In the Supreme Court of Pennsylvania—Pittsburg, 1854.

GOCHENAUR'S ESTATE.[1]

1. The Orphans' Court and its auditors have jurisdiction of the disputed claim of a creditor against the estate of a decedent, whether the estate be solvent or insolvent.
2. Where the husband occupies the relation of trustee to his wife, and takes possession of her property in that capacity, such possession will not bar her right if she survive him.
3. Reduction, by a husband, of his wife's personal property into his possession—so as to change the ownership—is a question of intention to be inquired of upon all the circumstances.
4. Conversion is not reduction, but only evidence of it.
5. Clear proof that the husband received his wife's money as a loan, or a disclaimer of intention to make it his own property, will preserve her right of survivorship.
6. Alleged admissions to that effect by the husband must be scanned with great vigilance, to prevent the consequences of misapprehension.
7. Interest accruing during the husband's lifetime cannot be allowed, in the distribution of his estate, upon a sum of money belonging to his wife, that was in his hands, and which he might at any time have reduced into his own possession, when there was nothing to indicate that he was willing to pay interest for it.

This was an appeal from a decree of the Orphans' Court of Lancaster County, entered under the following circumstances:

Benjamin Gochenaur was appointed one of the administrators of the estate of his wife's father, Christian Newswanger, on the 28th day of March, 1846, and received at several times, as his wife's share, sums of money amounting in all to $1786.

Gochenaur died on the 31st of December, 1851, and on the 19th of February, 1853, the administrators of his estate filed their account, showing a balance of $5136 55, "for distribution among the heirs." To this account various exceptions were filed on behalf of the widow, Barbara Gochenaur, the seventh and last of which was in the following terms:—"The accountants have not paid the widow of the said deceased her share or portion, which, as adminis-

[1] We are obliged to James E. Gowen, Esq., for the report of this case.

trator of Christian Newswanger, deceased, he, Benjamin Gochenaur, deceased, received, but which he never paid to the said widow, amounting, principal and interest, to $2079 $\frac{74}{100}$."

Upon motion of the attorney for the exceptant, the Court appointed D. G. Eshelman, Esq., auditor "to pass upon exceptions, and make distribution among those thereto entitled."

Before the auditor the counsel for the widow claimed the amount specified in the exception filed, upon the ground that the decedent, Gochenaur, had never reduced the sum received by him as his wife's share of the estate of Christian Newswanger, into possession, so as to become his own property, and that consequently it was a debt owing to her by the estate. The appellants, who were some of the heirs at law of Gochenaur, and distributees of his estate, alleged that the sum claimed by the widow had been converted to his own use by the husband.

The auditor having decided, upon the authority of a case in the Orphans' Court of Lancaster County,[1] that he had jurisdiction, and having heard the testimony upon the question of conversion, sustained the exception to the account, and awarded the widow the several sums received by her husband from the estate of her father,

[1] HEITLER'S ESTATE.—That was a case in which, upon a motion to have auditors appointed to examine the exceptions filed to the administration account of the estate of Richard R. Heitler, Esq., deceased, and to distribute the balance, Judge Long delivered the following opinion:

Previous to the Act of the 13th April, 1840, the law had been well settled by the Supreme Court, that an auditor had no authority to decide on the validity of a claim, in a solvent estate, in the Orphans' Court. By that Act it is made the duty of the Orphans' Court to appoint auditors for the purpose of distribution, "on the application of any creditor, as they were before authorized to do, on the application of the executor or administrator." And on the application of any legatee, heir, or other person interested in the distribution of the estate of any decedent, the Court is directed to "appoint one or more auditors to make distribution of such estate in the hands of any executors or administrators, to and among the persons entitled to the same." This Act, to a certain extent, has received a judicial construction in the Supreme Court, in the case of Kittera's Estate, 5 Harris, 417; and according to the view taken by them in that case, of the provisions of the Act of Assembly referred to, we are of opinion that the Orphans' Court have power to appoint auditors for the purposes indicated in the motion.

with interest calculated from a period immediately subsequent to the receipt of the last sum.

Exceptions, in which the question of jurisdiction was raised, were filed to the auditor's report, by the appellants, but the Orphans' Court, (Long, President,) after deducting from the amount awarded to the widow as a creditor of the estate, the interest computed during the lifetime of the husband, dismissed the exceptions and confirmed the report.

Upon the question of interest the opinion of the Orphans' Court was in the following terms:

"But we think the auditor erred in allowing her interest on that money during the lifetime of the testator. The money was received by him to accomplish a certain object, viz: for the purpose of paying his debts, and the auditor thought, as soon as that object was answered, he was liable for interest. When we take into consideration that the testator had the absolute control of this money, and might have converted it to his own use, we must not extend her rights beyond the agreement of the husband. Now, from the whole testimony, there is nothing to indicate that he was willing to pay interest for the money while in his possession, but the contrary we think is indicated by the testimony. Besides, courts have decided that where a wife permits a husband to receive the interest or profits of her estate, without any agreement to reimburse, he will not be required to respond to the wife for the same. *McGlensey's Appeal*, 14 S. & R. 64. The interest which, therefore, accrued in the lifetime of the testator, and which is charged against his estate, we direct to be struck out of the report, and with this modification the same is confirmed."

The errors assigned in the Supreme Court were—

1. The Court erred in taking jurisdiction of the claim of Mrs. Gochenaur. As an Orphans' Court, distributing a solvent estate, they possessed no such power.

2. The Court erred in allowing the said claim, or any part thereof.

3. The Court erred in allowing interest upon that claim.

The case was argued by

Messrs. *N. Ellmaker* and *J. E. Hiester*, for the appellants, who contended—

As to the first assignment of error:

That the Orphans' Court has no jurisdiction, excepting that conferred by the Acts of Assembly creating it.

Metts' Appeal, 1 Whart. 7, decided that in 1831 the Orphans' Court had no jurisdiction of an adversary claim against the solvent estate of a decedent. In *Warner's Estate*, 2 Whart. 295, the distinction between solvent and insolvent estates was stricken away, and the jurisdiction denied in either case.

Was jurisdiction conferred by the Act of 1832, or its supplements?

The 4th section of the Act of 1832, extends the jurisdiction, *inter alia*, to the distribution of the assets of decedents, after the settlement of administration accounts, among creditors and others interested; and the 19th section provides for the appointment of auditors, upon the application of the executor or administrator, to make distribution among creditors, *whenever there shall not be sufficient assets to pay all debts.*

The first clause of the 1st section of the Act of 1840, authorizes a *creditor* to apply for the appointment of auditors in the same cases that an executor or administrator could by the 19th section of the Act of 1832. The second clause of the same section directs the Court, upon the application of any legatee, or other person interested in the distribution, to appoint auditors to make distribution among those entitled. The first clause authorizes, by *express words*, the interference of creditors in insolvent estates only, as under the 19th section of the Act of 1832. The second clause might, perhaps, be tortured to include creditors *by inference.* But can jurisdiction be acquired by inference? But is there a fair inference to that effect? The use of the word *creditors* in the first clause, and its omission in the second, shows an intent not to include creditors in the latter. If such were not the case, the first clause is superfluous. The object of the second clause was to provide for the distribution of *solvent estates* among the distributees, after the payment of debts, a matter omitted in prior acts. *Kittera's Estate*,

5 Harris, 416, does not conflict with this view. There the estate was largely insolvent. The judge who delivered the opinion of the Court, construed the acts, as strongly as possible, in favor of the right of creditors to interfere *in all estates*, but the distinction between solvent and insolvent estates did not arise. The Orphans' Court has no jurisdiction of a disputed claim against a solvent estate. *Latimer's Estate*, 2 Ash. 520.

As to the second assignment:

It is clear, from the testimony, that Gochenaur had converted the money received from Newswanger's estate to his own use, without any agreement with his wife or any one that she should be repaid. His estate was increased by it, of which she reaps the benefit, as his widow. Loose declarations on his part, or a mere intention to give, create no liability. When he afterwards had the means to repay her, he never recognized her right to require it. *Fisher's Guardian* vs. *Husband*, S. C., May, 1848, (not reported;) *Housel* vs. *Housel*, 1 Wh. Dig. 925, pl. 531; *Clevenstine's Appeal*, 3 Harris, 496, and 5 Vesey, Jr., 71, were recited.

As to the third assignment:

Interest was never thought of by Gochenaur and his wife; and it is well settled that where interest is not part of the contract, it is not demandable until a demand be made, which was not done in this case until the exception to the account was filed in 1853.

A. Herr Smith, Esq., for the appellee,

As to the first assignment of error, cited Act of April 13, 1840, Sec. 1, Bright. Purd. p. 211, the opinion of Lewis, J., in *Kittera's Estate*, 5 Harris, p. 422; and the opinion of Black, C. J., in *Whiteside* vs. *Whiteside*, 8 Harris, 474.

As to the second assignment of error:

The question was one of law and fact. As to the facts, the auditor was correct in his finding. His opinion of the law was equally correct, and is supported by the authorities cited by him and by the cases of *Baker* vs. *Hall*, 12 Ves. 497, and *Gray's Estate*, 1 Barr, 329.

As to the third assignment:

Interest was allowed from the death of the husband. If the

appellee is entitled to the principal, it was a debt payable at the death of the husband, and must bear interest.

The opinion of the Court was delivered by

WOODWARD, J.—Under the terms of the Acts of Assembly relating to the jurisdiction and powers of the Orphans' Courts, and the opinion of this Court in *Kittera's Estate*, 5 Harris, 422, it is not to be doubted that the Orphans' Court of Lancaster had jurisdiction of the widow's claim in this case. The second and more important question is, whether, under the circumstances in proof before the auditor, the money claimed was so reduced into possession by the husband as to become his property. If it was, the widow has no title to it; if it was not, her right survived, and may be asserted in the Orphans' Court. The money came into his hands as administrator of Christian Newswanger, of whom Barbara was a daughter and heir; and to her Gochenaur stood in the double relation of husband and trustee.

In *Baker* vs. *Hall*, 12 Vesey, 497, where an executor entered into possession of the real and personal estates of the testator, married one of the residuary devisees under the will, and died leaving her surviving him, it was held by Sir William Grant, Master of the Rolls, that the husband must be considered to have entered into possession as trustee and executor of the will only, and not as husband; and therefore his wife's share of the residue could not be deemed sufficiently reduced into possession so as to prevent its surviving to her upon his decease. And in *Wall* vs. *Tomlinson*, 16 Vesey, 413, it was said that the transfer of stock to a husband, merely as trustee, cannot be regarded as a reduction into possession that will entitle his representatives. It was made *diverso intuitu*. If the husband takes possession, says Ch. Kent, 2d Com. 138, in the character of trustee, and not of husband, it is not such a possession as will bar the right of the wife if she survive him. The property must come under the actual control and possession of the husband, *quasi* husband, or the wife will take as survivor instead of the personal representative of the husband.

This distinction has been fully adopted in Pennsylvania, and a series of well considered cases, carrying out the principle to its logical result, has established that reduction into possession, so as to work a change of ownership, is a question of intention, to be inquired of upon all the circumstances. Conversion is not reduction into possession, but only evidence of it; and therefore conversion may be explained by other evidence, negativing the intention to reduce to possession in such manner as to transfer the title. According to these cases, marriage is treated as only a conditional gift of the wife's choses in action—or, to speak more accurately, a gift to the husband of her power to dispose of them to himself, or any one else, by force of the dominion to which he has succeeded as the representative of her person;—and because the gift is conditional, he has a right to reject it by refusing to perform the condition. The law does not cast it from him beyond his power of resistance, for every gift requires the assent of the donee, and hence clear proof that a husband received his wife's money as a loan, or a disclaimer of intention to make it his own property, proved by his admissions, will preserve her right of survivorship. *Siter's case*, 4 Rawle, 478; *Hess' Appeal*, 1 Watts, 255; *Hinds' Estate*, 5 Whart. 138; *Timbers* vs. *Katz*, 6 W. & S. 290; *Gray's Estate*, 1 Barr, 329; *Woelper's Appeal*, 2 Barr, 71.

It is said in Gray's case, that such admissions as a medium of proof are to be scanned with extreme vigilance; and to prevent the consequences of misapprehension or mistake on the part of witnesses, it is necessary that they be deliberate, precise, clear, and consistent with each other; not inconsiderate, vague, or discrepant;—a rule founded in the experienced uncertainties of parol proof, and most necessary to be continually applied. Beside the implications from the fiduciary character of Gochenaur, we have in this case his declarations and admissions, made, not in casual conversations after receipt and conversion of the money, but in the very act of receiving it, and which seem to answer all the conditions of the above rule. Thus Barr, who saw him receive $415 of the money in 1850, swears that he declared at the time, "it is my wife, Barbara's, and it is to be her's." And Ann Newswanger, speaking of the money he got

from the notes and articles bought at the vendue, amounting to $700, reports him as saying "he would take this money and pay his debts on which he was paying interest, but that it was Barbara's money and should be her's." Anna Kline thinks she was present three times when Gochenaur got money, and every time she heard him say it was his wife's and should be her's. She saw him count the $700; he said "it was his wife, Barbara's—he owed it and was going to pay it out—he ought'nt almost to take it to pay his debts." It cannot be doubted that such declarations imported an intention to convert the money to his own use as his wife's money and not his own;—that is, they explain the act of conversion consistently with his intention that it should survive to her, and not be so reduced into his possession as to extinguish her right.

The credibility of the witnesses was for the auditor, and we cannot rejudge his judgment on this point. Taking their testimony as true, we think the auditor and the Court were right, in view of it and of the fiduciary relation of Gochenaur to the fund, in decreeing the money to Barbara. The Court were clearly right in reversing the auditor on the question of interest, and of this the appellant has no reason to complain.

The decree is affirmed.

Louisville Chancery Court, Kentucky—May 11th, 1855.

VANDERPOOL *vs.* THE STEAMBOAT CRYSTAL PALACE.

1. Responsibility of owners of steamboats for thefts committed on them.
2. The boat will be liable, when it is furnished with state rooms and locks to the doors, if a watch, breastpin, pocket money, and such like, should be stolen from the room in the night-time, without breaking. This is the general rule. There are exceptions.
3. Where such is the structure of the berths, the officers of the boat must know whether the locks are in order or not; and if not, they must look to the protection of such property of the passenger, as before mentioned. It is not the duty of