. Appeal, No. 85, Jan. T., 1895, by defendants, from decree of C. P. Elk Co., Sept. T., 1894, No. 5, on bill in equity. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Affirmed.

Bill in equity to restrain the collection of a tax.

The facts appear by the opinion of MAYER, P. J., which was as follows:

"The plaintiff, the St. Mary's Gas Company, has filed its bill against the county of Elk and the treasurer of said county, avering that it is 'a corporation duly organized and chartered under the act of assembly of May 29, 1885, for the purpose of producing, dealing in, transporting, storing and supplying natural gas for public consumption, and as such is taxed upon its capital stock under the provisions of the 21st section of the act of assembly of June 21, 1889, and supplements thereto.

"'That the St. Mary's Gas Company is the owner of the natural gas in 684 acres of land situate in Ridgway township, Elk county, which is held and used only by the said St. Mary's Gas Company for its corporate purposes, and is wholly included in its capital stock.

"'That the said St. Mary's Gas Company is a public corporation having the right of eminent domain, and that the natural gas in the above lands is necessary and indispensable to the exercise of its corporate rights as a public corporation for the purpose of producing, dealing in, transporting, storing and supplying natural gas for public consumption.

"'That the county of Elk has assessed taxes for local purposes upon the said lands for the years 1890, 1891, 1892, 1893, aggregating the sum of one thousand and twenty-four dollars and fifty cents, which the said St. Mary's Gas Company has refused to pay.

"'That the said T. J. Shaffer, treasurer of Elk county, has advertised, under the provisions of the act of assembly approved March 13, 1815, the sale of said property, at the court house in Ridgway, on the eleventh day of June, A. D. 1894, for nonpayment of taxes above stated.

"'That it is advised and believes and therefore avers that their said property is not liable to taxation by the said county of Elk for local purposes as aforesaid, and that said assessment of taxes is illegal and void.'

"And praying:

"'That the aforesaid assessment of taxes by the county of Elk be decreed to be void and of no effect.

"'That an injunction may issue, temporary until hearing, and perpetual thereafter, restraining the said county of Elk from the assessment and collection of taxes upon the said property, and further, restraining the said T. J. Shaffer, treasurer of said county, from selling the said property for nonpayment of taxes as aforesaid.'

"The defendant has made answer to said bill, which on this hearing is to be regarded as an affidavit, admitting the incorporation of said plaintiff, under the act of May 29, 1885, but denying that it is a public corporation, and averring that the oil and gas in the six hundred and ninety-four acres owned by the said corporation are liable to taxation.

"The St. Mary's Gas Company is a corporation duly chartered and organized under 'An act to provide for the incorporation and regulation of natural gas companies' approved May 29, 1885, and is invested with all the rights, powers and privileges specified in the act. It is authorized by the first section 'to produce, mine, own, deal in, transport, store, and supply natural gas for either light, heat, or both or other purposes, and have all the rights and privileges necessary or convenient therefor.' The tenth section of the act provides that 'The transportation and supply of natural gas for public consumption is hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this act, to furnish to consumers along their lines and within their respective districts natural gas for heat or light or other purposes as the corporation may determine.' And provides further, 'Any and all corporations that is or are now or shall hereafter be engaged in such business, shall have the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas, the right, however, shall not be exercised as to any burying ground or dwelling, passenger railroad station-house, or any shop or manufactory in which steam or fire is necessarily used for manufacturing or repairing purposes, but shall include the right to appropriate land upon or under which to lay said lines and locate pipes upon and over, under and across, any lands, rivers, streams, bridges, roads, streets, lanes, alleys or other public highways, or other pipe lines, or to cross railroads or canals: Provided, In case the pipe lines cross any railroad operated by steam or canal, and in such manner as the railroad or canal company may reasonably direct: And provided further, That any company laying a pipe line under the provisions hereof shall be liable for all damages occasioned by reason of the negligence of such gas company,' etc.

"It is clear from a consideration of the foregoing and other provisions of the act, that companies organized under it are public corporations. In addition to the legislative declaration that the transportation and supply of natural gas for the public consumption is 'a public use,' corporations organized or provided for under the act are required 'to furnish to consumers along their lines and within their respective districts natural gas for heat or light or other purposes, as the corporation may

determine.' They are also invested in the fullest manner with the right of eminent domain and all other powers and privileges necessary for the prosecution of the business for which they are incorporated.

"Where use has been declared to be public by the legislature the courts will hold it such unless the contrary clearly appears. Edgewood Co. Railroad App., 79 Pa. 257; Bankhead v. Brown, 25 Iowa, 540; Concord Railroad Co. v. Greely, 17 N. H. 47; Olmstead v. Camp, 33 Conn. 532.

"But this question has been decided by the Supreme Court in the case of Henry M. Johnston against People's Natural Gas Company, reported in 5 Cent. Rep. page 564, in which it was held: 'That the transportation and supplying of natural gas for public consumption is a public use, and the right of eminent domain granted to corporations by the tenth section of the act to provide for incorporation and regulation of natural gas companies of May 29, 1885, is within the constitutional power of the legislature to grant.'

"It may be proper to state here that no evidence has been adduced by the defendant to show that oil exists in said land or that it is oil territory. On the contrary the evidence of the plaintiff proves that it is not oil territory and that oil has not been discovered upon it, although a number of wells have been drilled. The evidence of the plaintiff shows, and there is no countervailing proof, that the gas in the six hundred and ninety-four acres is necessary and indispensable to it in carrying out the public purposes for which it was incorporated, and is part of its capital stock upon which it pays a tax to the state.

"Being of the opinion that the plaintiff is a corporation engaged in a business of a public interest, and that as the evidence shows the gas in the six hundred and ninety-four acres is essential to the exercise of its corporate franchises for public purposes the exemption from taxation claimed must be sustained.

"'The principle which appears to be recognized in all the cases is that the public works of a corporation, used as such, with their necessary appurtenances and which are essential to the carrying out of the public purposes of such corporation, are exempt from taxation:' West Chester Gas Co. v. Chester County, 30 Pa. 232. The works of gas companies were held

not to be taxable, and the same thing was again decided in Coatesville Gas Co. v. Chester County, 97 Pa. 476. In Scranton v. The Scranton Electric Light and Power Co., it was decided that the property necessary to carry out the corporate purposes of a corporation engaged in business of public interest, is not liable to local taxation where such property is included in the capital stock which pays a state tax: 8 County Court Rep. 626. To the same effect is Lancaster v. Edison Electric Illuminating Co., 8 County Court Rep. 631. 'A public corporation is one which cannot carry out the purposes of its organization without charter rights from the commonwealth. Railroads, canals and gas companies must have the right of eminent domain in order to perform their functions. Their property, which is indispensable to their charter rights, is represented by their capital stock, and as such is taxed specially by the legislature, and the law will not subject it to duplicate taxation by mere inference:' Schuylkill Co. v. Citizens Gas Co., 148 Pa. 162.

"But it is contended by defendant that if the assessment of taxes was illegal, a bill for injunction is not the proper remedy; that the St. Mary's Gas Company should have proceeded in the manner provided by the act of assembly and appealed from the assessment. This contention is untenable. In the case of Banger's App., 109 Pa. 91, the Supreme Court laid down the rule. In that case they said: 'It was urged that a court of equity will not interfere to restrain the collection of taxes but will leave the party aggrieved to his remedy at law. This is true where tax is lawfully assessed, or where the matters complained of are mere irregularities in the valuation or assessment, but where for want of power to tax or disregard of the constitution in the mode of assessment, we have no doubt of the power and the duty of a court of equity to interfere:' St. Clair School Board's App., 24 P. F. S. 256; Wheeler v. City of Philadelphia, 77 Pa. 338; Kitty Roup's Case, 81* Pa. 211.

"In the case referred to by counsel in his brief, Moore v. Taylor, 147 Pa. 481, the property in that case had been exempt for a part of a year, but the exemption ceased and it was then assessed. And it was properly held in that case that, as the property was liable to taxation, the remedy of the party aggrieved was by appeal, and that a bill in equity would not lie.

"The injunction heretofore granted must, therefore, be continued until final hearing."

Error assigned was decree continuing injunction.

W. S. Hamblen and *Thomas H. Murray*, *N. T. Arnold*, *W. W. Barbour* and *Geo. R. Dixon* with them, for appellants.—Plaintiff is not a public corporation: 1 Bouvier's Law Dict. 367; 1 Redf. Rail. Cas., 6th ed. p. 43; Dartmouth College v. Woodward, 4 Wheat. 518; 2 Kent's Com. 275; Railroad v. Berks Co., 6 Pa. 70.

The tax on real estate was properly payable to the county: Lehigh Coal Co. v. Northampton Co., 8 W. & S. 334; E. Penna. R. R. Co.'s Case, 1 Walker, 428; Pa. C. & R. Co. v. Vandyke, 137 Pa. 253; Erie County v. Erie Transportation Co., 87 Pa. 437; Shamokin Valley R. R. Co. v. Livermore, 47 P. 465; Erie R. R. Co. v. Commonwealth, 66 Pa. 84; The County of Erie v. Erie & Western Transportation Co., 87 Pa. 434; P. R. R. Co. v. City of Pittsburg, 104 Pa. 522; County of Erie v. Commissioners of Water Works in City of Erie, 113 Pa. 368; Allegheny Co. v. McKeesport Diamond Market, 123 Pa. 164; Roaring Creek Water Co. v. Girton, 142 Pa. 92.

Equity has no jurisdiction: Hughes v. Kline, 30 Pa. 227; Clinton School District App., 56 Pa. 315; Stewart v. Maple, 70 Pa. 222; Van Nort's App., 121 Pa. 118; Moore v. Taylor, 147 Pa. 481.

Harry Alvan Hall, for appellees.—Equity has jurisdiction: Andrae v. Redfield, 12 Blatchf. 408; Hoffman's App., 10 W. N. C. 401; Riegel's App., 106 Pa. 437.

The real estate is exempt from local taxation: Appeal of the City of Pittsburg, 123 Pa. 374; Scranton v. Scranton Electric Light Co., 8 Pa. C. C. 626; Ridge Turnpike Co. v. Stoever, 6 W. & S. 378; Lehigh C. & N. Co. v. Northampton Co., 8 W. & S. 334; R. R. Co. v. Berks County, 6 Pa. 70; S. N. Co. v. Berks County, 11 Pa. 202; Commissioners of Wayne County v. Canal Co., 15 Pa. 351; Haupt's App., 125 Pa. 211; R. R. Co. v. Sabin, 26 Pa. 245; Commonwealth v. Standard Oil Co., 101 Pa. 145; Fox's App., 112 Pa. 352; Northampton County v. E. P. Ry. Co., 148 Pa. 282.

PER CURIAM, May 20, 1895:

We find nothing in this record that would justify a reversal of the decree continuing the injunction until final hearing of the cause.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

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168 407
168 413

First National Bank of Jamestown, New York, *v.* Anna B. Scofield and Carl W. Scofield, Defendants, Tidal Oil Co., Terre Tenant, Oscar E. Madden, Receiver of Tidal Oil Company, Terre Tenant, Appellants.

Mortgage—Affidavit of defense.

On a scire facias sur mortgage against a married woman, the affidavit of defense averred that the mortgage had been given by her under an agreement with plaintiff: (1) That her liability was to be only that of a guarantor of her husband upon certain notes held by the plaintiff on which her husband was an indorser; (2) that her liability upon the notes and the mortgage in question was to be a mere contingent and conditional one; (3) that certain notes, mortgages and other securities, pledged to the plaintiff bank by her, were to be first collected by it, and applied to the payment of her husband's debt to it; (4) that only in case of a deficiency after enforcing the collection of these notes and other securities was there to be a resort to the mortgage in controversy; (5) that other conditions upon which alone the plaintiff had a right to proceed upon this mortgage had not been performed by it; (6) that the contingency upon which she was to pay her husband's debt had not happened; (7) that the plaintiff had converted certain notes and securities to its own use, and transferred them to another party; (8) that it had taken a conveyance of one of the properties upon which she had a mortgage which had been assigned to plaintiff among the securities transferred to it, and that this property was worth more than the amount of her husband's debt to plaintiff, and it had taken the oil therefrom and not accounted for it. *Held*, that the affidavit of defense was sufficient to prevent judgment.

Argued May 9, 1895. Appeals, No. 391, Jan. T., 1895, and No. 28, July T., 1895, by defendants and the terre tenant, from order of C. P. McKean Co., Oct. T., 1894, No. 176, making absolute a rule for judgment for want of a sufficient affidavit of defense. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Reversed.

Scire facias sur mortgage.

Carl W. Scofield filed an affidavit of defense in which he averred:

"1. That he is a resident of the city of New York and one of the defendants in this action, and that Anna B. Scofield, the other defendant, is his wife; that the terre tenant is the Tidal Oil Company, a corporation existing under the laws of the state of West Virginia.

"2. That this is an action brought in the court of common pleas of McKean county, Pennsylvania, to foreclose a certain mortgage, dated on or about the 13th day of November, 1891, and that the facts connected with the execution and delivery of the said mortgage are as follows:

"On or about the 16th day of September, 1891, the deponent then being liable as an indorser upon certain negotiable promissory notes discounted by the plaintiff for deponent and being at the said time financially embarrassed, Anna B. Scofield, co-defendant herein, at his request and at the request of the plaintiff, entered into a certain contract in writing with the plaintiff, whereby she, the said Anna B. Scofield, undertook, promised and agreed to keep and save the plaintiff, its successor and assigns, free and harmless by reason of any notes or bills receivable held by it for value, upon which the name of the deponent appeared as indorser, or which the plaintiff had discounted for the deponent, and whereby she further guaranteed the payment of such notes or bills receivable held for value by the plaintiff, a copy of which agreement is hereto attached and made part of this affidavit; that, for the purpose of securing the said indebtedness of deponent, she thereby pledged to the plaintiff herein certain promissory notes or bills receivable made by the following named persons, to wit:

F. E. Wood	$ 62,491.25
S. B. Miller	5,000
W. H. Pickett & Co.	5,000
Allen, Coyle & Co.	12,416.34
H. E. Brown	18,416.61
A. R. Blood	11,050
J. A. Waterhouse	4,062.50
Total	$118,436.70

together with certain mortgages given to secure the said several notes respectively, and that only for the purposes aforesaid did the said Anna B. Scofield deliver to the plaintiff possession of the said notes or bills receivable and the said mortgages given to secure the same.

"3. That the plaintiff, among other things, agreed in the said contract that the defendant, Anna B. Scofield, should continue to conduct and carry on her business in a regular way, that she was at that time engaged in the business of oil producing and was the owner of certain oil properties, among them the Bordell farm, so called, described in the mortgage sought to be foreclosed herein; that thereafter, and upon the said 16th day of September, 1891, the said Anna B. Scofield made, executed and delivered another certain mortgage upon the said property, which this deponent thereafter, to wit, upon the 18th day of September, 1891, caused to be recorded in the county of McKean; that, at the said time, and for several weeks previous thereto, both the deponent and the said Anna B. Scofield were ill and in a highly nervous state and altogether unfit to attend to their business, and that, on or about the 20th day of September, 1891, deponent left Jamestown, in the state of New York, and proceeded to Ocean Grove, in the state of New Jersey, for rest and recuperation.

"4. That, during the month of September, 1891, and for many years prior thereto, one Arthur C. Wade, Esq., of the law firm of Cook, Fisher & Wade, Esqrs., of Jamestown, New York, was and had been deponent's confidential and legal adviser and had the full confidence of the deponent; that during the same time, and also during the times hereinafter mentioned, the said Arthur C. Wade was the legal adviser of the said Anna B. Scofield; that, on or about the 13th day of November, 1891, the deponent and the defendant, Anna B. Scofield, being at that time out of health and both suffering from severe attacks of nervous prostration and being entirely unfitted and incapacitated from attending to business of any kind, met the said Arthur C. Wade, at his request, at the Aberdeen Hotel, in the city of New York; that at that meeting the said Arthur C. Wade stated to the deponent and the said Anna B. Scofield that the mortgage executed on the 16th day of September, 1891, hereinbefore referred to, upon the Bordell property, by the de-

fendant, Anna B. Scofield, was void and of no effect; that deponent's creditors were liable at any time to successfully attack it; that the plaintiff did not wish or desire any further security, yet, for the purpose of protecting the property of the said Anna B. Scofield and her equity therein, he, the said Arthur C. Wade, as her legal adviser, and as the legal adviser of the deponent, advised him and her to execute and deliver, on the said 13th day of November, 1891, the mortgage upon which this action is brought, and that the deponent and the defendant, Anna B. Scofield, relied upon and believed the said statements.

"5. That at the time the said Arthur C. Wade, being also and at the same time the agent and attorney of the plaintiff herein, agreed, on behalf of the said plaintiff, that the plaintiff would hold the said mortgage solely for the protection of the said Anna B. Scofield; that thereupon, and relying upon the representations and statements of the said Arthur C. Wade, and with a full confidence in his integrity and honesty, and for the reasons and purposes hereinbefore set forth, and not otherwise, and without any consideration whatsoever in money or moneys worth moving from the plaintiff to this deponent, or to the said Anna B. Scofield, this deponent and the said Anna B. Scofield executed and delivered to the said Arthur C. Wade, as agent for the plaintiff herein, the mortgage upon which this action is brought, in the form and manner in which the said mortgage had theretofore been prepared by the said Arthur C. Wade and at that meeting submitted to the deponent and the said Anna B. Scofield for execution.

"6. That the property covered by the said mortgage was part of the property used and occupied by the said Anna B. Scofield in her business as an oil producer, and that it was not within the contemplation of any of the parties that the plaintiff should have any remedy whatsoever against this property or any other of the oil properties of the said Anna B. Scofield without first exhausting the securities deposited as aforesaid with the plaintiff under the contract hereinbefore referred to; that the plaintiff was and is bound to collect such bills receivable and to apply the proceeds thereof to the liquidation of whatsoever claims they may have against the deponent before they proceed against the property covered by the mortgage herein, but

that the plaintiff has hitherto failed and neglected so to collect the said bills receivable and to apply the proceeds thereof as aforesaid, as in equity and good conscience it ought to do.

"7. That among the said bills receivable so as aforesaid transferred by the said Anna B. Scofield to the plaintiff is a certain line of notes as aforesaid, made by one F. E. Wood, for $62,491.25, secured by a mortgage upon certain property situated in Allegheny county, New York, consisting of about six hundred acres of fee and leasehold oil lands, containing ninety producing oil wells, more or less, and that this property is worth more than the whole of the deponent's liability to the plaintiff; that the said property has heretofore, and before the commencement of this action, come into the possession of the plaintiff herein, and is now in the possession or under the control of it or its agents; that the said property is worth more than the deponent's liability to the plaintiff upon all paper discounted by the plaintiff for the deponent, and, as deponent is informed and verily believes, is available to be applied to the payment thereof and can readily be sold for an amount at least equal to such indebtedness.

"8. This defense is made in behalf of the said Tidal Oil Company, the terre tenant, as well as in the behalf of the defendants named in the writ of scire facias, deponent being a stockholder and director therein."

In a supplemental affidavit of defense C. W. Scofield avers:

"That the notes and securities transferred by the above named Anna B. Scofield to the above named First National Bank, of Jamestown, N. Y., as set forth in the agreement of Sept. 16, 1891, a copy of which is filed with the original affidavit of defense in this case, and made a part thereof, were, as deponent is informed and believes, and expects to be able to prove on the trial of this case, transferred by the said First National Bank of Jamestown, N. Y., to the Fredonia National Bank of Fredonia, N. Y., at a date prior to the bringing of this suit, and up to the time of bringing this action neither of said banks had proceeded to collect, nor to enforce the collection of any of said securities; that the possession of the Allegheny county properties mentioned in said original affidavit of defense was surrendered by F. E. Wood, the then owner, to the said plaintiff for the express purpose of avoiding foreclosure proceedings

under the mortgage, securing the notes mentioned in the said agreement of Sept. 16, 1891, and the proceeds of the oil therefrom is not applied to the payment of the indebtedness of the said Wood on his said notes, nor to liquidate the indebtedness of deponent to the said First National Bank, of Jamestown, N. Y., by either of said banks as deponent is informed and believes, and expects to be able to prove on the trial of this case; that the series of notes sought to be foreclosed, signed by J. A. Waterhouse, were indorsed by deponent and discounted by the said plaintiff before the making of the agreement of Sept. 16, 1891, to wit, on or about the 6th day of August, 1891, and it was not contemplated by any of the parties to this suit that the giving of said mortgage by the said Anna B. Scofield and this deponent was in any wise to affect the terms of said agreement, nor was it to arrange that some other course should be pursued for the best interest of all concerned thereunder, but, on the contrary, it was expressly agreed between the said Anna B. Scofield, this deponent, and A. C. Wade, as attorney for the said plaintiff, that no other course than that prescribed in said agreement should be adopted for enforcing the payment and collection of the securities mentioned in said agreement, except as set forth therein, all of which deponent expects to be able to prove on the trial of this cause."

The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Error assigned was above order.

Samuel T. Neill, R. & H. E. Brown with him, for appellants.—The pledgee in these circumstances is liable to the pledgor for the face value of the securities pledged: Thayer v. Manley, 73 N. Y. 305; Booth v. Powers, 56 N. Y. 22. The duties and liabilities of a trustee are imposed upon the pledgee: Diller v. Brubaker, 52 Pa. 498; Torrey v. Bank, 9 Paige, 649; Persch v. Quiggle, 57 Pa. 247; act of May 22, 1722, 1 Sm. Laws, 138; Cadmus v. Jackson, 52 Pa. 295; Fraley v. Steinmetz, 22 Pa. 437; Mevey's App., 4 Pa. 80; Hosie v. Gray, 73 Pa. 502; Craig v. Parkis, 40 N. Y. 181; Newell v. Fowler, 23 Barb. 628; Moiser v. Waful, 56 Barb. 80; Taylor v. Bullen, 6 Cow. 624; White v. Case, 13 Wend. 543; Mizner v. Spier, 96 Pa.

533; Seiple's App., 11 W. N. C. 392; Twitchell v. McMurtrie, 77 Pa. 383; Lippincott v. Whitman, 83 Pa. 244; Greenawalt v. Kohne, 85 Pa. 369.

Samuel Grumbine, for appellee, cited: Comly v. Bryan, 5 Whart. 261; Marsh v. Marshall, 53 Pa. 396; Peck v. Jones, 70 Pa. 83; Class v. Kingsley, 142 Pa. 636; Endlich on Affs. of Def. sec. 363; Erie v. Butler, 120 Pa. 374; Martin v. Berens, 67 Pa. 459; Reilly v. Daly, 159 Pa. 605.

MADDEN'S APPEAL.

OPINION BY MR. CHIEF JUSTICE STERRETT, May 20, 1895:

Our consideration of the affidavits of defense relied on in this case has led us to a different conclusion from that reached by the learned judge of the common pleas. While some of the averments contained therein are not as clear and specific as they might have been, we think that, considered as a whole, the affidavits fairly and with sufficient clearness present a state of facts which entitles the defendants to a trial by jury. For the purposes of this appeal, it must be assumed that they are prepared to introduce testimony tending, at least, to prove all their material averments. That being so, they should not be deprived of the opportunity of presenting their defense.

In view of the fact that the case goes back for trial, it is neither necessary, nor desirable to refer specifically to the allegations of fact upon which the defendants rely. They are sufficiently set forth in the affidavits; and, assuming them to be true, it is enough to say they are sufficient to carry the case to a jury. The assignments of error are sustained.

Judgment reversed and *procedendo* awarded.

SCOFIELD'S APPEAL.

OPINION BY MR. CHIEF JUSTICE STERRETT, May 20, 1895:

This appeal, by defendants, Anna W. Scofield and her husband, is from same judgment as the Appeal of Oscar E. Madden, receiver, etc., No. 391 of January Term, 1895, in which an opinion, reversing the judgment, etc., has just been filed. Both appeals were argued together, and involve substantially the same question. For reasons, briefly stated in the opinion referred to, the judgment should be reversed not only as to the

terre tenant, represented by the receiver, etc., but also as to these appellants.

Judgment reversed and a procedendo awarded.

R. H. Thayer, Surviving Partner of Thayer Oil Co., Appellant, v. Joseph Seep.

Contract—Parol evidence to vary written contract.

By a written contract defendant agreed to purchase oil from plaintiff at a certain sum per barrel above the market price of National Transit Company Certificate Oil. Plaintiff claimed that the written agreement did not embody the actual terms of the contract between the parties, and that, in addition to the price named in the written contract, defendant was to pay ten cents per barrel for piping the oil. Plaintiff was the only witness who testified in support of this claim. *Held*, that in the absence of another witness in support of plaintiff's claim, or of corroborating circumstances equivalent to the testimony of another witness, plaintiff was not entitled to recover the ten cents per barrel addition for piping.

Argued May 9, 1895. Appeal, No. 292, Jan. T., 1895, by plaintiff, from judgment of C. P. Crawford Co., Sept. T., 1892, No. 120, on verdict for plaintiff. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Affirmed.

Assumpsit to recover the price of oil sold and delivered.

At the trial it appeared that by a written agreement defendant agreed (1) to purchase from the Thayer Oil Company at any time within the period of one year from the date thereof all the merchantable oil run into the custody of the Southwest Pennsylvania Pipe Line, and to pay therefor twenty (20) cents per barrel more than the market price of National Transit Company Certificate Oil at the time when the Thayer Oil Company should elect to sell the same; and (2) to purchase from said Thayer Oil Company from time to time, as said company should elect to sell the same within the period of one year, all of their production from wells and interests in wells then owned or thereafter acquired by them situate in the Washington oil district and known as "Washington County Amber Oil," and to pay therefor eighteen (18) cents per barrel more than the

market price of National Transit Company Certificate Oil at the time of said purchase; and (3) in case the premium upon Washington county oil should, at any time within the period of one year from the date of the agreement, exceed eighteen cents per barrel above the price of National Transit Company Certificate Oil, he would pay the Thayer Oil Company for their oil as high a price as he paid to any third parties for the same kind of oil.

The plaintiff in his statemant claimed that by an oral agreement the defendant agreed to pay the Thayer Oil Company, for the oil produced from their properties named in the written agreement, a sum equal to the price of National Transit Company Pipe Line Certificate Oil, to which should be added ten (10) cents a barrel for piping said oil and any additional sum paid as premium on Washington county oil, but that by fraud and mistake the contract as prepared by the defendant did not contain the agreement as made. R. H. Thayer was the only witness who testified for plaintiff upon this subject. He stated that his understanding of the agreement was that the Thayer Oil Company was to receive from Mr. Seep as high a price for the oil to be delivered in the future as should be paid to any other party, and ten cents per barrel in addition thereto, which sum of ten cents per barrel he stated he understood they were to receive as pipage on the future production as a consideration for abandoning their pipe line.

The court charged in part as follows:

"[In order to justify the court or jury in modifying a contract entered into by the parties, and reduced to writing, it is necessary that the party alleging the fraud or mistake should show, by clear, precise and indubitable evidence, that the contract was as alleged by the party seeking to modify it, and until such evidence is offered the party is not permitted to change or contradict his undertaking and obligation in writing.

"In the present case, after examination of the evidence submitted by the plaintiff, it is the duty of the court to say to you that there is no such evidence as would warrant the court in submitting to you the question whether, as claimed by the plaintiff, there was a parol agreement between him and Messrs. Scheide and O'Day, or between him and Messrs. Scheide, O'Day and Seep, or between him and Mr. Seep, by the terms of which

he was to receive for his firm ten cents per barrel pipage, in addition to the price agreed upon for the oil, including the premium then to be paid.]" [1]

"[In this case, it does not appear to the court, from a consideration of the evidence, that the testimony of Mr. Thayer is supported by evidence, equivalent to the testimony of another witness, to the fact that the parol bargain which he made in Oil City or Titusville, included a stipulation or agreement that he should have ten cents per barrel pipage on the oil, to be run into the line from the oil wells owned by his firm, during the continuance of the contract made on the 17th of July, 1888. For this reason, a principal part of the plaintiff's case is withdrawn from your consideration.]" [2]

Plaintiff's point among others was as follows:

"4. In the present case, there is evidence to submit to the jury of the agreement between the parties, and of the inducement to the plaintiff to sign the contract, and that the contract, as written, does not express the agreement of the parties as to the ten cents per barrel additional price to be paid on account of the abandoning of the plaintiff's pipe line. If the jury find from the evidence that the witness, O'Day, was acting for and in behalf of the defendant, Joseph Seep, in reference to the negotiations of this contract, and that, in such negotiations, he was afterwards joined by W. T. Scheide, who was also acting for the defendant, Joseph Seep, and that those two conducted all negotiations with the plaintiffs prior and up to the signing of the contract, the defendant, Joseph Seep, is bound by the contract which they made, and the reading over of the contract, before it was executed, by the defendant's attorney, if wrongly drawn, did not relieve the defendant from the oral agreement of his agents, if the plaintiff was misled into signing. Answer: So much of this point as states that there is evidence to submit to the jury of the agreement of the parties, and of the inducement of the plaintiff to sign the contract, and that the contract, as written, does not express the agreement of the parties as to ten cents per barrel additional price to be paid on account of the abandonment of the plaintiff's pipe line, is denied. In the opinion of the court there is not sufficient evidence to submit to the jury to pass upon that question. The remainder of the point is affirmed. The court, however,

having instructed you that there is not sufficient evidence to submit to you upon the question of the reformation of the contract, the balance of the point does not become material." [3]

Verdict and judgment for plaintiff for $170.87. Plaintiff appealed.

Errors assigned were (1–3) above instructions, quoting them.

Roger Sherman, for appellant.—Parol evidence is admissible to establish a contemporaneous parol agreement which induced the written agreement, though it may change the written agreement: Ferguson v. Rafferty, 128 Pa. 337; Thomas v. Loose, 114 Pa. 35; School Furniture Co. v. School District, 130 Pa. 76; Glass Co. v. Storms, 125 Pa. 268; Greenawalt v. Kohne, 85 Pa. 369; Phillips v. Meily, 106 Pa. 536. The evidence was conflicting and should have been submitted to the jury: Angier v. Eaton, Cole & Burnham Co., 98 Pa. 594; Prowattain v. Tindall, 80 Pa. 295.

M. F. Elliott, *Thomas Roddy* with him, for appellee.—A written contract cannot be overthrown by the unsupported testimony of one party, contradicted by the oath of the other: Jackson v. Payne, 114 Pa. 67; Jones v. Backus, 114 Pa. 120; North v. Williams, 120 Pa. 109; Stull v. Thompson, 154 Pa. 43; Halberstadt v. Bannan, 149 Pa. 51; Hoffman v. Bloomsburg & Sullivan R. R., 157 Pa. 174.

PER CURIAM, May 20, 1895:

In construing the contract in question, as the same is written, the learned court was clearly right. The only question is whether the testimony—introduced by plaintiff for the purpose of reforming the instrument so as to make it read as he claims the parties intended,—is of that clear, precise and satisfactory character that is required in such cases. We think the learned judge was right in holding that it was not, and hence there was no error in withdrawing it from the consideration of the jury and directing them to render a verdict for the plaintiff in accordance with the contract as written.

Judgment affirmed.

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21 SC 72
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Frank H. Bolton v. Susanne B. Hey et al., Appellants.

Mechanic's lien—Res adjudicata—Judgment.

The judgment of a proper court puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed.

On an appeal from an order refusing to enter a judgment on a scire facias sur mechanic's lien for want of a sufficient affidavit of defense, the Supreme Court construed the agreements between the parties as not conferring the right to file liens. The judgment was affirmed and a plea filed in the lower court. Before the trial the Supreme Court applied in other cases a different rule of construction with a different result to contracts of like tenor and effect. *Held*, that the trial court was bound by the rule laid down by the Supreme Court in affirming the judgment, notwithstanding the different rule laid down in subsequent cases.

Argued Feb. 15, 1895. Appeal No. 263, Jan. T., 1895, by defendants, from judgment of C. P. Delaware Co., June T., 1894, No. 6, on verdict for plaintiff. Before STERRETT, C. J., MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Scire facias sur mechanic's lien. Before CLAYTON, P. J.

The facts appear by the opinion of the Supreme Court.

The court directed a verdict for plaintiff reserving the following question of law:

"Whether the judgment of the Supreme Court, dated March 28, 1892, affirming the judgment of this court, dated the 4th day of November, A. D. 1891, discharging the rule for judgment for want of sufficient affidavit of defense filed to the original scire facias issued on the claim filed in this case of September Term, 1891, No. 172, is a bar to the right of the plaintiff to recover; and, if so, then judgment to be entered for the defendants non obstante veredicto."

The court entered judgment on the verdict. Defendants appealed.

Error assigned, among others, was entry of judgment for plaintiff on the verdict.

Lewis Lawrence Smith, *A. Lewis Smith* with him, for appellants, cited on effect of the decision of the Supreme Court in this case: Marsh v. Pier, 4 R. 288; Brenner v. Moyer, 98 Pa. 278; White v. Kyle, 1 S. & R. 521; Dushane v. Bank, 39 Leg. Int. 280; Chouteau v. Gibson, 76 Mo. 38; Sturgis v. Rogers, 26 Ind. 1; Lucas v. San Francisco, 28 Cal. 591; Wells on Res Adjudicata, sec. 6; Black on Judgments, sec. 527; Chand. on Res Adjudicata, secs. 24, 296, 297.

E. H. Hall, *Robert N. Simpers* with him, for appellee, cited: Cox v. Henry, 36 Pa. 445; Berger v. Long & Stewart, 31 L. I. 373; act of April 18, 1874, P. L. 64.

OPINION BY MR. CHIEF JUSTICE STERRETT, May 27, 1895:

This alias scire facias was issued March, 1894, on the same mechanic's lien on which the original scire facias of 1891 was issued. That case was before us for adjudication two years ago, and is reported in 148 Pa. 156. Aside from the legal effect of our judgment and the subsequent proceedings in that case, the parties, subject-matter of the controversy, etc., in both actions, are precisely the same now as they were then. The original scire facias came here on appeal by plaintiff from refusal of the court below to enter judgment for want of a sufficient affidavit of defense. The sole ground of the refusal was that in the building contract of Oct. 11, 1890, between the defendant Mrs. Hey and the contractor Frank R. Hill, and the supplement thereto of same date, the right to file a lien against the building etc. was waived by the contractor. The sole question in the court below and here was the construction of those written instruments. If, as defendants contended, the contractor had agreed not to file any liens, the plaintiff had no case. The question was a purely legal one. In sustaining the construction given by the court below, this court, in a per curiam opinion by the then chief justice said: "The learned judge of the court below held that the affidavit of defense was sufficient to prevent judgment. In this we think he was right. The case comes directly within the ruling in Schroeder v. Galland, 134 Pa. 277. Indeed, the contract appears to have been drawn with reference to that decision, as its language is identical with the opinion of Mr. Justice GREEN. We adhere to the

law of that case. It follows that the judgment of the court below must be affirmed."

In strict form, the entry of this judgment is not in the words of the act of 1874, P. L. 64. If it had followed the language of the act, it would read thus: "Appeal dismissed at the costs of plaintiff, but without prejudice," etc.; but, it is nevertheless a judgment construing the building contract and supplement thereto, and holding that they in effect contain, inter alia, a covenant, on the part of the contractor, that no mechanic's lien shall be filed against the building. That being the cardinal, and in fact the only question in the case, the judgment was practically conclusive against the plaintiff's right to maintain the action of scire facias on the alleged lien, unless he could avoid its effect by proving a valid subsequent agreement relieving the contractor from the operation of his covenant against filing liens, or something equivalent thereto. Nothing of the kind was ever attempted for the reason doubtless that the covenant never was, in any manner, eliminated from the contract.

Following the adjudication in this court, a plea was filed in the court below, and on June 20, 1892, "judgment of nonsuit against plaintiff" was entered. This was followed by a rule to take off the nonsuit, and on argument, Jan. 3, 1894, that rule was discharged. No exception was taken, and no further proceedings appear to have been had in the original scire facias. The alias scire facias, now before us, was afterwards issued. Defendants' pleas thereto are, nil debet, and three special pleas, viz: (1) The building contract; (2) prior decision of the Supreme Court; (3) entry of nonsuit in the original scire facias; and certain matters of estoppel mentioned in the fourth assignment of error. There being no controversy as to the amount of plaintiff's claim, a verdict therefor was directed and taken subject to the opinion of the court on questions of law reserved. The points on which those questions arose are recited in the first, second and third specifications respectively. Judgment having been subsequently entered on the verdict in favor of the plaintiff, this appeal was taken.

One of the reserved questions presented in the third specification is whether the judgment of this court in the original scire facias, construing the building contract and, in effect,

holding that the contractor bound himself thereby not to file any liens against defendants' building, is a bar to plaintiff's recovery on the alleged lien? We think it is; and the court below should have so held notwithstanding the subsequent ruling of this court in Nice v. Walker, 153 Pa. 123, and more recent cases. As we have already seen, the only question for adjudication in the original scire facias was whether the contractor had substantially agreed with the owner that no liens should be filed. The only way in which that question could possibly be determined was by construing the building contract and supplement thereto. These written contracts between the owner and the contractor were the only evidence of their agreement. They were accordingly construed by the court, and it was then and there adjudged that they did embody a contract against filing liens. That judgment thus became the law of the case, and having never been reversed or set aside, it is still the law of that case, notwithstanding a different rule of construction may have been since applied, with a different result, to contracts of like tenor and effect. As was said by Mr. Justice KENNEDY in Marsh v. Pier, 4 Rawle, 273, 289, the "judgment of a proper court, being a sentence or conclusion of law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed." This case has since been cited with approval in Brenner v. Moyer, 98 Pa. 278, and elsewhere.

In Chouteau v. Gibson, 76 Mo. 38, the Supreme Court of that state, after referring to the fact that they and other courts of last resort have reversed their own rulings when they found that a rule laid down in a former decision was so unfounded in law or so mischievous in its consequences that they felt compelled to overrule it, proceed to say: "But while this may be and is often done, the right of a party to re-agitate and sue again upon the same cause of action adjudged in a case subsequently overruled in another case between other parties, or the same parties upon another cause of action, is concluded and forever gone."

It follows from what has been said, that the judgment in the first scire facias was a bar to plaintiff's recovery in this case, and judgment for defendants should have been entered accordingly.

Judgment reversed, and judgment is now entered, non obstante veredicto, in favor of the defendants and against the plaintiff, on the reserved question specified in the third assignment of error.

Rebecca H. Sloan's Appeal. James Watt's Estate.

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Will—Legacies—Real estate—Residuary estate.

The blending of the real and personal estate in the residuary clause of a will binds the real estate for the payment of legacies by implication, since the "residue and remainder" can only be ascertained after the payment of the debts, legacies and expenses.

Wills—Interest on legacies.

Where the settlement of an estate is delayed by litigation with a person who claims to be the widow of testator, the legatees are entitled to interest at the rate of six per cent on their unpaid legacies notwithstanding the fact that the executors were unable to realize more than four per cent in income from the estate.

In such a case the residuary legatees are in no position to complain, for the estate is charged with the payment of the debts and the pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest in the estate determined.

Will—Charitable gift—Legacies—Codicil.

Testator gave a gift of a sum of money to a charitable institution. Fifteen months afterwards he executed a codicil by which he gave the same sum to a trustee to pay the income thereof to two persons for their lives, and upon their death to pay the principal to the charity. The subject was introduced in the codicil by the words "I hereby annul and revoke the bequest" to the charity, and then followed immediately the words "and instead thereof I give and bequeath" to the trustee, etc. Within one calendar month after the execution of the codicil, testator died. *Held*, that notwithstanding the use of the words "revoke," "annul," and "instead thereof," the codicil did not revoke the bequest to the charity, but simply postponed its time of payment, and that the gift to the charity was therefore not affected by the act of 1855.

Argued March 29, 1895. Appeal No. 118, Jan. T., 1895, by Rebecca H. Sloan, from decree of O. C. Phila. Co., Jan. T.,

1887, No. 202, on exceptions to adjudication. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Exceptions to adjudication.

From the record it appeared that testator, James Watt, died on April 28, 1886. His will is dated Jan. 3, 1885; his codicil is dated April 12, 1886. He left no issue or wife to survive him. Testator by his will gave legacies to the amount of about $100,000. His personal estate amounted to about $65,000. His real estate, not specifically devised, was estimated to be worth about $75,000. The material portions of the will were as follows:

"(14) *Item.*—I give and bequeath to the Presbyterian Orphanage, in the State of Pennsylvania, the sum of seven thousand dollars to build a cottage for a school, and to be named the Findlay Highland Home.

"(18) *Item.*—I give, devise and bequeath the rest, residue and remainder of my estate, real and personal, to include also every legacy and devise aforesaid that may lapse in my lifetime to my said three sisters, and to the survivor or survivors of them, to be equally divided among them, if more than one, share and share alike.

"(21) *Lastly.*—I nominate and appoint the Pennsylvania Company for Insurances on Lives and Granting Annuities, of said City of Philadelphia, to be the executor of this, my last Will and Testament: and I hereby authorize and empower such executor to sell and dispose of all my real estate except the real estate herein specifically devised at public or private sale, whenever said executor will deem it prudent so to do, and to execute and deliver good and valid deed or deeds to the purchaser or purchasers thereof, in fee simple. And the purchaser or purchasers shall not be required to see to the application of the purchase money."

The codicil was as follows:

"Codicil to the last Will and Testament of James Watt, of the City and County of Philadelphia, and State of Pennsylvania, late a miller, and being in ill health, but of sound mind and memory. The said last Will and Testament bears date the third day of January, in the year of our Lord one thousand eight hundred and eighty-five.

"I hereby annul and revoke the bequest of seven thousand dollars to the Presbyterian Orphanage in the State of Pennsylvania, and instead thereof I give and bequeath to the Pennsylvania Company for Insurances on Lives and Granting Annuities, of said City of Philadelphia, the sum of five thousand dollars in trust to invest the same in good security or securities at interest, and to pay half yearly the interest or income of said sum so invested to Jacob Michael, of said City of Philadelphia, late a miller, for and during his natural life, and on and after his decease to pay said principal sum of five thousand dollars to the Presbyterian Orphanage in the State of Pennsylvania aforesaid to build a cottage for a school, and to be named the Findlay Highland Home.

"And I give and bequeath to the Pennsylvania Company for Insurances on Lives and Granting Annuities of said City of Philadelphia the sum of two thousand dollars in trust to invest the same in good security or securities at interest, and to pay half yearly the interest or income thereof to Josephine Halbach, of the City of Reading, in said State of Pennsylvania, widow, for and during her natural life, and from and after her decease to pay said principal sum of two thousand dollars to the Presbyterian Orphanage in the City of Philadelphia aforesaid to build or aid in building said cottage for a school, and to be named the Findlay Highland Home.

"And I desire my said Will to stand confirmed in all other respects."

After the death of the testator, and pending the litigation in the estate, the executor collected $25,000 from rents of residuary real estate.

The court in an opinion by PENROSE, J., entered the following decree:

"And now Nov. 19, 1894, it is ordered, adjudged and decreed as follows:

"1. So much of the items in the account as are rentals received from the residuary real estate, less all credits claimed for the payment of taxes and expenditures by the accountant in connection therewith and commissions claimed thereon, is awarded to the residuary devisees under the will of the decedent.

"2. The sum of $2,947.21 being the net amount in the

hands of the accountant arising from the sale of a part of the residuary real estate by the executors under the power in the will is awarded towards the payment of any amounts due on legacies if the personal estate be insufficient to pay the same as herein decreed, it appearing that such legacies are by the will made a charge on all the residuary real estate of the decedent.

"3. Interest at six per cent per annum from the date of the death of the decedent shall be paid on all legacies given to the accountant in trust, and the amounts computed and here awarded upon the said respective legacies shall be paid directly to the parties beneficially entitled thereto, and not to the accountant as trustee for such parties. Interest shall be paid on all other legacies at six per cent per annum from and after the expiration of one year from the date of the death of the decedent.

"4. The principal of the personal estate shall first be applied to payment of the principal of the several legacies, pro rata, and accumulated income from the personal estate shall be separately applied in a similar manner to the payment of interest on the several legacies.

"5. It appearing that certain payments have been made by the accountant by way of compromise of the claim of Mary Elliott, claiming before the court to be the widow of the decedent, and such payments having been made upon orders upon the accountant given by certain legatees to make such payments and charge the amounts thereof against the distributive shares of the respective legatees, it is directed that in the computation of interest upon the said legacies interest shall cease upon such payments from the date at which the same were made, except in the case of Josephine Cavett (otherwise Holbach), whose order upon the accountant was conditioned upon payment to her of interest to the date at which she shall receive her accrued interest under this decree.

"6. The gift to the Presbyterian Orphanage as modified by the codicil is not void, but stands good and is payable as so modified, pro rata, with the other legacies.

"7. It appearing that the estate has been continuously in litigation until the present time, no penalty is due the commonwealth upon the collateral inheritance tax, and interest is

payable to the commonwealth thereon only to the extent that the accounts show it to have been earned.

Errors assigned were, among others, paragraphs 2, 3 and 6 of decree, quoting them.

Francis Rawle and *Edward Otis Hinkley*, for Rebecca H. Sloan, appellant.—The legacies are not chargeable on the land devised to the residuary legatees: Gallagher's App., 48 Pa. 121; Cook v. Petty, 108 Pa. 138; Penny's App., 109 Pa. 324; Bennett's Est., 148 Pa. 139; Duvall's Est., 146 Pa. 176; Brookhart v. Small, 7 W. & S. 229; Nichols v. Postlethwaite, 2 Dall. 131; Paxson v. Potts, 3 N. J. Ch. 323; Witman v. Norton, 6 Binn. 395; Walter's App., 95 Pa. 305; Van Vliet's App., 102 Pa. 574; Montgomery v. McElroy, 3 W. & S. 370; Hassanclever v. Tucker, 2 Binn. 525; Davis's App., 83 Pa. 348; Brisben's App., 70 Pa. 410; Van Winkle v. Van Houton, 3 N. J. Eq. 172; Paxson v. Potts, 3 N. J. Eq. 313; Thomas v. Rector, 23 W. Va. 26; Read v. Cather, 18 W. Va. 263; Lupton v. Lupton, 2 Johns. Ch. 628; Brill v. Wright, 112 N. Y. 129; Stevens v. Gregg, 10 Gill & J. (Md.) 147; Gridley v. Andrews, 8 Conn. 1.

The existence of a power of sale has no tendency whatever to show an intention of the testator to charge the residuary realty: Perot's App., 102 Pa. 235; Becker's Est., 150 Pa. 524; McClure's App., 72 Pa. 414; Chew v. Nicklin, 45 Pa. 84.

Delay in the settlement of the estate which was wrought solely by the legatee should deprive his legacy of interest: Wickersham's App., 16 Phila. 213; Huston's App., 9 Watts, 472; Vandergift's App., 80 Pa. 118.

The gift to the Presbyterian Orphanage was defeated: Attorney General v. Lord Weymouth, Ambler, 23; 1 Jarman on Wills, 211; Poulston's Est., 11 Phila. 151; Appeal of Lutheran Congregation, 113 Pa. 34; Carl's App., 106 Pa. 635; Hoffner's Est., 161 Pa. 331.

Robert J. Byron and *Augustus W. Bomberger*, for Josephine Holbach and Mary Perry.—Interest should be six per cent per annum from the date of death to time of actual distribution; English v. Harvey, 2 Rawle, 305; Eyre v. Golding, 5

Binn. 472; Hilyard's Est., 5 W. & S. 30; Spangler's Est., 9 W. & S. 135; Washington Brown's Est., 41 Leg. Int. 26; Sergeant's Est., 9 Phila. 346; Townsend's App., 106 Pa. 268; Steiner's Est., 13 Phila. 358; Flickwir's Est., 26 W. N. C. 374; Bird's Est., 2 Pars. 168; King's Est., 32 Leg. Int. 74.

H. S. Prentiss Nichols and *Joseph de F. Junkin*, for Presbyterian Orphanage.—The act of 1885 is in derogation of the common law of the jus disponendi, and its effect is to be strictly confined to that which is within the spirit and reasons as well as its words: Manners v. Philadelphia Library Co., 93 Pa. 165; Appeal of Lutheran Congregation, 113 Pa. 34.

John G. Johnson, for The Pennsylvania Company for Insurance on Lives and Granting Annuities, exr. — Where a testator directs that certain legacies shall be paid, and devises and bequeaths to the residuary beneficiaries merely "the rest, residue and remainder of his estate, real and personal," the latter can take no benefit under his will until the legacies are fully paid.

The residuary real estate was charged with the payment of all amounts due on legacies, not collectible out of the personal estate: Greville v. Brown, 7 H. of L. Cases, 698; Hassenclever v. Tucker, 3 Yeates, 294; Davis's App., 83 Pa. 348.

The pecuniary legatees were entitled to six per centum per annum from the time the legacies were payable.

The effect of the codicil was not to give a new legacy to the Presbyterian Orphanage, but to diminish by $2,000 the legacy given by the will.

SLOAN'S APPEAL.

OPINION BY MR. JUSTICE WILLIAMS, May 27, 1895:

The appellant is one of three residuary legatees under the will of James Watt. The testator made two specific gifts of real estate and several pecuniary legacies amounting in the aggregate to about one hundred thousand dollars. He then gave all the "rest, residue and remainder" of his estate, real and personal, to his three sisters, share and share alike. The personal estate is not sufficient to pay the legacies, and the first question raised by this appeal is over the liability of the real estate for the deficiency. The court below rightly held that

the blending of the real and personal estate in the residuary clause bound the real estate for the payment of the legacies by implication, since "the residue and remainder" can only be ascertained after the payment of the debts, legacies, and expenses. This has been uniformly held in this state: Hassenclever et al. v. Tucker, 2 Binn. 525; Brisben's Appeal, 70 Pa. 405; Davis's Appeal, 83 Pa. 348. The testator died in 1886. His estate was immediately involved in litigation with one of the legatees who claimed to be his widow, and this claim was not finally disposed of until 1894, when a compromise was effected and the claim withdrawn. Pending this litigation the executors were unable to realize more than four per cent in income from the estate. The legatees claim interest at the rate of six per cent on their unpaid legacies and the appellant contends that they ought to receive no more than the estate has actually earned. The learned court below awarded interest at the legal rate. We do not see how it could have done otherwise. After the legacies became due and payable they were matured obligations against the estate, and bore interest, as any other liquidated demands would do at the rate fixed by law. The estate might have consisted of unimproved city property producing no income whatever. In that event, if the contention of the appellant is sound, the legacies would have borne no interest no matter how long they were withheld. It was doubtless to the advantage of the legatees that the claim of the alleged widow should be adjusted, and they may have acquiesced in what seemed a necessary delay in the settlement of the estate, but unless they agree to forego interest or to accept a less rate than that fixed by law, they were entitled to demand payment of principal and interest as soon as it was practicable for the executors to make it. The residuary legatees are in no position to complain, for the estate is charged with the payment of the debts and the pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest in the estate determinable. The remaining question raised by the assignments of error is over the effect of the codicil upon the bequest to the Presbyterian Orphanage. The will was executed on the third day of January, 1885, and contained the following: "Item (14). I give and bequeath to the Presbyterian Orphanage in the State of Pennsylvania the sum of seven

thousand dollars to build a cottage for a school, and to be named the Findlay Highland Home." Some fifteen months later, on the 12th day of April, 1886, he executed a codicil, the sole purpose of which was to postpone the time when the money should be payable to the Orphanage, so that the interest upon five thousand dollars thereof should be payable to Jacob Michael while he lived, and the interest upon the remaining two thousand dollars thereof should be paid to Josephine Holbach, widow, during her natural life, and the principal sum should remain invested pending these lives. For the purpose of making this change the testator made the Pennsylvania Company for the Insurance of Lives and Granting Annuities a trustee, charged with the investment of the money and the payment of the interest to the annuitants until their respective deaths, and thereupon to pay over the respective sums held for the benefit of the deceased annuitants to the Presbyterian Orphanage for the purposes named in the will. The subject is introduced into the codicil by the words: "I hereby annul and revoke the bequest to the Presbyterian Orphanage in the State of Pennsylvania," and then follow immediately the words "and instead thereof I give and bequeath," to the trustee, for the purposes already stated, viz, for investment and payment of interest to the annuitants during the life of each and then for the payment of the principal over to the Orphanage "to build or aid in building said cottage for a school to be named the Findlay Highland Home." Within one calendar month after the execution of the codicil the testator died and the position is now taken that the bequest to the Orphanage is void under the act of 1855. The contention is that the bequest was revoked by the codicil, and the codicil defeated by the statute, so that the seven thousand dollars the testator intended for the construction of the Findlay Highland Home must now go to the residuary legatees. Whether this is so or not depends on the testator's intention. His intention is to be gathered from the codicil as a whole read in the light of the original bequest. Looking at the bequest we find the testator had given the Orphanage the sum of seven thousand dollars to be used for a specific purpose, viz, the erection of a cottage to be used as a school building and to be called by the name of the Findlay Highland Home. This would have been payable at the end of

one year after his own death. The codicil gives the same sum of money, for the same purpose, to be paid on the death of the annuitants. What the testator did, and all that he intended to do, was to change the time for the payment of the bequest so as to give the interest to the persons named in the codicil while they lived. This is not a revocation. The fact that the testator called it by that name does not make it so. Revoke means to recall, to take back, to repeal. Annul means to abrogate, to make void. The codicil did not recall or make void the bequest in any particular except as to the time of payment, and this it changed. It left the donee, the gift, and the purpose to which it was to be applied unchanged. If the codicil did not revoke the bequest then the act of 1855 has no application, and the bequest stands as originally made, changed only as to the time for payment. But again, the testator says that the codicil is to be "instead of" the bequest in the body of the will. This expression excludes the idea of revocation in its technical sense, and is equivalent to a declaration that in such particulars as the codicil differs from the bequest it is to take the place of, or to be instead of, the bequest. 1 Jarman on Wills, 178, states the rule to be that the words "instead of," used in a codicil, are held to mean "instead of so much only as is incompatible with the codicil;" and cites several English cases in support of his statement. The codicil is incompatible with the bequest in nothing except the time of payment, and it therefore takes the place of the bequest, or stands instead of it, only in that particular. What the codicil really accomplishes is to provide a small life annuity for two of the testator's friends by withholding the bequest from the Orphanage during their lives, that the interest upon it may be paid to them in the meantime. It really diminishes the value of the gift to the Orphanage, for the benefit of the annuitants, and so falls within the purview of the rule declared in Carl's Appeal, 106 Pa. 635.

The orphans' court made no mistake in dealing with this question and the decree appealed from is now affirmed. The costs of this appeal to be paid by the appellants.

Appeal of Pennsylvania Company for Insurance on Lives and Granting of Annuities. Watt's Estate.

Wills—Rents from residuary real estate—Power of sale.

A power of sale in a will does not work an immediate conversion of the land as between the executor and the heir or legatee, but the title which accrued on the death of the testator remains in the heir or legatee, until divested by sale made under an order of the orphans' court, or the power contained in the will.

In such a case the executor has no authority to collect the rents accruing from the residuary real estate and to use them as assets of the testator's estate.

Argued March 29, 1895. Appeal, No. 194, Jan. T., 1895, by the Pennsylvania Company for Insurance on Lives, from decree of O. C. Phila. Co., Jan. T., 1887. No. 202, on exceptions to adjudication. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Exceptions to adjudication.

The facts of this case appear in Sloan's Appeal (the next preceding case).

Error assigned was the first paragraph of the decree of the court below, which was as follows: "So much of the items in the account as are rentals received from the residuary real estate, less all credits claimed for the payment of taxes and expenditures by the accountant in connection therewith and commissions claimed thereon, is awarded to the residuary devisees under the will of the decedent."

John G. Johnson, for the appellant.

Francis Rawle and *Edward Otis Hinkley*, for Rebecca E. Sloan, appellee.

OPINION BY MR. JUSTICE WILLIAMS, May 27, 1895:

The question raised by this appeal may be stated thus: Who is entitled to the possession of a testator's real estate after his decease? In the case of an intestate the question would not be regarded as an open one. Upon his decease his personal estate goes to his administrator but his real estate descends to his heirs at law. What persons shall inherit as heirs at law is a question that has been answered differently by the laws of different countries; but when they have been designated they take at once, and in fee, eo instanti, the death of the owner.

The course of descent can be broken or changed only by deed or will, for it is a settled principle of law that the heir cannot be disinherited except by express words or by clear implication. The administrator cannot interfere with the inheritance, and if he goes into possession or receives the rents therefrom he holds the same not as the assets of his intestate but as the agent or trustee of the heir at law: Walker's Appeal, 116 Pa. 419. The same thing is true of an executor. He has no estate in the testator's lands by virtue of his office as executor. If rents accruing after the testator's death come into his hands he cannot apply them to the payment of debts or legacies: Stoops' Estate, 31 P. L. J. 34; Fross's Appeal, 105 Pa. 258. The general rule is therefore that an executor has no right to the possession of the testator's real estate unless it is given him by the will. An executor or an administrator may sell the real estate for the payment of debts or legacies when the necessity for so doing is made apparent to the orphans' court and an order is made by that court authorizing such sale, but until then they have nothing to do with it. The testator may, as the testator in this case did, authorize his executor to make such sale, and such authority appearing in the will renders an order by the orphans' court unnecessary. In that case the executor may judge in the first instance of the necessity for the sale, and he may then proceed to make it. The proceeds then become assets in his hands and he may and must apply them to the payment of debts and legacies. In this case the executor has the rents of the real estate in his hands amounting to about twenty-five thousand dollars, and the residuary legatees ask that it be paid to them. The executor on the other hand claims the right to treat this money as assets and apply it to the payment of legacies. The contention is, as we understand it, that residuary legatees, being entitled to appropriate so much only of the property real and personal of the testator as remains upon the settlement of all demands *against* the estate, cannot take possession of the real estate *until final* settlement has been made and the residue precisely ascertained. But the premises do not support the conclusion. The residuary legatee, like the heir at law, takes the title of the testator upon his death. The title descends under the law to the heir. It comes by gift to the legatee. It comes to both subject to

such incumbrances as have been suffered or imposed by the former owner, and the title of both may be defeated or divested whenever the discharge of such incumbrances requires it. It is the "rest, residue and remainder" only that the heir at law can finally appropriate. The residuary legatee is no worse off. Until actual conversion becomes necessary, the heir, and the residuary legatee as well, is entitled to the possession as an incident to the title, and nothing but a positive provision in the will can deprive him of it. A power of sale does not work a conversion of the land as between the executor and the heir or legatee: Blight v. Wright, 1 Phila. 549; but the title which accrued on the death of the testator remains in the heir or legatee until divested by sale made under an order of the orphans' court, or the power contained in the will. So long as the title remains undivested the right to the possession remains: Erie Dime Savings and Loan Co. v. Vincent, Exr., 105 Pa. 315. If the executor collected the rents under an agreement with the residuary legatees that the amount received should be held as assets, and used in the payment of the pecuniary legacies, this agreement should have been proved and relied on in the court below. No such agreement was shown. It is urged that a power to sell authorizes the executor to take possession, else he could not give possession to the purchaser. The reply is that the residuary legatees do not question his right to take possession for the purpose of making a sale. What they deny is his power to collect the rents and use them as assets of the testator. In this we think they are right, and the learned orphans' court committed no error in sustaining their contention.

The decree is affirmed. The appellant to pay the costs of this appeal.

John Kirby *v.* Philip Fitzpatrick, Appellant.

Party walls—Discretion of building inspectors—Thickness of wall.

The discretion given by the act of Feb. 24, 1721, to the surveyors or regulators whose duties are now performed by the building inspectors, to "regulate the walls to be built between party and party, as to the breadth and thickness thereof," has been modified by subsequent acts forbidding the erection of a wall of less than the prescribed minimum thickness, but it has never been taken away, or otherwise abridged.

A builder, who without a permit erects a party wall of greater thickness than is required by the height and character of the building, cannot place one half of it on the adjoining lot, although the encroachment is within the maximum limit fixed by law. The extent of the use of the adjoining land is within the discretion of the inspectors, and is to be determined by the character and size of the building to be erected.

The building inspectors may in their discretion, because of the nature of the ground or the intended use of the building, or for other reasons, require the erection of a thicker wall without regard to the height of the building. If they do so the right to use more of the adjoining lot up to the maximum limit follows, but the necessity as far as it affects the right is to be determined by the inspectors, not by the builder.

Argued April 4, 1895. Appeal, No. 312, Jan. T., 1895, by defendant, from judgment of C. P. No. 3, Phila. Co., Dec. T., 1888, No. 987, on verdict for plaintiff. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Ejectment to recover a strip of ground in the Thirty-third ward of the city of Philadelphia.

The summons complained that defendant had in his actual possession a certain piece or strip of land situate on the northwesterly side of Kensington avenue, in the Thirty-third, formerly the Twenty-fifth, ward of the city of Philadelphia, at the distance of 53 feet 3 inches, or thereabouts, northeastwardly from the northeasterly side of Hart Lane, containing in front or breadth on said Kensington avenue 12 inches, more or less, and in length or depth between lines parallel at right angles with Kensington avenue 121 feet, 5 inches, more or less. The evidence showed that defendant obtained a permit to build a two-story brick store, 22 feet high, with foundation walls 16 inches and party wall 9 inches thick. Under this permit he

built a foundation wall 18 inches, and a brick wall upon it 13 inches in thickness.

On Jan. 17, 1894, the jury found the following special verdict: "The jury find a verdict for the plaintiff. They specially find that the upper part of the brick wall erected by the defendant as and for a party wall is upon the plaintiff's ground 4½ inches; that the lower part of said brick wall encroaches upon the plaintiff's ground 1¾ inches, and that the stone or foundation wall extends over on plaintiff's ground 12 inches beyond the party line."

This special verdict was subsequently amended by agreement of counsel with respect to the distance which the stone foundation wall of defendant's building extended over the line on to the plaintiff's lot, so as to give the distance of the foundation wall as being 9 inches beyond the party line, instead of 12 inches. Upon this special verdict judgment was entered for the plaintiff Feb. 9, 1895.

Errors assigned were as follows:

(1.) The learned court erred in directing a verdict for the plaintiff, inasmuch as it deprived the appellant of the width of foundation and party wall allowed by statute.

(2.) The special verdict and judgment thereon is too vague and indefinite, and is not in accordance with the writ or the evidence, and is not susceptible of execution by habere facias.

(3.) Upon the special verdict as amended judgment should have been given in favor of the defendant, inasmuch as the widths of walls found to have been erected are allowed by statute.

(4.) Because said verdict and judgment thereon is against the law.

Frederick J. Shoyer, for appellant, cited: Evans & Watson v. Jayne, 23 Pa. 34; Godshall v. Mariam, 1 Binn. 352; Monroe v. Conroy, 1 Phila. 441; Gordon v. Milne, 2 W. N. C. 513; Morris v. Balderston, 2 Brew. 459; Roudet v. Bedell, 1 Phila. 366; Deringer v. Augusta Hotel Co., 155 Pa. 609; Bowers v. Supplee, 3 W. N. C. 22; act of May 7, 1855, P. L. 464; McCall v. Barrie, 15 W. N. C. 28; Rosenthal v. Ehrlicher, 154 Pa. 396.

Alex. Simpson, Jr., for appellee, cited: Roberts v. Bye, 30 Pa. 377; act of Feb. 24, 1721, 1 Sm. L. 124; Bowers v. Supplee, 3 W. N. C. 22.

OPINION BY MR. JUSTICE FELL, May 27, 1895:

The controversy which gave rise to this action relates to the right of the defendant in the construction of a party wall. The parties own adjoining properties on Kensington avenue, each eighteen feet wide. The defendant made application to the building inspectors for and obtained a permit to build a two-story brick store, twenty-two feet high, with foundation walls sixteen inches and party wall nine inches thick. Under this permit he built a foundation wall eighteen inches and a brick wall upon it thirteen inches in thickness. The center of this wall is on the dividing line between the properties, and consequently one half of it rests upon the plaintiff's land. The right under the circumstances to construct a wall of this thickness is the subject of controversy, and it seems to depend upon the question whether a builder who without a permit erects a party wall of greater thickness than is required by the height and character of the building can place one half of it on the adjoining lot, although the encroachment is within the maximum limit fixed by law.

The earlier legislation upon the subject fixed no limit to the right of encroachment in the construction of a party wall. The act of Feb. 24, 1721, conferred upon the surveyors or regulators a discretion to determine the thickness of party walls, one half of which could be placed upon the adjoining lot. The discretion given to the surveyors was unchanged until a minimum thickness of nine inches for a party wall was fixed by the act of 25th April, 1852. The act of 2d February, 1854, sec. 27, gave the surveyors power to "finally decide upon all questions of party lines, the positions and thickness of party walls" under the statutes then in force. The act of 7th May, 1855, first limited the right of encroachment, and fixed the extent to which an adjoining lot could be used in the construction of a party wall by a proviso to the 8th section as follows: "provided any lot of the width of sixteen feet or less shall not be encumbered by more than nine inches of the stone foundation wall, or more than four and a half inches of the brick wall, nor in any

case shall any party wall be placed on the adjoining lot more than ten inches for the stone wall or more than six and a half inches for the brick wall." The same act fixed the minimum thickness of party walls, which was to be determined by the height and width of the building. The act of 11th April, 1856, eliminated the width of a building as a factor in determining the thickness of a party wall, and left it to be regulated by the height alone. This is substantially the legislation upon the subject up to the time of the passage of the act of 3d June, 1893, which need not be considered, as it is subsequent to the cause of action.

The discretion given by the act of 1721 to the surveyors or regulators, whose duties are now performed by the building inspectors, to "regulate the walls to be built between party and party as to the breadth and thickness thereof," has been modified by subsequent acts forbidding the erection of a wall of less than the prescribed minimum thickness, but has never been taken away or otherwise abridged. The act of 1855, sec. 6, requires the person desiring to erect a building to make application to the inspectors and to furnish "a written statement of the proposed location, the dimensions and manner of construction of the proposed edifice" and other particulars, and the granting of a permit to build in the manner described in the application is within the discretion of the inspectors.

The thickness of a party wall and the extent to which it may encroach upon an adjoining lot has never been left to the discretion of the builder. Under the act of 1721 both were left to the discretion of the regulators, and under the later acts the discretion of the inspectors has been limited so that a lot sixteen feet or less in width may not be encroached upon more than nine inches for a foundation and four and a half inches for a brick wall, and so that in no event shall the encroachment be more than ten inches for the stone and six and a half for the brick wall. Within these limits the right of encroachment is to be fixed by the inspectors, not by the builder. This right is statutory. It is not a right at any time and for any purpose to use the land of another, but only for the purpose and in the manner provided. The extent of the use, subject to the limitations imposed, is to be determined by the character and size of the building to be erected, and is within the discretion of the

inspectors. The builder should not be permitted to take more of his neighbor's land than he needs for the purpose of his building. The whole system of party wall legislation rests upon the principle of mutuality of burdens and benefits. If because of the height of the structure a party wall of greater thickness is required the encroachment may extend to the full limit. If the structure requires the support of a party wall of only the minimum thickness the right of encroachment is limited to eight inches in the foundation and four and a half inches in the superstructure.

The building inspectors may in their discretion because of the nature of the ground or the intended use of the building, or for other reasons, require the erection of a thicker wall without regard to the height of the building. If they do so the right to use more of the adjoining lot up to the maximum limit follows, but the necessity as far as it affects the right is to be determined by the inspectors, not by the builder.

The judgment is affirmed.

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James Collins Jones, Trustee, v. Beverly English & Son. S. Strouse & Co.'s Appeal.

Henry J. Braker v. Beverly English & Son. S. Strouse & Co.'s Appeal.

Judgment—Issue to determine validity of judgment—Attachment under act of 1869.

On an application by an attaching creditor for an order upon the sheriff to pay into court the proceeds of a sheriff's sale, and for an issue to determine the validity of the judgment under which the sale is made, the findings of the lower court are entitled to the greatest weight, and will not be set aside by the Supreme Court except for manifest error.

Where several executions are prior in lien to an attachment under the act of March 17, 1869, and one of the executions is under a judgment, the validity of which is not disputed, and the amount of which is larger than the proceeds of the sale, the attaching creditor has no standing to have the money paid into court, as such action would not benefit him, and would seriously prejudice the rights of the owner of the judgment entitled to the fund.

Argued April 8, 1895. Appeals, Nos. 232 and 233, July T., 1894, by S. Strouse & Co., from orders of C. P. No. 1, Phila. Co., March T., 1894, Nos. 613 and 614, discharging rules to show cause why proceeds of sheriff's sale should not be paid into court and feigned issues awarded to test the validity of the judgments. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Petition for order on sheriff to pay money into court and for issues to determine the validity of certain judgments.

From the record it appeared that appellants on March 29, 1894, issued an attachment under the act of 1869, and attached the stock of goods and other personal property of the defendants. Prior to the date of the attachment this property had been levied upon under sundry writs of fieri facias, issued on March 21, 1894, upon four judgments. The judgment in favor of James Collins Jones, trustee, was for $8,850, of which the validity of $8,000 was not disputed. The amount realized by the sale was about $6,000. The petitioners alleged fraud in the action of defendants in confessing the judgments.

The court after hearing testimony discharged the rule for the payment of the fund realized from the sheriff's sale into court and for the awarding of feigned issues to determine the validity of the judgments in dispute.

Error assigned was above order.

John Sparhawk, Jr., for appellants.—If any one of these judgments is successfully attacked, the proceeds of the sheriff's sale applicable to such judgment will not go to the creditor next in order of lien, but to the attaching creditor, who successfully impugns its validity and sets it aside: Shulze's App., 1 Pa. 251; Schick's App., 49 Pa. 380; Brown v. Parkinson, 56 Pa. 336; Henderson v. Henderson, 133 Pa. 399; Schwartz & Graff's App., 21 W. N. C. 246.

James Collins Jones, *Edward L. Perkins* and *Lewin W. Barringer* with him, for appellee.—Appellant has no standing to contest the validity of the judgments or to have the fund paid into court: Shulze's App., 1 Pa. 251; Schick's App., 49 Pa. 380; Jacoby's Est., 67 Pa. 434; Henderson v. Henderson, 133 Pa. 399; Fowler's App., 87 Pa. 449.

JONES v. ENGLISH.

OPINION BY MR. JUSTICE FELL, May 27, 1895:

The appellants caused attachments under the act of 1869 to issue against the property of the defendants and obtained rules upon the plaintiff and other execution creditors to show cause why the funds realized by the sheriff's sale of the defendants' property should not be paid into court and issues awarded to determine the validity of the judgments. Depositions, which cover ninety pages of the paper-book, were taken, and after hearing the rules were discharged. The appeal is from this action of the court.

It would require very clear evidence of error to justify a reversal of the order made. In reaching conclusions as to the facts the learned judges who heard and decided the cases in the Common Pleas have advantages which we have not, and their findings are entitled to the greatest weight and should not be set aside except for manifest error.

The facts which appear on the face of the proceedings are conclusive against the appellants. Their only standing was that of attaching creditors. There were four executions prior in lien to their attachment. These executions were for an aggregate amount of over $20,000, and the fund realized by the sheriff's sale was but $6,000. One of the judgments was for $8,850, and to the amount of $8,000 it was not impeached. The fund in the hands of the sheriff was not sufficient to pay this judgment, and whatever success the appellants might have in attacking other judgments they would not be entitled to take any part of the fund. There was then no reason why the money should have been paid into court upon their application. It would not have benefited them, and it would have seriously prejudiced the rights of the owner of the judgment entitled to the fund.

The order of the court is affirmed at the cost of the appellant.

BRAKER v. ENGLISH.

OPINION BY MR. JUSTICE FELL, May 27, 1895:

For the reason stated in the opinion in Jones, Trustee, v. English & Son, the order of the court in this case is affirmed at the cost of the appellant.

Petition of Citizens of Glade Township for Annexation to the Borough of Warren. Schultz's Appeal. Beaty's Appeal.

168 441
168 445

Boroughs—Annexation of territory—Remonstrances—Evidence.

In proceedings for the annexation of territory to a borough, a petition of citizens containing remonstrances against the inclusion of their lands in the territory proposed to be annexed is not evidence, and it is proper for the court to refuse leave to send the same before the grand jury for their consideration.

In such a case the petitioner's lands cannot be excluded where the effect of the exclusion would be to leave a portion of the township lying between the two ends of one of the principal streets of the borough after annexation.

Argued May 10, 1895. Appeals, Nos. 23 and 24, July T., 1895, by John Schultz et al. and by O. W. Beaty, from order of Q. S., Warren Co., Sept. T., 1894, No. 29, in proceedings to annex territory to a borough. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and FELL, JJ. Affirmed.

Petition for the annexation of a portion of Glade township to the borough of Warren.

From the record it appeared that a remonstrance in the form of a petition was filed by certain citizens objecting to the inclusion of their land in the proposed annexation.

The following motion was made:

"And now, Sept. 5, 1894, motion on the part of O. W. Beaty, D. W. Beaty and others, who have petitioned the court to be excluded from the limits of the territory proposed to be annexed to the borough of Warren, for leave to send before the grand jury their several petitions to be excluded and their witnesses in support of such petitions."

The court made the following order:

"September 5th, 1894, the Court deeming the matter improper for determination by the Grand Jury, the motion is denied, but without prejudice to the right of the petitioners to show any facts affecting the expediency of the proposed annexation to the Grand Jury. To this action the petitioners by their counsel at the time except, and bill sealed." [1]

The grand jury reported in favor of the proposed annexation.

The following exceptions were filed to the report of the grand jury:

"1. The learned court erred in not submitting a petition or remonstrance of said O. W. Beaty to go before the grand jury for their hearing and recommendation. [2]

"2. The learned court erred in restricting the consideration of the grand jury to the question of recommending in favor of or against annexation of the territory described in the petition, without permitting them the discretion to exclude any portion of the lands described in the petition, if in their judgment the exclusion of said lands was expedient. [3]

"3. The learned court erred in not permitting the grand jury, in case they thought it expedient so to do, to exclude the lands of O. W. Beaty or any other lands from the limits of the territory to be annexed to the borough of Warren. [4]

"4. The premises in the petition of O. W. Beaty are farm lands and should be excluded from annexation to the borough of Warren. [5]

The court overruled the exceptions in an opinion by NOYES, P. J., which was in part as follows:

"[There is no law authorizing the court to change the boundaries set forth in a petition for the incorporation of a borough, or to change its limits, except the act of April 1, 1863. And this does not apply to a case like the present but only to applications for incorporation. Moreover, it is the court which is to judge of the expediency of excluding farm lands under the provisions of the act of 1863. To submit the question to the grand jury would be to deprive the court of the discretion which the legislature plainly intended it should exercise. The court possesses a discretion to grant or refuse the application, but it cannot grant something different from what the petitioners ask. The application of the residents of the northern end of the territory, described in the petition, to be excluded, is clearly beyond any power possessed by the court in any case. The petitions of O. W. Beaty, D. W. Beaty, and others, to have their individual properties excluded as farm lands are not within the powers of the court in the present case; but even if they were, we could not grant them, for the reason that these properties manifestly constitute a part of the village of Glade, and could not be ex-

cluded without leaving a portion of Glade township lying between the two ends of one of the principal streets of the borough, as it would be after annexation.]" [7]

Errors assigned were (1) ruling on evidence; (2–5) refusing to sustain exceptions to report of grand jury, quoting exceptions; (6) in holding that the court had no authority to exclude the petitioner's lands as farm lands from the territory sought to be annexed to the borough of Warren; (7) portion of opinion as above, quoting it.

D. I. Ball, *C. C. Thompson* with him, for appellants, cited: Act of April 1, 1834, P. L. 163; act of April 3, 1851, P. L. 320; McFate's App., 105 Pa. 326; Black v. Tricker, 59 Pa. 17; act of June 11, 1879, P. L. 150; act of May 17, 1883, P. L. 36; act of April 1, 1863, P. L. 200.

W. W. Rice, of *Hinckley & Rice*, *W. V. N. Yates* with him, for appellees, cited: Act of June 11, 1879, P. L. 150; Camp Hill Borough, 142 Pa. 516.

SCHULTZ'S APPEAL.

PER CURIAM, May 27, 1895:

This proceeding was under the 2d and 3d sections of the act of June 11, 1879, entitled "A supplement to an act for the regulation of boroughs, approved the third day of April Anno Domini one thousand eight hundred and fifty-one," P. L. 150. The record shows that the proceedings, from beginning to end, are regular and in strict conformity with all the essential requirements of the act; and, unless there be substantial merit in one or more of the specifications of error, the decree, based on the findings of the grand jury and subsequent approval thereof by the court, should not be disturbed.

The first four specifications, relating to the refusal of the court to permit remonstrances to be laid before the grand jury, may be considered together. Some of the appellants presented petitions, remonstrating against the inclusion of their lands in the territory proposed to be annexed, etc., and moved the court for leave to send the same before the grand jury for their consideration. The court, considering these papers incompetent

as evidence, or for any purpose, denied the motion, "but without prejudice to the right of the remonstrants to show any facts, affecting the expediency of the proposed annexation, to the grand jury." This conceded to the remonstrants everything they were entitled to. The act after specifically prescribing the form, etc., of application for annexation "of any lots, out-lots or other tracts adjacent to a borough," provides that the court "shall cause the application to be laid before the grand jury, and if a majority of said grand jury, after a full investigation of the case shall find that the conditions prescribed by the act have been complied with, and shall believe that it is expedient to grant the prayer of the petitioners, they shall certify the same to the court, which certificate shall be entered of record, and may be confirmed by the court." The "full investigation of the case" that the grand jury is thus required to make must, of course, be conducted according to the ordinary rules of evidence. Recitals and allegations of fact, contained in remonstrances, promiscuously signed, are not competent evidence of the facts in regard to which it is made the duty of the grand jury to inquire. There is no merit in either of said specifications.

The sixth and seventh specifications relate to the learned judge's expression of opinion that, in cases such as this, the court had no authority to exclude the appellant's lands from the territory proposed to be annexed, etc. Without pausing to inquire whether he was right or wrong in that regard, it is very evident that appellants were not injured thereby, because in that part of his opinion recited in the seventh specification, the learned judge assuming, for the purpose of argument merely, that he had the power to exclude said lands, says he could not do so, "for the reason that these properties manifestly constitute a part of the village of Glade, and could not be excluded without leaving a portion of Glade township lying between the two ends of one of the principal streets of the borough, as it would be after annexation." It thus appears that if he had been ever so certain as to his authority to exclude the lands in question, he would not have done so for the very good and satisfactory reason above stated. There is no merit in the sixth and seventh specifications; nor is there anything in either of the other specifications that requires further notice. We

find no error in the record that would justify a reversal of the decree.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

BEATY'S APPEAL.

PER CURIAM, May 27, 1895:

This appeal is from the same decree as Schultz et al.'s appeal, in No. 23 of July term, 1894, in which an opinion has just been filed. Both cases were argued together and involve substantially the same questions. For reasons briefly given in the opinion referred to, the decree, as to these appellants, should also be affirmed.

Decree affirmed and appeal dismissed with costs to be paid by appellants.

Buffalo Township Poor District *v.* Mifflinburg Borough Poor District, Appellant.

Poor laws—Settlement—Master and servant.

A settlement by hiring for a year is not lost by the fact that the servant has absented himself for a month or more from the service without the consent of the master, if the master receives the servant back and continues the payment of his wages.

Argued May 13, 1895. Appeal, No. 40, Jan. T., 1895, by defendant from judgment of Q. S. Union Co., March Term, 1892, No. 21, on appeal from order of removal. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Appeal from order of removal.

MCCLURE, P. J., found the facts to be as follows:

"1. Barbara Stees, an unmarried woman, above seventy years of age and childless, became chargeable as a pauper upon the poor district of the township of Buffalo, Union Co., Pa.

"2. An order of removal was obtained by the overseers of the poor of said district and she was removed to the borough of Mifflinburg, in said county of Union.

"3. From this order of removal the overseers of the poor of

the borough of Mifflinburg appealed on the 14th day of March, 1892, to the court of quarter sessions of Union county.

"4. Barbara is a daughter of John Stees, was born in Limestone township, Union county, lived with him for some years, went to Jersey Shore and other places, returned home to her father's in said township and was living with him at his death in 1855.

"5. Barbara, as described by the witnesses, is obstinate and spiteful, spunky and stubborn; she is eccentric, of indifferent disposition, is not strong intellectually, but of sufficient mental capacity to make a contract for hire as a domestic servant. There was no change in her mental condition from 1857 to 1868, to which period this finding refers.

"6. In the year 1857 Barbara entered into the family of John M. Taylor, then living at White Springs, in the township of Limestone aforesaid, under a verbal contract for hire as a domestic servant, she to receive fifty cents per week for her services—and remained in said service under said contract in Limestone until the spring of 1860, when Taylor and his family moved to Mifflinburg, taking Barbara with them.

"7. On the 17th of February, 1861, the orphans' court of Union county appointed James Crossgrove trustee of the estate bequeathed to her by her father. Crossgrove was not a trustee or committee of her person, but assuming to act as such ratified the contract then existing between Barbara and John M. Taylor (see Mrs. Taylor's answer to the 5th interrogatory) and received her wages.

"8. Barbara did the rough work about the house of Taylor, washing, ironing, scrubbing, etc., and did not leave his service permanently until 1868.

"9. From the spring of 1860 to the year 1868 she was in the service of Taylor in Mifflinburg as a domestic under the contract for hire. She was, however, absent at one time several months, at her sister's (Mrs. Bolander's), at another time at Mrs. Shriner's (another sister), for several months, and made a number of visits to Samuel Stees for a day or two. She went away without the knowledge or consent of Taylor, and he did not pay her for the weeks she was absent.

"10. There was not a whole year during the period from 1860 to 1868 Barbara lived with Taylor that she did not go

away and stay a day or two. This happened every month or two. She went without Taylor's consent, but he always received her when she returned, and the service and pay went on as before.

"11. Barbara was self supporting until she left Taylor's, after that she was supported by her trustee under the provisions of her father's will until the fund was exhausted in 1888, when she became a charge on Buffalo township.

"With the above findings of facts it would seem that the settlement of the pauper is not difficult of solution.

"It is contended, however, by counsel for Mifflinburg, that by reason of her mental incapacity Barbara could not acquire a settlement otherwise than by derivation from her father; and further, that there was but a hiring by the week and that Barbara did not continue in the service of Taylor for one whole year, as required by section 9 of the act of 13th June, 1836. Barbara is not an idiot, nor can she be considered insane. While eccentric and irritable, obstinate and spiteful, she had sufficient mental caliber to make and execute a contract for hire as a domestic servant. This is conclusive of the first contention and we think the last is without foundation in law.

"Under our statute it is not necessary that the contract for hire be for a year. The essential element is the continuance in service for one whole year, and this may be under one or more contracts: Heidelburg v. Lynn, 5 Whart. 430; Lewistown v. Granville, 5 Barr, 283.

"That Barbara was away a day or two every month or so without the consent of her master did not terminate the service or prevent her acquiring a settlement in Mifflinburg, where the services were rendered. His taking her again under the same contract, paying her the same wages, purged the absence. In Beccles and Lewistoff, 3 Burns' Just. 447, where a man was hired as a blacksmith, and allowed by his master to work for another, the blacksmith getting the benefit of it and the master deducting by his consent the proportion of his wages for the time he was away, the court say, 'Service by the master's consent with another person is service of the master. But in this case, if it had been without the master's consent, yet the absence had been dispensed with by the master's taking him again.' The order of the sessions that no settlement was gained was quashed.

"A person hired for a year with leave of absence for a day tarried three, then returned and the master took him into his service as before. It was objected that his staying without leave was a desertion of the service and the time he stayed away takes so much off from a complete service for a year. But, by the court, 'This will not prevent a settlement, for the master's taking him again is a purgation of the offense, and no interruption of his service:' Rex and Islip, 1 Strange, 423; 3 Burns, 448. See also Hamburg v. Fordsburg, 3 Burns' Just. 448. 'There is no necessity of an actual service upon every day of the year. The master can always dispense with it. He can give leave of absence. Nay, if the servant is absent without leave, in the middle part of his year, such absence may be purged, as it has been termed, by the master receiving him again; that is, the subsequent consent of the master ratifies the action done.' Lord MANSFIELD in St Margaret's Westminster and Richmond Burrows, Sec. Cross, 780, 3 Burns, 455.

"We are accordingly of the opinion that there was a contract for hire as a servant and a continuance in such service for one whole year within the meaning of the statute. It follows that a settlement was thereby gained by Barbara in Mifflinburg, and that the order of removal must be confirmed.

"Sept. 8, 1894, it is ordered that the appeal be dismissed and the order of removal confirmed, and it is further ordered, adjudged and decreed that the overseers of the poor of the borough of Mifflinburg pay the costs of this proceeding, and pay to the overseers of the poor of the township of Buffalo their reasonable charges for the support and maintenance of the pauper."

Error assigned among others was above order.

Samuel H. Orwig, Joseph C. Bucher with him, for appellant.—There must be a hiring for a year and service for that period to give a settlement: Heidleburg v. Lynn, 5 Whart. 430; Lewistown v. Granville, 5 Pa. 283; Shippen v. Gaines, 17 Pa. 38.

J. M. Linn, P. B. Linn with him, for appellee.—The hiring need not be for a year. It is sufficient if the service be for a year under contract of hiring: Briar Creek Twp. v. Mount

Pleasant Twp., 8 Watts, 431. Absence may be purged by the master taking the servant back again: Beccles v. Lowistoft, 3 Burns' Just. 447; St. Margaret's Westminster and Richmond Burrows, 3 Burns' Just. 454; Hamburg v. Fordsburg, 3 Burns' Just. 447; Byberry v. Oxford, 2 Ashmead, 9; Fayette Twp. Overseers v. Fermanagh Twp. Overseers, 11 Pa. C. C. Rep. 70. The court should have been asked to answer the points submitted: Cambria County v. Madison Twp., 138 Pa. 109; Lower Augusta v. Selinsgrove, 64 Pa. 166; Montoursville Borough v. Fairfield, 112 Pa. 99; Warsaw Twp. v. Knox Twp., 107 Pa. 301.

PER CURIAM, May 27, 1895:

A careful examination of the record in this case has failed to convince us that there is any substantial error in the learned judge's findings of fact or in his conclusions of law. There is nothing in either of the twenty-two specifications of error that requires discussion. For reasons given by the learned president of the court below the decree should be sustained.

Decree affirmed and appeal dismissed with costs to be paid by the appellant.

Daniel D. Young v. Frank F. Colvin, Appellant.

Justice of the peace—Appeals—Costs—Corporations.

A corporation, other than municipal, on appealing from the judgment of a justice of the peace, must give bail absolute for the payment of debt, interest and costs on affirmance of the judgment, as provided by the acts of March 22, 1817, sec. 4, P. L. 128, and March 15, 1847, sec. 1, P. L. 361.

Argued May 13, 1895. Appeal, No. 164, July T., 1894, by defendant, from judgment of C. P. Bedford Co., April T., 1893, No. 117, on scire facias sur recognizance on appeal from a justice of the peace. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Scire facias sur recognizance on appeal from the judgment of H. C. Davidson, Esq., a justice of the peace.

LONGENECKER, P. J., filed the following opinion:

"On or about the 23d of November, 1889, a charter was granted and letters patent issued by the commonwealth of Pennsylvania to a corporation under the name and style of the Pennsylvania and West Virginia Railroad Company, to build a railroad in the counties of Bedford and Blair. On the 8th of October, 1892, the plaintiff sued the company before Harry C. Davidson, Esq., a justice of the peace in Bedford borough, and recovered a judgment, from which the company appealed and the defendant became surety on the recognizance to secure the appeal. It was taken under the 1st section of the act of March 15, 1847, P. L. 361, in these words:

"'And now, March 3, 1892, defendant appeals. Frank E. Colvin appears and acknowledges himself bound as bail absolute to plaintiffs in the sum of $60.00 for the payment of debt, interest and costs adjudged to be paid by the defendant on affirmance of this judgment.'

[Signed] "'FRANK E. COLVIN.'

"'Taken and acknowledged before me this 3rd day of Nov. 1892.'

[Signed] "'H. C. Davidson, J. P.'

"In the common pleas, the plaintiff again recovered judgment against the company, after which a sci. fa. sur recognizance was sued out against Colvin, the bail, to recover the debt and interest, he having already paid the costs. On June 27, 1893, the parties to this suit entered into an agreement to try it before the court without a jury, under the act of April 22, 1874. On the 17th of July, 1893, the evidence was taken.

"The case was subsequently argued on the law, but the court's notes taken at that hearing having become mislaid, we ordered a reargument, and on the 9th of February, 1894, full briefs were submitted by counsel, who then consented that we should consider the case on their briefs and dispose of it without further oral argument.

"There is a little difference in the testimony of the defendant and the justice of the peace as to what transpired at the time the recognizance was given. The justice suggested it should be bail absolute for debt, interest and costs under said act of 1847, while the defendant says he doubted it, but replied to the justice that he might be correct and so wrote the recognizance accordingly.

"It seems the plaintiff's counsel advanced him money on his claim pending this proceeding and took an assignment of it March 21, 1893, and that the defendant offered to pay the debt and interest if the judgment were assigned to him, but the plaintiff and his counsel declined to accept it on that condition, alleging that he was not entitled to an assignment.

"The defense interposed in this case raises the single legal question whether a corporation, other than municipal, on appealing from the judgment of a justice of the peace, must give bail absolute for the payment of debt, interest and costs on affirmance of the judgment, as was provided in sec. 4 of the act of March 22, 1817, P. L. 128, 6 Sm. L. 438, and sec. 1 of the act of March 15, 1847, P. L. 361. The phraseology of the two statutes is identical, viz:

"'When any corporation shall be sued and shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of the debt, interest and costs on affirmance of the judgment.'

"The only difference being that in the act of 1847 are inserted these words: 'Municipal Corporations excepted,' but the courts had already incorporated this exception into the practice under the earlier act: Robinson v. Jefferson Co., 6 W. & S. 16; King v. Dist. of Penna., 1 Phila. 402.

"Notwithstanding the intervening legislation, the act of 1817 was probably still in force at the time of the passage of the act of 1847: Rush v. Home Mutual Life Asso., 4 Pa. C. C. R. 523.

"But if it be regarded as repealed and that of 1847 as a re-enactment of its provisions, the same construction which the earlier act received from the courts must also apply to the latter act, because the re-enactment of the statute which had received judicial interpretation amounts to a legislative adoption of such construction: Evans et al. v. Ross, 107 Pa. 231; Endlich on Int. of Stat., secs. 368, 369.

"In the brief submitted to us by defendant, he contends that the act of 1847 'regulates appeals in writs of error to the Supreme Court alone,' and relies on the cases of Erie & A. R. R. Co. v. At. & Gr. Western R. R. Co., 3 Pitts. R. 232, and Throop v. Ins. Co., 2 Pears. 306, to support this theory. That was not the construction placed on the act of 1817: Schuylkill Nav. Co. v. Thomas, 13 S. & R. 431; Morris v. Del. & Schuylkill Canal Co., 4 W. & S. 461; Turnpike Co. v. Naglee, 9 S. & R. 227.

"From these cases it will be seen that the act of 1817 was held to apply to appeals from arbitrators, aldermen, and justices of the peace. Hence, under the rule of construction just mentioned, 107 Pa. 231, 232, it follows that the act of 1847 must likewise be held to apply to appeals in such cases. The latter act was passed, as its language indicates, to settle existing doubts as to the effect of the 1st section of the act of 1845 on appeals and writs of error by corporations, and those doubts were dispelled by a re-enactment of the precise words of the act of 1817. We regard the act of 1847 as being in full force to-day, as far as it relates to appeals from justices of the peace, unaffected by the later enactments of March 21, 1849, P. L. 216, and April 25, 1850, P. L. 571. The first of these relates only to foreign corporations in suits brought in courts of record, while the 12th section of the other concerns only appeals from awards of arbitrators and leaves untouched the subject of appeals from justices of the peace. The industry and acumen of counsel on both sides, aided by our own examination, have failed to discover any expression of the Supreme Court, since the passage of the latter statutes, as to their effect on the act of 1847, and those of the lower courts are in conflict. By far the best considered case we have seen of the common pleas courts, is that of Rush v. Life Asso., supra, in which Judge ARCHBALD, after a very intelligent review of the various statutes and decisions, holds that the act of 1847 is still in force except as modified by the act of 1850 concerning appeals from awards of arbitrators alone. He says its 'provisions as to other appeals by corporations than those from awards of arbitrators, of course, remain unaffected and in force.'

"Though the very point is not decided in Shivery v. Grauer, 2 Dist. R. 387, yet Judge FURST treats the act of 1847 as in force and applying to appeals from justices of the peace, and the only reason the bail was not held in that case was because the appeal was not filed, and there being no affirmance of the judgment, the condition of the recognizance was not broken.

"In the case at bar, the appeal was filed and the judgment affirmed, or sustained, by a recovery in the Common Pleas.

"[Being of opinion that the Pa. & West Va. R. R. Company were required to enter into a recognizance with bail to secure the debt and interest as well as the costs, and the recognizance

having been properly given in that form by the defendant, and the plaintiff's judgment being affirmed, the liability of the defendant thereupon became fixed for the full amount of the debt, interest and costs.] [1]

"And now, April 4, 1894, the court find for the plaintiff, Daniel D. Young, and against the defendant, Frank E. Colvin, Esq., the sum of $36.43 with interest thereon from Feb. 3, 1893.

"The prothonotary is directed to give notice of this finding to the parties or their attorneys, and if no exceptions are filed thereto within thirty days after the service of such notice, let judgment be entered by the prothonotary hereon according to said finding."

The court subsequently entered judgment for plaintiff.

Errors assigned, among others, were (1) portion of opinion as above, quoting it, and (2) entry of judgment for plaintiff.

Frank E. Colvin and *Alexander King*, for appellant, cited: King v. Culbertson, 10 S. & R. 325; Bolton v. Robinson, 13 S. & R. 193; Carpentier v. Delaware Ins. Co., 2 Binn. 263; Rogers v. Glendower Iron Works, 17 W. N. C. 444; Brown v. Co. Com., 21 Pa. 43; Saving Fund Society v. Philadelphia, 31 Pa. 181; State v. Wilson, 82 Am. Dec. 163.

Harry Cessna, for appellee, cited: Slutter v. Kirkendall, 100 Pa. 307; Berkstresser v. Com., 127 Pa. 15; act of March 22, 1817, Sm. L. 438; A. & C. R. Co. v. Atl. & Great West. R. R., 3 Pitts. 232; Germ. & Perkiomen Turnpike Co. v. Naglee, 9 S. & R. 227; Washington, etc., Turnpike Road v. Cullen & Crane, 8 Sand. R. 517; Thomas v. Stewart, 2 P. & W. 475; Morris v. Del. & Schuyl. Canal, 4 W. & S. 461; Beers v. West Branch Bank, 7 W. & S. 365; act of March 21, 1849, P. L. 216.

PER CURIAM, May 27, 1895:

It is unnecessary to add anything to what has been said, on the question involved, by the learned president of the court below. We find no error in the judgment, and affirm it on his opinion.

Judgment affirmed.

Youghiogheny River Bridge. Youghiogheny Bridge Co.'s Appeal.

Bridges—Appeals—Review.

In a proceeding for the erection of a county bridge between two boroughs, a decree of the court below finding that the bridge is necessary and would be too expensive for the boroughs, and approving "the report of the viewers and finding of the grand jury," and ordering "that the same be referred to the commissioners for such action as they may deem expedient and proper and in accordance with law and, if approved by them, that the same be recorded as a county bridge," is neither effective nor final unless the county commissioners concur in the findings of the court and the grand jury.

Such decree is only provisional, and when it does not appear that the commissioners have taken any action in the premises an appeal is clearly premature and will be quashed.

Argued May 13, 1895. Appeal, No. 55, July T., 1894, by Youghiogheny Bridge Co., from decree of Q. S. Fayette Co., Sept. T., 1892, No. 3, in proceedings for a county bridge. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Petition for a county bridge over the Youghiogheny river from Apple street in the borough of Connellsville to Traders alley in the borough of New Haven.

From the record it appeared that proceedings were begun Sept. 26, 1892, by petition of citizens, and the same day the court appointed viewers as provided by law, who, on Dec. 10, 1892, filed their report, finding in due form that the bridge was necessary and should be adopted as a county bridge. The court then ordered that the report be filed and laid before the grand jury at the March sessions. On March 11, 1893, the grand jury made their return approving the action of the viewers. No further action was taken in the matter until Feb. 5, 1894, when exceptions were filed.

The court dismissed the exceptions and entered the following decree:

"And now, April 12, 1894, this case came on to be heard at a special court duly ordered and held Feb. 10, 1894, upon

exceptions to report of viewers and finding of the grand jury; and upon consideration thereof, it is ordered that all the exceptions be and are hereby overruled. And it appearing to the court that said bridge is necessary, and would be too expensive for said boroughs of Connellsville and New Haven, the report of the viewers and finding of the grand jury are approved. And it is further ordered that the same be referred to the commissioners of said county for such action as they may deem expedient and proper in accordance with law; and, if approved by them, that the same be recorded as a county bridge."

Error assigned among others was above decree, quoting it.

W. G. Guiler and *S. E. Ewing*, *R. H. Lindsey* and *P. S. Newmyer* with them, for appellant.

William A. Hogg, *Boyd & Umbel* and *James C. Work* with him, for appellees.—This appeal was prematurely taken and should be dismissed. A bridge proceeding begins with the petition for viewers and is not complete until the county commissioners make the final order approving the report of viewers. An intermediate order of court is not final and is not the subject of appeal. The litigation attending the appeals from those various stages and orders in the proceeding may be entirely unnecessary, as the commissioners may refuse to approve the matter, or may so exercise the discretion conferred upon them by the act of May 25, 1887, 267, that no appeal will be desired.

PER CURIAM, May 27, 1895:

This proceeding for the erection of a county bridge over the Youghiogheny river, between the boroughs of Connellsville and New Haven, appears to be under the act of June 13, 1836, P. L. 560, the thirty-fifth section of which provides, among other things, that "if, on the report of viewers, it shall appear to the court, grand jury and commissioners of the county that such bridge is necessary and would be too expensive for such township or townships, it shall be entered on record as a county bridge." In the decree of court finding "that said bridge is necessary and would be too expensive for said boroughs of Connellsville and New Haven," and approving "the report

of the viewers and finding of the grand jury," it is accordingly "ordered that the same be referred to the commissioners . . . . for such action as they may deem expedient and proper in accordance with law; and, if approved by them, that the same be recorded as a county bridge." This decree is at best only provisional. It is neither effective nor final unless the county commissioners concur in the findings of the court and the grand jury. If they refuse to concur, without more, the proceeding falls. It they elect to exercise the authority vested in them by the first section of the act of May 25, 1887, P. L. 267, and merely assist in building the bridge, a different result is accomplished. It does not appear in this case, nor is it even alleged that the commissioners have taken any action in the premises. If they have not, this appeal is clearly premature; and, acting on that assumption, we think the appeal should be quashed.

Appeal quashed.

John T. Hogg *v.* Connellsville Water Company, Appellant.

Negligence—Trespass—Diversion of water—Water company—Damages.

In an action against a water company to recover damages for injuries to land caused by diversion of water from a stream, the case is for the jury where the evidence for the plaintiff tends to show that the defendant diverted from its regular channel a considerable quantity of water which otherwise would have flowed through and over plaintiff's land, lying on either side of the stream below the point at which the water was diverted, and that in consequence of such diversion plaintiff sustained injuries to his land.

Argued May 13, 1895. Appeal, No. 47, July T., 1894, by defendant, from judgment of C. P. Fayette Co., June T., 1889, No. 32, on verdict for plaintiff. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Trespass to recover damages for injuries to land caused by the diversion of water. Before SLAGLE, J., specially presiding.

At the trial it appeared that in 1883, defendant constructed

a dam across McCoy's run above the property of plaintiff. In 1890 a pumping station was established on the east bank of the Youghiogheny river. Plaintiff claimed damages for injury to pasture lands, and also for injury to his mill located on the Youghiogheny river. About the time defendant commenced using this water plaintiff leased his mill property for ten years, with the privilege of entering upon to make improvements and repairs, and agreeing to make necessary repairs during the term on the building, gristmill, forebay, mill-race, water wheels and water power. Plaintiff produced evidence which tended to show that the rental for the pasture lands had fallen off by reason of the taking of water by defendant. He also produced evidence tending to show that he had spent considerable sums of money to maintain the water power of his mill, and that such expenditures were made necessary by the diversion of water by defendant.

The court charged in part as follows:

"In this case Mr. Hogg was in the occupancy of the property himself, and he had used it for many years before for pasturage purposes and nothing else. He has used it ever since the dam was constructed on this stream for the same purposes, and, therefore, it seemed to me, that in reference to that, the question was simply how much has he in these last ten years and a half been damaged by the want of the water which has been taken away from him by the other party.

"Now, in reference to that, there is another matter that possibly better be mentioned here: A man doesn't own the water that runs through his property, he simply has a right to use it, and each man along a running stream has a right to use the water for his own purposes, not inconsistent with the rights of his neighbor. He has no right to divert it. He can use it as it passes through, he can take out of the stream as much as is necessary for the ordinary purposes of his property, but he cannot divert it so as to turn it into another and different channel.

"After he has made use of the water, all the rest must be allowed to run in its ordinary course, so that his neighbors can have a similar use as it passes by them; and, therefore, when you come to estimate what the damage to Mr. Hogg was by the interference with the running of this water, you don't undertake to estimate the value of that water, but simply the use of it to

Mr. Hogg, and what use of it has he been deprived of by the act of these parties.

"It might be that a stream was so large that the diversion of a part of it wouldn't interfere at all with all the use that a man might be able to make of the water as it passed through him, and in that case, if a man above on a stream takes out water to any extent, but leaves enough for his neighbor, his neighbor is not harmed, and therefore cannot recover any damages. He might possibly be entitled to nominal damages for the taking away of the water, but it would be only nominal.

"So the question for you to consider here upon this testimony is, was Mr. Hogg injured by being deprived of the water that came down this run, by the making of this dam, and, if he was, to what extent. And, as I said, he, it appears, used that all this time and before for many years for pasturage purposes.

"[If the property had been rented before, and if he was unable to rent it for as much afterwards as he was before, you would have a definite means of determining the measure of his damages, because there would be something which is a mere matter of calculation. But occupied as it was by Mr. Hogg upon which he was carrying on a business such as has been stated, there is no means of getting at the exact loss to him, because it is like any other matter of business.] [17] . . . .

"He has given you the number of cattle that was kept there and the prices for pasturing them, and has shown to you that there were some people complained about the want of water, and you probably know that pasture lands without water, or without sufficient water, would not be as valuable as if they had a sufficient quantity of water. . . .

"[On the other hand, the defendant company has a number of witnesses who say that, in their judgment, the plaintiff was not injured at all; that there was plenty of water there after that, and that he lost nothing by reason of the want of water. So you will take all that, then, and determine what would be a fair and just compensation to Mr. Hogg for the deprivation of this water upon his land, considering the use to which he was putting it at the time, and has been putting it ever since.] [18]

"[Having fixed that element of damages, you will then go to the other—that is, to the mill. And you will remember that when the case first opened there was some discussion as

to what was the proper testimony to be given in the case. A lease was offered in evidence, Mr. Hogg having leased the property, and if he got the same rent afterwards that he got before, of course he wasn't injured in the mill. That is very simple and plain, and when the suggestion was first made I was disposed to rule that Mr. Hogg could have no element of damage in that. But the counsel pointed out the fact that this lease was made with the condition that Mr. Hogg was to keep the race course—the mill race—in condition to supply a flow of water, as heretofore, and that seemed to me to be as if he had guaranteed it. For instance, if he had rented it for the same amount as he had rented it previously, and guaranteed the same amount of water and it wasn't supplied, and the mill lay idle for that reason, why, there would be a loss upon that, and therefore I allowed them to prove what additional cost there was in maintaining this flow of water by reason of the loss of water in the McCoy run, and that is a point you will determine—not what it cost to keep the race open, but what amount of that cost was caused by a want of water coming from McCoy's run.] [19]

"Now, the testimony was that there had been in these ten years,—Mr. Kerr, I think, was the name of the gentleman who testified—that during these ten years they had expended $1,661, I believe that was the amount, for keeping this race clean, and that Mr. Hogg had allowed $50.00 in addition to that for time that the mill was idle by reason of the want of water. That seemed to be coming nearer to a matter of calculation than the other. Some of the other witnesses testified that it would cost from $150 to $200 a year, they said, for keeping this race clean each year. Mr. Hogg said that he had no account of his expenses, but it seemed that Mr. Kerr had. Now, this $1,661—of course the $50.00 was a loss of rent, and if properly allowed he would be entitled to recover that as damages here—of the $1,661, Mr. Kerr said $450 was expense caused by the flood of 1888, and that, it is not claimed by the counsel, was a part of the expense of keeping open his mill-race. Then, there was evidence in the case that this mill-race always required some attention; that it always required some work, and that that ought to be deducted from the $1,661. It seems to me that that would be reasonable; that every mill-race would require some work. The wit-

nesses that were called on the part of the plaintiff, however, testified it would have been very little—very little on that account; that, in years immediately preceding 1883 and the building of this dam, I think one of them said, one year at least, they paid nothing. You have a right to consider all of this testimony, because there is testimony on both sides about that, and you have a right to use your own judgment as to whether anything ought to be deducted on that account or not.

"Then, the claim is that this work that was done—this $1,661 worth of work that was done at the dam and in the opening of the race immediately around the dam, that it was necessary, that they had to deepen it because there wasn't so much water coming in as heretofore, for the reason that they didn't get the water from McCoy's run, and that, therefore, they had to deepen the race and widen it to get a better flow of water from the river. They claim that whatever was necessarily so expended for that purpose would be a proper element of damages in this case, whether it was all caused by the run or not. Whatever was caused by the run—that is, a lack of water in the run—would be a proper element of damage and ought to be allowed to Mr. Hogg in this case. Now, the testimony of Mr. Kerr, I believe, is, that that work was necessary. I believe there was another gentleman testified to the same effect, that it was necessary in order to get water to the mill from the river, because of a loss of water in the run. If that is so, he is entitled to that, or so much of it as you may find was caused by a want of water in the run, which was kept back from McCoy's run by this dam, and that is the measure of his damage—the measure of his rights in this case. For that he is entitled to recover. He is entitled to recover a verdict at all events for what would be called nominal damages, and, in addition to that, any damages that he has shown here by the evidence to have been caused by the deprivation of the water running through his lands by means of the dam erected by the defendant company."

Plaintiff's points were among others as follows:

"1. That under the evidence the plaintiff is entitled to recover at least nominal damages. *Answer:* This is affirmed." [1]

"4. That, if the jury should find that the plaintiff is entitled to damages, they should estimate them from the date of the taking of the water down to the date of this trial. *Answer:* This is affirmed." [2]

Verdict and judgment for plaintiff for $1,200. Defendant appealed.

Errors assigned, among others, were (1, 2, 17, 18, 19) above instructions, quoting them.

R. E. Umbel, of *Boyd & Umbel*, for appellant. Plaintiff was not in actual possession of the premises. The landlord of a tenant for years cannot maintain trespass against a stranger, though the act done be injurious to the reversion: Bedingfield v. Onslow, 3 Lev. 209; Torrence v. Irwin, 2 Yeates, 210; 1 Archbold's Nisi Prius, 302; Ward et al. v. Taylor, 1 Pa. 238; Ives v. Cress, 5 Pa. 118; Lewis v. Carsaw, 15 Pa. 31; Clark v. Smith, 25 Pa. 137; Weitzel v. Marr et al., 46 Pa. 463; McNaught v. Swing, 1 Chest. 467; Nyman v. Sullivan, 3 Kulp, 345; Collins v. Beaty, 148 Pa. 65; Stephenson v. Brown, 147 Pa. 300.

W. G. Guiler, *Lindsey & Johnson* and *W. A. Hogg* with him, for appellee, cited: Clark v. Penna. R. R., 145 Pa. 438; Angell on Water-Courses, 135.

PER CURIAM, May 27, 1895:

In view of the facts which the testimony in this case tended to prove, there is nothing in either of the nineteen specifications of error that requires a reversal of the judgment. It is conceded that, for the purpose of supplying water to the people of Connellsville for domestic and other purposes, defendant company diverted from its regular channel a considerable quantity of water which otherwise would have flowed through and over plaintiff's lands, lying on either side of the stream below the point at which the water was diverted. It was also shown by competent evidence that, in consequence of said diversion of the water, plaintiff sustained damages. Without referring in detail to the testimony bearing on that and other questions involved in the issue, it is sufficient to say that it presented a proper case for the consideration of the jury; and it was fairly submitted to them, by the learned judge who specially presided at the trial, with substantially accurate and adequate instructions. We find nothing in either of the specifications that requires discussion.

Judgment affirmed.

168 462
26 SC 613

William H. Wilhelm, Sheriff, v. Fayette County, Appellant.

Sheriff—Fees—Commitment—Act of April 2, 1868.

Under the act of April 2, 1868, P. L. 4, the sheriff is entitled to a fee of fifty cents for each person received on commitment, without regard to the fact that they were all committed for the same criminal matter, or that a separate commitment was not made out for each separately.

Argued May 15, 1895. Appeal, No. 9, July T., 1895, by defendant, from judgment of C. P. Fayette Co., Dec. T., 1894, No. 133, in favor of plaintiff on case stated. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Case stated to determine the validity of fees claimed by sheriff.

The case stated was in part as follows:

"William H. Wilhelm, the plaintiff, is the sheriff of defendant county, and has been since the 1st Monday of January, 1893, and as such officer he is the keeper of the common jail of said county. As such sheriff and keeper of the common jail he did on the 4th day of April, 1894, receive into his custody and commit to said jail ninety-five persons charged with the murder of Joseph H. Paddock. These persons were all included in one information, and were all tried on the same bill of indictment. The said prisoners were committed to said plaintiff by John N. Dawson, Esq., a justice of the peace in and for said county by virtue of eighteen several writings or commitments, containing from three to eight names on each, in which commitments plaintiff was required to receive said defendants, and them have and keep in his custody until discharged by due course of law. Plaintiff did receive said prisoners, made a separate search and examination of each one and committed them singly and separately into said jail, opening and closing the door of said jail for each one, and kept them in said jail until they were duly discharged according to law.

"For said service plaintiff claims the sum of forty-seven and fifty one hundredths dollars ($47.50), being at the rate of fifty

cents for each of said prisoners so committed, and contends that such is the meaning contemplated by section 2 of the act of assembly of April 2, 1868, P. L. 4. Defendant claims that there is due plaintiff but the sum of fifty cents, there being but one such commitment as is contemplated by said act of assembly; or that at most there is due said plaintiff the sum of nine dollars, being at the rate of fifty cents for each of said eighteen commitment papers."

The court entered judgment for plaintiff for $47.50.

Error assigned was in directing judgment for plaintiff.

R. F. Hopwood, for appellant, cited: Act of April 2, 1868, P. L. 4; Yordy v. Lebanon County, 4 Pa. C. C. 162; Franklin Co. v. Conrad, 36 Pa. 317; Lehigh Co. v. Semmel, 23 W. N. C. 346.

D. W. McDonald, *James R. Cray* with him, for appellee, cited: Act of April 2, 1868, P. L. 4; act of June 12, 1878, P. L. 187; Morrison v. Bachert, 112 Pa. 322; 1 McKinney's Justice, 148; McGee v. Dillon, 103 Pa. 433; Com. v. Taylor, 5 Pa. C. C. 510; Rhoads v. Luzerne County, 1 Kulp, 431.

PER CURIAM, May 27, 1895:

This case stated embodies all the facts upon which the judgment of the court below is based. As sheriff of the county and keeper of the common jail, the plaintiff received into his custody ninety-five persons charged before a justice of the peace, in one information, with the murder of Joseph H. Paddock and duly committed for trial by said justice, as evidenced by eighteen separate commitments containing from three to eight names each. The sole question was whether plaintiff was entitled to a commitment fee of fifty cents for each of the ninety-five persons thus committed and received by him, or a fee of fifty cents for each of the eighteen separate commitment papers, or only a fee of fifty cents for the entire number of ninety-five persons named in said several commitments.

The act of April 2, 1868, fixing the fee bill under which the contention arose reads, inter alia, thus: "Fee on commitment for any criminal matter 50 cents." The learned judge of the

court below construed this to mean a fee of fifty cents for each person received on commitment, without regard to the fact that they were all committed for the same criminal matter, or the further fact that a separate commitment was not made out for each separately. In this we think he was so clearly right that discussion of the subject is unnecessary.

Judgment affirmed.

E. M. Butz, to use of National Bank of Fayette County v. Fayette County, Appellant.

Municipalities—Contracts—County commissioners.

The Supreme Court will not reverse a judgment in favor of an architect against a county for increased compensation over the amount named in a contract for building a county court house, where it appears that a change in the plans imposed additional work upon the architect, and the action of the county commissioners in approving of the increased compensation was done in entire good faith.

Argued May 15, 1895. Appeal, No. 10, July T., 1895, by defendant, from judgment of C. P. Fayette Co., Dec. T., 1894, No. 383, on verdict for plaintiff. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Assumpsit by architect on contract for supervising building of a court house. Before MESTREZAT, J.

At the trial it appeared that plaintiff was employed by defendant in 1888 to provide plans for the erection of a jail and for some alterations in the court house, and to supervise the work. He was to receive as compensation five per cent on the total cost of the work. On Oct. 28, 1889, he was again employed to draw up plans and specifications for the erection of a new court house. The evidence showed that in consideration of the fact that the other contract was running at the same time, he agreed to take three per cent for supervising the work under the second contract. After the plans for the new court house had been adopted and the contract let, the county commissioners determined that additional land was needed for the proper location of the building. This led to a delay of sixteen

months, and the commissioners accordingly voted to increase the plaintiff's compensation to four per cent on the total cost of the work.

Defendant's points, among others, were as follows:

"1. That under the contract of Oct. 28, 1889, and the acceptance thereof, the plaintiff was bound to prepare all necessary plans and specifications, and give an architectural supervision to said court house during its erection, without regard to the time consumed therein, and that any change required by the commissioners on said plans and designs should be made without extra cost over and above the commission of three per cent on the contract price. *Answer:* That is affirmed, if said contract was not subsequently changed by the parties. We have already so instructed you. If this case depends upon the original contract, this plaintiff would only be entitled to three per cent; but if there was a subsequent contract for a sufficient consideration, as I have explained to you, then the plaintiff would be entitled to recover under that contract." [7]

Verdict and judgment for plaintiff for $2,845.

Error assigned, among others, was (7) above instruction.

R. F. Hopwood, for appellant.—The subsequent promise for additional compensation was without consideration and void: Chester County v. Barber, 97 Pa. 455; Lancaster County v. Fulton, 128 Pa. 48.

S. E. Ewing, *A. C. Hagan* with him, for appellee, cited: Act of April 15, 1834, sec. 19, P. L. 541; Cooper v. Lampeter Twp., 8 Watts, 128; Allegheny County v. Lecky, 6 S. & R. 166; Jefferson County v. Slagle, 66 Pa. 202.

PER CURIAM, May 27, 1895:

We find nothing in this record that would justify a reversal of the judgment. Nor do we think that either of the assignments of error requires special consideration. If, in the judgment of the county commissioners, the plaintiff was justly entitled to additional compensation, they had an undoubted right to approve his claim, in part at least. There is nothing whatever in the testimony to show that in doing so they did not act in

entire good faith. The case was fairly submitted to the jury with instructions which appear to be adequate and free from substantial error.

Judgment affirmed.

William H. Beaver, Trustee for Sarah J. Slear, v. George M. Slear.

Judgment—Opening judgment—Interest—Husband and wife.

A judgment note for borrowed money payable one day after date was given by a husband to a trustee for his wife; the wife lived with the husband seventeen years after the date of the note; there was no agreement as to the payment of interest; the wife's declarations that she did not claim interest were proved. After the wife's death the trustee entered judgment on the note including interest from its date. The court below opened the judgment, and directed a feigned issue to try how much was due on the note. *Held*, that there was no such abuse of discretion as would justify the supreme court in reversing the decree.

Argued May 15, 1895. Appeal, No. 445, Jan. T., 1895, by plaintiff, from order of C. P. Union Co., Dec. T., 1893, No. 126, making absolute a rule to open judgment. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Rule to open judgment.

From the record it appears that in 1876 plaintiff received from his wife $1,163, which he used in paying off charges upon his farm. He gave a judgment note for $1,200, payable one day after date to a trustee for his wife. No agreement was made as to interest, and declarations of the wife offered in evidence showed that she did not claim any. To one witness she said that she thought that when a man and a woman were living together, it was not right for a man to pay a woman interest for money that they had in a farm together. Mr. Slear and his wife continued to live together until the date of his wife's death, Nov. 1, 1893. After the death of the wife her brother, the trustee named in the note, entered judgment on the note with interest from one day after its date, viz, April 3, 1876.

The court made absolute a rule to open the judgment, and ordered a feigned issue to try how much was due on the note.

Error assigned was above order.

J. M. Linn, *P. B. Linn* with him, for appellant.—On obligations in writing for sums payable upon demand, or upon a day certain, interest is payable, if payment of the principal sum is not made at the time agreed upon: Jacobs v. Adams, 1 Dallas, 52; Pawling v. Pawling, 4 Yeates, 225; Dilworth v. Sinderling, 1 Binn. 488.

Interest is chargeable in implied contracts, on bills and notes, if payable at a future day certain, after they become due: 1 Bouvier's Inst. 455, sec. 1107; Randolph on Commercial Paper, sec. 1709; Kittel's Est., 156 Pa. 445; Hauer's Est., 140 Pa. 420; Bachman v. Killinger, 55 Pa. 414; Williams' App., 47 Pa. 307; Wormley's Est., 137 Pa. 101 · Hamill's App., 88 Pa. 363; Grabill v. Moyer, 45 Pa. 530.

If it was error to open the judgment upon the facts as they stood when the order was made, it was error to submit the case to the jury: English's App., 119 Pa. 533; Knarr v. Elgren, 9 Atl. Rep. 875; Scott's App., 123 Pa. 155; Jenkintown Nat. Bank's App., 124 Pa. 337.

Joseph C. Bucher and *Andrew A. Leiser*, for appellee, were not heard, but cited in their printed brief, on the question of a stipulation necessary to bind husband to pay interest to his wife: Towers v. Hagner, 3 Whart. 48; Reber's Est., 143 Pa. 308; May v. May, 62 Pa. 206; Gochenaur's Est., 23 Pa. 460; Mellinger v. Bausman, 45 Pa. 522. The burden of proof is on the wife to show that the interest was not intended as a gift: McGlinsey's App., 14 S. & R. 64; Edward v. Cheyne, L. R. 13 App. 385; In re Flamank, L. R. 40 Ch. Div. 461; Moore's Est., 47 Pa. 307; Com. v. Vanderslice, 8 S. & R. 452: Williams' App., 47 Pa. 307; Bown v. Morange, 108 Pa. 69; Moore v. Moore, 165 Pa. 464. Whether the judgment should be opened or not was a matter in the sound discretion of the court below, with which the Supreme Court will not interfere when the discretion has not been abused: Earley's App., 90 Pa. 321; Herman v. Rinker, 106 Pa. 121; Sossong v. Rosar, 112 Pa. 197;

Woods v. Irwin, 141 Pa. 278; Kneedler's App., 92 Pa. 428; Wise's App., 99 Pa. 193; Wernet's App., 91 Pa. 319; Jenkintown Nat. Bank's App., 124 Pa. 337; Kelber v. Plow Co., 146 Pa. 485; Com. v. Titman, 148 Pa. 168; Walter v. Fees, 155 Pa. 55.

PER CURIAM, May 27, 1895:

While we cannot assent to the proposition that, in a case such as this, the burden is on the plaintiff to show affirmatively that the defendant agreed to pay interest from the maturity of his note, we are not prepared to say, in view of the facts and circumstances of the case, that the court erred in opening the judgment and letting the defendant into a defense. There was no such abuse of discretion as would justify us in reversing the decree complained of.

Decree affirmed and appeal dismissed with costs to be paid by appellant.

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George Philler et al., Clearing House Committee of the Clearing House Association, v. John J. Patterson, Appellant.

[Marked to be reported.]

Banks and banking—National bank—Clearing house.

A clearing house association organized by the national banks of a particular locality merely for the purpose of facilitating the settlement of daily balances between them without involving any element of speculation, or any business undertaking by or on behalf of the associated banks, does not violate the statutes of the United States relating to national banks, or transcend the limits which these statutes have drawn about the business of banking.

Thirty-eight national banks in the city of Philadelphia formed a clearing house association for the settlement of daily balances. A room was hired and fitted up at the expense of the associated banks, and a manager employed who presided over the business of striking the balances every morning at a fixed hour. To facilitate the settlement of daily balances without the necessity for handling and counting the cash in every case, each bank deposited in the hands of certain persons called the Clearing House Committee a sum of money, or its equivalent in good securities, to be used for payment of balances. For these sums the committee issued certificates which were used in lieu of the cash they represented. The

committee was also authorized to receive from any member of the association additional deposits of bills receivable and other securities and issue certificates therefor "in such amount, and to such percentage thereof as may in their judgment be advisable." They agreed to accept the additional certificates, if issued, in payment of daily balances at the clearing house on the condition that the securities deposited therefor should be held by the committee "in trust as a special deposit pledged for the redemption of the certificates issued thereupon." *Held*, (1) that the banks forming such an association did not violate the Federal Statutes, (2) that the committee of the clearing house had a standing to sue on a promissory note deposited with it.

Promissory note—Accommodation note.

When an accommodation note has been used by the holder for the purpose for which it was given, the accommodation maker or indorser is bound by the action of his friend, and becomes liable to pay the amount of the note according to its terms. He cannot defend against the indorsee on the ground that the note was without consideration, for to permit this would defeat the purpose for which he loaned his credit.

Argued April 8, 1895. Appeal, No. 264, Jan. T., 1895, by defendant, from judgment of C. P. No. 1, Phila Co., Dec. T., 1891, No. 599, on verdict for plaintiff. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Assumpsit on a promissory note. Before BIDDLE, J.

At the trial it appeared that the note was as follows:

$5,000. PHILADELPHIA, February 11, 1891.

"On the 4th day of June, 1891, without grace, I promise to pay to the order of J. F. Bailey, Five thousand dollars, payable at the Spring Garden National Bank, without defalcation, value received.

"JOHN J. PATTERSON.

"Indorsed:—J. F. Bailey," with notarial protest.

The evidence showed that the note was indorsed and delivered to Francis W. Kennedy, who was the president of the Spring Garden National Bank. The Spring Garden National Bank was a member of the Clearing House Association of the Banks of Philadelphia. In November and December, 1890, the clearing house committee advanced to the Spring Garden National Bank over $400,000 in the form of loan certificates. These advances were made on the faith of collateral securities then held by the committee, consisting of promissory notes

and of other securities, which were deposited by the Spring Garden Bank with the clearing house committee at the time the advances were severally made, and which were approved solely by the committee. In February, 1891, the committee held, amongst other security for the payment of this indebtedness, $116,077 of promissory notes then about to mature, which on Feb. 17, 1891, at the request of the Spring Garden National Bank, the committee delivered to that bank, and in consideration therefor received from the bank other promissory notes amounting to $116,081, which included the note in suit.

The following offers of testimony by defendant with objections and rulings of the court were made during the trial.

"The defendant offers to prove by John J. Patterson, a witness on the stand, that prior to Dec. 3, 1887, defendant and J. F. Bailey borrowed from Nelson F. Evans and Francis W. Kennedy $17,500, and as collateral security for the repayment thereof deposited with them $27,500 of the Second Mortgage Bonds of the Bloomington and Normal Horse Railway Company; that on Dec. 3, 1887, defendant with Bailey sold out their equity in said bonds for $5,000 to said Evans, and the said Kennedy assuming to pay the loan of $17,500 hereinbefore mentioned, and as part of this transaction Kennedy and Evans represented that it would be necessary for deponent to make and Bailey to indorse a note for $5,000, so as to carry the loan of that amount until it would be convenient for Kennedy and Evans to pay it off, which they said would be done within the next six months; that this, however, was not done, and on the maturity of the first note Francis W. Kennedy informed witness that he had been unable to pay off the loan, but requested defendant to make and Bailey to indorse a new note for a like amount, which was to be used to enable Kennedy and Evans to carry said loan, and thus the note continued to mature and be renewed on similar statements made by Kennedy down until the making of the note in suit, which occurred on Feb. 11, 1891, on or about which date said Kennedy stated to defendant that he had been unable to pay off said loan of $5,000, and requested defendant to make and Bailey to indorse the note in suit, to be applied by him in carrying the said loan of $5,000, and, relying on the truthfulness of those statements, defendant made and Bailey indorsed the note in suit and delivered the same to

said Francis W. Kennedy for the purposes aforesaid; that said statement was untrue, and was fraudulently made by the said Kennedy to witness to deceive and defraud him, and to enable the said Kennedy to obtain the said promissory note, and use the same for his own general purposes, and not for the purpose stated when the note was made and indorsed and delivered to him, and that at the time of making and delivery of the note in suit to said Kennedy he was the president of the Spring Garden National Bank and its chief executive officer.

"Objected to, because the defendant has already proved that the plaintiffs are bona fide holders for value, having given a full and valuable consideration for the note, and that the facts, if proved, would be no defense to the action.

"Objection sustained. Exception to defendant. [1]

"Defendant offers in evidence blank loan certificate of the clearing house committee of the Philadelphia banks, and states that he proposes to follow it up by proof showing that certificates in this form were issued to the Spring Garden National Bank to the aggregate of $400,000 in December, 1890; that as collateral security for the certificates above referred to the Spring Garden National Bank, among other collaterals, deposited with the Clearing House Association a promissory note made by John J. Patterson to the order of J. F. Bailey, indorsed by J. F. Bailey and dated Sept. 13, 1890, wherein the maker promised to pay to the order of the indorser on the 31st of January, 1891, $5,000; that after the maturity of this note, to wit, on the 17th day of February, 1891, the Spring Garden National Bank brought the note in suit to the Clearing House Association and deposited it as substituted collateral for the note of like amount due on the 31st of January, 1891.

"Plaintiff objects, first, because the paper which is offered in evidence is not the paper which is described in the offer of proof, as the paper offered in evidence is a certificate of the clearing house committee and not by the banks as recited in the offer; and, secondly, because the evidence is immaterial and irrelevant unless it is coupled with an offer to prove a defense to the payment of the note itself.

"Objection sustained. Exception to defendant." [2]

The material portions of the constitution and by-laws of the Clearing House Association are as follows:

"ARTICLE 1. The title of this association shall be the Clearing House Association of the Banks of Philadelphia.

"ARTICLE 2. Its object shall be to effect at one place the *daily exchanges* between the several associated banks . . . . and the payment at the same place of the balances resulting from such exchanges. The responsibility of the association for such exchanges is strictly limited to the faithful distribution by the manager among the creditor banks for the time being of the sums actually received by him, and should any losses occur while the said balances are in the custody of the manager, they shall be borne and paid by the associated banks in the same proportion as the expenses of the Clearing House, as hereinafter provided for.

"ARTICLE 3. Each bank belonging to the association may be represented at all meetings thereof by the *president*, vice-president, or cashier, or by such other person as the board of directors shall appoint." . . . .

"ARTICLE 5. At the stated meeting in the month of January, annually, a standing committee of six bank officers shall be elected by the majority, and by ballot, to be called the Clearing House Committee, whose duty it shall be to procure from time to time a suitable room or rooms for the Clearing House, to provide proper books, stationery, furniture, fuel, and whatever else may be necessary for the convenient transaction of business thereat, to appoint a manager annually, to establish rules and regulations to be observed at the Clearing House in cases not provided for in these articles, subject to the approval of the association, and generally to supervise the Clearing House affairs. This committee shall have charge of the funds belonging to the association, shall draw on each bank for its quota of expenses, and shall at the stated meetings in April and October submit detailed accounts of expenditures and estimates of what may be required for the Clearing House the ensuing half year.

"This committee shall take into their separate custody the collateral securities required to be deposited with them by the banks, members of the association, under the provisions of article XVII., and receipt therefor, and for any exchange of such collateral securities."

"ARTICLE 9. The hour for making the morning exchange at

the Clearing House shall be at eight and a half o'clock A. M. precisely; between the hours of eleven and twelve o'clock the debtor banks shall pay to the manager at the Clearing House the balances against them, in such certificates as are or may be from time to time authorized by the Clearing House Association, or in the certificates hereinafter mentioned except fractional amounts, which shall be paid in Clearing House due bills. At twelve and a half o'clock the creditor banks shall receive from the manager at the same place, the respective balances due to them, provided the balances due from the debtor banks shall have been paid."

"ARTICLE 13. The Clearing House Association of the Banks of Philadelphia shall receive on deposit, in special trust, such United States gold coin as any of the associated banks may choose to send to it for safe keeping, for Clearing House purposes, which coin shall be kept in the safe or safes belonging to the association in the vault or vaults of the Farmers' and Mechanics' National Bank of Philadelphia.

"Certificates in exchange for such coin shall be issued to the depositing banks in sums of $5,000; said certificates shall be signed by the manager of the Clearing House Association or by his assistant, or other person designated by the association for the purpose, and shall be countersigned by the president, acting president, cashier, or assistant cashier of the Farmers' and Mechanics' National Bank of Philadelphia. Such certificates shall be negotiated only among the associated banks, and shall be received by them in payment of balances at the Clearing House. Such special deposits of coin are to be entirely voluntary—each bank being left perfectly free to make them or not at its own discretion.

"The coin thus placed in special deposit is to be the absolute property of such of the associated banks as shall from time to time be the holders of the certificates, and is to be the depository, subject to withdrawal on presentation of the properly indorsed certificates at any time during banking hours."

"ARTICLE 17. Each bank, member of the Clearing House Association, shall deposit security with the Clearing House Committee as collateral for their daily settlements in the following percentage or assessment on capital. . . . .

"The committee shall apply the deposit of any defaulting

bank to the payment of the balance due by such bank at the Clearing House, or to the reimbursement *pro rata* of the several banks furnishing said balance, under article XI., and the surplus, if any, shall be held as collateral security for other indebtedness to members of this association."

The agreements under which the certificates were issued in 1873 and also in 1890 were as follows:

"CLEARING HOUSE ASSOCIATION OF PHILADELPHIA.

"*Agreement of September 24th, 1873, as Amended October 18th, 1873.*

"For the purpose of enabling the banks, members of the Philadelphia Clearing House Association, to afford proper assistance to the mercantile and manufacturing community, and also to facilitate the inter-bank settlements resulting from their daily exchanges, we, the undersigned, do bind ourselves by the following agreement on the part of our respective banks, viz.:—

"*First.*—That the Clearing House Committee be, and they are hereby authorized to issue to any bank, member of the association, loan certificates bearing six per cent. interest on the deposits of bills receivable and other securities to such an amount and to such percentage thereof as may in their judgment be advisable.

"These certificates may be used in settlement of balances at the Clearing House, and they shall be received by creditor banks in the same proportion that they bear to the aggregate amount of the debtor balances paid at the Clearing House. The interest that may accrue upon these certificates shall be apportioned monthly among the banks which shall have held them during that time.

"*Second.*—The securities deposited with the said committee shall be held by them in trust as a special deposit, pledged for the redemption of the certificates issued thereupon, the same being accepted by the committee as collateral security, with the express condition that neither the Clearing House Association, the Clearing House Committee, nor any member thereof, shall be responsible for any loss on said collaterals arising from failure to make demand and protest, or from any other neglect

or omission, other than the refusal to take some reasonable step which the said depositing bank may have previously required in writing.

"*Third.*—On the surrender of such certificates, or any of them, by the depositing bank, the committee will indorse the amount as a payment on the obligation of said bank held by them, and will surrender a proportionate amount of securities, except in case of default of the bank in any of its transactions through the Clearing House, in which case the securities will be applied by the committee, first, to the payment of outstanding certificates, with interest; next to the liquidation of any indebtedness of such bank to the other banks, members of the Clearing House Association.

"*Fourth.*—The committee shall be authorized to exchange any portion of said securities for others, to be approved by them, and shall have power to demand additional security, at their own discretion.

"*Fifth.*—That the Clearing House Committee be authorized to carry into full effect this agreement, with power to establish such rules and regulations for the practical working thereof as they may deem necessary, and any loss caused by the nonpayment of loan certificates shall be assessed by the committee upon all the banks in the ratio of capital.

"*Sixth.*—The expenses incurred in carrying out this agreement shall be assessed upon the banks in equal proportion to their respective capital.

"*Seventh.*—That the Clearing House Committee be and they are hereby authorized to terminate this agreement upon giving thirty days' notice thereof, at any stated meeting of the Clearing House Association."

"PHILADELPHIA, November 18th, 1890.

"At a meeting of the Clearing House Committee, held this day, it was, on motion—

"*Resolved*, That in accordance with resolutions of September 24th, 1873, as amended October 18th, 1873, the Clearing House Committee will issue loan certificates to banks applying and receive them in payment of balances.

(Signed) "JOHN C. BOYD,
"*Manager.*"

The form of loan certificate issued under the foregoing agreement was as follows:—

"No. 9601. $5000.

"CLEARING HOUSE COMMITTEE OF THE PILADELPHIA BANKS, PHILADELPHIA.

"*This certifies*, that the..... has deposited with this committee, securities in accordance with the agreement of a meeting of bank officers, held September 24th, 1873. This certificate will be received during the continuance of said agreement, and of any renewals of the same, in payment of balances at the Clearing House for the sum of FIVE THOUSAND DOLLARS, only from a member of the Clearing House Association, to whom the same may have been issued, or to whom it may be indorsed by the manager of the Clearing House.

LOAN CERTIFICATE.

On the surrender of this certificate by the depositing..... bank above named, the committee will indorse the amount as a payment on the obligation..... of said bank held by them, and surrender a proportionate amount of the collateral securities; except in case of default on the part of..... said bank in its transactions through the Clearing House Association of Philadelphia. .....

COMMITTEE.

INDORSED:—
Paid to the Clearing House.

DATE OF INDORSEMENT. By .....

To .....

To ....."

Plaintiffs' point was as follows:

"1. Under the evidence in this case your verdict should be for the plaintiffs. *Answer:* Affirmed." [4]

Defendant's points were as follows:

"1. That under the statute of the United States known as the National Bank Act the plaintiffs cannot maintain this action. *Answer:* Refused. [5]

"2. The undisputed evidence in this cause shows that the Clearing House Association of the Banks of Philadelphia is composed of banks incorporated under the provisions of the statute of the United States known as the National Bank Act and its supplements, and that under the provisions of that statute there is no authority to maintain the pending action. *Answer:* Refused. [6]

"3. The undisputed evidence in this case shows that the Clearing House Association of the Banks of Philadelphia is composed of national banks incorporated under the provisions of the statutes of the United States in reference to national banks, and that the pending suit is brought by the plaintiffs in their capacity as the clearing house committee of said association and for the use and benefit of said association; that there is no authority under the provisions of the aforesaid statute of the United States or otherwise to maintain the present action either in the name of the Clearing House Association of the Banks of Philadelphia or in the names of the respective plaintiffs, being the Clearing House Committee of the Clearing House Association of the Banks of Philadelphia. *Answer:* Refused. [7]

"4. That under the evidence in this case and the statutes governing national banks the plaintiffs cannot maintain the pending action against the defendant. *Answer:* Refused. [8]

"5. That under all the evidence in this cause the verdict must be for the defendant. *Answer:* Refused." [9]

The court charged as follows:

"[The only question in this case is a question of law, which is a matter that I have to decide. As far as you are concerned the note is there which it is admitted has never been paid. Under those circumstances, of course, your verdict will be for the plaintiffs. I affirm the plaintiffs' point and refuse the points of the defendant.]" [3]

Verdict and judgment for plaintiffs for $5,997. Defendant appealed.

Errors assigned were (1, 2) rulings on evidence, quoting the bill of exceptions; (3–9) instructions as above, quoting them.

M. Hampton Todd, for appellant.—Before the holder of a negotiable promissory note, which has been obtained by fraud or misrepresentation and proof thereof made, can recover on it, he must show that he is the holder of it for value before maturity without notice, and in this case the defendant having proved or offered to prove, which is the same thing, that the note was fraudulently obtained, he thereby shifted the burden to the plaintiffs of proving that they were such holders for value before maturity without notice: Lerch Hardware Co. v. Bank, 109 Pa. 240.

There is no authority under the provisions of the national bank act for the national banks forming the Clearing House Association of Philadelphia to enter into the agreement of Sept. 24, 1873, as amended Oct. 18, 1873, and repromulgated Nov. 18, 1890; nor was there any authority in said Clearing House Association, either directly or acting through its governing committee, the plaintiffs in this action, to issue the $400,000 of loan certificates in this case to the Spring Garden National Bank, or to receive and hold collateral securities, and especially the note in suit, from the Spring Garden National Bank to secure the repayment by the said bank of the amount of said certificates to the holders thereof with interest; nor has the said associated banks, either directly in their own name, or indirectly through the instrumentality of their governing committee for the use of said associated banks, a right to maintain an action on the note in suit against the defendant; nor can such Clearing House Association, or its committee, become a bona fide holder for value thereof. In short, it has no authority in law to purchase the note in suit or to maintain an action upon it. We submit that the issuance of these loan certificates, and the receipt of collaterals to secure their payment with interest, are without authority of law and absolutely void.

If such an association is beyond the powers of such national banks, then the association, directly or indirectly, cannot main-

tain an action on the certificates of loans issued in pursuance of said agreement, or on the collaterals deposited as security for the certificates of loan: Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24.

A. T. Freedley, for appellee.—The maker of a promissory note cannot escape payment of his obligation by alleging that the act whereby a subsequent holder acquired it for value was an act ultra vires of the holder's chartered powers: National Bank v. Matthews, 98 U. S. 628; National Bank v. Whitney, 103 U. S. 102; Swope v. Leffingwell, 105 U. S. 3; Reynolds v. Crawfordsville Bank, 112 U. S. 413; Casey v. Credit Mobilier, 2 Woods, 86; Wright v. Pipe Line Co., 101 Pa. 204; Pine Grove Twp. v. Talcott, 19 Wall. 678; Sedgwick's Statute and Constitutional Law, 90; Kingman County v. Cornell University, 12 U. S. App. 559.

If the loan certificates were directly issued by a bank such issuance would not be ultra vires. It is a dealing on the faith of promissory notes, which is the very business for which banks are established: O'Hare v. Second Nat. Bank, 77 Pa. 97; Casey v. Credit Mobilier, 2 Woods, 86; Wright v. Pipe Line Co., 101 Pa. 202.

The point that the committee are not entitled to sue, as not being the absolute owners of the note, is without foundation. They held the note, and they have the legal title thereto. In an action on a negotiable instrument any holder is entitled to sue: Logan v. Cassell, 88 Pa. 290; Pearce v. Austin, 4 Whart. 489; Holmes v. Paul, 6 Am. Law Reg. 482; Brown v. Clark, 14 Pa. 469; Ward v. Tyler, 52 Pa. 393; Ballentine v. McGeagh, 4 Brewst. 95.

Opinion by Mr. Justice Williams, May 29, 1895:

Two lines of defense were taken in this case in the court below. The first of these denied the capacity of the plaintiffs to sue, and was brought to the attention of the learned judge by a prayer for instructions to the jury "that under the evidence in this case and the statutes governing national banks the plaintiffs cannot maintain the pending action against the defendant." The second alleged that the note sued on was made for the accommodation of F. W. Kennedy, president of the Spring Gar-

den National Bank, and that the plaintiffs were chargeable with notice of the want of consideration as between the maker and F. W. Kennedy. The first of these lines of defense makes it important for us to consider and determine the character and objects of the Clearing House Association, the distinction to be taken between it and the clearing house, and the functions and powers of the clearing house committee. An examination of the constitution or articles of association adopted by the banks forming "The Clearing House Association of the Banks of Philadelphia" shows the character and objects of the organization very clearly. In substance these articles amount to an agreement with each other by thirty-eight national banks in the city of Philadelphia to facilitate and simplify the settlement of daily balances between them for their mutual advantage. This agreement substitutes a settlement made at a fixed place and time each day by representatives of all the members of the association, in the place of a separate settlement by each bank with every other made over the counter. No other object is contemplated or provided for. The association does not provide for any united action for any business purpose. It does not contemplate the employment of capital or credit in any enterprise. It proposes and provides for co-operation to expedite and simplify the transaction by each member of the association of its own proper business in one particular, viz, the settlement of daily balances with the other national banks doing business in the city. Incidentally, co-operation in this particular would tend to bring the banks belonging to the association into closer relations, enable them to become more familiar with the volume of business and the actual condition of each other, and open the way to make them mutually helpful in times of financial stringency; but these results are incidental only. The Clearing House Association is nothing more nor less than an agreement among thirty-eight national banks to make their daily settlements at a fixed time and place each day. To carry this agreement into operation it became necessary to determine the place and hour at which the settlement should be made. A suitable room was secured, fitted up with desks and other necessary appliances at the expense of the associated banks, and a manager chosen to preside over it and direct the action of the clerks and runners when in session.

This room is the clearing place or, in the language of the constitution of the association, the clearing house. It is the place where the representatives of the several banks meet, and where all balances are struck and settled daily between the banks composing the association.

At the close of each meeting the amount due to and from each bank is definitely ascertained. The debtor banks then pay over to the manager the gross balance due from them to settle their accounts with all the members of the association, and he makes distribution of the sum so received among the creditor banks entitled to receive them. The clearing house is therefore not a business organization, a corporation, a partnership or an artificial person of any sort, but a place in which the thirty-eight members of the association settle with each other daily. We come now to consider the committee and the position in the general scheme occupied by it. Among the economies in time and labor contemplated by the banks was a settlement of daily balances without the necessity for handling and counting the cash in every case. To provide for this the banks agreed that they would deposit in the hands of certain persons, to be selected by them and to be called the clearing house committee, a sum of money, or its equivalent in good securities, at a fixed ratio upon their capital stock, to be used for payment of balances against them. For these sums the committee was to issue receipts or certificates in convenient sums, and these receipts or certificates were to be used in lieu of the cash they represented, which remained in the hands of the committee pledged for the payment, when payment became necessary, of the certificates. The committee held the funds and securities deposited with them in trust for the special purpose of securing the payment as far as they would reach of the balances due from the bank making the deposit. On Sept. 24, 1873, the associated banks entered into another agreement with each other by which "for the purpose of enabling the banks, members of the Philadelphia Clearing House Association, to afford proper assistance to the mercantile and manufacturing community and also to faciliate the inter-bank settlements resulting from the daily exchanges," they authorized the committee to receive from any member of the association additional deposits of bills receivable and other securities and issue certificates therefor "in

such amount, and to such percentage thereof as may in their judgment be advisable." The additional certificates, if issued, they agreed to accept in payment of daily balances at the clearing house on the condition that the securities deposited therefor should be held by the committee "in trust as a special deposit pledged for the redemption of the certificates issued thereupon." The committee were made, both by the original articles of association and by the additional contract of 1873, trustees or agents for all the members of the association with authority to accept deposits in money or securities and to issue their own receipts therefor, the money or securities remaining in their hands in pledge for the redemption of the receipts or certificates so issued by them. When a bank to which certificates had been issued under the original plan or the contract of 1873 failed to redeem them when their redemption became necessary, it was the duty of the committee to collect the securities in their hands and apply the proceeds to the payment of the holders of the certificates. The deposits were made, and the certificates issued, under an unconditional pledge of the securities to the committee for the payment of the certificates, and their title could only be divested by the payment of the sums for which the securities were pledged. The entire plan on which the settlements are made is therefore a device adopted by the banks to facilitate their legitimate business as banks, and involves no element of speculation, and no business undertaking by or on behalf of the associated banks. We are unable therefore to see in what respect these banks have violated the statutes of the United States relating to national banks or have transcended the limits which these statutes have drawn about the business of banking. They have diverted none of their funds, embarked in no new undertaking, entered into no business alliance, but devised and adopted what seems to be an improved method for doing a portion of their own necessary work. This same method or one identical in general outline has been adopted by the banks in every great city in the United States and by many in other lands; and, as far as I am aware, it has nowhere been held that the method is illegal. On the contrary it has recommended itself by its economy of time and labor to the several banks and, by its incidental results in promoting mutual helpfulness and confidence, has come to be regarded

with favor by the general public. The first line of defense was therefore properly held to be untenable by the court below and the assignment of error to that ruling cannot be sustained. The second line fails with the first. If it was not a violation of law for the banks to arrange for their own daily settlements in the manner provided by the clearing house agreement, then the committee became holders for value of the securities deposited with, and receipted for by them, and as such are not affected by equities existing between the original parties to the promissory notes or other negotiable securities for which they have issued certificates. But if they could be regarded as fixed with notice of the character of the note it is not easy to see how the fact that the note now sued on was made for the accommodation of F. W. Kennedy can avail the defendant. The committee are certainly holders for value and hold the note in pledge for the payment of its face in cash. Let us suppose they knew when they took it that it had been made and delivered to Kennedy for his accommodation. The very object of making an accommodation note is that the person for whose accommodation it was made may use it in the way that will best accommodate him. When it has been so used by the holder the accommodation maker or indorser is bound by the action of his friend and becomes liable to pay the amount of the note according to its terms: Moore v. Baird, 30 Pa. 138; and he cannot defend against the indorsee on the ground that the note was without consideration, for to permit this would defeat the purpose for which he loaned his credit: Cozens v. Middleton, 118 Pa. 622. As against a holder for value an accommodation maker can defend only on the ground of actual payment. The fact that it was without consideration and made for the accommodation of him who negotiated it is immaterial: Miller v. Pollock, 99 Pa. 206. Accommodation indorsers often show the character of their indorsement by a direction made upon the face of the note to credit the proceeds to the drawer, but the fact that the bank discounting had notice that the indorser was lending his credit to the maker has never been thought to affect the bank, or to relieve the indorser.

The evidence offered at the trial to show that the note was without consideration and given for the accommodation of F. W. Kennedy, by whom it was used in exactly the manner that must

have been contemplated when it was given, was properly rejected. It might have been competent if the action had been brought by Kennedy but as against a holder for value it was inadmissible. This question was ruled in the very recent case of Philler et al. v. Jewett, decided at the present term.

The judgment is now affirmed.

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168 484
200 155

168 484
214 415

A. J. Fillman v. John S. Ryon, C. C. Ward and L. W. Fenton. John S. Ryon, Appellant.

Trespass—Conspiracy—Extortion—Amendment—Statute of limitations.

Where an action is brought against more than one for a wrong done, a combination or joint act of all must be proved in order to recover against all; but if it turns out on the trial that one only was concerned, the plaintiff may recover as if such one had been sued alone, and in such case the conspiracy is nothing as to sustaining the action, the foundation being the actual damage done to the plaintiff.

Conspiracy to extort money—Arrest—Amendment.

Defendant and two other persons were sued as co-conspirators in an executed scheme to extort money from plaintiff by means of his arrest and detention on the charge of embezzlement. More than six years after the cause of action arose, the declaration was amended so as to remove therefrom the element of conspiracy, and the case was so proceeded in that it resulted in a judgment against one of the defendants for the money alleged to have been extorted, and in a judgment in favor of the other codefendants. *Held*, that the amendment did not prejudice the defendant against whom judgment was recovered, as the essence of the complaint in the declaration was the extortion, and the amendment was not necessory to authorize or sustain the judgment.

Duress—Imprisonment—Extortion.

To constitute duress by imprisonment the latter must be unlawful, or there must be an abuse of, or an oppression under, lawful process or legal detention. If there is an arrest for a just cause, but for an unlawful purpose, the party arrested, if he is thereby induced to part with his money, may recover it back in an action of trespass as having been procured from him by duress.

Argued May 1, 1894. Appeal, No. 242, Jan. T., 1894, by defendant, from judgment of C. P. Tioga Co., Nov. T., 1887, No. 302, on verdict for plaintiff. Before STERRETT, C. J., GREEN, MCCOLLUM, MITCHELL and DEAN, JJ. Affirmed.

Trespass to recover damages for a wrong done to plaintiff by an executed scheme to extort money from him by means of his arrest.

The case was referred to S. F. Channell as referee under the local act of Feb. 23, 1870, P. L. 219.

The referee reported the facts to be as follows:

"From the evidence produced, the referee finds that this claim arose from a transaction which occurred on the 23d day of April, 1886. The action was commenced on the 31st day of October, A. D. 1887, and the plaintiff's statement was filed on Aug. 27, 1888. On Dec. 17, 1892, and more than six years after the cause of action arose, the plaintiff, by leave of the court, filed an amended statement of his claim by which he claimed damages from the defendants for obtaining from him, under duress, money and valuable security to the amount and value of $387, and for damages in being deprived of his personal liberty.

"At the trial before the referee, the attorneys for the plaintiff made no claim for any damages by reason of the plaintiff having been deprived of his personal liberty, or for the humiliation and the like occasioned by the arrest to which he had been subjected, but demanded damages only for the value of that which they alleged they should show the plaintiff had paid to the defendants, or one of them, under duress, with interest.

"For about four years prior to April 3, 1886, the plaintiff, A. J. Fillman, was in the employ of John S. Ryon, one of the defendants, in conducting for him a store and market at Elkland, Pa.

"At about that date the plaintiff and said Ryon settled, and they agreed there was due plaintiff from said Ryon, for such service, the sum of $373.55, and said Ryon paid plaintiff that day, to apply thereon, $100, and on the 21st day of the same month paid him another $100, to apply thereon, and also gave him his duebill for the balance of about $173.

"On April 23d, of the same month, the said Ryon, defendant, made an information before C. C. Ward, Esq., then a justice of the peace at Elkland, Pa., and one of the defendants in this case, in which he charged the plaintiff, under the 107th section of the act of March, 1860, with having, while in his employ, as above stated, feloniously taken from him money, upon which

information he procured the said C. C. Ward to issue a criminal warrant for the arrest of the plaintiff, and by him it was delivered to L. W. Fenton, then a constable at Elkland, and now one of the defendants in this case, for execution.

"Upon this warrant the said Fenton arrested the plaintiff and took him to the office of the said justice, which was also the office of the said Ryon, at about 10:30 o'clock in the forenoon. There they found the said justice and the defendant Ryon and two or three other persons.

"Soon after the plaintiff was brought in, the justice inquired of him if he desired an attorney, and said to him that if he desired one he was entitled to time to get one. The plaintiff failed to signify a desire for an attorney, and the justice read the information to him, explaining that it was a somewhat serious charge, and inquired if he was guilty, to which he responded that he was not.

"Soon thereafter the justice left the office, and as soon as he left, or a little before, the outside door of the office was locked, but by whose suggestion it is not certain, and a little before the justice left the said Fenton suggested to the plaintiff that he knew whether he was guilty or not, and that if he was he ought to settle the matter, but he advised him not to pay anything if he was not guilty. From that time the said Fenton, Fillman and Ryon entered into a general discussion of the matter which, however, largely related to how much the plaintiff should pay to the said Ryon. Ryon at first demanded of plaintiff $500, then offered to take $400, and finally accepted $200 in money and the duebill which he had given plaintiff for $170.50, he being assured that that was all the plaintiff could raise.

"Mr. Ryon stated once or twice while the conversation was being had that he could not settle the criminal prosecution, that the law would not allow him to do so, and also, soon after the plaintiff was brought in, made some statement in the nature of a threat and about his ability to send him to the penitentiary. After this had been done, and the plaintiff had signed a receipt to said Ryon in full of all demands, he was allowed his liberty at about twelve o'clock. As the parties separated it was suggested by some one of them that what had there occurred should be kept quiet.

"At one o'clock the justice returned to his office and found

the defendant, Ryon, there, and he then directed the justice to enter upon his docket record of the case that 'the prosecutor not appearing the defendant is discharged,' which was accordingly done.

"Nothing further has ever been done with the criminal prosecution, and it was not shown that prior to the arrest complained of the plaintiff had any knowledge that Mr. Ryon had such a claim against him.

"At the trial the defendants offered considerable evidence for the purpose of showing probable cause, and also some evidence for the purpose of showing actual cause for the prosecution. This evidence was objected to by the attorneys for the plaintiff, but the evidence was received by the referee conditionally, reserving the question as to its competency and legal effect.

"As to the evidence upon the question of probable cause, the referee finds that it was sufficient to establish the existence of such fact, if the case were one where the plaintiff was claiming damages for an unlawful restraint of liberty, as is usually the case.

"As to the evidence tending to establish actual cause, it was all very uncertain and unsatisfactory. It did not show that an amount as great as $370 had been misappropriated by the plaintiff, and I do not understand defendants' counsel to contend that it did. But for the sake of certainty the referee finds that the weight of evidence shows that a small amount of money and goods, ($35.00 in value,) the property of the defendant Ryon, had been taken by the plaintiff, as charged against him.

"One of the questions asked of the defendant Ryon, by his counsel, was: 'State, Mr. Ryon, whether in making that complaint you made against him you did it in good faith, believing him to be guilty as charged, or were you actuated by malice in doing it?' This question was also received by the referee under objection, reserving the question of its competency.

"The referee further finds that the prosecution was commenced by the defendant Ryon for the purpose of extorting money from the plaintiff, and that the money and duebill was paid and returned to said defendant by plaintiff under the compulsion of said prosecution, as managed by defendant, and to

be relieved therefrom; that there was such an abuse of legal process by the defendant as to constitute duress, and that the money and duebill which was obtained by said Ryon from plaintiff was obtained by duress of his person. See Prough v. Entriken, 11 Pa. 84; Stouffer v. Latshaw, 2 Watts, 165; Work's App., 59 Pa. 448; Taylor v. Jaques, 106 Mass. 294; Osburn v. Robinson, 36 N. Y. 371; Hackett v. King, 6 Allen, 58; Adams v. Nat. Bank, 15 Am. Rep. 451.

"The counsel for the defendants contends that if the plaintiff is entitled to recover at all for the injury complained of, his remedy must be by an action of assumpsit. He also claims that any claim that the plaintiff may have had is barred by the statute of limitations, for the reason that the plaintiff's statement, under which he claims, was filed more than six years after the alleged cause of action accrued.

"From these facts the referee finds the following conclusions of law:

"First. As to the question reserved on the admission of evidence offered for the purpose of showing probable and actual cause, the referee now rules that under the facts of this case such evidence was immaterial. [4]

"Second. As to the question reserved as to the admission of the defendant to testify as to his belief in the guilt of the plaintiff as to the matters charged against him, the referee now holds that such evidence was incompetent. See Ramsey v. Arott, 64 Tex. 320, and note to 14 Am. & Eng. Ency of Law, 25. [5]

"Third. The referee finds that this action is properly brought in trespass. See 2 Hilliard on Torts, 104; Foshay v. Ferguson, 5 Hill, 154; Chase v. Dwinall, 20 Am. Dec. 354; Foster v. Weaver, 118 Pa. 42.

"Fourth. The referee does not find that the amended narr in this case works such a change in the cause of action as to let in the bar of the statute of limitation. The change is mainly in the statement of the mode by which the injury was effected. [6]

"Fifth. The referee finds from the facts that the plaintiff is entitled to recover from the defendant John S. Ryon the sum of $370.50 and interest thereon since April 23, 1886, and he finds no cause of action as to the other defendants, C. C. Ward and L. W. Fenton." [7]

Judgment was entered by the referee against defendant John S. Ryon for $536.85, and in favor of the other two defendants. Defendant, John S. Ryon, appealed.

Errors assigned, among others, were (4-7) referee's findings as above, quoting them; and (8) entry of judgment as above.

James Ryon, *R. K. Young* and *George W. Merrick* with him, for appellant.—It is not necessary in all cases to aver that the malicious acts complained of are without probable cause. The allegation of discharge from the arrest raises the legal presumption prima facie that the prosecution was without probable cause: Smith v. Ege, 52 Pa. 419; Madison v. Penna. R. R. Co., 147 Pa. 509; Bernar v. Dunlap, 94 Pa. 329; Emerson v. Cochran, 111 Pa. 622; Norcross v. Otis, 152 Pa. 481; Prough v. Entriken, 11 Pa. 81.

Under the amended statement in this case the allegations of bad treatment, oppression and duress bear upon the question of malice and motive: 14 Am. & Eng. Ency. of Law, 62.

The facts of actual cause, if known to the defendant, constitute for him probable cause; and if unknown to him, though not strictly admissible as showing probable cause, are admissible as bearing upon the guilt of the plaintiff; for the action of malicious prosecution is given to protect an innocent plaintiff, not a guilty one: Gilliford v. Windel, 108 Pa. 142.

The cause of action arose by the finding of fact, April 23, 1886, and the declaration was amended Dec. 17, 1892, more than six years thereafter. In amending the record we understand the practice to be that, if the amendment raises the question of limitations, it is allowed as of course without exception, and the question is raised after the evidence is in on prayers for instructions or conclusions of law as to its effect: Kaul v. Lawrence, 73 Pa. 410; Leeds v. Lockwood, 84 Pa. 70; Tyrrill v. Lamb, 96 Pa. 464; Seipel v. Extension Co., 129 Pa. 425.

By the amendment the cause or ground of the action is wholly changed or shifted. The conspiracy is eliminated. It is no longer a charge of an unlawful agreement of mind as an inference from certain acts, but the acts themselves as such, in and of themselves, become one thing averred and complained of; and a judgment is rendered against one of the three defend-

ants: Winder v. Northampton Bank, 2 Pa. 446; Reitagel v. Franklin, 5 S. & R. 33; Newall v. Jenkins, 26 Pa. 159.

An amendment which makes a substantial change in the cause or ground of action, especially if it will deprive the opposite party of a defense under the statute of limitations, is error: Royse v. May, 93 Pa. 454; Furst v. Building Association, 128 Pa. 183; Fairchild v. Dunbar Furnace Co., 128 Pa. 485.

Jerome B. Niles, *John T. Gear*, *Aaron R. Niles*, and *Alfred J. Niles* with him, for appellee.—The defendant's rights were not changed or interfered with in the amendment. Bardsley v. Kern, 39 Leg. Int. 131; Caldwell v. Remington, 2 Wharton, 131; Smith v. Bellows, 77 Pa. 441; 2 Troubat & Haly's Practice, 72; Wilhelm's App., 79 Pa. 120; Seipel v. R. Co., 129 Pa. Rep. 425; Coxe v. Tilghman, 1 Whart. 287; Yost v. Eby, 23 Pa. 327; Proper v. Luce, 3 P. & W. 65; Clymer v. Thomas, 7 S. & R. 178; Steffy v. Carpenter, 37 Pa. 41; Knapp v. Hartung, 73 Pa. 290.

Where one induces another to enter into a contract and part with his property either by duress of imprisonment or duress per minas, the transaction is void and no title passes, and the party who assumes the control of property obtained by him in this way is liable to the owner in trover without a demand and refusal: 2 Hilliard on Torts, 104; Chase v. Dwinall, 20 Am. Dec. 352; Foshay v. Ferguson, 5 Hill (N. Y.), 154; Carey v. Hotaling, 1 Hill (N. Y.), 311; Hackett v. King, 6 Allen (Mass.), 58; Winebiddle v. Porterfield, 9 Pa. 137; Chapman v. Calder, 14 Pa. 369.

Though a person is arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest is thereby to extort money or enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purpose; and a release or conveyance of property obtained by such means is void: Hackett v. King, 6 Allen, 58; Watkins v. Baird, 6 Mass. 506; Taylor v. Jacques, 106 Mass. 291; Grainger v. Hill, 33 Eng. Com. Law Rep. 675; 2 Hilliard on Torts, 104; Foshay v. Ferguson, 5 Hill (N. Y.), 154; Evans v. Begley, 2 Wend. 243; Cobbs v. Sowle, 24 Am. Rep. 166; Chase v. Dwinall, 20 Am. Dec. 352; Adams v. Irving Nat. Bank, 116

N. Y. 606; Mayer v. Walter, 64 Pa. 285; Schofield v. Ferrers, 47 Pa. 194; Gilliford v. Windel, 108 Pa. 146; Schmidt v. Weidman, 63 Pa. 173; Prough v. Entriken, 11 Pa. 85; Work's App., 59 Pa. 445.

The settlement made as shown by the evidence, was not in pursuance of the 9th section of the criminal procedure act of March 31, 1860, Purd. Dig. 475 (ed. 1883), or of any other act of assembly. It was in violation of the section permitting the settlement of certain criminal cases, and every adjudicated case bearing upon this subject: 1 Story's Eq. J. 304; Ormerod v. Dearman, 100 Pa. 561; Pearce v. Wilson, 111 Pa. 14; Bredin's App., 92 Pa. 241; National Bank v. Kirk, 90 Pa. 49; Riddle v. Hall, 99 Pa. 116.

OPINION BY MR. JUSTICE MCCOLLUM, May 30, 1895:

The defendant and two other persons were sued as co-conspirators in an executed scheme to extort money from the plaintiff by means of his arrest and detention on the charge of embezzlement. This sufficiently appears from the declaration filed in the case. More than six years after the cause of action arose the declaration was amended so as to remove therefrom the element of conspiracy, and the case was so proceeded in that it resulted in a judgment against the present defendant for the money alleged to have been extorted from the plaintiff, and in a judgment in favor of his co-defendants. It is claimed that the amendment changed the cause of action and deprived the defendants of substantial rights. If the conspiracy was the cause of action and the amendmant substituted for it a new and distinct cause barred by the statute of limitations there would be obvious merit in the defendants' contention. But the essence of the complaint in the declaration was the extortion, and the amendment was not necessary to authorize or sustain the judgment appealed from. This being so the defendants were not in any manner prejudiced by the amendment. It did not introduce a new cause of action nor contribute to the result complained of. The case as presented by the pleadings before the amendment was allowed was clearly within the principle of Laverty v. Vanarsdale, 65 Pa. 507, in which it was held that where an action is brought against more than one for a wrong done, in order to recover against all a com-

bination or joint act of all must be proved, but if it turns out on the trial that one only was concerned, the plaintiff may recover as if such one had been sued alone, and in such case the conspiracy is nothing as to sustaining the action, the foundation being the actual damage done to the plaintiff. To the same effect is Collins v. Cronin, 117 Pa. 35, in which it was held that in an action against two or more in case in the nature of a conspiracy, if the tort be actionable, whether committed by two or more, recovery may be had against but one, but, if the tort be actionable only when committed under an unlawful conspiracy of two or more, recovery may not be had unless the unlawful conspiracy be established. In the case before us, as in Laverty v. Vanarsdale, the tortious act complained of was "capable of being performed by one defendant alone." For these reasons the defendant's eleventh point was inapplicable, and the answer thereto, although technically erroneous, furnishes no ground for reversing the judgment.

There was probable cause for the arrest of the plaintiff for the crime with which he was charged in the information, and the warrant for it was regular upon its face. The arrest, therefore, considered by itself, afforded no ground for an action for malicious prosecution. This much was conceded by the learned referee, who nevertheless found that the arrest was made for the purpose of extortion, and that the money obtained by it was paid under duress. As these findings appear to be warranted by the evidence the case must be disposed of upon them. To constitute duress by imprisonment the latter must be unlawful, or there must be an abuse of or an oppression under lawful process or legal detention: 6 Am. & Eng. Ency. of Law, 62, and cases there cited. If there is an arrest for a just cause but for an unlawful purpose the party arrested if he is thereby induced to enter into a contract may avoid it as one procured by duress: Baker v. Morton, 12 Wall. (U. S.) 150. "Though a person is arrested under a legal warrant and by a proper officer yet if one of the objects of the arrest is thereby to extort money or enforce the settlement of a civil claim such arrest is false imprisonment by all who have directly or indirectly procured the same or participated therein for any such purpose; and a release or conveyance of property obtained by means of such arrest is void:" Hackett v. King, 6 Allen, 58.

The principles enunciated in the citations made are in accord with the decisions of this court: Prough v. Entriken, 11 Pa. 85; Schofield v. Ferrers, 47 Pa. 194; Schmidt v. Weideman, 63 Pa. 173; Mayer v. Walter, 64 Pa. 285; Work's Appeal, 59 Pa. 445. The law does not countenance the employment of criminal process for the collection of debts and the enforcement of civil liabilities. If there is probable cause for a criminal prosecution and it is instituted and maintained for a lawful purpose, the acquittal of the accused does not give him an action against the prosecutor. But if there is just cause for the prosecution and it is resorted to for an unlawful purpose the prosecutor will not be permitted to acquire anything by it. These well settled principles are applicable to the facts found by the learned referee in the case at bar. The plaintiff was arrested on the charge of embezzlement and for the purpose of extorting money from him. The prosecution was abandoned when the purpose of it was accomplished. He parted with his property while under duress by imprisonment and threats, and his right to recover it from the wrongdoer cannot under the circumstances shown be successfully questioned. We think, too, that as the act of which he complains was obviously unlawful and tortious he may recover the property obtained by it in this form of action.

The specifications of error are overruled.

Judgment affirmed.

James B. Jones et al. v. Jennings Bros. & Co., Ltd., Appellants.

168 493
19 SC 611

Sale—Contract—Executory contract—Measure of damages.

An order for the purchase of steel scrap, "similar to sample wagon load" previously delivered, is an executory contract, and no title passes until the goods are accepted by the vendee.

168 493
22 SC 10
22 SC 480

Where the vendee refuses to accept the goods without sufficient cause, the title remains in the seller, and the measure of damages for the refusal to accept is not the purchase price of the goods, but the difference between the price agreed upon and the market value on the day appointed for delivery.

168 493
25 SC 28
26 SC 379

168 493
223 376
e38SC 380

168 493
f41SC652

Argued Oct. 24, 1894. Appeal No. 111, Oct. T., 1894, by defendants, from judgment of C. P. No. 3, Allegheny Co., May T., 1892, No. 707, on verdict for plaintiffs. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Assumpsit for goods sold and delivered. Before PORTER, J.

At the trial plaintiffs claimed to recover the value of two car loads of steel scrap alleged to have been furnished under the following order:

"JENNINGS BROTHERS & COMPANY, LIMITED,
"Office, Preble Avenue, Allegheny, P. O., Pittsburg.

"No. 1,955. Pittsburg, Pa., Dec. 1, 1891.

"MESSRS. J. B. JONES & BRO.

"Please furnish us with the following:—In our yard on Preble avenue, Allegheny, about sixty tons steel scrap similar to sample wagon load delivered to us this A. M., at $16 per gross ton (F. O. B. cars, Allegheny,) confirming verbal agreement.

"With bill, giving number of this order.

"JENNINGS BROTHERS & COMPANY, LIMITED,
"John Davis, *Treas.*

"Send Bill of Lading and Duplicate Invoice without prices."

Defendants subjected the sample to analysis. They claimed that the steel scrap delivered under the order did not correspond in quality with the sample, and refused to accept the car sent to them.

When the evidence was closed, defendants requested the court to charge as follows:

"1. This action being for the price of merchandise sold and delivered by plaintiffs to defendants, and the evidence being uncontradicted that the merchandise was not accepted by the defendants, the plaintiffs cannot recover in this action and the verdict should be for the defendants. *Answer:* Refused. [1]

"2. The evidence being uncontradicted that the defendants declined to receive the merchandise, if this refusal was in violation of their contract the plaintiffs could only recover for a breach of the contract, and the measure of damages would be the difference between the price agreed upon and the market value of the scrap on the day appointed for delivery, and no

evidence having been given of the market value of the goods as compared with the price, it does not appear that the plaintiffs have suffered any damage and the verdict should be for the defendants. *Answer:* Refused. [2]

"5. Under all the evidence the verdict should be for the defendants. *Answer:* Refused." [3]

Verdict and judgment for plaintiffs for $897.05. Defendants appealed.

Errors assigned were (1-3) above instructions, quoting them.

W. K. Jennings, for appellants.—The first car was never accepted by the defendants, and the second car was never delivered at all, although the verdict was for the price of both cars. The action therefore could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered: Unexcelled Fire Works Co. v. Polites, 130 Pa. 536.

Delivery to a common carrier is a delivery to a purchaser, but such delivery is constructive merely: Braddock Glass Co. v. Irwin, 153 Pa. 440.

Delivery is not complete without acceptance, and there is a distinction between executed and executory contracts, which is pointed out by Mr. Justice WILLIAMS in Fogel v. Brubaker, 122 Pa. 7, which was overlooked by the learned judge. In regard to executory sales, he says that they "are made by sample or by description, the goods not being seen by the purchaser until they have been selected and forwarded by the seller. . . . The rule in this case is not caveat emptor, but caveat venditor, for the duty of selecting and sending the article ordered by description or by sample is on the seller . . . . As was said by this court in Dailey v. Green, 15 Pa. 126, "'when the contract is executory, as it always is when a particular article is ordered without being seen, from one who undertakes it shall be of a given quality or description, and the thing sent as such is never completely accepted, the buyer is not bound to keep it, or pay for the article on any terms, though no fraud was intended by the vendor.'"

Morton Hunter, for appellees.—The verdict of the jury must be construed to be substantially a finding of the facts that the plaintiffs had delivered the goods and fully complied with the contract.

The measure of damages is the contract price, as the rule of damages, contended for by appellants, that the damages are the difference between the contract price and the market value, does not apply to cases where goods have been delivered and the plaintiff has fully performed his contract.

OPINION BY MR. JUSTICE MCCOLLUM, May 30, 1895:

The scrap steel for the price of which this action was brought was sold by sample and to be delivered to the defendants at the place designated in the order for it. This sample was subjected to a chemical analysis, and as it proved to be satisfactory the merchandise in question was ordered on the faith of it. The material shipped in pursuance of the order did not correspond in quality with the sample and the defendants refused to accept it. The contract was executory and the ownership of the property was not changed by it. The title to the latter remained in the plaintiffs subject to the defendants' inspection and acceptance of it: Fogel v. Brubaker, 122 Pa. 7. The carrier was the agent of the plaintiffs and there was no delivery actual or constructive to the defendants. In fact it does not appear that all the merchandise sued for was conveyed to the place appointed for the delivery of it. One car load of it was hauled there, and the plaintiffs say they directed their agent to ship another car load of it to that point, but it does not appear that this direction was complied with. Assuming, however, that the agent obeyed instructions and that the second car load, as respects this issue, is on the footing of the first, did the defendant's refusal to accept the material so shipped render them liable for the price of it? Whilst it was demonstrated by the analysis that the steel scrap in question did not correspond in quality with the sample, there was uncontradicted evidence that it was taken from the same pile and was similar in external appearance. The defendants affirmed and the plaintiffs denied that the similarity or the want of it was to be ascertained by an analytical test, and in view of the instructions the fair inference from the verdict is that the jury sustained the plaintiffs' contention in this par-

ticular. We must assume, therefore, for the purposes of our present inquiry, that the material which the defendants refused to accept was such as the contract called for.

In executory contracts for the sale of goods not specific, the measure of damages for the refusal of the buyer to accept the same is the difference between the price agreed upon and the market value on the day appointed for delivery: Unexcelled Fire Works Co. v. Polites, 130 Pa. 536. In that case "the plaintiffs made the carrier their agent for delivery but the goods in fact were not delivered. A delivery was tendered by the carrier when the goods arrived at their destination, but they were not received. The action therefore could not be for the price but for special damages for a refusal to receive the goods when the delivery was tendered." The decision in the case referred to, and from which we have quoted, is in exact accord with the rule as stated in Benjamin on Sales, secs. 758 and 870, and is not in conflict with any decision of this court. We think it sustains the defendants' contention in this case and that on the authority of it the judgment of the court below should be reversed. If the defendants were justified in their refusal to accept the goods they incurred no liability in consequence of it, but if they ought to have accepted the goods the plaintiffs were entitled to recover such damages as they sustained by the nonacceptance of them. As they failed to submit any evidence of damage the court should have directed a verdict for the defendants.

Judgment reversed.

Noah W. Shafer v. Lacock, Hawthorn & Co., Appellants.

Negligence—Evidence—Declarations.

Declarations made by workmen while a fire was in progress to the effect that it was caused by their carelessness, are admissible in evidence in an action by the owner of the property destroyed against the employer of the workmen to recover damages for the loss occasioned by the fire.

Negligence—Presumption of negligence from circumstances.

Where the thing which causes the injury is shown to be under the management of the defendants, and the accident is such as in the ordinary course of things does not happen when those who have the management use

168 497
183 31
168 497
190 353
168 497
201 257
168 497
20 SC 628
168 497
21 SC 467
168 497
24 SC 382
24 SC 482
168 497
28 SC 535
168 497
213 372
168 497
36 SC 583
168 497
223 172
388C 233

proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from a want of care, and the burden is upon the defendants of establishing their freedom from fault.

Defendants were employed by plaintiff to repair a roof. They sent two men to do the work, who took a fire pot upon the roof. A fire was caused by sparks from the fire pot, and plaintiff's property was destroyed. *Held*, that the circumstances raised a presumption of negligence against defendants.

Argued Oct. 29, 1894. Appeal, No. 157, Oct. T., 1894, by defendants, from judgment of C. P. No. 2, Allegheny Co., Oct. T., 1893, No. 120, on verdict for plaintiff. Before GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Trespass to recover damages for loss of property alleged to have been destroyed by the negligence of defendants' workmen. Before White, J.

At the trial it appeared that defendants were engaged in the tin roofing business. Plaintiff employed them to repair the roof of his house. Defendants sent two workmen to do the work who took with them upon the roof of the house a fire pot. Sparks escaped from the fire pot, and set the house on fire. The entire building was destroyed, together with a large part of the furniture and some valuable trees.

Plaintiff testified:

"A. Then as soon as I got into the gate one of the tinners came to me and he said"—

Objected to as hearsay. Objection overruled. Counsel for defendants except, and bill sealed. [1]

"A. He said, I owe you an apology for burning your house down, and then he said to me,—told me how it occurred. He said, I was working up on the roof and I had exposed it, a spark got into the sheathing, and I thought I had put it out, and when I came back I found that the fire had such a start that we couldn't control it. What I said to him I don't mind.

Rose Shelton was asked this question:

"Q. What did they say?"

Objected to as incompetent. Objection overruled. Counsel for defendants except, and bill sealed. [2]

"A. Why, Mary Shafer asked them whether they were hunting for something; they were talking to themselves, and she

asked them what it was about, and they said a spark had caught and they wanted some water."

Charles F. Swift was asked this question:

"Q. Did you hear any conversation between the tinner and other persons, or yourself, that day, and if so, when did you hear it?"

Objected to as incompetent and hearsay. Objection overruled. Counsel for defendants except, and bill sealed. [3]

"A. After the fire got well under headway, so far that nothing more could be done to carry articles from the house, the wind shifted to the south, I think, and the cinders came in a northwesterly direction, falling on many of the articles that had been removed from the house. They were lying in the upper part of the yard, and a number of us commenced carrying a number of those articles across the road in Mr. Collenbaugh's yard, and during the time of carrying of these articles the conversation between the group of persons who were there and the tinner occurred there."

"Q. Well, now, just state what the conversation was."

Objected to as incompetent and hearsay. Objection overruled. Counsel for defendants except and bill sealed.

"A. As we were standing there he pointed at an opening at the foot of the window casing or mullin—I don't know just exactly what you call it; it was resting on the window stool outside, a hole large enough to enter my fist through; he said that his pot was sitting out on the roof, and that sparks from that pot drew around the mansard and the corner of the casing into that hole, and he discovered it was on fire, and he said he extinguished it, as he supposed, spit in it, rubbed it with his hand, put it out, and I can't say positively whether he said he put it out as far as he could see or not."

"Q. He gave that as the way the fire occurred? A. That was the only theory he could give at that time. Q. Did he say when that occurred? A. During the time that he was on the roof, mending a hole in the roof near the window, open from the roof—what time of day, do you mean? Q. Yes. A. I can't say as he did; I don't remember as he said just what time of day it was."

Milton Kerns was asked this question:

"Q. Did Mr. Reese tell you that he expected to be discharged

or bounced on Saturday for the burning of Mr. Shafer's house, and that it had caught from a spark from his charcoal stove? A. Yes, sir."

Objected to as incompetent. Objection overruled. Defendant's counsel except and bill sealed. [4]

Defendants' points were among others as follows:

"4. If the jury believe that the workman sent by defendants to do the work upon plaintiff's house was a competent and careful workman, and that the fire pot furnished to him by defendants and used by him was a safe and proper appliance, then the defendants were not guilty of the want of reasonable and ordinary care, and their verdict should be for the defendants. *Answer:* Refused. [5]

"5. Under all the evidence the verdict should be for the defendants. *Answer:* Refused." [6]

The court charged in part as follows:

"[Now, the contention of the defendant is that the fire did not originate from sparks from this fire pot, and he has suggested this theory to account for the fire—and mainly on that contention they differ—that the fire burst out at the side of the dormer window. Now, I allow the testimony to be given of what the young man said at the time the building was burned as a part of the res gestæ. He admitted to Mr. Shafer that the fire, according to Mr. Shafer's testimony, originated from a spark from his fire pot, and that he tried to put it out and failed. The colored girl, and also Mary, heard him admit that the fire caught from a spark. A man down in the yard while the house was burning said he explained where it caught; pointed up; caught from a spark. Then the next day he admitted, according to the testimony of those two witnesses (who were called to contradict him), that the fire caught from a spark. To one of them he expressed the fear that he would be dismissed from the employment of the defendants for burning the house, and to the other one admitted that it caught from a spark, and that he thought he had extinguished it, and when he returned found it had got beyond control. Now, the young man, when first called as a witness, explaining what he said to Mr. Shafer, differs materially from what Mr. Shafer says he said. He said that he told Mr. Shafer he owed an explanation, and that he told him he thought the house caught from a spark.

But his testimony here is that it did not catch from a spark. He has so testified, or rather explained his declaration to Mr. Shafer at that time, because he then supposed it caught from a spark. Now, as I say, gentlemen, the first question is, how did that fire take place? If it took place from a spark or sparks from the fire pot he was using, then the next question would be, was it negligence? Was it because of his negligence in handling it, or doing something which he ought not to have done, or not being as careful as he ought to have been? The fair presumption is, if it caught from sparks, that it was negligence. That is the fair presumption. He denies here that it caught from sparks, and denies that he said so to these others. Now, I say if you find from the evidence that the fire originated from the sparks, the fair presumption would be that it was through some negligence of his. The plaintiff cannot explain the exact circumstances of the case, but the young man knows all about it. If it was not through negligence, that is, if this spark set fire to the house without negligence on his part, he could explain it, because if it was purely accidental, without any negligence on his part, there would be no responsibility on him or his employer. By way of illustrating it, what I mean, gentlemen, I will say this: If he was handling the fire box very carefully, as he ought to have been doing, upon a roof where there would be danger from sparks, and if, with that care and caution that he ought to have exercised, there was a sudden puff of wind that sent sparks into the house, he would not be responsible; there would not be negligence there. He denies that the fire took place from sparks, and you have the declarations of the various witnesses. If you find that the fire did occur from sparks, the fair presumption would be that he was in some way negligent, as he only could explain how it occurred, and why he was not guilty of negligence, if it occurred from sparks.]" [7]

Verdict and judgment for plaintiff for $17,018. Defendants appealed.

Errors assigned were (1–4) rulings on evidence, quoting the bill of exceptions; (5–7) above instructions, quoting them.

J. S. Ferguson, *James S. Young* and *Lewis McMullen* with him, for appellants, cited on the question of evidence: 21 Am.

& Eng. Ency. of Law, 106; Russell v. Hudson River R. R., 17 N. Y. 137; Williamson v. Cambridge R. R., 144 Mass. 148; Lane v. Bryant, 75 Mass. 245; Lund v. Tyngsborough, 9 Cushing, 36; Story on Agency, sec. 134; Packet Co. v. Clough, 87 U. S. 540; Vicksburg R. R. v. O'Brien, 119 U. S. 99.

On the question of negligence: Buckley v. Gutta Percha Co., 113 N. Y. 540; Allison Mfg. Co. v. McCormick, 118 Pa. 519; McCully v. Clark & Thaw, 40 Pa. 399; Baker v. Fehr, 97 Pa. 72.

J. M. Garrison, *John S. Robb* with him, for appellee, cited on the question of evidence: 1 Rice on Evidence, 376; Lund v. Tyngsborough, 9 Cushing, 41; Hanover R. R. v. Coyle, 55 Pa. 396; Pa. R. R. v. Lyons, 129 Pa. 113; Tompkins v. Saltmarsh, 14 S. & R. 275; Elkins v. McKean, 79 Pa. 493; Mesert v. Perry, 36 Miss. 261; Leahey v. Cass Ave. R. R., 97 Mo. 165; O. R. R. v. Porter, 92 Ill. 437; Toledo R. R. v. Goddard, 25 Ind. 185; Greenleaf on Evidence, secs. 258, 259, 261, 262; 1 Rice on Evidence, 376; 21 Am. & Eng. Ency. of Law, 106.

On the question of negligence, 16 Am. & Eng. Ency. of Law, 448; Scott v. London, etc., 3 Hurl. & Colt., 596; Rose v. Stephens & Condit Trans. Co., 20 Blatchf. 411; Mulcairns v. Janesville, 67 Wis. 24; White v. Boston R. R., 144 Mass. 404; Dougherty v. Missouri R. R., 81 Mo. 325; Bedford etc. R. R. v. Rainbolt, 99 Ind. 551; Cummings v. National Furnace Co., 60 Wis. 603; Seybolt v. New York etc. R. R., 95 N. Y. 562; Lowery v. Manhattan R. R., 99 N. Y. 158; Douglass v. Mitchell, 35 Pa. 443.

Opinion by Mr. Justice McCollum, May 30, 1895:

If the destruction of the plaintiff's property was the direct result of the negligence of the defendants' servants in the performance of the work their employers had undertaken to do for him this judgment must stand, unless it plainly appears that the court below erred in its rulings on offers of evidence or in its instructions to the jury. It is contended in support of the appeal that the declarations of the workmen, made while the fire was in progress, to the effect that it was caused by their carelessness, were not admissible to charge their employers with liability for the consequences of it. We think this contention is

sufficiently answered by the decisions of this court in Hanover Railroad Co. v. Coyle, 55 Pa. 396; Tompkins v. Saltmarsh, 14 S. & R. 275; Elkins v. McKean, 79 Pa. 493, and Penna. Railroad Co. v. Lyons, 129 Pa. 113. We accordingly overrule the first, second, and third specifications of error. As the evidence complained of in the fourth specification was received in rebuttal, and manifestly for the purpose of contradicting the defendants' principal witness in a material matter, it was clearly relevant and its admission afforded no ground for reversing the judgment. The proposition that if the defendants furnished a proper fire pot and competent and careful workmen they are not responsible to the plaintiff for the loss he sustained through the negligence of their servants is not applicable to the case. The relation between the parties is not that of master and servant and the duties which the former owes to the latter need no consideration in the decision of the questions involved in this issue. For these reasons the fourth and fifth specifications are overruled.

There are cases in which a fair presumption or inference of negligence arises from the circumstances under which the injury occurred, and this we think is one of them. The defendants by their servants were in possession of the roof of the plaintiff's house and engaged in repairing it. For the purposes of their work they had a fire pot there, and it is established by the verdict that the fire which destroyed his property was caused by a spark or sparks from it. The workmen, while the fire was in progress, acknowledged that it was so caused, but on the trial they set up in the interest of their employers, a theory respecting the origin of it which was discredited by their previous declarations, and other testimony, and was rejected by the jury. It was a theory born long after the fire and opposed to their observation at the time of it. It was speculative and conjectural and it was justly condemned. The defendants by their servants were in exclusive possession of the roof, and the destruction of the property was due to fire brought there by them, and under their control. The occurrence was not in the ordinary course of things, and the circumstances connected with and surrounding it put on them the duty of showing that it was at least consistent with the exercise of proper care in the performance of their work. If it was capa-

ble of an explanation which repelled an inference that it resulted from their negligence, they could and ought to have made it because they were in a position to do so, while from the nature of the case it was not in the power of the plaintiff to show expressly in what manner their work was performed or the cause of the escape from the fire pot of the sparks by means of which his house was burned. In Sherman and Redfield on Negligence, secs. 59 and 60, the rule applicable to the case is thus stated: "The accident, the injury and the circumstances under which they occurred are in some cases sufficient to raise a presumption of negligence and thus cast on the defendant the burden of establishing his freedom from fault. When the thing which causes the injury is shown to be under the management of the defendants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from a want of care." See also on this point Thompson on Negligence, 1227–1235, Cooley on Torts, 706, and 16 Am. & Eng. Ency. of Law, 448, and cases there cited. In the light of the evidence and the principles applicable to it we cannot convict the learned court below of error in the instructions. We therefore overrule the sixth and seventh specifications.

Judgment affirmed.

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168 504
183 507

John Dietz v. Metropolitan Life Ins. Co., Appellant.

Insurance—Life insurance—Health of insured—Misrepresentations.

A policy of life insurance stipulated that "no obligation is assumed by the company prior to the date hereof, nor unless upon said date the assured is alive and in sound health." The assured died of typhoid pneumonia. The physician who attended him in his last illness filled out a blank furnished by defendant, in which, in reply to the question: "Was deceased afflicted with any infirmity, deformity or chronic disease? If so, specify," he wrote "Epilepsy." The father and sister of the assured testified that the assured had fits during childhood, but that he had not been so afflicted for twelve years prior to the date of the policy, and that he was in sound health when the policy was issued. *Held*, that the question as to whether the assured was in sound health at the date of the policy was for the jury.

In such a case it is not error for the court to charge "A man may have sick headache temporarily, and still be considered in sound health, although abstractly considered it is not sound health; so a man may have an attack of rheumatism; now abstractly he would not be considered to be in sound health, and yet I apprehend that in the meaning of this policy he would be in sound health if it was just a temporary attack of rheumatism. . . . These little infirmities, or rather these little attacks of temporary disease,—headache, or a little attack of rheumatism, or some little attack of that kind,—I do not apprehend are what is meant in this policy to be 'sound health,' because they have no probable bearing upon the man's life."

Argued Oct. 31, 1894. Appeal, No. 209, Oct. T., 1894, by defendant, from judgment of C. P. No. 2, Allegheny Co., July T., 1893, No. 625, on verdict for plaintiff. Before GREEN, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Assumpsit on a policy of life insurance. Before WHITE, J.

At the trial it appeared that the policy contained the following stipulation: "No obligation is assumed by the company prior to the date hereof, nor unless upon said date the assured is alive and in sound health." The insurance company claimed that the assured was ill with chronic epilepsy at the time the policy was issued. The assured died of typhoid pneumonia two years after the date of the policy. The physician who attended him at the time of his death filled out a blank furnished by the defendant. In the blank was the following question: "Was deceased afflicted with any infirmity, deformity or chronic disease? If so, specify." In answer to this the physician wrote "Epilepsy." The father and sister of the deceased testified that he had been subject to fits during childhood, but that he had not been so afflicted for twelve years prior to the date of the policy.

The court charged in part as follows:

"Now the question of sound health is the defense here. What is meant by 'sound health' in the sense of this policy? There are a great many things to be considered in the question of sound health. It relates to the time the policy was issued; it expressly says that the company will not assume any obligation unless the party is living at the time the policy is issued and in sound health. Now a man may be in sound health according to the common meaning and acceptation of those words, if

he is sound in health so as not to be in danger or not to be seriously sick,—not to be afflicted in any way that would endanger his life or create any reasonable probability that his life was in danger. I do not say that he must be seriously sick, so as to imply that he was not likely to recover; I do not mean that; [but what I mean is this; a man may have sick headache, temporarily, and still be considered in sound health, although, abstractly considered it is not sound health. So a man might have an attack of rheumatism, a temporary attack of rheumatism; now abstractly he would not be considered to be in sound health, and yet I apprehend that in the meaning of this policy, he would be in sound health, if it was just a temporary attack of rheumatism. So I apprehend if a man had his arm broken at the time of the issuing of this policy, just an ordinary fracture of the arm, not of serious character, that he, in the sense of this policy, would be considered a man in sound health. I take it that the words 'sound health' there have some reference to the risk that the company is assuming at the time the policy is issued. These little infirmities, or, rather, these little attacks of temporary disease—headache or a little attack of rheumatism or some little attack of that kind—I do not apprehend are what is meant in this policy by 'sound health' because they have no probable bearing upon the man's life,] [2] and probably have no bearing upon the risk the company is assuming at the time. I infer from this policy that it means something that the company would require to be communicated to it at the time the policy is taken out,—something that might affect the risk it was taking.

"In this case the assured died of typhoid pneumonia. The allegation here is that he was subject to epileptic fits, and that he was not, therefore, in sound health when the policy was issued.

"The counsel for the defendant has presented two points to me. One is that under all the evidence the verdict ought to be for the defendant. I refuse that point. [1] The other is that if the insured was afflicted with the chronic epilepsy at the time the policy was issued the verdict ought to be for the defendant. I affirm that point, and that is the question now before you. Was the insured, at the time the policy was issued, afflicted with chronic epilepsy?

"Chronic means long standing; that is the general meaning of the word chronic,—a probability of it continuing—because a long standing disease is likely to continue, and generally these chronic diseases grow worse with years. They are almost always regarded as incurable, or, at least, not likely to be cured.

"From the evidence, gentlemen, it would seem that the insured, when he was a boy, was subject to epileptic fits. I think the evidence would fairly justify the jury in finding that fact. Now, according to the testimony of the physician called, boys may outgrow these epileptic fits, and if he was not subject to them at the time this policy was taken out, why I think he might be regarded as of sound health. There is some conflict in the testimony on that point. The testimony of some of the witnesses would indicate that these epileptic fits continued on until the time of his death. The father and the sister testify, or the father more especially, that for some twelve years he had not been afflicted with these epileptic fits except occasionally at night he had some of them. The father did not call them epileptic fits; he spoke about them as 'weaknesses;' and the sister testified that for several years before his death he had nothing of the kind during the daytime.

"Now it is for you, gentlemen, to say upon all the evidence whether this insured party was afflicted with chronic epilepsy at the time this policy of insurance was issued. If he had been for some years free from them, I apprehend that he would be regarded at the time of the policy issuing as of sound health, although he had these fits years before. But if they continued on down to the time of his death and he was then still subject to them, and there was a probability of his being subject to them in the future, I think he could not be regarded as of sound health.

"As I said, the certificate of the physician here seems to me to relate more especially to the occurrences at the time of the sickness and death. In answering that eleventh question that I have referred to: ['Was the deceased afflicted with any infirmity, deformity or chronic disease? If so, please specify.' He simply gives the word 'Epilepsy.' Now that question appears to refer back to the whole life; it does not limit to the time of the death, but it seems to go back and cover the whole life, and if the party had been subject to epileptic fits

in childhood and had recovered from them, I apprehend the doctor ought to answer as the answer is here. I do not know what they mean by 'deformity or chronic disease,' but still the question, I apprehend, is as to the condition of the party at the time of the death.]" [3]

Verdict and judgment for plaintiff for $258. Defendant appealed.

Errors assigned were (1–3) above instructions, quoting them.

W. K. Jennings, for appellant.—To leave to the jury a finding of fact without the color of proof is certainly error: Whitehill v. Wilson, 3 P. & W. 405; Eister v. Paul, 54 Pa. 196; McCracken v. Roberts, 19 Pa. 390; Koons v. Steele, 19 Pa. 203.

L. K. Porter, *S. G. Porter* with him, for appellee.

Opinion by Mr. Justice McCollum, May 30, 1895:

There was no evidence of fraud or misrepresentation in obtaining the insurance, and the sole question for the jury was whether the insured was in sound health when the policy was issued. It appears to have been conceded that the immediate cause of his death was typhoid pneumonia, but the defendant company claimed that he was affected with chronic epilepsy, and introduced some evidence to support its claim. Upon this evidence it requested the court to say that its claim was substantiated and to direct the jury to find in its favor. The court declined to comply with the request and referred the question to the jury with the instruction that if they believed from the evidence that the insured was afflicted with chronic epilepsy at the time of the issuing of the policy, then he was not in sound health and the verdict should be for the defendant. The refusal of the request is the subject of the first specification of error. The condition of the health of the insured when the policy was issued was essentially and entirely a question of fact to be decided upon the evidence and involving the credibility of witnesses. The most of the evidence affecting this question related to the period of his childhood, and was to the effect that he occasionly had fits, "or weak spells." His father, who was called by and on behalf of the defendant, testified that he had not seen

his son have "a weak spell" for twelve years preceding the issuing of the policy, although during all that time the latter dwelt and worked with the former. He testified further that his son was strong and active, and the most of the time referred to was employed as a hodman. The sister of the insured who was also called by the defendant company testified substantially as her father did in regard to her brother's health and ability to labor. Their testimony was uncontradicted and tended to show that he was in sound health when the policy was issued. The certificate of the physician who attended him in his last sickness afforded but little if any support to the claim that he was afflicted with chronic epilepsy. It was, on this point, plainly reconcilable with the testimony of the father and sister, and with the other evidence in the case. Our conclusion resulting from an examination of all the testimony is that the question whether the insured was in sound health when the policy was issued was for the jury, and that it would have been manifest error to refuse to submit it to them.

The second and third specifications are based on excerpts from the charge which the defendant characterizes as misleading. We have given to this complaint all the consideration it deserves and are convinced that it is without just foundation. The charge appears to be adapted to the issue and the evidence affecting it, and there is no prejudice, partiality or tendency to mislead, discernible in it. It was the duty of the learned trial judge to construe the contract and to define the scope and meaning of the provision in it on which the defendant sought to avoid the insurance. It is not claimed that there was any error in his construction of the contract, but the learned counsel for the defendant appears to think that his explanation of the meaning of the words "sound health" as used in the policy was more elaborate and illustrative than was necessary and tended to belittle the defense. We do not think so; nor do we see any merit in the criticism of the portion of the charge which is complained of in the third specification. The jury were plainly and repeatedly informed that the material question for their determination was whether the insured was in sound health when the policy was issued. There was no room in the instruction on this point for misapprehension of the issue. The specifications are overruled.

Judgment affirmed.

James B. Hasson and W. S. Cook, Guardian of Frank N. Cook and Lily Dale Cook, v. Benjamin Klee, Appellant.

Ejectment—Evidence—Adverse possession—Charge of court.

In an action of ejectment where defendant claims title by adverse possession for twenty-one years by himself and his predecessors in title, and plaintiffs claim that during a portion of the twenty-one years defendant's predecessors in title held the land under a permission, license or lease from plaintiffs' predecessors in the title, and there is no evidence to show the existence of such a permission, license or lease, and no reference in the case to it, except in an offer of testimony which is rejected as incompetent, it is error for the court to refer to the alleged lease, or to base any instructions upon the assumption of its possible existence.

Argued Nov. 6, 1894. Appeal, No. 254, Oct. T., 1894, by defendant, from judgment of C. P. No. 2, Allegheny Co., Oct. T., 1893, No. 623, on verdict for plaintiffs. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Ejectment to recover two lots on Buena Vista street in Allegheny city. Before WHITE, J.

The facts appear by the charge of the court, and the opinion of the Supreme Court.

The charge of the court was as follows:

"This action is to recover two lots on Buena Vista street in Allegheny city, each lot 20 feet fronting on the street and extending back 110 feet.

"The plaintiff claims title under his brother, J. R. Hasson, and from the heirs of W. Duff, Jr. William Robinson, I believe, laid out the lots on that street, at least they are described as lots Nos. 200 and 201 in his plan, and he made a deed for these two lots to J. R. Hasson and W. Duff, Jr., on the 10th day of May, 1856. J. R. Hasson conveyed his interest in those lots to James B. Hasson, who, I believe, is his brother, on the 14th day of December, 1892, and afterwards James B. Hasson got a deed from the heirs of W. Duff, Jr., dated the 7th day of January, 1893. By virtue of these conveyances the plaintiff has a regular title to those lots, and, if there was nothing else, he would be entitled to recover.

"The defendant, however, sets up the statute of limitations. On the 28th day of February, 1889, he got a deed from his uncle, Joseph Klee. To go back, however, to the beginning of what might be called the record title of the defendant, he claims under a deed executed by the sheriff of this county, acknowledged on the 25th day of January, 1866, purporting to convey the right, title and interest of Edward McQuaide in these two lots. That deed was to Greenwald and Kahn. Greenwald sold to Kahn his interest, which would be one half, by a deed of the 23d of November, 1874, and Kahn made a conveyance then to Kaufman on the 8th day of February, 1875; then Kaufman conveyed to Joseph Klee, by a deed of Oct. 25, 1877.

"There is no evidence before us that Edward McQuaide ever had any title to these two lots; there is no deed on record to him, conveying any title whatever. The sheriff sold whatever title or interest he may have had in these two lots. If he had no title, that sheriff's deed conveyed no title. It is frequently the case that a party having a judgment, and supposing that the defendant in his judgment has an interest in some property, may have it levied upon and sold. It does not convey a title unless the party as whose property it was sold had the title; and, as there is no deed on record showing that Edward McQuaide ever had any title to these lots, and no evidence before us here that he ever had any title, that sheriff's deed gave no title to these lots to Greenwald and Kahn.

"It may be considered, however, in this case simply as evidence that they went into possession under color of title; that is, claiming that they had some title to the lots; and if they went into possession in pursuance of that sheriff's deed, it would be the beginning of their possession, and then, if they retained possession of it, claiming title and using it as their own, for twenty-one years, the statute of limitations would give them a title.

"The possession of property which will enable a party to perfect a title and claim the benefit of the statute of limitations must be a peaceable possession; not a possession where there is a fight about it or controversy or trouble arising about it,—a peaceable possession for twenty-one years. It must also be what is called a hostile possession; that is, claiming it as the

property of the party in possession, and denying the title of any other person; it must be of that character. It must also be a visible possession; one that can be seen and known by any person who may have a claim to the title. It must be exclusive; not a part of the time having it in possession and a part of the time somebody else using it. It must be continuous for twenty-one years, and, as another adjective is used, notorious; that is, the possession should be such that persons claiming any interest in the property, or anybody else, may see that these parties are in possession, and in possession in such a way that this possession may show that these parties claim it and own it; so that persons may see and know their possession. Now these are the essential elements to make a possession for twenty-one years, sufficient to give a person a title.

"The object of that statute is to quiet titles to property; and if a man actually has the title to property and pays no attention to it, is indifferent about it, lets somebody else go in possession and keep possession in that way for twenty-one years, why the law says that he ought to lose his title, and that the party in possession for that length of time, using in that way, ought to be considered the real owner of that property. Of course before such a statute was passed a man's title was not cut up if he had been out of possession fifty years, but that often led to trouble; deeds might be lost, and in various other ways a party in possession might not be able to prove his title; and for that reason, I say, the statute was passed, saying twenty-one years peaceable possession of property, claiming it as a man's own, denying the title of any person else, in possession of it so that everybody could see it, exclusively, nobody else having anything to do with it, would make a good title, and that is really the claim here of the defendant.

"Now ordinarily in actions of ejectment the plaintiff must recover on the strength of his own title. It is not necessary, generally, in an action of ejectment, for the defendant to put in evidence his title, unless the plaintiff can make out a good title; in that sense the plaintiff must recover on the strength of his own title. But where the plaintiff has a record title, a deed or series of deeds on record, that clearly gave him the title to the property, and the defendant sets up, in opposition to that, the claim of the statute of limitations, then the burden of proof is

on the defendant to prove that he has had possession of it in such a way and such a length of time as would give him a title.

"In this case, therefore, the burden of proof is on the defendant to show that he, or those under whom he claims, have been in possession of this property for twenty-one years.

"Now I believe there is no evidence here to show how long McQuaide was in possession of that property. There is some evidence that he was; yet the evidence on the part of the plaintiff is that he occupied these two lots from 1856, when J. R. Hasson got title from Robinson, until, perhaps, 1861 or 1862. Yet there is some evidence here that McQuaide used these two lots as a part of his cattle yard there; and there is some evidence that he had left there, or ceased to use them as a cattle yard, before this sheriff's sale, in January of 1866. I do not think that is very material in this case, because the mere possession of McQuaide, if he had possession, has not been established here as a possession claiming title. He may have been a tenant or he may have been there by sufferance; there is no evidence that his possession was exclusive, and hostile to the plaintiff.

"Now the first question would be as to the possession of the defendant or those under whom he claims,—and he may go back and claim the benefit of the statute through all of those preceding owners of the property, if their possession was continuous. Going back, then, to Greenwald and Kahn, who got the sheriff's deed in 1866, if Greenwald and Kahn, or those to whom they conveyed, had possession, claiming it and using it as I have indicated the kind of possession should be, for twenty-one years after that, that would give a good title to the defendant. Say that possession commenced at the date of the sheriff's deed,—and, ordinarily, possession is not given at a sheriff's sale on the date of the deed; ordinarily it is after that some time,—but taking it as the date of that deed, if Greenwald and Kahn entered into possession in pursuance of that deed on the 25th day of January, 1866, claiming it as theirs, using it as theirs and continuing in possession (such a possession as I have indicated) for twenty-one years, they would have a good title. The twenty-one years would expire on the 25th of January, 1887.

"If they had twenty-one years' possession the fact that they may not have been in possession afterwards will not cut up the title they obtained by the statute of limitations; but they must have been twenty-one years consecutively, all the time, in possession.

"Now the evidence is that Greenwald and Kahn quit business about 1885, because the evidence is that the stockyards were abandoned in 1885. That would not be twenty-one years; it would only be nineteen years, and if the time falls short even one month of twenty-one years it is fatal to the title.

"Apart from that, gentlemen, there is, under the evidence, a question for you, whether Greenwald and Kahn did take possession of the property at that time, by virtue of the sheriff's deed. The witness Kraft testified that they were in possession in 1865. He says that Mr. Kahn told him that they were there in pursuance of a lease in 1865. Now, if they were there in pursuance of a lease from Mr. Hasson, the owner of the property, they could not claim title under the sheriff's sale of the lots as the property of McQuaide, without giving up the possession to Hasson, or, at least, notifying him of that sheriff's sale, and that they claimed title under that sheriff's sale.

"Then there is other evidence for you to consider, whether Mr. Hasson did use this property after 1865. He testifies that he did, for some purposes, use it even in 1869.

"These are matters for you, gentlemen, because you will have to fix the date when Greenwald and Kahn took possession of it, claiming it as their property. If they did not take possession and have exclusive possession of it, hostile possession, until 1869, why the twenty-one years would not expire until 1890.

"After that yard was abandoned as a cattle yard, it is a question for you, gentlemen, whether after that date, after 1885, the defendant, or those under whom he claims, had possession of it in the sense I have indicated,—the kind of possession that the law requires.

"One witness testifies that, I think in 1893, he got a lease of it from the plaintiff here, and that he had it, I think he said seven,—six, seven or eight—years before that, and it was lying out, a kind of common; and he said he didn't know who claimed it or who owned it, and he occupied it for a considerable time without knowing who claimed it or who owned it."

"About 1891, I believe it is, the controversy arose between these parties.

"If the parties under whom the defendant claims (and that would be Greenwald and Kahn) abandoned the property before the twenty-one years had run, neglected it and paid no attention to it, did nothing in the way of tending to it or exercising any care over it, so that anybody could see that there was a claiming owner to that property, why that would not finish or complete their twenty-one years.

"Under the evidence Greenwald and Kahn paid the taxes on this property all along, perhaps before 1866, the time of this sheriff's sale.

"Now, as the sheriff's sale was of the title of McQuaide, the plaintiff would not be presumed to know anything about it. It could have taken place without the plaintiff's knowledge at all, and unless he knew something about it he would not be prejudiced, could not be prejudiced because there was a sheriff's sale selling it as the property of McQuaide.

"So a party may pay the taxes on the property, and the mere fact of paying the taxes will not give a party the title to the land. It is very frequently the fact that where there is a long lease the property may be assessed in the name of the tenant, or even if assessed in the name of the landlord the tenant may pay the taxes; but generally, I believe, where there is a long lease, the property is taxed in the name of the tenant for the mere convenience in payment, perhaps. The mere fact that a party has paid taxes for twenty or thirty years will not give title to the property; it may be evidence, in connection with other evidence, as to the kind of possession that the party has, and it may be evidence, also, in connection with other testimony, that he claimed title to it, and, in that sense, it is to be considered."

Plaintiffs' point, among others, was as follows:

"4. If the jury believe that Greenwald and Kahn used said lots by the permission, license or lease of the rightful owners, Hasson and Duff, from 1866 to Nov. 23, 1874, or to any later date, then their possession to that time would not be adverse or hostile, and the plaintiffs are entitled to recover. *Answer:* Affirmed."

Errors assigned were (1) answer to point as above, quoting point, and (2) the whole charge.

J. Scott Ferguson, *J. A. Langfitt*, *Wm. Kaufman* and *H. W. McIntosh* with him, for appellant.

W. S. Nesbit, *D. C. Nevin* with him, for appellees.

OPINION BY MR. JUSTICE MCCOLLUM, May 30, 1895:

There was evidence in the case from which the jury might have found that Greenwald and Kahn were the immediate successors of McQuaide in the occupancy of the lots in question and that he was in possession of them as early as 1860. At a sheriff's sale in 1866 they acquired his title to or interest in them, and thereafter for a period of nineteen years they used them for "droveyard purposes" and paid all the taxes on them, including the assessments for municipal improvements. It is a circumstance worthy of note that while McQuaide, Greenwald and Kahn were living Hasson and Duff who owned the lots in 1856 offered no resistance to their possession or the possession of their successors in title. In December, 1892, Hasson conveyed his interest in them to his brother, the present plaintiff, who having obtained a deed from the heirs of Duff in January, 1893, leased them in April of that year to Winters. This was the first assertion by lease of the Hasson and Duff title, and it was obviously made to enable the plaintiffs to secure possession and compel the defendant to abandon his claim, or bring suit to enforce it. The evidence submitted on the trial afforded but slight ground, if any, for an inference that Greenwald and Kahn were at any time the tenants of Hasson and Duff, or that they paid the taxes for the use of the lots. The declaration testified to by Kraft as having been made to him by Hasson in 1865 was not sufficient to warrant it. That declaration, if made, was quite as consistent with a possession under McQuaide whose title Greenwald and Kahn acquired the next year as a possession under Hasson and Duff. Besides, an inference that the taxes were paid for the use of the lots was opposed to the admissions made on the trial, and to the testimony of J. R. Hasson the plaintiffs' grantor. He testified distinctly that he paid all the taxes, directly, or advanced money

to another person to pay them. He so testified after the plaintiffs' offer to prove by him a different state of facts was rejected. Furnishing money to a person to pay taxes is not a leasing of lots in consideration of the lessee's agreement to pay the taxes upon them and keep them fenced. But the rejected offer furnished no basis for the verdict of the jury, or for instructions to them. It could rightly have no place in either.

There was no evidence showing that McQuaide bought or leased the lots of Hasson and Duff, but there was evidence of his possession of them anterior to that of Greenwald and Kahn, and of their purchase of the lots at a judicial sale of them as his. The sale indicated that it was supposed by the creditors of McQuaide that he owned or had an interest in the lots and that such was the belief of Greenwald and Kahn is evidenced by their purchase of them. Their possession and payment of taxes and assessments for street improvements were therefore naturally referable to a claim by them of ownership of the lots on which the assessments were laid. But as it was not shown that McQuaide had title to the lots the purchasers took nothing by the sale, and the evidence of it was valuable only as throwing light upon the nature and character of their claim and possession. The conditions under which the case was tried were not favorable to the ascertainment of the facts essential to a correct decision of it. The parties whose possession constituted the principal reliance of the defendant were dead and their death rendered the plaintiffs' grantor incompetent to explain that possession. The litigants were therefore compelled to rely for their evidence, respecting the possession of the lots, upon the recollection of persons residing in the neighborhood of them. The evidence so obtained covered a period of thirty years and was somewhat conflicting. It was sufficient, however, to warrant the jury in finding a possession which clothed the defendant with title under the statute of limitations, and so the learned court below regarded it. Was it submitted to them with proper instructions? Whilst the attention of the jury was called to every possible phase of the plaintiffs' contention it seems to us that the defendant's case was not adequately presented to them. From what was said in the charge respecting the declaration testified to by Kraft as having been made to him by Kahn in 1865, the jury may have inferred that the

declaration considered by itself was sufficient to justify them in finding that Greenwald and Kahn were then in possession of the lots under a lease from Hasson. For reasons already stated we think it could not be so regarded. We think, too, that the unqualified affirmance of the plaintiffs' fourth point was misleading. By it the jury were told that if they believed Greenwald and Kahn were in possession of the lots by the permission, license or lease of Hasson and Duff, the plaintiffs were entitled to recover. True, there was an offer to prove such a possession by the plaintiff's grantor but he was adjudged incompetent for that purpose and the offer was rejected. If the learned court thought there was any evidence in the case sufficient to warrant such a belief the attention of the jury should have been directed to it, and they ought, under the circumstances, to have been advised that the rejected offer should have no place in their deliberations. In other words they should have been instructed that their belief must rest on the evidence in the case, uninfluenced by an offer of evidence which was excluded. The instructions in regard to the possession of McQuaide ignored the testimony of Trauerman and Meyers, which was to the effect that he had exclusive possession of the lots from 1860 to 1865, and that he was succeeded in that possession by Greenwald and Kahn, who maintained it for nineteen years. In the instructions respecting the possession of the latter there was no reference to the admission in regard to it, or to the admission of their payment of taxes. In the last paragraph of the general charge the jury were told that "generally where there is a long lease the property is taxed in the name of the tenant," although there was no evidence in the case of such a practice. In short it appears to us that the tendency of the charge considered as a whole was to unduly depreciate the defendant's claim, while giving to the plaintiffs' contention all the prominence and consideration it deserved.

The specifications of error are sustained, the judgment is reversed and a venire facias de novo is awarded.

James Omslaer, Appellant, *v.* Pittsburg & Birmingham Traction Company.

Negligence—Street railways—"Stop, look and listen"—Crossings.

A person about to cross the tracks of a street railway operated by cable or electricity is bound to look and listen. While there is no settled rule that he should stop before crossing a street railway, and it does not appear desirable that there should be, yet there may be occasions when it will also be his duty to stop.

Plaintiff was injured while driving across the tracks of an electric railway at the intersection of two streets. At the point where the accident occurred there were two tracks running north and south upon which cars were run in opposite directions. On nearing the crossing, plaintiff could see that there was no car on the north-bound track. His view of the south-bound track was so obstructed by a wagon, and by piles of lumber and brick, that he could not see more than twenty-five feet of the track from his place of observation. For these obstructions, the street railway company was not responsible. Ahead of him, and moving in the same direction, was a wagon loaded with iron, and the noise created by it was sufficient to drown the noise made by an approaching car. Without stopping to listen, or to wait a moment for the abatement of the noise which prevented his hearing, he drove upon the tracks, and a south-bound car struck his buggy and injured him. *Held*, that it was the duty of plaintiff under the circumstances to stop before going upon the tracks, and that it was not error for the court to enter a compulsory nonsuit.

Argued Nov. 8, 1894. Appeal, No. 284, Oct. T., 1894, by plaintiff, from judgment of C. P. No. 3, Allegheny County, Nov. Term, 1892, No. 173, entering nonsuit. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Trespass for personal injuries.

The facts appear by the opinion of the Supreme Court.

Error assigned was refusal to take off nonsuit.

James S. Young, *S. U. Trent* with him, for appellant.—The rule of stop, look and listen is not to be inflexibly applied to foot passengers or others in crossing a street railway: Ehrisman v. Ry., 150 Pa. 180; Carson v. Federal St. Ry. Co., 147 Pa. 219; Gilmore v. Passenger Ry. Co., 153 Pa. 31; Gibbons v.

Wilkes-Barre Ry. Co., 155 Pa. 279; Kestner v. Pittsburg & Birmingham Traction Co., 158 Pa. 422; Jackson v. P. A. & M. Traction Co., 159 Pa. 399; Shea v. St. Paul City Ry. Co., 50 Minn. 395.

Wm. D. Evans, Geo. C. Wilson with him, for appellee.—Even on the sidewalk a man is bound to look where he is going: Buzby v. Traction Co., 126 Pa. 561. The rights of the railway company are superior to those of the public: Robb v. Connellsville, 137 Pa. 42.

Opinion by Mr. Justice McCollum, May 30, 1895:

The plaintiff was injured while crossing the railway tracks of the defendant company on Smithfield street at the intersection of said street and First avenue in the city of Pittsburg. There were two tracks on the street known as the north- and south-bound tracks, and upon them electric cars were run in opposite directions to accommodate the travel on that crowded thoroughfare. The plaintiff approached these tracks on First avenue west of Smithfield street, and on nearing the crossing he had such a view of the street south of the avenue as satisfied him that there was no car on the north-bound track which would delay his passage over it. The south-bound track was on the west side of the street and between him and the north-bound track, and his view of the former was so obstructed by an ice wagon and by piles of lumber and brick that he could not see more than fifteen feet of it north of the avenue, nor more than twenty-five feet of it from his point or place of observation. For these obstructions the defendant company was not responsible. Ahead of him and moving in the same direction was a wagon loaded with iron, and the noise created by it was sufficient to drown the noise made by an approaching car. Without stopping to listen or wait a moment for the abatement of the noise which prevented his hearing, he drove upon the tracks, a south-bound car struck the left hind wheel of his buggy and he was thrown from it to the ground. For the injury thus received he sought, by this action, to obtain compensation from the defendant company, and he was turned out of court on the ground that the injury was the result, in part at least, of his own carelessness. While we sympathize with him in his misfortune

we must recognize and enforce the well settled legal rule that he cannot charge another person, natural or artificial, with the consequences of his own negligence. If therefore his driving upon the track, under the circumstances shown by the undisputed evidence submitted by him, was a negligent act, wholly or partially responsible for his injury, the judgment of the trial court must be sustained. This is so although the negligence of the defendant company may have contributed to the occurrence. Mutual fault gives no right of action to either party for a loss or injury occasioned by it.

The rule of "stop, look and listen" before attempting to cross the tracks of a steam railroad is inflexible and non-observance of it is negligence per se. So much of this rule as requires a person about to cross the tracks of a steam railroad, to "look and listen" to discover whether a train is approaching, is applicable to the crossing of a street railway operated by cable or electricity: Carson v. Federal Street Ry. Co., 147 Pa. 219; Ehrisman v. East Harrisburg City Ry. Co., 150 Pa. 180, and Wheelahan v. Phila. Traction Co., 150 Pa. 187. There is no settled rule which demands that he shall stop before crossing a street railway nor does it appear desirable that there should be. Such a rule would materially interfere with travel on the street, and ordinarily there would be no occasion to apply it, because on nearing the crossing his sight and hearing would sufficiently advise him whether there was opportunity for safe passage over it. There may be, however, situations in which ordinary care would require that he should stop as well as look and listen before attempting to cross. The plaintiff was confronted by such a situation. He could not see the approaching car because of the obstructions in the street, and he could not hear it because of the noise made by the wagon before him. As the wagon was moving from him a brief stop would have removed the obstruction to his hearing but he did not make it. He drove upon the track with the consciousness that there might be a car which he could neither see nor hear approaching the crossing in the usual manner within thirty feet of him, and in so doing he exposed himself to a risk which under the circumstances he must be considered as having voluntarily and intelligently assumed. It was a negligent and hazardous act, and there was no attempt to show any circum-

stances which justified or excused it. It clearly contributed to, if it was not alone responsible for, the injury he received.

The specification of error is overruled and the judgment is affirmed.

Pittsburgh Storage Company v. Scottish Union and National Insurance Company, Appellant.

Insurance—Insurable interest—Bailee's lien—Storage warehouse.

Merchandise held by a storage company subject to storage liens is "merchandise held in trust," within the meaning of a policy of fire insurance which describes the property insured as "on merchandise, hazardous, not hazardous or extra hazardous, their own, or held by them in trust, or in which they have an interest or liability and have agreed to insure under this policy and not removed, stored or hereafter stored during the continuance of this policy."

The fact that a storage company holds property on storage upon a stipulation that it will not be responsible for loss or damage by fire, does not prevent it from insuring the property to the extent of its lien for storage.

Unless a statement of interest is required either in the application or in the policy, the insured need make none, and unless it is otherwise provided it is sufficient that he has an insurable interest.

Argued Nov. 9, 1894. Appeal, No. 309, Oct. T., 1894, by defendant, from judgment of C. P. No. 2, Allegheny Co., July T., 1894, No. 449, for plaintiff on case stated. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Assumpsit on a policy of fire insurance.

The case stated was as follows:

"The Scottish Union and National Insurance Company, of Edinburgh, by its policy numbered 1,660,970, duly executed and delivered, insured the Pittsburg Storage Company from the 24th day of January, 1893, to the 24th day of January, 1894, to an amount not exceeding two thousand five hundred ($2,500) dollars, against all direct loss or damage by fire to the property which in the policy was described as follows: 'On merchandise, hazardous, not hazardous, or extra hazardous, their own, or held by them in trust, or in which they have an interest or

liability and have agreed to insure under this policy and not removed, stored or hereafter stored during the continuance of this policy in the brick building, occupied as offices, ice depot, stable and for storage purposes, situated on the southwest corner of Pike and Thirteenth streets, extending to Mulberry alley, Pittsburg, Pa.

"That upon the 27th day of October, 1893, the building mentioned and described in this policy, with all of its contents, was entirely destroyed by fire. That merchandise stored with the plaintiff company, and which it had agreed to insure to the extent of $7,470.39, and merchandise upon which the storage company had made advances amounting to $375, was destroyed in this fire, and that the defendant insurance company has paid its proportion of these losses.

"That in addition to the property so destroyed, the loss upon which has been paid, there was at the time located in the building and destroyed by the fire considerable merchandise of various descriptions, which, at different times and by different owners, had been deposited with the Pittsburg Storage Company in its capacity of a public warehouseman, without any agreement on the part of the storage company with the owners that the same should be insured, and for which the storage company had issued its certificates of deposit to the owners thereof, in which it was specifically set out that the storage company would not be responsible for loss or damage by fire.

"That there was, at the time of the fire, due and unpaid upon the merchandise so deposited with the Pittsburg Storage Company storage charges amounting in the aggregate to the sum of $3,569.47, which charges were liens upon the property so held by the Pittsburg Storage Company as bailee, the value of the property in each particular instance of deposit being in excess of the amount of the storage lien thereon.

"That these storage charges have been reduced since the date of the fire by payments made by the owners of the property destroyed, until they now amount to the sum of $2,492.98; and that the proportion of this balance payable by the Scottish Union and National Insurance Company, in the event that it is held liable therefor, amounts to $541.95.

"If the court be of the opinion that the policy of the defendant insurance company covers the storage liens of the plaintiff

company, then judgment to be entered against the defendant company in the sum of five hundred and forty-one ($541.95) dollars, with interest thereon from the 1st day of May, 1894, but, if not, then judgment to be entered in favor of the defendant. The costs to follow the judgment, and neither party reserving the right of appeal.

The court, EWING, J., filed the following opinion:

"Were we to take literally the words of the case stated in the last paragraph, that alone would decide the question against the plaintiff. They are: 'If the court be of the opinion that the policy of the defendant insurance company covers the storage liens of the plaintiff company, then judgment to be entered,' etc.

"The defendant did not undertake the insurance of liens. It insured merchandise only. A fair construction of the whole case stated, however, requires that we should construe this submission as to whether or not the merchandise referred to was insured by the defendant to the extent of plaintiff's lien thereon.

"The undertaking, as set out in the case stated, with its punctuation, describes the property insured thus:

"'On merchandise, hazardous, not hazardous, or extra hazardous, their own, or held by them in trust, or in which they have an interest or liability and have agreed to insure under this policy and not removed, stored or hereafter stored during the continuance of this policy in the brick building,' etc.

"In construing a policy of insurance the insurer is the promisor, and in words or sentences of doubtful signification or ambiguous phrases, the meaning most favorable to the promisee—the insured—is to be adopted: Franklin Fire Ins. Co. v. Brock, 57 Pa. 80; Corinth Ins. Co. v. Berger, 42 Pa. 292; Teutonia Ins. Co. v. Mund, 102 Pa. 94; Kister v. Ins. Co., 128 Pa. 566; Merrett v. Germania Ins. Co., 54 Pa. 285; Hoffman v. Ætna Ins. Co., 32 N. Y. 413.

"What, then, did the defendant agree to insure for the plaintiff? There are three distinct classes specified, the phrases separated both by the sense and by punctuation. First, 'their own;' second, 'or held in trust by them;' third, 'or in which they have an interest or liability and have agreed to insure under this policy and not removed.'

"The goods now under consideration do not come under the first class.

"The case stated describes the goods thus: 'Merchandise of various descriptions which at different times and by different owners had been deposited with the Pittsburg Storage Company in its capacity of a public warehouseman without any agreement on the part of the storage company with the owners that the same should be insured and for which the storage company had issued certificates of deposit to the owners thereof in which it was specifically set out that the storage company would not be responsible for loss or damage by fire.'

"Was the merchandise held in trust?

"This term in an insurance policy is not held to mean a technical legal trust, but to cover goods that have been intrusted to the insured as bailees: Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Phœnix Ins. Co. v. Favorite, 49 Ill. 263; Siter v. Morris, 13 Pa. 218.

"In Home Insurance Company v. Baltimore Warehouse Company, almost the identical question as in this case was decided. STRONG, J., says: 'The words "merchandise held in trust" aptly describe the property of the depositors. The warehouse company held merchandise in trust for their customers—not, it is true, as technical trustees, but as trustees in the sense that the goods had been intrusted to them. They were not empowered by their charter to hold property under technical trusts cognizable in equity. Hence, when they sought insurance of merchandise held by them in trust, it must have been intended of such as they held in trust in a mercantile sense,—goods intrusted to them by the legal owners.'

"That such is the meaning of the words as used in this policy we cannot doubt, and such has been held by courts of the highest authority to be the meaning of similar words in fire policies, citing Waters v. Monanah F. & L. Assurance Co., 5 El. & Bl. 870, and London & N. W. Railway Co. v. Glynn, 1 El. & El., Q. B, 652, in support.

"In the case in 93 U. S. a clause in the charter of the company required that every receipt or warehouse certificate issued should contain on its face a notice that the property mentioned therein was held by the corporation as bailee only and was not insured by the corporation, and the receipts in question did contain that notice. In our case the receipts contain the notice that this storage company would not be responsible for loss by

fire. In legal effect the provisions are identical. As held in the Baltimore case, there is no prohibition against insurance by the warehouse company either for its own interest or that of its customer.

"If the liability of the defendant was dependent on the third class of goods insured, we would be disposed to rule in favor of the defendant. But in our opinion the goods are 'merchandise held in trust.' And the case is ruled in favor of the plaintiff by the case of Home Insurance Company v. Baltimore Warehouse Company, supra.

"Counsel for defendant contends that the clause 'and have agreed to insure under this policy' contained in the description of the third class of goods insured affects the second. We are unable to so read the policy. The three clauses are separate and independent, both in construction and punctuation. If the third clause is attached to and affects the second clause, it also in the same way would control the first clause. But if it should be held to affect the whole description of goods insured, what does it mean? It is at least ambiguous and capable of several interpretations different from that claimed by defendant, and for that reason it is to be interpreted in favor of plaintiff. The business of the plaintiff was known. Most of the property in its warehouse was held in trust, as this was; and if it were intended to exclude it from the benefit of the policy, it would not have been difficult to do so by plain, explicit terms.

The court entered judgment for plaintiff on case stated.

Error assigned was above judgment.

J. S. Ferguson, *E. G. Ferguson* with him, for appellant.—The court below has decided this case in a way adverse to the views and interests of both parties to the suit. If its views are correct, then the plaintiff instead of presenting a claim against the insurance company for the amount of its storage charges ought to have claimed for the value of the goods destroyed. Otherwise it would be in the position of an unfaithful trustee. The case stated admits that the value of the property in each particular instance of deposit is in excess of the amount of the storage lien thereon.

The case of Home Insurance Company v. Baltimore Warehouse Company, 93 U. S. 527, simply decides that merchandise held in trust by the warehouse company can be recovered for under the policy, and that the insurance company could not relieve itself by simply paying the amount of the charges of the warehouse company against the merchandise. The policy in that case did not contain, as the policy in this case does, the words "and have agreed to insure under this policy."

The vice of the argument of the court below in the opinion filed lies in this: that it ignores the manifest fact that the storage company does not sue or claim for the value of the merchanise, but expressly limits its claim to the storage bills or liens upon the merchandise.

W. H. McClung, *J. A. Evans* with him, for appellee.—When words are without violence, susceptible of two interpretations, that which will sustain the assured's claim and cover the loss must, in preference, be adopted: May on Insurance, sec. 175; Teutonia Ins. Co. v. Mund, 102 Pa. 94; Western Ins. Co. v. Cropper, 32 Pa. 355; Franklin Ins. Co. v. Brock, 57 Pa. 80; Com. Ins. Co. v. Berger, 42 Pa. 292; Merrick v. Germania Ins. Co., 54 Pa. 284; Kister v. Ins. Co., 128 Pa. 560; Metropolitan Life Ins. Co. v. Drach, 101 Pa. 278; Burkhard v. Travelers Ins. Co., 102 Pa. 263; Haws v. Fire Association of Phila., 114 Pa. 431; Western & Atlantic Pipe Lines v. Home Ins. Co., 145 Pa. 346; Heffron v. Ins. Co., 132 Pa. 583; Commercial Ins. Co. v. Robinson, 64 Ill. 265; Philadelphia Tool Co. v. Assurance Company, 132 Pa. 241.

The expression "merchandise held in trust" has been judicially construed in Home Insurance Co. v. Baltimore Warehouse Co., 93 U. S. 527; Phœnix Ins. Co. v. Favorite, 49 Ill. 259, and other cases where, it is held, that it aptly describes property held by a warehouseman under an ordinary bailment.

Affirmations and warranties with respect to title are no part of the policy, and, even if so, they would be held not to apply to a risk such as the present: Grandin v. Ins. Co., 107 Pa. 26; Tyler v. Ætna Ins. Co., 12 Wend. 507; Crowley v. Cohen, 3 Barn. & Ad. 478; Traders Ins. Co. v. Robert, 9 Wend. 409; White v. Hudson River Ins. Co., 7 How. Pr. Rep. 341.

OPINION BY MR. JUSTICE MCCOLLUM, May 30, 1895:

The learned court below applying well settled rules in the construction of the policy in question concluded that the merchandise to which this contention relates was insured by the defendant to the extent of the plaintiff's storage liens upon it. That the plaintiff by virtue of these liens had an insurable interest in it is not questioned. There was no specification in the policy or in the application therefor of the nature and amount of this interest, nor was it necessary that there should be. The law on this subject is tersely stated in 7 Am. & Eng. Ency. of Law, 1020, as follows: "The insured is often required to answer certain inquiries in his application for insurance respecting the interest which he owns, and these being made a part of the policy become warranties, the falsity of which vitiates the policy. But unless a statement of interest is required either in the application or in the policy, the insured need make none, and unless it is otherwise provided it is sufficient that he has an insurable interest." Many cases sustaining this view are cited in note 6 on the same page. That the merchandise subject to the storage liens in question was held by the plaintiff in trust is a proposition that cannot be successfully controverted. It is sufficient on this point to refer to the following cases cited in the opinion of the learned court below: Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Phœnix Ins. Co. v. Favorite, 49 Ill. 259, and Siter v. Morris, 13 Pa. 218. If therefore the merchandise was included in the insurance the plaintiff was entitled to a judgment for the sum named in the case stated as the defendant's proportion of the balance due on the liens. Was it insured? The defendant contends it was not, and that the insurance was limited to such merchandise as the plaintiff owned or had agreed with the bailors to insure. In considering this contention we must keep in mind these facts: The plaintiff was engaged in the business of storage and the bulk of the property in its possession was held for that purpose. It was a bailee of the merchandise with a lien upon it for storage charges and advances, and this lien clothed the plaintiff with an insurable interest in the subject of it. Its object in obtaining the insurance was indemnity against loss by fire. The purpose of the insured was to have, and of the insurer to afford, protection to the interest

of the former in the merchandise described in the policy. In one part of it the plaintiff had an interest as owner, and in other parts of it an interest founded upon its storage liens or upon its liabilities arising from its agreements with bailors to insure. The suggestion that the construction of the policy adopted by the learned court below makes the plaintiff in limiting its claim to the interest based on the storage liens, an unfaithful trustee, appears to overlook the fact that in its certificates of deposit issued to the owners of the merchandise in question it expressly stipulated that it "would not be responsible for loss or damage by fire." This fact accords with and tends to sustain rather than to antagonize and discredit the plaintiff's contention that the insurance on the merchandise for which these certificates were issued was limited to its interest therein. It shows that the plaintiff was under no obligation or duty to the holders of the certificates to insure for their benefit the merchandise described in them. We cannot discover in this fact, or in the case stated, an admission that the plaintiff did not intend to insure its interest in the merchandise. The fact that under the contract of bailment the bailee is not responsible to the bailor for a loss of or damage to the subject of it by fire, has no connection with, nor is it any qualification of, the bailee's right to insure its own interest therein. The merchandise in question was covered by the terms of the policy and belonged to the class designated in it as merchandise held in trust. The attempt to qualify this designation by the language descriptive of the merchandise constituting the third class disregards punctuation, and if successful would exclude from the insurance the most of the merchandise in the possession of the plaintiff as bailee. There is no rule of construction which demands or would justify such perversion of the language of the insurer plainly and literally affording protection to the insured in accordance with its contention. It follows from these views that we approve the judgment entered and the reasons given for it by the learned court below.

Judgment affirmed.

William R. Holmes, Appellant, *v.* H. H. Woods and William N. Frew.

Vendor and vendee—Marketable title—Specific performance.

A recovery in an action of assumpsit for the purchase money due on a contract for the sale of land will have the effect of a decree for specific performance, and must be decided upon the same equitable principles.

A doubtful title which exposes the holder of it to litigation is not marketable, and the rule in equity is that the purchaser will not be compelled to accept it.

Partition—Contingent interests.

Contingent interests given by a will to persons now living, and to others yet unborn will not be divested by partition proceedings unless the persons living be made parties, and the interests of those unborn be submitted to the court and some one be appointed to represent them, or such order made for their protection as equity and justice require.

Partition—Parties—Contingent interests—Marketable title.

Plaintiff had two undivided eighth interests in land, subject to a life estate in his mother, which were liable to open to let in after-born children; and under the will by which his mother took, certain others had contingent interests in the land. Upon his mother's conveying to him her life estate in one eighth interest, plaintiff instituted proceedings for partition of all the land, wherein two of the defendants, being minors, appeared by guardian, and in which the interests of the unborn parties in interest were not submitted to the court for protection, and to which persons having contingent interests were not made parties. *Held*, that plaintiff did not obtain by the partition proceedings a marketable title to the one eighth portion assigned to him in such proceedings.

Argued Nov. 12, 1894. Appeal, No. 321, Oct. T., 1894, by plaintiff, from judgment of C. P. No. 1, Allegheny Co., June T., 1894, No. 638, for defendants, on case stated. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Assumpsit to recover balance of purchase money under articles of agreement for the sale of land.

The facts appear by the opinion of the court by SLAGLE, J., which was as follows:

"This action was brought to recover a balance of purchase money on an article of agreement for the sale of a lot of ground on Fifth avenue, 22d ward, Pittsburg. The defendants refused

to accept a conveyance because they were advised by counsel that it would not give a good title. A case was stated by which it was agreed that if the court be of the opinion that the title to land is a good marketable title, then judgment to be entered in favor of plaintiff for $39,000, with interest, etc., but if not, then judgment to be entered for defendants for $1,000, with interest, etc.

"The lot in dispute was part of the estate of Andrew Fulton, deceased, and came to plaintiff by deed from Thomas C. Fulton, Jr., who obtained it through proceedings in partition at No. 596 June term, 1893, in court of common pleas No. 1, of Allegheny county.

"It is contended by defendants that these proceedings did not vest a good title in Thomas C. Fulton, Jr.

"1st. Because he did not have an estate which entitled him to demand partition. 2d. Because certain parties living, and others who might be born, had contingent interests which would not be barred by the proceedings. 3d. Because partition could not be demanded of this lot, which is a small part of a larger tract in which the parties were jointly interested.

"It is therefore necessary to inquire who were the parties to the proceedings in partition and what were their respective interests.

"The proceedings were by bill in equity, filed by Thomas C. Fulton, Jr., as plaintiff. The defendants were Thomas C. Fulton, Sr., plaintiff's father; Margaret M. Fulton, his mother; Jane M. Fulton, his sister; James Cooper Fulton and Andrew Fulton, his brothers, who were minors, represented by John Paul, their guardian, and John Paul, trustee and executor d. b. n. c. t. a. of Andrew Fulton, deceased.

"The property belonged to Andrew Fulton, who died July 30, 1867, having made his last will and testament, which was duly proved and is made part of the case stated. The will is lengthy and contains many complicated provisions, but the conditions are easily understood. By the second clause of the will he devised to his daughters Jane and Margaret, seven lots on Smithfield street, three lots on Grant and Fourth streets, and five acres upon which he lived, of which the lot in dispute is part. The devise was subject to conditions and limitations, as follows:

"1st. To Jane and Margaret in equal shares for life, each having the power to appoint in fee by will, with the single limitation that she should not give any part of it to her husband, if any she have.

"2d. In default of such disposition by will by either of said daughters, her half is devised in fee to any child or children living at the time of her death, and this to include grandchildren to take per stirpes.

"3d. In case of the death of either of said daughters without children or grandchildren living, and without having made an appointment by will, her share to go to her sister for life and subject to the limitations as to her share.

"4th. If both of said daughters should die without leaving children and intestate, the estate was devised to the children of his sons, Samuel and Andrew, and to his adopted son Harry in equal shares.

"5th. Having prohibited certain uses of the property and the incumbering it by his daughters, it is provided that any violation of these conditions by either shall work a forfeiture of her interest, and the same is devised to the executors, their survivors, survivor or successors in trust to dispose of the same as if she were dead.

"The daughter Jane died intestate and leaving one son, A. Fulton Dilworth. This rendered the fourth condition impossible, so that the devisees mentioned in this clause can never take under it. And Mrs. Dilworth having died before Margaret, if Margaret should die without children and intestate, the third clause would be inoperative, and there being no other provision for its disposition it would revert to the estate of Andrew Fulton, and as to it he would die intestate, and it would be divisible among his heirs.

"Upon the death of Jane the undivided one-half of the entire property vested in her son, A. Fulton Dilworth, in fee.

"A. Fulton Dilworth died April 25, 1886, having devised all of the undivided half of all the above described properties to 'Margaret M. Fulton for life, with remainder to her children, share and share alike,' subject to an annuity of $1,000 to John Paul, payable out of the rents.

"By deed of May 3, 1893, Thomas C. Fulton, Sr., and Margaret M. Fulton, his wife, conveyed to Thomas C. Fulton, Jr.,

her life estate in the undivided eighth part of the property described in the partition proceedings, which became vested in him by will of A. Fulton Dilworth.

"At the time the bill was filed by Thomas C. Fulton, Jr., his interest in the property described, and of which he claimed partition, was an undivided one eighth interest during the life of Margaret Fulton, one undivided one eighth in remainder derived from A. Fulton Dilworth, and a contingent remainder in one eighth under the will of Andrew Fulton. Neither of these remainders are limited to the property described; both relate to other property, of which this is part, and the interest derived from A. Fulton Dilworth, though vested, is liable to open to let in after-born children of Mrs Fulton: Gernet v. Lynn, 31 Pa. 94; Ross v. Drake, 37 Pa. 373.

"The first question raised is, did Thomas C. Fulton have such an interest in this property as justified the partition made?

"He did not have the right in respect to that part of the estate devised to his mother by Andrew Fulton, having no vested interest in it. Nor did he have such right by reason of the vested remainder derived from A. Fulton Dilworth, because it was not 'an indefeasible estate, not subject to be diminished by a subsequent event': Act of June 3, 1840, Purd. 1295, p. 31. His only right would then be by virtue of the life estate derived from his mother. He might have partition of this interest with his cotenant for life, but his right to partition of the entire estate depends upon a consideration of the interests of the defendants.

"Thomas C. Fulton, Sr., had no interest in the property, and was joined as the husband of Margaret M. Fulton. She had a life estate in all the properties mentioned under her father's will, subject to the conditions contained in it, and a like interest under A. Fulton Dilworth's will, except that portion conveyed to Thomas C. Fulton, Jr.

"Jane Fulton, his sister, and James C. and Andrew, his brothers, had vested remainders in the undivided half of the entire property under the will of A. Fulton Dilworth, and contingent remainders in the other undivided half under their grandfather's will, both in common with the plaintiff.

"As to that part derived from A. Fulton Dilworth it may open to let in children of Margaret Fulton hereafter born.

Though her age makes this improbable, there is a possibility of such issue which the law does not ignore: List v. Rodney, 83 Pa. 483.

"As to the other undivided half devised to Mrs. Fulton, there is the same possibility, and in addition the possibility of one or more of her children dying in her lifetime leaving a child, in which event such child would take not through his deceased parent, but directly under the will of Andrew Fulton, which expressly includes grandchildren of Margaret Fulton in the limitation of this property.

"But Margaret Fulton may fail to appoint, and her children may die in her lifetime without issue. In this case the property would go to the heirs of Andrew Fulton living or hereafter to be born. It is evident then that persons not now in existence may become interested in this property, and that on a contingency not remote, as for instance the death of one of Margaret Fulton's children in her lifetime leaving children.

"Partition of such an estate could not have been had before the act of June 2, 1840: Gest v. Way, 2 Whart. 445.

"It is probable that the act of 1840 was passed to meet this case, which was decided in 1837. But the proceedings in partition do not appear to be in accordance with this act. The act requires that 'all existing persons interested be made parties.' If this relates to persons having a present vested interest, the children of Margaret Fulton are not properly joined as defendants, except as to the undivided interest derived from A. Fulton Dilworth, because their interest in the other undivided half is contingent and does not vest until the death of their mother. If it includes persons having contingent interests, the heirs of Andrew Fulton now living should have been made parties, for their interest vests on one other contingency.

"However this may be, there does not appear to have been any proper compliance with the law as to parties unborn who may become interested in the estate. The act provides that 'for the protection and security of the interests of any unborn person or persons the court shall have the authority to make such order in regard to the purpart in which he may become interested as equity and justice may require.'

"Though this simply gives authority to the court, it is manifestly its duty to make such orders. In all cases of partition

it is proper, if not necessary, to name or describe as far as possible all persons who are or may become interested in the property to be divided, that the court may act intelligently in ascertaining and administering the rights of parties. In cases where persons unborn may become interested it is essential that that fact should be stated in order that appropriate action might be taken to protect their rights. Otherwise the provisions of this act could not be enforced, and such parties would not be concluded. In these proceedings there was no suggestion that any other persons than the parties named were or could be interested.

"But it is contended that it is sufficient to bring in the first remaindermen, and counsel cites: Giffard v. Hort, 1 Sch & Lef. 386, and Hopkins v. Hopkins, 1 Atk. 593. But these were cases of estates tail, the remaindermen having vested estates of inheritance. In Freeman on Partition, sec. 482, commenting on these cases, it is said: 'But in order to bind the interests of persons not in esse, the proceedings must be adapted to that purpose. If no mention is made of such interests, and the pleading and judgment are founded upon the theory that the persons in being before the court are the only persons having any estates or interests in the property, then no interests are affected except those vested in the parties before the court.' This is the principle embodied into the law of 1840. But it is said that all such parties were in court in the person of John Paul, who was made a defendant as 'trustee and executor d. b. n. c. t. a. of Andrew Fulton, deceased.'

"He is not mentioned in the partition proceedings as representing those interests, and we do not find that he is clothed with any such authority by the will. The only reference to the executors in relation to this property is the provision that the life tenants shall not incumber it without their consent, and in case the life tenants violated any of the directions as to its use, it is devised to them in trust to dispose of the same as if she were dead. The first clause gives him no interest in or control over the property itself, and the second merely creates a contingency upon which he may acquire title. He may therefore be a proper party to the proceedings in partition, but there is no intimation in the will that he shall represent the contingent interest of parties living or to be born, nor is there any sug-

gestion in the bill that he is made a party for such purpose. It is true that he gave a bond upon receipt of a portion of the appraised value of the property which might be construed to inure to the benefit of all persons who may hereafter become interested, but as he is not charged with such duty by the will, and it was not ordered to him by the court, as the representative of such parties it cannot be regarded as a compliance with the provisions of the act of 1840.

"That act contemplates more than giving security for money after proceedings have resulted in a sale of the property or conversion into money of some of the purparts by appraisement. Persons unborn have the right to be represented throughout the entire proceedings by some one appointed by the court. At least their interests should be set forth and presented to the court so that orders might be made 'as equity and justice may require.'

"For these reasons we are of the opinion that the interests of the heirs of Andrew Fulton living or unborn, and the possible children of Margaret Fulton and of her children are not concluded by the proceedings in partition at No. 596, June term, 1893.

"But there are other objections to these proceedings which may cast a cloud upon the title, if they do not make it entirely void. Before the conveyance to Thomas C. Fulton, Jr., Margaret Fulton was the owner of a life estate in the entire property. She could not then maintain proceedings in partition, for the reason that partition operated on the possession, and she having the sole right of possession there was nothing to divide: Seiders v. Giles, 141 Pa. 93. Can she by a sale of a portion of her life estate in part of the land confer on her grantee the right to demand partition of that part?

"It is very clear that one tenant in common cannot by a sale of his interest in part of the premises confer upon his grantee the right to demand partition of that part. In some states said conveyances are disregarded, but in those in which they are recognized they are held not to affect the rights of other cotenants: Freeman on Partition, secs. 199, 200–466; Miller on Partition, 48.

"In our own state it has been held that the entire estate held in common must be brought into the proceedings: Rex v. Rex,

3 S. & R. 533; Harlan v. Langham, 69 Pa. 235. The reasons for these rules are strongly stated by Justice SHARSWOOD in this last case.

"The same mischief would result by permitting a life tenant who had no right to partition to confer upon one of the tenants in common of the remainder the power to demand partition of part of the tenement by granting to him an undivided portion or all of her life estate in that part. If that can be done the entire property may be disposed of piecemeal by conveying such interest from time to time, and thus prevent the partition of the estate in the mode which the law contemplates and to which the parties interested are entitled, and by the same means the life tenant and one of the tenants in common would have it in their power to effect a conversion of the entire property by selling such interests in parts which could not be subdivided. They may thus effect the sale by proceedings in the common pleas of property of which the orphans' court has exclusive jurisdiction.

"Two of the children of Margaret Fulton, defendants in this case, are minors appearing by guardian. Though such proceedings may bind parties to the record able to consent, it is more than doubtful whether a guardian can bind his ward by such consent, and surely the decree would not bind persons who having contingent interests were not made parties, or persons unborn whose interests were not submitted to the court for protection.

"The title to the property mentioned in the agreement for sale is in our judgment not marketable, and therefore the defendant is entitled to judgment on the case stated.

"And now, to wit, October —, 1894, this cause came on to be heard on a case stated, and it having been argued in open court by counsel for plaintiff and defendants, and the court having fully considered the same, it is ordered, adjudged and decreed, that judgment be entered in favor of the defendants and against plaintiff in the sum of one thousand one hundred and eighty-three and thirty-three hundredths dollars, and costs."

Error assigned was above judgment, quoting it.

George P. Hamilton, John A. Wilson with him, for appellant,

cited as to conclusiveness of the decree of the orphans' court: Herr v. Herr, 5 Pa. 428; Painter v. Henderson, 7 Pa. 48; Lair v. Hunsicker, 28 Pa. 115; Gesell's App., 84 Pa. 241; Markelien v. Trapnell, 34 Pa. 42; act of July 7, 1885, P. L. 257; Franklin Savings Bank v. Taylor, 9 U. S. 406; Giffard v. Hort, 1 Sch. & Lef. 386; McArthur v. Scott, 113 U. S. 340; Hopkins v. Hopkins, West, Ch. 606; Cholmondeley v. Clinton, 2 Jac. & W. 1; Mullins v. Townsend, 5 Bli. N. S. 567; Ex parte Dering, 12 Sim. 400; Calvert on Parties, 253.

As to contingent remainders: Miller on Partition, 60; Rex v. Rex, 3 S. & R. 533.

Wm. W. Wishart, for appellees, cited as to contingent remainders: List v. Rodney, 83 Pa. 483; McBride v. Smith, 54 Pa. 245; Peirce's App., 4 W. N. C. 439; Calahan's Est., 7 W. N. C. 130; Mergenthal's App., 15 W. N. C. 441; Cannon's Est., 16 W. N. C. 544; Reichard's App., 116 Pa. 232; Reiff's Est., 124 Pa. 145; Woelpper's App., 126 Pa. 563; Gernet v. Lynn, 31 Pa. 94; 2 Blackstone's Com. 125; Coke on Littleton, 28; 3 Washburn on Real Property, 261; Seiders v. Giles, 141 Pa. 100; Harlan v. Langham, 69 Pa. 238; Everhart v. Shoemaker, 42 Leg. Int. 484.

As to the validity of the partition: Daphouse's Est., 130 Pa. 256; Fink's App., 47 Leg. Int. 424; Cubbage v. Franklin, 62 Mo. 364; Williams v. Hassell, 74 N. Car. 434; Outcalt v. Appleby, 36 N. J. Eq. 73; Gerard v. Buckley, 137 Mass. 475; Hill v. Jones, 65 Ala. 214; Springer v. Savage, 32 N. E. 520; Gest v. Way, 2 Whart. 445; Seiders v. Giles, 141 Pa. 99; act of June 3, 1840, Purd. Dig. 1295, sec. 31; Ziegler v. Grim, 6 Watts, 106; Stevens v. Enders, 1 Green Ch. 273; Culver v. Culver, 2 Root (Conn.), 278; Packard v. Packard, 16 Pick. (Mass.) 194; Baldwin v. Aldrich, 34 Vt. 526; Brown v. Brown, 8 N. H. 94; Norment v. Wilson, 5 Humph. (Tenn.) 310; Robertson v. Robertson, 2 Swan (Tenn.), 201; Wilkinson v. Stewart, 74 Ala. 198; Simmons v. McAdams, 6 Mo. App. 297; Grisson v. Parish, Phill. Eq. Eng. 330; Williams v. Hassel, 73 N. C. 174, 74 N. C. 434; Justice v. Guion, 76 N. C. 442; Simpson v. Wallace, 83 N. C. 477; Parks v. Siller, 76 N. C. 191; Striker v. Mott, 2 Paige, 387; Brewster v. Striker, 2 N. Y. 37; Mead v. Mitchell, 17 N. Y. 210; Schori v. Stephens, 62 Ind. 441;

Hodgkinson et ux., Petitioners, 12 Pick. 374; Moore v. Appleby, 108 N. Y. 237; Nicol v. Carr, 35 Pa. 381; Freetly v. Barnhart, 51 Pa. 279; Swain v. Fidelity, etc. Co., 54 Pa. 455; Ferguson's App., 56 Pa. 487, n.; Dalzell v. Crawford, 1 Pars. Eq. Cas. 37; Kelly's Est., 2 W. N. C. 431; Holt's App., 98 Pa. 257; Mitchell v. Steinmetz, 97 Pa. 251.

OPINION BY MR. JUSTICE MCCOLLUM, May 30, 1895:

Has the plaintiff a marketable title to the land described in the contract on which his suit is based? If he has he is entitled to recover the balance of the purchase money due on the contract, and if he has not, the judgment entered by the court below in favor of the defendant for the amount paid upon it must be sustained. While the action is in assumpsit for the purchase money a recovery in it would have the effect of a decree for specific performance, and for this reason the law, as well as the agreement of the parties, requires that it shall be decided on the equitable principles which would govern a chancellor on a bill filed for such a decree: Nicol v. Carr, 35 Pa. 381. A doubtful title or a title which exposes the holder of it to litigation is not marketable, and the rule in equity is that a purchaser will not be compelled to accept it. The rule on this subject is well stated by PAXSON, J., in Mitchell v. Steinmetz, 97 Pa. 251: "A decree for specific performance is of grace, not of right. It will never be made in favor of a vendor unless he is able to offer a title marketable beyond a reasonable doubt, nor against a vendee where he is able to show any circumstances which would make it unconscionable to do so." This statement of the rule is well supported by the decisions of this court in numerous cases, among which we may mention: Nicol v. Carr, supra; Swain et al v. Fidelity Ins. Co., 54 Pa. 455; Doebler's App., 64 Pa. 9; Swayne v. Lyon, 67 Pa. 436.

The land in dispute is part of the lands of which Andrew Fulton died seized, and which were disposed of by his will. Respecting his title to the land, or the construction of his will, there is no contention here. It appears to be conceded that under his will and by virtue of its provisions there are persons now living, and others yet unborn, who have contingent interests in the land, which, if not barred or divested by the parti-

tion proceedings hereinafter considered render the plaintiff's title unmarketable. The learned judge of the court below in a well considered and lucid opinion, referred to and designated these interests, and as the accuracy of his conclusions respecting them is not questioned, we pass directly to the consideration of the effect of the partition, which by common consent appears to be the pivotal point in the case. Were these interests barred, divested or extinguished by the partition proceedings under which it is claimed that Thomas C. Fulton, Jr., to whose rights the plaintiff has succeeded, acquired a marketable title? The learned judge of the court below after careful consideration of various matters affecting the question concluded that they were not, and he therefore entered a judgment in favor of the defendant. The matters so considered by him related to the right of Thomas C. Fulton, Jr., on whose bill the proceedings were instituted, to demand partition of the land in question; to what appeared to him as noncompliance with the law as to parties unborn who might become interested in the estate, and as to the representation in the proceedings of minors who were then interested in it. We cannot profitably add anything to what he has said respecting them and other matters affecting the plaintiff's title and authorizing the judgment appealed from. We have duly considered them in connection with our statutes and decisions relating to partition, and our conclusion is that the plaintiff has not a marketable title. The questions arising upon the case stated are important and not free from difficulty. They raise such doubts respecting the title as ought to induce a prudent man to hesitate in accepting it. As was said in Nicol v. Carr, supra, we do not enter into them, nor indicate any opinion how they ought to be decided, but we hold it as a very clear conviction that the defendant ought not to be compelled to pay for a title burdened by them.

Judgment affirmed.

168 541
204 332

F. Futhey Smith, Executor, *v.* John A. Snyder, Appellant.

Landlord and Tenant—Notice—Termination of lease—Holding over—Waiver.

A lease from year to year required that notice of an intention to terminate the lease should be in writing. Three months before the end of the year the lessee gave verbal notice to the lessor's agent of his intention to vacate the premises at the end of the year. The agent did not insist on the written notice or ask for one. Before the end of the year the lessee told the agent that he would be willing to remain on the premises as tenant from month to month. The agent told him that he would communicate with the lessor, and let him know in time. The agent had no further communication with the lessee until after the end of the year. The lessee remained in possession, and about a month after the termination of the year was informed by the lessor that he would not be accepted as a tenant from month to month. *Held*, that while a jury would be justified in finding a waiver of the written notice, yet the agent's conduct did not create a new tenancy, and the tenant held over as tenant from year to year.

Argued Jan. 16, 1895. Appeal, No. 114, July T., 1894, by defendant, from order of C. P. No. 4, Phila. Co., March T., 1894, No. 709, making absolute a rule for judgment for want of a sufficient affidavit of defense. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Assumpsit for rent.

Plaintiff claimed to recover $120, being for four months' rent of premises 2221 Wallace street, Philadelphia, due Dec. 1, 1893, Jan. 1, 1894, Feb. 1, 1894, and March 1, 1894.

Defendant filed the following affidavit of defense:

"That on or about May 20, 1893, I went to the plaintiff and gave him notice of my intention to vacate the premises, No. 2221 Wallace street, at the end of the current year, at which time the plaintiff did not insist upon the written notice of my intention, nor did he ask for one.

"On or about August, 1893, a few days before the expiration of the current term, I called again to see him and told him that I would be willing to remain in the house from month to month after the expiration of the current term, and the plaintiff told me that he would see Mrs. McFetrich, widow of John H.

McFetrich, of whose estate the plaintiff is the executor, to see whether she would be willing that I should remain on the premises as a tenant, from month to month, and told me that he would let me know in time, so that I should not be prejudiced by any action of mine by reason of the running of time or remaining in possession of the premises. I therefore, under these representations, believing that my notice to quit had been acquiesced in, and believing that as I had not received any notice to the contrary from the plaintiff, but relying upon his promise, remained in possession of said premises, as a tenant, from month to month. Subsequently, and after September, 1893, I was informed by the plaintiff that Mrs. McFetrich would not accept me as a tenant from month to month. I thereupon vacated said premises on the 7th day of November, 1893, and paid all rent in full to Dec. 1, 1893. On the said 7th day of November, 1893, I surrendered possession of the premises to the plaintiff and sent him the keys, which were not returned, but which he still retains, and the plaintiff entered into possession of said premises and leased them to another tenant who entered into possession of same, in March, 1894, for which month he seeks to hold the defendant.

"I further aver that having given the notice three months before the expiration of the current year of my intention to leave, I remained upon the premises after September 1st, relying upon the representations of the plaintiff and believing therefrom that I remained simply as a tenant from month to month. I further aver that I have paid all rents due during my possession of said premises as aforesaid."

The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Error assigned was above order.

J. Campbell Lancaster, *Malcolm G. Campbell* with him, for appellant.—The plaintiff must be presumed to have accepted the surrender, as he exercised such acts of ownership as re-renting the property and accepting a tenant and putting him in possession for one of the months for which rent is claimed: Pratt v. Richards, 69 Pa. 53; Vetter's App., 99 Pa. 52; Wilgus v. Whitehead, 89 Pa. 131; Auer v. Penn, 92 Pa. 444;

Groves v. Donaldson, 15 Pa. 128; Brownfield v. Brownfield, 151 Pa. 567.

The claim and judgment embrace the month of March, 1894, during which month the defendant avers the plaintiff leased the house and put another tenant in possession. This, it cannot be doubted, relieved the defendant at least from that month: Auer v. Penn, 92 Pa. 444; Auer v. Penn, 99 Pa. 370; Tiley v. Moyers, 43 Pa. 404; Wolf v. Guffey, 161 Pa. 276.

E. O. Michener, for appellee.

Opinion by Mr. Justice McCollum, May 30, 1895:

The lessee gave notice in time of his intention to terminate the tenancy at the end of the current year. True, the notice was not in writing as required by the lease, but it was competent for the lessor to waive this requirement, and to accept and act upon the verbal notice as sufficient for the purpose for which it was given. A waiver may be evidenced by express agreement, or by declarations and conduct from which a fair implication of it arises. When the verbal notice was given there was no objection or suggestion made that it was not such notice as the lease called for. When the lessee in the last month of the term proposed to remain in possession of the premises after the expiration of it, as a tenant from month to month, the lessor's agent to whom the proposition was made promised to see whether the lessor was willing that he should so remain, and to let him know in time so that he should not be prejudiced by holding over. In this promise there was a recognition of the sufficiency of the notice and the resultant right of the lessee to terminate the tenancy at the end of the current year. The agent did not communicate to the lessee before the term expired the result of his conference with the lessor, and the lessee construing the failure to do so as an acceptance of his proposal to remain in the house thereafter as a tenant from month to month, continued in possession of it. Was he justified in so construing the broken promise of the agent? We confess our inability to discover in it any authorization of a continued possession of the premises on new terms. If the lessee in pursuance of the notice he gave had vacated the premises and the lessor had sued him for rent accruing the next year, on the ground that he had

not given the notice required by the lease a jury would have been justified in finding from the conduct of the lessor a waiver of written notice and such finding would have defeated his claim. But this conduct did not create a new tenancy nor authorize a finding from it of an acceptance of the lessee's proposal.

Judgment affirmed.

Catawissa Railroad Company, Appellant, v. Philadelphia & Reading Railroad Company.

Railroads—Lease—Covenants—Parallel roads.

Plaintiff leased to defendant its railroad as well as its traffic contract rights with connecting or feeder railroads, for a period of 999 years, the defendant to maintain the road in good order and condition, keep it in public use, operate it with all reasonable care and efficiency and use all proper and reasonable means to maintain and increase the business thereof. Defendant subsequently became practically the owner of another connecting railroad having the same general direction as the leased railroad with practically the same terminals. *Held*, that, while defendant may not violate the stipulations of the contract in letter and spirit and operate its own road for its own benefit without incurring liability to the plaintiff, yet its covenant is not broken by shipping large amounts of freight over its own parallel road, when the carrying of such freights over the leased road would have been impracticable, on account of its heavy grades, curvatures and ancient method of construction.

Argued Jan. 16, 1895. Appeal, No. 374, Jan. T., 1894, by plaintiff, from decree of C. P. No. 4, Phila. Co., March T., 1889, No. 469, on bill in equity. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Bill in equity for an injunction to restrain the diversion of freight from plaintiff's railroad.

The case was referred to Henry Flanders, Esq., as examiner and master, who reported as follows:

"First. By indenture made Oct. 10, 1872, the Catawissa Railroad Company leased and demised its road to the Philadelphia & Reading Railroad Company for the full term of 999 years

from and including the 1st day of November, A. D. 1872; a copy of the lease is attached to the complainant's bill and marked 'Exhibit A.'

"Second. At the date of the lease and prior thereto, the Philadelphia & Reading Railroad Company operated a line of railroad from East Mahanoy Junction, or from Tamanend, three miles to the westward, and which was the eastern terminus of the Catawissa Railroad, to Shamokin. This line was made up of several small roads, which by merger and lease had passed into the hands of the Philadelphia & Reading Railroad Company, and constituted a part of its system.

"Third. About ten years after the lease of the Catawissa Railroad to the Philadelphia & Reading Railroad Company, the latter road entered into an agreement with the New York Central & Hudson River Railroad Company, the Fall Brook Coal Company, the Jersey Shore Pine Creek and Buffalo Railroad Company, and others, by which and supplementary agreements it undertook to extend its line from Shamokin to West Milton, thus intersecting the Catawissa Railroad at the latter point. This agreement and supplements were dated respectively Feb. 4th, and April 1st, and July 15th of the same year.

"Fourth. By the sixth article of this agreement the Reading Company covenants and agrees with the other companies that all railway traffic, the route, direction or destination of which it can control, from Philadelphia and intermediate points, and from points south of Philadelphia and destined for points upon or beyond the said new line, shall be thrown upon said new line. On its part the New York Central covenants with the Reading and other companies that all railway traffic from points on its line or from its western and northern connections, the route, direction or destination of which it can control, and intended for points upon or beyond the new line, shall be thrown upon the said new line.

"Fifth. The Philadelphia & Reading Railroad Company constructed the line from Shamokin to West Milton by means of a new railroad company formed for that purpose and called the Shamokin, Sunbury & Lewisburg Railroad Company. All the stock of this company was owned by the Philadelphia & Reading Railroad Company, which moreover by the agreement aforesaid had covenanted that the new company should do, keep and

perform all the covenants entered into by the Reading Company, with respect to the location, construction, maintenance and operation of the line between Shamokin and West Milton.

"Sixth. Upon the completion of the Shamokin, Sunbury & Lewisburg Railroad in July, 1893, the Reading Company leased it and has since controlled and operated it.

"Seventh. The distance from West Milton to Williamsport over the line of the Catawissa Railroad is about twenty-eight miles; its whole line from Williamsport to Tamanend is about ninety-six miles in length. If the Shamokin, Sunbury & Lewisburg Railroad is used from the point of intersection at West Milton in the transportation of freight and passengers the Catawissa gets about twenty-eight miles of the haul; if not used and the transportation is thrown entirely upon the Catawissa, then it gets about ninety-six miles.

"Eighth. At Shamokin and its vicinity are extensive anthracite coal fields, and the chief motive for building the Shamokin, Sunbury & Lewisburg Railroad was to transport the coal from these fields to northern and western points. It is conceded by the plaintiff, and the master finds, that this coal could not be successfully sent eastward to Tamanend and thence over the Catawissa Railroad to these northern and western points. The defendant was and is justified in sending it by the Shamokin, Sunbury & Lewisburg Railroad. The Catawissa thus gets the advantage of its transportation over about twenty-eight miles of its tracks. It gets the same advantage by the freight which comes back in return.

"Ninth. At the time the Reading leased the Catawissa, the latter road had no connection or outlet north or west of Williamsport. Its traffic originated or terminated at that place. Whether there should be extensions depended thereafter on the lessee. The lessor, by the terms of the lease, had parted with the independent power to make them. If made by the lessee the cost and expense were to be borne by him, and the lessor was to derive no direct revenue from them. The Reading was entitled to the whole of the freight accruing from the use of such extension and was to account for no part thereof to the Catawissa.

"Tenth. By the agreement of Feb. 4, 1882, and its supplements, the Reading, as already stated, was to extend its line

from Shamokin to West Milton. This line was completed in July, 1883, but the Reading at that period was involved in financial difficulties and during the three following years was in the hands of receivers and, as the answer alleges, the said line was not 'properly' completed and operated until March, 1887. Nevertheless it had been used in the transportation of coal, and during the four preceding years nearly a million and a half tons had passed over the road, the Catawissa getting its proportion of the freight on that part of its line between West Milton and Williamsport.

"Eleventh. In the same year that the Shamokin, Sunbury & Lewisburg Railroad was completed, to wit, 1883, the Catawissa, under the provisions of its charter, was extended by the lessee and at his cost from Williamsport to Newberry Junction, a distance of three and five tenths miles. In the same year the Pine Creek Railroad was opened from Newberry Junction to Jersey Shore, and in the course of the two following years the other parties to the aforesaid agreement and its supplements had completed the extensions and made the connections they had stipulated to make, and thus through a system of connecting lines was formed a new line from Philadelphia to Buffalo. These connections greatly increased the business of the Catawissa road. Between the years 1883 and 1887 hard coal was carried from Shamokin to West Milton and thence over the Catawissa to Newberry Junction, and soft coal from Newberry Junction by the way of Williamsport over the Catawissa to its eastern terminus; and passengers and miscellaneous freights over the entire line of the Catawissa to and from Williamsport.

"Twelfth. The anthracite and bituminous coal traffic arose entirely from the connections established by reason of the agreement of Feb. 4, 1882, and its supplements, as well as the miscellaneous through traffic. Apart from these sources of business the traffic proper to the Catawissa road was declining rather than increasing. In 1883 it lost the transportation of oil by reason of the construction of the pipe line, thus causing a reduction in its revenue of nearly $150,000 per annum, and the lumber trade which had been a chief factor in its transportation was from its nature in process of diminution.

"Thirteenth. The road itself by reason of elevations, grades, curvatures, trestles and bridges, and by reason of the increased

weight of modern engines and cars was not by comparison as well fitted as the Shamokin, Sunbury & Lewisburg Road for railroad purposes, nor could it have been so fitted without a very large expenditure, which by the terms of the lease was to be borne by the Catawissa, and if so fitted the new traffic could not be carried over its line without practical inconvenience and additional cost.

"Fourteenth. On the 20th of March, 1887, the bulk of the traffic, both eastern and western, which, since the year 1883 had been carried over the Catawissa, was withdrawn, and thereafter carried by the way of West Milton and Shamokin. At or about the same time the number of freight and passenger trains on the Catawissa road, those going northward as well as those going southward, were reduced and new time-tables were issued.

"Fifteenth. Nevertheless the new business which was still carried over that part of the Catawissa line between Williamsport and West Milton was large and valuable. Between March, 1887, and March, 1890, this new business, consisting of anthracite and bituminous coal, merchandise and passengers, amounted to $1,971,720.02.

"Sixteenth. The rental which the Reading stipulated to pay the Catawissa semiannually, during the term of the lease, was thirty per cent of the gross receipts, but from and after the 1st day of May, 1886, and the 1st day of November, 1886, the semiannual rental was not to be less than $113,000; that is to say, $226,000 per year, whether thirty per cent of the gross receipts reached that sum or not. In addition to the rental, the annual interest on the mortgage indebtedness of the Catawissa, amounting at the date of the lease to the sum of $65,722.50 was payable by the Reading, and a further sum of $8,000 per annum was likewise payable by the Reading, to the Catawissa, to maintain the corporate organization of the latter.

"Seventeenth. From the date of the lease of the Catawissa to the Reading in 1872 to the year ending Oct. 31, 1890, the stipulated thirty per cent of the gross receipts have never, in any year except one (the year 1886), amounted to the aggregate of the above sums, and from the date of the diversion of the traffic at West Milton in March, 1887, to the year ending Oct. 31, 1890, thirty per cent of the gross receipts, even though

credited with the whole merchandise traffic from and to points between Williamsport and West Milton as if carried by way of the Catawissa, although in point of fact carried by the way of Shamokin, would fall short of the minimum rental, $166,939.05.

"Upon the foregoing facts the complainant insists inter alia that the Shamokin, Sunbury & Lewisburg Railroad is a parallel and competing railroad with the Catawissa, and that its lease by the Reading was illegal and void.

"1. With this contention the master does not agree. The Catawissa had been leased by the Reading for the term of nine hundred and ninety-nine years; subject to the covenants of the lease the Reading had practically become the owner of the road; it had passed into its possession and was a part of its system. The Shamokin, Sunbury & Lewisburg was likewise a part of its system and owned by it. There is nothing in the lease of the Catawissa that restricts the right of the Reading to extend its own line; that such extension is made through and by means of an independent organization does not affect the question. The Shamokin, Sunbury & Lewisburg Road was built, owned and controlled by the Reading Road. The lease as between the parties was a mere formula. The building of such a road under such circumstances, the master is of opinion, in nowise conflicts with section 4 of article 17 of the constitution of Pennsylvania. The constitutional inhibition relates to a different condition of things altogether. It is intended to prevent one independent railroad corporation from leasing or purchasing or controlling the works or franchises of another independent corporation having under its control or owning a parallel or competing line. The evil aimed at was the acquisition by one railroad of a rival road, and thus suppressing competition. The building by one road of another railroad to facilitate traffic is a totally different thing.

"2. Under any circumstances a parallel road, if it is not at the same time a competing road, doubtless, does not fall within the prohibition of the constitution. And in deciding the question whether a road is a competing road an important factor in the decision must always be the distance on either side of it from which it can draw its traffic. In France, where this question has been studied more scientifically perhaps than elsewhere, in calculating the probable traffic of a new line all

sources of traffic lying more than from three to six miles on either side of it are excluded. If the terminal points are the same, then the amount of that traffic must be considered, and brought into the calculation.

"3. But, as already stated, the master is of opinion that the question of a parallel or competing road does not arise in this case and, therefore, forbears to discuss it at length.

"4. The Reading Railroad Company was bound by the terms of the lease 'To maintain in good order and condition, keep in public use and operate with all reasonable care and efficiency the railroad hereby demised (the Catawissa), and shall and will use all proper and reasonable means to maintain and increase the business thereof.'

"5. In stipulating to maintain and increase the business of the Catawissa, by all proper and reasonable means, the Reading did not thereby restrict or yield its right to promote its own business. By the extension of its own line and the connections which it made with other lines it brought into existence a very large amount of new traffic. In the transportation of this new traffic it uses a part of the Catawissa line. The contention is that it was bound to use the whole.

"6. The master does not concur in this view of the question. By making use of the Catawissa as a link in the new line, established by the agreement of Feb. 4, 1882, and its supplements, the Reading threw upon that portion of the Catawissa, thus used, as already stated, a very large amount of new traffic. It could do no more without impairing its own interests. In other words, the Reading while greatly promoting the business of the Catawissa, by using a part of its line in the transportation of the new traffic created by the Reading, was under no moral or legal obligation to diminish or impair its own business, by using the whole line, even though there were no impediments to its use. That it did temporarily use the whole is of no consequence. The Catawissa was benefited by such temporary use. But such temporary use, while the Reading was finally completing or perfecting its own line, established no right to a permanent use.

"7. The preponderance of testimony clearly is, that the Reading could not carry the new traffic over the Catawissa without practically rebuilding the line and double tracking it. But

this, in the master's view of the case, is an unimportant inquiry, because he is of opinion that the Reading was bound by no legal duty or obligation to transfer the new traffic to that line, whether rebuilt or not.

"8. It is further contended that at the time the lease was made the Catawissa was contemplating the opening of a western connection, and is entitled to the new business arising from the connections made, or to be made, with other roads.

"9. Whether the Catawissa before the lease could have made connections (assuming that it contemplated making them) giving it an outlet to northern and western points is conjectural. The chief consideration that enabled the Reading to form these connections was her fields of anthracite coal, and she built the Shamokin, Sunbury & Lewisburg Railroad in order to send it forward, and the other roads to the north and west, extended their lines in order to receive and forward it, as well as to find a new market for their soft coal. But whether the Catawissa could or could not have formed similar connections, had it retained the power to form them, it nevertheless received its equitable proportion of the new traffic created by the connections made by the Reading, by having that part of its road between Williamsport and West Milton used as a link in the new line. There is nothing in the lease, nor in the nature of things, which raises any obligation on the part of the Reading, when, as under the circumstances of this case, it can use with advantage a part of the Catawissa, and with profit to both roads, to use the whole, though with inconvenience and loss to its own.

"10. As already observed, when the Catawissa leased its line to the Reading it parted with the independent power to make extensions or form connections with other roads. Thenceforward its rights were to be determined by the covenants of the lease.

"11. It is further urged on behalf of the Catawissa, that the western traffic was business which naturally belonged to the Catawissa, and was the natural result of the growth of the road.

"12. This is not obvious, and it would seem that the natural growth of a railroad's traffic is that which comes from the development of the country along its lines, the founding of industries, the opening of mines, if mines there are, and the increase of trade and population. Be this as it may, the master

is of opinion that the clause in the lease requiring, on the part of the lessee, the use of all proper and reasonable means to maintain and increase the business of the road, does not require, as a part of these means, the building of new lines. He may do so as a matter of business judgment and discretion, but the lease imposes on him no express or implied obligation to do it.

"13. It is hardly necessary to observe, in conclusion, that any diversion of the traffic proper to the Catawissa, any traffic originating or terminating in Williamsport or local traffic should be restored or accounted for as part of the receipts of the road. If under the prayer for general relief the complainant desires such an accounting it should be so ordered, although the master does not understand that it complains that it has not been credited with such receipts. Otherwise, the bill should be dismissed."

Upon exceptions to the master's report, THAYER, P. J., filed the following opinion:

"The grounds of complaint against the defendant set up in plaintiff's bill appear to be twofold: 1. It complains, that the building and leasing of the Shamokin, Sunbury & Lewisburg Railroad from Shamokin to West Milton were unlawful acts, being, as it alleges, in contravention of the prohibition contained in article XVII. section 4, of the constitution, forbidding the acquisition of the rights of a parallel and competing road by another company; and 2, that the defendant, the Philadelphia & Reading Railroad Company, has used for many years past, and still continues to use, the Shamokin, Sunbury & Lewisburg Railroad for the transportation of freight, which the plaintiff says the defendant is bound in good faith and equity to carry over the Catawissa Road in consequence of certain covenants entered into by the defendant with the plaintiff, and contained in the lease of the Catawissa Railroad made between the plaintiff and defendant Oct. 10, 1872.

The first point made by the plaintiff, viz, that the building by the Reading of the Shamokin, Sunbury & Lewisburg Road was in effect the purchase of a parallel and competing line, and that so its possession and use of it is unlawful, was hardly touched upon by either side in the oral argument, and *seems* to be virtually abandoned in the printed argument. Nevertheless, as it has been made a prominent feature of the bill, we

have examined it, and have arrived at the conclusion reported by the learned master. A brief statement of the facts will show that the point is altogether untenable. By the lease of Oct. 10, 1872, which was for 999 years, the Philadelphia & Reading Railroad Company became the proprietor and virtual owner of the Catawissa Railroad upon the terms and subject to the covenants contained in the lease. At the date of the lease, and previously thereto, the Philadelphia & Reading Company operated several small connecting roads, extending from the eastern terminus of the Catawissa Railroad at Tamanend to Shamokin.

"About ten years after the lease of the Catawissa to the Philadelphia & Reading, the Philadelphia & Reading Company entered into contracts with the New York Central & Hudson River Railroad Company, and several other smaller companies, to build a connecting link from Shamokin to West Milton, intersecting the Catawissa Road at that point. The chief object of this was to open an outlet from the Schuylkill coal region northward and westward, by the way of Williamsport, for the transportation of anthracite coal to the markets of those regions, and for the mutual benefit of all the roads interested, including the Catawissa, for that road, belonging to the lessee, the Philadelphia & Reading, constituted between West Milton and Newberry Junction a necessary part of the new system of outlet. All the roads interested would, of course, benefit more or less by the building of the new link, for all would share to a greater or less extent in the profits of the newly opened transportation, and they would share also in the benefit resulting from the return freight over the portions of the several lines used, whether it consisted of the soft coal brought from the west or the general merchandise coming from the same direction. In order that the system of connections should be completed, the Philadelphia & Reading, after the lease, extended, at its own cost, the Catawissa Road from Williamsport to Newberry Junction.

"That the Philadelphia & Reading Company had authority to build the Shamokin, Sunbury & Lewisburg branch, in the manner in which it was accomplished, has not been questioned, and does not admit of doubt. Was it in any sense a competing road, the acquisition of which is prohibited by article XVII. of

the constitution? The object of the prohibition was clearly, as the master has pointed out, to prevent one independent railroad corporation from acquiring possession of the road of another independent company which is operating a competing line. It was to prevent the buying up by one railroad corporation of a competing line and the establishment thereby of a monopoly. The building by a company of an additional road for the purpose of facilitating and enlarging its own business can, by no fair process of reasoning, be contended to be within the constitutional prohibition, unless, indeed, a man can be said to compete with himself when he enlarges his own business or enters into a new one. Where there is competition there must be competitors, and with what propriety can the Philadelphia & Reading Company, running and operating the Shamokin, Sunbury & Lewisburg, be said to compete with itself in operating another railroad, which is its property, or is to be under its exclusive control for nine hundred and ninety-nine years? Competition in business is out of the question where all the business is in the hands of the same individual. It is also quite clear from all the evidence that the Shamokin, Sunbury & Lewisburg Road was not built as a competing road with the Catawissa, nor for any such purpose. Its sole object was to open up new northern and western connections for the Philadelphia & Reading, by an alliance with other interests and powerful roads which had no connections with the Catawissa, and between which and the Catawissa there had never been any competition nor rivalry whatsoever, and could not be under existing conditions at the time when the new road was built

"If the Philadelphia & Reading was not the owner of the Catawissa, then it was engaged, according to the plaintiff's argument, in building a competing line, which is a policy encouraged by the constitution and not prohibited by it. If it was the owner, then it was simply building an additional line for itself. There is no question in the case, therefore, of buying up a competing line. There was not a word in the lease by which the Philadelphia & Reading acquired the Catawissa which prevented the building of new roads by it and forming any new connections which it might desire or consider profitable for the enlargement of its own business. It is apparent, therefore, that it was neither prohibited by the constitution

nor precluded by its agreement with the Catawissa from continuing its road from Shamokin to West Milton. And if it had the right to build the road it had the right to use it, and to all the profit to be derived from its use and operation, and with this I dismiss the point.

"Upon the second point, viz, that the defendant has made an unfair use of the Shamokin, Sunbury & Lewisburg Road, by diverting traffic from the Catawissa Road, and sending it over the Shamokin, Sunbury & Lewisburg, for the purpose of benefiting itself, and at the expense of the rental to be paid by the defendant to the plaintiff, we are of the opinion, after the examination of the evidence, that no case has been made out by the plaintiff which entitles it to equitable relief. It is important, in the first place, to understand properly the scope of the covenant which the plaintiff alleges the defendant has broken, and the extent of the obligations which that covenant imposed upon the defendant. What the plaintiff chiefly relies upon is the covenant contained in the eighth article of the lease, by which it was agreed by the defendant that it would maintain the Catawissa in good order and condition, operate it with reasonable care and efficiency, and use all proper and reasonable means to maintain and increase the business thereof. The plaintiff contends that the defendant has broken the last clause of the covenant, in not transporting all freight which comes to West Milton, whether coming either from the north or the south, over the Catawissa instead of the Shamokin, Sunbury & Lewisburg Railroad. I do not, I think, overstate the extent of the plaintiff's demand in this respect. Not only was it so argued, but it will be observed that by its bill it asks us to enjoin the defendant from carrying over the Shamokin, Sunbury & Lewisburg Road all freight 'originating at West Milton, or at points east, north, or northwest thereof, as well as all freight originating at East Mahanoy Junction, or at points south, southeast, north or northwest thereof.' The plaintiff's bill is therefore virtually and in terms a bill to enjoin the defendant from operating the Shamokin, Sunbury & Lewisburg Railroad, as well as the road from Shamokin to East Mahanoy Junction, which was a necessary link in the connection, and which was acquired from several other independent companies by the defendant long before it entered into the agreement

with the plaintiff for the lease of the Catawissa. The plaintiff in its bill also asks that the defendant may be compelled to account with it for all freight carried over the Shamokin, Sunbury & Lewisburg Road. It does not complain that the defendant has appropriated more than its share of the receipts for freight carried over the Shamokin, Sunbury & Lewisburg Road, but that it has appropriated any part of it. This is, of course, to deny the right of the defendant to build the road at all—a denial which is wholly without evidence to sustain it, unless we are to assume that the words of the covenant, which I have quoted, are sufficiently potential to produce the results contended for. With such a conclusion we can by no means agree. The defendant did not, by entering into the lease with the plaintiff, debar it of any right which it already possessed. It surrendered none of its franchises or corporate powers, nor did it agree to subordinate its own business to the interests of the lessor, nor to abstain from extending its system and making such connections with other roads as might conduce to its profit and advantage. It is not to be presumed that it would have been willing to acquire the plaintiff's road upon any such terms.

"A covenant to use all proper means to increase another man's business does not necessarily imply that he shall neglect his own, or that he shall derive no profit for himself from anything which might possibly be turned to the advantage of the other.

"The defendant is required to use all reasonable means to maintain and increase the business of the road. This means that it will do what is usually accounted reasonable, and what ought to be so accounted by reasonable men. It is difficult, perhaps impossible, to bring within the limits of a precise definition exactly what is required by an undertaking in such general terms. It can only be determined when questions arise in regard to the particular actions and conduct of the party and their results. The defendant in the present case, by the extension of its own line and its connections, according to the report of the master, greatly benefited the Catawissa, bringing into existence, according to the report of the master, a very large amount of new traffic, in the prosecution of which it used a large portion of the Catawissa road. The plaintiff

contended that it was bound to use the whole, and to send the whole traffic over the Catawissa. It could not have done that without greatly injuring its own interests; if it had done so its own road would have been idle. We agree with the master that the Philadelphia & Reading, while greatly promoting the business of the Catawissa, by using a part of its line in the transportation of the new traffic created by the new northern and western connections, was under no legal obligation to restrict or impair its own business by using the whole Catawissa line to the exclusion of the road which it had itself built at a cost of $4,000,000, for the purpose of establishing the connections which produced the new business. The master, moreover, has reported that the preponderance of the testimony is that, owing to its condition and the peculiarities of the construction of the Catawissa, the new traffic created by the Reading could not have continued to be carried over the Catawissa without first practically rebuilding the road, an expense which is not incumbent on the defendant to incur.

"If any traffic has been diverted from the Catawissa which properly, peculiarly, or naturally belongs to it, that is, traffic originating or terminating at Williamsport, or arising from the development of the industries of the country bordering upon its line, and if it could be shown to amount in value to a sum which would affect the rental paid to the plaintiff according to the terms of the lease, the plaintiff might justly complain of such an injury and ask redress for it. But that is not the case presented by the bill, nor is it the case for which the plaintiff is contending. What it demands is that, in settling the amount of rent to be paid by the defendant, it should account for the gross receipts of the Shamokin, Sunbury & Lewisburg Road since March, 1887, and pay the plaintiff thirty per centum of such gross receipts. We agree with the learned master that the facts of the case do not sustain such a demand, and that the plaintiff has shown no such equity as would justify us in making such a decree as it asks for. The plaintiff was protected by a fixed minimum rental stipulated for in the lease. It has not shown any state of facts which entitles it to add to that amount thirty per cent of the gross receipts of the Shamokin, Sunbury & Lewisburg Road.

"To sum up the whole controversy, we are of opinion that

the defendant had a right to build the Shamokin, Sunbury & Lewisburg Road; that neither the constitutional provision, which has been appealed to, nor the agreement which it entered into with the Catawissa for the lease of its road, presented any just or lawful obstacle to its doing so, and that having built it, it has the right to operate it for its own benefit, without incurring any responsibility to the plaintiff for the manner in which it has operated it, or any liability to account with the plaintiff for the freights sent over its road.

"The exceptions are dismissed.

"The report of the master is confirmed, and the bill is dismissed with costs to be paid by the plaintiff.

DECREE.

"And now, Jan. 27, 1894, this cause having come on to be heard upon exceptions to the report of the master, and having been argued by counsel, and the court being duly advised in the premises, it is ordered, adjudged, and decreed that the exceptions to the report of the master be and they are hereby dismissed, and the said report be and the same is hereby confirmed, and the bill of the plaintiff is dismissed with costs to be paid by the plaintiff."

Error assigned, among others, was above decree.

George Tucker Bispham, *A. H. Wintersteen* with him, for appellant.—Under the covenants of the lease, including the covenant to use all proper and reasonable means to maintain and increase the business of the plaintiff's road, the defendant was bound affirmatively to increase the plaintiff's business to the fullest extent reasonably possible, and negatively to procure for itself no advantage of any nature inconsistent with or interfering with such increase, and the conduct of the defendant has been in breach of these covenants.

No evidence of special facts was produced sufficient to justify the defendant in diverting through traffic from the plaintiff in the manner complained of.

Thomas Hart, Jr., and *Samuel Dickson*, for appellee.—The Catawissa Railroad, as now constructed, is not in condition to

do properly, with safety and promptitude, the new business which was acquired by the making of the new railroad connections beyond Williamsport under the contracts of 1882.

To do the south-bound business as the plaintiff contended it should be done over the whole line of the Catawissa Railroad, would involve a method of operation in connection with the transportation of hard coal over the Shamokin Railroad, northward, so expensive and difficult in conducting, that it cannot be said to be a proper and reasonable means to increase the traffic of the Catawissa Railroad under the terms of the eighth covenant of the lease.

A master's report upon the facts is all but conclusive, and the consideration of the testimony in this case shows that it cannot be contended there has been any such glaring error in the master's findings as will induce this court to set them aside: Burton's App., 93 Pa. 214; Bugbee's App., 110 Pa. 331.

OPINION BY MR. JUSTICE DEAN, May 30, 1895:

A thorough examination of the voluminous testimony in this case, has convinced us that the conclusions of the master and the decree of the court below are right. The plaintiff, on 10th October, 1872, leased to defendant its railroad, for a period of nine hundred and ninety-nine years, as well as all its traffic contract rights with connecting or feeder railroads, and with shippers; the leased road to be run, used and operated by the defendant, upon certain terms and conditions. As a consideration, the defendant agreed to pay the maturing interest on certain obligations of the plaintiff company, and eventually the principal, and, in addition, semiannually as rental, a sum equal to thirty per cent of the gross receipts of the leased road. This was the minimum; even this was protected by the further stipulation, that the annual rental was never to fall below $226,000 per year. The lessee further agreed to maintain the road in good order and repair; operate it with all reasonable care and efficiency; and further, use all proper and reasonable means to maintain and increase the business thereof.

As the value or amount of the rental, beyond the minimum, payable to plaintiff, would depend on the amount of the gross receipts, the importance of this last clause becomes apparent. The defendant, about ten years after the lease of the Cata-

wissa Railroad, became practically the owner of the Shamokin Railroad, a connecting road, having the same general direction as the Catawissa, and practically east and west the same terminals; while operating this road, nominally, under a lease, defendant really was the owner. The burden of plaintiff's complaint is, that it being to defendant's interest to promote traffic on the last named road, it wrongfully, and to the prejudice of the Catawissa, diverted traffic from the Catawissa to the Shamokin.

The fact is undisputed, that, by reason of traffic contracts made by defendant with new western connections, the carrying business, thereafter, of anthracite coal west and bituminous east, greatly increased. If the whole of defendant's coal traffic west from Shamokin had been put on the Catawissa, it would have had a haul of ninety-six miles, the entire length of its road, but as much of it was diverted to the Shamokin at the point of intersection with the Catawissa, the latter got but twenty-eight miles; and the respective hauls were the same with the return freights east.

The master found, that to have given the Catawissa the carrying of all this freight, would, on account of its grades, curvatures and ancient methods of construction, have been impracticable; but, nevertheless, that defendant, by its traffic contracts with connecting roads east and west, had largely increased the traffic of the Catawissa. Notwithstanding this increase, however, with the exception of one year, 1886, thirty per cent of the aggregate gross receipts has never equalled the minimum rental.

While we concur, almost throughout, in the findings of fact and conclusions of the master and the court below, that plaintiff, under the evidence, has presented no case which entitles it to an account up to the date of the filing of the bill in this case, we will not undertake now to give a construction to this lease which would determine the rights of the parties, in the future, under a different state of facts. The defendant covenanted that it would, during the term, "maintain in good order and condition, keep in public use, and operate with all reasonable care and efficiency, the Catawissa Railroad, and shall and will use all proper and reasonable means to maintain and increase the business thereof." As is properly said by the court

below, "It is difficult, perhaps impossible, to bring within the limits of a precise definition exactly what is required by an undertaking in such general terms." But we decline to say that the defendant had a right, in view of this covenant, to operate its own road for its own benefit, without incurring any responsibility to the plaintiff. We can easily see how defendant, by the operation of its own road, might violate this stipulation, in both spirit and letter, and thereby become answerable to plaintiff. While it is clear from the evidence, that, up to this time, it has not done so; and while no precise definition of its duty, under this general covenant, ought now to be given; still, future operations can alone determine its future responsibility. In giving the lease a construction applicable only to the facts before us, we avoid any prejudice of plaintiff's right, or suggestion of wrong on part of defendant.

The decree is affirmed, and the appeal is dismissed.

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Sophia Strauss's Estate. Jennie Bonowitz's Appeal.

Marriage—Evidence of marriage.

At the audit of an administrator's account the fund was claimed by the alleged husband of the decedent. To establish the fact of marriage he produced the official certificate of the birth of a child naming himself and decedent as husband and wife; checks by him to decedent indorsed by her in her married name; a letter addressed to her as a married woman by one objecting to the alleged husband's claim; a policy of life insurance taken out by claimant for decedent's benefit, in which decedent is described as "his wife." There was also evidence that decedent collected moneys from beneficial societies of which the claimant was a member, which she could only do as his wife, and there was evidence of a deed to her in her married name. It appeared also that in the circle in which she lived she was called by claimant's name, and that his children by a former wife called her mother and received from her the consideration and care which her duty as the wife of their father imposed. *Held*, that the evidence was sufficient to establish the marriage relation between claimant and decedent.

Argued Jan. 21, 1895. Appeal, No. 117, July T., 1894, by Jennie Bonowitz et al., from decree of O. C. Phila. Co., Jan. T., 1894, No. 268, dismissing exceptions to adjudication. Before

STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Exceptions to adjudication.

From the record it appeared that on Feb. 26, 1894, Morris Strauss filed his account as administrator of Sophia Strauss, deceased, and at the audit of his account before FERGUSON, J., the balance for distribution was claimed by the committee in lunacy of Nathan Strauss, alleging that he was the husband of deceased. It was also claimed by the brothers and sisters of deceased, who alleged that Nathan Strauss was not the husband of deceased, and that they were entitled to the balance for distribution. Further facts appear by the opinion of PENROSE, J., and by the opinion of the Supreme Court.

On March 14, 1894, the said auditing judge filed his adjudication in which he found that Nathan Strauss was the husband of the deceased, and awarded to his committee in lunacy the balance of her estate amounting to $585.17. On exceptions to the adjudication, HANNA, J., filed the following opinion:

"While fully recognizing the well-settled rule, which is mainly relied upon in this case to sustain the finding of the auditing judge, viz: That upon a question of fact it is entitled to the same weight as the verdict of a jury, and will only be set aside on such grounds as would justify the setting aside of such verdict: Rawling's Est., 37 Leg. Int. 133; Fabian's Est., 38 Leg. Int. 185; Lewis's App., 127 Pa. 127,

"Yet it is also equally well settled that if the fact found is a deduction from other facts, the conclusion reached is the result of reasoning, and is subject to revision and correction: Phillips' App., 68 Pa. 130; Moyer's App., 77 Pa. 482; Hindman's App., 85 Pa. 466; Cake's App., 110 Pa. 65.

"And in the recent case of Kittell's Est., 156 Pa. 445, DEAN, Justice, said: 'This rule, so often repeated, has application only to those facts depending on the candor, intelligence, and memory of witnesses. Where the truth is determined by inferences or probabilities, from established or undisputed facts, we can review and determine the reasonableness or unreasonableness of such inferences as well as the auditor or the court below.'

"It is upon the principle thus announced that the correct

ness of the conclusion reached in the present case is to be determined. A fact has been found not only contrary to the evidence and the weight of the evidence, but a well-established rule of law in this State. A lawful marriage is ascertained to have taken place between the decedent and the claimant, but the date when this relationship commenced is not determined, and the auditing judge expressly finds 'there was no evidence of any marriage ceremony' between the parties. While it is conceded, in the absence of the other facts and circumstances developed from the testimony, a marriage ceremony, so called, is not required to constitute a legal marriage, yet it is omitted to be also found as a fact that there was any evidence of a contract or agreement of the parties that they should live and cohabit together as husband and wife; and their marriage is presumed upon what is deemed sufficient evidence of cohabitation and reputation to raise a presumption of marriage. As to the cohabitation or living together of decedent and claimant as husband and wife, the testimony shows they never at any time lived and cohabited together, nor did they obtain the general reputation of man and wife among their relatives, friends, neighbors and acquaintances that the law requires: Bicking's App., 2 Brewster, 202; Brice's Est., 2 W. N. C. 112; Comm. v. Stump, 53 Pa. 132; Yardley's App., 75 Pa. 207; Green's Est., 5 C. C. R. 605.

"But what was the relationship of decedent and claimant? It appears from the testimony, and is not disputed, that in 1882 claimant, with his minor children, his wife being dead, boarded with decedent's sister, by whom she was employed as a household servant; that on May 2, 1883, she became the mother of a child, of whom it is admitted claimant was the father; that no marriage had taken place between them, or contract or agreement of marriage; that the child lived but a few weeks, and the mother suffered from serious illness during a period of nine months thereafter; but still no ceremony of marriage or contract of marriage. And if the testimony is to be credited, and it is not impeached, claimant, immediately after the birth of the child, left this city. And although he defrayed the expense of the burial of his child, remitted money to decedent to aid in the maintenance of herself, and his children, allowed her to assume his name and collect moneys due him from his lodge,

and took out a policy of insurance upon his life, payable to her as his wife, and his children, yet he never cohabited with her in the family relation, and suffered her, after recovery from her illness, to resume and continue in the capacity of a caretaker of his children and household domestic for her sister.

"It also appears from the testimony of almost every witness that decedent was known by her maiden name prior to the birth of her child, and not until afterwards did she assume or was she known or addressed as Mrs. Strauss.

"And Sarah Eppstein, a disinterested witness, who had formerly employed decedent as a 'hired girl,' testified that the latter did all the housework for her sister; that she, the witness, was present when the child was born; that she coaxed claimant, on the day before he went away, to marry Sophia, but he refused. 'He said he would do all for her that he could, because he got that child with her. She was crying so much, and near out of her mind, and that is the reason he went away too. He said he would try to do whatever he could. He would not marry her.'

"And a brother-in-law of claimant testified that he began to 'call' decedent Mrs. Strauss 'about the time the child was born,' and he inquired of claimant if he was married, and why he did not get married by a Jewish rabbi, 'and he laughed, and said that he was married anyhow, and that was all the satisfaction he gave me—that he was married outside a Jewish rabbi, and that was strong enough, or words to that effect.'

"Mrs. Eppstein, the witness above named, further testified that the reason decedent called herself Strauss after the child was born was 'She was so ashamed she would not go to nobody, and then he (claimant) told her, "I don't care; you can call yourself Mrs. Strauss." She would not stay with the children; wanted to go away, and she wanted to come back to me. I coaxed her to stay there; to never mind.' In view of this testimony, unimpeached and uncontradicted, it surely is a mistake to find that decedent and the claimant were ever husband and wife.

"And even if cohabitation and reputation were clearly proved, which is by no means the case, 'they are not marriage; they are but circumstances from which a marriage may be presumed. The presumption of marriage arising from such facts may

always be rebutted, and wholly disappears in the face of proof that no marriage in fact had taken place.' PAXSON, J., Hunt's App., 86 Pa. 294.

"Again, it cannot be questioned that the intercourse between claimant and decedent was in its inception illicit. As already stated, it was not attempted to be shown that decedent bore the name or was known as Mrs. Strauss until subsequent to the birth of her child. This being the case, we find the law to be that 'The general rule is, that a relation shown to have been illicit at its commencement is presumed to continue so until proof of change. Such a relation raises no presumption of marriage:' Hunt's App., supra; Reading Ins. Co.'s App., 113 Pa. 208; Grimm's Est., 131 Pa. 199; Weitzel v. Central Lodge, 1 Dist. Rep. 143.

"Here decedent consented to illicit relations with the father of her child, and, as was also said in Hunt's Appeal, supra, such intercourse, while perhaps not meretricious, so far as she was concerned, yet 'was clearly illegal.'

"And claimant, in his endeavor to prove that he is the surviving husband of decedent, is obliged to show not merely cohabitation and reputation but 'a marriage in fact.' This he has failed to do, and consequently the conclusion of the auditing judge is unsupported either by the testimony or the settled law upon the question involved. This disposes of the claim of the committee of the alleged husband, who became a lunatic ten years before the death of the woman he wronged, and who, while compos mentis, disregarded her tears, turned a deaf ear to her entreaties, and refused to make her his lawful wife. Finally, what is said by SHARSWOOD, J., in Bicking's App., supra, may well be applied in the present instance: 'A man may live with his kept mistress in such a way as to create a kind of repute of marriage among some persons. He may even to gratify her allow himself to be held out, or hold himself out, to her friends and acquaintances as her husband; may recognize the fruit of the connection as his children, and manifest affection and tenderness towards them; and yet the evidence may fall far short of that which ought to satisfy the mind that there was an actual agreement to form the relation of husband and wife.'

"For the reasons given, the exceptions should be sustained;

but the court being equally divided in opinion, they must be dismissed.

"The exceptions are dismissed and the adjudication confirmed. The exception filed by accountant to the allowance of the claim for medical attendance not urged at the argument we presume may be considered as withdrawn."

ASHMAN, J., concurs.

PENROSE, J., filed the following opinion:

"The question raised by the exceptions is one of fact purely, and under well-settled principles the finding of the auditing judge is conclusive unless the evidence upon which it is based is insufficient to justify it. That from the birth of her child until her own death, a period of ten years or more, the decedent bore the name of the man whose claim as her husband has been sustained by the adjudication, that she was so known and addressed not only by her acquaintances generally, but by the members of her own family who now deny the marriage and claim her estate as next of kin, and that the children of this man lived with her and called her mother, are facts which cannot be denied or questioned. It is true that the exceptants, claiming as next of kin, asserted that the child so born was illegitimate, and hence, as contended, the original relation having been illicit, marriage can only be established by direct proof, not by mere reputation. But the evidence upon this point, which is mainly, if not altogether, the testimony of persons directly interested, is opposed by documentary evidence, the genuineness of which admits of no doubt—the official certificate of birth of the child naming the parents as if husband and wife, the checks by the former to the latter with their indorsement by her in her married name, the letter addressed to her as a married woman by one of the exceptants, her deed in her new name, etc.; and it cannot be said, therefore, that the auditing judge was not warranted in failing to find that the relation in its inception was an unlawful one.

"But if he had so found, the proof of subsequent marriage did not rest upon mere reputation. There was direct evidence of admissions and declarations quite sufficient to establish it. There was, moreover, uncontradicted evidence that the decedent collected moneys from beneficial societies of which the husband was a member, which she could only do as his wife; and there

is the final fact, proved by the testimony of one of the exceptants, and by the production of the policy itself, that the husband, long before the decedent's death, insured his life for her benefit and the benefit of his children by a former marriage, describing her in the instrument as 'his wife.' It is difficult to imagine anything more convincing than this.

"It is not enough that upon the same evidence another judge might have reached a different conclusion. The finding has the force of the verdict of a jury, and as in the present case it cannot be said to be without evidence or against the weight of the evidence, the exceptions, in my opinion, should be dismissed."

FERGUSON, J., concurs.

Errors assigned were in dismissing exceptions to adjudication.

Henry N. Wessel, for appellants.—When certain facts are found, when there are only immaterial contradictions in the evidence of the witnesses, when the conclusions reached are the deductions from facts admitted or not seriously conflicting, it is the right and the duty of the appellate court to review the process of reasoning of the auditing judge and to decide whether the facts supporting the conclusion are sufficient to establish it: Bicking's App., 2 Brewst. 202; Milligan's App., 97 Pa. 525; Jacobs' App., 107 Pa. 137; Cake's App., 110 Pa. 65; Phillips' App., 68 Pa. 130; Gaines v. Brockerhoff, 136 Pa. 175; Beaumont v. Wilkes-Barre, 142 Pa. 198; Moyer's App., 77 Pa. 482; Hindman's App., 85 Pa. 466; Kutz's App., 100 Pa. 75; Bedell's App., 87 Pa. 510; McConnell's App., 97 Pa. 31; Babcock v. Day, 104 Pa. 4.

To prove marriage in civil cases, other than by solemnization, there must be evidence as to long-continued cohabitation as man and wife, combined with general reputation thereof, and the testimony relied upon to establish this must be most satisfactory: Chambers v. Dickson, 2 S. & R. 475; Senser v. Bower, 1 P. & W. 450; Guardians v. Nathans, 2 Brewst. 149; Covert v. Hertzog, 4 Pa. 145; Thorndell v. Morrison, 25 Pa. 326; Reading Fire Ins. Co.'s App., 113 Pa. 204; Brice's Est., 2 W. N. C. 112; Com. v. Stump, 53 Pa. 132; Yardley's Est.,

75 Pa. 207; Tholey's App., 93 Pa. 36; Green's Est., 5 Pa. C. C. 606.

Under the testimony, it appearing plainly that the intercourse was meretricious, the law will not raise a presumption of marriage for cohabitation and reputation, but will require proof of an actual marriage. The presumption is that the unlawful relation continued: Hantz v. Sealy, 6 Binn. 405: Physick's Est., 2 Brewst. 187; Bicking's App., 2 Brewst. 202; De Amarelli's Est., 2 Brewst. 239; Yardley's App., 75 Pa. 207; Reading Ins. Co.'s App., 113 Pa. 204; Drinkhouse's App., 151 Pa. 294; Hunt's App., 86 Pa. 294.

A husband who, by reason of drunkenness, profligacy, or other cause, deserts his wife, is not entitled to the benefits of the intestate laws of the state of Pennsylvania: Wilson v. Coursin, 72 Pa. 306; Foreman v. Hosler, 94 Pa. 418; Orreil v. Van Gorder, 96 Pa. 180; Elsey v. McDaniel, 95 Pa. 472; Ellison v. Anderson, 110 Pa. 486; Holbrook's Est., 20 W. N. C. 79; Moninger v. Ritner, 14 W. N. C. 99; Hilker's Est., 22 W. N. C. 148.

Where the desertion is shown it is presumed to have been willful and malicious: Bealor v. Hahn, 117 Pa. 169; Bealor v. Hahn, 132 Pa. 242; Ingersoll v. Ingersoll, 49 Pa. 249: Van Dyke, 135 Pa. 459.

Emanuel Furth, *Jacob Singer* with him, for appellees.—A marriage is a combination of acts by which a man and a woman become husband and wife: 14 Am. & Eng. Ency. of Law, 470; Chambers v. Dickson, 2 S. & R. 477.

Marriage is regarded in this state as a civil contract and is provable in all civil actions by cohabitation, reputation, acknowledgment of the parties, reception by the family and any other circumstances from which it may be inferred: Lehigh Valley R. R. Co. v. Hall, 61 Pa. 366; Hill v. Hill's Administrator, 32 Pa. 511; Drinkhouse's Est., 151 Pa. 294.

Opinion by Mr. Justice McCollum, May 30, 1895:

The learned auditing judge found from the evidence before him, that Nathan Strauss was the husband of Sophia Strauss, the decedent, and his finding was confirmed by a divided court. It is conceded that if his finding in this particular was justified

by the evidence, the adjudication based thereon should be sustained. The brothers and sisters of the decedent, five in number, have appealed from the adjudication on the ground, as they allege, that the learned orphans' court erred in deciding that she was the wife of Strauss. They admit that he was the father of her child, but they insist that it was illegitimate, although they must allow that the registration of its birth and the acknowledgments or admissions of its parents furnish some ground at least for an inference opposed to their contention. It would seem to the ordinary mortal that proper regard for the reputation of their sister would have induced them to relinquish their claim to the small sum in dispute rather than to engage in a contest in which their success depended upon showing her departure from the path of virtue and her resort to a false pretense to hide her shame. But while this was a matter proper for their consideration before inaugurating the contest it cannot be allowed to affect in any degree the decision of the question before us on their appeal. It is a question of fact determinable upon the evidence, oral and documentary. There is some conflict in the former; the latter is undisputed and includes the record of the birth of the child, the receipt for the burial expenses, the checks drawn by Nathan Strauss to the order of Sophia Strauss, her signature to the deeds, and the insurance effected and maintained by Nathan Strauss on his life in favor of Sophia Strauss as his wife. In the record and papers referred to there is a clear recognition by the parties of the existence of the marital relation between them. Their acts and admissions thus evidenced are consistent with that relation and cannot be reconciled with any other without impeachment of their chastity and truth. The beneficial society of which Strauss was a member recognized and dealt with the decedent as his wife. All the testimony in the case is to the effect that after the birth of her child she was known to the narrow circle in which she moved as Mrs. Strauss. A brother-in-law of Nathan Strauss testified that about a year before her child was born she was so known to him and others in the neighborhood, and that Strauss told him she was his wife. His children by a former wife called her mother and received from her the consideration and care which her duty as the wife of their father imposed. If the admissions and representations made by the

parties in regard to the relation they sustained to each other were false and intended to deceive their neighbors, it is quite clear that her relatives, including the appellants, were participants in the fraud. They were willing that their sister while she lived should be known to her and their neighbors as the wife of Strauss, in order as they suggest, to conceal her wrongdoing, but now for the obvious purpose of appropriating the small estate she left for distribution under the intestate laws, they repudiate the claim they sanctioned in her lifetime and allege that her relations with Strauss were illicit. We think it is clear that their change of position and the motive which prompted it, were not well calculated to lend strength to and inspire confidence in their testimony. All the written evidence was adverse to their contention and the natural inferences from it supported the marriage. It was for the auditing judge to consider the oral testimony in connection with the written, and from all the evidence before him to ascertain the facts. The law favors marriage: 14 Am. & Eng. Ency. of Law, 520, and cases cited. It is a civil contract and in civil cases, at least, reputation and cohabitation are sufficient evidence of it: Senser v. Bower, 1 P. & W. 450; Thorndell v. Morrison, 25 Pa. 326; R. R. Co. v. Hall, 61 Pa. 361; Hanna v. Phillips, 1 Grant, 253; the admissions of the parties of the fact of their marriage are in the nature of direct proof of it: Greenawalt v. McEnelley, 85 Pa. 352. In the light of these well settled principles, we think the evidence was sufficient to sustain the finding of the auditing judge that Strauss was the husband of the decedent, and to authorize the adjudication based thereon.

Decree affirmed and appeal dismissed at the cost of the appellants.

STERRETT, C. J., and MITCHELL, J., dissent and would reverse for the reasons given in the opinion of HANNA, P. J

Mary Reeves v. Thomas McComeskey, Appellant.

168 571
27 SC 264
168 571
28 SC 313
168 571
31 SC 60

Landlord and tenant—Rent—Repairs.

No implied covenant that the landlord warrants the leased premises to be tenantable, or that he undertakes to keep them so, arises out of the relation of landlord and tenant, and in the absence of a provision in a lease that the lessor shall repair, it is no defense to an action for the rent that the demised premises are not in a tenantable condition.

A tenant occupied premises for nine years and seven months under a lease which bound him to keep them in good repair, and which he was at liberty to terminate at the end of any current year upon thirty days' notice. He paid the rent for the first seven months of the tenth year, and then abandoned the premises, alleging that they were not in habitable condition. *Held*, that he was liable for the rent for the remainder of the year.

In an action for rent an offer by the tenant to prove "that he was told previously to his removal that they would take the property, and that he might leave it," is incompetent for vagueness inasmuch as the offer does not state by whom the tenant was told that the property would be taken.

The leaving of the key with the lessor's agent where the evidence shows there was no acceptance of the surrender of the lease, and the putting of a bill "for rent" or "for sale" on premises vacated by a tenant before the expiration of his term, does not deprive the landlord of his right to collect the rent until the expiration of the term.

Argued Jan. 25, 1895. Appeal, No. 99, July T., 1894, by defendant, from judgment of C. P. No. 3, Phila. Co., March T., 1893, No. 266, on verdict for plaintiff. Before STERRETT, C. J., WILLIAMS, McCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Assumpsit for rent. Before FINLETTER, P. J.

At the trial it appeared that on Jan. 18, 1882, John McCloskey, agent for Mary Reeves, leased to John and Thomas McComeskey the premises 2416 Frankford Ave. Thomas McComeskey continued to occupy the premises until Aug. 18, 1892, when he vacated the premises alleging that they were no longer habitable.

During the trial defendant's counsel made the following offers:

Mr. Gorman: "I offer to prove that the premises were in such a state of dilapidation that it was dangerous for the defendant and his family to live there, and the physician, after the death of his two children and the sickness of his wife,

advised him that the premises were in such a condition as to be dangerous and prejudicial to health."

Offer overruled. Exception for defendant. [1]

Mr. Gorman: "I also offer to prove by this witness that the ordinary repairs incident to a house of this character would not put this property in a condition for tenant's occupancy."

Objected to. Objection sustained. Exception for defendant. [2]

"Q. Did you see this property after you had delivered the key to Mr. McCloskey? A. Yes, sir; I did.

"Q. State whether there was a bill on it."

Objected to.

Mr. Gorman: "I desire to follow it up by showing that there was a bill 'for sale' put on it."

"Q. You saw this property after you had delivered the key, and you found a bill 'for sale or to rent' on the property?"

Objected to. Objection sustained. Exception for defendant. [3]

By Mr. Gorman: "Q. What was the name of the party who went to the owner or agent to rent this property, after you left it?"

Objected to. Objection sustained. [4]

Mr. Gorman: "I propose to show by this witness that a party applied to rent the property and made an offer for it for the balance of the term, and that they refused to rent it."

Objected to. Objection sustained. Exception for defendant. [5]

Mr. Gorman: "I also offer to prove that the property was offered for sale during the term for which the suit was brought, with possession."

Objected to. Objection sustained. [6]

Mr. Gorman: "I now offer to prove by this witness that he was told previous to his removal that they would take the property and that he might leave it."

Objected to. Objection sustained. Exception for defendant. [7]

Mr. Gorman: "I offer to prove that when the witness delivered the key to the agent the agent accepted the key from the witness, and thereafter put a bill on the house 'for sale,' and thereafter offered it to a purchaser, with immediate possession."

Objected to. Objection sustained. Exception for defendant. [8]

The court gave binding instruction for plaintiff.

Verdict and judgment for plaintiff for $133.75. Defendant appealed.

Errors assigned were (1–8) rulings on evidence, quoting the bill of exceptions; (9) binding instructions for plaintiff.

William Gorman, for appellant.—A tenant is not bound to make substantial and lasting repairs: Torriano v. Young, 6 C. & P. 8; Leach v. Thomas, 7 C. & P. 326; Sherrer v. Dickson, 3 Brewst. 276; Brolaskey v. Loth, 5 Phila. 81; Salisbury v. Marshall, 4 C. & P. 65. The offer to prove acceptance of surrender should have been received: De Morat v. Falkenhagen, 148 Pa. 393; Gaunnis v. Kater, 29 Leg. Int. 230; Reeve v. Bird, 1 Cromp., M. & R. 31; Pratt & Reath v. Richards Jewelry Co., 69 Pa. 53.

Charles Knittel, for appellee.—As to surrender of the premises: Auer v. Penn, 99 Pa. 370; De Morat v. Falkenhagen, 148 Pa. 393.

Opinion by Mr. Justice McCollum, May 30, 1895:

The lessee's first objection to the payment of the rent sued for is that the demised premises were not tenantable. It appears that he occupied them nine years and seven months, under a lease which bound him to keep them in good repair, and which he was at liberty to terminate at the end of any current year of the term on giving to the lessor thirty days' previous notice of his intention to do so. If the untenantable condition of which he complains was caused by reasonable wear and tear he must have had notice of it in time to enable him to determine the lease in accordance with its provisions and thus avoid a dispute concerning a few months' rent. He does not claim that there was any extraordinary cause for the alleged dilapidation of the premises, but he says that to render them habitable substantial repairs which it was not his duty to make were required. Instead of adopting the method provided by the lease for determining it he paid the rent for the first seven months of the

tenth year of his tenancy and abandoned the premises. Assuming they were not tenantable when he abandoned them, and that he left them because they were not, do these facts constitute a defense to the claim for rent for the balance of the year? The lessor did not warrant or represent them to be tenantable or undertake if they were to keep them so, and there is no implied covenant of this nature founded upon or arising from the relation of landlord and tenant. In the absence of a provision in a lease that the lessor shall repair it is no defense to an action for the rent that the demised premises are not in a tenantable condition: Wheeler et al. v. Crawford, 86 Pa. 327, and Moore v. Weber, 71 Pa. 429; see also Jackson and Gross on Landlord and Tenant, secs. 288–963 and 1045, and cases cited in the notes. It follows that the lessee's first objection to the claim in this case is not well taken.

The second objection to the claim is founded upon the lessee's abandonment or surrender of the premises. He left the key with the lessor's agent and his own account of the conversation between them shows that there was then no acceptance of the surrender and that it was the purpose of the lessor to hold him for the rent. His subsequent offers of evidence were properly overruled by the court. The matters to which they referred were not sufficient, if proven, to establish an acceptance or to afford a legitimate basis for an inference of it. His offer "to prove that he was told previously to his removal that they would take the property and that he might leave it" was altogether too vague. It significantly omitted to mention who told him. If it was the lessor or her agent he could easily, and undoubtedly would, have said so in his offer.

De Morat v. Falkenhagen, 148 Pa. 393, is not applicable to this case. It related to the sufficiency of an affidavit of defense, and held that an affidavit which distinctly averred a surrender and acceptance was good. Auer v. Penn, 99 Pa. 370, is in accord with the conclusions we have reached and so is Breuckman v. Twibill, 89 Pa. 58.

The specifications of error are overruled and the judgment is affirmed.

Commonwealth v. Calvin F. Heckler, Appellant.

Liquor laws—Gift of liquor on Sunday—Elections.

The act of May 13, 1887, P. L. 108, is, as it declares, "to restrain and regulate the sale" of intoxicating liquors, and a person not a liquor dealer, who goes to his neighbor's house on Sunday for the purpose of asking him to go to the polls, and while in his neighbor's wagon shed gives him a drink of whiskey, is not guilty of violating its provisions.

Argued Feb. 12, 1895. Appeal, No. 96, July T., 1894, by defendant, from judgment of Q. S. Bucks Co., Nov. T., 1893, No. 96, on verdict of guilty. Before STERRETT, C. J., MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Reversed.

Indictment for selling liquor on Sunday.

The substance of the testimony as agreed upon by counsel was as follows:

On Sunday, Nov. 5, 1893, the defendant, Calvin F. Heckler, who lives in Quakertown borough, Bucks county, Pa., went to the house of Tobias Kile, in Rockhill township, said county, arriving there about three o'clock P. M. He came up the road and stopped at Kile's house, got out of his wagon, and came into the yard. He asked Kile whether he was going to the election the following Tuesday. Kile said he did not know. Heckler said he would send a team to take him to the polls, and he should go. Heckler then invited Kile to come into the wagon house. He took a small flask out of his pocket, and gave him a drink of whiskey. After a short consultation, Heckler gave him another drink of whiskey out of the flask. Kile did not pay anything for it. He, Kile, was eighty-eight years old. Heckler, the defendant, also stopped at the house of Isaac Kile, a brother of the said Tobias Kile, at the same time, and also gave him a drink of whiskey out of the small flask. Heckler stayed about one minute, and Isaac Kile had one drink. The defendant lives at Quakertown, and left his house on this day in a wagon to go to Rockhill, for the purpose of getting out the vote. He was feeling badly, and took a small flask of whiskey with him. The defendant was not in the liquor business, but was the editor of the Quakertown Times, an attorney at law, and justice of the peace.

Defendant's points were as follows:

"If the jury find that the defendant is not the keeper of a hotel or restaurant, and in no way engaged in the sale of liquors, there can be no conviction in this case, inasmuch as the seventeenth section of the act of 1887, under which this indictment is laid, does not apply to persons not engaged in the sale of liquors.

"If it is contended that said section does apply to persons not engaged in the sale of liquors, then said section is unconstitutional, because under such construction, said act would contain more than one subject.

"The title to the said act limits it to those engaged in the sale of liquors. *Answer:* Refused. [1]

"2. So much of section 17 of the act of 1887 as forbids a person who is not a seller of liquors to give intoxicating drink to any person on Sunday, is in conflict with the constitution of this state. *Answer:* Refused." [2]

Verdict of guilty.

The defendant moved in arrest of judgment, filing the following reasons:

"1. Because it appeared by the evidence that the liquor was furnished by the defendant to the parties charged in the indictment, in a social way and as a matter of hospitality, and was furnished by the defendant as an individual and private citizen, and not otherwise. [3]

"2. Under all the evidence in the case, no offense or crime was shown to have been committed, and the judgment should be arrested." [4]

The court in an opinion by YERKES, P. J., overruled the motion in arrest of judgment, and sentenced defendant to pay a fine of fifty dollars, and to undergo an imprisonment in the county prison for twenty days. Defendant appealed.

Errors assigned were (1, 2) above instructions, quoting them; (3, 4) refusal to arrest judgment, quoting reasons as above.

John M. Arundel and *R. O. Moon*, *Robert M. Yardley* and *Gilkeson & Wright* with them, for appellant.—The seventeenth section of the act of assembly of May 13, 1887, under which appellant was indicted in the court below, prohibiting the gift

by any person of any spirituous, vinous or malt liquors on Sunday, applies only to persons engaged in the sale thereof, and not to persons nowise engaged in the liquor traffic: Com. v. Carey, 151 Pa. 368; Altenburg v. Com., 126 Pa. 602.

If the act of 1887 contemplates persons not engaged in the sale of spirituous, vinous, brewed or malt liquors, it is, as to said seventeenth section, unconstitutional, being in violation of article 3, section 3 of the constitution of this state: Dorsey's App., 72 Pa. 192; Union Pass. Ry. Co.'s App., 81* Pa. 91; Rogers v. Mfg. Imp. Co., 109 Pa. 109; Dewhurst v. Allegheny, 95 Pa. 437; State v. Hutchins, 74 Iowa, 20; Kansas v. Barrett, 27 Kansas, 213; Albrecht v. People, 78 Ill. 510; Aden v. Cruse, 127 Ill. 231; Stary v. Young, 47 Ind. 150; Williams v. State, 48 Ind. 307; Com. v. Doll, 6 Pa. C. C. R. 49.

Paul H. Applebach, ex-district attorney, for appellee, cited: Com. v. Sellers, 130 Pa. 32; Com. v. Silverman, 138 Pa. 642; Com. v. McCandless, 21 W. N. C. 162.

OPINION BY MR. JUSTICE MITCHELL, May 30, 1895:

The summary of the testimony agreed upon by the district attorney and the counsel for appellant, which practically makes the facts uncontested, shows that the appellant was not guilty of any criminal or unlawful act. The case is ruled by Com. v. Carey, 151 Pa. 368. We do not need to add anything to what is there so clearly said by our brother WILLIAMS, that the act of May 13, 1887, P. L. 108, is an act as its title declares "to restrain and regulate the sale" of intoxicating liquors, and its "provisions are not applicable to the table, or the personal habits of citizens within the precincts of their own homes. . . . The furnishing of liquors on Sunday or to any of the excepted classes, that is made punishable, is a furnishing in evasion of the law forbidding sales. . . . . If for reasons of health or habit one chooses to supply his own table with his own liquors for use by himself, his family or his guests on Sunday, there is not now, and so far as I am aware there never has been in this state any statute forbidding him to do so." The acts complained of in that case were done at the defendant's temporary abode in a fishing camp set up with the ulterior object of tracing the perpetrators of a series of crimes in that neigh-

borhood, and hence the references in the opinion to the defendant's home, "his own table," etc., but the basis of the decision is the character of the act as one of hospitality and not of evasion of the statute. This appears clearly in the next paragraph to that already quoted, where it is said, if the jury found "that the acts complained of were acts of hospitality extended to his guests, they should have acquitted him of the misdemeanor." The place is not material except as a matter of evidence bearing on the intent. It is the nature and intent of the act, not the place where it is done, that determine its character as lawful or otherwise. If the appellant in the present case had taken his neighbor in his buggy to his house and there given him the whisky the act would have been one of hospitality within the very words of Com. v. Carey. The fact that the drink was given in the neighbor's own woodshed made no difference in the character of the act. If not to be called with strict accuracy one of hospitality, it was one of a similar kind, equally innocent, the cultivation of friendly feelings with his neighbors and the stimulation of the interest of two electors who having passed four score years were doubtful whether they would go to the polls or not. If its elections are never subjected to more sinister influences than that, Bucks county will be entitled to congratulation.

Judgment reversed.

STERRETT, C. J., dissents.

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William Evans, George W. Sidner and Amos Garrett, Appellants, v. Willistown Township, Wilmer B. Cox and Stephen L. Beitler, Supervisors.

Constitutional law—Statutes—Title of act—Act of June 10, 1893.

The act of June 10, 1893, P. L. 419, entitled "An act to regulate the nomination and election of public officers, requiring certain expenses incident thereto to be paid by several counties and punishing certain offenses in regard to such elections," is insufficient in title and repugnant to article 3, section 3, of the constitution, in so far as it attempts to regulate the mode of voting on questions of the increase of municipal indebtedness.

It seems that if the act were valid, it would repeal the act of June 9, 1891, P. L. 252, providing for the method of voting on questions relating to the increase of municipal indebtedness.

Argued Feb. 12, 1895. Appeal, No. 109, July T., 1894, by plaintiffs, from decree of C. P. Chester Co., No. 283, in equity. Before STERRETT, C. J. MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Bill in equity by taxpayers for an injunction to restrain the defendants from increasing the debt of the township of Willistown, Chester county, Pennsylvania, by the sum of $40,000 in pursuance of an election which purported to authorize such increase. It was alleged that said election was illegal in that the question being voted on was not printed on the official ballot prescribed by law, but on separate ballots. The defendants demurred. The court in an opinion by HEMPHILL, J., sustained the demurrer and dismissed the bill.

Error assigned was in dismissing bill.

J. Frank E. Hause, for appellants.—The question involved in this case has been expressly decided in Ripple v. Lackawanna Co., 146 Pa. 532.

The Baker ballot law of 1893 is entirely inconsistent on the question here involved, with the act of June 9, 1891, amending the act of April 20, 1874.

All acts of assembly are to be construed, if possible, so as to avoid violating the constitution of the state. If, then, interpretation is doubtful, that meaning will be adopted which obeys the constitution.

It was the evident purpose of the framers of the constitution of 1874 to make all laws pertaining to all elections uniform: 5 Const. Debates, 165; Rishel v. Luther, 2 Dist. Rep. 770; Cusick's Election, 26 W. N. C. 425.

The language of the constitution cannot be construed to apply to one class of elections and not to others. It must cover all: Rishel v. Luther, 2 Dist. Rep. 770; Wright v. Barber, 5 W. N. C. 444; Cusick's Election, 26 W. N. C. 425.

Thomas W. Pierce, for appellees.—The two statutes for con-

sideration are not upon the same subject. If the latter act repeals the first act or any of its provisions, it must be by implication: Homer v. Com., 106 Pa. 221.

To constitute a repeal by implication there must be such a manifest and total repugnancy in the provisions of the new law as to lead to the conclusion that the latter law abrogated and was designed to abrogate the former: Sifred v. Com., 104 Pa. 179.

If this act was to apply to and repeal the provisions for the class of elections, provided for in the bill of 1891, the title does not fairly give notice of such subject and would be calculated to mislead inquiry: Allegheny Co. Home's App., 77 Pa. 77.

OPINION BY MR. JUSTICE MITCHELL, May 30, 1895:

The act of June 9, 1891, P. L. 252, is clearly repealed by the act of June 10, 1893, P. L. 419, if the latter is valid. The provisions of the two are irreconcilable. The act of 1891 requires the voter to express his wishes on the proposed increase of municipal debt upon a separate ballot marked on the outside "increase (? of) the debt" and having on the inside, written or printed, "no increase of debt" or "debt may be increased" and these ballots to be deposited in a special and separate box, as was then provided by law for elections in general. The act of 1893 on the other hand requires the voter on the same question to use the one official ballot prescribed by the act on which the question is to be "printed in a brief form" below the lists of candidates and followed by the words "yes" and "no." If these two methods apply to the same elections they are obviously irreconcilable. The language of the act of 1893 in section 14 is, "whenever the approval of a constitutional amendment or other question is submitted to the vote of the people, such question shall be printed upon the ballots" etc., as above quoted. The learned judge below was of opinion that the words "other question" were so controlled by their association with the words "approval of a constitutional amendment" that they must be confined to those questions which are submitted to the same electoral body, i. e. the people of the whole state, and that questions which only go before the electors of a subordinate municipality were therefore not included. We are unable to adopt this view. Passing by the fact that there are no other such

questions and the legislature cannot be presumed to have made express provision for a class of cases that does not exist, this construction requires the insertion in the act of the words "other question submitted to the vote of the whole people of the state," or some equivalent phrase. There is no warrant for such addition to the language actually used. The words "other question" mean matter on which the electors are to express their will, other than the election of officers. The clause has reference to the nature of the subject before the people, not to the particular body of electors who are to decide it, and the words "other question" are used in contradistinction to the choice of candidates for office which is the main subject of the act. They include all questions, whether state or local, which are submitted by referendum, to the direct vote and decision of the electors either of the state at large, or of a particular locality.

But it is objected that notwithstanding the repugnancy of the two statutes on this point, the act of 1891 is not repealed because the act of 1893 is unconstitutional in that its title gives no notice or indication of this subject. This objection we are obliged to sustain. The act of 1893 is entitled "an act to regulate the nomination and election of public officers, requiring certain expenses incident thereto to be paid by the several counties and punishing certain offenses in regard to such elections." This title, except for the omission of a few words requiring certain expenses to be paid by the commonwealth, is an exact duplication of the title of the act of June 19, 1891, P. L. 349, which is repeated, amended and supplied by the act of 1893. The title restricts the subject of the act to elections of "public officers," and expresses nothing which carries notice in any way of an intention to include the subject of the increase of municipal indebtedness. This subject had been expressly and elaborately legislated upon by the act of June 9, 1891, and those interested therein would hardly suppose that the specific provisions for the mode of ascertaining the people's will on those questions, would be wholly changed by another act only ten days later. At any rate they, and the members of the legislature themselves were entitled by the constitution to notice in the title of the statute that it proposed to deal with that subject. The acts of June 19, 1891, and June 10, 1893, are equally

defective in not meeting the requirements of sec. 3, art. 3 of the constitution. The specification in the title of the act of 1893 that it was an act for the regulation of the nomination and election of public officers, not only failed to express the intention to regulate the mode of voting on questions of the increase of municipal indebtedness, but tended to the impression that that subject was not included. The title therefore was not only insufficient, but misleading: Union Pass. Ry.'s App., 81* Pa. 91; Phila. v. Market Co., 161 Pa. 522. So much therefore of the act as relates to elections other than those for public officers must be declared unconstitutional. As this strikes out that part of section 14 which makes the conflict with the act of June 9, 1891, it follows that the latter act is not repealed, and the election was properly held under its provisions.

Though we have not reached it by the same pathway we concur in the conclusion of the learned court below.

Judgment affirmed.

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Commonwealth ex rel. A. G. Morris et al. *v.* A. A. Stevens, President, G. L. Owens, Secretary, D. S. Kloss, Treasurer, William Walton, Charles A. Morris, A. G. Morris, A. A. Stevens, G. L. Owens and D. S. Kloss, Managers of the Tyrone Water and Gas Company.

Corporations—Quo warranto—Corporate elections—Directors.

A stockholder in a corporation who has been elected a director has a standing in quo warranto proceedings to contest the right of other persons to hold the office of director although they were elected at the same meeting at which he himself was elected and his title was not disputed. As a stockholder he has the right to have the votes properly counted, and the affairs of the company committed to the charge of the officers legally elected by a majority of the stockholders.

Corporations—Elections—Contest involving several offices—Act of June 14, 1836, *sec.* 8—*Quo Warranto.*

Under the act of June 14, 1836, sec. 8, P. L. 621, giving the court discretionary power to try "the several rights of different persons" by one writ of quo warranto, the title to different offices may be determined *in* one writ.

Where the offices in controversy are different, but the title of the incumbents as to all of them depends upon the same votes at the same elec-

tion, and a decision on the validity of that election will be equally conclusive as to the rights of all, the controversy as to all of the offices may be determined by one writ of quo warranto.

Where a person holds certificates of stock on which he is prima facie entitled to vote, a preliminary injunction issued before the election, the intention and effect of which were to merely restrain him from negotiating or transferring the stock, will not deprive him of the right to vote the stock at the election.

Argued Feb. 22, 1895. Appeal, No. 32, Jan. T., 1895, by defendants, from judgment of C. P. Blair Co., Oct. T., 1892, No. 85, on verdict for plaintiffs. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, MITCHELL, DEAN and FELL, JJ. Affirmed.

Quo warranto to determine the right of defendants to act as officers of the Tyrone Water and Gas Co. Before BELL, P. J.

At the trial it appeared that the Tyrone Gas and Water Company was incorporated by an act of the legislature approved March 10, 1865, under the provisions of which the members of the company were to elect from their number a president, treasurer and secretary and a board of six managers. At the annual meeting of the members of the company held on the first Monday of July, 1890, C. Guyer was elected president, and A. B. Hoover, treasurer, A. A. Stevens secretary, and C. Guyer, A. B. Hoover, A. A. Stevens, A. G. Morris, G. W. Burket and W. A. Guyer as managers. No election was held in 1891, and the officers elected in 1890 held over.

Under the provisions of the act of incorporation, certificates of stock in the company are transferable by the holder at his pleasure, in the presence of the president, treasurer, or other persons appointed by the company for that purpose. And when such assignment shall have been made and entered upon the books of the company, then the transferee shall be a member of said company, and at every election or meeting of the stockholders of the company shall be entitled to one vote for each share of stock by him held.

On June 30, 1892, A. G. Morris was the holder of certificates representing 808 shares. Included in these shares were 253 shares claimed by the creditors of A. B. Hoover. On July 2, 1892, the creditors of Hoover obtained a preliminary

injunction against Morris restraining him "from exercising any ownership or control of the said 230 or more shares of the capital stock of the Tyrone Gas and Water Company and from selling, assigning, transferring, secreting or disposing of the same, and that the Tyrone Gas and Water Company and its officers are enjoined from transferring the said shares of stock on its books and from in any way approving or recognizing the transfer of the same by said Hoover or Wood to Morris or any other person, and by said A. G. Morris to any person whomsoever until our court make further order to the contrary."

July 27, 1892, on motion to dissolve this interlocutory injunction, DEAN, P. J., filed the following opinion:

"On the 2d day of July last, late in the evening (Saturday), a bill in equity was presented to me by counsel for creditors of the insolvent Tyrone Bank setting out 253 shares of stock of said Tyrone Gas and Water Co. had been fraudulently transferred to A. G. Morris with intent to place the same beyond the reach of creditors of said bank, and praying for a preliminary injunction directed to said Morris and said Water Company enjoining them from in any manner negotiating, transferring or using said stock until the right or title to said stock should be legally determined. The injunction was awarded, was served on both A. G. Morris and the Water Company.

"The annual election of directors of the Water Company is on the first Monday in July in each year, and in this year fell on Monday, the 4th day of July, the day but one after the injunction was granted—and this intervening day being Sunday, at the election on Monday the disputed 253 shares of stock in the hands of Mr. Morris were not voted for directors; the tellers rejected them because of the preliminary injunction. If Mr. Morris had been allowed to vote them, they with other stock held by him would have constituted a majority of the whole stock and given him a controlling interest; excluding them left him a minority stockholder.

"No such effect as this was intended by the preliminary injunction; not a hint is given in the bill that the annual election was to be held in forty-eight hours after the injunction was awarded or that it was intended to control the election. The injunction was solely to restrain the negotiation or trans-

fer of the stock until the title to it was determined. If the fact of the early election had been disclosed to me, either in the bill or orally by the counsel presenting it, I would have directed either that the injunction should not affect Mr. Morris' right to vote the stock, or that the annual election should be postponed until the title to the stock had been determined. The injunction was wrested from its purpose and was made to accomplish a wholly different one; the purpose was to keep the stock in Mr. Morris' hands for the benefit of the creditors of the Tyrone Bank, should they establish a right to it; the injunction was used in the interest of rival stockholders to oust Mr. Morris from the control of a corporation in which he had a large interest outside the disputed 253 shares, and this without a hearing or notice to him.

"Such a despotic use of power by a judge, if the facts had been brought to his notice, would have been in the highest degree reprehensible; as the facts were not made known at the time, I can now only do whatever is within my power to preserve the rights of the complaining stockholder.

"The injunction heretofore granted at the instance of A. G. Morris restraining the Tyrone Gas and Water Company from incurring any debt for new and extraordinary improvements, from issuing or inviting or accepting subscriptions to any new stock or additional stock to that already issued, is continued until the evidence as to the ownership of said 253 shares of stock be taken by the master appointed for that purpose. As to the water pipe ordered before the injunction was served, the said Gas and Water Company is allowed to receive and pay for the same out of any money now in the treasury of the company, or which may come in from the ordinary receipts, but it is not authorized to issue either directly or indirectly new stock in payment for the same.

"It is urged that there is a necessity for extraordinary improvements of the property of the company immediately; this may be the case but it gives us no right to authorize what may prove a minority of the stockholders of a company to manage a property in defiance of the will of what may prove a majority.

"As to the allegation that the president and board of directors of the company have treated the order of the court, heretofore made, with contempt, the president, A. A. Stevens,

Esq., by his oath on file has expressly denied and disclaimed any such action. No decree in that matter is therefore necessary."

On July 4, 1892, the annual meeting of the company was held, and Morris voted the 808 shares standing in his name. The tellers allowed the ballots to be deposited, but rejected in the count the 253 shares in controversy.

The writ of quo warranto was issued on Aug. 1, 1892. Defendants moved to quash the writ for the following reasons:

"First. There being no dispute about the election of A. G. Morris, the relator, to the office of director of Tyrone Gas and Water Company, he cannot test the title of any other of the officers of said corporation in these proceedings. That can only be done by those claiming such offices as against the de facto officers in possession of the office.

"Second. The right to exercise separate and distinct offices in a corporation cannot be raised, as here attempted, in one and the same proceeding, as the suggestion in this case shows that it raises the question of title to the following several and distinct officers: A. A. Stevens, President; D. S. Kloss, Treasurer; G. Lloyd Owens, Secretary; A. G. Morris, Director; Charles A. Morris, Director; D. S. Kloss, Director; G. Lloyd Owens, Director; A. A. Stevens, Director; William Walters, Director; which defendants submit cannot be done, and the writ should be quashed."

The court overruled the motion to quash, KREBS, P. J., of the 46th judicial district, filing the following opinion:

"The first reason assigned cannot in our opinion be maintained. The suggestion filed discloses a clear ground of interest in the relator who filed the same. His interest consisted in his right to vote the 253 or more shares of stock; the right to vote which, if his suggestion be true and on this demurrer must be taken as true, he was deprived of and thereby a board of directors elected by a minority contrary to his right. If the election of Mr. Morris to the board of directors as part of the ticket of Mr. Stevens and those acting with him could have the effect of preventing an inquiry into the method and legality of the corporate election, then any minority of a private corporation who might be reckless enough of the rights of a stockholder or stockholders to disregard what otherwise might be

required, could stifle inquiry and prevent investigation by placing upon their ticket such of the opposition as they might think would institute proceedings for such an investigation. We cannot assent to the rightfulness of such a contention.

"But leave has been asked and is hereby granted to the relator to join with him and amend the record by adding as corelators, Caleb Guyer, C. A. Morris, T. K. Morris; and of these there are those to whom the first reason could not apply if it is well taken as to A. G. Morris.

"We come now to the second reason assigned, namely, that the right to separate and distinct offices cannot be raised in one suggestion.

"The 8th section act of June 14, 1836, is in these words: 'If it shall appear to the court or judge as aforesaid that the several rights of different persons may be properly determined by one writ, it shall be lawful for such court or such judge to make such order or orders for the introduction or addition of such persons into the writ or for notice to such persons to appear and take defense, as shall be reasonable and just.' This statute is remedial, and is to be so construed and administered as to advance, that is, render effective, the remedy. This is the rule of all remedial statutes: Com'th v. Dillon, 61 Pa. 488. The language of the statute is broad and comprehensive and the court cannot by restrictive construction fritter away its plain meaning. Wherever the several rights of different persons may be properly determined by one writ it shall be done.

"The learned counsel has cited the opinion of Judge LIVINGSTON, from 3 Lanc. Bar, 177, in which it is ruled that several persons claiming different offices cannot unite in one and the same information for the purpose of determining the title to both offices in one proceeding. The learned judge in that case after citing the 8th section of the act of 1836, supra, says, 'that it applies more particularly to writs of quo warranto issued at the suggestion of the attorney general against corporators in which all may be joined and it may be also applied in all cases where two or more persons hold one and the same office.' . . .

"But upon what grounds does he thus narrow the provisions of the statute? There is no express language in the statute that requires it. The first, second and third sections of the act declare the jurisdiction, causes, and at whose instance the writ

may issue. The 4th section prescribes the form of the writ and the remaining sections of the statute regulate the process, service, pleadings and judgment, with execution thereon. Not one word limiting the powers conferred in the 8th section to the writ when sued out by the attorney general.

"But the learned judge says: 'It may be also applied in all cases where two or more persons hold one and the same office: as where two or more are trustees,' etc., etc. There need not be any conflict of opinion upon the construction of this act of 1836. The office contested or questioned by the suggestion is the office of the directorship of the Tyrone Gas and Water Company. The office of president, secretary and treasurer is but the result of being a director or manager of the corporation, and unless a director, the person cannot be a president, secretary or treasurer. So that there is nothing in the opinion of Judge LIVINGSTON in Com'th v. Martin, 3 Lanc. Bar, 177, which militates against the joinder of the defendants or the corelators in one and the same information. The office questioned is the directorship. It is not pretended that if the board which elected Mr. Stevens president was a duly elected board of directors or trustees that his election as president of the board is not legal. His office as president stands or falls as an incident of the proceedings touching the election of the board of directors and not otherwise.

"But apart from this view is another, and to our minds is another equally forceful. It is that the policy of the law is to cheapen litigation while preserving the rights of the parties. Nothing can be done that will deprive either party of a full hearing by the joinder. The suggestion discloses but a single cause of complaint. That cause applies equally to all or it applies to none. In one form, a writ of quo warranto is a proceeding to contest an election, and while the lower courts have for years differed upon the question of the joinder of more than one office in a contested election of ballots under our election laws, the opinion of the Supreme Court, in Mook et al. v. Conrad et al., from quarter sessions of Phila. Co., has set at rest that question in favor of the joinder in a single petition or one proceeding. We think the rule may well apply to a proceeding by quo warranto by analogous reasoning.

"It is therefore ordered this 15th June, 1893, that the demur-

rer be overruled and defendants required to file their answer within ten days. And it is further ordered that pending the trial of these proceedings the injunction heretofore awarded by Judge DEAN on July 27, 1892, be and continue in full force and effect; and that no stock be issued, nor debt created for any purpose except by application to and leave granted by the court, and it is further ordered that the annual election to be held on the 1st Monday of July, 1893, be continued over until the 3d Monday of October, A. D. 1893. The trial at this term continued, but the cause to be set for trial on the 9th day of October, A. D. 1893, at the head of the list for that week."

At the trial the jury returned a verdict for plaintiffs subject to certain points of law reserved. The court subsequently entered judgment in favor of plaintiffs on the verdict, BELL, P. J., filing the following opinion:

"The points reserved in this case raise two main questions:

"First. Were the tellers at the election for officers for the Tyrone Gas and Water Company, held July 4, 1892, justified in refusing to count 200 of the shares voted by A. G. Morris?

"Second. Assuming that said tellers were justified in such refusal, which ticket did, in point of fact, receive the majority of legally qualified votes cast?

"At the date of said election there were eighteen hundred and sixty-nine (1869) shares of stock outstanding. Ballots representing nine hundred and fifty-five (955) shares were deposited in the hat (used as a ballot box) for the Morris ticket, that is the relators, or plaintiffs, in this action. These ballots clearly represented a majority of the stock and most certainly elected the Morris ticket unless the tellers were justified in their action in refusing to count two hundred (200) of the shares as voted. At the trial we instructed the jury as follows:

"'We instruct you that there being no challenge of the right to vote those 808 shares,' (part of the Morris stock) 'that when the 808 shares were once in the teller's hat, they had no right then arbitrarily to strike off 200 shares of that stock,—to disfranchise 200 shares as they did.'

"This instruction was pro forma, but we are by no means convinced that it was wrong. In fairness to a voter, challenges of his right to vote should be made at a time when he can answer the challenge; his vote should not be rejected, espe-

cially after it has once been placed in the ballot box, without giving him an opportunity to be heard, and, if possible, establish his right to have the vote counted. And the undisputed evidence in this case is that the 200 shares, which the tellers refused to count, were rejected without giving Mr. Morris an opportunity to be heard.

"Dr. G. W. Burket, one of the tellers, called by plaintiffs, testified as follows:

"Q. Didn't the tellers retire to compute the vote? A. Yes, sir.

"Q. Was Morris present? A. No.

"Q. Didn't Morris call you out from the room? A. No, I came out; then they objected to that part of it; I called on Morris—this thing came up and Mr. Owens replied that if Morris came why Stevens must come in.

"Q. Didn't you go out to report to Morris the result? A. "No, sir.

"Q. You called him out and asked him what you should do about the 253 votes? A. I went out to consult him about this, yes, about this amount that was being thrown out, but I didn't get any consultation because they claimed, if Morris came in there to be consulted, Stevens would come in, and that part was dropped and we settled the matter just as reported there with my protest."

G. L. Owens, Esq., another teller called by defendants, substantially corroborates this testimony of Dr. Burket. Mr. Owens says:

"Q. Before the tellers had made their report, did Dr. Burket wish to consult with Morris? A. Yes, sir; just before signing he wanted to see Mr. Morris, and he went out and called him in, and Morris came in; I made the remark that if Morris came in one of the leading men, Stevens, should come in, and Burket acquiesced in that; I think he and Morris had some little talk about it.

"What was this but a disfranchisement of the two hundred shares without allowing Mr. Morris, who had voted them, a hearing? For this reason, if no other, we think the tellers erred in refusing to count said two hundred shares.

"[But, again, the said rejection of the said two hundred shares was erroneous, in our opinion, because the tellers arbi-

trarily refused to count that number of shares for the Morris ticket, without having any means of identifying, by name, number or otherwise, the particular stock affected by the injunction, and without attempting to identify same, and without adopting any course of procedure which might have resulted in such identification] [19]

"It is true that this last reasoning savors of technicality, but, if this be urged as an objection against its conclusiveness, we might respond that the whole case of the defendants bristles with technicalities. If we were called on to settle this present controversy by the golden rule, we would adjust it about as follows:

"Mr. Morris and his adherents are the owners—the equitable owners at least—of some nine hundred and forty-nine (949) shares of stock; Mr. Stevens and his friends control but eight hundred and eighty-six (886) shares; Mr. Morris therefore has a clear majority of the stock. The injunction issued by the court was issued at the instance of creditors of A. B. Hoover and was intended, not to disfranchise the Hoover stock, but to preserve it within the grasp of the law so that, if it should be ascertained that it was transferred by Hoover in fraud of the rights of his creditors, it might be restored to said creditors. The injunction resulted in the tellers disfranchising the Hoover stock in the hands of Mr. Morris at the election. Such a result was not the primary object, or ostensible purpose, of the injunction,—could not advance the interests of Hoover's creditors,—and was a manifest injury and injustice to Mr. Morris, because it deprived him of his rights as the majority stockholder in the water company. Such wrong should be righted and Mr. Morris should be allowed to control the affairs of the company.

"At the trial of this case we were of the opinion, and so instructed the jury, that the act of Mr. Morris in voting the Hoover stock was a violation of the injunction, and that the tellers would likewise have violated the injunction, in allowing the Hoover stock to be voted, had the right to vote said stock been challenged at a proper time and in a proper manner.

"Subsequent reflection and examination of authority have caused us to waver in this opinion, if not wholly to change our mind.

"The primary purpose, the ostensible object, of the bill of equity, on which the injunction was based, was to preserve the Hoover stock within the grasp of the Hoover creditors. The recitals in the injunction follow the bill, and said injunction is in effect a mandate commanding that no act be done which would prejudice the alleged right of the Hoover creditors. The object of the injunction was to protect creditors, not to disfranchise the stock. How could the act of Mr. Morris in voting the stock prejudice the Hoover creditors? Such act of voting would not make him a bona fide holder for value without notice. And we cannot see how the reception and counting of his vote by the tellers could throw even a straw in the pathway of the Hoover creditors to impede them in their contest for the stock.

"Voting the stock doubtless was a violation of the letter of the injunction, but how, and why, was it a violation of the spirit of the injunction? And courts punish those who violate the spirit, not the letter, of an injunction.

"In High on Inj. sec. 1419, it is said: 'Where proceedings in attachment are instituted to punish a defendant for breach of an injunction, the fact of his guilt must be clearly and explicitly established to the satisfaction of the court. But, while the injunction must be implicitly obeyed, it is the spirit and not the strict letter of the mandate to which obedience is exacted, and complainant, failing to prove a violation of this to the satisfaction of the court, the rule for an attachment for contempt will be discharged.'

"Again in same work, section 1446, it is said 'In deciding whether there has been an actual breach of an injunction it is important to observe the objects for which the relief was granted, as well as the circumstances attending it. And it is to be observed that the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. . . . Upon the other hand, when the conduct complained of, although literally a breach of the injunction, is not so in spirit, and when defendants have acted in good faith, and there is no evidence of any intention on their part to violate the writ, they will not be held guilty of a contempt of court.'

"We conclude, therefore, that the chancellor, issuing the

injunction, would not have punished Mr. Morris for voting the Hoover stock, since the violation alleged was of the letter only and not of the spirit. If this be true, why should we, in a collateral proceeding, inflict a penalty on Mr. Morris by disfranchising him, and why should we justify the tellers in refusing to count this stock? Such justification of such refusal is founded on the idea that the court issuing the injunction would have punished the tellers had they counted the vote, but if said idea rests on an unstable foundation, and we think it does, the idea itself becomes delusive and misleading.

"After the somewhat careful consideration of the matter we have come to the conclusion that we must give a negative answer to the first question raised, namely: 'Were the tellers justified in refusing to count two hundred of the shares voted by A. G. Morris?'

"Such denial of said first question in effect, we think, leaves the defendants with nothing to support their claim, because it must be remembered that Mr. Morris' vote was not rejected because his stock was improperly transferred—or rather not transferred on the books of the company—but because of the pendency of the injunction.

"But our answer to said first question may be erroneous, we will therefore briefly consider the second question, namely:

"Assuming that said tellers were justified in such refusal to count the two hundred shares, which ticket did, in point of fact, receive the majority of legally qualified votes cast?

"The right of Mr. Stevens to vote two hundred and fifty-five (255) shares is undisputed; Mr. Morris likewise held one hundred and forty-one (141) shares, which indisputably were entitled to be voted; certificates for these said shares had been regularly issued to these gentlemen some time (possibly several years) prior to the present controversy.

"Mr. Stevens, however, voted six hundred and twenty-five (625) additional shares. Had he a legal right to vote said additional shares? We think not.

"The act of assembly incorporating this Gas and Water Company (act of March 10, 1865, P. L. 1866, p. 1149) makes the following provision:

"'Section 7. That the president and managers shall procure certificates of stock, which, signed by the president and treas-

urer, and sealed with the corporate seal, shall be delivered to each stockholder, and which shall be transferable at his pleasure, in the presence of the president, treasurer, or other person appointed by the company, for that purpose, subject, however, to all assessments due and to become due thereon: and when such assignment shall have been made, and entered upon the books of the company, the holder shall be a member of said company, and in every election, or meeting of the stockholders of the said company, shall be entitled to one vote for each share of stock by him, or them, held.'

"The said six hundred and twenty-five (625) additional shares voted by Mr. Stevens were principally—if not wholly—purchased by him from Caleb Guyer. Mr. Guyer and Mr. A. B. Hoover (original owner of the Hoover stock now owned by Mr. A. G. Morris) had been partners in the Tyrone Bank which became insolvent in December, 1891. About the time of the failure of the bank Mr. Guyer sold his stock in the water company to Mr. Stevens. A transfer of same was signed on the back of the certificates, but Mr. Stevens failed to surrender said stock, have the assignment entered on the books of the company, or have new certificates issued to him. It is true that a lead pencil memorandum was made, opposite the record showing the original issue of stock to Mr. Guyer, 'to A. A. Stevens,' but we do not deem said pencil memorandum to be such 'entry on the books of the company' as would, from a legal standpoint, entitle Mr. Stevens to vote said stock. [The section of the incorporation act just quoted says that there must be 'an entry in the books of the company,' and after such entry the transferee shall have a right to cast one vote for each share by him held. We think the entry contemplated was a surrender of the old shares, and the issuing of new; that such was the interpretation adopted by the company, and their custom is shown by the testimony of Mr. Guyer on page 25 of the notes of testimony.

"The six additional shares voted by friends of Mr. Stevens were also illegally voted, as the persons voting were only equitable holders of the stock and there was no pretense that any transfer to them had been entered on the books of the company.

"[We conclude therefore that Mr. Stevens for president, and his ticket for the other offices, only received two hundred

and fifty-five (255) legally qualified votes, to wit, the votes cast on the original holding of Mr. Stevens.] [24]

"As we have said, the right of Mr. Morris to vote one hundred and forty-one (141) shares (his original holding) is unquestioned. He voted in addition eight hundred and eight (808) shares (including the 253 shares originally owned by Hoover) and his son C. A. Hoover voted three (3) shares. Dr. Burket also voted three shares for the Morris ticket, but Dr. Burket's shares were not in proper form to be voted, as no transfer to him was entered on books of the company.

"The eight hundred and eight shares so voted by A. G. Morris, and also the three shares voted by Chas. A. Morris, appeared to be regularly entered and transferred on the books of the company, but the defendants challenge and contest the regularity of such entry and transfer because made by persons who defendants allege were not officers of the company.

"Up to December, 1891—the date of the failure of the Tyrone Bank—it is admitted that Caleb Guyer was president, and A. B. Hoover treasurer of the water company. About the time of said failure Mr. Guyer sold all his stock to Mr. Stevens and Mr. Hoover also sold all his stock,—said Hoover stock ultimately being transferred to A. G. Morris.

"Defendants most strenuously contend that when Guyer and Hoover ceased to be stockholders, they also ceased ipso facto to be officers of the company, and that the entry by them on June 30, 1892, of a transfer of eight hundred and eight shares of stock to Mr. Morris, and the issuance by them, as president and treasurer of the company, of new certificates for said stock was illegal and vested in Mr. Morris no right to vote said stock.

"We are of the opinion that under the act of incorporation of this water company it was obligatory that the officers should be stockholders. We conclude this to be so from the fact that only such original corporators, as should become stockholders, should be directors or managers,—managers is the term used in the act of incorporation. If this is so, Mr. Guyer ceased to be president de jure and Mr. Hoover ceased to be treasurer de jure when they parted with their stock, but we think that although they ceased to be officers de jure they still continued to be officers de facto.

"In Cook on Stock and Stockholders, ed. 1894, sec. 623, p. 852, it is said:

"'Where the charter requires the director to be a stockholder he must continue to hold stock during his term of office. If he sells all his stock in the company he thereby becomes disqualified and ceases ipso facto to be a director. He may, however, remain a de facto director and bind the company by his acts if allowed to continue in his position.'

"In the present case Messrs. Guyer and Hoover parted with their stock; by so doing they lost their de jure right to their respective offices, [but did not they continue to be officers de facto? No election was held to fill the vacancies; no one assumed to discharge the duties of their respective offices. Mr. Guyer was the custodian of the corporate seal of the company and of the stock books up to the date of the election in July, 1892, and if he was not president, de facto at least, on June 30, 1892, who was president?

"And to hold that a vacancy existed would be to disfranchise every share of stock that happened to be transferred, because in such case there would be no officer to attest the transfer and make the entry in the books.] [7]

"[We are decidedly of the opinion that Mr. Guyer and Mr. Hoover were officers, not, it is true, de jure but de facto on June 30, 1892, and, as such officers, that their issue to A. G. Morris on that day of a certificate for eight hundred and eight (808) shares of stock was legal and bound the company; and that Mr. Morris had a legal right to vote said stock at the election on July 4, 1892.] [8]

"In Cook on Stock and Stockholders, sec. 713, p. 1057, it is said:

"'The contracts of an officer de facto, acting within the sphere of his office, are binding upon the corporation.'

"Properly attesting the transfer of stock is an act peculiarly within the sphere of official duty; it is in the main ministerial; its performance, in general, in no wise increases the liabilities or alters the condition of the corporation.

"The legal question to which we have referred was most ably and elaborately argued before us. We will not attempt to reiterate the arguments pro and con, or to cite, much less to analyze, the mass of authorities presented to us. We have endeavored to examine all the authorities cited, to which we had access, and, while conflicting expressions may doubtless be

pointed out, we deem the foregoing citations from Cook on Stock and Stockholders to be a fair resumé of the law on the subject. The facts in none of the cases cited were analogous to the facts of the present case.

"The fifth point submitted by defendants asks us to rule that there can be no recovery in this action by Caleb Guyer as president because he was not a stockholder at the time of the election. Defendants' tenth point raises a similar objection in the case of G. W. Burket, director.

"The evidence is undisputed that, on the day of the election, both of these gentlemen were equitable owners and holders of stock. Mr. Guyer held a stock certificate but, by a clerical omission seemingly never noticed until during the trial of the case, his said certificate was not signed by the treasurer.

"This objection, at least so far as it relates to Dr. G. W. Burket, comes with rather bad grace from Messrs. Owens, Kloss and Walton, three of the defendants, as these three gentlemen are in a like predicament with Dr. Burket, that is to say, they were only equitable owners of stock on the day of the election.

"But the following citation from Cook on Stock and Stockholders, may be a sufficient answer to said objector.

"'Although the charter requires the directors to be stockholders it has been held that the transferee and holder of a certificate of stock is qualified even though the stock itself stands on the books of the company in the name of the transferrer.' Cook on Stock and Stockholders, ed. 1894, sec. 623, p. 850.

"The conclusions arrived at by us may be summarized as follows. [We conclude:

"First. That the tellers erred in refusing to count two hundred (200) of the shares voted by A. G. Morris; consequently Mr. Morris and the plaintiffs received a total vote of at least nine hundred and fifty-two (952) shares, legally qualified to vote, and were elected, as the defendants, against whom the jury rendered a verdict, at most only received a vote of eight hundred and eighty-six (886) shares.

"Second. Assuming that the tellers rightly refused to count the two hundred (200) so called Hoover shares, yet still plaintiffs were duly elected as they received the vote of at least

seven hundred and fifty-two (752) legally qualified shares while the defendants, against whom verdict was rendered, only received the vote of two hundred and fifty-five legally qualified shares.] [23]

"We answer the points reserved as follows:

"We affirm plaintiffs' first, second, third, fourth (these four points were affirmed pro forma at the trial) and sixth points. In the view we have taken of the case plaintiffs' seventh point becomes immaterial, but, if material, it may be considered to be affirmed. We likewise affirm defendants' first point. We deny plaintiffs' fifth point, and we likewise deny defendants' second, third, fourth, fifth, sixth, tenth and eleventh points.

"Upon payment to prothonotary of the jury fee we direct that judgment be entered on the verdict:

"That A. A. Stevens, defendant, shall be ousted and altogether excluded from the office, franchise, privilege and power of president of the Tyrone Gas and Water Company, and it is decided that Caleb Guyer was, on the 4th day of July, 1892, duly elected president of said corporation and shall hold possession of the said office until another shall be elected in his stead according to law and the regulations of said corporation;

"That D. S. Kloss, defendant, shall be ousted and altogether excluded from the office, franchise, privilege and power of treasurer of the said Tyrone Gas and Water Company, and it is decided that Charles A. Morris was, on the 4th day of July, 1892, duly elected treasurer of said corporation and shall hold possession of the said office until another shall be elected in his stead according to law and the regulations of said corporation:

"That G. L. Owens, defendant, shall be ousted and altogether excluded from the office, franchise, privilege and power of secretary of the said Tyrone Gas and Water Company, and it is decided that Charles A. Morris was, on the 4th day of July, 1892, duly elected secretary of said corporation and shall hold possession of the said office until another shall be elected in his stead according to law and the regulations of said corporation;

"That William Walton, D. S. Kloss and G. L. Owens, defendants, shall be ousted and altogether excluded from the office, franchise, privilege and power of directors or managers of the Tyrone Gas and Water Company, and it is decided that Dr.

G. W. Burket, Caleb Guyer and T. K. Morris were, on the 4th day of July, 1892, duly elected directors or managers of said corporation (in the place and stead of said William Walton, D. S. Kloss and G. L. Owens) and shall hold possession of said office until others shall be elected in their stead according to law and the regulations of said corporation;

"That said defendants, A. A. Stevens, D. S. Kloss, G. L. Owens and Wm. Walton, jointly pay the costs."

Errors assigned were, among others, (1) overruling motion to quash; (7, 8, 23, 24) portions of opinion on points reserved.

H. M. Baldrige, *G. H. Spang* and *Stevens & Owens* with him, for appellants.—Parties contesting for different offices cannot be joined in one and the same proceeding, either as plaintiffs or defendants: High on Ex. Leg. Rem. 704; Brewster's Practice, sec. 2106; People v. DeMill, 15 Mich. 164; Moock v. Conrad, 155 Pa. 536; Coopersdale Election, 157 Pa. 637.

It was the duty of the tellers to challenge any vote offered. That was the duty of objecting stockholders. The duty of the tellers was only to receive the votes, pass upon any challenges made, and the legality of votes cast; and obey any orders that might be made to them by any court of competent jurisdiction; compute the vote and announce the result. The injunction served on the company and the tellers had, prior to the election, been served on A. G. Morris; and he, disregarding the mandate of the court, cast his ballot, including the enjoined stock, into the hat. How else could the tellers obey the injunction than by refusing to count, in the ballot cast by Morris, what, from the best information they had, would equal the Hoover stock.

George B. Orlady, *Hicks & Templeton* and *O. H. Hewit* with him, for appellees.—The relators were competent to sue: 1 Cook on Stock & Stockholders, 620; 17 Am. & Eng. Ency. of Law 53; Miller v. McCutchen, 2 Pars. Eq. Cas. 207; Com. v. Martin, 3 Lanc. Bar, 177; People v. DeMill, 15 Mich. 164.

The office of president, secretary or treasurer is but the result of being a director or manager of the corporation, and unless a director, the person cannot be a president, secretary or treasurer. So that there is nothing in the opinion of Judge LIVINGSTON

in Com. v. Martin, 3 Lanc. Bar, 177, which militates against the joinder of the defendants or the corelators in one and the same information: Moock v. Conrad, 155 Pa. 586; In re St. Lawrence Co., 44 N. J. L. Rep. 529; Com. v. Dillon, 61 Pa. 488.

The challenge to the vote about to be cast must be directed as to the number, and specific as to reason of challenge, and after the reception of the vote all the power of an officer is at an end, so far as the right to reject or throw it out for want of qualification of the vote is concerned; so that as soon as the vote is deposited in the box all control of the officer over it ceases, and he has no further power in the matter: 6 Am. & Eng. Ency. of Law, 307; Hartt v. Harvey, 32 Barb. (N. Y.) 55; Harbaugh v. Cicott, 33 Mich. 241; Reg. v. Donahgue, 15 Up. Can. Q. B. 454; Justice's Opinion, 70 Me. 560; State v. Donnewirth, 21 Ohio, 216; 19 Am. & Eng. Ency. of Law, 673; Com. v. Daltzel, 1 Dist. R. 657.

Opinion by Mr. Justice Mitchell, May 30, 1895:

The motion to quash the writ raised two questions, first, the standing of the relator to institute the proceedings, and secondly, the right to join the several defendants in one writ.

First, it is contended that the title of the relator to the office of director not being disputed he has no standing to question the title of the respondents to similar positions. But this view, as was well held by the learned judge below, overlooks the rights of the relator as a stockholder, to have his votes properly counted, and the affairs of the company committed to the charge of the officers legally elected by a majority of the stockholders. This is too clear to need further elaboration.

Secondly. The right to separate and distinct offices held by different incumbents, cannot in general be inquired into in one proceeding. But in this state the practice in quo warranto is regulated by the act of June 14, 1836, P. L. 621, and the eighth section provides that "if it shall appear to the court or judge (allowing the writ) that the several rights of different persons may be properly determined by one writ, it shall be lawful for such court or judge to make such order or orders for the introduction or addition of such persons into the writ, or for notice to such persons to appear and take defense, as shall be reasonable and just." The obvious purpose of this provision is to

bring the proceeding under the principle of equity practice, that the court having obtained jurisdiction of the subject-matter of controversy shall include all the parties to it, and make a final determination of the whole. This is in accordance with the general policy of the law, and the proper construction of remedial statutes. While the words are, the "several rights of different persons," and it is not expressly said that the title to different offices may be determined in one writ yet the latter case is not excluded by the language used, and may be equally within the intended remedy. It appears to be clearly so in the present case. Although the offices in controversy are different, yet the title of the incumbents as to all of them, depends on the same votes at the same election, and a decision on the validity of that election will be equally conclusive as to the rights of all. The case is therefore clearly within the privilege of the statute, and the learned judge was right in dismissing the motion to quash, and overruling the demurrer.

The cases of Moock v. Conrad, 155 Pa. 586, and Coopersdale Election, 157 Pa. 637, cited by both parties, have very little bearing on the present question, but so far as applicable they are in harmony with the conclusion herewith announced. In the former it was held on a motion to quash that a contest of the election of four councilmen might be commenced by a single petition where it "alleged fraud or mistake calculated to affect the entire ticket, and to destroy the returns as to each one of the set returned as elected," and that in case a joint trial would result in injustice or inconvenience, the respondents could sever in their answers, and ask the court to allow them to sever in their trials. In the Coopersdale Election case it was held by the court below, that to join contests for burgess, councilmen, school directors, justice of the peace, constable, and collector of taxes, in one petition would "complicate the proceedings, and involve the court in confusion as to questions of costs, evidence, and decrees, and compel persons having no joint interests to join in a defense," and this was affirmed by this court. Both those cases were decided upon the same principle, namely the practicability of determining the whole controversy in one proceeding without injustice or inconvenience, and of refusing the attempt unless those conditions appeared. In both those cases that principle was applied under the gen-

eral powers of the courts at common law. In the present case the same principle is applied under the additional sanction of express statutory authority. The difference in result arises from the difference in the facts and circumstances.

Upon the merits of the case, it appears that Morris was the holder of certificates of shares on which he was prima facie entitled to vote. The creditors of Hoover claimed title to 253 of the shares held by Morris, upon grounds that might authorize a court of equity to require Morris to transfer them, but gave no authority to the tellers to reject them in counting the vote. The action of the tellers must therefore be justified, if at all, by the terms of the injunction.

Very serious objections are raised to the mode of proceeding by the tellers in allowing the ballots to be deposited, and then rejecting them in the count without giving Morris any opportunity to be heard in defense of his right to vote them, and without any identification of the shares enjoined, or any evidence that such enjoined shares were included in those voted by Morris. It is however unnecessary to discuss these objections in detail, as it appears from the opinion of the learned court below on the points reserved, and even more clearly from the opinion of our brother DEAN while president judge, in continuing the injunction upon the Gas and Water Company against incurring any new debts pending the contest over the Hoover stock, that no effect upon the election, or the right of Morris to vote the stock thereat, was intended by the preliminary injunction. Neither the action of Morris therefore in voting the stock nor that of the tellers in receiving his votes, though contrary to the general language used in the injunction, was a violation of its real intent and meaning, and the nominal violation was no ground on which the later action of the tellers in rejecting the votes in the count could be sustained.

As this disposes of the whole controversy on the merits, the numerous assignments of error need not be discussed in detail.

Judgment affirmed.

Commonwealth v. Frantz Bezek, Appellant.

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Criminal law—Murder—Continuance—Discretion of court.

The Supreme Court will not reverse a judgment on a verdict of guilty of murder in the first degree because the lower court refused a continuance, where there is nothing on the record to show an abuse of discretion in the action of the lower court, or that a postponement of the trial would have resulted in strengthening the defense in any respect.

Evidence—Blending relevant with irrelevant matters—Review.

In civil cases the rule of evidence is that "where an offer blends irrelevant and inadmissible matters with a matter relevant and admissible, and it is made and rejected as a whole, the rejection of it is not error;" but this rule ought not to be summoned to sustain a ruling prejudicial to the interests of a defendant on trial for murder.

Where an offer of evidence is improperly rejected, but immediately afterwards under another offer the evidence is admitted in full, the ruling on the first offer is not a ground for reversing the judgment.

Murder—Insanity—Evidence.

Insanity is an independent defense, and he who sets it up must show the existence of it by fairly preponderating evidence.

Evidence—Confession—Voluntary statement.

Where a prisoner is warned that any statement he might make concerning a murder with which he is charged may be used against him, and that he need not say anything about it unless he desires to do so, and he subsequently makes a statement, such statement may be used as evidence at his trial.

Argued Feb. 25, 1895. Appeal, No. 243, Jan. T., 1895, by defendant, from judgment of O. & T. Lackawanna Co., on verdict of guilty of murder in the first degree. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM, and MITCHELL, JJ. Affirmed.

Indictment for murder.

Defendant moved for a continuance of the case for the reason that counsel for the defense was assigned by the court Friday noon, that the case was called for trial Monday following; that defendant did not understand the English language and no interpreter could be procured, and therefore counsel would be compelled to go to trial without having an opportunity to prepare the case. The court refused the motion. [1]

At the trial it appeared that on Oct. 9, 1894, the prisoner shot and killed Maria Kerzek. Prior to the shooting the prisoner asked the deceased to marry him, and she refused. The prisoner claimed that he then attempted to shoot himself, and that the girl rushed towards him to prevent the shooting, and in the struggle the revolver was discharged, and the girl was shot.

The counsel for defendant proposed to prove by the witness on the stand, John Karocious, that he had known the defendant since childhood; that his name is Frank Pershon; that the witness is the defendant's father's half-brother; that about five years ago, while Frank was in the Austrian army he was confined in Liebach asylum for the insane; that he was confined there, having become insane at two different times in his lifetime, on account of this girl, Maria; that he saw him at Mayfield, arriving in this country with her; that they remained at his place until Maria went to Olyphant; that the defendant told the witness after he learned that Maria would not marry him that he was going to kill himself and witness advised him not to do so, but to go to work with him.

To be followed by evidence of witnesses who saw the defendant confined at the asylum at Liebach, and those who knew of his having been confined there; also evidence showing that he stated that he would take his life if Maria refused to marry him; also to be followed by evidence showing that he has been confined at the asylum at Liebach within ten months of this trial.

By the Court: "How does the mere fact of this man having been in an insane asylum tend to prove his insanity?"

By defendant's counsel: "It may not establish insanity just now."

By the Court: "How does it establish it then?"

By defendant's counsel: "This will go to corroborate other witnesses. It would be prima facie evidence that he was insane. This man is not offered as an expert as to whether the defendant was insane or not, but simply that the man was incarcerated and he knew that he was in the insane asylum."

By district attorney: "The commonwealth objects to the whole offer as immaterial, irrelevant and incompetent."

By the Court: "I will sustain the objections and exclude the evidence. Exception noted for defendant, and bill sealed." [2]

John Karocious was asked this question by defendant's counsel: "In what part of the hospital did you see Frank in Austria? In what part was he confined?"

By the district attorney: "The commonwealth objects to the question as immaterial, irrelevant and incompetent."

By the Court: "I sustain the objection." [3]

"Anthony Kranz testified for the defendant that he saw him in the hospital, which hospital was alleged to have been a hospital for the treatment of insane persons, in Liebach, Austria; and the question was asked by the defendant's counsel —'How did he act?' The answer being—'He acted like crazy.'"

By the district attorney: "The commonwealth objects to the answer, and asks that it be stricken out."

By the Court: "It may be stricken out." [4]

The counsel for the defense proposed to prove by Anton Bourschnak that he furnished the money to Mr. and Mrs. Kramer as a loan, and that they purchased the ticket upon which Maria came to America; that after her arrival in America, Mrs. Kramer in the presence of Frank, said that Maria should marry witness; that witness said he did not care to marry Maria, but wanted his money back. This for the purpose of contradicting Mrs. Kramer on the point where she swore that Anton Bourschnak bought the ticket for her to come to America, with the understanding that he was to marry her when she got here. That there was no such understanding between Maria and Anton Bourschnak, and that Anton Bourschnak did not know that he was to marry Maria until Mrs. Kramer asked him to in the presence of Frank, after their arrival.

By the district attorney: "The commonwealth objects to the offer as irrelevant and immaterial for that purpose. Further, that it is not an offer to contradict the commonwealth's evidence on a material point. That it is not a material contradiction."

By the Court: "I sustain the objection and exclude evidence. Exceptions noted for defendant and bill sealed." [5]

Counsel for defendant proposes to prove by the same witness that he furnished the money to Mr. and Mrs. Kramer as a loan. That they purchased the ticket upon which Maria came to America, and this for the purpose of contradicting the testimony of Mrs. Kramer when she testified that the witness sent the ticket to her sister, Maria, to come to America.

By the district attorney: "The commonwealth objects to the offer as immaterial, irrelevant and incompetent."

By the Court: "Objection sustained. Evidence excluded. Exception noted for defendant, at whose request a bill is sealed." [6]

C. I. Berger, called by the commonwealth, testified as follows:

"Q. Now before this defendant made any statement there in reference to this affair did the Squire say anything to him, that is through the interpretation of you and Mr. Magenreider, was there any communication from the Squire to the defendant as to the effect of what he would say? A. Mr. Cummings spoke him several times. Q. What did he say? A. 'Ain't got no use to talk here.' Q. Why? A. Well, I don't know why. Q. Did the Squire tell him why he could not talk? A. Squire Cummings said he ain't got no use to talk here. Q. Was that communicated to the defendant through Magenreider and you? A. Then he told us any way. Q. The Squire, you say, told him no use to talk there. Now, did you make known, did you and Magenreider make known to the defendant what the Squire said? A. Yes, sir. Q. Then you say he told you any way. What I am trying to get at is, you say that you heard the Squire tell him that he had no use to talk there. Now, of course, he couldn't understand it. What I am trying to get at is this: Did you and Magenreider explain to the defendant what the Squire said? A Yes, sir, we did. Q. Now, after that warning of the Squire was communicated to the defendant, tell us what the defendant said that you heard and understood?"

By counsel for defendant: "If you honor please, we would object upon the ground that he got it as hearsay from Magenreider, and interpreted to him; he did not get it from the defendant himself, but got it from another interpreter."

By the Court: "He has already said that he understood what the defendant said to the other interpreter, and he also understood what the interpreter said to the defendant."

By counsel for defendant: "We will enter another objection."

By the Court: "I do not desire any reflection to be cast upon the court, because we desire to do everything that is possible for this defendant. The court ruled that it is only the

person to whom the defendant talked, or who could understand him, or who heard him and understood him, that can give the testimony, and therefore ruled out the evidence of Mr. Cummings. This witness says that he understood this defendant himself without the aid of the other interpreter. Now, that comes exactly within the rule."

By the district attorney: Q. "Tell us what the defendant said that you heard and understood?"

By counsel for defendant: "We renew the objection. To-day the witness on the stand, it was either to-day or yesterday, was asked to converse with the defendant, and he then stated that he could not speak the language, but another gentleman could speak the language.

"It seems to me that this man under arrest in that alderman's office, surrounded by all these wiseacres, should have been warned by more than to say 'he has no use to talk;' that is all that was communicated to him, so this gentleman says; whether he was led to make this statement in his condition or not is a question it seems to me that is material, whether they have a right to come in here after having him in duress, getting this confession out of him, or this statement, without warning him more than he says they did warn him, by the alderman making the naked statement that 'he has no use to talk,' and he says he communicated that to him; no use to talk means nothing, as I understand it.

"We enter an objection that he was under duress."

By the witness: "I said before I can talk some, and some I cannot."

By district attorney: "Q. Now please answer the question? A. Well the first question was, what he said. Of course, we asked him how it was, and he said he loved Maria about three years in the old country, and he came in to marry her. Then he said, 'Never mind, bring me to the priest;' he wants a priest, 'and then hang me.' That is what he said in the Squire's office. Then we asked where he bought the revolver, when he bought the revolver. He said that same morning; then asked him whereabouts; this side of the bridge or another side of the bridge, and he said this side of the bridge. That is all what he said. Q. Was there anything said that you heard about him showing the constable where he got the revolver? A. No, sir.

Q. You didn't hear anything of the kind? A. No, sir. Q. Or was there anything said about the price he paid for the revolver? A. No, sir. Q. You didn't hear anything of the kind? A. No, sir. Q. Did you have another conversation with the defendant at the county jail afterwards? A. Yes, sir. Q. When was that? A. That was to-day three weeks. Q. What conversation did you have with him there? A. I asked him, because he didn't know me, I asked him, 'What for you in here?' 'Well,' he said, 'I shoot a lady up in Olyphant.' Well, I asked him, 'What for you done that?' Well, then he told me, he said, 'Because I was excited; I loved her out in the old country, and I came in and she didn't want me here,' and then he ask me about how much he get. I said, 'I don't know;' then he write me a letter in the county jail to Mrs. Kramer, and I took that along and I went out." [14]

The counsel for the defendant moved to have the evidence of the last witness, C. I. Berger, stricken from the record, for the reason that the defendant was not warned in any manner, nor was he told or made aware in any manner whatsoever that the statements that were made by him while in the squire's office would be used in the trial of this case against him.

By the Court: "I refuse the motion. Exception noted for defendant, at whose request a bill is sealed." [15]

The commonwealth proposed to prove by Fred Magenreider that he was present at the squire's office at the hearing and acted as interpreter with the last witness; that the defendant there stated that he bought the revolver for $6.50, and when asked whether it was this side of the bridge, or the other side, he said this side, meaning the Olyphant side of the Lackawanna river bridge. He said he loved Maria in the old country, and came here to marry her, and that she would not have him, and he shot her.

By counsel for defendant: "The counsel for the defendant objects to the offer because the prisoner was under arrest at the time, and that there appears to be no warning given to him that the statements that were made by him would be used against him on the trial of the case, and therefore it is incompetent."

By the Court: "The objection is overruled and evidence admitted. Exception noted for defendant, at whose request a bill is sealed." [16]

The court charged in part as follows:

"[In this case we have only to deal with that kind of murder in the first degree, described as 'willful, deliberate and premeditated.'] [9] 'Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offense. Therefore, if an intention to kill exists, it is willful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances of the evidence.'

"In reviewing the testimony in this case you will find some important facts which cannot be disputed. That Maria Kerzek, in the borough of Olyphant, on the morning of October 9th last, while in the enjoyment of full life, received a pistol wound from a revolver in the hands of the defendant cannot be questioned; that this wound caused the girl's death, and that the pistol which the defendant had was purchased by him the morning of the shooting a short time before the tragic ending of Maria's life, are facts which stand before you uncontradicted, and are practically admitted by the defendant. The representative of the commonwealth contends that the circumstances surrounding the shooting justify you in finding only one kind of verdict: that of murder in the first degree; that the killing was willful, deliberate and premeditated; that the defendant, when disappointed on account of the refusal of the girl to marry him, and her determination to marry another man, became inspired with the spirit of revenge; that he prepared himself deliberately to carry out a murderous purpose; that he went to Lally's store on Monday evening to purchase a revolver, and only hesitated on account of the difference of a dollar and a half in the price; that he returned to Kramer's house where the girl lived and slept there during the night, and that in the morning, imbued with the same feeling and purpose, he left Kramer's house after breakfast, went to Lally's

store, purchased the revolver, paid $6.50 for it, loaded it with five cartridges, and within the space of less than an hour's time returned to Kramer's house, and on being again refused marriage by the girl, shot and killed her. The commonwealth contends that the circumstances of the shooting are consistent with no other hypothesis than that of murder in the first degree—a willful, deliberate and premeditated murder.

"I will now call your attention to the evidence in the case:

"Dr Kelly, the coroner, described the condition of the body, the nature and extent of the wound, the finding of the bullet at the base of the brain, and testifies as to the cause of death.

"Edward Rosenfeld is called, and says that while going home from church he heard an alarm. His attention was attracted to the Kramer house. He heard screaming, and thereupon he went near the door, and saw Mrs. Kramer with a child on her arm, the girl, Maria Kerzek, near her, and the defendant close by with a revolver in his hand, pointed towards Maria. The witness saw and heard the first shot fired by the defendant, and and then ran away and heard two shots more fired. This, in substance, is his testimony as to the shooting. I am not giving his exact words, you must consider his whole testimony, and must rely upon your own recollection of the testimony of the witnesses in deciding the facts of this case. It is my duty to assist you in reviewing the evidence, but you, gentlemen of the jury, are the sole judges of the facts. It is your exclusive right and your supreme prerogative to determine the facts of this case.

"George Adams is called next. He was attracted by Mrs. Kramer's excited manner, and by three pistol shot reports. He saw smoke coming out of the door of the Kramer house, and soon after saw the defendant jump out of the house from behind the door and run toward the river, with a number of people, with hue and cry, running after him.

"Josephine Kramer, the sister of the deceased girl, and an eyewitness to the shooting, testifies to the events which happened on Tuesday morning. She says that the defendant took his breakfast on that morning, and went out of the house. He returned about eight o'clock, finding Mrs. Kramer and Maria in the dining room, Maria scrubbing the floor. The defendant sat down at the table, and after a short time the witness, Mrs.

Kramer, discovered a revolver in his possession. She then called the girl into the other room. The defendant had just asked the girl to marry him, and she had refused. As soon as both women went into the front room, the defendant followed them and fired three shots at Maria, the third taking effect. The witness says that the defendant was facing Maria when he fired the shots, and was close to her. You saw the attitude of the witness on the stand demonstrating the manner in which the shots were fired, and the relative positions of the defendant and Maria.

"You will notice, gentlemen of the jury, that I am so far recalling the testimony as to the events immediately surrounding the shooting. I will refer to other testimony in discussing other features of this case.

"The weapon used is produced here in court, and a witness, James Lally, is put upon the stand to show how the defendant obtained the revolver. Mr. Lally states that the prisoner came to his store on Monday evening, October 8th, to purchase a revolver. He pointed to one in the show-case, asking 'how much?' Mr. Lally said 'Six dollars and a half.' Defendant offered five dollars, which was refused, and then left the store. The next morning the defendant comes to the store again, purchases the revolver for $6.50, buys the cartridges, and then leaves the store armed with a loaded revolver.

"The commonwealth has produced several witnesses, who describe the actions of the defendant, after the shooting and after he left the Kramer house, his running away rapidly, his pursuit by several citizens, his running into the river and there held at bay by several people on both banks of the river and his final surrender and capture. The purpose and intended effect of this testimony is to show the flight of the defendant, his attempt to escape the consequences of his alleged crime. [Flight is considered as evidence of guilt. It is your privilege to look upon this testimony in that light. It will bear that construction. You may also look upon it as evidence of fear on the part of the defendant—fear of summary punishment at the hands of his pursuers. Weigh it carefully and give it the effect it reasonably should have.] [7]

"I will now call your attention to the testimony for the defense. The defendant by himself and counsel, admits the pur-

chase of the revolver, and that Maria Kerzek came to her death by means of a shot fired from this revolver in the hands of the defendant. The defense is twofold. It is contended that the firing of the fatal shot was accidental; that while he was about to commit suicide and had the revolver under his chin, the girl took hold of his arm, and that in the scuffle that ensued the shots were fired and Maria was killed. The defendant also contends that the condition of his mind was such that he was not responsible for his acts; that his mind was unhinged, and that he did not know the consequences of his act.

"The provisions of our law in Pennsylvania permit the defendant in a homicide case to go upon the witness stand and testify in his own behalf. His credibility as a witness is for you, and you have a right to take into consideration the position of the defendant in relation to this case, and its possible consequences, in determining the weight you should give to his testimony.

"On the witness stand he gives you his history in Austria, his acquaintance with and engagement to Maria Kerzek; his service in the army, his sickness and detention in the hospital, or in an insane department of the hospital; his journey to Mayfield, Lackawanna county, arriving there October 7th last; his relations and conversations with Maria on Sunday and Monday; her refusal to marry him; his consequent sadness and grief; the purchase of the revolver on Tuesday morning; his return to Mrs. Kramer's house with the revolver in his pocket; the refusal again of Maria to marry him; his attempt to shoot himself; the interference of the girl and her consequent unfortunate death.

"Certain witnesses are called on behalf of the defendant, among them Joseph Petrocious, John Karocious, Anthony Kranz and Martin Sikon. Their testimony relates to the actions of the defendant in the hospital, his sickness, his crying and praying, his actions on Sunday and Monday in Mayfield and Olyphant, and other facts and details which you may recall, and which do not occur to me now. It is your duty to take into consideration all the testimony in the case. If you find any contradictions in the evidence you must examine them closely, and ascertain whether the contradictions are only apparent. If you can harmonize all the testimony it is your duty

to do so. But if you cannot, then you have the right to believe or disbelieve any witness or any part of the testimony.

"The credibility of the witnesses is for the jury. In deciding what weight you give to the testimony of a witness, you must take into consideration the interest of the witness in the possible result of the case, the accuracy of his recollection, his opportunity of observation as to the facts he testifies to, and the demeanor and appearance of the witness upon the stand.

"The question will naturally recur to you, was the shooting and killing of Maria Kerzek an accident as claimed by the defendant? If it was, then the defendant cannot be convicted under this indictment. The evidence on this part of the case is in the main that of the defendant. I need not repeat it to you. It is claimed by his counsel that the defendant is corroborated by Dr. Parke, the jail physician. You have heard his evidence. He says that in his judgment the wounds under the chin and below the lip were produced by a bullet. The nature of the wound has been described to you. Could a bullet traverse in the direction indicated by the wound without shattering the chin bone? It is for you to decide. [You heard the testimony of Mr. Cummings. He examined the face of the defendant closely the day of the shooting, and found no wound under the chin.] [13] Then you have the testimony of George Adams, who says the defendant while running toward the river came in contact with a barbed wire fence, and injured his chin until blood came. Then you have the fact that two bullet holes were found in the window frame in Mrs. Kramer's house, and one bullet in the deceased girl's brain; thus with the two loaded cartridges found in the revolver accounting for the five bullets. If you find that the killing of Maria Kerzek was the result of an accident, then you must acquit the defendant.

"If you find that the killing was not the result of accident, then was the defendant insane when he committed the act, and unable to distinguish between right and wrong? The law presumes every man to be sane. Sanity is a man's normal condition. If a defendant alleges insanity, either partial or general, as an excuse for crime, the jury must be satisfied from the evidence that the allegation is true. Whether it be a hallucination or delusion, partial or general insanity, the test is that if a man has not sufficient power of memory and mind

to know the relation in which he stands to others, and others to him, if he does not understand the nature of his act, whether it is right or wrong, if his moral perception is so weakened that he cannot understand the consequences of his act, then he is not responsible and cannot be convicted of any crime whatever. Or if he is dominated by an uncontrollable and irresistible impulse, impelling him onward to the commission of a deed, and overpowering the will, then that is such a condition of mind as releases man from responsibility for his acts.

"[The evidence to sustain this contention of the defendant appears to be meager, but the evidence is for you to consider, and you must draw from it your own conclusions.] [8] You have heard the testimony as to his actions in the Austrian Hospital, and as to his actions and words on Sunday and Monday and Tuesday morning in this country, and you have seen him upon the witness stand. Are you satisfied, gentlemen, from the evidence that the defendant was not responsible when he committed the act charged against him? If you are, then he should be acquitted of this indictment on the ground of insanity."

Defendant's points were among others as follows:

"8. In order to convict of murder in the first degree, the jury must find from the evidence in the case beyond a reasonable doubt that the mind of the defendant was not so affected, in consequence of the decedent's rejecting him and refusing to enter into the relations which had existed between them so long, thus unbalancing his mind, so as to be incapable of such deliberate premeditation as is necessary to constitute murder in the first degree. *Answer:* Subject to my instructions to you, gentlemen of the jury, in regard to the question of this man's insanity, and applying the facts of the case to the law set forth in this point, I affirm it." [10]

"17. That no positive evidence has been produced by the commonwealth to show that the killing was premeditated and deliberate, and that the circumstances under which the killing took place may be reconciled with the theory of the absence of such intent. *Answer:* This point is refused. It is for the jury to find the degree of his guilt." [11]

Verdict of guilty of murder in the first degree, upon which the court passed sentence of death.

Errors assigned were (1) refusal of court to grant continuance; (2, 3, 4, 5, 6, 13, 14, 15, 16) rulings on evidence, quoting the bill of exceptions; (7–11) instructions as above, quoting them. (12) The refusal of the court, at the request of the foreman, to have read to the jury all the evidence tending to show the condition of defendant's mind at the time of the homicide.

G. M. Watson and *George S. Horn*, *A. J. Colborn* with them, for appellant.

John P. Kelly, ex-district attorney, *John R. Jones*, district attorney, with him, for appellee.

OPINION BY MR. JUSTICE MCCOLLUM, May 30, 1895:

Frank Berchine, otherwise known as Frank Bezek, is under sentence of death for the murder of Maria Kerzek at Olyphant, Lackawanna county, on the 9th of October last, and the record of his trial and conviction is before us for review. It was his right to have an impartial trial in accordance with law, and if that was denied to him it is our duty on his appeal to afford him an opportunity for it by reversing the judgment. We were induced by his poverty to facilitate the review he sought by accepting the official stenographer's type-written copy of the testimony in lieu of its presentation in the paper-books as required by our rules. We have carefully examined and studied the testimony so furnished to us, and while we do not deem it necessary nor propose to analyze or discuss it in this opinion we unhesitatingly say that his conviction of murder of the first degree was fully warranted by it. It plainly shows that the homicide was a consequence of the refusal of the deceased to become his wife. Whether it was the result of an attempt by him to commit suicide, of a premeditated purpose to murder her, or of the unconscious act of a madman, were questions for the jury upon the evidence under proper instructions from the court.

There are sixteen specifications of error filed in the case, and we will consider them in their order. It is conceded by the learned counsel for the defendant that there is nothing upon the record on which to base the first specification, and this con-

cession, confirmed by an inspection of the record, is, technically speaking, a sufficient answer to it. Nevertheless, in favorem vitæ, we have considered it in the light afforded by their statement of the grounds for it and by the reply of the learnedc ounsel for the commonwealth. So considered it appears to be founded upon a denial of the defendant's motion for a continuance of the case. As nothing short of an abuse of the discretion the trial court has in passing upon a motion of this character would justify our intervention, and as it does not appear that this discretion was abused in the case before us, the specification must be overruled. It is proper in this connection to add that nothing was shown in support of the motion which presented reasonable ground for believing that a postponement of the trial would result in strengthening the defense in any respect.

There is nothing in the offer which forms the subject of the second specification that raises any doubt concerning the correctness of the ruling upon it, except the portion of it which relates to the alleged confinement of the defendant in an insane asylum in Austria, and the exclusion of this appeared to us on first view as error which might authorize and perhaps call for a reversal of the judgment. The technical answer to this view is that where an offer blends irrelevant and inadmissible matters with a matter relevant and admissible, and it is made and rejected as a whole, the rejection of it is not error: Sennett v. Johnston, 9 Pa. 335, and Wharton v. Douglass, 76 Pa. 273. But in deciding the question raised by the specification we shall not take into consideration the rule supported by the cases cited. These were civil cases and if the rule stated in them is applicable to, it ought not to be summoned to sustain a ruling prejudicial to the interests of a defendant on trial for murder. The specification, however, fails to disclose the ruling immediately following the one in question, and under which the defendant was allowed to prove all material and admissible matters contained in the preceding offer, together with his acts, declarations and conduct while in Austria, and in this country, tending to show that he was insane when the homicide was committed. This ruling rendered the ruling complained of in the second specification harmless and without effect upon the defendant's rights, even though it be conceded there was error in its exclusion of that part of the offer relat-

ing to his confinement in an asylum. Joseph Petrocious, John Karocious and Anthony Krantz who were his neighbors in Austria and whose acquaintance with him dates from the period of his childhood, testified to having seen him in a hospital at Liebach, five years ago, and to his acts and declarations there. That their testimony did not fully sustain the offer may be attributable to their want of knowledge or recollection of the matters to which their attention was called, but it is not chargeable to any ruling of the court.

The rulings complained of in the third and fourth specifications of error were not excepted to in the trial court and are not, under well-settled rules, reviewable here. Besides, there is nothing discoverable in either of them which can be regarded with any show of reason as prejudicial to any right or interest of the defendant. The matters to which they referred could not legitimately affect the decision of any question involved in the case.

The fifth, sixth, seventh, eighth, ninth and tenth specifications do not require elaborate discussion. It is sufficient to say of the fifth and sixth that the offer made for the purpose of contradicting Mrs. Kramer related to immaterial matter and was based on an assumption not warranted by her testimony. The instructions in regard to the effect of the defendant's flight from the scene of the murder were, considered as a whole, unobjectionable, and so were the instructions concerning the evidence of his alleged insanity. It is not claimed that the murder of Maria Kerzek was committed by means of poison, or by lying in wait, or in the perpetration of or attempt to perpetrate any arson, rape, robbery or burglary. The jury were not required to consider a murder so perpetrated, and they were substantially so instructed in the language of Justice AGNEW in Com. v. Drum, 58 Pa. 16. We do not assent to the claim that the instruction was misleading. The defendant has no cause to complain of the answer to his eighth point. The point was misleading and not a fair or correct statement of the law applicable to the defense of insanity. It ignored the presumption of sanity and cast on the commonwealth the burden of showing by affirmative evidence, which excluded reasonable doubt, that the defendant was not insane when the homicide was committed. Insanity is an independent defense and the decisions of this court say

that he who sets it up must show the existence of it by fairly preponderating evidence: Ortwein v. Com., 76 Pa. 421; Lynch v. Com., 77 Pa. 209; Brown v. Com., 78 Pa. 123; Meyers v. Com., 83 Pa. 131, and Pannell v. Com., 86 Pa. 260.

We see no error in the rulings or action complained of in the eleventh and twelfth specifications. There was direct as well as circumstantial evidence that the murder was "willful, deliberate and premeditated," and there was nothing said or done in relation to the jury's request in respect to the reading of the testimony which furnishes any ground for reversal or adverse criticism.

We are unable to find in the excerpt from the charge, which is the subject of the thirteenth specification, anything that could possibly prejudice the defendant's cause or mislead the jury.

There was no exception to the admission of Berger's testimony but there was an exception to the denial of the motion to strike it out. The reason assigned for the motion did not accord with the facts as shown by the evidence. Cummings testified distinctly that he warned the defendant that any statement he might make concerning the murder would be used against him, and that he need not say anything about it unless he desired to do so. The statements made by the defendant appear to have been voluntary and we cannot say they were misunderstood or misinterpreted by the witnesses who testified to them. We therefore see no valid reason for rejecting the evidence of them. Upon this review of the case we conclude that it was fairly tried and that all the specifications of error must be overruled.

The judgment is affirmed and it is ordered that the record be remitted for the purpose of carrying the sentence into execution.

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168 619
35 SC 116

Commonwealth v. Robert P. Harris, Appellant.

Criminal law—Embezzlement by consignee.

On an indictment for embezzlement as consignee, the judge charged: "A consignee is a person to whom merchandise or personal property of any kind is committed for the purpose of sale;" *Held*, to be correct and sufficiently comprehensive to direct the attention of the jury to the distinction between a consignment for sale on the consignor's account and a purchase where the title passed though the goods were not paid for.

In such a case it is not improper for the trial judge to call the attention of the jury to the fact that the law regards the act of a consignee in appropriating consigned property to his own use as a very serious offense which should not escape punishment; if he also cautions the jury in equally explicit terms that, for the very reason of the seriousness of the charge, the prisoner should not be convicted upon slight evidence.

Criminal law—Reading to jury act of assembly containing penalty.

On the trial of an indictment for embezzlement, it is not error for the court at the beginning of the charge to read the act of assembly defining the offense, although in doing so the jury are informed what the penalty is which the law imposes for the offense: Commonwealth v. Switzer, 134 Pa. 383; Catasauqua Co. v. Hopkins, 141 Pa. 30 (45); and Rosenagle v. Handley, 151 Pa. 107, distinguished.

Criminal law—Embezzlement by consignee—Evidence.

The defendant wrote a letter under a printed letter head of "Commission Merchant" to the prosecutor suggesting a "Consignment" of grapes. In the letter the defendant offered to "handle all the grapes you can possibly ship on commission, or will buy outright from you." To this letter the prosecutor replied by telegram: "Will ship you a mixed lot . . . . for sample." Two days later he wrote that the shipment had been made. Neither telegram nor letter took any notice of the alternative to sell on commission, or to buy outright. A week later the defendant wrote a second letter ordering more grapes of specified kinds, mentioning the price at which he had sold some, and concluding "send the bill with this order, and I will forward you a check for full amount you forgot to state in your letter how much the grapes was write and let me know send bill for full amount." In answer to this the prosecutor wrote saying: "Will ship . . . . and forward bill of the amount," and further on, "with prices of different kinds that you will take." A few days later the defendant wrote a third letter ordering more grapes, offering a certain amount outright for mixed lots, and repeating the direction to send bill for full amount, and the promise to forward check. *Held*, that the evidence was not sufficient to convict the defendant of embezzlement as consignee.

Argued March 14, 1895. Appeal, No. 386, Jan. T., 1895, by defendant, from judgment of Q. S. Northampton Co., Oct. T., 1894, No. 27, on verdict of guilty. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Reversed.

Indictment for embezzlement as consignee. Before SCHUYLER, P. J.

At the trial it appeared that on Sept. 13, 1894, the prisoner wrote to A. B. McKeel, as follows:

"Vegetables a Specialty. A complete line in season.

Fresh Fish,	Robert P. Harris, Wholesale Commission	Sweet Potatoes,
Clams,	Merchant and Shipper Fruits, Vegetables, Oysters, &c.	Cranberries,
Crabs,	Receiver and Shipper of York State	Green Truck,
Snappers, &c.	Plums and Grapes.	Strawberries.

"220 West Third Street,
"So. Bethlehem, Pa., Sept. 13, 1894.

"*Dear Sir:*

"I am handling a large amount of grapes this season and I understand you are a large shipper I write you in order to open some business with you if you have began shipping yet you may ship me a consignment of about 500 large and 500 small baskets of Concords by freight for first shipment would prefer them in car lots as I handle large quantities of grapes in this section of the country will handle all the grapes you can possible ship on commission or will buy outright from you my charges are 10 Per c all shipments receive my own personal attention Hoping to hear from you and we can do a big business together this year

"Yours Resp.
"ROBT. P. HARRIS"

McKeel replied by telegraph as follows:

"9th mo. 15th/94

"Will ship you to-day a mixt lot of grapes—5 lb. Baskets. For sample. By freight.

"Respt. A. V. MCKEEL."

He subsequently wrote as follows:

"9th mo. 17th/94 5 P. M.

"ROBERT P. HARRIS,

"*Dear Sir:* Shipt you the 15th inst. by Lehigh Valley RRd.
150—5lb Delaware Grapes
30 " Concords "
2 " Niagara "

"Expected to have written you this morning.

"Please write of what kinds you can do the best with.

"The print stamped with our name will all be found alright —Concords & Niagaras now—& Catawbas later.

"Respectfully A. V. MCKEEL"

Harris wrote the following letters:

"220 West Third Street,
"So. Bethlehem, Pa., Sept. 21, 1894.

"Mr. A V MCKEEL

"*Dear Sir:* Rec your grapes and came in very fine condition thought they were very nice Ship me as many as you possibly can of Delawares Concords and Niagaras as they are the best selling grapes in this city got 18c for Delawares wholesale Brightons dont sell very good here also send bill with this order and I will forward you a check for full amount you forgot to state in your letter how much the grapes was write and let me know send bill for full amount and oblige

"Yours Resp
"ROBT. P. HARRIS."

"220 West Third Street,
"So. Bethelehem, Pa., Sept. 29, 1894.

"Mr. A. V. MCKEEL.

"*Dear Sir:* Rec your grapes and also letter grapes were nice you may ship me a car lot of mixed grapes will give you 12c out right for them as they run Nigras Concords Catawbas and Linsleys ship as soon as you possibly can also send bill with grapes for full amount and will forward you a check on receipt of at once also have sent you stencil wire to me at once when you ship at my expence and Oblige

"Yours Resp.
"ROBERT P. HARRIS."

Defendant claimed that he bought the goods outright and did not take them to sell on commission.

The court charged as follows:

"The indictment which you have been sworn to try, charges the defendant, Robert P. Harris, with having received into his possession as consignee, a quantity of grapes belonging to the prosecutor, and with having sold the grapes, and with having appropriated the proceeds of sale fraudulently to his own use.

"[The indictment has been framed under the following act of assembly: "If any consignee or factor having the possession of merchandise, with authority to sell the same, or having possession of any bill of lading, permit, certificate, receipt or order for the delivery of merchandise with the like authority, shall deposit, or pledge such merchandise or document, consigned or intrusted to him as aforesaid, as a security for any money borrowed, or negotiable instrument received by such consignee or factor, and shall apply or dispose of the same to his own use, in violation of good faith, with intent to defraud the owner of such merchandise, and if any consignee or factor shall, with like fraudulent intent, apply or dispose of, to his own use, any money or negotiable instrument, raised or acquired by the sale or other disposition of such merchandise, such consignee or factor in every such case shall be guilty of a misdemeanor, and sentenced to pay a fine, not exceeding two thousand dollars, and undergo an imprisonment, not exceeding five years.]" [4]

"[To constitute this offense, the commonwealth must have satisfied you that the defendant received these grapes as consignee. Many of you among the jury understand what is meant by consignee as distinguished from purchaser. A consignee is a person to whom merchandise or personal property of any kind is committed for the purpose of sale.] [1] Where there is a sale, the title to the property, whether the property is paid for or not, passes to the purchaser, but in the case of a consignment, there the title to the property remains in the consignor, and all that the consignee receives is the right to sell that property for, and on account of, the consignor. [But you know, gentlemen, the difference between a sale of property and a consignment for the mere purposes of a sale.] [2]

"[The first question for you to determine is, what was this contract between the prosecutor and defendant? Was it a sale,

or was it a consignment? That question you will determine from the letters which have been given in evidence on both sides and from all the other facts and circumstances in the case. If you examine these letters and the other facts in the case and you are unable to say whether beyond a reasonable doubt the defendant is guilty or not, then you must give the defendant the benefit of that doubt and return a verdict of not guilty. If, however, after a careful review of all the evidence in the case, you are satisfied beyond a reasonable doubt that the contract was a consignment then you will inquire further whether the defendant sold the property and appropriated the proceeds to his own use with a fraudulent intent.] [3] It is an element in the case that the defendant must have received the property into his possession. There is no dispute about that. That is admitted. There is another element in the case that the defendant must have sold the property. That is also admitted.

"In the third place it is necessary for the commonwealth to satisfy you that the defendant appropriated the proceeds of the property to his own use. It is admitted by the defense that he did appropriate a part of the money received from the sale of these grapes to his own use. If that was done with a fraudulent intent and the property was consigned to him instead of having been sold to him, then it would be your duty to return a verdict of guilty. If, however, you have a reasonable doubt whether the money was appropriated by the defendant with a fraudulent intent, you must give the defendant the benefit of that doubt and return a verdict of not guilty.

"It has been said to you, and very properly, that in the eye of the law this is a very grave and a very serious offense, that is the offense against which this act of assembly is directed. It has been said with reason, that you ought not to convict the defendant upon slight evidence. That is very true and a very proper caution to give to the jury, and I repeat it to you now, as I have in substance said, that you must be satisfied from the evidence beyond a reasonable doubt of the guilt of the defendant; and, if you have a reasonable doubt as to any one of the essential features of this case, you must give the defendant the benefit of that doubt and return a verdict of not guilty.

"But there is another view of the case which it is proper I should call your attention to. Whilst beyond all question in

contemplation of the legislature, this offense of a consignee appropriating property consigned to his own use is a most serious offense, and because it is a most serious offense, if you are satisfied beyond a reasonable doubt of the defendant's guilt, then all the more important it is that the defendant who is guilty of such an offense should not escape the punishment which the enormity of the offense entitles him to receive.]" [5]

The court refused to instruct the jury to find a verdict of not guilty.

Verdict of guilty, upon which the court sentenced the prisoner to pay a fine of one dollar, and to undergo an imprisonment in the county prison for one year.

Errors assigned were (1-6) above instructions, quoting them.

Russell C. Stewart, for appellant.—The defendant was a purchaser of the goods and not a consignee: Com. v. Newcomer, 49 Pa. 478; English act of Geo. IV. c. 94; Wood v. Rowcliffe, 6 Hare, 183; Monk v. Wittenbury, 2 B. & Ad. 484.

We think the court committed clear error in referring to the definition of the word "consignee" as being a matter of no importance, and in giving to the jury the defective definition we complain of in our first assignment of error: Wharton's Criminal Pleading and Practice, 8th ed. sec. 709; Meyers v. Com., 83 Pa. 143.

Instead of telling the jury they were to judge, the court should have construed these written instruments, these letters, and said there was nothing in them to convict the defendant: Com. v. McManus, 143 Pa. 97; Hargrave's note to Coke, Litt. 155; Wharton's Criminal Practice and Pleading, 8th ed. 807.

The court first read the entire section of the act to the jury, gave them the definition and the punishment. Courts should never refer to the punishment prescribed by the act: Com. v. Switzer, 134 Pa. 389: Catasauqua Mfg. Co. v. Hopkins, 141 Pa. 45.

If we are correct in our position that the court should pass on the legal questions, the letters being in writing, the court should have done so, and should have directed the jury to return a verdict of not guilty: Bishop on Criminal Procedure 3d ed. sec. 977; People v. Bennett, 49 N. Y. 137.

A. C. La Barre, district attorney, for the commonwealth.—The contract between the prosecution and the defendant was one of consignment, and Harris was a consignee: 3 Am. & Eng. Ency. of Law, 317; Story on Agency, sec. 33.

The complaint in appellant's argument that the court's instruction to the jury was erroneous because the court did not charge the jury that the acceptance of the trust was necessary to constitute the contract of consignment, is without force, because the defendant's proposition to the prosecutor was in evidence, the prosecutor complied with the proposition, the minds of the parties therefore having met, and because of the acceptance of the grapes by the defendant.

A jury may take out with them any writings that have been given in evidence, without distinction as to sealed or unsealed, except the depositions of witnesses: Alexander v. Jameson, 5 Binn. 238; M'Cully v. Barr, 17 S. & R. 445; Sholly v. Diller, 2 Rawle, 179; Spence v. Spence, 4 Watts, 165.

Although parts of a charge when taken separately may seem to be erroneous and indicate a leaning to one side or the other, there is no error if, taken as a whole, the questions at issue are fairly left to the jury: Reese v. Reese, 90 Pa. 89; Lehigh Valley R. R. v. Brandtmaier, 113 Pa. 610; Reeves v. Del., Lack. & West. R. R., 30 Pa. 454; Irvin v. Kutruff, 152 Pa. 609; Peirson v. Duncan, 162 Pa. 187; Fox v. Fox, 96 Pa. 60; Henry v. Klopfer, 147 Pa. 178.

Opinion by Mr. Justice Mitchell, May 30, 1895:

The law was correctly given to the jury by the learned judge below. The turning point in the case was the capacity in which the appellant received the grapes, whether as consignee or as purchaser. The definition of consignee by the judge was accurate, and sufficiently comprehensive to direct the attention of the jury to the nature of the contract, and the distinction between a consignment for sale on consignor's account and a purchase where the title passed though the goods were not paid for.

Nor was there any error in reading the act of assembly to the jury. It was done at the beginning of the charge as a concise and accurate mode of informing the jury of the exact offense for which the prisoner was on trial. That in reading

the whole section of the act, the judge necessarily informed the jury what the penalty was which the law imposed for the offense, was merely an incidental result, not at all analogous to the specific direction of the jury's attention to the consequences of a verdict of guilty which was held to be erroneous in Com. v. Switzer, 134 Pa. 383; Catasauqua Co. v. Hopkins, 141 Pa. 30 (45); and Rosenagle v. Handley, 151 Pa. 107.

The learned judge in his charge called the attention of the jury to the fact that the law regarded the act of a consignee in appropriating consigned property to his own use, as a very serious offense, which should not escape punishment, but he also cautioned them in equally explicit terms that for the very reason of the seriousness of the charge the prisoner should not be convicted upon slight evidence. We are unable to perceive anything in this of which the appellant has any cause to complain.

On the main issue however we think the case is with the appellant. It is peculiar in the respect that substantially the whole evidence is in writing. The dealings between the prosecutor and the prisoner were entirely by letter and telegram, and the judge submitted the case to the jury on these papers, and "all the other facts and circumstances." These other facts were, first, the shipment of the grapes at prisoner's request and their receipt by him, facts not disputed, but which were equally consistent with guilt or innocence; secondly, failure of the prisoner to make immediate returns, a fact also undisputed but depending for its character on the capacity in which the receipt and sale of the goods were made; and, thirdly, the prisoner's announcement of himself on his letter headings as a commission merchant, and putting his dwelling place in the same heading where it might well be understood as his business address.

This was but a mere makeweight at the most. None of these outside facts and circumstances bore directly on the issue which was the fraudulent appropriation by a consignee or factor of the proceeds of sales of consigned goods. Without a foundation of evidence of this crucial fact all the other matters are immaterial, and the evidence of this fact as already said must be found, if at all, in the writings. The parties never met personally until after the transactions were past, and when they did

meet nothing is testified to by the prosecutor which is material to the issue. We must turn therefore to the letters. The first of these is from appellant to the prosecutor asking to open business with him, and suggesting a "consignment." This word and the printed letter head of "commission merchant" by themselves might as the commonwealth contends sustain the inference that the transaction was a consignment to a factor, but it is plain from the context that the word "consignment" was used in the sense of "shipment," for the offer immediately follows to "handle all the grapes you can possibly ship on commission or will buy outright from you." To this letter the prosecutor replied by telegram "will ship you a mixed lot . . . . For sample," and two days later, by letter announcing the shipment as having been made. Neither telegram nor letter took any notice of the alternative to sell on commission or to buy outright which appellant's letter had offered, nor made any mention of prices or terms either for sale or commission. Both parties seem to have regarded this first transaction as preliminary and experimental, and left it indefinite in all respects. A week later appellant wrote the second letter ordering more grapes of specified kinds, mentioning the price at which he had sold some, "got 18c. for Delawares wholesale," but concluding "send bill with this order and I will forward you a check for full amount you forgot to state in your letter how much the grapes was write and let me know send bill for full amount." While the mention of the price which he got for the Delawares points somewhat towards a sale on commission, this construction is clearly overborne by the call for a bill, the promise to send check for full amount, and the reminder that the shipper had forgotten to state how much the grapes of the first lot were to be. The substantial part of this letter, if not entirely inconsistent with a sale on commission indicates much more clearly a purchase, and was so understood by the prosecutor, for in his answer after acknowledging the receipt of the letter, he says "will ship . . . . and forward bill of the amount" and further on, "write prices of different kinds that you will take." A few days later the appellant wrote the third letter ordering more grapes offering 12 cents outright for mixed lots and repeating the direction to send bill for full amount and the promise to forward check. This closed the transactions. Two days after

the date of the last letter the prosecutor came to South Bethlehem and saw appellant for the first time, but nothing took place between them which throws any light on the transactions by letter, for though the prosecutor testifies that the goods were sent "on commission" yet he nowhere says that fact was communicated to the appellant, and his cross-examination indicates apparently that he used the words "on commission" as synonymous with "on credit."

As already said the case must be sustained, if at all, on the letters. They show that the business was conducted with almost incredible looseness on both sides. The prosecutor did not know what he was to get for his goods, which on his present theory was to depend entirely on what the appellant sold them for, a question he never asked, while on the other hand the appellant on his theory was selling goods without knowing what they had cost him, and whether he was making a profit or a loss. Neither version is consistent with the most ordinary principles of business care and prudence. But looseness of method is not fraud, and something more was necessary to sustain the indictment. The basis of the whole case was fraudulent misappropriation by a consignee or factor, and the commonwealth failed to prove that that was the prisoner's relation to these transactions. Without that foundation there was nothing to which any of the other evidence in the case could be material, and the judge should have affirmed the appellant's request, and directed a verdict of not guilty.

Judgment reversed.

Incorporation of Flemington Borough. Philip H. Walker's Appeal.

Boroughs—Incorporation—Withdrawal of names of petitioners—Reconsideration by grand jury.

It is no ground to set aside proceedings to incorporate a borough that the day after the report of the grand jury was agreed upon and signed by the foreman, but before it was presented to the court, the request of two of the jurors for a reconsideration of the case was refused by the foreman.

At the same time that a petition for the incorporation of a borough was laid before the grand jury, a written request was presented to the court on

behalf of some of the petitioners for leave to withdraw their names from the petition. The court made the following order: "Leave granted to lay the within before the grand jury." *Held*, (1) that the order was not in terms, or by necessary or reasonable implication, leave to the petitioners to withdraw their names; and (2) that at that stage of the proceedings they had no right to withdraw them.

An owner of land who files a specific objection to the inclusion of it in a borough will not be heard to complain that his objection was removed by decree of the court.

Parties who oppose the inclusion of land in a borough cannot object to the exclusion of it on the ground that a formal request to exclude was not made by the owner of it.

Boroughs—Incorporation—Power of court over boundaries.

It seems that the authority given to the court by the act of April 1, 1863, to exclude farm land carries with it the power to make such modification of the boundaries of the proposed borough as the exclusion of the land renders necessary for the protection of all interests concerned. Per McCOLLUM, J.

Argued March 19, 1895. Appeal No. 84, July T., 1894, by Philip H. Walker et al., from order of Q. S. Clinton Co., Sept. T., 1892, No. 1, Miscellaneous Docket, incorporating the borough of Flemington. Before STERRETT, C. J., GREEN, WILLIAMS, McCOLLUM and FELL, JJ. Affirmed.

Petition for the incorporation of a borough.

From the record it appeared that on May 11, 1892, the grand jury filed a report in favor of incorporating the borough in accordance with the prayer of the petitioners.

The following exceptions were filed to the report.

"1. The return handed in to the court was not the finding of the majority of the grand jury. A vote was taken the day before the return was made, which resulted in a majority of one in the grand jury in favor of the borough. After the adjournment two of the grand jurors who had voted in favor of the borough desired to change their vote, and consulted counsel not concerned upon either side as to their right to have the finding reconsidered, and he advised them that they had such right. They sent then for one of the witnesses called by the remonstrants, to appear before the grand jury, the next morning, and when he came, at their request, they informed him of their intention to change their votes. When the grand jury met the next morning they requested a reconsideration of

the case, which the foreman refused, stating that he had signed the return, and it was too late to reconsider, after which the foreman handed in the return as it now stands. [1]

"2. A clear majority of the freeholders residing within the limits of said proposed borough were not petitioners for the same. At the time the petition was submitted to the grand jury it was signed by eighty-nine persons, of whom eleven had withdrawn their names by leave of court, seventy-eight remaining as petitioners. The remonstrance was signed by sixty-five persons besides the eleven who had withdrawn their names from the petition, making seventy-six who were then opposed to the borough. A considerable number of the petitioners were not freeholders, so that a majority of the freeholders then appeared as opposing the borough. Since the hearing before the grand jury six more of the petitioners have withdrawn their names, so that now, of the alleged freeholders residing within said limits, eighty-two are opposed to the borough and seventy-two in favor of it. [2]

"3. The village of Flemington is at one end of the territory proposed to be incorporated, and does not cover much, if any, over one third of said territory. At the other end said territory comes up to the line of the city of Lock Haven. A considerable portion, probably one third, of the residents within the lines of the proposed borough live on the hill adjoining the city of Lock Haven, forming geographically part of said city, and separated from the village of Flemington by nearly half a mile of territory, which is altogether used for farm land, with but few houses; the said residents adjoining Lock Haven being, with one exception, unwilling to be included in said borough. [4]

"4. A large amount of farm land, not included within the village of Flemington, or needed for borough purposes, is included within the proposed limits. There are three public roads leading from Lock Haven to Flemington. The one turns off from Fairview street at the house of Alexander Montgomery, turns to the left about half way from the city to the village of Flemington, till it reaches the turnpike, then immediately leaves the turnpike, going over the hill to the right, till it enters Flemington. This road lies all the way between Alexander Montgomery's house and the village of Flemington through farm lands. The middle road, known as the turnpike, is built up

about one and a half squares from the Lock Haven city line, and is within the limits of Price's addition to Lock Haven. It then passes for a quarter of a mile through farm lands before entering the village of Flemington. The third road leads a ound the hill in the direction of the canal, and runs for half a mile through farm land, there being but four houses from the city line to Sturdevant street in Flemington.

"There are two cross streets laid out on the plot of Price's addition to Lock Haven, and opened, on the right side of the turnpike, going away from Lock Haven, extending one square to the right, with which exception there are no cross streets between the city of Lock Haven and the town of Flemington, on any of said roads." [5]

MAYER, P. J., filed the following opinion on the exceptions:

"We have carefully considered the exceptions filed to said application and the testimony bearing on the same.

"The first of the exceptions cannot be considered for the reason that the court is bound to accept the return of the grand jury, and cannot take into consideration what occurred after the grand jury had made their finding.

"As to the second exception, we are satisfied, after carefully reading the testimony, that the weight of evidence shows that the requisite number of freeholders signed the original petition in order to give the court jurisdiction. [After the petitioners had signed the original petition and it was laid before the grand jury they could not withdraw their names so as to defeat the application.] [3] The second exception is therefore not sustained.

"[As the court has changed the boundary of the proposed borough by a new line, excluding from the borough that portion adjoining the city of Lock Haven, which will meet the objection raised by the third exception, the new boundaries, as fixed by the decree to be entered, will also remove the objections raised by the fourth exception.] [6]

"All the exceptions are, therefore, overruled."

Errors assigned were (1, 2, 4, 5) in overruling exceptions, quoting exceptions as above; (3, 6) portions of opinion as above; (7, 8) in decreeing the incorporation of the borough.

Charles Corss, for appellants.—In ordinary cases the proceedings of the jury are private and their findings conclusive, and the court will not go behind them. The hearing in this case was however public, and was in fact attended by all who took an interest in the case. The finding was not authoritative, or binding upon the court, but advisory only.

The petition for a borough and the withdrawal of the petition were referred as one paper to the grand jury, by an indorsement identically the same upon each, viz: "11 May, 1892, leave is granted to lay the within before the Grand Jury. By the Court, JOHN A. SITTSER, P. J.," and both papers were marked "filed May 11, 1892." Judge SITTSER knew when the withdrawal petition was presented to him, whether it was too late, and had it been so, would have refused it. All things are presumed to be rightly done in a court of justice and it will not be presumed that Judge SITTSER made the order too late, and when he had no right to make it, without any proof whatever.

The court should have sustained the exception against incorporating into a borough territory, of which one half was used exclusively for farming purposes, and also the exception against incorporating into one borough two distinct villages, one a part geographically of the city of Lock Haven: Duquesne Bor., 147 Pa. 67; Tullytown Bor., 1 Dist. Rep. 295.

The majority which gives jurisdiction must be a clear majority, not depending upon a shifting to one side or the other of two or three names, or upon the reconciling of conflicting testimony, or upon the credibility of the respective witnesses: Taylorsport Borough, 21 W. N. C. 534.

H. T. Harvey, for appellees.—Grand jurors will not be permitted to testify or give information relative to the proceedings which occurred before the grand jury: Zeigler v. Com., 22 W. N. C. 111; State v. Baker, 20 Mo. 338; Thomas & Merriman on Jurors, 742.

The legislature have vested in the court and grand jury the discretion to determine whether or not the conditions prescribed by law to entitle the petitioners to be incorporated into a borough have been complied with: Rand v. King, 134 Pa. 641; Blooming Valley Borough, 56 Pa. 66; Tailor Borough, 160 Pa. 479.

The court may confirm the charter of the borough and at the same time modify the boundaries so as to protect the right of surrounding landowners and do justice to all the interests to be affected: Tullytown Borough, 1 Dist. Rep. 292.

Though the opinion of the grand jury is of great assistance in determining disputed questions of fact the court must exercise an independent judgment: Edgewood v. Borough, 130 Pa. 348; Incorporation of Lehman, 4 Pa. C. C. 37; Sworesville Borough, 5 Kulp, 171.

OPINION BY MR. JUSTICE MCCOLLUM May 30, 1895:

The parties who complain of the exclusion of territory the inclusion of which constituted their most material objection in the court below to the incorporation of the proposed borough cannot be justly accused of an undue regard for consistency in their efforts to defeat it. There is nothing in the record which shows that they were residents of the borough as incorporated, or that any resident of it excepts to the decree of incorporation. If therefore they have any standing to contest the decree we may fairly infer that it is as residents or taxpayers of the township affected by it. But as the township was not prejudiced by a modification of boundaries which saved to it a tract of valuable land they ought to base their attack on the decree on other grounds if any appear in the record to warrant it. We are not prepared to say that parties who opposed the inclusion of the land can object to the exclusion of it on the ground that a formal request to exclude it was not made by the owners of it. An owner who requested that his land be excluded from the proposed borough would not be allowed to attack the decree of incorporation on the ground that his request was complied with, and if in lieu of a formal request he filed a specific objection to the inclusion of it he ought not to complain that his objection was removed by the decree.

Speaking for myself, only, the authority given to the court by the act of April 1, 1863, to exclude farm land, carries with it the power to make such modification of the boundaries of the proposed borough as the exclusion of the land renders necessary for the protection of all interests concerned, and there was no misuse of this power in the case at bar.

More than four months after the grand jury reported in favor

of the proposed borough, an exception was filed alleging that the day after the report was agreed upon and signed by the foreman, but before it was presented to the court, two of the jurors requested a reconsideration of the case, but did not obtain it. We discover no error in the ruling on this exception. Nor do we think any error was committed in overruling the second exception. In that it was alleged that, at the time the petition for the incorporation of the borough was submitted to the grand jury, a sufficient number of petitioners had withdrawn their names from it, by leave of court, to defeat the application. The record does not show that any of the petitioners withdrew their names from the petition or that leave was granted to them by the court to withdraw their names from it. This alone is a sufficient answer to the exception. But the exception was not supported by the evidence. An attempt was made to show that on the day the petition was laid before the grand jury a written request was presented to the court in behalf of some of the petitioners for leave to withdraw their names from the petition, on which request Judge SITTSER made the following indorsement: "11 May 1892 leave granted to lay the within before the grand jury." This indorsement was not in terms or by necessary or reasonable implication leave to withdraw their names. Besides at that stage of the proceedings they had no right to withdraw them. But we need not further discuss or consider the evidence submitted in support of the exceptions. It has been duly considered and passed upon by the court below. All the jurisdictional facts appear upon the record and we find nothing in it to require us to reverse the decree. We therefore overrule the specifications.

Decree affirmed.

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180 176

168 634
23 SC 599

168 634
208 581

168 634
34 SC 399

William McFarland *v.* Henry G. Schultz and William McGall, Appellants.

Mechanic's lien—Subcontractor—Lumping charge—Amendment.

A subcontractor must specify the items of his claim for work or material, and a lumping charge for either does not satisfy the requirement of the statute, and should be stricken off on motion.

Such a defect is not purely formal, it is substantial, and it cannot be remedied by an amendment made after the expiration of the time allowed for filing the lien.

Argued March 26, 1895. Appeal, No. 86, Jan. T., 1895, by defendants, from judgment of C. P. No. 2, Phila. Co., March T., 1893, No. 101, M. L. D., on verdict for plaintiff. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, MITCHELL and DEAN, JJ. Reversed.

Scire facias sur mechanic's lien.

From the record it appeared that the following claim was filed on April 21, 1893:

"The said William McFarland (carter and digger) files this claim for $158.60 against all those sixteen contiguous three-story brick dwelling houses and lots or pieces of ground situate on the west side of Seventh street, commencing at 200 feet north from the north side of Somerset street, Thirty-third ward, Philadelphia, and more particularly described as follows:

1.	W. side 7th St.,	200 ft.	N. from	N. side Somerset St.,	14 ft.	× 66 ft.
2.	"	214	"	"	"	"
3.	"	228	"	"	"	"
4.	"	242	"	"	"	"
5.	"	256	"	"	"	"
6.	"	270	"	"	"	"
7.	"	284	"	"	"	"
8.	"	298	"	"	"	"
9.	"	312	"	"	"	"
10.	"	327	"	"	15 ft.	"
11.	"	342	"	"	"	"
12.	"	357	"	"	"	"
13.	"	372	"	"	"	"
14.	"	387	"	"	"	"
15.	"	402	"	"	"	56 ft.
16.	"	417	"	"	"	68 ft.

Apportioned as follows:

1 to 8 inclusive, each $10.00
9 to 12 inclusive, each 9.88
13 to 16 inclusive, each 9.77

"The said sum of $158.60 being a debt contracted for work and labor done, to wit: grading and digging lots, and carting away dirt from the same.

"The said work and labor having been done and performed

at the request of the said owner by William McGall, contractor, within six months last past, for and towards the erection and construction of and upon the credit of said buildings, under and in pursuance of a verbal agreement between the said William McFarland and William McGall, contractor as aforesaid.

"The said work and labor having been done and performed for and toward the erection and construction of the said buildings between Aug. 29, 1892, and Oct. 22, 1892, and the said McFarland claims to have a lien upon said buildings according to the act of assembly, etc.

No. 1.	Described as above,	$10 00
No. 2.	" " "	10 00
No. 3.	" " "	10 00
No. 4.	" " "	10 00
No. 5.	" " "	10 00
No. 6.	" " "	10 00
No. 7.	" " "	10 00
No. 8.	" " "	10 00
No. 9.	" " "	9 88
No. 10.	" " "	9 88
No. 11.	" " "	9 88
No. 12.	" " "	9 88
No. 13.	" " "	9 77
No. 14.	" " "	9 77
No. 15.	" " "	9 77
No. 16.	" " "	9 77
		$158 60

"WILLIAM McFARLAND,
"By his Attorney
"SAML. J. FARROW."

On May 20, 1893, the court discharged a rule to strike off the lien. On June 13, 1893, by permission of the court an amended lien was filed specifying the items of the claim.

At the trial the court gave binding instructions for plaintiff.

Verdict and judgment for plaintiff. Defendants appealed.

Errors assigned were (1) order discharging rule to strike off lien; (2) allowing amended claim to be filed; (3, 4) instructions for plaintiff as above.

M. J. O'Callaghan, for appellants, cited: Russell v. Bell, 44 Pa. 47; Lee v. Burke, 66 Pa. 336; Fahenstock v. Speer, 92 Pa. 146; Fourth Av. Baptist Church v. Schreiner, 88 Pa. 124; Knox v. Hilty, 118 Pa. 430; act of June 11, 1879, P. L. 122; Jobsen v. Boden, 8 Pa. 463; Harlan v. Rand, 27 Pa. 511; Titusville Iron Works v. Keystone Oil Co., 122 Pa. 627; Brown v. Cowan & Steele, 110 Pa. 588; Duff v. Hoffman, 63 Pa. 191; Schenck v. Uber & Tees, 81 Pa. 31.

Samuel J. Farrow for appellee, cited: Chapel v. Baer, 3 Penny. 530; Singerly v. Doerr, 62 Pa. 9; Wentroth's App., 82 Pa. 469; Hill v. Newman, 38 Pa. 151.

Opinion by Mr. Justice McCollum, May 30, 1895:

We think it is clear that the claim filed in this case was fatally defective and that the rule to strike it off should have been made absolute. It did not adequately set forth the nature and kind of the work done nor when it was done. The claimant was a subcontractor and bound to strict compliance with the provisions of the statute on which he relied for his lien. The reasons for exacting such compliance were clearly stated by Strong, J., in Russell v. Bell, 44 Pa. 47, and need not be repeated here. It has been repeatedly held by this court that a subcontractor must specify the items of his claim for work or materials and that a lumping charge for either does not satisfy the requirement of the statute and should be stricken out on motion. If authority for the foregoing views is needed it will be found in Russell v. Bell, supra; Lee v. Burke, 66 Pa. 336; Fahnestock v. Speer, 92 Pa. 146; Brown v. Myers, 145 Pa. 17. The learned counsel for the claimant appears to have recognized the existence of the defects referred to, because, after the rule to strike off the lien was discharged, he sought to cure them by an amendment which was allowed by the court on his motion. It seems now that he relies on this amendment as an answer to the first specification of error. Assuming that the claim as amended would have been sufficient if filed in time the question arises whether the amendment was admissible after the time allowed for filing the claim had expired. He contends that it was and, as sustaining his contention, cites: Chapel v. Baer, 3 Penny. 530. While the report of the case

cited shows that the amendment was made after the expiration of the time allowed for filing the lien, there is nothing in it which indicates that the question we are considering was raised or discussed. The briefs of counsel and the per curiam opinion show that the principal contention related to the nature of the defects which were amendable under the act of June 11, 1879, P. L. 122, rather than to the time when amendments which were admissible could be made. We think, from the report of the case, that the question now before us was not raised in or decided by it.

The statement of the claim in substantial conformity with the statute has hitherto been considered as essential to the validity of the lien. The statute in this particular is mandatory and compliance with it within the time allowed for filing the claim is necessary to the continuance of the lien it gives. The defects in the claim under consideration are not purely formal, but they are substantial and such as were held in Singerly v. Cawley, 26 Pa. 248, to be incurable.

Our conclusion is that the defects were such that the court should have struck off the lien, and that the amendment was not warranted by the act of 1879. In this conclusion we are in accord with our construction of the act in Knox v. Hilty, 118 Pa. 430. We therefore sustain the first and second specifications of error, and, as this renders discussion of the other specifications unnecessary, we dismiss them without comment.

The judgment is reversed, and the rule to strike off the lien is reinstated and made absolute.

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189 150

Abbie Hicks, Administratrix of Henry Hicks, Deceased, v. National Bank of Northern Liberties.

Set-off—Decedents' estates—Executors and administrators.

In an action by the administrator of a solvent estate the defendant may set off against the claim of the plaintiff a debt due by the decedent when the suit was brought: Chipman v. Ninth Nat. Bank of Phila., 120 Pa. 86, distinguished.

Argued March 27, 1895. Appeal, No. 100, Jan. T., 1895, by defendant from order of C. P. No. 2 Phila. Co., June T., 1894,

No. 782, making absolute a rule for judgment for want of a sufficient affidavit of defense. Before STERRETT, C. J., WILLIAMS, MCCOLLUM, MITCHELL and DEAN, JJ. Reversed.

Assumpsit to recover the amount of a deposit.

Joseph Moore, president of defendant bank, filed an affidavit of defense in which he averred:

"The said Henry Hicks, deceased, was a depositor in our bank and at the time of his death, which occurred on June 24, 1894, there was standing to his credit on the books of the bank a balance of $234.73.

"I am informed, believe, and expect to be able to prove that the said Henry Hicks was, at the time of his death, solvent, as I have in my possession a statement of his assets and liabilities which he furnished to the bank shortly before his death, showing that he was then entirely solvent, with assets largely in excess of his liabilities. And I believe, and therefore aver, that when the settlement of his estate shall be made, and the account of his administratrix shall have been settled in the usual way in the orphans' court, it should appear that his estate is solvent and able to pay his indebtedness.

"Shortly after his death, several promissory notes, which had been discounted for him on the faith of his said deposit in our bank, and for which the said deposit was held as payment, fell due, but were protested and are unpaid, as follows: . . . .

"Under the understanding which we had with Henry Hicks in his lifetime, and which he had confirmed by his own act, we set off these notes as they fell due against the said balance of $234.73, and other deposits subsequently made, and hereinafter referred to, and charged up the same upon the books of the bank. On July 3, 1894, letters of administration were granted to the plaintiff in this case.

"On June 28th the said Abbie Hicks deposited in the regular account, and to the credit of the said Henry Hicks, for the purpose of the business, $132.78, and on July 2d, upon the demand of the bank, for the purpose of paying off a protested discounted note, she deposited checks amounting to $340.27, of which $31.96 was credited as cash, and the remainder when it was collected from out-of-town banks as follows:

On July 5th,	$237 66
On July 10th,	11 91
On July 18th,	58 74

"The said defendant, therefore, is not indebted to the said plaintiff in any amount whatever, but, on the contrary, the estate of Henry Hicks is indebted to said defendant for a balance of $2,044.84 exclusive of accrued interest."

The court made absolute a rule for judgment for want of a sufficient affidavit of defense.

Error assigned was above order.

William Henry Lex for appellant.—If decedent was solvent the debt may be set off whether it fell due before or after his death: Bosler v. Exchange Bank, 4 Pa. 32; Bank v. Shoemaker, 11 W. N. C. 215; Thomas v. Winpenny, 13 W. N. C. 93; Skiles v. Houston, 110 Pa. 254.

Charles F. Linde, for appellee, cited: Chipman v. Ninth Nat. Bank, 120 Pa. 88; Light v. Leininger, 8 Pa. 405; Farmers' and Mechanics' Bank App., 48 Pa. 57.

Opinion by Mr. Justice McCollum, May 30, 1895:

It is a well-settled rule, supported by reason and authority, that in an action by the administrator of a solvent estate the defendant may set off against the claim of the plaintiff a debt due by the decedent when the suit was brought. In such a case no valid reason appears for compelling the defendant to pay what he does not owe and look to his debtor's estate for the repayment of it. By requiring him to do so the commissions of the administrator may be increased at the expense of the estate and the defendant may be driven to an action against it for money he paid under compulsion of the law. It will thus be seen that the probable result of a departure from the rule above stated would be to delay the settlement of the estate, to increase litigation, and to subject the parties concerned to additional and unnecessary trouble and expense in the adjustment of the accounts between them.

It was thought by the learned court below that the rule we are considering was overthrown by Chipman v. Ninth National

Bank of Phila., 120 Pa. 86, which was an action by an assignee for the benefit of creditors to recover deposits made by the assignors with the defendant, and in which it was held that drafts and notes discounted for them before and maturing after their assignment were not admissible as a set-off. In this case the familiar rule that, in an action by the administrator of an insolvent estate, the debts of a decedent maturing after his death are not admissible as a set-off, was applied, and properly so. An assignment for the benefit of creditors is a badge of insolvency. It is presumably made because the assignor is not able to pay his debts as they became due in the ordinary course of his business. Chipman v. The Bank, supra, did not consider or allude to the rule as to set-off in actions by administrators of solvent estates, but dealt with an insolvent estate and the rights of the assignor's creditors in it. The cases cited in the brief of the plaintiff's counsel enforced the rule as to set-off in actions by insolvent estates, and recognized the rule applicable to it in actions by solvent estates, and in the opinion of the court, Beckwith v. The Union Bank, 9 N. Y. 211, which was an action by an assignee for the benefit of the creditors of an insolvent firm, was cited as like the case then under consideration. We conclude that Chipman v. The Bank is not in conflict with the defendant's contention in the case before us.

A motion for judgment for want of a sufficient affidavit of defense is in the nature of a demurrer. It admits the existence of the facts averred and denies their sufficiency as an answer to the claim. By the affidavit filed in this case it sufficiently appears that Henry Hicks was solvent at the time of his death, and that the defendant has valid claims against his estate, some of which matured before the suit was brought. It follows from what has been said that it was error to enter the judgment appealed from.

Judgment reversed and procedendo awarded.

Emma P. Beynon, Appellant, *v.* Pennsylvania R. R.

Negligence—Railroads—Crossings—"Stop, look and listen."

In an action to recover damages for the death of plaintiff's husband a nonsuit entered for contributory negligence will be sustained, although the case is a close one, where the plaintiff's evidence shows that the deceased approached a railroad crossing in a wagon; that he stopped about five or ten feet from the track, at a point where the track, when not obscured by mist or smoke, could be seen for a distance of from 900 feet to a mile; that there was a slight mist, and the track was obscured by smoke for 100 feet from where he was when he began to cross, walking his horses; that he was struck after he had passed four tracks; that no signal was given by the train which struck him, and that the speed of the train was about forty miles an hour.

Argued April 3, 1895. Appeal, No. 234, Jan. T., 1895, by plaintiff, from judgment of C. P. No. 3, Phila. Co., March T., 1893, No. 160, refusing to take off nonsuit. Before STERRETT, C. J., GREEN, MITCHELL, DEAN and FELL, JJ. Affirmed.

Trespass to recover damages for the death of plaintiff's husband. Before FINLETTER, P. J.

At the trial the court entered a compulsory nonsuit.

In the opinion refusing to take off nonsuit, FINLETTER, P. J., stated the facts to be as follows:

"The facts in this case are undisputed and certain. On the 2d of February 1893, at 5.30 P. M., the husband of the plaintiff was crossing the railroad at Fuller's Lane and was killed by a passenger train on track No. 1. He had passed over four tracks.

"He had stopped about five or ten feet from the track and had looked in the direction from which the train came. He was in a wagon and the witness Watson was on horseback a little behind. There was a slight mist and a not very high wind, but the tracks when not obscured by smoke could be seen from 900 feet to a mile. The track was obscured by smoke about 100 feet from where they stood when they began to cross, walking their horses. The distance from where they stopped to look to a place of safety was about fifty feet.

"There was no evidence that the defendant whistled or rung the bell or had a headlight, and they were in this respect negligent. The rate of speed was forty miles an hour, but there is no evidence that it was unusual or immoderate.

"The nonsuit was entered because the plaintiff's husband was negligent."

GORDON, J., in a dissenting opinion stated the facts as follows:

"The man who was killed approached the railroad crossing in his wagon about twilight of a misty day. The evidence was explicit that he twice stopped and looked and listened, the last time at the edge of the tracks, which he then proceeded to cross, but was struck by an express train running at the rate of forty miles an hour. He had safely crossed four tracks before he was struck. A fellow traveler on horseback crossed all the tracks without injury. No whistle was blown from the engine, no bell was rung until the train was almost at the crossing, and there was no headlight. The points at which the injured man stopped to look and listen were, in the ordinary condition of the tracks, proper places for the performance of that legal duty, as they permitted a clear view of 900 feet. At the time of the accident, however, a freight train which had passed by had left a cloud of smoke and steam hanging over the track on which the train that struck the man was approaching. This obscured the view, so that this track was not clearly open to vision for more than about 100 feet beyond the crossing, when the man last stopped to look. A freight train also passing still further down the track partially obstructed the view."

Error assigned was refusal to take off nonsuit.

D. Stuart Robinson, for appellant.—Decedent complied with the rule laid down in Beale v. Penna. R. R., 73 Pa. 504; R. R. v. Feller, 84 Pa. 226; Carroll v. R. R., 12 W. N. C. 348; Neimann v. Del. & Hud. Canal Co., 149 Pa. 92: Carr v. R. R., 99 Pa. 505. Kraus v. R. R., 139 Pa. 272, is not applicable to the facts of this case.

David W. Sellers, for appellee.

PER CURIAM, May 30, 1895:

This is a close case, but we are not convinced that the court below erred in holding, as matter of law, that the deceased, Dana R. Beynon, was guilty of contributory negligence in attempting to cross defendant company's tracks at the time and under the circumstances shown by the evidence; and hence the rule to take off the judgment of nonsuit was not improperly discharged.

Judgment affirmed.

Manhattan Brass Co., Appellant, *v.* Albert P. Reger.

Sale—Rescission—Misrepresentations—Partnership.

Where a partnership makes a false statement to a mercantile agency and subsequently is dissolved and a new firm is organized under the same name, and goods are sold to the new firm before the statement to the mercantile agency comes to the knowledge of the vendor, the sale of the goods cannot be subsequently rescinded by the vendor, on the ground that the statement to the mercantile agency was false.

Argued April 12, 1895. Appeal, No. 18, Jan. T., 1895, by plaintiff, from judgment of C. P. No. 2, Phila. Co., June T., 1891, No. 903, on verdict for defendant. Before GREEN, WILLIAMS, MCCOLLUM, DEAN and FELL, JJ. Affirmed.

Sheriff's interpleader to determine the ownership of goods taken in execution.

The facts appear by the opinion of the Supreme Court.

The court gave binding instructions for defendant.

Verdict and judgment for defendant. Plaintiff appealed.

Error assigned was above instruction.

John Sparhawk, Jr., for appellants.

Charles Francis Gummey, Jr., *M. Hampton Todd* with him, for appellee.

OPINION BY MR. JUSTICE FELL, May 30, 1895:

For some years prior to March 1, 1891, P. A. Reger and C. A. Reger were partners trading as Perry A. Reger & Bro. On the date named the partnership was dissolved, and a new partnership, the members of which were P. A. Reger and C. T. Hickman was formed, and the same firm name was retained. The statement as to the financial condition of Perry A. Reger & Bro., which it is claimed was the basis of the credit given, was made by the old firm to a mercantile agency on Dec. 30, 1890, and not communicated to the plaintiff until July 30, 1891. The merchandise in question was sold to the new firm in June, 1891.

From these facts it follows that the learned judge was clearly right in directing a verdict for the defendant in the interpleader. The right to rescind the contract of sale was based upon the alleged falsity of a statement made not in relation to the defendant in the execution, but in relation to another party, and not communicated to the plaintiff until after the goods were sold. The facts do not raise the legal questions elaborately argued by the appellant's counsel, and it is unnecessary to consider them.

The judgment is affirmed.

John Brady *v.* Prudential Insurance Co., Appellant.

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Insurance—Life insurance—Suit on policy—Time limit.

A stipulation in a policy of life insurance that, "if the insured shall die three or more years after the date hereof, and after all due premiums shall have been received by the company, the policy shall be incontestable," does not relieve the beneficiary from the necessity of bringing suit on the policy within six months from the death of the assured, as required by a clause of the policy providing that "no suit or action at law or in equity shall be maintainable unless such suit or action shall be commenced within six months after the decease of the person insured; and it is expressly agreed that should any such suit or action be commenced after the expiration of six months the lapse of time shall be deemed conclusive evidence against the validity of such claim."

Argued April 15, 1895. Appeal, No. 149, July T., 1894, by defendant, from judgment of C. P. Luzerne Co., Oct. T., 1890,

No. 494, on verdict for plaintiff. Before STERRETT, C. J., GREEN, WILLIAMS, MCCOLLUM and MITCHELL, JJ. Reversed.

Assumpsit on a policy of life insurance. Before LYNCH, J.

At the trial it appeared that the policy in suit was dated April 21, 1884. The assured died on May 4, 1888. The present suit was begun on Aug. 1, 1890. The policy contained the following provisions:

"Ninth. No suit or action at law or in equity shall be maintainable to enforce the performance of this contract until after the filing in the principal office of the company of the above mentioned proof of death, nor unless such suit or action shall be commenced within six months next after the decease of the person insured under this policy; and it is expressly agreed that should any suit or action be commenced after the expiration of said six months, the lapse of time shall be deemed as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

"Twelfth. If the insured shall die three or more years after the date hereof, and after all due premiums shall have been received by the company, this policy shall be incontestable."

The court charged in part as follows:

"The court instructs you that the ninth clause of this policy, providing that suit must be commenced within six months after death, is qualified and controlled, so far as this case is concerned, by the twelfth clause, and that the ninth clause has reference to suit upon a policy that had not been issued three years before the death of the insured. When the death did not occur until more than three years after the date of the policy, the ninth clause does not apply, and it is not essential that suit be commenced within six months after the death of the assured." [6]

Defendant's point among others was as follows:

"1. That the policy offered in evidence contains a condition that no suit or action at law or in equity shall be maintainable to enforce the performance of this contract, unless such suit or action shall be commenced within six months next after the decease of the person insured under this policy, and the insured having died on the 4th day of May, 1888, this suit having been

brought on the 1st day of August, 1890, which was more than six months after the death of the insured, the failure to bring this suit within six months after the death of the insured is a bar to this action, and the verdict must be for the defendant. Answer: That point is refused." [1]

Verdict and judgment for plaintiff for $625. Defendant appealed.

Errors assigned among others were (1, 6) above instructions, quoting them.

E. F. McGovern, for appellant.—The failure to bring the suit within six months after the death of the insured was a bar to recovery: Cray v. Hartford Fire Ins Co., 1 Blatch. (U. S.) 280; Steen v. Niagara Fire Co., 42 Am. Rep. 297; Thomas v. Prudential Ins. Co., 148 Pa. 594; Warner v. Ins. Co., 1 Walker, 315; Wilson v. Ins. Co., 27 Vt. 99; Hocking v. Howard Ins. Co., 130 Pa. 170; 2 Chitty on Const. 1214; Farmer's Mut. Ins. Co. v. Barr, 94 Pa. 345; Waynesboro Mut. Fire Ins. Co. v. Conover, 98 Pa. 384; Universal Ins. Co. v. Weiss, 106 Pa. 20; Riddlesbarger v. Ins. Co., 7 Wall. 386; Starck Admr. v. Union C. L. Ins. Co., 134 Pa. 45; Wilkinson v. Ins. Co., 72 N. Y. 499; Williams v. Vt. N. Fire Ins. Co., 20 Vt. 222.

D. L. O'Neill, *W. H. Hines* with him, for appellee.—It is a cardinal rule of interpretation that effect should, if possible, be given to each and every part of a contract, so that it may stand as a whole and carry out the intention of the parties: Ins. Co. v. Cropper, 32 Pa. 356.

The condition of the policy being against the statute of limitations of this state, against justice and common right, and being the language of the insurer, it must be construed strictly against her and in favor of the insured: Phila. Tool Co. v. Assurance Co., 132 Pa. 236; Grandin v. Ins. Co., 107 Pa. 38; Ins. Co. v. Mund to use of Biddle, 102 Pa. 94; Imperial Ins. Co. v. Dunham, 117 Pa. 460; Ins. Co. v. Hoffman, 125 Pa. 626; Merrick v. Ins. Co., 54 Pa. 277; Stafford v. Walker, 12 S. & R. 190; Ins. Co. v. Tomlinson, 125 Ind. 84; Baley v. Ins. Co., 80 N. Y. 21; Richards on Ins. sec. 43, p. 53; Livingston v. Sickles, 7 Hill, 253; Ins. Co. v. Brock, 57 Pa. 74; Bole v. Ins. Co.,

159 Pa. 56; Dougherty v. Ins. Co., 154 Pa. 385; Roe v. Ins. Co., 149 Pa. 94; Krug v. Ins. Co., 147 Pa. 272; Pickett v. Ins. Co., 144 Pa. 79; Doud v. Ins. Co., 141 Pa. 47; Humphreys v. Benefit Association, 139 Pa. 264; Mears v. Ins. Co., 92 Pa. 15.

In Western Insurance Co. v. Cropper, 32 Pa. 351, it was held "if an exception in a policy be capable of two interpretations equally reasonable, that must be adopted which is most favorable to the assured, for the language is that of the insurers." This principle is recognized and approved in Edwards v. Metropolitan Life Ins., 5 Kulp, 259; Com. v. Ins. Co., 2 Lanc. 253; Ames v. N. Y. Union Ins. Co., 14 N. Y. 253; The Mayor &c. v. Hamilton Fire Ins. Co., 39 N. Y. 45; Miller v. Hartford Fire Ins. Co., 70 Iowa, 704; Coursin v. Penna. Ins. Co., 46 Pa. 323; Swartz v. Ins. Co., 39 L. I. 264; Commonwealth Ins. Co. v. Berger et al., 42 Pa. 292; Insurance Co. v. O'Maley, 82 Pa. 401; Teutonia Ins. Co. v. Mund to use of Biddle, 102 Pa. 89; Hoffman v. Ætna Ins. Co., 32 N. Y. 405.

Opinion by Mr. Justice Williams, May 30, 1895:

The sixth assignment of error directs attention to the controlling question in this case. In the policy of insurance sued on the ninth clause contains the following provisions, "No suit or action at law or in equity shall be maintainable unless such suit or action shall be commenced within six months next after the decease of the person insured; and it is expressly agreed that should any such suit or action be commenced after the expiration of six months the lapse of time shall be deemed conclusive evidence against the validity of such claim." The action was not brought within the time so limited. This fact was relied upon by the defendant as an answer to the action. The learned judge of the court below held that the provision was a valid one, and was binding upon the plaintiff unless he was relieved from its operation, under the circumstances of this case, by a waiver or by some other stipulation contained in the agreement.

The twelfth clause in the same policy contained this stipulation: "if the insured shall die three or more years after the date hereof, and after all due premiums shall have been received by the company, the policy shall be incontestable." This stipulation the learned judge held relieved the plaintiff from the bar of the limitation imposed by the ninth clause and

opened the way to a recovery. If the insured had died before the end of three years after the date of his policy then the limitation of the right to sue after six months would have been, in the view of the learned judge, a good defense; but having survived three years and the policy having become incontestable the right to defend upon the agreed limitation was gone. The correctness of this exposition of the twelfth clause in the policy is the question presented on this appeal. In considering this question, it is important to remember that the application for insurance and the acceptance of it by the company, which is evidenced by the policy, constitute, when taken together, the contract. If the representations as to age, state of health, or general physical condition, on which the policy was issued, turn out to be untrue, the right of his representative to recover may be contested for that reason and the company may deny its liability under a policy so obtained. The twelfth clause puts a limit upon the time when such objections may be made. If the insured lives for three years and pays all moneys due from him in the meantime, then the statements made in the application are taken to be true. They are no longer contestable. The policy is to be held to be a good and valid contract binding upon the company according to its terms. In case of death happening after three years, the policy, if suit be brought upon it, is not to be defeated by inquiry into representations on which it was based, but the company must be held to performance. What then is the undertaking of the company? It is to pay if suit be brought within the time stipulated and proper proofs of death are produced. But suppose the proofs of death are not sufficient. The right of the company to contest its liability on that ground is not affected by the twelfth clause. So if the action is not brought within the time fixed, the company may contest, not the policy but the plaintiff's right to recover upon it, for that reason. In this case therefore the plaintiff started with an incontestable policy. The defendant said, by way of reply to the action, "yes, you have a valid policy, but you have not brought your action within the time you agreed to." This was prima facie a defense, and the burden was thereby cast upon the plaintiff to show some reason why he was not bound by his own covenant. Unless he did this to the satisfaction of the court and jury he could

not recover. The provision in the ninth clause which was relied upon to show that the policy was incontestable did not amount to a confession of judgment. It did not deny to the company the right to defend against an action brought upon the policy, except in so far as the defense might rest on a denial of the validity of the policy itself. All other lines of defense remained open to it.

The learned judge gave altogether too broad a scope to the stipulation in the twelfth clause. Under his exposition it not only closed the doors against inquiry into the statements and representations in the application, but it closed the doors against all other defenses.

It made not the policy only, but the right to recover, incontestable. This was error, and for this reason the judgment is now reversed and a venire facias de novo awarded.

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1. *Sufficiency—Practice, C. P.* An affidavit of defense is sufficient which denies the grounds of liability averred in the statement and those which arise by implication from the averments made.

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2. *Sufficiency as denying sale.* Where a statement avers the sale and delivery of merchandise on a certain day, an affidavit of defense is sufficient which avers that plaintiff did not sell and deliver to defendants the merchandise on the day named, and that the defendants did not receive the said merchandise or any portion of it at any price on the said date or at any subsequent time. **Barker v. Fairchild,** 246.

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BENEFICIAL ASSOCIATIONS.

1. *By-laws—Amendment—Contract.* Where a benefit certificate in a beneficial association is accepted subject to the right of the association to amend its constitution and by-laws, the contract in so far as it consists of the constitution and by-laws may be changed by an amendment of the constitution and by-laws, but in so far as it consists of something specifically agreed to between the parties at the time, and not necessarily a part of the constitution and by-laws, an amendment changing the contract is invalid.

Plaintiff accepted a benefit certificate subject to the right of the association to amend its by-laws. The certificate provided that plaintiff should become entitled to receive one-half the amount after twelve

BENEFICIAL ASSOCIATIONS—*continued.*

years "if living, and in good standing." An amendment of the by-laws provided for the payment of one-tenth of the amount specified in the beneficial certificate yearly, upon arrival at the period of expectation of life, and total physical disability. *Held*, that plaintiff was not subject to the amendment. **Hale v. Equitable Aid Union,** 377.

2. *Death of beneficiary—Widow.* The by-laws of a beneficial association provided that "in the event of the death of all the beneficiaries selected by the member, before the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws the benefit shall be paid to the widow." A member named his wife as beneficiary. The wife subsequently died, and the member married again. The member afterwards died without having made any change in his certificate. *Held*, that his widow, surviving him, was entitled to the fund. **Fischer v. Am. Legion of Honor,** 279.

BOROUGHS.

1. *Annexation of territory—Remonstrances—Evidence.* In proceedings for the annexation of territory to a borough, a petition of citizens containing remonstrances against the inclusion of their lands in the territory proposed to be annexed is not evidence, and it is proper for the court to refuse leave to send the same before the grand jury for their consideration.

In such a case the petitioner's lands cannot be excluded where the effect of the exclusion would be to leave a portion of the township lying between the two ends of one of the principal streets of the borough after annexation. **Schultz's App.,** 441.

2. *Incorporation—Reconsideration by grand jury.* It is no ground to set aside proceedings to incorporate a borough that the day after the report of the grand jury was agreed upon and signed by the foreman, but before it was presented to the court, the request of two of the jurors for a reconsideration of the case was refused by the foreman. **Flemington Borough,** 628.

3. *Incorporation—Withdrawal of names of petitioners.* At the same time that a petition for the incorporation of a borough was laid before the grand jury, a written request was presented to the court on behalf of some of the petitioners for leave to withdraw their names from the petition. The court made the following order: "Leave granted to lay the within before the grand jury." *Held*, (1) that the order was not in terms, or by necessary or reasonable implication, leave to the petitioners to withdraw their names; and (2) that at that stage of the proceedings they had no right to withdraw them. **Flemington Borough,** 628.

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1. *Provisional decree—Appeals.* In a proceeding for the erection of a county bridge between two boroughs, a decree of the court below finding that the bridge is necessary and would be too expensive for the boroughs, and approving "the report of the viewers and finding of the grand jury," and ordering "that the same be referred to the commissioners for such action as they may deem expedient and proper and in accordance with law and, if approved by them, that the same be recorded as a county bridge," is neither effective nor final unless the county commissioners concur in the findings of the court and the grand jury.

Such decree is only provisional, and when it does not appear that the commissioners have taken any action in the premises an appeal is clearly premature and will be quashed. **Bridge Co.'s Appeal,** 454.

BUILDING INSPECTORS.

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1. *Porch.* A structure in violation of. **Ogontz Co. v. Johnson,** 178.

CAUSEWAYS.

1. *Railroads—Eminent domain—Over, under, or at grade.* Under the act of Feb. 19, 1849, sec. 12, P. L. 84, providing for the construction of a causeway where a railroad severs a tract of land, the conditions of the ground must be considered as to whether the causeway shall be overhead, under grade, or at grade. **Port v. R. R.,** 19.

2. *Definition*—A causeway within the meaning of the act is an internal improvement or arrangement intended to afford the means of getting from one part of the land to the other, and has no reference to road crossings, or to the means of getting off the premises to market or elsewhere. **Port v. R. R.,** 19.

3. *Measure of damages*—The measure of damages in such a case is the inconvenience which the landowner has suffered in the enjoyment of his property arising out of the failure to construct a causeway. The injury to the land caused by its being severed, or by the inconvenient shapes of the severed parts, or by excavations or embankments, or by obstruction of access to public or private ways cannot be considered, as such injury is provided for in the assessment of damages for the original taking of the land. **Port v. R. R.,** 19.

CHARGE OF COURT.

1. *Criminal law—Reading to jury act of assembly containing penalty.* On the trial of an indictment for embezzlement, it is not error for the

CHARGE OF COURT—*continued.*

court at the beginning of the charge to read the act of assembly defining the offense, although in doing so the jury are informed what the penalty is which the law imposes for the offense: Commonwealth v. Switzer, 134 Pa. 383; Catasauqua Co. v. Hopkins, 141 Pa. 30 (45); and Rosenagle v. Handley, 151 Pa. 107, distinguished. **Com. v. Harris,** 619.

2. *Mistake—Review.* The Supreme Court will not reverse a judgment on a verdict where all the testimony offered was admitted and submitted to the jury on the ground that the trial judge made a misstatement of a fact in his charge, which was corrected before the jury left the court room. **Sommer v. Gilmore,** 117.

3. *Practice, S. C.* No exception having been taken to admission or exclusion of evidence and no error being assigned to the instruction of the trial judge on any legal question, the Supreme Court will not reverse a judgment on a verdict where the trial judge said: "Take the case then, and under the testimony given before you and the law as you have heard it, render such verdict as you believe will accord with your obligations," etc. **Mixel v. Betz,** 328.

CHARITIES.

1. *Charitable use.* A testamentary disposition for the benefit of the poor of a defined locality is a charitable use. **Trim's Est.,** 395.

2. *Charitable gift—Will—Legacies—Codicil.* Testator gave a gift of a sum of money to a charitable institution. Fifteen months afterward he executed a codicil by which he gave the same sum to a trustee to pay the income thereof to two persons for their lives, and upon their death to pay the principal to the charity. The subject was introduced in the codicil by the words "I hereby annul and revoke the bequest" to the charity, and then followed immediately the words "and instead thereof I give and bequeath" to the trustee, etc. Within one calendar month after the execution of the codicil, testator died. *Held*, that notwithstanding the use of the words "revoke," "annul" and "instead thereof" the codicil did not revoke the bequest to the charity, but simply postponed its time of payment, and that the gift to the charity was therefore not affected by the act of 1855. **Watts' Est.,** 422.

CLEARING HOUSE.

1. *Banks and banking—National bank.* A clearing house association organized by the national banks of a particular locality merely for the purpose of facilitating the settlement of daily balances between them without involving any element of speculation, or any business undertaking by or on behalf of the associated banks, does not violate the statutes of the United States relating to national banks, or transcend the limits which these statutes have drawn about the business of banking.

Thirty-eight national banks in the city of Philadelphia formed a clearing house association for the settlement of daily balances. A room was hired and fitted up at the expense of the associated banks, and a manager employed who presided over the business of striking the balances every morning at a fixed hour. To facilitate the settle-

CLEARING HOUSE—*continued.*

ment of daily balances without the necessity for handling and counting the cash in every case, each bank deposited in the hands of certain persons called the Clearing House Committee a sum of money, or its equivalent in good securities, to be used for payment of balances. For these sums the committee issues certificates which were used in lieu of the cash they represented. The committee was also authorized to receive from any member of the association additional deposits of bills receivable and other securities and issue certificates therefor "in such amount, and to such percentage thereof as may in their judgment be advisable." They agreed to accept the additional certificates, if issued, in payment of daily balances at the clearing house on the condition that the securities deposited therefor should be held by the committee "in trust as a special deposit pledged for the redemption of the certificates issued thereupon." *Held*, (1) that the banks forming such an association did not violate the Federal Statutes, (2) that the committee of the clearing house had a standing to sue on a promissory note deposited with it. **Philler v. Patterson,** 468.

CODICIL.

1. *Will—Legacies.* Effect of codicil in modifying and not revoking a charitable gift. The words "revoke" "annul" and "instead thereof" being construed under the contest only to postpone time of payment and not to revoke said charitable gift. **Watt's Est.,** 422.

COMMON CARRIER.

1. *Carriers of live stock — Negligence — Presumption — Evidence — Mules.* Injury to the contents of a car may furnish ground for an inference of want of ordinary care in transportation, although there may be no evidence of an injurious accident to the train, nor any direct evidence of improper or negligent handling of the car.

This rule applies with proper limitations to live stock, but has no application in the case of injuries which are such as animals voluntarily inflict upon each other, or which cannot be accounted for, or which can be satisfactorily explained on any other ground than that of negligence in managing the train; nor does it apply in cases of death from natural causes, or causes entirely unknown. **Shaeffer v. R. R.,** 209.

CONSTITUTION OF PA.

1. *Art. III.* § 3. The act of June 10, 1893, P. L. 419, purporting to regulate the nomination and election of public officers and requiring certain expenses incident thereto to be paid by the several counties is repugnant to art. III. sec. 3 of the const. of Pa. in so far as it attempts to regulate the voting on questions of the increase of municipal indebtedness. **Evans v. Williamstown,** 578.

2. *Art. IX.* § 1 — *Taxation — Banks — Uniformity of.* The act of June 8, 1891, P. L. 240, is constitutional. **Com. v. Bank,** 309.

3. *Art. XI.* § 8—*Statutes—Defective title.* **Payne v. Coudersport Borough,** 386.

CONSTITUTIONAL LAW.

1. *Statutes—Title of act—Act of Feb.* 8, 1871. The act of Feb. 8, 1871, sec. 2, P. L. 31, entitled "An act to enable the board of school directors of the borough of Coudersport, in the county of Potter, to establish and maintain a graded school," and providing "that the whole of the territory contained in the East Fork road district, in the county of Potter, is hereby annexed to the said school district of Coudersport, and the board of school directors of said district are authorized and empowered to levy and collect a school tax upon the assessed valuation of all property in said territory, the same as they levy and collect the property within the original bounds of said school district," is defective in title and repugnant to the eighth section of the eleventh article of the constitution of Pennsylvania in force at the time of the passage of the act. **Payne v. Coudersport Borough,** 386.

2. *Statutes—Title of act—Act of June* 10, 1893. The act of June 10, 1893, P. L. 419, entitled "An act to regulate the nomination and election of public officers, requiring certain expenses incident thereto to be paid by several counties and punishing certain offenses in regard to such elections," is insufficient in title and repugnant to article 3, section 3, of the constitution, in so far as it attempts to regulate the mode of voting on questions of the increase of municipal indebtedness.

It seems that if the act were valid, it would repeal the act of June 9, 1891, P. L. 252, providing for the method of voting on questions relating to the increase of municipal indebtedness. **Evans v. Williamstown Twp.,** 578.

CONTRACT.

1. *Addition to written instrument after signature—Evidence—Question for jury.* Where an addition to a contract is written on the page following the signatures, and it appears that there was ample room for the addition on the same page with the signatures, and the evidence is conflicting as to whether or not the addition had been made with plaintiff's knowledge before the agreement was signed, the question is for the jury to determine whether or not the addition is binding on the plaintiff. **Lilly v. Person,** 219.

2. *Agreement to sell land* to railroad for right of way contained a stipulation that the company shall construct and maintain a suitable crossing. The railroad presented a deed containing no reference to the stipulation. The landowner tendered a deed with the stipulation. *Held* that he was entitled to have the proviso inserted and that he could maintain equitable ejectment to compel acceptance of such a deed. **Hall v. R. R.,** 64.

3. *Beneficial associations.* Benefit certificate subject to amendment of by-laws and constitution. **Hale v. Equitable Aid Union,** 377.

4. *Building contract—Change in specifications—Delay—Penalty.* A building contract provided that the builder should forfeit a certain sum for each day that the building remained unfinished after the time fixed by the agreement for its completion. The owners reserved the right at any time during the progress of the work to make any alterations in the plans and specifications. The contract provided that any

CONTRACT—*continued.*

change in the plans "either in quantity or quality of the work" should be executed by the plaintiff "without holding the contract as violated or void in any other respect." During the progress of the work, a change was made in the material for the front of the building from brick and granite to Indiana stone with carved panels and frieze. *Held*, that plaintiff was not responsible for delay necessarily resulting from the alterations in the work directed by the owners. **Lilly v. Person,** 219.

5. *Building contract — Lost paper — Evidence.* Plaintiff contracted in writing with defendants to construct a building for them for $17,550. One of the specifications provided that he should tear down an old building and use such materials in the construction of the new one as were suitable, "the net value of such materials to be reckoned at the amount stated in the contractor's bid, and the said amount to be deducted from the gross contract price." The plaintiff's bid for the new work and for the material of the old building was in writing, but had been lost or destroyed by the defendants, and there was no written evidence of the amount he had agreed to allow for the old material. *Held*, that it was competent for the plaintiff to show that his original bid was in excess of the amount stated in the contract, and that he wrote below his bid that he allowed the excess for the old building. **Lilly v. Person,** 219.

6. *Construction of contract—Parol evidence to modify—Advertising in street car.* Defendant, who was engaged in the business of street railway advertising, inserted plaintiffs' advertising card in street cars in accordance with plaintiffs' written instructions as follows: "You are hereby authorized (upon conditions expressed or referred to herein only) to insert our advertisement as per copy to be furnished by us, in one hundred and twenty-four cars as per other side of this contract, to occupy a space of eleven by forty-two" . . . . etc. Plaintiffs claimed that defendant had agreed by parol to permit them to substitute the advertisement of other parties. This was testified to by one witness for the plantiffs, and distinctly denied by defendant. Under a similar contract for the previous year, plaintiffs at their own request were permitted to sublet their space to other parties. *Held*, (1) that the evidence was not sufficient to sustain a finding by the jury, that the written agreement between the parties was changed or modified; (2) that plaintiffs were not entitled to recover damages from defendant on the ground that he refused to permit them to sublet their space. **Wyckoff v. Ferree,** 261.

7. *Covenants in lease—Vendor and vendee—Notice—Collateral agreement.* **Wertheimer v. Thomas,** 168.

8. *Evidence.* Addition to written instrument after signature. Question for jury. **Lilly v. Person,** 219.

9. *Municipal contracts.* Increased compensation to architect for additional labor beyond the contract stipulation. **Butz v. Fayette Co.,** 464.

10. *Mutual covenants—Damages—Speculative damages.* Plaintiff and defendants entered into a written agreement containing mutual

CONTRACT—*continued.*

covenants by which defendants were to convey to plaintiff twenty-four lots, "clear of incumbrances; taxes and water rents to be apportioned; sewer, gas, water, curb and street pavement to be put in" by defendants; and plaintiff was to convey to defendants a number of properties, and to build houses on the lots conveyed to him by defendants "within one year." Defendants failed to put in the curb and street pavement. The city did the work, and filed liens against the properties. These plaintiff was compelled to pay. Plaintiff did not begin the construction of houses until after the street improvements were put in, and until more than a year after the execution of the contract. In an action to recover the amount of the municipal liens paid by plaintiff, *held*, that he was entitled to recover, (1) because he was not bound to build the houses before the curbing and paving were done; (2) because the damage, if any, suffered by defendants from plaintiff's failure to build the houses within a year were not the subject of set-off for the reason that they were speculative, and not in contemplation of the parties when the contract was made, and not such as arose naturally from the breach. **McConaghy v. Pemberton,** 121.

11. *Negligence—Municipalities—Independent contractor—Fireworks.* Where by the terms of a written contract with a municipality to furnish a display of fireworks, a contractor undertakes to purchase the fireworks, set them off and do the whole work for a designated sum for the entire service, he is an independent contractor, and the municipality is not liable for injuries caused to a person by the contractor's negligence in performing his contract. **Heidenwag v. Phila.,** 72.

12. *Parol evidence to vary written contract.* By a written contract defendant agreed to purchase oil from plaintiff at a certain sum per barrel above the market price of National Transit Company Certificate Oil. Plaintiff claimed that the written agreement did not embody the actual terms of the contract between the parties, and that, in addition to the price named in the written contract, plaintiff was to pay ten cents per barrel for piping the oil. Plaintiff was the only witness who testified in support of this claim. *Held*, that in the absence of another witness in support of plaintiff's claim, or of corroborating circumstances equivalent to the testimony of another witness, plaintiff was not entitled to recover the ten cents per barrel addition for piping. **Thayer v. Seep,** 414.

13. *Railroad.* Agreement for joint control of track construed. **P. & R. R. v. River Front R. R.,** 357.

14. *Sale—Executory contract.* An order for the purchase of steel scrap, "similar to sample wagon load" previously delivered, is an executory contract, and no title passes until the goods are accepted by the vendee. **Jones v. Jennings,** 493.

15. *Sale—Measure of damages.* Where the vendee refuses to accept the goods without sufficient cause, the title remains in the seller, and the measure of damages for the refusal to accept is not the purchase price of the goods, but the difference between the price agreed upon and the market value on the day appointed for delivery. **Jones v. Jennings,** 493.

CONVERSION.

1. *Will—Rents from residuary real estate—Power of sale—Conversion.* A power of sale in a will does not work an immediate conversion of the land as between the executor and the heir or legatee, but the title which accrued on the death of the testator remains in the heir or legatee, until divested by sale made under an order of the orphans' court, or the power contained in the will.

In such a case the executor has no authority to collect the rents accruing from the residuary real estate and to use them as assets of the testator's estate. **Pennsylvania Co.'s Appeal,** 430.

CORPORATIONS.

1. *Acts of officers de facto—When valid.* Acts of officers de facto of a corporation are not valid when such acts are for their own benefit, because they cannot take advantage of their own want of title, of which they must be cognizant. It is only where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defects of title, that their acts are good. **Shellenberger v. Patterson,** 30.

2. *Appeals—Bail.* Corporations other than municipal must give bail absolute for debt, interest and costs on appeal from judgment of a justice. **Young v. Colvin,** 449.

3. *Elections—Contest involving several offices—Quo Warranto—Rights of stockholders—Directors—Enjoining transfer of stock does not enjoin voting.* A stockholder in a corporation who has been elected a director has a standing in quo warranto proceedings to contest the right of other persons to hold the office of director although they were elected at the same meeting at which he himself was elected and his title was not disputed. As a stockholder he has the right to have the votes properly counted, and the affairs of the company committed to the charge of the officers legally elected by a majority of the stockholders.

Under the act of June 14, 1836, sec. 8, P. L. 621, giving the court discretionary power to try "the several rights of different persons" by one writ of quo warranto, the title to different offices may be determined in one writ.

Where the offices in controversy are different, but the title of the incumbents as to all of them depends upon the same votes at the same election, and a decision on the validity of that election will be equally conclusive as to the rights of all, the controversy as to all of the offices may be determined by one writ of quo warranto.

Where a person holds certificates of stock on which he is prima facie entitled to vote, a preliminary injunction issued before the election, the intention and effect of which were to merely restrain him from negotiating or transferring the stock, will not deprive him of the right to vote the stock at the election. **Com. v. Stevens,** 582.

4. *Taxation—Public corporations.* Power of equity to restrain collection of illegal tax on real estate of a natural gas company which is indispensable for carrying out the public purpose for which it was incorporated. **Gas Co. v. Elk Co.,** 401.

CRIMINAL LAW.

1. *Embezzlement by consignee—Evidence—Consignee defined.* Evidence held insufficient to convict. Reading to jury by court of act of assembly containing penalty not error. **Com. v. Harris,** 619.

2. *Liquor laws.* Gift of liquor on Sunday does not violate act, 1887. **Com v. Heckler,** 575.

3. *Murder—Continuance—Discretion of court—Insanity.* The S. C. will not reverse for a refusal to grant a continuance there being nothing to show abuse of discretion.

Insanity is an independent defense and must be shown by fairly preponderating evidence. **Com. v. Bezek,** 603.

COSTS.

1. *Justice of the peace—Appeals—Corporations.* A corporation, other than municipal, on appealing from the judgment of a justice of the peace, must give bail absolute for the payment of debt, interest and costs, on affirmance of the judgment, as provided by the acts of March 22, 1817, sec. 4, P. L. 128, and March 15, 1847, sec. 1, P. L. 361. **Young v. Colvin,** 449.

DAMAGES.

1. *Measure of—Railroad—Causeways—Act* 1849. The measure of damages is the inconvenience which the landowner has suffered in the enjoyment of his property arising out of the failure to construct a causeway. **Port v. R. R.,** 19.

2. *Measure of—Sale—Executory contract.* Where a vendee refuses to accept the goods without sufficient cause, the title remains in the seller, and the measure of damages for refusal to accept is not the price of the goods, but the difference between the contract price and the market value on the day appointed for delivery. **Jones v. Jennings,** 493.

3. *Speculative damages, arising under mutual covenants,* which were not in contemplation of parties when the contract was made, and not such as arose naturally from the breach, cannot be set off by defendant against damages claimed by plaintiff as a direct result from the defendant's breach of covenant. **McConaghy v. Pemberton,** 121.

DECEDENT'S ESTATE.

1. *Claim for services—Evidence—Declarations—Will.* In an action against a decedent's estate for services, where plaintiff relies upon declarations of the deceased that the services were to be paid for, a will showing a legacy to the plaintiff is admissible in evidence.

In such a case it is proper for the jury to know what had been given to plaintiff by the deceased,—whether during her life, or by her will, to take effect after her death. Such evidence is not conclusive upon the plaintiff, but it is for the jury to say what effect should be given to it. **Hughes v. Keichline,** 115.

2. *Family settlements—Opinion of auditing judge.* Where the distributees of an estate, without inventory, appraisement or account filed, make forty-six settlements among themselves of the income and principal of the estate, during seventeen years, the orphans' court will not

DECEDENT'S ESTATE—*continued.*

set aside the settlement at the instance of a widow of one of the distributees, who was also one of the executors who assisted in making distribution, where no fraud appears, and where the estate has in the opinion of the auditing judge been managed with honesty and integrity. **Palethorp's Est.,** 98.

3. *Joint stock company.* Dissolution by death. Liability of estate of deceased partner. **Wilcox v. Derickson,** 331.

4. *Marriage.* Evidence *held* sufficient to support claim as widower. **Strauss's Est.,** 561.

5. *Partnership—Specific performance.* Option of survivor to buy deceased partner's estate. Measure of appraisement or valuation. **Rohrbacher's Est.,** 158.

6. *Practice—Appeals.* Opening executor's account. Interlocutory order. **Long's Est.,** 341.

7. *Set-off—Executors and administrators.* In a suit by an executor a debt due by decedent to defendant may be set off. **Hicks v. National Bank,** 638.

8. *Will—Charge on land—Evidence.* **Dickerman v. Eddinger,** 240.

9. *Will—Charitable use.* A disposition for poor of a defined locality is a charitable use. **Trim's Estate,** 395.

10. *Will—Estate during widowhood.* **Patton v. Church,** 321.

11. *Will—Legacies—Interest thereon.* Blending of real and personal estate in residuary clause binds real estate for payment of legacies. *Codicil,* effect of, on a charitable gift under act of 1855. **Watt's Estate,** 422.

12. *Will—Power of sale* does not work such immediate conversion as to authorize executor to collect rents of real estate in question. **Penna. Co.'s Appeal,** 430.

13. *Will—Power to partition estate—Power of appointment—Vested estate—Jurisdiction, O. C.* **Schwartz's Est.,** 204.

14. *Will—Trusts and trustees—Separate use trust.* **Steinmetz's Est.,** 171.

DEEDS.

1. *Boundaries—Alleys.* See ALLEYS, 1. **McNeal v. Rebman,** 109.

2. *Building restriction—Porch.* A porch built upon brick foundations, roofed, and permanently attached to the whole width of a front of a house, and projecting to within seven feet of the fence line, is an integral part of the building within the meaning of a building restriction in a deed, providing that "all buildings upon the said lots shall be erected not less than fifteen feet back from the fence line."

Such a structure is a violation of the building restriction, notwithstanding the fact that it is open at the sides and in front. **Ogontz Co. v. Johnson,** 178.

3. *Description—Boundaries—Evidence.* Where the eastern boundary of a lot is described in a deed as "beginning at a point on the south side of the Warren and Franklin road and the north-east corner of . . . . lot, running thence southwardly along said . . . . line ten perches to a post, thence northwardly to a post in said road, thence westwardly along said road to the place of beginning," and there is

DEEDS—*continued.*

nothing else in the deed to show what was the lot to the east of the land, and the evidence as to the location of the eastern line is conflicting, the position of the line is a question of fact for the jury. **Smith v. Horn,** 372.

4. *Tender of—Agreement to sell land—Railroads—Sufficiency of reservation.* **Hall v. R. R.,** 64.

DISCRETION.

1. *Dissolution of attachment under act of* 1869 is within the discretion of the lower court and not reviewable where the record fails to show an abuse of discretion. **Hall v. Oyster,** 399.

DURESS.

1. *Imprisonment—Extortion.* To constitute duress by imprisonment the latter must be unlawful, or there must be an abuse of, or an oppression under, lawful process or legal detention. If there is an arrest for a just cause, but for an unlawful purpose, the party arrested, if he is thereby induced to part with his money, may recover it back in an action of trespass as having been procured from him by duress. **Fillman v. Ryon,** 484.

EJECTMENT.

1. *Evidence—Adverse possession—Charge of court.* In an action of ejectment where defendant claims title by adverse possession for twenty-one years by himself and his predecessors in title, and plaintiffs claim that during a portion of the twenty-one years defendant's predecessors in title held the land under a permission, license or lease from plaintiffs' predecessors in the title, and there is no evidence to show the existence of such a permission, license or lease, and no reference in the case to it, except in an offer of testimony which is rejected as incompetent, it is error for the court to refer to the alleged lease, or to base any instructions upon the assumption of its possible existence. **Hasson v. Klee,** 510.

2. *Parol partition—Evidence.* In an action of ejectment where the plaintiff sets up a record title, and the defendant offers evidence tending to show that plaintiff and his brother, who was defendant's predecessor in title, divided the land which they held as tenants in common by a parol partition; and that in pursuance of this partition, plaintiff's brother entered into possession of the land in controversy, which testimony is contradicted on the part of plaintiff, the case is for the jury. **McKnight v. Bell,** 50.

EMBEZZLEMENT.

1. *By consignee.* On an indictment for embezzlement as consignee, the judge charged: "A consignee is a person to whom merchandise or personal property of any kind is committed for the purpose of sale;" *Held,* to be correct and sufficiently comprehensive to direct the attention of the jury to the distinction between a consignment for sale on the consignor's account and a purchase where the title passed though the goods were not paid for.

EMBEZZLEMENT—*continued.*

In such a case it is not improper for the trial judge to call the attention of the jury to the fact that the law regards the act of a consignee in appropriating consigned property to his own use as a very serious offense which should not escape punishment; if he also cautions the jury in equally explicit terms that, for the very reason of the seriousness of the charge, the prisoner should not be convicted upon slight evidence. **Com. v. Harris,** 619.

EQUITABLE EJECTMENT.

1. *Contract—Agreement to sell land—Deed—Railroads—Crossings.* In an executory contract to sell land to a railroad company for right of way, it was stipulated that the railroad company "shall construct and maintain a good and sufficient crossing over the right of way on said premises." The railroad company tendered a deed which contained no reference to the crossing. The landowners tendered a deed to the railroad company containing the following clause: "Excepting and reserving unto the said parties of the first part, their heirs and assigns, forever, a good and sufficient right of way, causeway or railroad crossing over and across the said Clearfield & Mahoning Railway on the said premises of the parties of the first part, so that the occupant or occupants of the said premises of the parties of the first part may cross or pass over the said railroad on the premises with wagons, carts and implements of husbandry, as the occasion may require; said causeway or railroad crossing to be maintained by the said party of the second part; its successors and assigns." *Held,* that the landowner was entitled to have inserted in the deed the above provision and that he could maintain an equitable ejectment to compel the acceptance of such a deed by the railroad company. **Hall v. R. R.,** 64.

EQUITY.

1. *Responsive answer—Evidence.* Where a bill in equity against the executrix of the estate of plaintiff's mother is filed nearly eight years after the account of the executrix had been adjudicated by the orphans' court, which averred the fraudulent appropriation by the executor of certain property belonging to the decedent, in which plaintiff has an interest as heir and legatee, and the fraudulent omission to include it in the account; and that the facts alleged in the bill became known to plaintiff only recently before filing the bill, and the answer of defendant directly and explicitly denied the averments of fraud in the bill, and claimed ownership of the property by the defendant, the burden is on the plaintiff to meet the responsive answer and overcome it with two witnesses, or with one witness and corroborative circumstances. **Huston v. Harrison,** 136.

2. *Street railways.* Standing of municipal authorities in equity to prevent company from constructing railway if there has been a default in the conditions imposed for municipal consent. **Plymouth Township v. Railway,** 181.

ESTOPPEL.

1. *Railroads—Stock subscription.* Where a stock subscription is

ESTOPPEL—*continued.*

made by an agent of a railroad company for the purpose of obtaining a loan from a third party, and such subscription is recognized by the stockholders and directors of the company, who accept the loan with a knowledge of such subscription, and presumably with a knowledge that without such subscription the loan would have been invalid and contrary to law, the stockholders and directors of the company are estopped from asserting that the subscription is invalid because not made in writing and in the prescribed form. **Shellenberger v. Patterson,** 30.

EVIDENCE.

1. *Blending relevant with irrelevant matters—Evidence rejected and subsequently admitted—Review.* In civil cases the rule of evidence is that "where an offer blends irrelevant and inadmissible matters with a matter relevant and admissible, and it is made and rejected as a whole, the rejection of it is not error;" but this rule ought not to be summoned to sustain a ruling prejudicial to the interests of a defendant on trial for murder.

Where an offer of evidence is improperly rejected, but immediately afterwards under another offer the evidence is admitted in full, the ruling on the first offer is not a ground for reversing the judgment. **Com. v. Bezek,** 603.

2. *Boroughs—Annexation of territory—Remonstrance.* A remonstrance of citizens not evidence. **Schultz's Appeal,** 441.

3. *Carriers of live stock—Negligence—Experts—Question for jury.* In an action to recover damages for injuries to mules shipped from Kentucky to Fleetwood, Pennsylvania, testimony was presented to show that the animals were in good condition and uninjured when they were received at Harrisburg; that the injuries were of recent occurrence, and not such as the animals would have inflicted upon each other, except involuntarily if they were thrown down and trampled or jammed together by a collision or rough handling of the cars. Witnesses who had been for years engaged in shipping mules, who knew their habits and disposition and the causes likely to lead to their injury while on board cars, and who saw the mules when they were unloaded, were allowed to express their opinion as to the cause of the injuries. *Held,* that the evidence was properly admitted.

In an action to recover damages for injuries to live stock during transportation, the burden of proof as to any limitation upon the common law liability of the carrier is upon the defendant, and unless such limitation is admitted, or clearly established by proof, the question is necessarily for the jury. **Schaeffer v. R. R.,** 209.

4. *Confession—Voluntary statement.* Where a prisoner is warned that any statement he might make concerning a murder with which he is charged may be used against him, and that he need not say anything about it unless he desires to do so, and he subsequently makes a statement, such statement may be used as evidence at his trial. **Com. v. Bezek,** 603.

5. *Contract — Building contract — Lost paper.* Proof of contents. Addition to written instrument after signature. **Lilly v. Person,** 219

EVIDENCE—*continued.*

6. *Contract.* Parol evidence to vary written contract held insufficient. **Thayer v. Seep,** 414.

7. *Decedent's estate—Claim for services.* Admission of will showing legacy to the plaintiff to rebut alleged declarations of deceased that services were to be paid for. **Hughes v. Keichline,** 115.

8. *Deed—Description—Boundaries.* The evidence as to the location of one boundary line being conflicting the position of the line is a question of fact for the jury. **Smith v. Horn,** 372.

9. *Defective sidewalk—Contributory negligence* when a question for jury. **Fee v. Columbus Borough,** 382.

10. *Ejectment—Charge of court.* It is error for trial judge to refer in an action of ejectment to an alleged lease the only evidence of which was a repeated offer of testimony. **Hasson v. Klee,** 510.

11. *Embezzlement by consignee.* The defendant wrote a letter under a printed letter head of "Commission Merchant" to the prosecutor suggesting a "Consignment" of grapes. In the letter the defendant offered to "handle all the grapes you can possibly ship on commission, or will buy outright from you." To this letter the prosecutor replied by telegram: "Will ship you a mixed lot . . . . for sample." Two days later he wrote that the shipment had been made. Neither telegram nor letter took any notice of the alternative to sell on commission, or to buy outright. A week later the defendant wrote a second letter ordering more grapes of specified kinds, mentioning the price at which he had sold some, and concluding "send the bill with this order, and I will forward you a check for full amount you forgot to state in your letter how much the grapes was write and let me know send bill for full amount." In answer to this the prosecutor wrote saying: "Will ship . . . . and forward bill of the amount," and further on, "with prices of different kinds that you will take." A few days later the defendant wrote a third letter ordering more grapes, offering a certain amount outright for mixed lots, and repeating the direction to send bill for full amount, and the promise to forward check. *Held,* that the evidence was not sufficient to convict the defendant of embezzlement as consignee. **Com. v. Harris,** 619.

12. *Equity suit—Responsive answer.* The burden is on the plaintiff to meet a responsive answer and overcome it with two witnesses or one witness and corroborative circumstances. **Huston v. Harrison,** 136.

13. *Malicious prosecution—Probable cause.* Testimony that a trial judge directed a verdict of acquittal and instructed the jury to hold prosecutor liable for costs inadmissible. In such a case the inquiry as to probable cause goes back to commencement of prosecution. **Grohmann v. Kirschman,** 189.

14. *Marriage—Evidence of marriage.* At the audit of an administrator's account the fund was claimed by the alleged husband of the decedent. To establish the fact of marriage he produced the official certificate of the birth of a child naming himself and decedent as husband and wife; checks by him to decedent indorsed by her in her married name; a letter addressed to her as a married woman by one objecting to the alleged husband's claim; a policy of life insurance

EVIDENCE—*continued.*

taken out by claimant for decedent's benefit, in which decedent is described as "his wife." There was also evidence that decedent collected moneys from beneficial societies of which the claimant was a member, which she could only do as his wife, and there was evidence of a deed to her in her married name. It appeared also that in the circle in which she lived she was called by claimant's name, and that his children by a former wife called her mother and received from her the consideration and care which her duty as the wife of their father imposed. *Held*, that the evidence was sufficient to establish the marriage relation between claimant and decedent. **Strauss's Est.,** 561.

15. *Mortgage—Parol mortgage—Lost paper.* In order to convert a deed absolute on its face into a mortgage, or to create a parol secret trust as against such deed, the evidence must be clear, precise and indubitable. **Burr v. Kase,** 81.

16. *Negligence—Declarations.* Declarations made by workmen while a fire was in progress to the effect that it was caused by their carelessness, are admissible in evidence in an action by the owner of the property destroyed against the employer of the workmen to recover damages for the loss occasioned by the fire. **Shafer v. Lacock,** 497.

17. *Practice, S. C.—Assignments of error.* The S. C. will not consider an assignment of error to rejection of evidence, where the record shows that the exclusion of the evidence was not excepted to at the trial and that no exception was afterwards allowed. **Mixel v. Betz,** 328.

18. *Question for jury—Ejectment—Parol partition.* Plaintiff in ejectment set up record title; defendant alleged a parol partition between plaintiff and his brother who was defendant's predecessor in title. *Held* that the case is for the jury. **McKnight v. Bell,** 50.

19. *Sheriff's interpleader—Lease.* On a sheriff's interpleader to determine the ownership of growing crops and corn in crib, the claimant of the property may show by parol evidence that a lease of the farm where the crops were growing, signed by the defendant in his own name, was really signed by defendant as agent for the claimant, and that the defendant had no interest in the property. **Galbraith v. Bridges,** 325.

20. *Will—Charge on land* may be created without express words and by implication from the whole will. **Dickerman v. Eddinger,** 240.

EXECUTORS AND ADMINISTRATORS.

1. *Practice, S. C. & O. C.—Appeals—Opening executor's account—Interlocutory order.* **Long's Est.,** 341.

FAMILY SETTLEMENTS.

1. *Decedent's estate.* Where distributees have during seventeen years made family settlements among themselves and when the estate has been managed with integrity, the court will not set aside the settlement at the instance of the widow of one distributee who had acquiesced in the settlement. **Palethorp's Est.,** 98.

FEES.

1. *Public officers—Statutes repealed.* **Com. v. Mann,** 290; **Com. v. Allegheny Co.,** 303.

2. *Sheriff's fees* for commitment under act of 1868. **Wilhelm, Sheriff, v. Fayette Co.,** 462.

GAS COMPANIES.

1. *Taxation—Public corporations—Real estate—Equity—Injunction.* **Gas Co. v. Elk Co.,** 401.

HIGHWAYS.

1. *Negligence—Townships—Dangerous roads.* Whether common prudence dictated the erection of a barrier along a precipice a question properly left to the jury. **Trexler v. Township,** 214.

INFANT.

1. *Contributory negligence—Sudden peril—Master and servant.* **Neilson v. Coal Co.,** 256.

INJUNCTION.

1. *Taxation.* Equity has power to restrain collection of illegal tax. **Gas Co. v. Elk Co.,** 401.

INSANITY.

1. *Murder—Evidence.* Insanity is an independent defense, and he who sets it up must show the existence of it by fairly preponderating evidence. **Com v. Bezek,** 603.

INSURANCE.

1. *Fire insurance—Incumbrances—Charge on land.* A charge upon land created by will is an incumbrance within the meaning of a clause in a policy of fire insurance which provides that "if the property real or personal covered by this policy be or become incumbered by a mortgage, trust-deed, judgment or otherwise, the entire policy shall be void, unless otherwise provided by agreement indorsed hereon or added hereto." **Renninger v. Dwelling House Ins. Co.,** 350.

2. *Fire insurance—Misrepresentation by insured.* No recovery can be had upon a policy of fire insurance procured upon the representation that the property insured was owned by and in charge of a successful business man, when in fact the title was in a married woman who exercised no supervision over it. **Freedman v. Fire Asso.,** 249

3. *Fire insurance—Waiver* is essentially a matter of intention, and cannot arise out of acts done in ignorance of material facts, and its proof is inadequate unless it is shown that the insurer knew of the right of forfeiture at the time of doing the act. **Freedman v. Fire Asso.,** 249.

4. *Fire insurance—Insufficient evidence of waiver—Direction of verdict.* A stock of merchandise was insured in the name of R. Freedman. The insurance was procured by the representation of the owner's agent that R. Freedman was a successful business man. It was owned by Rosa Freedman, a married woman, and was in charge of her brother-

INSURANCE—*continued.*

in-law. The property was destroyed by fire. The third day after the fire plaintiff's husband and the agent of the insurance company met by appointment, the agent supposing that he was meeting R. Freedman, the insured. Bills were produced to "Mr. R. Freedman" for goods claimed to have been burnt, and after some examination with a view to ascertain the amount of the loss the parties separated. Proofs of loss in which the pronoun "her" appeared were made out and mailed to the company's office, without any request or suggestion from the officers of the company. Subsequently the special agent of the company wrote a letter to plaintiff addressing her as "madam," calling her attention to the fact that a certificate of the nearest magistrate had not been attached to the proof of loss. The letter contained a distinct statement that liability was neither admitted nor denied. *Held*, that the evidence as to a waiver was insufficient, and that the trial judge should have directed a verdict for the defendant. **Freedman v. Fire Asso.,** 249.

5. *Fire insurance—Mistake of agent.* The fraud or mistake of an insurance agent within the scope of his authority will not enable his principal to avoid a contract of insurance to the injury of the insured who acted in good faith; and the fraud or mistake of the agent may be proved by parol evidence notwithstanding it is provided in the policy that the description of the property shall be a part of the contract and a warranty by the insured. **Dowling v. Ins. Co.,** 234.

6. *Fire insurance—Misdescription by agent.* In an action upon a policy of fire insurance, it appeared that no written application for insurance was made, and that the policy was written by the defendant's agent, and accepted in good faith without examination, and not read by the insured until after the fire. The building insured was built for and used as a boarding house, and was erroneously described in the policy as "occupied by the insured as a dwelling only." The plaintiff fully and accurately described the property to the agent as a boarding house, and it was seen and examined by the agent, and the misdescription was his act alone. *Held*, that plaintiff was entitled to recover. **Dowling v. Ins. Co.,** 234.

7. *Fire insurance—Proof of loss—Waiver.* A policy of fire insurance required proof of loss to be made within sixty days. On the day of the fire the company's agent was notified by telegraph of the fire, and a few days afterwards inspected the premises and stated to plaintiff that the building was a total loss, and that plaintiff should make out a statement as to the value of the contents of the house, and that he could take his time to make his statement, and hold it until it was called for. Twenty-two days after the fire plaintiff mailed a proof of loss to the agent. About three months after the fire a proof of loss was sent directly to the company. Two months afterwards the company returned the latter proof of loss. *Held*, that the evidence was sufficient to justify a finding by the jury that a proof of loss had been furnished within the time fixed by the policy, and that the company had also waived all irregularities. **Dowling v. Ins. Co.,** 234.

8. *Fire insurance—Sub-agent.* Where a duly authorized insurance agent in the due prosecution of the business of his company employs

INSURANCE—*continued.*

another as a sub-agent to solicit insurance, the acts of the sub-agent have the same effect as if done by the agent himself. **McGonigle v. Ins. Co.,** 1.

9. *Insurable interest—Bailee's lien—Storage warehouse.* Merchandise held by a storage company subject to storage liens is "merchandise held in trust," within the meaning of a policy of fire insurance which describes the property insured as "on merchandise, hazardous, not hazardous or extra hazardous, their own, or held by them in trust, or in which they have an interest or liability and have agreed to insure under this policy and not removed, stored or hereafter stored during the continuance of this policy.

The fact that a storage company holds property on storage upon a stipulation that it will not be responsible for loss or damage by fire, does not prevent it from insuring the property to the extent of its lien for storage.

Unless a statement of interest is required either in the application or in the policy, the insured need make none, and unless it is otherwise provided it is sufficient that he has an insurable interest. **Pittsburg Storage Co. v. Ins. Co.,** 522.

10. *Life insurance—Health of insured—Misrepresentations.* A policy of life insurance stipulated that "no obligation is assumed by the company prior to the date hereof, nor unless upon said date the assured is alive and in sound health." The assured died of typhoid pneumonia. The physician who attended him in his last illness filled out a blank furnished by defendant, in which, in reply to the question: "Was deceased afflicted with any infirmity, deformity or chronic disease? If so, specify," he wrote "Epilepsy." The father and sister of the assured testified that the assured had fits during childhood, but that he had not been so afflicted for twelve years prior to the date of the policy, and that he was in sound health when the policy was issued. *Held,* that the question as to whether the assured was in sound health at the date of the policy was for the jury.

11. *Temporary disease—Question for jury.* In such a case it is not error for the court to charge "A man may have sick headache temporarily, and still be considered in sound health, although abstractly considered it is not sound health; so a man may have an attack of rheumatism; now abstractly he would not be considered to be in sound health, and yet I apprehend that in the meaning of this policy he would be in sound health if it was just a temporary attack of rheumatism. . . . These little infirmities, or rather these little attacks of temporary disease,—headache, or a little attack of rheumatism, or some little attack of that kind,—I do not apprehend are what is meant in this policy to be 'sound health,' because they have no probable bearing upon the man's life." **Dietz v. Ins. Co.,** 504.

12. *Life insurance—Suit on policy—Time limit.* A stipulation in a policy of life insurance that, "if the insured shall die three or more years after the date hereof, and after all due premiums shall have been received by the company, the policy shall be incontestable," does not relieve the beneficiary from the necessity of bringing suit on the policy within six months from the death of the assured, as required by a

INSURANCE—*continued.*

clause of the policy providing that "no suit or action at law or in equity shall be maintainable unless such suit or action shall be commenced within six months after the decease of the person insured; and it is expressly agreed that should any such suit or action be commenced after the expiration of six months the lapse of time shall be deemed conclusive evidence against the validity of such claim." **Brady v. Ins. Co.,** 645.

13. *Proof of loss—Total loss.* Where there is a total loss of an insured building, of which the insurance company has been immediately notified, no further technical proof of loss is necessary. **McGonigle v. Ins. Co.,** 1.

14. *Waiver of proof of loss.* Where a total loss has occurred and the secretary of the company, who also acts as general manager and adjuster, goes promptly to the ground, has appraisers appointed according to the terms of the policy, and promises immediate payment on the finding of the appraisers, the company cannot afterwards set up as a defense the failure of the assured to make proof of loss. **McGonigle v. Ins. Co.,** 1.

15. *Waiver of condition in policy.* In such a case a waiver of a condition in the policy against incumbrances may also be inferred. **McGonigle v. Ins. Co.,** 1.

INTEREST.

1. *Legacies.* Interest on legacies at rate of 6 per cent imposed where distribution is delayed by litigation affecting residuary estate only. **Watt's Est.,** 422.

JOINT STOCK COMPANIES.

1. *Contract—Dissolution by death of member—Liability of estate of deceased member.* The articles of a joint stock company at common law, engaged in the banking business, provided that the death of a stockholder should not operate as a dissolution of the association, "but the shares of such decedent shall thereupon vest in his executors, or administrators, or devisees, of said stock, who shall succeed with like effect as provided in case of a transfer upon the books of the association." It was provided in case of a transfer that "the assignee or assignees of such share or shares shall thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto." And it was further provided as follows: "The holders of stock in this association either by an original subscription, transfer or otherwise, shall, by virtue of such subscription, or acceptance of such transfer, be subject to and thereby take upon themselves the several and respective duties and obligations devolved and incumbent upon them as stockholders or directors, as the case may be." A member died, and his executors did not accept his stock. *Held*, that his general estate was not liable for debts contracted by the association after his death. **Wilcox v. Derickson,** 331.

JUDGMENT.

1. *Issue to determine validity.* Attachment under act of 1869. **Jones v. English,** 438.

JUDGMENT—*continued.*

2. *Opening judgment.* The refusal of the court below to open a judgment when the testimony is conflicting will not be disturbed by the Supreme Court. **Range v. Culbertson,** 324.

3. *Opening judgment — Interest — Husband and wife.* A judgment note for borrowed money payable one day after date was given by a husband to a trustee for his wife; the wife lived with the husband seventeen years after the date of the note; there was no agreement as to the payment of interest; the wife's declarations that she did not claim interest were proved. After the wife's death the trustee entered judgment on the note including interest from its date. The court below opened the judgment, and directed a feigned issue to try how much was due on the note. *Held*, that there was no such abuse of discretion as would justify the Supreme Court in reversing the decree. **Beaver v. Slear,** 466.

JUSTICE OF PEACE.

1. *Appeals—Bail—Corporation*, other than municipal, must enter bail absolute for debt, interest and costs in cases of appeal from judgments of a justice. **Young v. Colvin,** 449.

2. *False imprisonment.* Liable for illegally ordering an arrest or refusing to accept bail. **Grohmann v. Kirschman,** 189.

JURISDICTION, C. P.

1. *Partition, C. P—Tenants in common—Final decree.* The court will entertain a bill at the instance of a widow of one tenant in common claiming under a will. The refusal to dismiss such a bill is not a final decree. **Palethorp's Est.,** 102.

JURISDICTION, O. C.

1. *Will—Power of appointment.* No decree can properly be made upon a conveyance by an executor or trustee under a power conferred by will, unless the aid of the court is required to supply some omission in the terms of the instrument creating the power. **Schwartz's Est.,** 204.

LANDLORD AND TENANT.

1. *Lease—Public policy—Sheriff's sale.* A stipulation in a lease for years that if the lessee shall become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, the whole rent for the balance of the term shall become due and payable in advance of other claims, is not against public policy, and will be sustained in favor of the landlord on a distribution of the proceeds of a sheriff's sale of the lessee's property, to the extent of giving the landlord priority for one year's rent. **Platt & Co. v. Johnson,** 47.

2. *Termination of—Notice—Holding over—Waiver.* A lease from year to year required that notice of an intention to terminate the lease should be in writing. Three months before the end of the year the lessee gave verbal notice to the lessor's agent of his intention to vacate the premises at the end of the year. The agent did not insist on the written notice or ask for one. Before the end of the year the lessee

LANDLORD AND TENANT—*Continued.*

told the agent that he would be willing to remain on the premises as tenant from month to month. The agent told him that he would communicate with the lessor, and let him know in time. The agent had no further communication with the lessee until after the end of the year. The lessee remained in possession and about a month after the termination of the year was informed by the lessor that he would not be accepted as a tenant from month to month. *Held*, that while a jury would be justified in finding a waiver of the written notice, yet the agent's conduct did not create a new tenancy, and the tenant held over as tenant from year to year. **Smith v. Snyder,** 541.

3. *Rent—Repairs.* No implied covenant that the landlord warrants the leased premises to be tenantable, or that he undertakes to keep them so, arises out of the relation of landlord and tenant, and in the absence of a provision in a lease that the lessor shall repair, it is no defense to an action for the rent that the demised premises are not in a tenantable condition.

A tenant occupied premises for nine years and seven months under a lease which bound him to keep them in good repair, and which he was at liberty to terminate at the end of any current year upon thirty days' notice. He paid the rent for the first seven months of the tenth year, and then abandoned the premises, alleging that they were not in habitable condition. *Held*, that he was liable for the rent for the remainder of the year. **Reeves v. McComesky,** 571.

4. *Term—Expiration of notice.* In an action for rent an offer by the tenant to prove "that he was told previously to his removal that they would take the property, and that he might leave it," is incompetent for vagueness inasmuch as the offer does not state by whom the tenant was told that the property would be taken. **Reeves v. McComesky,** 571.

5. *Notice—Expiration of term.* The leaving of the key with the lessor's agent where the evidence shows there was no acceptance of the surrender of the lease, and the putting of a bill "for rent" or "for sale" on premises vacated by a tenant before the expiration of his term, does not deprive the landlord of his right to collect the rent until the expiration of the term. **Reeves v. McComesky,** 571.

LEASE.

1. *Public policy—Sheriff's sale.* **Platt, Barber & Co. v. Johnson,** 47.

2. *Railroads—Covenants—Parallel roads.* **Catawissa v. P. & R. R.,** 544.

3. *Termination of—Notice—Holding over—Waiver.* **Smith v. Snyder,** 541.

LEGACIES.

1. *Legacies—Real estate—Residuary estate—Interest on legacies.* The blending of the real and personal estate in the residuary clause of a will binds the real estate for the payment of legacies by implication, since the "residue and remainder" can only be ascertained after the payment of the debts, legacies and expenses.

Where the settlement of an estate is delayed by litigation with a

LEGACIES—*continued.*

person who claims to be the widow of testator, the legatees are entitled to interest at the rate of six per cent on their unpaid legacies notwithstanding the fact that the executors were unable to realize more than four per cent in income from the estate.

In such a case the residuary legatees are in no position to complain, for the estate is charged with the payment of the debts and the pecuniary legacies first, and not until this is done is the residue ascertained or the extent of their interest in the estate determined. **Watt's Est.,** 422.

LIQUOR LAWS.

1. *Refusal of license—Record—Review.* Where the record in an application for a liquor license shows that the case was heard, considered and refused by the court for the reason "that there is no necessity for the house to be licensed," and there is nothing else upon the record, the Supreme Court will not assume that the license court acted arbitrarily, or that the reason assigned for its action in refusing the license had no existence in fact. **Sandcroft's License,** 45.

2. *Sale—Act* 1887—*Gift of liquor on Sunday.* The Act of May 13, 1887, P. L. 108, is as it declares "to restrain and regulate the sale" of intoxicating liquors, and a person not a liquor dealer, who goes to his neighbor's house on Sunday for the purpose of asking him to go to the polls, and while in his neighbor's wagon shed gives him a drink of whiskey, is not guilty of violating its provisions. **Com. v. Heckler,** 575.

LOST INSTRUMENT.

1. *Evidence—Building contract.* **Lilly v. Riegel,** 219.

MALICIOUS PROSECUTION.

1. *False imprisonment—Evidence—Probable cause—Judge's direction for acquittal.* In an action to recover damages for malicious prosecution, where the plaintiff claims that there was no probable cause for the prosecution, testimony to the effect that at the trial of the plaintiff the judge directed a verdict of acquittal and instructed the jury to hold the prosecutor liable for costs, is inadmissible.

In such a case the inquiry as to probable cause goes back to the commencement of the prosecution, and it relates to the facts then known and as they then appeared. The remarks of the trial judge were directed to the question of actual guilt as it appeared after a full investigation and after hearing the testimony of both sides. They were based upon a state of facts different from those which led to the arrest, and were therefore irrelevant. **Grohmann v. Kirschman,** 189.

2. *Justice of peace—Illegal arrest—Trespass—Damage.* A justice of the peace illegally ordering or causing a person to be arrested, or refusing to accept bail where the offense charged is bailable, is liable in damages to the injured party in an action of trespass under the act of 1887.

Where in such a case the plaintiff's statement avers the original wrongful arrest and a subsequent wrongful committal to prison, but

MALICIOUS PROSECUTION—*continued.*

does not aver the refusal to admit to bail, but the latter fact appears by the evidence, a judgment on a verdict for plaintiff will be sustained. **Grohmann v. Kirschman,** 189.

MARRIAGE.

1. *Evidence of.* Evidence *held* sufficient to support claim as widower of deceased. **Strauss's Est.,** 561.

2. *Married women—Power of alienation—Separate use—Trust—Will.* **Cobb's App.,** 175.

MASTER AND SERVANT.

1. *Negligence—Infant—Contributory negligence—Sudden peril.* Where a coal company employs a boy thirteen years of age as a slate picker, but subsequently directs him to unfasten cars from an endless chain, a work which the evidence showed to be dangerous, it is the duty of the company to see that the boy receives such instructions as will inform him of the dangers which surround him, and enable him as far as practicable to avoid them. Whether this duty was performed by the company is necessarily a question of fact for the jury.

In such a case where the boy without fault on his part is suddenly placed in a position of peril, he cannot be held to the duty of quickly deciding, and acting upon the wisest course to escape the threatened danger. **Neilson v. Coal & Iron Co.,** 256.

2. *Poor laws—Settlement* by hiring not lost by a month's absence without consent if master receives servant back. **Poor District v. Poor District,** 445.

MECHANIC'S LIEN.

1. *Subcontractor—Lumping charge—Amendment.* A subcontractor must specify the items of his claim for work or material, and a lumping charge for either does not satisfy the requirement of the statute, and should be stricken off on motion.

Such a defect is not purely formal, it is substantial, and it cannot be remedied by an amendment made after the expiration of the time allowed for filing the lien. **McFarland v. Schultz,** 634.

2. *Res adjudicata—Effect of different ruling in other cases—Judgment.* On an appeal from an order refusing to enter a judgment on a scire facias sur mechanic's lien for want of a sufficient affidavit of defense, the Supreme Court construed the agreements between the parties as not conferring the right to file liens. The judgment was affirmed and a plea filed in the lower court. Before the trial the Supreme Court applied in other cases a different rule of construction with a different result to contracts of like tenor and effect. *Held,* that the trial court was bound by the rule laid down by the Supreme Court in affirming the judgment, notwithstanding the different rule laid down in subsequent cases. **Bolton v. Hey,** 418.

MISREPRESENTATION.

1. *Fire insurance.* Misrepresentation of essential fact will vitiate. **Freedman v. Fire Ass.,** 249.

MISREPRESENTATION—*continued.*

2. *Insurance—Life insurance—Health of insured.* **Dietz v. Ins. Co.,** 504.

3. *Sale—Rescission—Misrepresentation by partnership.* **Brass Co. v. Reger,** 644.

MISTAKE.

1. *Agent—Fire insurance—Description of property.* **Dowling v. Ins. Co.,** 234.

2. *Charge of court.* The Supreme Court will not review for a mistake of fact which was corrected before jury left the room. **Sommer v. Gilmore,** 117.

MORTGAGE.

1. *Defense to purchase money mortgage—Principal and agent—Representation by agent—Sale of real estate.* **McNeile v. Cridland,** 16.

2. *Parol mortgage—Evidence—Lost paper.* In an action of ejectment it appeared that defendant, who had been a judgment creditor of plaintiff, bought plaintiff's real estate at a sheriff's sale, entered into possession and continued to occupy it for a period of twelve years, and up to the time the suit was brought. Plaintiff claimed that defendant had agreed in writing, at the time of the sheriff's sale, to reconvey the land to him when the debt should be paid, and that the writing was lost. He was permitted to testify to its contents. His evidence was that the writing contained an agreement on the part of defendant to reconvey the property when the debt was paid, but he could not give the specific terms of the agreement or the amount of the debt, nor could he remember that any provision was made for taxes, repairs or other expenditures. He did not pretend to remember the full contents of the paper. The alderman who, according to plaintiff's testimony, had prepared the paper was called, but he testified that he had only a faint recollection of drawing some paper for the parties and he could not recall the contents. The defendant positively denied that he had ever executed any such paper. Evidence was offered and admitted, however, that he had made declarations both before and after the sheriff's sale that he only wanted his money out of the property and that he intended to return the property when he got sufficient money out of it to pay his debt. It appeared from the testimony that large sums of money were spent by defendant for improvements upon the land. The evidence showed that, about a year after the sheriff's sale, the property burned down and that defendant received enough of insurance money to pay his debt, and that plaintiff then made no claim upon him to reconvey the property. *Held*, that the evidence was insufficient to entitle plaintiff to recover. **Burr v. Kase,** 81.

3. *Sci. Fa.—Affidavit of defense—Sufficiency—Married woman.* On a sci. fa. sur mortgage against a married woman, the affidavit of defense averred that the mortgage had been given by her under an agreement with plaintiff: (1) That her liability was to be only that of a guarantor of her husband upon certain notes held by the plaintiff on which her

MORTGAGE—*continued.*

husband was an indorser; (2) that her liability upon the notes and the mortgage in question was to be a mere contingent and conditional one; (3) that certain notes, mortgages and other securities, pledged to the plaintiff bank by her, were to be first collected by it, and applied to the payment of her husband's debt to it; (4) that only in case of a deficiency after enforcing the collection of these notes and other securities was there to be a resort to the mortgage in controversy; (5) that other conditions upon which alone the plaintiff had a right to proceed upon this mortgage had not been performed by it; (6) that the contingency upon which she was to pay her husband's debt had not happened; (7) that the plaintiff had converted certain notes and securities to its own use, and transferred them to another party; (8) that it had taken a conveyance of one of the properties upon which she had a mortgage which had been assigned to plaintiff among the securities transferred to it, and that this property was worth more than the amount of her husband's debt to plaintiff, and it had taken the oil therefrom and not accounted for it. *Held*, that the affidavit of defense was sufficient to prevent judgment. **Bank v. Scofield,** 407.

MUNICIPAL LAW.

1. *Contracts—County commissioners.* The Supreme Court will not reverse a judgment in favor of an architect against a county for increased compensation over the amount named in a contract for building a county court house, where it appears that a change in the plans imposed additional work upon the architect, and the action of the county commissioners in approving of the increased compensation was done in entire good faith. **Butz v. Fayette Co.,** 464.

2. *Fireworks—Act of August* 26, 1721. The act of Aug. 26, 1721, sec. 4, providing a penalty of five shillings for setting off fireworks in the city of Philadelphia without the governor's special license, applies only to individuals, and not to the city acting in its corporate capacity. **Heidenwag v. Phila.,** 72.

3. *Independent contractor — Negligence — Fireworks.* A company agreed, in consideration of a lump sum, to furnish a display of fireworks on one of the public bridges of a city, to furnish "expert artisans" to do the firing and to pay all claims for damages for injuries to persons or properties resulting from the fireworks. The specifications showed that the pieces to be displayed were so large that scaffolding was necessary. The company erected scaffolding upon the sides of the bridge, but the cartway was not obstructed, and cars, wagons and pedestrians were permitted to traverse it. While plaintiff's infant son in charge of his aunt was crossing the bridge, part of the scaffolding fell and killed him. *Held*, that the municipality was not liable for the injury. **Heidenwag v. Phila.,** 72.

4. *Street railways—Municipal consent—Conditional consent—Act* 1889. The right of local authorities to give consent or refusal to street railways is derived from the constitution and not from the act of 1889, and the railway company must take such consent with imposed conditions or not at all. **Plymouth Township v. Ry.,** 181.

MUNICIPAL LIENS.

1. *Sewers—Assessments—Private sewers.* The fact that a landowner constructed a private sewer sufficient for his property with the consent of the municipality, will not relieve him from assessments for a public sewer subsequently constructed by the municipality under the street upon which his property abuts.

In such a case it is immaterial that the sewer clerk of the city issued permits allowing other properties to be connected with the private sewer, and that a schoolhouse owned by the city was connected with the private sewer. **Yost v. Odd Fellows Hall,** 105.

MURDER.

1. *Continuance—Discretion of court.* The Supreme Court will not reverse a judgment on a verdict of guilty of murder in the first degree because the lower court refused a continuance, where there is nothing on the record to show an abuse of discretion in the action of the lower court, or that a postponement of the trial would have resulted in strengthening the defense in any respect. **Com. v. Bezek,** 603.

2. *Insanity—Evidence.* Insanity is an independent defense, and he who sets it up must show the existence of it by fairly preponderating evidence. **Com. v. Bezek,** 603.

NEGLIGENCE.

1. *Carriers of live stock — Presumption — Evidence — Limitation of liability—Question for jury.* **Schaeffer v. P. & R. R. R.,** 209.

2. *Contributory negligence—Boroughs—Defective sidewalk.* In an action of trespass against a borough to recover damages for personal injuries suffered from falling upon a sidewalk alleged to be defective, the case is for the jury where the evidence, though conflicting, tends to show that at the point where the accident occurred there were loose planks, and that the sidewalk had been in a defective condition for several months.

In such a case, where there was evidence that plaintiff had previously passed over the walk frequently, it was not error for the court to charge that whether plaintiff ought to have noticed its dangerous condition, is for the jury; "she was not bound to the exercise of extraordinary care; but she was bound to use such care as a person of ordinary prudence, situated as she was, under like circumstances would use, and if she neglected that, it would be negligence." **Fee v. Columbus Borough,** 382.

3. *Contributory negligence—Infant—Master and servant.* Whether infant employee engaged in a position of peril had received adequate instruction to enable him as far as possible to avoid the dangers of his employment is necessarily a question of fact for the jury. **Neilson v. Coal & Iron Co.,** 256.

4. *Contributory negligence—Railroads—Grade crossings—"Stop, look and listen."* In an action to recover damages for the death of plaintiff's husband killed at a grade crossing, it appeared that at the point where the accident occurred the general direction of the railroad was north and south. There were two tracks, one for the north and one for the south-bound trains. The deceased, driving in an open two-

NEGLIGENCE—*continued.*

horse farm wagon, came from the highway traveling eastward, crossed the south-bound track, and was stuck by a train bound north on the other track. In approaching the railroad, he stopped at a point about forty feet from the track where a train could be seen coming from either direction for eight hundred or one thousand feet. As this distance diminished on nearing the track the view of the railroad was rapidly extended until at the crossing a train could be seen for more than a third of a mile. The undisputed evidence showed that the deceased could have seen the train which killed him, if he had looked when he was fifteen or twenty feet from the track. *Held*, that the deceased was guilty of contributory negligence, and that plaintiff was not entitled to recover.

In such a case the fact that the deceased stopped, looked and listened at a point forty feet from the railroad, did not exempt him from the charge of contributory negligence, if he drove forty feet to the crossing, with an approaching train in view. **Gangawer v. P. & R. R. R.,** 265.

5. *Contributory negligence—Street railways—"Stop, look and listen"—Crossings.* Plaintiff was injured while driving across the tracks of an electric railway at the intersection of two streets. At the point where the accident occurred there were two tracks running north and south upon which cars were run in opposite directions. On nearing the crossing, plaintiff could see that there was no car on the north-bound track. His view of the south-bound track was so obstructed by a wagon, and by piles of lumber and brick, that he could not see more than twenty-five feet of the track from his place of observation. For these obstructions, the street railway company was not responsible. Ahead of him, and moving in the same direction, was a wagon loaded with iron, and the noise created by it was sufficient to drown the noise made by an approaching car. Without stopping to listen, or to wait a moment for the abatement of the noise which prevented his hearing, he drove upon the tracks, and a south-bound car struck his buggy and injured him. *Held*, that it was the duty of plaintiff under the circumstances to stop before going upon the tracks, and that it was not error for the court to enter a compulsory nonsuit. **Omslaer v. Traction Co.,** 519.

6. *Independent contractor—Municipality* not liable for negligence of an independent contractor engaged by the city to furnish a display of fireworks for a lump sum. **Heidenwag v. Phila.,** 72.

7. *Presumption of negligence from circumstances.* Where the thing which causes the injury is shown to be under the management of the defendants, and the accident is such as in the ordinary course of things does not happen when those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from a want of care, and the burden is upon the defendants of establishing their freedom from fault.

Defendants were employed by plaintiff to repair a roof. They sent two men to do the work, who took a fire pot upon the roof. A fire was caused by sparks from the fire pot, and plaintiff's property was

NEGLIGENCE—*continued.*

destroyed. *Held*, that the circumstances raised a presumption of negligence against defendants. **Shafer v. Lacock,** 497.

8. *Railroads—Crossings—"Stop, look and listen."—Nonsuit—Contributory negligence.* In an action to recover damages for personal injuries received at a grade crossing, a compulsory nonsuit is properly entered where the evidence for plaintiff shows that, in approaching the crossing, she stopped about three hundred feet from it, where she had a view of the railroad; that she then proceeded to the crossing; that for a distance of fifty-five feet along the highway from the crossing there was an unobstructed view of the railroad for a distance of five hundred feet; that when about to go upon the crossing, a hand car approached and frightened her horse, causing him to wheel suddenly, upsetting the buggy, and causing her injuries. **Plummer v. R. R.,** 62.

9. *Railroads—Crossings—"Stop, look and listen."—Nonsuit—Contributory negligence.* In an action to recover damages for the death of plaintiff's husband a nonsuit entered for contributory negligence will be sustained, although the case is a close one, where the plaintiff's evidence shows that the deceased approached a railroad crossing in a wagon; that he stopped about five or ten feet from the track, at a point where the track, when not obscured by mist or smoke, could be seen for a distance of from 900 feet to a mile; that there was a slight mist, and the track was obscured by smoke for 100 feet from where he was when he began to cross, walking his horses; that he was struck after he had passed four tracks; that no signal was given by the train which struck him, and that the speed of the train was about forty miles an hour. **Beynon v. R. R.,** 642.

10. *Townships—Dangerous road.* In an action to recover damages for personal injuries, it appeared that plaintiff was injured by falling with his team and wagon down a declivity extending seventy feet at the side of a public road eleven feet wide, on the other side of which there was an embankment. The descent for the first ten feet was vertical, and for the rest of the way it was so steep that the plaintiff and his horses rolled down it fifty feet until their motion was arrested by a stump. There was no guard rail or barrier of any kind at this point. The case was submitted to the jury with instructions that if the road was dangerous by reason of its proximity to a precipice it was the duty of the township to exercise common prudence to insure the safety of travelers, and to erect barriers if they were necessary for that purpose. *Held*, that a judgment on a verdict should be sustained. **Trexler v. Township,** 214.

11. *Township—Unmanageable horses.* The question of safety relates not only to the tendency of the horse to become frightened, but also to the facility with which he can be controlled, and it is too broad a statement to say that country roads must be so kept that "skittish" horses may be driven upon them with safety. There is no duty whatever to provide for the use of vicious, untrained or unmanageable horses, and whoever drives such horses upon the road does so at his peril. Per FELL, J. **Trexler v. Township,** 214.

NOTICE.

1. *Special partnership—Notice of dissolution.* **Smith v. Irvin,** 271.

2. *Vendor and vendee — Covenants in lease — Collateral agreement.* A vendee is held to have notice of the covenants of an existing lease of which he knew but had not examined and as to the contents of which he has not been misled, but he is not charged with notice of a distinct collateral agreement. **Wertheimer v. Thomas,** 168.

PARTITION.

1. *Contingent interests—Parties—Marketable title.* Contingent interests given by a will to persons now living, and to others yet unborn, will not be divested by partition proceedings unless the persons living be made parties, and the interests of those unborn be submitted to the court and some one be appointed to represent them, or such order made for their protection as equity and justice require.

Plaintiff had two undivided eighth interests in land, subject to a life estate in his mother, which were liable to open to let in after-born children; and under the will by which his mother took, certain others had contingent interests in the land. Upon his mother's conveying to him her life estate in one eighth interest, plaintiff instituted proceedings for partition of all the land, wherein two of the defendants, being minors, appeared by guardian, and in which the interests of the unborn parties in interest were not submitted to the court for protection, and to which persons having contingent interests were not made parties. *Held*, that plaintiff did not obtain by the partition proceedings a marketable title to the one eighth portion assigned to him in such proceedings. **Holmes v. Woods,** 530.

2. *Jurisdiction of C. P.—Tenants in common.* The court of common pleas has jurisdiction to entertain a bill in equity for partition of real estate, filed by a widow of one of the tenants in common, claiming title under a will.

Where the case is heard upon bill and answer and plaintiff alleges sufficient interest to sustain the bill, the cause must be proceeded with and the rights of all the parties will be determined by subsequent proceedings. **Palethorp's Est.,** 102.

3. *Jurisdiction C. P.—Interlocutory or final decree.* The refusal of the court to dismiss a bill and the ordering that it be proceeded with before a master is not a final decree. **Palethorp's Est.,** 102.

3. *Parol partition* set up as a defense in an action of ejecment *held* to be a question for the jury. **McKnight v. Bell,** 50.

PARTNERSHIP.

1. *Decedents' estates—Specific performance—Option of survivor to buy deceased partner's estate.* Two partners entered into an agreement, providing that in the event of the death of either the survivor should have the right to purchase the deceased partner's interest. The agreement provided that bills receivable should be taken by the survivor at their face value, materials in stock at cost, good accounts at a discount of five, and manufactured articles at a discount of ten per cent. The agreement then continued: "It is agreed that all property . . . . such as lands, buildings (subject to the encumbrances now

PARTNERSHIP—*continued.*

thereon being three several yearly ground rents) . . . . stationary fixtures of all kinds . . . . patterns, plates, wagons, horses, carriages, and all tools . . . . shall be valued at the sum of Twenty five thousand dollars, and if anyone or all of the said yearly ground rents shall be extinguished or any other premises shall be purchased in the name of the firm . . . . then said sum of Twenty five thousand dollars shall be increased in amount to the sum expended either in the extinguishment of any or all of the said yearly ground rents or in the purchase of any other premises. And if any portion of the premises in the name of the firm shall be sold or encumbered . . . . then said sum of Twenty five thousand dollars shall be reduced in amount the sum realized from the sale or encumbrance thereof." *Held*, that the increase provided for was that which would result from the extinguishment of ground rents, and the purchase of other premises, but did not include moneys spent on new buildings and additions and improvements to the plant of the firm. **Rohrbacher's Est.,** 158.

2. *Dissolution by death—Liability for debts after the death.* The general estate of a deceased partner is not liable for debts contracted after his death unless distinctly made so by the clear language of the partnership agreement, or by the will of the decedent. **Wilcox v. Derickson,** 331.

3. *Joint stock company at common law—Dissolution by death.* Estate of a deceased member not liable for debts contracted after death where the executors had declined to accept his stock. **Wilcox v. Derickson,** 331.

4. *Sale — Rescission — Misrepresentation.* A false statement was made by a partnership, which subsequently dissolved; a new firm was organized under some name to which goods were sold: *Held* That the sale having been made without knowledge of the misrepresentation, it could not be rescinded on the ground that the statement of the first firm was false. **Brass Co. v. Reger,** 644.

5. *Special partnership—Notice—Dissolution.* Where a special partner in a limited partnership formed under the act of March 21, 1836, P. L. 143, gives the notice required by the partnership articles of his intention to withdraw his capital from the firm at a certain time, but afterwards consents to withdraw it gradually, and the firm is not dissolved, he is entitled to participate in profits earned up to the actual dissolution of the partnership following a notice given by one of the other partners. **Smith v. Ervin,** 271.

PENSIONS.

1. *Soldiers' Home—Voluntary payment or maintenance.* In an action by an inmate of a Soldiers' Home against the Home, to recover money which he alleged he had been compelled to pay to the Home out of his pension, an affidavit of defense is sufficient which avers that a rule of the Home required the inmates to turn over eighty per cent of their pension money to the treasurer of the Home; that upon the admission of the plaintiff to the Home he signed an agreement binding himself to comply with the rules of the Home of which he knew this to be one; that the payments for which he sued were made by him volun-

PENSIONS—*continued.*

tarily in accordance with the contract executed by him on his admission.

Not decided whether this rule of the Home is authorized or not. **Bryson v. Soldiers' Home,** 352.

PARTY WALLS.

1. *Discretion of building inspectors—Thickness of wall.* The discretion given by the act of Feb. 24, 1721, to the surveyors or regulators whose duties are now performed by the building inspectors, to "regulate the walls to be built between party and party, as to the breadth and thickness thereof," has been modified by subsequent acts forbidding the erection of a wall of less than the prescribed minimum thickness, but it has never been taken away, or otherwise abridged.

A builder, who without a permit erects a party wall of greater thickness than is required by the height and character of the building, cannot place one half of it on the adjoining lot, although the encroachment is within the maximum limit fixed by law. The extent of the use of the adjoining land is within the discretion of the inspectors, and is to be determined by the character and size of the building to be erected.

The building inspectors may in their discretion, because of the nature of the ground or the intended use of the building, or for other reasons, require the erection of a thicker wall without regard to the height of the building. If they do so the right to use more of the adjoining lot up to the maximum limit follows, but the necessity as it affects the right is to be determined by the inspectors, not by the builder. **Kirby v. Fitzpatrick,** 434.

POOR LAWS.

1. *Order of removal—Settlement—Service without residence.* Under the act of June 13, 1863, clause V. sec. 9, P. L. 543, an order of removal of an "unmarried person, not having a child," will be quashed, where it appears that although the pauper had acquired a settlement in the district mentioned in the order, he had subsequently acquired a settlement, by being bound and hired as a servant during one whole year, in another district.

Under the act of June 13, 1836, clause V. sec. 9, P. L. 543, describing the manner in which "any unmarried person, not having a child," may gain a settlement in any district, both residence and service in the same poor district is not necessary to acquire a settlement. **Bellefonte v. Somerset Co.,** 286.

2. *Settlement—Master and servant.* A settlement by hiring for a year is not lost by the fact that the servant has absented himself for a month or more from the service without the consent of the master, if the master receives the servant back and continues the payment of his wages. **Poor District v. Poor District,** 445.

POWER OF APPOINTMENT.

1. *Will.* O. C. has no jurisdiction to make a decree unless aid is required to supply some omission in terms of instrument creating the power. **Schwartz's Est.,** 204.

POWER OF SALE.

1. *Trusts and trustees.* A trustee cannot be permitted to deprive himself of a power of sale, conferred for the benefit of the trust or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust. **Hickok v. Still,** 155.

PRACTICE, C. P.

1. *Affidavit of defense* sufficient which denies grounds of liability averred in statement and those which arise by implication from averments made. **Barker v. Fairchild,** 246.

2. *Charge of court—Review.* Where no exception was taken at the trial to the admission or exclusion of evidence, and no error assigned to the instruction of the trial judge on any legal question, the Supreme Court will not reverse a judgment on a verdict for plaintiff because the trial judge said to the jury, "Take the case then, and under the testimony given before you, and the law as you have heard it, about which there is no difference of opinion between counsel, render such a verdict as you believe will accord with the obligations you have assumed as jurors." **Mixel v. Betz,** 328.

PRACTICE, O. C.

1. *Appeals—Opening executor's account—Interlocutory order.* No appeal lies from an order of the orphans' court opening a decree of confirmation of an executor's account upon an application promptly made by one who was a minor, unrepresented by guardian or otherwise, when the account was filed.

In such case, where the allegations in the petition are specifically denied by the answer, and no testimony is taken to support the averments of the petition, the only matter in dispute which the orphans' court can dispose of on bill and answer is the amount of compensation to which the executor is entitled for his services.

An order opening a decree of confirmation of an executor's account should state as to which items the account is opened and a reexamination allowed. **Long's Est.,** 341.

PRACTICE, S. C.

1. *Appeals—Opening executor's account—Interlocutory order—Executors and administrators.* **Long's Est.,** 341.

2. *Assignments of error—Exception.* The Supreme Court will not consider an assignment of error to the rejection of evidence, where the record shows that the exclusion of the evidence was not excepted to at the trial, and that no exception was afterwards allowed. **Mixel v. Betz,** 328.

3. *Review—Charge of court.* The Supreme Court will not review for a misstatement of fact in the charge of the court which was corrected before the jury left the room. **Sommer v. Gilmore,** 117.

4. *Review—Liquor laws—Refusal of license—Record.* **Sandcroft's License,** 45.

PRINCIPAL AND AGENT.

1. *Representations by agent—Sale of real estate—Defense to purchase*

PRINCIPAL AND AGENT—*continued.*

money mortgage. When an agent acts contrary to his instructions his principal will be bound by his acts which are within the scope of the authority which the agent was held out to the world to possess.

In an action upon a purchase money mortgage, the case should be submitted to the jury where the evidence for the defendants tends to prove that in purchasing the mortgaged premises, defendants relied upon representations of plaintiff's agent who negotiated the sale to the effect that the house was well built on solid ground; when instead thereof it was actually erected on made ground which gradually settled to such an extent as to cause the sinking, cracking and bulging out of the front wall and other damages, and that a large expenditure of money would be required to repair the damages thus occasioned. **McNeile v. Cridland,** 16.

2. *Sub-agent—Fire insurance.* Acts of a sub-agent properly employed by a duly authorized agent have same effect as if done by the agent. **McGonigle v. Ins. Co.,** 1.

PROMISSORY NOTE.

1. *Accommodation note.* When an accommodation note has been used by the holder for the purpose for which it was given, the accommodation maker or indorser is bound by the action of his friend, and becomes liable to pay the amount of the note according to its terms. He cannot defend against the indorsee on the ground that the note was without consideration, for to permit this would defeat the purpose for which he loaned his credit. **Philler v. Patterson,** 468.

PUBLIC OFFICERS.

1. *Building inspectors.* Discretion of, as to the thickness of wall. **Kirby v. Fitzpatrick,** 434.

2. *Fees—Acts of March* 10, 1810, *April* 5, 1842, *and March* 31, 1876—*Statutes—Repeal.* The act of March 31, 1876, P. L. 13, providing that the fees of county officers shall be paid into the county treasury, and that the officers shall be paid by salaries, repeals the act of March 10, 1810, 5 Smith's Laws, page 105, and its supplement, the act of April 5, 1842, P. L. 236, by which in the county of Philadelphia such fees, after deduction of expenses, were divided between the officers and the commonwealth. **Com. v. Mann,** 290.

3. *Fees—Statutes—Repeal—Acts of March* 10, 1810, *and April* 6, 1871. The act of March 10, 1810, 5 Smith's Laws, page 106, requiring county officers to pay over to the commonwealth fifty per cent of all fees in excess of $1,500 was repealed as to Allegheny county by the act of April 6, 1871, P. L. 476, and its supplement, the act of March 6, 1872, P. L. 209, providing that such fees should be paid into the county treasury. **Com. v. Allegheny Co.,** 303.

4. *Sheriff—Fees—Commitment—Act of April* 2, 1868. Under the act of April 2, 1868, P. L. 4, the sheriff is entitled to a fee of fifty cents for each person received on commitment, without regard to the fact that they were all committed for the same criminal matter, or that a separate commitment was not made out for each separately. **Wilhelm v. Fayette Co.,** 462.

PUBLIC POLICY.

1. *Lease—Rent to become due in advance.* A stipulation that in event of lessors becoming embarrassed, making an assignment or being sold out at sheriff's sale the whole rent shall become due in advance for balance of the term is *not* against public policy. **Platt, Barber & Co. v. Johnson,** 47.

QUESTION FOR JURY.

1. *Contract.* Addition to a written instrument after signature. **Lilly v. Person,** 219.

2. *Defective sidewalk—Contributory negligence.* **Fee v. Columbus Borough,** 382.

3. *Water company — Trespass.* The evidence showing diversion of water for which damages are claimed, the case is for the jury. **Hogg v. Water Co.,** 456.

QUO WARRANTO.

1. *Corporate elections.* A director has a standing in quo warranto proceedings to contest the right of other persons to hold the office of director—*Contest involving several offices*—when it may be determined by one writ of quo warranto. **Com. v. Stevens,** 582.

RAILROADS.

1. *Agreement for joint control of track.* Two railroad companies contracted to build a connecting river front railroad for their joint use. The expense of maintaining the line was to be in proportion to the actual tonnage represented by the two companies. The rules for the management of the joint line were drawn up and signed by the managers of the two railroad companies. *Held,*

(1) The rules, adopted by the joint action of the officers of the companies for the management and maintenance of that part of the River Front Railroad that is the subject of this contention, amount to an agreement or contract upon the subject to which they relate.

(2) Such contract is not irrevocable, but is subject to such modification as circumstances may require in order to promote the purpose in view and the interests of the parties.

(3) Such changes cannot be made arbitrarily at the will of either party, but they require the concurrence of both.

(4) Either party may give suitable notice of its purpose to withdraw from the arrangement at and after a day named. Thereafter, if the parties cannot readjust their relations to each other, the courts must make such ad interim orders as will protect the rights of the parties and secure the preservation and operation of the road.

(5) In disposing of such a question the relative ownership, tonnage, and other relevant circumstances should be considered. **P. & R. R. R. v. River Front R. R.,** 357.

2. *Carriers of live stock — Negligence — Presumption — Evidence.* **Schaeffer v. R. R.,** 200.

3. *Causeways—Measure of damages.* Act of February 19, 1849, P. L. 84. **Port v. R. R.,** 19.

RAILROADS—*continued.*

4. *Grade crossings—Stop, look and listen—Contributory negligence.* **Gangawer v. R. R.,** 265.

5. *Lease—Covenants—Parallel roads.* Plaintiff leased to defendant its railroad as well as its traffic contract rights with connecting or feeder railroads, for a period of 999 years, the defendant to maintain the road in good order and condition, keep it in public use, operate it with all reasonable care and efficiency and use all proper and reasonable means to maintain and increase the business thereof. Defendant subsequently became practically the owner of another connecting railroad having the same general direction as the leased railroad with practically the same terminals. *Held*, that, while defendant may not violate the stipulations of the contract in letter and spirit and operate its own road for its own benefit without incurring liability to the plaintiff, yet its covenant is not broken by shipping large amounts of freight over its own parallel road, when the carrying of such freights over the leased road would have been impracticable, on account of its heavy grades, curvatures and ancient method of construction. **Catawissa v. P. & R. R.,** 544.

6. *Negligence—Crossings—Stop, look and listen—Nonsuit.* **Plummer v. R. R.,** 62.

7. *Negligence—Crossings.* Wayfarer's duty under rule of stop, look and listen. **Beynon v. R. R.,** 642.

8. *Street railways—Municipal consent—Act of May* 14, 1889. The right of local authorities to give their consent or refusal to a street railway company to construct their road is derived from the constitution and not from the act of May 14, 1889, P. L. 217; and the railway company must take such consent upon such conditions as the local authorities may impose, or not at all.

The provision in the act of May 14, 1889, that the company shall complete its road within two years after the consent of the local authorities, unless the time shall be extended by such authorities, does not prevent the local authorities from making it a condition of their consent that the railway shall be completed within a time less than two years.

Where the time limit is, by express stipulation of the contract, one of the conditions on which the consent is given, time is of the essence of the contract, to protect the public in their right to the prompt enjoyment of the benefits accruing to them from the franchise. If, therefore, the railway company does not complete its railway within the time stipulated, and the local authorities revoke their consent for breach of this condition, they will have a standing in equity to prevent the company from constructing its railway. **Plymouth Township v. Ry. Co.,** 181.

9. *Street railways—Stop, look and listen—Crossings—Negligence.* A person about to cross the tracks of a street railway operated by cable or electricity is bound to look and listen. While there is no settled rule that he should stop before crossing a street railway, and it does not appear desirable that there should be, yet there may be occasions when it will also be his duty to stop. **Omslaer v. Traction Co.,** 519.

RAILROADS—*continued.*

10. *Stock subscriptions—Estoppel.* Where a person has subscribed to the unissued stock of a corporation, which corporation has accepted the subscription without offering to allot such stock amongst the stockholders, a stockholder has no remedy in equity to compel the issue of any portion of such stock to himself, or to have the subscription of the one who subscribed to the stock declared invalid. If injured, he has his remedy at law to recover damages for such injury.

It seems that in such a case a stockholder cannot complain where it appears that no stockholder offered to take or was willing to take the stock at par, or that it would have sold for more. **Shellenberger v. Patterson,** 30.

REAL ESTATE.

1. *Sale of—Representations by agent.* Defense to purchase money mortgage. **McNeile v. Cridland,** 16.

2. *Wills—Legacies.* Blending of real and personal estate in residuary clause binds real estate for payment of legacies. **Watt's Est.,** 422.

RES ADJUDICATA.

1. *Judgment.*—The judgment of a proper court puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed. **Bolton v. Hey,** 418.

SALE.

1. *Executory contract—Measure of damages.*—An order for steel scrap "similar to sample wagon load previously delivered," is an executory contract, and no title passes until goods are accepted. The measure of damages will be difference between market price and price agreed upon. **Jones v. Jennings,** 403.

2. *Rescission—Misrepresentation—Partnership.*—Where a partnership makes a false statement to a mercantile agency and subsequently is dissolved and a new firm is organized under the same name, and goods are sold to the new firm before the statement to the mercantile agency comes to the knowledge of the vendor, the sale of the goods cannot be subsequently rescinded by the vendor, on the ground that the statement to the mercantile agency was false. **Manhattan Brass Co. v. Reger,** 644.

SEPARATE USE.

See TRUSTS.

SET-OFF.

1. *Decedents' estates—Executors and administrators.*—In an action by the administrator of a solvent estate the defendant may set off against the claim of the plaintiff a debt due by the decedent when the suit was brought: Chipman v. Ninth Nat. Bank of Phila., 120 Pa. 86, distinguished. **Hicks v. National Bank,** 638.

SEWERS.

1. *Assessments—Private sewers.* **Yost v. Odd Fellows Hall,** 105.

SHERIFF.

See PUBLIC OFFICERS.

SHERIFF'S INTERPLEADER.

1. *Lease—Evidence.* **Galbraith v. Bridges,** 325.

SIDEWALK.

1. *Defective sidewalk—Contributory negligence—Question for jury.* **Fee v. Borough,** 382.

SPECIFIC PERFORMANCE.

1. *Decedents' estates—Partnership—Option of survivor to buy deceased partner's estate.* **Rohrbacher's Est.,** 158.

2. *Vendor and vendee—Marketable title.* A doubtful title which exposes the holder to litigation is not marketable and the purchaser will not be compelled to take it. **Holmes v. Woods,** 530.

STATUTES.

1. *Public officers—Repeal of—Construction—Weight of uniform practice.* Where a new statute on the same subject embraces provisions similar to those of the old statute for its enforcement, elaborates them, and introduces a more complete system, with a wholly different purpose, the new statute repeals the old statute.

In construing statutes applicable to public corporations the courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time. **Com v. Mann,** 290.

2. *Repeal.* Act of March 10, 1810, 5 Sm. Laws, 106, as to county fees is repealed as to Allegheny Co. by act April 6, 1871, P. L. 476, and its supplement March 6, 1872, P. L. 209. **Com. v. Allegheny Co.,** 303.

3. *Title of act* of Feb. 8, 1871, P. L. 31, defective in that it violates art. XI., sec. 8, Const. of Pa. **Payne v. Coudersport,** 386.

4. *Title of act.* Act of June 10, 1893, P. L. 419, offends art. 3, § 3, Const. of Pa. and is insufficient in title. **Evans v. Willistown Twp.,** 578.

STATUTES OF LIMITATION.

1. *Conspiracy to extort money—Amendment—Limitation.* Defendant and two other persons were sued as co-conspirators in an executed scheme to extort money from plaintiff by means of his arrest and detention on the charge of embezzlement. More than six years after the cause of action arose, the declaration was amended so as to remove therefrom the element of conspiracy, and the case was so proceeded in that it resulted in a judgment against one of the defendants for the money alleged to have been extorted, and in a judgment in favor of the other codefendants. *Held,* that the amendment did not prejudice the defendant against whom judgment was recovered, as the essence of

STATUTES OF LIMITATION—*continued.*

the complaint in the declaration was the extortion, and the amendment was not necessary to authorize or sustain the judgment. **Fillman v. Ryon,** 484.

STREET RAILWAYS.

See Sub Title RAILROADS.

TAXATION.

1. *Banks—Uniformity of taxation—Act of June* 8, 1891—*Constitution, art.* IX. *sec.* 1, XIV. *amendment.* The act of June 8, 1891, P. L. 240, which provides that any bank incorporated by this state or the United States may, in lieu of all taxation except upon its real estate, collect from its shareholders and pay into the state treasury a tax of eight mills on the dollar on the par value of all its shares that have been subscribed for or issued, and that any bank which fails to do so shall be subject to a tax of four mills upon the actual value of all the shares of its capital stock, is not repugnant to art. IX. sec. 1, of the constitution of Pennsylvania, which ordains that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The act is not in conflict with the condition upon which the several states are permitted to tax the shares of stock in national banks, namely: "That the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

The act is not in conflict with amendment XIV. of the constitution of the United States, which ordains that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The act provides sufficient means of notice to the shareholders of the stock upon which the tax is imposed. **Com. v. Bank,** 309.

2. *Public corporations—Real estate—Public use—Equity—Injunction.* Equity has power to restrain the collection of a tax where there is a want of power to tax, or a disregard of the constitution in the mode of assessment.

A court of equity will restrain by injunction the collection of a tax assessed upon the real estate of a natural gas company organized under the act of May 29, 1885, P. L. 29, where the evidence shows that the land is part of its capital stock upon which it pays a tax to the state and is necessary and indispensable to the company in carrying out the public purpose for which the company was incorporated. **Gas Co. v. Elk Co.,** 401.

TRESPASS.

1. *Conspiracy — Extortion — Amendment — Statute of limitations.* Where an action is brought against more than one for a wrong done, a combination or joint act of all must be proved in order to recover against all; but if it turns out on the trial that one only was concerned the plaintiff may recover as if such one had been sued alone, and in such case the conspiracy is nothing as to sustaining the action, the

TRESPASS—*continued.*

foundation being the actual damage done to the plaintiff. **Fillman v. Ryon,** 484.

2. *Diversion of water — Water company — Damages.*—In an action against a water company to recover damages for injuries to land caused by diversion of water from a stream, the case is for the jury where the evidence for the plaintiff tends to show that the defendant diverted from its regular channel a considerable quantity of water which otherwise would have flowed through and over plaintiff's land, lying on either side of the stream below the point at which the water was diverted, and that in consequence of such diversion plaintiff sustained injuries to his land. **Hogg v. Water Co.,** 456.

TRUSTS AND TRUSTEES.

1. *Fraud—Insolvency of trustee—Confidential relations.* A. made a will which contained a schedule of the valuation of his real estate, and directed that his daughter C. should, after his decease, select $25,000 worth of said real estate, according to the valuation set out in the will.

The real estate thus selected was devised to her to possess, occupy and control during life, in trust for her children, and in case of her death without children then to his heirs at law at the time of her death. After paying necessary expenses and repairs, and affording such proper support for herself and family as she might deem necessary, she was given power to invest whatever income might remain in the real property or interest-bearing securities for the use and benefit of the trust. She was also given power to sell and convey in fee simple any portion of the real estate, and reinvest the proceeds of such sale in other real estate and interest-bearing securities. In accordance with the provisions of the will C. selected portions of the testator's real estate of the value of $25,000.

Among the properties thus selected was a brick yard, where C. carried on the business of brickmaking, and incurred debts in this business and in the improvement of the trust property. C. died largely indebted and her estate was insolvent. The plaintiffs were creditors of C. and, failing to obtain payment in full of their indebtedness out of the estate of C., filed their bill against the administrators and children of C., and sought to hold the trust estate liable for the payment of the balance of their indebtedness due from C. The bill averred that the estate of C. was made insolvent by the use of plaintiff's money in the improvement of the trust estate, and that their claims were for work done, materials furnished and money expended in making improvements and betterments to said estate, by which the value of the property was largely enhanced, the enhancement exceeding the proceeds of the trust property sold by C. and the unpaid balance of the indebtedness of her estate. The bill did not aver fraud either individually or as trustee on the part of C., or that the work had been done or materials or money furnished by plaintiffs upon any other security than her personal responsibility.

The court below dismissed the bill on the ground that the dealings between the parties were strictly of a business character; that there

TRUSTS AND TRUSTEES—*continued.*

was no confidential or fiduciary relation existing between them, and the evidence failed to show any artifice, trick or false pretense at the time the indebtedness was incurred. Affirmed by the Supreme Court on the opinion of the court below. **Heburn v. Spotts,** 346.

2. *Power of sale—Surrender of discretion.* A trustee cannot be permitted to deprive himself of a power conferred for the benefit of the trust, or so to fetter its exercise by himself or his successor as to defeat the purpose of the trust.

Testatrix by her will directed as follows: "I authorize and empower my executor at any time during the lifetime of my husband with his assent, and I direct him immediately upon the decease of my said husband, or so soon thereafter as may be, to sell the whole or any part of my real estate for cash, upon credit or ground rent," etc. On Oct. 20, 1890, the executor who was also the husband agreed with the plaintiff as follows: "That if Geradine H. Hickok desire to become a purchaser of that piece of ground or land, with house and appurtenances thereon . . . .—of which she is now lessee and occupier—at any time during her leasing of the property she may do so for the sum of nine (9) thousand dollars, to be paid as follows," etc. The plaintiff was then in possession under a lease from the executor which did not end until May 1, 1894. The husband died on Feb. 13, 1892, and on Dec. 3, 1893, plaintiff notified the administrator d. b. n. c. t. a. of her intention to purchase under the agreement. *Held*, that she was not entitled to a specific performance of the contract.

The vice of the agreement was that it bound the trust estate no matter what the detriment to it might be, without giving it any corresponding advantage. This was not a use of the power, but a surrender of it for the time. It suspended the exercise of the discretion which had been given the executor and defeated the direction in the will for an immediate sale upon the husband's death. **Hickok v. Still,** 155.

3. *Separate use trust.* Where purpose of will to create is clear, no particular form of words is necessary. **Steinmetz's Est.,** 171, 175.

VENDOR AND VENDEE.

1. *Covenants in lease—Notice—Collateral agreement.* As between the vendor and vendee of land the latter is held to have had notice of the covenants of an existing lease of which he knew but had not examined, and as to the contents of which he had not been misled, but he is not charged with notice of a distinct collateral agreement.

A lease gave the tenant an option to buy the demised premises at a certain price. Before the termination of the lease the owner of the land agreed to sell it to plaintiff who knew of the lease, but did not know that it gave the tenant an option to purchase. Before plaintiff received his deed the tenant exercised his option, and the deed was made to the tenant. Plaintiff subsequently bought the land at an advanced price and sued the vendor for the difference. The court gave binding instructions for defendant. *Held*, to be error. **Wertheimer v. Thomas,** 168.

2. *Marketable title—Specific performance.* A recovery in an action

VENDOR AND VENDEE—*continued.*

of assumpsit for the purchase money due on a contract for the sale of land will have the effect of a decree for specific performance, and must be decided upon the same equitable principles.

A doubtful title which exposes the holder of it to litigation is not marketable, and the rule in equity is that the purchaser will not be compelled to accept it. **Holmes v. Woods,** 530.

WAGES.

1. *Decedent's estate—Claim for services—Evidence—Declarations—Will.* **Hughes v. Keichline,** 115.

WATER COMPANY.

1. *Trespass — Diversion of water by Water Company — Damages.* When whole question is for the jury. **Hogg v. Water Co.,** 456.

WILL.

1. *Charitable use.* A testamentary disposition for the benefit of the poor of a defined locality is a charitable use.

A devise of land specifically described, and all the residue of an estate, "to go to the benefit of the poor of Eldred Township, Warren County, Pa.; to have the use and nothing more . . . . for their benefit and use . . . . and when fully proven up to be managed by the overseers of the poor in said county for the benefit of Eldred Township," is a charitable use, and the trustees are sufficiently designated, notwithstanding the fact that their correct corporate name is not given. **Trim's Est.,** 395.

2. *Charge on land—Evidence.* A charge on land cannot be created by the mere gift of an annuity, but it may be created without express words and by implication from the whole will that such was the intention.

Testator directed as follows: "My son John he shall settle my personal property as soon as it is possible he shall pay the of the money from my personal goods the half of the money to my Daughter Marget and what is Left from the Balance of the Thousand Dollars he tookt of for himself my Son John Shall pay to my Daughter Marget an Annually one a Hundred and twenty five Dollars for her Natural Life (for Dowery) time or as Long as she will Liv in this World and my Son John he shall have all my real Estate for his own property as Soon my Daughter is Deased my Son John Shall not pay any Longer not to her heirs and to nobody it be Stopt." Testator was an old man and died within two months of the execution of his will. He had very little personal property. *Held*, that the annuity of the daughter was charged upon the land. **Dickerman v. Eddinger,** 240.

3. *Estate during widowhood.* Testator directed as follows: "I give, devise and bequeath unto my wife, Anna B. Church, my homestead lot and buildings thereon, with the appurtenances, situate in the city of Meadville, Pa., and also all my household goods and furniture, horses, cows, carriages, sleighs, harness, and the like to be occupied and used by her as and for a family home during her widowhood." The residue of the estate was devised and bequeathed to the wife and

WILL—*continued.*

children in such shares and estates as they would take under the intestate laws. *Held*, that the wife took an estate during widowhood, and not in fee. **Patton v. Church,** 321.

4. *Legacies.* Interest thereon when delayed by litigation. *Blending of real and personal estate* in residuary clause binds real estate for payment of legacies. *Codicil*, effect of, as modifying and not revoking a charitable gift. **Watt's Est.,** 422.

5. *Power of sale* does not work such an immediate conversion as to authorize executor to collect the rents of the real estate in question. **Pennsylvania Co.'s Appeal,** 430.

6. *Power to partition estate—Vested estate.* Where a testator devises all his real estate to his wife for life with the power to divide and parcel out the same amongst his five sons, naming them, upon such conditions and terms as she shall deem best and right, the widow may allot a share of the real estate to a daughter of a deceased son. **Schwartz's Est.,** 204.

WILLS.

9. *Trusts and trustees—Separate use trust.* Where the purpose to create a separate use trust is clear, no particular form of words is necessary.

Testator by his will directed that during the life of his wife his real estate should remain undivided and unapportioned, and that one third of the net income should be paid to her and the remainder divided equally among his children, naming them. He further directed as follows: "This arrangement I desire to continue during the life of my wife . . . . At her decease it is my will that my children do as they think best. It is, however, my will (should my children agree to a division of my estate after the death of my wife) that the separate portions of my daughters . . . . shall be separately secured to them and to their use beyond the dictation of the husband of either of them." The daughters were all married at the date of the will. *Held*, that the daughters took a valid separate use trust which went into effect upon the death of the widow.

The intent of the testator was to secure the shares of his daughters to their separate use, and the contingency of the widow's death, and the partition by the children of the common estate did not go to the creation of the separate use but to the time and occasion for putting it into formal execution. **Steinmetz's Est.,** 171.

10. *Trusts—Separate use trust—Married women—Power of alienation.* **Cobb's Appeal,** 175.

WORDS AND PHRASES.

1. *Charge on land* created by will is an *incumbrance* within meaning of a fire insurance policy which provides that the policy shall be deemed void if property be incumbered. **Renninger v. Ins. Co.,** 350.

2. "*Duress by imprisonment,*" what constitutes. **Fillman v. Ryon,** 484.

3. "Stop, look and listen." **Plummer v. R. R.,** 62.

WORDS AND PHRASES—*continued.*

4. "*Stop, look and listen*"—*Negligence—Street railways—Crossings.* **Omslaer v. Traction Co.,** 519.

5. *Stop, look and listen.* The rule applied. **Gangawer v. R. R.,** 265.

6. *Stop, look and listen.* Wayfarer's duty under the rule. **Beynon v. R. R.,** 642.

7. *Sudden peril—Infant—Contributory negligence.* **Neilson v. Coal and Iron Co.,** 256.

8. "*Waiver*" is essentially a matter of intention and cannot arise out of acts done in ignorance of material facts. **Freedman v. Fire Association,** 249.