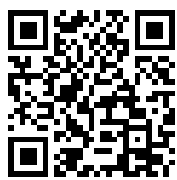

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JURISPRUDENCE

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VOL. 7. FRIDAY, JANUARY 4, 1878. No. 1.

COMMON PLEAS OF ERIE COUNTY.

Erie Saving Fund and Building Association v. Thompson et al.

The Act of 16th June, 1836, requires the first notice of sheriff's sales of real estate to be at least twenty-one days before the day of sale.

Motion to stay sale for want of sufficient advertisement.

Opinion by GALBRAITH, J. November 12, 1877.

This motion presents the question whether under the Act of Assembly regulating sheriffs' sales of real estates, the notice required to be given in two newspapers must be for three full weeks previous to the sale. The 63d section of the Act of 16th June, 1836, provides, so far as relates to this question, that "the officer shall also give notice of every such sale by advertisement * * in at least two newspapers * * once a week during three successive weeks previous to such sale." It is strongly urged by counsel for plaintiff that the true construction of the law will sustain a notice as sufficient if published any time in each week for three weeks before the sale; and it is claimed that this having been the practice for a long time in this county, it ought not now to be interfered with. "Contemporaneous practice is a powerful interpreter of doubtful meaning, when long continued by common consent," as said Chief Justice Gibson. But in this matter the practice has not been uniform, but various, throughout the State, and even here has not always been the same, my predecessor, Judge Vincent, having held in a case argued before him, involving the same question, that the full three weeks' or twenty-one days' notice previous to the sale must be given. In the case of Wallace's Estate, in Allegheny county, this question was fairly raised before Judge Hampton, who held the advertisement to be insufficient unless the first one of the three required to be given in two newspapers were published full three weeks before the sale. He says: "If the construction contended for by the counsel for the plaintiff in the execution be correct, the requirements of the act would be complied with by publishing in two of our daily papers on Saturday of one week, and Saturday of the next week, and Monday of the succeeding week, and the sale might take place the next day, which would be only ten days' notice before the day of sale." Here it is conceded by the counsel that it would not comply with the act to have the last notice in the same week with the sale, but why urge that if published any time during the three weeks previous it is sufficient. But if they are right in this, the notice could be cut

down to sixteen days by publishing the first on Saturday of the first week. It is the duty of courts to construe the laws according to the common, ordinary meaning of language as it is popularly understood, and not according to strained, technical, and forced constructions. It is evident that the framers of the law now in question meant that the debtor should have three weeks' notice of the intended sale of his property by the sheriff. A practice that would shorten the brief period of grace thus allowed ought not to be sanctioned. In the present case the first notice was published on October 23d, advertising the sale to take place November 12th. This would make twenty-one days by including both the day of such publication and the day of sale; but this would be clearly erroneous under the well settled rule as to the computation of time, and which requires the last day to be excluded. This would leave but twenty days, which, under our view of the law, is as fatal as if it were but fifteen.

The rule to stay the sale is made absolute.—*Legal Intelligencer.*

COMMON PLEAS OF LUZERNE COUNTY.

In Re Auditor's Report of the Personal Property of W. H. Bennett.

1. Under the Act of 1872, the only notice required to be given to the sheriff by parties entitled to its benefits is a notice following the words of the statute.
2. If the notice claiming money arising from the sale of personal property is actually delivered to the sheriff before the sale of property levied on, and liable for wages, it is within time, and the claim, if an honest debt, must be allowed..

Opinion by HANDLEY, J. September 3, 1877.

The personal property of W. H. Bennett was sold by the sheriff on September 25th, 1876, for the sum of two hundred and five dollars and twenty-five cents. This sale was made by virtue of several executions then out, and in the hands of the sheriff. Attached to one of the executions was a notice dated September 25th, 1876, directed to the sheriff, and signed by Stine, who states therein that he has a claim for labor done for W. H. Bennett, and desires the sheriff to withhold from the proceeds of the sale of the property of Bennett twenty-eight dollars. C. W. Randall also gave notice on the same day that he claimed two hundred dollars for labor done for W. H. Bennett. Geo. W. Oakley also gave notice, but failed to appear before the auditor and make good his claim. Whereupon the Oakley claim was disallowed. The auditor found, from the evidence, that Bennett was indebted to Randall in at least the sum of two hundred dollars, and to Stine the sum of twenty-eight dollars. While the auditor fails to say in his report that the respective claims of these parties were for work and labor done for Bennett, yet that, no doubt, was intended. The evidence of Mr. Bennett, certified with and attached to the report, shows that the claim of these parties is for labor. Bennett says that " up to the day of sale

he was owing Randall three hundred and twenty-eight dollars and fifty-eight cents. To six months previous to the sale Randall worked for him nearly every day. * * He did wheelwrighting or wagon work. * * The property sold on the writ was used in and about the manufactory of wagons." Bennett then adds, "I am acquainted with Isaac Stine. He has been employed at my shop. * * I think the notice given by Stine is correct. It was all earned within six months previous to the sale." The testimony of Randall and Stine establishes the same fact. The audltor disallowed the claim of Randall and Stine, and awarded the balance of the fund, eighty-nine dollars and twenty-seven cents, to the landlord for rent. To this report Randall and Stine filed exceptions:

1. Because the auditor did not appropriate the fund to the claim of the said Randall and Stine. 2. Because the auditor appropriated the fund to the landlord's claim. 3. Because the auditor refused to take into consideration the amount paid by the plaintiff in the writ to the said landlord during the sheriff's sale.

The third exception we will not consider; the first and second we will consider together. The auditor based his finding in this case upon the ruling of the Supreme Court in the case of the Bank v. McMillen, 1 Weekly Notes, 55; but the facts in that case and in this are entirely dissimilar. In that case, as we find it reported, it seems that the only notice the sheriff received was a list containing names, with certain amounts set opposite them. The sheriff paid in full the execution on which the sale took place, and paid the balance of the proceeds into court. The auditor appointed to distribute the amount thus paid in allowed the claims for labor; but the court below, being of the opinion that the notice given to the sheriff was not sufficient, set aside the report, and awarded the whole amount to the bank. This ruling, upon appeal, was sustained. The court said that "the written notice served upon the sheriff *in this case* was but a memorandum of the names of certain persons and the sums opposite; it did not refer to the property, or claim any lien thereon." In the case in hand the notice is not as full as it ought to be, but the notice states very clearly that the claim is "for labor done for W. H. Bennett," and the Stine notice demands "the sheriff to withhold the amount of money claimed." The notice required by the Act of 1872, 2 P. D. 1464, § 2, is that "in all cases * * it shall be lawful for such * * laborers * * to give notice in writing of their claim or claims, and the amount thereof, to the officer, * * at any time before the actual sale of the property levied on." The Act of 1872 is more of a fertilizing act, passed to promote the growth of statement, than a remedial act, to protect the rights of the working masses. But whether it is a fertilizing act or a remedial act, it is our duty to give it the most reasonable and liberal interpretation, so as to carry out the object named therein. What other notice, therefore, need be given by a laborer than a notice

in writing, at any time before the actual sale of the property, stating therein the amount he claims, for what, and out of what estate? This is all that the law requires of him, and this may be done in the most simple manner possible. As an exposition of the weight to be attached to the notice, and the form thereof, we may look at the Act of 1874, Purd. Dig. sup. 1966, § 2, which repeals the lien notice against real estate, and yet the Act of 1872 expressly provided that "no such claim shall be lien on real estate, unless the same be filed * * * within three months after the same becomes due." Now, a laborer may have a lien on real estate, and yet no notice is required. He has, as we said in the case of Teets v. Teets, 6 Luz. Leg. Reg. 20, a secret claim against any purchaser, or any creditor, who has not by mortgage, judgment, or execution acquired a prior lien. In the case of William Pieffer, 6 Luz. Leg. Reg. 101, it was held that the notice must state the business in which the employer was engaged, the kind of services rendered by the claimant, whether as clerk, miner, mechanic, or laborer, and the fact that a lien is claimed upon the property seized by the officer; also, the particulars of the services, and the amount claimed. This, we are of the opinion, is altogether too specific. What does the poor laborer know about giving notice as here detailed? We take it that it is the duty of the auditor to ascertain these details from the evidence before he makes his report. The statute says simply that he shall, before actual sale, give notice of his claim. If he gives notice before the actual sale of all the property levied upon and the money paid over, that he has a claim for wages against the defendant in the writ, that fulfills the full measure of the statute, and the laborer ought to be allowed his claim, if the evidence taken before the auditor establishes that his claim is within the statute, due and unpaid, and is an honest debt. But the Pieffer case has no bearing upon the important question in this case. In that case the debtor was engaged in mining and building houses at the mines, and he was also engaged in keeping a hotel, separate and distinct from his mining business. The fund for distribution was raised by the sale of the personal property in and about the hotel. The court adds, "The auditor, therefore, rightly decided that the execution creditor was entitled to the proceeds of the sale, and the persons employed at the mines had no lien upon the property, or claim upon the fund." The evidence in this case develops no such state of facts, and hence there cannot, under the evidence taken before the auditor, be any doubts about what property was sold and lienable for the wages of these men.

We are of the opinion that the auditor erred in allowing the claim for rent and disallowing the claims of Randall and Stine for wages out of this fund. The first and second exceptions are sustained, the third not considered, and thereupon we remit the report to the same auditor to distribute the fund *pro rata* between Randall and Stine in proportion to their respective claims.

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VOL. 7. FRIDAY, JANUARY 11, 1878. No. 2.

COMMON PLEAS OF LUZERNE COUNTY.

Miller v. Turnbach.

Plaintiff sold his farm to defendant; there was a judgment against the former, which both parties supposed was a lien on the farm, and which they treated as such, though in fact the lien of the judgment had expired; defendant paid to plaintiff the whole consideration money, except an amount equivalent to the amount of the judgment, and this he retained, promising to apply it to the satisfaction of the judgment; he failed to do so, and plaintiff was obliged to pay the judgment himself; thereupon, plaintiff brought suit against defendant to recover the amount so paid; defendant resisted on the ground that his promise was a mere verbal promise to pay the debt of another, and, hence, was void under the Statute of Frauds and Perjuries: *Held*, that plaintiff was entitled to recover the amount of purchase money retained by defendant, and that the promise of the latter to pay the judgment against the former, no matter whether it was a lien against the farm or not, with money thus retained, was not a promise to pay the debt of another within the meaning of the Statute of Frauds and Perjuries.

This case was tried before Stanley Woodward, Esq., Referee. He found the facts to be as follows:

1. On the 27th of August, 1867, George W. Drum, guardian of certain miner children, recovered a judgment against Jeremiah Miller, in the Court of Common Pleas of Luzerne county, for the sum, real, of two thousand two hundred and ninety-eight dollars and sixty-three cents, with interest from August 13th, 1867, and costs.

2. On the 16th of June, 1874, *scire facias* was issued to revive and continue the lien of said judgment, and on 21st of September, 1874, judgment was entered thereon in favor of the plaintiff, for the sum of seven hundred and sixty dollars and forty-nine cents, with interest and costs. It should be observed, in this connection, that the five years' lien of the original judgment expired on the 27th of August, 1872.

3. On the 6th of October, 1874, Jeremiah Miller paid the amount of this judgment to George W. Drum, guardian, &c., plaintiff.

4. On or about the 2d of October, 1872, Jeremiah Miller, the plaintiff, who, by buying out the interests of his brothers and sisters in a farm in Sugarloaf township, formerly owned by their father, had become possessed of the whole legal title, sold and conveyed the same to John Turnbach, the defendant, for the consideration of eight thousand dollars. A part of the consideration money was paid down, and the balance, excepting an amount equal to the Drum judgment, was secured by judgment notes, about which no contention exists. But with reference to the Drum judgment, then amounting to seven hundred and sixty dollars and forty-nine cents, or thereabouts, the referee

finds, that Turnbach then and there verbally agreed to pay it. This added to the down payment in cash, and to the judgment notes, before referred to, made up the eight thousand dollars. Turnbach took possession of the farm, and remained upon it until November, 1873, when, by contract in writing, dated November 11, 1873, he sold the property back to Jeremiah Miller and John Miller for the sum of six thousand dollars. Payments were to be made as follows: "First, all money shall be applied on judgments and liens which are entered against the said John Turnbach, in such payments as may be agreed upon by the plaintiffs in said judgments or liens with the said Jeremiah and John Miller; and after paying such judgments or liens, the balance to be paid to John Turnbach, his heirs or assigns, on demand."

5. That during all this time the parties dealt in good faith, severally believing that the Drum judgment was a valid and subsisting lien upon the land conveyed by Miller to Turnbach.

6. The original declaration of the plaintiff, besides charging generally a promise on the part of the defendant to pay the liens and incumbrances against the property, and particularly the Drum judgment, contained the ordinary common counts in assumpsit. After the close of the evidence and arguments, the plaintiff's counsel desired to file an amended declaration, setting out specifically the promise and undertaking of the defendant in connection with the sale and the Drum judgment. Permission was accorded, the amended declaration was filed, though against the objection of defendant's counsel.

Under the facts and pleadings, the following questions seem to have been raised:

1. Does the promise of the defendant fall within the terms of the Act of April 26, 1865, known as the Statute of Frauds and Perjuries?

2. Does the fact that the judgment in question had ceased to be a lien at the time the alleged promise was made, and thus become a personal debt of Jeremiah Miller, bring the case within the statute referred to? or,

3. Is this a case where the Statute of Frauds and Perjuries is not applicable, and to be considered as an action brought to recover a portion of the purchase money for land sold and conveyed by one man to another?

The answers of the referee to the questions thus raised, and also his general finding, are as follows:

1. That the case does not fall within the Statute of Frauds, for the reason that the defendant's promise was, in effect, to pay his own debt, and not that of another; and, therefore, it was not necessary that it should be in writing.

2. That the fact that the judgment had lost its lien at the time the promise was made, is not of material consequence.

3. That the action is to be regarded as founded upon a promise, with a good consideration to support it, made by the defendant for the

payment of money due from him to the plaintiff. While delivery of a deed is generally tantamount to a receipt in full for the purchase money, still it is not necessarily so as between vendor and vendee, and the transaction may be investigated and explained.

Reference is made to Malone et al. v. Keener, 8 Wr. 109; Arnold v. Stedman, 9 Wr. 189, and cases there cited; Taylor v. Preston, 29 P. F. S. 436.

The referee concludes his report as follows: "Judgment to be entered in favor of plaintiff, and against the defendant, for the sum of eight hundred and fifty-five dollars and fifty-four cents, with interest from December 5th, 1876."

The following exceptions were taken to the report:

1. The referee erred in finding as matter of fact, that all parties considered the judgment in favor of Drum, guardian, &c., as a lien on the land sold Turnbach.

2. The referee erred in allowing an amendment of the declaration after the evidence had been concluded and the case argued before him, which introdued a new cause of action, and which called for a different defense.

3. The referee erred in not finding, under the pleadings upon which the case was tried, that the alleged parol promise of Turnbach to pay the Drum judgment was a promise to pay the debt of another, and, therefore, void by the Statute of Frauds and Perjuries.

4. The referee erred in not finding for the defendant upon all the facts and the law.

THE COURT.—The first exception to this report, amounts simply to a complaint that the referee did not look upon the facts elicited by the testimony in the case with the eyes of defendant's counsel. It has been repeatedly held by this court that such an exception was altogether untenable: Enterprise Ins. Co. v. Thornton, 1 Luz. Leg. Reg. 32; Lackawanna Iron and Coal Co. v. Fales, Id. 743; Garrison v. Bryant, 2 Luz. Leg. Reg. 9; Long v. Davis, 5 Luz. Leg. Reg. 66.

The second exception is grounded in the fact that the referee permitted an amendment of the plaintiff's declaration, after the evidence had been closed and the arguments of counsel made. This amendment, it is urged on the part of the defense, contained a new cause of action. We cannot adopt this view. The amendment contained no new cause of action; besides, the original declaration was sufficient without it. The allowance of the amendment, therefore, whether proper or not at that stage of the proceedings, was immaterial, and brought the defendant no hurt.

The third exception is a mistaken one also. It charges upon the referee the error of not finding that the defendant's promise, on which the action was founded, was a mere verbal promise to pay the debt of another, and, hence, void under the Statute of Frauds and Perjuries.

Let us look at the facts: In October, 1872, the defendant purchased the plaintiff's farm for eight thousand dollars; there was a judgment against the latter, in favor of George W. Drum, guardian, unsatisfied and on record, the lien of which, so far as the farm was concerned, had expired, though neither the plaintiff nor the defendant were aware of this, both supposing the judgment to be still a subsisting lien, and treating it as such; the defendant paid the plaintiff all the purchase money for the farm, except a sum equal to the amount unpaid on the judgment before referred to, and this he promised to pay in satisfaction of that judgment; or, in other words, to pay the judgment itself. He failed to do so, and the plaintiff was subsequently obliged to pay the judgment himself. Thereupon, he brought this action to recover from the defendant the amount so paid; or, in other words, to recover the balance of consideration money due him for the farm. The referee, after full hearing, found that the defendant's promise was not a promise to pay the debt of another, but a promise to pay his own debt, and, hence, not within the Statute of Frauds and Perjuries. We think this finding was correct. The Drum judgment constituted the exact measure of the balance of purchase money due from the defendant to the plaintiff for the farm; the defendant, instead of paying that balance directly to the plaintiff, retained it in his own hands, promising to appropriate it in satisfying a judgment against the plaintiff; the fact that this judgment was not a lien against the farm, though both the plaintiff and the defendant thought it was, was not material as between them; the whole consideration money for the farm belonged exclusively to the plaintiff; its ownership was in nowise changed by the agreement in connection with the Drum judgment; the plaintiff's action, therefore, was well founded.

The fourth exception, being the general one that the referee erred in not finding for the defendant upon all the facts, and upon the law, falls necessarily with the others.

And now, January 2, 1878, it is ordered that judgment be entered in this case in accordance with the findings of the referee.

Opinion by HARDING, P. J. January 2d, 1878.

Geo. K. Powell, for plaintiff.

A. R. Brundage and H. W. Palmer, for defendant.

Bellewe, in the preface to his reports, quaintly says to the reader: "Beseeching you that where you shall find any faults, which either by my insufficiency, the intricate of the work, or the printer's recklessness, are committed, either friendly to pardon, or by some means to admonish me thereof."

The Luzerne Legal Register.

VOL. 7. FRIDAY, JANUARY 18, 1878. No. 3.

AMENDMENTS TO THE RULES FOR THE REGULATION OF THE PRACTICE IN THE COURT OF COMMON PLEAS OF THE COUNTY OF LUZERNE.

RULE I.—Affidavits of Defense.

SECTION 1. In all actions instituted on bills, notes, bonds, or other instruments of writing, for the payment of money, and for the recovery of book debts or accounts; in all actions upon contracts for the loan or advance of money, whether the same be in writing or not; in all actions of debt or scire facias on mortgages, recognizances, judgments, and on liens of mechanics and material men, except against executors and administrators, the plaintiff shall be entitled to judgment by default, to be entered in court, or by the prothonotary, at his request, on payment of the legal fee, on or after the second Monday of the term next succeeding that to which the process issued is returnable, unless the defendant, or some person for him, shall previously have filed an affidavit of defense, stating therein the nature and character of the same; and if the defense be to a part only, he shall specify the sum which is not in dispute, and judgment shall be entered for so much as is, or shall be, acknowledged to be due to the plaintiff, if demanded by the plaintiff; but if, in case of such affidavit to part of the demand, the plaintiff will not take judgment for the sum admitted to be due by the defendant, together with the costs accrued, in full satisfaction of his demand, and shall not recover a sum greater than that admitted to be due by the defendant, the plaintiff shall pay all costs which shall accrue after the making and filing of such affidavit: *Provided*, that no judgment shall be entered by virtue of this rule, unless the plaintiff shall have filed a declaration or statement on or before the Monday next succeeding the return day to which the process issued is returnable. *And provided, also*, that no judgment shall be entered by virtue of this rule, unless the plaintiff shall, within two weeks after the return day of such process, have filed in the office of the prothonotary a copy of the instrument of writing, book entries, record, or claim on which such action has been brought.

RULE VI.—Auditors and Auditors' Reports.

SECTION 4. In cases referred to an auditor, it shall be the duty of any person desiring an issue to be formed under the 87th section of the Act of Assembly relating to executions, passed 16th June, 1836, to reduce his request to writing, particularly stating therein any fact which he disputes, and to present the same, under oath or affirmation, to the auditor within four days after written notice that the hearing by the Auditor has been concluded; and it shall be the duty of the auditor to make a report to the court of the presentation of such written request to him, annexing said paper to his report.

SECTION 7. Upon the final or absolute confirmation and recording of an auditor's report, the prothonotary or sheriff shall forthwith pay out the fund as distributed without further order.

RULE XVIII.—Legal Notices.

SECTION 1. In compliance with the provisions of the Act of 12th February, A. D. 1863, entitled "An Act relating to the publication of Legal Notices in Luzerne county," THE LUZERNE LEGAL REGISTER is designated as the weekly legal publication in which, in compliance with the said act, shall be published a concise and intelligible abstract of all legal notices required to be published in cases pending in, or under process issuing out, of any and *all* of the courts of Luzerne county, except the Orphans' Court: *Provided*, that the price to be charged for advertising sheriff's sales shall be three dollars for one piece of land, and one dollar and fifty cents for each additional piece belonging to the same defendant. And it is further ordered, that all auditors' notices be published in the said THE LUZERNE LEGAL REGISTER as one of the public newspapers of the county, as also the trial, jury, argument, and certiorari lists.

RULE XIX.—Money in Court.

SECTION 2. Upon the payment of money into court to abide the order of the court, the same shall be deposited in such bank as the court may designate, to the credit of the court in the particular cause, and shall be drawn out only upon an order of the court, attested by the prothonotary, except in the cases provided for in section 7, of Rule VI.: *Provided*, that nothing herein shall be construed to prevent a disposition of the money by agreement of the parties. A copy of this rule will be inserted in the bank-book in which the deposits are inscribed.

RULE XXII.—Notices.

SECTION 1. All notices shall be in writing. They shall be served by being read in the hearing of the party, or by giving

him notice of the contents by delivering him a true copy thereof, or if the party cannot conveniently be found, by leaving such copy at his dwelling house with an adult member of his family, or if the party reside in the family of another, with one of the adult members of the family in which he resides.

RULE XXIII.—Pleading.

SECTION 4. On or after the second Monday of each term, in all cases where the plaintiff's declaration or statement was filed on or before the third day of the last preceding term, or within three days after the return day of the writ, if such declaration, writ, or statement be necessary, he shall be entitled to the defendant's plea, or a judgment to be entered in court, or by the prothonotary, upon filing proof of service of a ten days' notice on defendant or his attorney, upon payment of the legal fee, and at the same time, and also on the second Monday next after the second return day, or thereafter, judgment may be taken as aforesaid, for default of defendant's appearance, in all cases of summons and scire facias, returnable to the term for which the court is then sitting, if the writ has been served according to the Act of Assembly, and the plaintiff has duly filed his declaration or statement, if required by law: *Provided*, that judgment for want of an appearance may not be taken before the second term in cases of ejectment. If the defendant does not appear in ten days after the service of the writ, agreeably to the 34th section of the Act of 13th June, 1836, and declaration is duly filed as aforesaid, the prothonotary may enter judgment on or after the first day of the next succeeding term. If, however, in any of the cases above mentioned the plaintiff shall not take judgment, the court may at any time thereafter, on motion, direct such judgment to be entered.

SECTION 6. Rules to declare, state, describe, and plead, when the party on whom such rule is taken is in court, may be entered, on application to the court, on any motion day, returnable on the second Monday of the next term, or judgment, or non pros., as the case may be.

RULE XXVI.—Sheriff and Sheriff's Sales.

SECTION 2. Thursday of each of the weeks of the terms, and the fifth day succeeding the June return day, and the fifth day succeeding the September return day, are appointed for the purpose of allowing the acknowledgment of deeds by the sheriff, and also for the reading of sheriff's returns under the first and second sections of the Act of 20th April, 1846, where the purchaser of real estate appears, from the proper records, to be a lien creditor, entitled to the whole or any portion of the proceeds of a sheriff's sale, and claims that his receipt for the amount of his lien be taken by the sheriff.

RULE XXXI.—Trial and Trial List.

SECTION 6. It is ordered that hereafter not more than the first ten cases on the trial list shall be liable to be called for trial on the first Monday of the several terms of the Court of Common Pleas, the second ten on Tuesdays, the third ten on Wednesdays, and that subpœnas shall be issued returnable at two o'clock P. M. on Mondays, and at nine o'clock A. M. on Tuesdays and Wednesdays, respectively, for cases liable to be tried on those days. The untried cases of each day shall have preference until disposed of.

ORPHANS' COURT OF LUZERNE COUNTY.

Estate of Thomas Wilkinson, dec'd.

1. A suit and judgment before a justice of the peace is not such "an action commenced and duly prosecuted," in order to continue the lien of a debt, as is required by the Act of February 24, 1834, unless the creditor shall file a transcript of his judgment in the prothonotary's office within five years after the death of the decedent.
2. To perfect a lien on the lands of a decedent a creditor must commence and duly prosecute his claim to such an extent as to give notice of the same in the prothonotary's office of the county where the lands to be charged are situated.

Exceptions to audit.

Opinion by RHONE, J. December 10, 1877.

This decedent died the 1st of February, 1867, and on the 28th of February, 1868, the claimant, whose debt is now contested, obtained judgment before a justice of the peace on a suit against the administrator of this estate. This judgment was revived by scire facias the 3d of November, 1875. In 1877 the decedent's real estate was sold by order of the court for the payment of his debts; and it is the fund arising from this sale which is now being distributed. On the audit a transcript of the record of the justice was presented, and payment demanded.

If this claim be allowed the estate will only pay about sixty-seven cents on the dollar, and so its payment is contested by a creditor on the ground that the debt was not a lien on the land sold at the time of sale. The precise point raised is, that a suit and judgment before a justice of the peace is not such "an action commenced and duly prosecuted" as is required by the 24th section of the Act of February 24, 1834, in order to continue the lien of such debt; that the claimant should have filed a transcript of his judgment in the prothonotary's office within five years after the death of the decedent. The Act of Assembly cited does not state where the action shall be commenced,

and the claimant holds that where the debt is within one hundred dollars it is sufficient if it be prosecuted to judgment before a justice of the peace within the five years; that it is not necessary to file a transcript in the prothonotary's office, because the section of the act cited does not require it, and without the intervention of the act his debt would be an indefinite lien on the lands. He has certainly complied with the strict letter of the act, but he has as certainly violated its spirit, and as its letter is blind, the courts have almost invariably followed its spirit. Since the elaborate opinion of Justice Kennedy in Kepner v. Hoch, 1 Watts, 9, the courts have invariably so construed this section of the act as to bring it in harmony with the general lien laws of the State. In Brindley's Appeal, 19 P. F. Smith, 295, Justice Sharswood says, "We should remember that the principal intention of the act was to promote the security and repose of titles in the hands of heirs and devisees, as well as purchasers from them." In this sentence he states the force of the argument in all of the cases on the subject. Then it must follow that the creditor who would continue his secret lien on the lands of a decedent beyond five years must commence and duly prosecute the claim to such an extent as to give notice of the same in the prothonotary's office of the county where the lands to be charged are situated, for the law has fixed that as the only place where judgments affecting titles are to sought after. If the creditor may commence and prosecute his action in any court where he can obtain a judgment, he can as effectually secrete his lien indefinitely as if he had not commenced any action at all. The rule of law laid down in Brindley's Appeal, *supra*, is that the "action" must be *commenced* in such a court of record as would give notice to all who might chose to deal with the title, and that the presentation of the claim in the Orphans' Court on a distribution audit was not sufficient. The section under consideration further provides that where the debt or demand is not payable within the said period of five years, a copy of the same shall be filed "in the office of the prothonotary of the county where the real estate to be charged is situate." This undoubtedly applies as well to debts under one hundred dollars as over that sum, and a copy or statement of all such debts must be filed in that office within the five years. It cannot be that it was intended that debts which were due within the five years might be recorded in any place, and those not due within that period should be found in only one particular place. We are of the opinion that this claim was rightly commenced, but that its lien was lost because it was not duly prosecuted.

One other question is presented, viz: Is this creditor, who, by vigilance, has continued the lien of her debt, authorized to set up the statute as a bar to the recovery of the claim of another creditor? Is not the statute intended only to protect heirs and devisees and purchasers from them? We answer that while the preamble is limited, the act is general. The whole purpose of the act was to trust the lazy creditor

to the benefit of every other party interested. If our conclusions thus far have been correct, this claimant had no lien on the land when it was sold, and consequently has none on the fund, and it is no matter to him what becomes of it so long as he cannot share in it. In this case there will be no surplus, but if there had been it would go to the heir, or to his creditors: Scott, 193-200.

The clerk will, therefore, further amend the report of audit by appropriating *pro rata* to the other judgments therein set forth the full amount therein appropriated to Daniel Baer; and the claim of said Daniel Baer is rejected and disallowed.

L. C. Kinsey, for estate.

M. E. Walker, for creditor.

COMMON PLEAS OF LUZERNE COUNTY.

Williams v. Sheridan et al.

A defendant in proceedings to obtain possession for non-payment of rent is not entitled to the $300 exemption allowed by the Act of 1849.

Exceptions to referee's report.

Opinion by DANA, J. November 12, 1877.

We concur with the referee in the opinion that the defendant in the proceedings and writ by the landlord to disposses him, under the Act of 1834, was not entitled to the exemption allowed by the Act of 1849. The first exception of plaintiff is wholly unimportant if the second is overruled.

The exceptions are overruled, and judgment ordered on the report of the referee.

In Sims v. The State, 43 Alabama, 33, which was an indictment for larceny, the court charged the jury thus: "Gentlemen of the jury, if you believe the evidence, you will find the defendant guilty." To this charge the prisoner very properly excepted. The court then said to the jury: "Go along, and find the defendant guilty." On error the judgment was reversed, the chief justice saying, "The remark made to the jury after the charge was given was, to say the least of it, a great violation of judicial propriety, and no doubt had an influence with the jury, that did or might well have prejudiced the prisoner." We think no one will presume to question this conclusion of the learned court.

The Luzerne Legal Register.

VOL. 7. FRIDAY, JANUARY 25, 1878. No. 4.

COMMON PLEAS OF LUZERNE COUNTY.

Loomis v. Reynolds et al.

1. It is unlawful for the council of the city of Wilkes-Barre to contract any debt, or make any appropriation, on behalf of the city, without first passing an ordinance to that end, and presenting the same to the mayor for his approval.
2. Appropriations for all the departments of the city government should be made in advance each year, and the tax-levy shall only be commensurate therewith.
3. No debt in excess of the amount appropriated by ordinance can be incurred.

In Equity. Motion for preliminary injunction.

Opinion by STANTON, J. January 23, 1878.

The plaintiff, a tax-payer and resident of the city of Wilkes-Barre, complains that the first twenty defendants, constituting the city council of the city of Wilkes-Barre, have unlawfully appropriated for the opening, widening, repairing, grading, curbing, and locating the streets of said city, and for the payment of salaries in connection therewith, large expenditures in excess of the sum appropriated for such purposes for the current fiscal year; and that they have also unlawfully directed orders to issue for the payment of these and other like debts; that, also, said G. M. Reynolds and S. O. Jones, clerk of said council, have already issued, or are about to issue, such orders; and that F. V. Rockafellow, treasurer of said city, has paid, or is about to pay, out of the funds of the city in his hands moneys on such unlawful orders.

Plaintiff further complains that the first named twenty defendants, as the city council, have unlawfully arrogated, and are about to unlawfully arrogate to themselves, sole legislative power within the said city, and concerning its affairs, separate from and without the concurrence of the mayor thereof, and in detraction of his lawful authority.

Plaintiff also further complains that said first named twenty defendants have unlawfully expended, and are about to unlawfully expend, the moneys of the city in the First, Fifth, Sixth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth wards of said city, respectively.

The bill concludes with a prayer that said first named twenty defendants be enjoined and restrained from incurring and contracting, without the concurrence of the mayor thereunto lawfully had, any further debts or expenses in or about the streets or bridges of said city; and that they be further enjoined and restrained from incurring and contracting any other indebtedness in said wards for the repairing,

opening, improving, paving, or lighting the streets, alleys, gutters, and sidewalks, or for any other city purpose, and from appropriating and applying therein any city moneys, until the indebtedness of each of said wards shall have been fully and completely paid and canceled; that said G. M. Reynolds and S. O. Jones be restrained and enjoined from issuing any orders for the payment of the debts already so unlawfully contracted as aforesaid, or hereafter to be contracted for such unlawful purposes; and that said F. V. Rockafellow, as city treasurer, be restrained from paying out of the funds of said city any moneys on said orders; and for such other and further relief in the premises as may seem meet.

The points presented by the bill are—1. Can a debt in excess of the amount appropriated by ordinance, passed June 7th, 1877, on account of streets, be contracted during the current fiscal year, which began on April 1st, 1877? 2. Can any debt be contracted, or appropriation of city moneys be made by council, before the ordinance or resolution to that end be first presented to the mayor for his approval? 3. Are the wards of the city, indebted as alleged in the bill, precluded from any other repairs and improvements of the streets, alleys, gutters, and sidewalks therein, until said indebtedness is fully paid and canceled? 4. Must the amount for each department be appropriated at the beginning of each fiscal year? The answers to these points seem to us ample enough to cover all the material allegations in the bill. While the act incorporating the city and its supplement are obscure enough in their phraseology to beget disputation between the council and the mayor on some of the points involved, subsequent legislation has, however, illumined the dark places.

By virtue of sections five and six of the act incorporating the city, approved May 4th, 1871, the legislative powers are vested in the city council; and it is provided therein that every bill which shall have passed the council shall, within three days, be presented to the mayor, who shall, if he approve, sign the same; and section twenty-seven of the same act provides that the power of the corporation shall be vested in the corporate officers designated in the charter, namely, the mayor and the city council, and that they shall have power to make such laws, ordinances, by-laws, rules, and regulations, not inconsistent with the laws of this Commonwealth, as they shall deem necessary for the good government of said city. The language of these sections has no ambiguous sound as to what power the mayor has over the city legislation, or as to the extent he should participate therein. To meet this phase of the law, however, the defendants reply by their affidavits, read on the hearing of this case, that the appropriations of city moneys are made on warrant, and that it is not necessary to obtain the mayor's approval to such warrant. This position, if tenable (which we deny) under the act incorporating the city, and its supplement, must be abandoned by the defendants when confronted by the following provi-

sions of the act dividing the cities of the State into three classes, &c., approved May 28, 1874:

Section seven of said act says: "No money shall be paid out of the city treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." Many persons step over the bridge before they reach it, and the defendants make such a misstep in reaching the warrant without first treating the bridge of legislation. Is there any question as to the nature of the law or legislation required in making such appropriations, or as to the persons who should participate in making such laws? There can scarcely be, in the light of what has already been said; but if there be a doubt, then the third paragraph of section four of said act of 1874 is quite declaratory on these points. This act of 1874 leaves little to implication as to the points involved as aforesaid. This paragraph says: "Every legislative act of councils shall be by resolution or ordinance; and every ordinance or resolution, except as hereinafter provided, shall, before it takes effect, be presented, duly engrossed and certified, to the mayor for his approval." The council and the mayor have each exclusive powers, but the power to legislate is not one of them. There is no question but that it is unlawful for the council of the city of Wilkes-Barre to contract any debt, or make any appropriation, on behalf of said city, without first passing an ordinance or resolution to that end, and then presenting such ordinance or resolution to the mayor for his approval; and if the city treasurer should pay out of the city funds a warrant drawn otherwise than in pursuance of an appropriation so made, he would be guilty of a misdemeanor.

Section six of said act of 1874 provides, in effect, that all work and materials required by the city shall be furnished and performed under contract, to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance; and it shall be the duty of councils forthwith to enact such ordinances. The city council of Wilkes-Barre, in appropriating, with the concurrence of the mayor, on June 27th, 1877, by ordinance, a certain sum for the department of streets, did what the law required. Appropriations for all the departments of the city government should, we think, be made in advance every year, and the tax-levy should only be commensurate therewith. If municipal governments were carried on otherwise there would be no limits or bounds to taxation. The act relating to county rates and levies (Purdon, 358, sec. 1) provides that the commissioners of every county shall, at their first meeting after the general election in every year, proceed to make an estimate of the probable expense of the county for the ensuing year. It is on this estimate the county assessments and tax-levies are based, and they who framed the legislation incorporating the city of Wilkes-Barre intended that the assessments and tax-levies of said city should be based on such estimate, for it is provided in section twenty-four of said act, and section two of its sup-

plement, that so much tax should be levied and collected annually for city purposes, "on the valuation assessed for county purposes, as now is or may be provided by law."

Plaintiff's bill does not set forth whether the sum of four thousand dollars, thus appropriated to the department of streets, was the full amount of tax levied for this purpose for the year, commencing April 1, 1877; but if it were not, the debts contracted by the council as aforesaid, without the concurrence of the mayor, would be illegal. Section five of said act of 1874 provides that "no ordinance shall be passed, except by a two-third vote of both councils, and approved by the mayor, * * providing for the payment of any claim against the city, without previous authority of law." There was only previous authority of law for the payment of four thousand dollars, and the payment of the claims against the city in excess of this amount could only be made as provided in section five of said act of 1874. We cannot affirm the proposition of plaintiff that because the wards above named had each a certain indebtedness charged up against them on the books of the city previous to the first of April, 1877, that it is unlawful to appropriate any of the moneys raised for the fiiscal year, commencing that date, for street purposes by the city, in repairing and building the streets, alleys, and bridges in said wards. The indebtedness so charged to said wards is really an indebtedness by the whole city, and suit therefor would lie against the city alone. But even if each of said wards were indebted as alleged, the terms of the proviso to section two of the supplement, approved April 2d, 1872, allow all moneys raised by taxation or assessment of the inhabitants and property of each ward to be appropriated and applied in any year for the repairs of streets, alleys, gutters, or sidewalks, or for opening, widening, lighting, paving, or improving streets, alleys, or gutters, or for any city purpose in such ward. The streets of such wards might become unfit for travel, if they could not be repaired or improved before the payment of such alleged indebtedness.

Therefore, it is hereby ordered and decreed that a writ of special injunction issue to restrain said defendants from drawing orders for, or appropriating or paying moneys out of the treasury of said city of Wilkes-Barre, and from making contracts or incurring any debts for streets, bridges or any other purpose, and from doing any act of legislation without first having the ordinance or resolution for any of said purposes duly engrossed and certified to the mayor for his approval, as provided in section six of said act incorporating the city. Plaintiff to first give bond, with sufficient sureties, in the sum of one thousand dollars, to be approved according to law.

ERROR.—In the opinion published on page 13, in the Estate of Thomas Wilkinson, dec'd, we used the word "trust" instead of "hurt." The sentence should read, "The whole purpose of the act was to hurt the lazy creditor to the benefit of every other party interested.

AMENDMENTS TO THE RULES FOR THE REGULATION OF THE PRACTICE IN THE COURT OF COMMON PLEAS OF THE COUNTY OF LUZERNE.

RULE I.—Affidavits of Defense.

SECTION 1. In all actions instituted on bills, notes, bonds, or other instruments of writing, for the payment of money, and for the recovery of book debts or accounts; in all actions upon contracts for the loan or advance of money, whether the same be in writing or not; in all actions of debt or scire facias on mortgages, recognizances, judgments, and on liens of mechanics and material men, except against executors and administrators, the plaintiff shall be entitled to judgment by default, to be entered in court, or by the prothonotary, at his request, on payment of the legal fee, on or after the second Monday of the term next succeeding that to which the process issued is returnable, unless the defendant, or some person for him, shall previously have filed an affidavit of defense, stating therein the nature and character of the same; and if the defense be to a part only, he shall specify the sum which is not in dispute, and judgment shall be entered for so much as is, or shall be, acknowledged to be due to the plaintiff, if demanded by the plaintiff; but if, in case of such affidavit to part of the demand, the plaintiff will not take judgment for the sum admitted to be due by the defendant, together with the costs accrued, in full satisfaction of his demand, and shall not recover a sum greater than that admitted to be due by the defendant, the plaintiff shall pay all costs which shall accrue after the making and filing of such affidavit: *Provided*, that no judgment shall be entered by virtue of this rule, unless the plaintiff shall have filed a declaration or statement on or before the Monday next succeeding the return day to which the process issued is returnable. *And provided, also*, that no judgment shall be entered by virtue of this rule, unless the plaintiff shall, within two weeks after the return day of such process, have filed in the office of the prothonotary a copy of the instrument of writing, book entries, record, or claim on which such action has been brought.

RULE VI.—Auditors and Auditors' Reports.

SECTION 4. In cases referred to an auditor, it shall be the duty of any person desiring an issue to be formed under the 87th section of the Act of Assembly relating to executions, passed 16th June, 1836, to reduce his request to writing, particularly stating therein any fact which he disputes, and to present the same, under oath or affirmation, to the auditor within four days after written notice that the hearing by the Auditor has been concluded; and it shall be the duty of the

auditor to make a report to the court of the presentation of such written request to him, annexing said paper to his report.

SECTION 7. Upon the final or absolute confirmation and recording of an auditor's report, the prothonotary or sheriff shall forthwith pay out the fund as distributed without further order.

RULE XVIII.—Legal Notices.

SECTION 1. In compliance with the provisions of the Act of 12th February, A. D. 1863, entitled "An Act relating to the publication of Legal Notices in Luzerne county," THE LUZERNE LEGAL REGISTER is designated as the weekly legal publication in which, in compliance with the said act, shall be published a concise and intelligible abstract of all legal notices required to be published in cases pending in, or under process issuing out, of any and *all* of the courts of Luzerne county, except the Orphans' Court: *Provided*, that the price to be charged for advertising sheriff's sales shall be three dollars for one piece of land, and one dollar and fifty cents for each additional piece belonging to the same defendant. And it is further ordered, that all auditors' notices be published in the said THE LUZERNE LEGAL REGISTER as one of the public newspapers of the county, as also the trial, jury, argument, and certiorari lists.

RULE XIX.—Money in Court.

SECTION 2. Upon the payment of money into court to abide the order of the court, the same shall be deposited in such bank as the court may designate, to the credit of the court in the particular cause, and shall be drawn out only upon an order of the court, attested by the prothonotary, except in the cases provided for in section 7, of Rule VI.: *Provided*, that nothing herein shall be construed to prevent a disposition of the money by agreement of the parties. A copy of this rule will be inserted in the bank-book in which the deposits are inscribed.

RULE XXII.—Notices.

SECTION 1. All notices shall be in writing. They shall be served by being read in the hearing of the party, or by giving him notice of the contents by delivering him a true copy thereof, or if the party cannot conveniently be found, by leaving such copy at his dwelling house with an adult member of his family, or if the party reside in the family of another, with one of the adult members of the family in which he resides.

RULE XXIII.—Pleading.

SECTION 4. On or after the second Monday of each term, in all cases where the plaintiff's declaration or statement was filed on or

before the third day of the last preceding term, or within three days after the return day of the writ, if such declaration, writ, or statement be necessary, he shall be entitled to the defendant's plea, or a judgment to be entered in court, or by the prothonotary, upon filing proof of service of a ten days' notice on defendant or his attorney, upon payment of the legal fee, and at the same time, and also on the second Monday next after the second return day, or thereafter, judgment may be taken as aforesaid, for default of defendant's appearance, in all cases of summons and scire facias, returnable to the term for which the court is then sitting, if the writ has been served according to the Act of Assembly, and the plaintiff has duly filed his declaration or statement, if required by law: *Provided*, that judgment for want of an appearance may not be taken before the second term in cases of ejectment. If the defendant does not appear in ten days after the service of the writ, agreeably to the 34th section of the Act of 13th June, 1836, and declaration is duly filed as aforesaid, the prothonotary may enter judgment on or after the first day of the next succeeding term. If, however, in any of the cases above mentioned the plaintiff shall not take judgment, the court may at any time thereafter, on motion, direct such judgment to be entered.

SECTION 6. Rules to declare, state, describe, and plead, when the party on whom such rule is taken is in court, may be entered, on application to the court, on any motion day, returnable on the second Monday of the next term, or judgment, or non pros., as the case may be.

RULE XXVI.—Sheriff and Sheriff's Sales.

SECTION 2. Thursday of each of the weeks of the terms, and the fifth day succeeding the June return day, and the fifth day succeeding the September return day, are appointed for the purpose of allowing the acknowledgment of deeds by the sheriff, and also for the reading of sheriff's returns under the first and second sections of the Act of 20th April, 1846, where the purchaser of real estate appears, from the proper records, to be a lien creditor, entitled to the whole or any portion of the proceeds of a sheriff's sale, and claims that his receipt for the amount of his lien be taken by the sheriff.

RULE XXXI.—Trial and Trial List.

SECTION 6. It is ordered that hereafter not more than the first ten cases on the trial list shall be liable to be called for trial on the first Monday of the several terms of the Court of Common Pleas, the second ten on Tuesdays, the third ten on Wednesdays, and that subpœnas shall be issued returnable at two o'clock P. M. on Mondays, and at nine o'clock A. M. on Tuesdays and Wednesdays, respectively, for cases liable to be tried on those days. The untried cases of each day shall have preference until disposed of.

SHERIFF'S SALES.

Abstract of property to be sold by P. J. Kenny, Sheriff of Luzerne county, on Saturday, February 9, A. D. 1878, at 10 o'clock A. M., at the Arbitration room, in the Court House, Wilkes-Barre, who will proceed with the different properties in the order in which they are numbered, to wit:

1

Suit of W. W. Neiler v. C. H. Johnson.

3276 September term, 1877. $1,687.50. Al. lev. fa. 451 January term, 1878. Woodward & Coons, Att'ys.

A lot in the city of Wilkes-Barre, on Canal street, beginning at a corner on the southeasterly side of said Canal street, being the northwesterly corner of lot of Chas. A. Becker; thence along said Canal street north, 59 degrees east, 42 feet to a corner; thence along lands of Troxell and Kirkendall south, 31 degrees east, 175 feet to the center line of the North Branch Canal; thence along said center line south, 59 degrees west, 42 feet to a corner in line of said Becker's lot; thence along line of Becker's lot north, 31 degrees west, 175 feet to the place of beginning; containing 7,000 square feet of land; on which is a two-storied frame building, with a two-story addition.

2

Suit of M. H. Post v. M. Lederer.

995 October term, 1876. Debt, $2,000. Fi. fa. 65 February term, 1878. Strauss, Att'y.

All that lot of land, in Wilkes-Barre city, bounded as follows: Northeast by lands of the heirs of Beaumont, deceased, 33 feet 8 inches, southeast by land of M. Neidenburg 134 feet, southwest by a street front 53 feet 9 inches, and northwest by lands of M. Neidenburg 158 feet 4 inches; all improved, with one 2-story frame dwelling house and outbuildings thereon.

3

Suit of A. H. Reynolds, Trustee, v. Chas. Hutchison.

2830, September term, 1877. Debt, $110,000. 2d pluries fi. fa. 50 February term, 1878.

Suit of Brown & Gray v. Charles Hutchison.

201 October term, 1873. Debt, $7,353.72. Pluries fi. fa. 49 February term, 1878.

Palmer and Bedford, Att'ys.

1. All that certain tract of land situated in the township of Kingston, beginning at a corner of land of Stephen Vaugn and in line of land of the heirs of John Dorrance, deceased; thence by said Dorrance's land north, 31 degrees 5 minutes west, 1500 feet; thence north, 46 degrees 35 minutes east, 323 ft.; thence south, 47 degrees 30 minutes east, 90 7-10 feet; thence south, 76 degrees east, 103 feet; thence north, 46 degrees 35 minutes east, 120 feet; thence south 67 degrees 30 minutes east, 350 feet; thence south, 49 degrees 15 minutes east, 118 feet; thence south, 39 degrees 45 minutes west, 293 7-10 feet; thence south, 10 degrees 30 minutes east, 148 feet; thence south, 31 degrees 5 minutes east, 828 feet; thence south, 58 degrees and 55 minutes west, 443 feet to the place of beginning; containing 18 acres and 108 6-10 perches of land; all improved with a coal breaker, engines and machinery, barn, blacksmith shop, offices, powder house and other outbuildings thereon.

2. All that certain lot in Mill Hollow in Kingston township, beginning at a corner on the main road and in line of land of Mrs. Sarah Reese; thence by said Reese's land south, 46 degrees west, 120 feet; thence south, 70 degrees east, 40 feet to a corner; thence north, 47½ degrees east, about 110 feet to said road; thence by the same north, 53½ degrees west, 40 feet to the beginning; containing about 4630 square feet of land.

3. All the anthracite coal in, on or under all that certain piece of land situate in the township of Kingston, bounded on the north and east by the main public road which leads from the borough of Kingston to the village of Trucksville; on the south by lands of Morris Cramer, and on the west by lands of Greenleaf; containing 1½ acres of land.

4. All the anthracite coal in or under the following described piece of land, situated in the township of Kingston, beginning at a corner in the road leading from Kingston to Dallas; thence by land of Sarah Ide south, 46½ degrees west, 165 feet; thence by land of John Bartholomew north, 51½ degrees west, 90 feet; thence north, 46½ degrees east, 165 feet to said road; thence along said road south, 51½ degrees east, 90 feet to the place of beginning; containing 14,850 square feet.

5. All the following described piece of land situate in the borough of Kingston, beginning at a corner on Page street about 100 and —— feet from the main road between Kingston borough and Plymouth township; thence along said Page street 100 feet to a corner; thence at right angles to said Page street in a south-westerly direction to line of lands of William Loveland; thence southwest along said Loveland's land 100 feet to a corner; thence at right angles to the line of said Loveland's land to the place of beginning; containing about 55 square rods of land, with the improvements.

6. All the anthracite coal in or under the following described piece of land situated in the township of Kingston, being a part of lot No. 16 of the third division of lots in said township of Kingston; bounded on the northeast by the public road between lots No. 16 and 17 and on the northwest by land of Charles Laphy; on the southwest by land of E. A. Abbott and on the southeast by land now or late the estate of William Hancock, deceased; containing 98 perches.

7. All that certain piece of land situate in the township of Kingston, beginning at a corner of Vaughn street and lands of Fisk; thence along Vaughn street 30 degrees 15 minutes, 66 6-10 perches to a corner; thence along other lands of Stephen Vaughn south, 59 degrees 45 minutes west, 26 2-10 perches to a corner; thence by other lands of Stephen Vaughn north, 27 degrees 30 minutes west, 33 3-10 perches to a corner; thence by lands of the said Charles Hutchison north, 59 degrees 45 minutes east, 14 perches to a corner; thence still by land of the said Charles Hutchison north, 30 degrees 15 minutes west, 33 3-10 perches to a corner in line of lands of said Fisk; thence along the same north, 59 degrees 30 minutes east, 12 7-10 perches to the place of beginning; containing 8 acres and 23 perches of land.

4

Suit of W. W. Winton, assigned to the Scranton Trust Company and Savings Bank, v. Frank B. Marsh and James P. W. Riley.

223 October term, 1874. Debt, $40,000. Al. fi. fa. 47 February term, 1878. Price, Att'y.

1. All that lot of land, in the borough of Dunmore, beginning at an oak tree, in the southwest corner of said lot of land, in line of lots Nos. 31 and 32, certified township of Providence; thence by line of lot No. 32 south, 54 degrees 30 minutes east, 161 44-100 perches to a cut stone corner, also a corner of the lands of the Pennsylvania Coal Co.; thence north, 35 degrees and 30 minutes east, 40 35-100 perches to a cut stone corner; thence by lands of the Pennsylvania Coal Co. north, 54 degrees 30 minutes west, 161 44-100 perches to a corner on line of lands of Peter Walsh; thence by said lands south, 35 degrees and 30 minutes west, 40 35-100 perches to the place of beginning; containing 40 acres; all improved, with seven double miners' houses, two barns, one large 2-story frame store house, one store barn, and other improvements thereon.

2. All the coal and other minerals underlying the following lot, in Dunmore, beginning at the southwesterly corner of said lot of land, at a stake and stones; thence north, 39 degrees east, 843 feet to a corner; thence south, 40 degrees east, 690 feet to a corner in line of an alley; thence south, 42 degrees and 30 minutes west, 690 feet to a corner in line of lands of Chas. W. Potter, deceased; thence by the same north, 52 degrees and 30 minutes west, 638 feet to the place of beginning; containing 11 acres and 100 perches.

5

Suit of Brader Brothers, assigned to J. C. & H. B. Phelps, v. Henry Gibbons.

757 October term, 1876. Debt, ——. Al. fi. fa. 54 February term, 1878. Price, Att'y.

All that lot, in the township of Plains, being part of lot No. 8, in the 3d division of the certified township of Wilkes-Barre, and lot No. 22, in plot of lands made by J. Allabach for L. Myers, beginning at a corner of lot No. 24; thence north, 58½ degrees west, about 40 feet to a corner in line of lot No. 20, conveyed to I. S.

The Luzerne Legal Register.

VOL. 7. FRIDAY, FEBRUARY 1, 1878. No. 5.

COMMON PLEAS OF LUZERNE COUNTY.

In Re Assignment of the Ellenwold Coal Company (limited).

1. Under a sale by an assignee the claims of miners, mechanics, laborers, and clerks for wages have a preference on the fund arising therefrom over a claim for rent or taxes.
2. Rent is only a preferred claim when the fund arises from a sale under an execution.

Exceptions to report of auditor.

Opinion by STANTON, J. January 15, 1878.

The Ellenwold Coal Company (limited) organized under an Act of Assembly, entitled "An Act authorizing the formation of partnership associations, in which the capital subscribed shall alone be responsible for the debts of the association, except under certain circumstances," approved June 2d, A. D. 1874, for the purpose of mining anthracite coal, and carrying on a business incident thereto, in Luzerne county, by deed of assignment, dated and delivered the 8th day of August, A. D. 1877, assigned and conveyed all her property to Nathan Van Horn, Esq., in trust for the benefit of her creditors. The said assignee, on the 11th day of October, A. D. 1877, made sale of a portion of the personal property of said company, and the balance remaining in his hands, after payment of the costs and expenses of assignment, was $5,021.34. An auditor was appointed by the court to distribute this fund to and among the parties entitled thereto. A number of persons appeared before the auditor, and made claim to this fund. The auditor, after hearing these parties, made a *pro rata* distribution of the fund, less the costs of the audit, amounting to $185, among about three hundred and fifteen persons, claiming in the aggregate $8,171.03, for labor and services rendered for said company by them respectively, in the capacity of miners, mechanics, laborers, and clerks, during a period not exceeding six months immediately preceding the said assignment, together with M. J. Philbin, Chas. A. Zeigler, and John F. Donahoe, the sum of whose claims, $90.87, was predicated on services not performed for said company, but for persons who brought suits before them against said company.

To this distribution exceptions were duly filed by some of said claimants, to wit: John Leonard, Burke and Callahan, Chas. Shovlin, G. S. Richmond, and Samuel Raub and J. C. Fuller.

Leonard excepts thereto on the ground that the auditor did not

allow $96.50 in his favor, and Burke and Callahan except because the auditor disallowed their claims of $36.65. We do not find in the auditor's report that any proof of such claims was made before him. F. A. Driesbach made proof before the auditor that said company, at the time of assignment, owed John Leonard $4.75, and this sum the auditor allowed him. The docket of Alderman Donahoe, offered in evidence before the auditor for the purpose of establishing his claim on said fund, although evidence of the fact that said Leonard and Burke and Callahan had judgments respectively against said company for the said sums of $96.50 and $36.65, was not proof sufficient that the debts on which these judgments were founded were due for such services as would give them preferred claims on said fund. We, therefore, cannot sustain the exceptions of Leonard and Burke and Callahan.

The very words of Charles Shovlin's exception, that his claim of $98.76 is for "costs made in serving process as constable upon said company previous to their assignment," are the strongest justification that the auditor can have for not allowing it in the distribution. The auditor's report does not even show that any proof was made before him in support of this claim. Shovlin's exception is not sustained.

G. S. Richmond excepts to the distribution on the ground that no part of said fund is applied to his claim for taxes, amounting to $70.51, for which a levy had been made by him prior to the sale by the assignee. We think the auditor acted justly in not making application of any part of said fund to this claim. The assignment of the sixty-four cars was made at least three months before levy was made on them by Collector Richmond. The taxes were not a lien on them until the seizure of October 1st, 1877: 10 P. F. Smith, 46. Under the third section of the act of 1872, relating to wages, the moment the assignment was made, that moment, it seems to us, the claims of the said miners, mechanics, laborers, and clerks employed by said company became preferred claims. Even had the collector his levy made prior to the assignment, and sale were made by him after, we hold that, under the act of 1872, the said claims of the miners, mechanics, laborers, and clerks would have the preference on the fund created by such sale. This exception is, therefore, not sustained.

Samuel Raub and J. C. Fuller file as exceptions to the finding and distribution of said auditor—first, that he "erred in distributing the first moneys to the claims for labor;" second, that he "erred in not distributing the first moneys to the claims for rent due Raub and Fuller." The auditor's report shows that proof was made before him that at the time of said assignment $6,000 were due by said company as lessees of J. C. Fuller, Caroline M. Fuller, Samuel Raub and Caroline Raub for rent on lease of coal land mined by them. The auditor, however, refused to apply any of said fund to this claim, and without error, we think. Even if a lessor's claim for rent could be a preferred one under a sale by an assignee, the claim of these exceptants lacks

certain requisites. The auditor's report shows no proof produced before him that said $6,000 did not exceed one year's rent, or that the goods and chattels sold by the assignee were upon the lands demised, and were liable to distress by them for rent, or that there was any tenancy by the owners of the goods at the time of their said sale. But granting that a claim for rent can be a preferred claim under an assignee's sale, it certainly does not take the first place whenever a claim for wages as aforesaid is presented. There is no doubt that when the Legislature passed the act of 1872, relative to wages, they had the act of 16th June, A. D. 1836, giving a preference to claims for rent, fully in view; and to emphasize the fact (for it needed no express words to explain their meaning) that the said act of 1872 repealed said act of 1836 as far as the wages of labor are concerned, they inserted in said act of 1872 the words: "In all cases of executions, landlord's warrants, * * hereafter to be issued against any person or persons or chartered company, engaged as before mentioned, it shall be lawful for such miners, laborers, mechanics, or clerks to give notice in writing of their claim or claims, and the amount thereof, to the officers executing either of such writs, at any time before the actual sale of the property levied on; and such officers shall pay to such miners, laborers, mechanics, and clerks out of the proceeds of sale the amount each is justly and legally entitled to receive, not exceeding $200.00" Under this provision of the act, this fund would certainly be distributable among the miners, mechanics, laborers, and clerks employed by this company, even if it were in the hands of these lessors, instead of in the hands of the assignee, as the result of a sale by them on a landlord's warrant. But it seems the General Assembly apprehended that this portion of the act of 1872 would not be sufficient to satisfy lessors that labor had a preference to rent on a fund arising from a sale by an assignee, and they, therefore, inserted also in said act of 1872 the words: "In all cases of the death, insolvency, or assignment of any person or persons or chartered company, engaged in operating as hereinbefore mentioned, or of execution issued against them, the lien of preference mentioned in the first section of this act, with the like limitations and powers, shall extend to every property of said persons or chartered company." Giving these lessors even the right to a preference on a fund arising from a sale by an assignee, this last quoted provision of the act of 1872 says in express words that their claim must stand in abeyance until labor is compensated. But we cannot see that these lessors have any preferred rights whatever on the fund arising from the sale by the assignee, and we, therefore, refuse to sustain the exceptions.

The distribution of said fund as made by the auditor is sustained, except as to the amounts of $9.34, $10.31, and $34.15, respectively, allowed in said distribution to Alderman M. J. Philbin, Alderman Chas. A. Zeigler, and Alderman John F. Donahoe as costs on judgments

obtained before them against said company. The claims of said aldermen, if they have any standing as to said fund, are not in any manner preferred claims, and can take nothing from said fund until the claims of the miners, mechanics, laborers, and clerks employed by the company as aforesaid are fully satisfied. We, therefore, remit the report to the same auditor, that he may disallow the claims of the said M. J. Philbin, Charles A. Zeigler, and John F. Donahoe on said fund, and distribute the amount thereof, namely, $53.80, proportionately among those entitled to said fund.

H. A. Fuller, E. A. Lynch, and S. Woodward, for exceptions.

T. H. Atherton, J. T. Lanahan, S. Jenkins, *contra.*

ERROR.—In the syllabus of the opinion published in our last number, in the case of Loomis v. Reynolds et al., we used the word "shall" instead of the word "should." Corrected it would read as follows: "Appropriations for the departments of the city government should be made in advance each year, and the tax levy should only be commensurate therewith." On page 17, in the same opinion, we used the word "treating" instead of the word "treading." The sentence should read, "Many persons step over the bridge before they reach it, and the defendants made such a misstep in reaching the warrant without first treading the bridge of legislation."

According to Lord Campbell, in the tenth year of King Henry VII., that very distinguished judge, Lord Hussey, who was Chief Justice of England during four reigns, in a considered judgment delivered the opinion of the whole Court of King's Bench as to the construction to be put upon the words, "As free as tongue can speak or heart can think:" Year Book, 10 Hen. VII., fol. 13, pl. 6.

Words spoken of an attorney, "Thou canst not read a declaration," per quod, &c. The court: The words are actionable, though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes, &c. Judgment was given for the plaintiff: Jones v. Powel, 1 Mod. 272.

AMENDMENTS TO THE RULES FOR THE REGULATION OF THE PRACTICE IN THE COURT OF COMMON PLEAS OF THE COUNTY OF LUZERNE.

RULE I.—Affidavits of Defense.

SECTION 1. In all actions instituted on bills, notes, bonds, or other instruments of writing, for the payment of money, and for the recovery of book debts or accounts; in all actions upon contracts for the loan or advance of money, whether the same be in writing or not; in all actions of debt or scire facias on mortgages, recognizances, judgments, and on liens of mechanics and material men, except against executors and administrators, the plaintiff shall be entitled to judgment by default, to be entered in court, or by the prothonotary, at his request, on payment of the legal fee, on or after the second Monday of the term next succeeding that to which the process issued is returnable, unless the defendant, or some person for him, shall previously have filed an affidavit of defense, stating therein the nature and character of the same; and if the defense be to a part only, he shall specify the sum which is not in dispute, and judgment shall be entered for so much as is, or shall be, acknowledged to be due to the plaintiff, if demanded by the plaintiff; but if, in case of such affidavit to part of the demand, the plaintiff will not take judgment for the sum admitted to be due by the defendant, together with the costs accrued, in full satisfaction of his demand, and shall not recover a sum greater than that admitted to be due by the defendant, the plaintiff shall pay all costs which shall accrue after the making and filing of such affidavit: *Provided*, that no judgment shall be entered by virtue of this rule, unless the plaintiff shall have filed a declaration or statement on or before the Monday next succeeding the return day to which the process issued is returnable. *And provided, also*, that no judgment shall be entered by virtue of this rule, unless the plaintiff shall, within two weeks after the return day of such process, have filed in the office of the prothonotary a copy of the instrument of writing, book entries, record, or claim on which such action has been brought.

RULE VI.—Auditors and Auditors' Reports.

SECTION 4. In cases referred to an auditor, it shall be the duty of any person desiring an issue to be formed under the 87th section of the Act of Assembly relating to executions, passed 16th June, 1836, to reduce his request to writing, particularly stating therein any fact which he disputes, and to present the same, under oath or affirmation, to the auditor within four days after written notice that the hearing by the Auditor has been concluded; and it shall be the duty of the

auditor to make a report to the court of the presentation of such written request to him, annexing said paper to his report.

SECTION 7. Upon the final or absolute confirmation and recording of an auditor's report, the prothonotary or sheriff shall forthwith pay out the fund as distributed without further order.

RULE XVIII.—Legal Notices.

SECTION 1. In compliance with the provisions of the Act of 12th February, A. D. 1863, entitled "An Act relating to the publication of Legal Notices in Luzerne county," THE LUZERNE LEGAL REGISTER is designated as the weekly legal publication in which, in compliance with the said act, shall be published a concise and intelligible abstract of all legal notices required to be published in cases pending in, or under process issuing out, of any and *all* of the courts of Luzerne county, except the Orphans' Court: *Provided*, that the price to be charged for advertising sheriff's sales shall be three dollars for one piece of land, and one dollar and fifty cents for each additional piece belonging to the same defendant. And it is further ordered, that all auditors' notices be published in the said THE LUZERNE LEGAL REGISTER as one of the public newspapers of the county, as also the trial, jury, argument, and certiorari lists.

RULE XIX.—Money in Court.

SECTION 2. Upon the payment of money into court to abide the order of the court, the same shall be deposited in such bank as the court may designate, to the credit of the court in the particular cause, and shall be drawn out only upon an order of the court, attested by the prothonotary, except in the cases provided for in section 7, of Rule VI.: *Provided*, that nothing herein shall be construed to prevent a disposition of the money by agreement of the parties. A copy of this rule will be inserted in the bank-book in which the deposits are inscribed.

RULE XXII.—Notices.

SECTION 1. All notices shall be in writing. They shall be served by being read in the hearing of the party, or by giving him notice of the contents by delivering him a true copy thereof, or if the party cannot conveniently be found, by leaving such copy at his dwelling house with an adult member of his family, or if the party reside in the family of another, with one of the adult members of the family in which he resides.

RULE XXIII.—Pleading.

SECTION 4. On or after the second Monday of each term, in all cases where the plaintiff's declaration or statement was filed on or

before the third day of the last preceding term, or within three days after the return day of the writ, if such declaration, writ, or statement be necessary, he shall be entitled to the defendant's plea, or a judgment to be entered in court, or by the prothonotary, upon filing proof of service of a ten days' notice on defendant or his attorney, upon payment of the legal fee, and at the same time, and also on the second Monday next after the second return day, or thereafter, judgment may be taken as aforesaid, for default of defendant's appearance, in all cases of summons and scire facias, returnable to the term for which the court is then sitting, if the writ has been served according to the Act of Assembly, and the plaintiff has duly filed his declaration or statement, if required by law: *Provided*, that judgment for want of an appearance may not be taken before the second term in cases of ejectment. If the defendant does not appear in ten days after the service of the writ, agreeably to the 34th section of the Act of 13th June, 1836, and declaration is duly filed as aforesaid, the prothonotary may enter judgment on or after the first day of the next succeeding term. If, however, in any of the cases above mentioned the plaintiff shall not take judgment, the court may at any time thereafter, on motion, direct such judgment to be entered.

SECTION 6. Rules to declare, state, describe, and plead, when the party on whom such rule is taken is in court, may be entered, on application to the court, on any motion day, returnable on the second Monday of the next term, or judgment, or non pros., as the case may be.

RULE XXVI.—Sheriff and Sheriff's Sales.

SECTION 2. Thursday of each of the weeks of the terms, and the fifth day succeeding the June return day, and the fifth day succeeding the September return day, are appointed for the purpose of allowing the acknowledgment of deeds by the sheriff, and also for the reading of sheriff's returns under the first and second sections of the Act of 20th April, 1846, where the purchaser of real estate appears, from the proper records, to be a lien creditor, entitled to the whole or any portion of the proceeds of a sheriff's sale, and claims that his receipt for the amount of his lien be taken by the sheriff.

RULE XXXI.—Trial and Trial List.

SECTION 6. It is ordered that hereafter not more than the first ten cases on the trial list shall be liable to be called for trial on the first Monday of the several terms of the Court of Common Pleas, the second ten on Tuesdays, the third ten on Wednesdays, and that subpœnas shall be issued returnable at two o'clock P. M. on Mondays, and at nine o'clock A. M. on Tuesdays and Wednesdays, respectively, for cases liable to be tried on those days. The untried cases of each day shall have preference until disposed of.

SHERIFF'S SALES.

Abstract of property to be sold by P. J. Kenny, Sheriff of Luzerne county, on Saturday, February 9, A. D. 1878, at 10 o'clock A. M., at the Arbitration room, in the Court House, Wilkes-Barre, who will proceed with the different properties in the order in which they are numbered, to wit:

1

Suit of W. W. Neiier v. C. H. Johnson.

3276 September term, 1877. $1,687.50. Al. lev. fa. 451 January term, 1878. Woodward & Coons, Att'ys.

A lot in the city of Wilkes-Barre, on Canal street, beginning at a corner on the southeasterly side of said Canal street, being the northwesterly corner of lot of Chas. A. Becker; thence along said Canal street north, 59 degrees east, 42 feet to a corner; thence along lands of Troxell and Kirkendall south, 31 degrees east, 175 feet to the center line of the North Branch Canal; thence along said center line south, 59 degrees west, 42 feet to a corner in line of said Becker's lot; thence along line of Becker's lot north, 31 degrees west, 175 feet to the place of beginning; containing 7,000 square feet of land; on which is a two-storied frame building, with a two-story addition.

2

Suit of M. H. Post v. M. Lederer.

995 October term, 1876. Debt, $2,000. Fi. fa. 65 February term, 1878. Strauss, Att'y.

All that lot of land, in Wilkes-Barre city, bounded as follows: Northeast by lands of the heirs of Beaumont, deceased, 33 feet 8 inches, southeast by land of M. Neidenburg 134 feet, southwest by a street front 53 feet 9 inches, and northwest by lands of M. Neidenburg 158 feet 4 inches; all improved, with one 2-story frame dwelling house and outbuildings thereon.

3

Suit of A. H. Reynolds, Trustee, v. Chas. Hutchison.

2830, September term, 1877. Debt, $110,000. 2d pluries fi. fa. 50 February term, 1878.

Suit of Brown & Gray v. Charles Hutchison.

201 October term, 1873. Debt, $7,353.72. Pluries fi. fa. 49 February term, 1878.

Palmer and Bedford, Att'ys.

1. All that certain tract of land situated in the township of Kingston, beginning at a corner of land of Stephen Vaugn and in line of land of the heirs of John Dorrance, deceased; thence by said Dorrance's land north, 31 degrees 5 minutes west, 1500 feet; thence north, 46 degrees 35 minutes east, 323 ft.; thence south, 47 degrees 30 minutes east, 90 7-10 feet; thence south, 76 degrees east, 103 feet; thence north, 46 degrees 35 minutes east, 120 feet; thence south 67 degrees 30 minutes east, 350 feet; thence south, 49 degrees 15 minutes east, 118 feet; thence south, 39 degrees 45 minutes west, 293 7-10 feet; thence south, 10 degrees 30 minutes east, 148 feet; thence south, 31 degrees 5 minutes east, 828 feet; thence south, 58 degrees and 55 minutes west, 443 feet to the place of beginning; containing 18 acres and 108 6-10 perches of land; all improved with a coal breaker, engines and machinery, barn, blacksmith shop, offices, powder house and other outbuildings thereon.

2. All that certain lot in Mill Hollow in Kingston township, beginning at a corner on the main road and in line of land of Mrs. Sarah Reese; thence by said Reese's land south, 46 degrees west, 120 feet; thence south, 70 degrees east, 40 feet to a corner; thence north, 47½ degrees east, about 110 feet to said road; thence by the same north, 53½ degrees west, 40 feet to the beginning; containing about 4600 square feet of land.

3. All the anthracite coal in, on or under all that certain piece of land situate in the township of Kingston, bounded on the north and east by the main public road which leads from the borough of Kingston to the village of Trucksville; on the south by lands of Morris Cramer, and on the west by lands of Greenleaf; containing 1½ acres of land.

4. All the anthracite coal in or under the following described piece of land, situated in the township of Kingston, beginning at a corner in the road leading from Kingston to Dallas; thence by land of Sarah Ide south, 46½ degrees west, 165 feet; thence by land of John Bartholomew north, 51½ degrees west, 90 feet; thence north, 46½ degrees east, 165 feet to said road; thence along said road south, 51½ degrees east, 90 feet to the place of beginning; containing 14,850 square feet.

5. All the following described piece of land situate in the borough of Kingston, beginning at a corner on Page street about 100 and ——— feet from the main road between Kingston borough and Plymouth township; thence along said Page street 100 feet to a corner; thence at right angles to said Page street in a south-westerly direction to line of lands of William Loveland; thence southwest along said Loveland's land 100 feet to a corner; thence at right angles to the line of said Loveland's land to the place of beginning; containing about 55 square rods of land, with the improvements.

6. All the anthracite coal in or under the following described piece of land situated in the township of Kingston, being a part of lot No. 16 of the third division of lots in said township of Kingston; bounded on the northeast by the public road between lots No. 16 and 17 and on the northwest by land of Charles Laphy; on the southwest by land of E. A. Abbott and on the southeast by land now or late the estate of William Hancock, deceased; containing 98 perches.

7. All that certain piece of land situate in the township of Kingston, beginning at a corner of Vaughn street and lands of Fisk; thence along Vaughn street 30 degrees 15 minutes, 66 6-10 perches to a corner; thence along other lands of Stephen Vaughn south, 59 degrees 45 minutes west, 26 2-10 perches to a corner; thence by other lands of Stephen Vaughn north, 27 degrees 30 minutes west, 33 3-10 perches to a corner; thence by lands of the said Charles Hutchison north, 59 degrees 45 minutes east, 14 perches to a corner; thence still by land of the said Charles Hutchison north, 30 degrees 15 minutes west, 33 3-10 perches to a corner in line of lands of said Fisk; thence along the same north, 59 degrees 30 minutes east, 12 7-10 perches to the place of beginning; containing 8 acres and 23 perches of land.

4

Suit of W. W. Winton, assigned to the Scranton Trust Company and Savings Bank, v. Frank B. Marsh and James P. W. Riley.

223 October term, 1874. Debt, $40,000. Al. fi. fa. 47 February term, 1878. Price, Att'y.

1. All that lot of land, in the borough of Dunmore, beginning at an oak tree, in the southwest corner of said lot of land, in line of lots Nos. 31 and 32, certified township of Providence; thence by line of lot No. 32 south, 54 degrees 30 minutes east, 161 44-100 perches to a cut stone corner, also a corner of the lands of the Pennsylvania Coal Co.; thence north, 35 degrees and 30 minutes east, 40 35-100 perches to a cut stone corner; thence by lands of the Pennsylvania Coal Co. north, 54 degrees 30 minutes west, 161 44-100 perches to a corner on line of lands of Peter Walsh; thence by said lands south, 35 degrees and 30 minutes west, 40 35-100 perches to the place of beginning; containing 40 acres; all improved, with seven double miners' houses, two barns, one large 2-story frame store house, one store barn, and other improvements thereon.

2. All the coal and other minerals underlying the following lot, in Dunmore, beginning at the southwesterly corner of said lot of land, at a stake and stones; thence north, 39 degrees east, 843 feet to a corner; thence south, 40 degrees east, 690 feet to a corner in line of an alley; thence south, 42 degrees and 30 minutes west, 690 feet to a corner in line of lands of Chas. W. Potter, deceased; thence by the same north, 52 degrees and 30 minutes west, 638 feet to the place of beginning; containing 11 acres and 100 perches.

5

Suit of Brader Brothers, assigned to J. C. & H. B. Phelps, v. Henry Gibbons.

757 October term, 1876. Debt, ———. Al. fi. fa. 54 February term, 1878. Price, Att'y.

All that lot, in the township of Plains, being part of lot No. 8, in the 3d division of the certified township of Wilkes-Barre, and lot No. 22, in plot of lands made by J. Allabach for L. Myers, beginning at a corner of lot No. 24; thence north, 58½ degrees west, about 40 feet to a corner in line of lot No. 20, conveyed to I. S.

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VOL. 7. FRIDAY, FEBRUARY 8, 1878. No. 6.

GENERAL SESSIONS OF DELAWARE.

State v. McDaniel.

One who is prosecuted for selling liquor without license cannot successfully defend himself by showing it was sold by his wife in a part of the house used by her as a store.

The defendant was prosecuted at the fall sessions, 1877, for selling liquor without license. The evidence showed that the defendant and his wife lived together in the same house, and that she kept a small candy shop in one of the apartments, and sold liquor therein. There was also evidence that McDaniel remonstrated with his wife for selling liquor. But it was likewise proven that McDaniel was a man of firmness and determination.

By the law of the State a married woman is authorized to carry on business on her own account, and for her own benefit.

For McDaniel it was argued that inasmuch as a married woman is so authorized to do business for herself, it amounted to a legislative enfranchisement, and she was no longer under her husband's control in business matters, nor was he answerable for what she did.

THE COURT—The Legislature has not yet, and if the peace of families and the welfare of society are to be considered, it will be a long time before it will take away the husband's control of his own family. It is absolutely necessary that some one should have control of the household; and in all ages, and among all nations, this authority has been reposed in the husband. And the Legislature, in authorizing a married woman to do business on her account, never meant to enfranchise her, or to interfere with the domestic relations in any manner whatever. And if the defendant in this instance had so willed, he might have shut up the house, and forbidden his wife to sell liquor or anything else in it. Or he might have carried the liquor into the street, and poured it out without let or hindrance by his wife, or any one else.

The defendant was convicted and sentenced.—*Pittsburg Legal Journal.*

COMMON PLEAS OF LUZERNE COUNTY.

Kennedy v. St. Gabriel Temperance and Benevolent Society of Hazleton.

Rule for mandamus.

Opinion by DANA, J. December 24, 1877.

Whether an alternative mandamus be preceded by a rule to show cause, or is issued upon petition without rule, the only question for the court is whether the petition discloses sufficient ground for the allowance of the writ. We conceive that the practice is not to hear and determine the case upon the rule to show cause, but where the suggestion shows in the applicant or relator a *prima facie* case, a specific legal right, as well as the want of a specific legal remedy, to make the rule absolute, allow an alternative writ to issue, leaving the defendant's counsel the opportunity of being heard upon a rule to quash, or upon a demurrer, plea, or answer: Comlth. ex rel. McMahon v. Hibernia Association, 2 Brewster, 441. The alternative writ gives the party to whom it is directed an opportunity to do the act, or to show good reason, at the return of the writ, why he should not do it. He does this by making a return, in which he may traverse the facts alleged in the writ, or admitting them, may avoid performance by stating sufficient facts in excuse. The relator may then demur, plead to, or traverse the facts set forth in the return. This is the practice recognized by the act relating to mandamus: Keasy v. Bricker, 10 S. 9-13. The act provides that the court shall allow the persons suing or defending "such convenient time to make return, plead, reply, rejoin, or demur, as shall be just and reasonable." The pleading may raise issues of fact, to be sent to a jury; and if, after issue and trial, the return be adjudged insufficient, then a peremptory mandamus issues to compel the performance of the duty required. The act contemplates regular issues of fact and law, as in other cases, with the time and opportunity for the relator and the defendant to raise and meet them: Treasurer of Jefferson County v. Shannon, 1 Sm. 221; Com. ex rel. v. Allegheny County, 8 C. 218; Ib., 1 Wr. 287.

The petition in this case avers and sets out the illegal expulsion, as he claims, of the relator from membership in the St. Gabriel Temperance and Beneficial Society of Hazleton; that his expulsion was at a special, not a general meeting of the society, in the absence of the relator, and without notice to or opportunity for him to appear and be heard in his defense. In case of the disfranchisement of a corporator, the courts entertain jurisdiction to restore him by mandamus where the cause is sufficient, or the proceedings irregular, although they will not enquire into the merits of what has passed in a regular course of proceeding: Com. ex rel. Fischer v. The German Society, 3 H. 251.

It is objected against the allowance of this writ, that the relator

has not shown demand made upon the defendants to re-instate him before asking for the writ. It is, in general, necessary that the defendants should be requested to do that of which performance is sought by means of the writ, and their refusal shown, or at least alleged, but this omission may be supplied by showing circumstances which clearly evince an intention not to do the act required: Dillon on Municipal Corporations, § 696.

There is found a sufficient *prima facie* showing of such circumstances, if prior demand in this case be required, in the action of the society, as evinced by the letters of the secretary of December 13, 1876, and December 8, 1876, in answer to the relator's application for a rehearing and restoration to membership.

Whilst not entirely formal, and the entitling of the action may, perhaps, require amendment, yet we are of the opinion that the petition and papers presented on the rule to show cause disclose sufficient *prima facie* ground for the allowance of an alternative writ.

The rule to show cause is thereupon made absolute, and an alternative mandamus allowed to be issued.

The City of Scranton v. The People's Street Railway Company.

In Equity. Motion to dissolve injunction.

Opinion by DANA, J. November 12, 1877.

The complaint in the bill is, that the defendants are proceeding to construct, for the use of their cars, a turn table, on Main street, in Scranton, which, it is averred, will be, when built, a nuisance, rendering the street at that point unsafe and dangerous; and that its construction is not authorized by the defendants' charter and the laws of the Commonwealth.

A preliminary injunction having been awarded, without notice, on presentation of the bill, the question of its continuance, pending the further investigation of the case, is now presented. Its dissolution or continuance now, in this preliminary hearing, does not affect or indicate the ultimate disposition by the court of the questions raised, after the evidence is all in, upon the final hearing.

Upon the affidavits read and statutory provisions cited by the parties, ought the preliminary injunction, under the rules of equity, to be continued?

The evidence contained in the affidavits, it will be observed, bearing on the question whether the turn table will or will not be a nuisance, or hinder or endanger the use of the street, consists mainly in opinions formed by the several witnesses. A number of gentlemen

called and sworn by the plaintiffs are of the opinion that the construction of the turn table, as proposed, will endanger travel; a larger number called by the defendants are of the opinion that it will not, and that a similar table located and used on another street in the city does not in the slightest degree interfere with the convenience or safety of travel. Caution is requisite in applying this strong remedy at all times, but especially where the evidence consists of opinions. An injunction may issue or be continued on this species of evidence where the case is clearly made out, but this cannot be done against the preponderance of the proof. Should it appear on further and full investigation that the structure, when completed, is a nuisance, or is so built as to impede travel, or endanger life or property, the question, as then presented, can be disposed of by such a decree as the facts and law shall warrant.

The sixth section of the Act of March 23d, 1865, P. L. 1866, p. 1201, incorporating the defendants, and the first section of the Act of March 27th, 1866, P. L. 1300, incorporating the Scranton and Providence Passenger Railway Co., which was merged in the defendants' company, invested them with all the rights and privileges conferred by the general railroad law of February 19, 1849. The tenth section of that act, P. D. 1218, § 34, authorizes the company to construct "such bridges, viaducts, turn-outs, sidlings, or *other devices*, as they may deem necessary or useful." The designation, "other devices," seems to be comprehensive enough to include a turn table, and thus its construction, if it does not interfere with the rights of the public, be authorized.

The preliminary injunction heretofore awarded is dissolved.

There is one instance in the reign of Elizabeth of a criminal jurisdiction being directly assumed by the Court of Chancery on a bill filed to punish a party for corrupt perjury, where there was not sufficient evidence to convict him at common law. He demurred, but was compelled to answer: Cary, 90.

TREMAIN'S CASE.—Being an infant he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge. And the court sent a messenger to carry him from Oxford to Cambridge. And upon his returning to Oxford there went another, *tam* to carry him to Cambridge, *quam* to keep him there: 1 Strange, 167.

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VOL. 7. FRIDAY, FEBRUARY 15, 1878. No. 7.

COMMON PLEAS OF CHESTER COUNTY.

Graham v. The McLean and Bennor Machine Company.

1. The cost of recovering a judgment not reached in distribution are not entitled to be paid out of the fund in court.
2. Nor are the costs of execution such a judgment.
3. The sheriff is not entitled to charge for the services of a watchman employed to take charge of loose tools under levy, nor for coal used in heating the building occupied by them.
4. A claim for "labor performed or furnished" is not sufficiently described to sustain a mechanic's lien.
5. *Dubitatur*, whether a mechanic's claim, in which the date when the work was performed is not given, but it is stated in the body of the claim to have been performed "within six months last past," is sufficient: Lehrman v. Thomas, 5 W. & S. 262, doubted.
6. Services rendered subsequent to levy are not entitled to a preference under the (Wages) Act of 9th of April, 1872.
7. The written notice required by this statute must be as full and particular as the claim, exhibiting every fact necessary to sustain a lien.
8. This written notice can not be helped out by verbal additions.

This was the distribution of a fund, the proceeds of the sale of personalty and real estate, paid by the sheriff into court. R. Jones Monaghan, Esq., was appointed auditor to make distribution, and in the course of a lengthy report considered the following questions: The defendant was a corporation organized for the manufacture of sewing machines, had purchased the building and lot comprising the real estate sold by the sheriff, and was engaged in fitting it up with machinery and appliances when levy was made. They were carrying on their business at this time in Philadelphia, but did no manufacturing in Chester county, except finishing a few parts of machines brought there in the rough. The personalty comprised a large lot of tools, many of them very small and alleged to be of great value. They were under levy from September 12, 1876, till January 24, 1877, when the sale occurred. At the time of the sale there were in the sheriff's hands five executions, under which he advertised and sold. But three of them were reached in the distribution. Before the auditor, the sheriff claimed the costs, both of original process and execution, on all these writs; the auditor refused costs of any kind to judgments not reached in the distribution, relying on Knickerbocker v. Shipherd, 3 Con. 383, and distinguishing Shelly's Appeal, 2 Wr. 210, and Fry's Appeal, 26 P. F. S. 82.

The sheriff also claimed $330 for services of a watchman, who was employed night and day, from the time of levy to day of sale, to guard

the tools levied. The goods were in an unoccupied building seven miles from the sheriff's office, were represented to the sheriff as very valuable, and liable to be stolen, and he was requested by direction of the defendant to put a watchman in charge. The sheriff also claimed $18 for coal used in warming the office of the building, in which the watchman stayed. A controversy arose among the execution creditors as to what of the articles levied were personalty and what realty, and several sales were advertised and adjourned between the time of levy and day of sale. The auditor found that the services of a watchman were necessary, and that the charge here made was reasonable, but that the sheriff was not entitled to demand its payment, citing Bussier v. Pray, 7 S. &. R. 449; Borie v. Leeds, 28 Legal Intelligencer, 340; S. C., 8 Phila. 354, and cases there cited; Miles v. Huber, 1 Penna. L. J. Rep. 154; Fitch's Appeal, 10 Barr, 461, and Act of 28th of March, 1814, sec. 26; Purd. Dig., 690, pl. 70. These claims were accordingly refused.

Adam Weber also presented a mechanic's lien "for labor performed and furnished," which was defective in that it did not, either in the body of the claim or in the bill annexed, state any date whereby to verify the general statement in the body of the claim that the labor was performed "within six months prior to filing this claim." The claim was not under a contract, but for twenty weeks' work at $20 per week. The auditor, relying on Lehrman v. Thomas, 5 W. & S. 262, and The Church v. Trout et al., 4 Cas. 155, refused the claim.

There were also presented several claims for a preference for wages under the Act of 9th of April, 1872. One for services held to be within the act, was refused because the services were rendered after the levy, following Pershing, P. J., in Kindig v. Atkinson, 34 Legal Intelligencer, 197, June 1, 1877.

Luther L. Cheyney's claim was for wages as a machinist, and his services were held by the auditor to fall within the contemplation of the Act of Assembly. His notice, sent by mail to the sheriff, was in the following terms:

PHILADELPHIA, October 1, 1876.

McLean & Bennor Machine Co. to L. L. Cheyney, Dr.:

To wages from May 1st to August 31st, at $5 per day .	$552
Credit	265
Balance	$287

MR. WILLIAM MORRISON, Sheriff:

Dear Sir—I notify you that the above bill is due me from the company. Very respectfully,

L. L. CHEYNEY.

Subsequently, Mr. Cheyney met the sheriff, who acknowledged the receipt of the notice, told him it was all right, and that he considered it a preferred claim.

The auditor held the notice insufficient, and refused the claim, saying, *inter alia:* What then are the essentials of the act of 1872, which must appear in the written notice to the sheriff? It must show, we think, at least: 1. The amount claimed to be due as a preference. 2. That the character of the services for which claim is made falls within the statute; that is, that they were rendered by one of the class of employees named in the act of assembly, and that they were rendered in or about a business, subject of the statute, carried on by the defendant. 3. That the services were rendered within six months preceding the sheriff's sale. 4. That the wages due are claimed to be a lien on the property levied; and 5. Reference must be made to the process in the sheriff's hands under which the property is seized by him.

Tried by these tests, the notice here given wholly fails. The character of the services is not stated, nor is it claimed in the notice that they were rendered in or about the business of the defendant, subject of the statute. Nor is claim made of lien or preference, nor is there any reference to process in the sheriff's hands. It is urged, however, that the sheriff has helped out the written notice. The sheriff was not the only party needing notice—is, indeed, the one least interested in it. And the statute expressly requires the notice of claim to be in writing. It cannot be said to be in writing if but a part of it is written. The statute certainly contemplated no such thing as written notice being helped out by oral testimony.

Exceptions were filed to the auditor's report, on argument of which, besides cases cited by the auditor, there were cited by counsel on the question of mechanics' lien raised, Shaw v. Barnes, 5 Barr, 19; Hahn's Appeal, 3 Wr. 410; McCay's Appeal, 1 Wr. 129; Driesboch v. Keller, 2 Barr, 79; Hilary v. Pollock, 1 Har. 186; McClintock v. Rush, 13 P. F. S. 205; Summerville v. Wann, 1 Wr. 183.

Opinion by BUTLER, P. J. January 26, 1878.

The exceptions filed by Luther L. Cheyney must be dismissed Notice to the sheriff under the Act of April, 1872, relating to laborers. and others, is intended to serve the same purpose as filing a claim with the prothonotary; that is, to inform parties interested of the lien. The notice must therefore be as full and particular as the claim, exhibiting every fact necessary to sustain a lien. It is sufficient, of course, that it be certain to a "common intent"; but certain to this degree it must be, presenting a *prima facie* case. As before stated, the object is to inform others of the existence of the lien, that they may know how to protect themselves. It is not sufficient to put them on *inquiry*, as was argued. Such inquiry would be troublesome, and uncertain in its results. Claiming a preference, the laborer must comply with the

conditions on which it is allowed. The notice can not be helped out by verbal additions. The statute requires that it be in writing, that uncertainty may be avoided. Mr. Cheyney's notice was clearly insufficient: McMillin v. Bank, 1 Weekly Notes, 55; Kendig v. Atkinson, Legal Intelligencer, vol. 34, p. 196.

The only objection made to the mechanic's lien of Adam Weber before the auditor, was that the claim filed does not specify the date at which the work was performed. If the case rested on this objection, it is not certain that we would agree with the auditor in rejecting the lien. His position finds support in Lehrman v. Thomas, 5 W. & S. 562, where the question was invoked, and in the observations of judges in other cases where it was not. But it is by no means clear that the more recent cases can be reconciled with this view. In several, it is held sufficient to specify dates between which the work was done. If this rule is applicable to all cases, (and it may seem difficult to find reason for distinction, while the requisites of every claim are prescribed by the same section of the statute, and in the same language,) it would follow that the averment here is sufficient. But it must be conceded that the question is involved in much confusion. Probably no subject has been more fruitful of conflicting authority than the statutes conferring mechanics' liens; and no question arising under them has resulted in greater uncertainty than that on which the auditor has passed. We are relieved from deciding it here. Before us another question has been raised, about which there is less room for doubt. The claim states that it is "for labor performed or furnished" without further description. The statute requires the "nature or kind of work" to be set forth. The term labor is not sufficiently descriptive; indeed, is not descriptive at all. Work and labor are synonymous terms. Webster defines labor to be "physical toil, or bodily exertion, hard muscular effort, directed to some useful end, as agricultural, manufactures and the like; intellectual exertion, mental effort, *work*, toil, &c.," and work to be "the exertion of oneself for a purpose, to put forth effort, to *labor*, &c." While the term labor may to some extent be regarded as descriptive of servile toil, it has no such confined meaning. Its signification is as broad as that of work. It will not serve, therefore, to describe the nature or kind of work, as required by the statute, for which a lien is claimed. The object of description is, as the courts say, to individuate the work, that the owner may know what it is he charged for. And it must be sufficiently particular to serve this purpose.

Respecting the other matters excepted to, we agree with the auditor in the results reached.

All exceptions must be dismissed.—*Legal Intelligencer.*

The Luzerne Legal Register.

VOL. 7. FRIDAY, FEBRUARY 22, 1878. No. 8.

OYER AND TERMINER OF LUZERNE COUNTY.

Commonwealth v. Scranton et al.

1. Any number of citizens may assemble together, and peaceably discuss the difficulties, real or imaginary, surrounding them: they may march with music and banners through the streets of our towns and cities, and no person has a right to interfere with or molest them, so long as they do not disturb the public peace, nor violate individual rights. More than that, though their march be tumultuous, their conduct riotous within the meaning of the penal law, thus rendering them liable to arrest, prosecution, conviction, and punishment, still they are not to be attacked and slain by armed men, with impunity. If they are, the offenders are liable to arrest, trial, and conviction either of murder of the first degree, or of murder of the second degree, or of voluntary manslaughter, as the circumstances may warrant.
2. The Pennsylvania statute on the subject of riots has in view, first, a riot in the nature of an unlawful assembly, or an affray merely; second, a riot which has features of aggravation about it; and third, a riot which is attended with the destruction of buildings and machinery.
3. Any tumultuous disturbance by three or more persons assembling together of their own authority, and deporting themselves in such a manner as to produce danger to the public peace and tranquility, and which excites terror, alarm, and consternation in the neighborhood, is an unlawful assembly.
4. Such an assembly may be dispersed by a magistrate, whenever he finds an order of things existing which calls for interference on his part in the interest of the public peace. He is not required to delay action until the unlawful assembly ripens into an actual riot. He may invoke the aid of every citizen present, and they are bound to respond to his requisition. He has a right to arrest the offenders, or to authorize others to do so, by a mere verbal command, without any other warrant whatever. If he fails to do his utmost for the suppression of such an assembly, he may, himself, be indicted and convicted of a criminal misdemeanor.
5. An unlawful assembly ripening into a riot should be crushed out at once by all lawful means; because, if suffered to continue, destruction, ruin, even death, are almost certain features of its pathway.
6. When an actual riot is at hand, when its more dangerous features have been actually put on, and life and property are threatened, more decisive measures may be adopted. Citizens may, of their own authority, endeavor to suppress it: they may arm themselves, and whatsoever they honestly and reasonably do in their efforts to suppress it, will be supported and justified by the law.
7. Laboring men, no matter in what capacity, have the right to demand what to them seems a fair compensation for their work; and if that compensation is not accorded, they have the right to strike, or, in other words, to quit work. Again, any laborer who is willing to work for a compensation satisfactory to himself, even though it be less than that demanded by his associates of the same class, has the right to work. But, as the law will compel no man to work for a price not assented to by himself, so the law will not permit any man, or body of men, to enforce the idleness of others who are willing to work for a price that suits them.

The following is the charge of Judge HARDING, as reported by J. F. Standish, Jr., Court Stenographer, in the recent Scranton riot case:

Gentlemen of the Jury:

The defendants here are charged with voluntary manslaughter. It is alleged that they slew, on the 1st of August last, one Patrick Langan. Counsel for the defendants and counsel for the Common-

wealth have each in turn made almost exhaustive reference to a case tried before Judge King, in Philadelphia, some years ago, many of the features of which were closely analogous to those appearing in the present case.

You have been told that the law laid down in that case must govern this. To a certain extent this is true. Judge King's statement of the law is the correct one. You have been further told that the jury are judges of both the law and the facts. This is also true; but, so far as the present case is concerned, it will be expected that the jury will take the law from this Court, not from other Courts. The jury will remember, too, that it is not the Daley case they are now trying, but the Scranton case; that the former occurred in Philadelphia upwards of thirty-three years ago, while the latter occurred in the city of Scranton, in this county, only five months ago; that Matthew Hammitt, of Philadelphia, was not the person slain, but Patrick Langan, of the county of Luzerne,; that John Daley is not the person indicted, but W. W. Scranton, Lewis Bortree and others; that it is the law applicable to the facts and circumstances connected with this latter case, which must govern in the disposition of it.

And, gentlemen, I will say at the outset, that if the facts and circumstances have been truthfully detailed by the Commonwealth, then the defendants named in this indictment, excepting Ezra Ripple, George Throop, A. E. and T. F. Hunt, J. C. Highrighter and Jefferson Roesler, against whom no testimony has been given, may be convicted of voluntary manslaughter.

People may assemble together to the number of three, or of thousands, and peaceably discuss the difficulties surrounding them; they may march with music and banners through the streets of our towns and cities, and no person has a right to interfere with, or molest them, so long as they do not disturb the public peace, nor violate individual rights. More than that, though their march be tumultuous, their conduct riotous within the meaning of the penal law, thus rendering them liable to arrest, prosecution, conviction and punishment, still, they are not to be attacked and slain by armed men, with impunity. If they are, the offenders, no matter who they may be, nor what their importance, nor what their standing, social or otherwise, become liable to arrest, trial and conviction, either of murder of the first degree, or of murder of the second degree, or of voluntary manslaughter, as the circumstances may warrant. To be more explicit: If that mass of people designated by most of the witnesses as the mob, came up Washington avenue on the morning referred to, in the manner described by the several witnesses examined on the part of the Commonwealth, and as they turned into Lackawanna avenue, they were fired upon by the defendants, then, even though the slain man and his associates were engaged in what might be termed a riot, there was no justification for that firing, no justification for that killing. Because, according to this

testimony, the riot, if riot it was, was of the mildest conceivable type: it could not, therefore, have required murderous force to suppress it.

But, gentlemen, we have had two sworn descriptions of the manner of conduct of that multitude, or mob, as it has been called, on that day. Which of the descriptions is the correct one? This is the great fact to be determined, and the determination of it is solely for you. It would be idle to deny that there is a wide, even irreconcilable, conflict between the testimony on the part of the Commonwealth, and that on the part of the defense. It is your province, no matter what may be the views of the Court, or the views of the counsel in the case, to believe, of the witnesses, whom you will, and to disbelieve whom will. You should, however, examine with care all the the testimony presented on the one side and the other; you should weigh it in a just balance; you should find according to your convictions of the truth.

What is the answer of the defendants? It is, that on the 1st of August last, a large body of men came together within the limits of the city of Scranton, ostensibly for the purpose of discussing the difficulties, real or imaginary, that surrounded them, but really for the purpose of organizing in force with a view to stop every industry connected with mining or manufacturing in and about that city; that, being thus convened, they resolved to go in a body and drive from employment every person engaged about the machine shops and other places of labor belonging to the two great companies of that vicinity; that this resolution, passed in the midst of uproar and confusion, they proceded at once to carry out; that violence, bloodshed and terror marked their path; that, meeting with no adequate resistence, they rushed on beyond the shops towards the chief avenue of the city, proclaiming as they went the further purpose of robbery and murder; that they struck down the Mayor, who, in obedience to the mandates of official duty, had bravely interposed himself in their path; that they overthrew the civil law outright; that, thereupon, the defendants committed the act here charged against them as a high crime.

At this point, gentlemen, more particularly for your own instruction, but incidently for the hundreds of laboring men within reach of my voice, I will state the law governing their rights. Laboring men, no matter in what capacity, have the right to demand what to them seems a fair compensation for their work, and if that compensation is not accorded, they have the right to strike; in other words, to quit work: again, any laborer who is willing to work for a compensation satisfactory to himself, even though it be less than that demanded by his associates of the same class, has the right to work. And, as the law will compel no man to work for a price not agreed upon by himself, so the law will not permit any man, or body of men, to enforce the idleness of others who are willing to work for a price that suits them. Such is the rule wherever civilization extends; such will be the rule as long as civilization lasts.

It is not strange, however, that laboring men should mistake their rights in this particular; it is not strange that cunning, wicked, dangerous demogogues should lead them astray; it has been so in times past, it is so in times present—demagogues swarm amongst them like bees—and so it will continue, most likely, down to the end of time.

The history of strikes is but a harrowing story of the sufferings of the laboring classes. Betrayed through evil advisers into violations of the law, they have languished and died in prisons, and their burial places have been in prison yards; their children, orphaned, have grown up to early vagabondism and crime.

And, yet, the teachings of experience seem to go unheeded. The demagogue is as powerful to-day as ever. But the wheel of civilization and good government moves on, nevertheless; it will move on thus till the latest day. The striker, grown into a rioter, may achieve a temporary triumph, but its duration can scarcely be of a day. Law and order are characteristics of our institutions, and no power on earth can supplant them. True enough, any law may be changed, but never by violence. The redress for bad laws is the ballet-box; the redress for unsatisfactory officials is likewise the ballot-box. We have recently had an example of the latter in our midst. I may say, however, that no matter who are our officials, the law as it stands will be enforced. It may be changed, as I have indicated, but by the bludgeon, *never*.

The statute law of our State in regard to riot, is as follows:

"SECTION 19.—If any person shall be concerned in any riot, rout, unlawful assembly or an affray, and shall be thereof convicted, he shall be guilty of a misdemeanor and be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment not exceeding two years, or both, or either, at the discretion of the Court; and in case any one is convicted of aggravated riot, the Court may sentence the offender to imprisonment by separate and solitary confinement at labor, not exceeding three years.

"SECTION 20.—If any persons riotously and tumultuously assemble together, to the disturbance of the public peace, shall unlawfully and with force, demolish, pull down or destroy, or begin to demolish, pull down or destroy any public building, private house, church, meeting house, stable, barn, mill, granery, malt house or outhouse, or any building or erection used in carrying on any trade, or manufacture, or any branch thereof, or any machinery, whether fixed or movable; prepared for or employed in any manufacture or any branch thereof, or any steam engine, or other engine, for sinking, working or draining any mine, or any building or erection used in conducting the business of any mine, or any bridge, wagonway, road or trunk, for conveying minerals from any mine, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be imprisoned by separate or solitary confinement at labor, or by simple imprisonment, not exceeding seven years."

You will observe, gentlemen, that the statute contemplates, first, a riot in the nature of an unlawful assembly, or an affray merely; second, a riot which has features of aggravation about it; and third, a riot which is attended with the destruction of buildings or machinery. Now, taking the testimony as presented on the part of the Commonwealth, and the assembly of the first of August last, in the city of Scranton, amounted neither to a riot involving the destruction of buildings or machinery, nor to a riot of an aggravated character; at most, it was but an unlawful assembly. Hence, as I have said already, if this testimony be believed, the defendants who made an attack upon it from which the death of Patrick Langan resulted, may be convicted in manner and form as they stand charged in this indictment.

The words "riot," and "unlawful assembly," as used in the statute, have a distinct legal signification, thus: Any tumultuous disturbance, having no avowed or ostensible, legal or constitutional object, assembling together of their own authority, and deporting themselves in such a manner as to produce danger to the public peace and tranquility, and which excites terror, alarm and consternation in the neighborhood, is an "unlawful assembly." To illustrate: If the meeting down at the Silk Works, where the resolution was passed that all should go in a body and stop the operatives in the machine shops, was truthfully described by the witnesses for the defense, then that meeting was not only an "unlawful assembly," but it was the beginning of an aggravated riot. Every person present, was, in the eye of the law, a principal. In this crime all are regarded as principals until the contrary is shown. Further, if, in carrying out the resolution passed at the Silk Works, the mob, as it has been called, proceeded to the shops of the Lackawanna Iron and Coal Company, entered them, struck down those who were employed there, drove them away, surely, a riot of a very dangerous and wicked character was in full progress.

The law governing the duties of magistrates, and of citizens, when an unlawful assembly threatens the public peace, has been well stated by an eminent jurist whose name has been repeatedly mentioned by counsel in the argument of this case, Judge King, of Philadelphia, now deceased. Such an assembly may be dispersed by a magistrate whenever he finds an order of things existing, which calls for interference in the interest of the public peace. He is not required to delay action until the unlawful assembly ripens into an actual riot. He has the right to arrest the offenders, or to authorize others to do so by a verbal command, without any other warrant whatsoever. He may invoke the aid of every citizen present, and they are bound to respond to his requisition. Indeed, if he fails to do his utmost for the suppression of such an assembly, he may, himself, be indicted and convicted of a criminal misdemeanor. I repeat: An unlawful assembly ripening into a riot should be crushed out at once by all lawful means; because, if suffered to continue, destruction, ruin, death, are almost certain features of

its pathway. It is like the snow-ball that we rolled to a declivity in our boyhood, small at first, but rolling on unrestrained, it soon acquired huge proportions, and bore down everything before it.

Again, gentlemen, when an actual riot is at hand, when its more dangerous form has been put on, and life and property are threatened, more decisive measures may be adopted. Citizens may, of their own authority, lawfully endeavor to suppress it; they may arm themselves, and whatever they honestly and reasonably do in their efforts to suppress it, will be supported and justified by the law. A riotous mob is the most dangerous thing on the face of the earth. Of all animals under the sun, men running mad are the worst in their fury.

Now, gentlemen, what was the real condition of affairs, at Scranton, on the morning of the first of August last? You must find an answer to this, from the testimony alone, from no other source. The showing on the part of the Commonwealth, was full, clear, and to the point. If you are satisfied of its correctness, beyond a reasonable doubt, then, I have already instructed you as to your duty in the premises. If, on the other hand, the testimony adduced for the defense leads you to view the occurrences of that morning in a different light; or, in other words, if that testimony raises in your minds a reasonable doubt of the guilt of the accused, that is to say, a doubt springing from a fair and full consideration of the testimony on both sides, then all the defendants named in the indictment are entitled to an acquittal. I refer, in brief, to the testimony of the defense. All the wiinesses on that side give us, substantially, the same history. On the morning of the first of August last, hundreds of men who were on a strike, as it is called, assembled at the Silk Works in the city of Scranton; they passed a resolution to go in force and stop all work at the machine shops near at hand; they rushed to one of these shops and drove away all who were employed there, inflicting serious personal violence upon some and threatening and terrifying others; they went to another shop and enacted like outrages there; their number, now greatly increased by women and boys, was such that universal terror and alarm seemed abroad in that city; they constituted a howling, yelling, apparently irresistable, and wicked mob; having accomplished the purpose of their resolution passed at the Silk Works, they approached the main avenue of the city; above the common roar always incident to such a mob, were heard the words, "Let us go for Bill Scranton—We will have his blood—Let us go for Lackawanna avenue—To the Company's stores—We'll gut 'em." At this juncture, the Mayor, a bold, brave man, appeared. He did nothing more than his duty, but he well did all of that. Few men, gentlemen, would have had the nerve to do what he did. Unaided, unarmed, alone, he met that wild, maddened, surging mass; he commanded, besought them to disperse; they attacked him, beat him, bruised him, imperilled his life; fortunately, though felled to the ground once or twice, he was able to rise

each time, otherwise the life would have been trampled out of him; supported by two of his aids, who had hastened to his rescue, and by a friend in the person of a priest, a noble and fearless man, the Mayor reached Lackawanna avenue, where, bleeding and wounded though he was, he was again set upon by one of the rioters, a stalwart man, who dealt him a blow that broke his jaw; here he was met by thirty or forty special policemen, or *posse*, as they have been called, whom, with commendable prudence he had selected and sworn to aid him in the preservation of the public peace but a few days before, and whose presence, at that particular juncture, was the result of an order that he dispatched to them hardly an hour previously; the *posse* was assailed with clubs; missiles thrown at them filled the air; a pistol shot fired from the crowd struck one of them; the Mayor gave an order to fire; that order was obeyed; Lackawanna avenue was saved; the Company's stores were saved; that wild crowd melted away, dispersed at once; the public peace was restored.

Gentlemen, the credibility of the witnesses, the defendants' witnesses, I mean, who give the history of that day's occurrences, as thus briefly stated, is for you. If you are satisfied that it is the true history, then most certainly there ought not to be a conviction of any of the defendants named in this indictment; if it is the true history, the city of Scranton was fortunate in having for her chief officer on that day Robert H. McKune, one of the few Mayors of the cities of Pennsylvania who, in the almost general troubles of the time, manfully stood up for law and order; if it is the true history, the city of Scranton was fortunate that the Mayor's *posse* was composed of just such men as W. W. Scranton, Lewis Bortree and their associates; if it is the true history, these defendants, I repeat, are entitled to a general finding of not guilty. The case is now with you.

C. E. Rice and Cornelius Smith, for Commonwealth.

W. G. Ward, Stanley Woodward and H. W. Palmer, for defense.

SUPREME COURT OF PENNSYLVANIA.

Johnson v. Johnson.

Where the evidence establishes the habitual intemperance of the husband, and acts of violence towards the wife, the Supreme Court will not interfere with a decree of divorce.

William Johnson's appeal from decree of the Court of Common Pleas, No. 2, of Allegheny county.

PER CURIAM. October 27th, 1877.

In a case of such gross conduct on the part of the husband, whose intemperance is a standing barrier to the happiness of his wife, as well

as his own, we ought not to be astute to find a technical reason for reversing the decree. The court below evidently thought the evidence which established more than one battery on the wife was reliable, and that the husband's denial was not. The testimony is contradictory, and the defendant's habits tend to confirm the probability of his wife's statement, for a drunken man is not a very accurate witness. Upon the whole, we are led to conclude that there is no apparent error in the decree. If it be severe, it is but another instance of the terrible effect of a habit which destroys soul and body.

Decree affirmed, with costs to be paid by appellant, and appeal dismissed.—*Legal Intelligencer.*

COMMON PLEAS OF LANCASTER COUNTY.

Cole, now for the use of Watson, v. Cole.

A warrant of attorney by a minor to confess a judgment is void, no matter under what circumstances it was given, and the judgment should be vacated, on motion, on the infancy being shown, especially when due diligence has been shown.

Rule to show cause why the judgment should not be opened, and defendant let into a defense, and execution set aside.

Opinion by PATTERSON, J. November 17th, 1877.

This is an application, submitted without argument, to open a judgment and set aside an execution, entered upon bond, or note, and warrant, dated the 17th day of September, 1875, for $200. A fi. fa. issued February 28, 1877, returnable to third Monday of April, 1877. The defendant's attorney, on affidavit filed, obtained a rule to show cause, &c., on April 17th, 1877. Depositions were taken, in which the defendant, and party asking relief, says he never received any consideration for this judgment, and that he was in his minority when he signed the same; that he did so at the request of the plaintiff, who is a brother, and who said he would protect him from anybody he owed, &c.; that he, the defendant, could not read or write; that other witnesses testified to a book (which was produced) as containing the record of the children's ages, and kept in the family, and by which it appears the defendant, Washington Cole, was born August 1st, 1856. The adverse party also took testimony, which somewhat contradicts that of the defendant as to the facts above recited, but fails to show entire consideration for the obligation.

From all that has been made to appear, and it being manifest that the party, when apprised of the execution, showed diligence in coming into court and asking relief, we think the judgment should be opened and the execution set aside, the lien to remain meantime: Knox v. Flack, 10 Harris, 337. Rule absolute.

The Luzerne Legal Register.

VOL. 7. FRIDAY, MARCH 1, 1878. No. 9.

QUARTER SESSIONS OF LUZERNE COUNTY.

Commonwealth v. Woodward and Dorin.

1. The defendants, editors and proprietors of the *Sunday Morning News*, published a libel of George B. Kulp by calling him "a thief." At the time of this publication, Mr. Kulp was a private citizen, but for some years prior thereto had been counsel for the commissioners of Luzerne county. Upon the trial of this case, the defendants plead not guilty and justified: *Held*, first, that the publication in question was a libel upon its face; and second, that any malicious publication injurious to the reputation of one who is living is a libel.
2. The constitution of 1874 worked a radical change in the law of libel in Pennsylvania. Prior to the adoption thereof, the maxim, namely, "the greater the truth, the greater the libel," was fully recognized; now, however, where the person libeled is a public officer, or where the matter charged and published is proper for investigation and publication, the defendants cannot be convicted of libel if it be established to the satisfaction of the jury that the matter charged and published is true, and that such publication was made without malice and without negligence.
3. Before the press may publish a libel of another, the law requires that sufficient facts be ascertained of the truth of the matter published. When an editor publishes a libel of another before making proper inquiry, and obtaining sufficient proof of the matter charged, which, when laid before a jury, fails to convict beyond a reasonable doubt, there is negligence within the meaning of the constitution, and the defendant may be convicted of libel.
4. When a defendant is upon trial for libel, and justifies, the door of evidence must be opened wide, to allow him every possible opportunity consistent with rules of evidence, to establish his justification. If he fails in proving the truth of his libel, or fails to show that such publication was not maliciously or negligently made, then the majesty of the law must be asserted; not alone, however, by the court, but by the jury, who are made the judges of the law and the facts by the constitution.
5. Where the person libeled is a public officer, or the matter published is proper for public examination or investigation, the burden is cast upon the defendant to prove the truth of the matter contained in the libel.
6. Courts in Pennsylvania are in duty bound, as the law of libel now is, to give all editors and proprietors of newspapers the full benefit of the greatest possible latitude when criticising the official acts of public officers or the acts of private citizens who may, for corrupt purposes, and in an unlawful manner, meddle with the administration of justice, or the administration of the public affairs of the land.

Charge of the court by HANDLEY, J.

Gentlemen of the Jury:

This is a case growing out of the last political campaign, and it involves more or less of the feeling that usually springs from events of that kind. We are not here for the purpose of convicting innocent men. Criminal courts are open, in this country, for the purpose of giving to men charged with the commission of crimes a full and fair opportunity to free themselves of such charges. We do not sit here to convict men because of prejudice, growing out of political feeling, or of nationality. If, therefore, you will approach this case and dispose of it upon the law and the evidence, leaving out all personal and political feeling, you will have fulfilled the full measure of your oaths of office. If, on the other hand, you should dispose of this case because

of prejudice, or because of any political feeling, for or against these parties, then you will simply have made a mockery of justice; and in that event, men will not be apt, when a libel is published upon their good names, or a wrong is done to their property, or their rights, to enter a temple of justice and ask for justice. With justice thus administered, men will resort to the old trial by battle, and thus will take the vengeance of the law into their own hands. To avoid, therefore, proceedings of this nature among our people, it is the duty of courts of justice, especially when sitting upon the trial of a question such as this, to dispose of it simply upon the law and the evidence.

With these few preliminary remarks, I will now call your attention to the law and the evidence in this case. The defendants, F. P. Woodward and M. F. Dorin, are charged in the indictment presented by the prosecution in this case with having published, on the 4th day of November, 1877, a false, malicious and defamatory libel of George B. Kulp, a citizen of this county. I need not detain you to cite authorities on the definition of the word "libel," although I might, at this particular place, cite the definition given by some of the most able law-writers, and some of the most able judges of this and other countries. The law-making power of our State, when the criminal laws of this State were consolidated and revised in 1860, provided for the punishment of this offence, and the statute thus given to us at that time defines libel as follows:

"If any person shall write, print, publish, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule, such person shall be guilty of a misdemeanor."

Hence, we say to you, all malicious publications, injurious to the reputation of a person, is a libel; and the most essential element of this offence is malice; and this is the doing of an act to another without a just cause, unlawfully, wrongfully and recklessly. He who publishes a libel must be presumed, in the eyes of the law, to have intended that which the publication is calculated to bring about. If it was not so intended, it is for the defendants, when placed upon trial, to show that it was not so intended.

The article complained of, gentlemen, is headed "Last Words." This paper will be sent out with you; it is your duty, not alone to select any one particular sentence, or any one particular word in this article, but to take up and read the whole article, before you dispose of this case. A mere selection of one sentence, or of one word in the article, is not sufficient; it is your duty to take up the whole article, read it carefully, and then apply the evidence to the offence charged in the indictment, and say whether the Commonwealth has made out her case. Now, as I said before, you will bear it in mind that this article was published immediately before an important election in this county; and while it may be all improper to bring into a

court of justice anything that may have taken place in favor of one, or against another candidate, during that campaign, yet, this is a case growing out of that very question; and, hence, political feeling is embodied in the case to an extent that is beyond our power to separate it from that event. We cannot say that this libel was published at any other time, or for any other purpose than for matters connected with that campaign. The article complained of and set out in the indictment is a libel upon its face; and unless you find from the evidence that it was a privileged publication, made without malice or negligence, then the defendants may be convicted, in manner and form as they stand indicted. What publications, under the constitution of 1874, are privileged? Immediately upon the adoption of the constituion of 1874, the whole subject of the law of libel was radically changed when the person libeled is a public officer; and it is now provided that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury." The clause of the constitution to which I have just called attention, has worked a radical change, as we said before, in the law of libel in Pennsylvania.

As we now understand and construe it, where it is established upon the trial of a cause for libel, to the satisfaction of the jury, that the publication was not maliciously or negligently made, the defendant must be acquitted. In other words, if the libel complained of is a matter proper for public investigation or information, and it is established to the satisfaction of the jury that it was published without malice and without negligence, a criminal prosecution cannot be maintained in Pennsylvania, as the law now stands. Now, have the defendants satisfied you, within the meaning of the law, that the matter of which the prosecutor complains was proper for public investigation or information, and was not published maliciously or negligently. If the matter complained of was true, then the matter charged in this indictment was proper for public information. If, on the other hand, it was not true, it is *prima facie* presumed to have been published maliciously. The burden, then, is upon these defendants to remove that presumption, by proper evidence, that this libel was not published maliciously or negligently. Have they removed this presumption? Now, it is for you to take up the evidence, examine it carefully, and ascertain whether the presumption of malice has been removed; and to ascertain this fact you will take up the evidence of Mr. Woodward, one of the defendants. He admits that he published the article in question; he admits that he is a part owner and editor of the paper in question; and he states to you that the information he had was taken from another paper, which had published evidence taken in an investigation growing out of frauds connected with the administration

of the county affairs in this court house. Has he made a full and fair explanation to you of the reason why the defendants published this libel? If he has, then you are in duty bound to acquit. If he has not, then it is your duty, on the other hand, to convict. We want every editor in this county to know, as the law of libel is now laid down in our constitution, whenever they discover any man, it does not matter who he may be, whether it is the president of the United States or an obscure constable of one of our back townships, that such person is meddling with the public affairs of any of the counties, the boroughs, the townships, or other municipal corporations of this Commonwealth, for the purpose of committing fraud upon the honest administrations of the law, or the administration of justice, his foul deeds may be exposed without fear of having to answer the charge of libel therefor. So long as I sit upon this bench, I will open wide the door of evidence to let in all testimony to show what connection such person had with transactions of that kind. And we do this for more than one purpose. We do this first to carry out the reformation intended by the adoption of the new constitution; and we do it, second, to sustain editors in this country in keeping in the background dishonest, improper and corrupt men from meddling with the public affairs of this land. To-day, if it were not for the manly conduct of the editors of our newspapers; if it were not for the freedom of the press, we would have no republican form of government in this land. It is only by their watchfulness, their carefulness, and their great ability, that the people are educated whom to place in public office, and in whom to repose confidence. Now, it may be said, and perhaps it has been said truly upon the argument of this case, that all papers and all editors are not high-toned, honorable men; but that is not a question for you; it is not for you to ascertain the morals or the social standing of the men who own and control newspapers. This is a separate and distinct branch of business, and like all other business in this land the bad often gain access to and succes in it as well as the good. No man would say that the art of writing was an improper thing, simply because some vagabond might take up a pen some day and attach your name to an important document, and thus commit forgery. It cannot be said truthfully, nor can it be alleged, that because one man may commit forgery, that all men should be debarred from the privilege of learning how to write. Hence, I say to you, that you must extend to the editors and the publishers of newspapers in this country a freedom that is not awarded to any other class of men in any other country in civilization. Did these defendants, then, intend to charge larceny, or only illegal practices upon this prosecutor? If the intention was to charge larceny, and they justify the charge, the justification must be so strong that if the prosecutor was upon trial for larceny you would have to say he was guilty, in manner and form as he stands indicted. If the justification falls short of that one iota, then you are to pass on to another point, and ascertain from the evidence whether his connection with this trans-

action was illegal or immoral. If you find he was engaged in assisting the corrupt and bad men, who once got possession of this court house, in defrauding the people of this county, then your verdict ought to be for the defendants in this case; because we want every man to know that their conduct in public transactions, as well as private, when meddling with public officers, must be so honest and so pure that the editorials of men who may desire to stir up strife by the publication of libels will not be sufficient to disturb them or their relations in society. So far as the publication of editorials by editors and proprietors of newspapers against public men, or men meddling with public matters, are concerned, if such men are pure in heart and in deed, it makes no matter if there was a whirlwind of editorials flying around, accusing them of being thieves, vagabonds and criminals, they can defy all such accusations if their hearts are pure and their conduct honest at all times and under all circumstances.

Now, in this case, we have to take these words as we find them in this paper. The prosecutor is here called a "thief." Did these men mean that this man was a thief in the sense that we use that word in criminal courts, or as that word is used in the criminal law of the land? If they did, and they have failed to show to you that he is a thief, then it is your duty to convict, and to return a verdict of guilty against these defendants in manner and form as they stand indicted. If they did not intend to say that he was a thief in the manner thus detailed to you, then was the subject matter they published proper for public investigation and information? Now, there is not a man in the county of Luzerne that is acquainted with the character of the prosecutor, George B. Kulp, but knows that *he* is not a thief, in the sense that word is used in the criminal code of our State, or in our criminal courts. Was it used, therefore, on the eve of a political campaign? or used in connection with the evidence delivered before an investigating committee in the court house? It is for you to say whether it was used in that sense, or whether it was used in the sense of crime, in the manner I have recently called to your attention. If you find it was so used, then, as a matter of justice to this prosecutor, you are in duty bound, unless the evidence shows that he is a thief, to render a verdict of guilty against these defendants in manner and form as they stand indicted. If, on the other hand, you find from the evidence that these defendants, while prosecuting their profession, published this libel without malice or negligence, believing it was a matter proper for public investigation or information, then you would be committing a great wrong, not alone upon these defendants, but upon others engaged in the publication of newspapers, to render a verdict of guilty in manner and form as these defendants stand indicted. If you say these defendants are not guilty, then you have the power to say whether the county, the prosecntor, or these defendants shall pay the costs of prosecution. If you say they are guilty, then you have nothing to say about the costs. If you find they are not guilty, you may

direct one or both of the defendants to pay the costs of prosecution, or you may direct the prosecutor to pay the costs of prosecution; and you have it within your power to apportion the costs between the prosecutor and these defendants in such proportion as you deem proper.

Commonwealth v. Woodward and Dorin.

1. William Penn Kirkendall, of Luzerne county, was libeled by the defendants, and charged with having committed "perjury, rank and foul." At the time of the publication of the libel, Mr. Kirkendall was holding the office and performing the duties of sheriff. When the case was called for trial, the defendants plead not guilty and justified: *Held*, first, that the publication in question was a libel upon its face; and second, that unless the defendants established by proof to the satisfaction of the jury the truth of the charge, beyond a reasonable doubt, they should be convicted.
2. The evidence in this case developed the fact that Daniel Silkman, an independent candidate, received four thousand dollars to withdraw in favor of the prosecutor; but there was no evidence connecting the prosecutor, Mr. Kirkendall, with this transaction, and no evidence that he was cognizant of the payment of this bribe, until after he took the oath of office: *Held*, first, that if Sheriff Kirkendall was a party to that transaction, the defendants were justified in the publication of this libel, and must be acquitted; second, that unless the defendants establish by proof the connection of Sheriff Kirkendall with this transaction, their justification falls, and they ought to be convicted.
3. The constitution is a shield for all men while conducting the publication of a newspaper, but it is not a shield for rash men who libel men holding public office, unless they can establish the truth of the charges set forth in such libel.

Charge of the court by HANDLEY, J.

Gentlemen of the Jury:

This is a twin case to the one tried and disposed of yesterday by a jury of this court. Without any fear that anything said by counsel upon the argument, or by the court in the charge to the jury in that case, or the result arrived at by the jury, may influence you in your verdict in this case yet we deem it proper, as well as our duty, to caution you that while disposing of this case it is your duty to arrive at a verdict upon the law and the evidence, without any reference whatever to the disposition made of that case. The charge here is libel; the indictment charges that these defendants, Woodward and Dorin, editors and proprietors of the *Sunday Morning News*, a newspaper published in this city, did, on the 11th day of November, 1877, publish a false, malicious and defamatory libel of William Penn Kirkendall, a citizen of this county, and at present holding the commission of high sheriff of Luzerne county. The statute, under which this indictment is drawn, defines a libel to be as follows:

"If any person shall write, print, publish, or exhibit any malicious or defamatory libel, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt or ridicule, such person shall be guilty of a misdemeanor."

Hence, we say to you, all malicious publications, injurious to the reputation of a person, is a libel, unless such publication is excused by the laws of the land. The most essential element in a charge of this nature is malice; and this is the doing of an act to another without a

just cause, wrongfully, unlawfully, and recklessly. Hence, he who publishes a libel, the law presumes he intended what he said in such publication. If it was not so intended; if it was not his intention to publish a libel, then it is his duty, when brought into a court of justice, to explain to the court and jury why he published it, and eradicate from the publication, if he can, by proper evidence, all malicious intent. Now, the article in this case is quite short. The paper will be sent out with you, and it is your duty to take it up, read it carefully, and ascertain whether it contains the words laid in the indictment. If you so find, after you have examined the indictment, then we say to you that the article, as copied in the indictment, is a libel upon its face, and unless you can find, from the evidence in this case, that it was a privileged publication, made without malice on the part of these defendants, and not negligently published, then you may return a verdict of guilty against these defendants, in manner and form as they stand indicted. The constitution, article first, section 7, prescribes who may not be punished for libelous utterances; it also provides to what extent the public officers of Pennsylvania may be exposed in their official conduct. The clause of the constitution to which I have just called your attention, worked a radical change in the whole system of the law of libel. Before the adoption of this constitution, the truth of a libel could not be admitted in evidence; *now*, where the party libeled is a public officer, or where the matter charged is proper for public investigation or information, the constitution provides that the party charged with libel may put these facts in evidence in justification of his conduct. Now, have these defendants, upon the trial of this case, justified their conduct in publishing this libel? If they have, then your duty is very simple indeed, and that is to acquit these defendants. If they have not, and you find from the evidence that this libel was published maliciously, and not for the purpose of exposing fraud or perjury, and not for public information or investigation, then it is equally your duty to return a verdict of guilty against these defendants, in manner and form as they stand indicted.

The burden is on the defendants to prove that the matter complained of was published within the meaning of the law. It cannot be denied, in this case, but that William Penn Kirkendall is a public officer—is the sheriff of Luzerne county. Now, the evidence is, that after receiving his nomination for the office of sheriff, some parties made an arrangement by which an independent candidate was bought off. Is there any evidence in this case that William Penn Kirkendall was a party to that transaction, or had anything to do with it; if he was a party to such transaction, and that fact is established to you, beyond a reasonable doubt, then these defendants are justified in this publication, and must be acquitted. But is there any evidence in this case bringing home actual knowledge to Mr. Kirkendall on this point? The only evidence we have, outside of the evidence of the Commonwealth, is this: George W. Kirkendall, his brother, who was

called as a witness, testifies that he made this arrangement without the knowledge or consent of William Penn Kirkendall. The party libeled, the prosecutor in this case, goes upon the stand, and testifies that he had no knowledge whatever of this transaction until after he was sworn into office. Now, it is for you to say, from all the evidence in this case, whether, if William Penn Kirkendall was upon trial for perjury in this court, at this time, you would convict him of the crime of perjury, under the evidence. If you would not convict, then these defendants have not justified within the meaning of the law, and their justification falls to the ground. The constitution is a shield for all men while conducting the publication of newspapers; but it is not a shield for men who rush headlong into public print and libel their neighbors and men holding public office. If a libel is published against a public officer, it is the duty of the publisher to ascertain the truth of the charge before such publication takes place—to make thorough search into the fact before such charge is scattered broadcast to the world. Now, have the defendants used that caution and care that the law expects they ought to use, before they libeled William Penn Kirkendall? If you find from the evidence they did, then they ought to be acquitted. If you find from the evidence they failed to make proper inquiry to connect the prosecutor with this matter, failed to ascertain whether Sheriff Kirkendall knew of this matter and was a party to it, before he took the oath of office, then it is your duty to return a verdict of guilty against these defendants, in manner and form as they stand indicted. The defendants have presented a legal proposition. I will now read it to you and instruct you thereon, as requested.

"That, although the jury believes that the charge made against the prosecutor is not true, yet, if they believe that the defendants had reasonable ground to believe that the charge was true, then the charge was not maliciously made, and the defendants cannot be convicted."

Now, as I said to you in my general charge, if you find from the evidence, these defendants made careful examination into all the facts connected with this transaction, and published the article in question only after making such examination, then this proposition is correct and may be affirmed. But if, on the other hand, you find from the evidence no such examination was made, and no care was taken to ascertain whether William Penn Kirkendall had any connection with this transaction, or paid the four thousand dollars in question for the purpose named in the testimony, then, of course, this proposition ought not to be affirmed, and the law as laid down therein does not apply in this case. If, upon a careful examination of the whole evidence—and the constitution provides that you shall pass upon the law and the evidence—you find these parties guilty, in manner and form as they stand indicted, you will simply say in your verdict, we find the defendants guilty in manner and form as they stand indicted. If, on the other hand, you find they are not guilty, then you will so say in your verdict, and in that event you may direct the county, the prosecutor, or

these defendants to pay the costs of prosecution; or you may apportion the costs between the prosecutor and these defendants, in such proportion as you deem proper.

Immediately after the rendition of a verdict of guilty in each of the foregoing cases, counsel for the defendants presented reasons for a new trial and in arrest of judgment, and prayed the court for a rule to show cause. The reasons for a new trial in the case wherein Mr. Kulp is prosecutor are as follows:

1. The verdict is against the law and the evidence.

2. The court erred in forcing the defendants to trial in the absence of material witnesses who had been duly subpœnaed, and an attachment issued for said witnesses.

3. That S. B. Mott, one of the jurors who was sworn in the case, was not correct; that is to say, the name was written "J. B." Mott instead of S. B. Mott; all of which appears of record in the case.

In the Kirkendall case the following reasons were presented:

1. The verdict was against the law and the evidence.

2. The court erred in charging the jury that the defendants must establish their defense beyond a reasonable doubt.

3. The court erred in charging the jury, in substance, as follows: "What is the evidence connecting William Penn Kirkendall with the transaction between Geo. W. Kirkendall and Byron Winton? There is none, save only the evidence of William Penn Kirkendall and Geo. W. Kirkendall, who swear that William Penn Kirkendall knew nothing about it."

4. The court erred in not affirming defendants' point of law without qualification.

After argument by counsel, Judge Handley delivered the following oral opinion:

"We have made a very careful examination of the several reasons presented by counsel for a new trial and in arrest of judgment in each of these cases.

"In regard to the first reason in each case, it is sufficient to say in answer thereto that the constitution provides that the jury shall be the judges of the law and the facts in cases of this nature. The defendants cannot justly complain of our charge to the jury, nor ought they complain of the construction we put upon the law of libel while disposing of their cases. We opened wide the door of evidence to allow these defendants to prove the truth of their publication. The proofs they presented did not establish to the satisfaction of the jury the truth thereof, nor that the publications were made without malice and without negligence; hence, the verdict in each case was guilty. We must, therefore, overrule the first reason for a new trial in each case.

"The second reason in the case wherein Mr. Kulp is prosecutor must also be overruled. It is true the witnesses in question were subpœnaed, and it is also true that an attachment was awarded, but only at the last hour, and then it was expressly stated that the awarding thereof should not delay the trial of their cases. No evidence was shown the court of the materiality of the witnesses absent, nor was the attachment returned during the trial of the cases.

"The second reason for a new trial in the case wherein Mr. Kirkendall is prosecutor must also be overruled. No other rule of law than the one we have here laid down ought to prevail in cases of libel. To establish the truth of the libel, it must be proved beyond a reasonable doubt; otherwise the truth, within the meaning of the constitution, is not established.

"The third reason in the Kulp case must also be overruled. No objection was made to the name of Mr. Mott until after plea entered, the jury sworn, and verdict rendered. The fifty-sixth section of our criminal procedure cures the question raised by this point.

"The third reason in the Kirkendall case will not be discussed. The language there is not the language of the charge of the court, and is, therefore, overruled.

"The defendants' fourth point in the Kirkendall case must also be overruled. The point in question involved a question of fact, and it went to the jury under what we deemed then, and now, proper instructions.

"The motions for a new trial in each case are overruled, and the defendants are called for sentence."

Before pronouncing the sentence, his honor prefaced it with a few remarks, probably intending them as a sort of admonition to others in like cases to offend, as they could afford but little comfort to the prisoners. He said:

"When your cases were called for trial, I gave you the full benefit of the fundamental law of the land, which provides that every citizen may freely write and print on any subject, being responsible for the abuse of that liberty. I opened wide the door of evidence to allow you free liberty to defend yourselves as you and your counsel deemed most wise. Your cases were submitted to juries upon two separate charges, which almost ruled the prosecutors out of court. The result is known, and you are here for sentence. I am now about to pronounce sentence, but before I do I may add, that when an editor is brought into a criminal court to answer the charge of libel, there are two courses open for him to adopt by way of defense. One is to retract to the fullest extent, plead guilty, and throw himself on the mercy of the court. The second is to justify. If an editor adopts the first course, unless the person libeled is a private citizen, the court is in duty bound to be merciful, and pronounce sentence only for costs, a nominal fine, and admonish the accused to go hence and sin no more. If he adopts

the second course, and fails, then the wages of his sin is fully earned, and the vengeance of the law is upon him. In each of your cases the jury found you guilty, and recommended you to the mercy of the court. You shall have the benefit of that, notwithstanding courts are not bound by such recommendation when a great injury has been inflicted. Now, in your cases, no matter how we may mould the sentence, it will alwavs appear severe, simply because two must answer for each crime, and there are two cases for the same grade to answer for. The sentence of the court is, wherein George B. Kulp is prosecutor, that you, F. P. Woodward, pay the costs of prosecution in this case, pay the Commonwealth of Pennsylvania a fine of seven hundred dollars, and undergo an imprisonment in the Luzerne county jail for the term and period of ten callendar months, and that you stand committed till the sentence be complied with. And that in the case wherein Wm. Penn Kirkendall is prosecutor, that you, F. P. Woodward, pay the costs of prosecution in this case, pay the Commonwealth of Pennsylvania a fine of seven hundred dollars, and undergo an imprisonment in the Luzerne county jail for the term and period of ten callendar months, and that you stand committed until this sentence shall be complied with. The term of your imprisonment to commence on the expiration of the former sentence this day imposed upon you."

A similar sentence was then imposed upon M. F. Dorin, the other defendant.

WHAT THE EDITORS OF THE "SUNDAY MORNING NEWS" HAVE TO SAY SINCE THEIR IMPRISONMENT.

"ONCE FOR ALL.—Everybody having access to the ear of the public has enjoyed his privilege of sitting in judgment upon the twin cases in which the editors of the *Sunday News* are so peculiarly and painfully concerned. The utterances of our brethren of the press have been in the main of a kindly tone, and yet we have not allowed our mental equilibrium to be disturbed by either flattery or criticism, but have rather inclined to calmly sit in our solitude and think the whole matter over, and we muse somewhat on this wise: Are we monsters? Are we malicious disturbers of the public peace? Are we conscienceless defamers of private character? Have we, or have we not, the warm, generous feelings that men ought to have? And the result of our reflections is, dear readers, that many, even of our friends, have misunderstood us from the beginning. That an editor can, like the famous Butler, have a hat full of bricks, and seem to the world at large to take delight in hurling them promiscuously among public men, and yet harbor no malice toward the individuals, or be found 'cheek by jowl' in some corner with them, seems incomprehensible to many intelligent people. The facts, however, exist, and 'facts are stubborn things.'

"Now, as we said, while everybody has had his say, and upon the

real gist of the matter, we have maintained a dogged silence. We propose to be heard now, and we think we know all about it, and that we may have no more unreasonable censorious criticism, hear us once for our cause, and that once is for all.

"And firstly—We admit most frankly, and have been willing to admit, even before the cases were adjudicated. that the articles which appeared in the *Sunday News*—and for the publication of which we are now imprisoned—were *grossly libelous* in the sense of being defamatory to private character, and also that their publication was ill advised and uncalled for. We had no personal knowledge of, and but slight acquaintance with either of the prosecutors, and since our imprisonment have been most kindly and sympathetically treated by both them and their friends. We have, therefore, deliberately determined to throw off the mask of reserve that conscious integrity has forced upon us hitherto, and state to the public that we sincerely regret that either of the articles referred to ever appeared in the *Sunday News* under our management. And this acknowledgment is not the product of any recent revolution in our private views concerning the matter or the effect of the punishment which the court has administered.

"Secondly—We here avow that no malice ever prompted us to publish either of those articles, or any other that has appeared in our paper. We designed the publication of a newspaper that should have a place in the confidence of the community, and never intended that politics should have anything to do with its aims and purposes—much less force its nominal managers into positions of discredit and reproach. We are poor men (we ask nobody's pity for that), and young, (one of us having passed his twenty-fifth birthday in a prison cell like a common felon, as the result of our recent indiscretion;) each is the head of a small family, as dear to us as yours, reader, and when all these thoughts and circumstances crowd into our hours of idleness we shrink back for a moment, overcome by humanity's native weakness; again we summon courage and rejoice that One higher than ourselves or our circumstances has said, 'as thy day is so shall thy strength be.'

"'Once for all,' we said in the outset of this article. We designed to say in the body of it that it was never in our heart to defame any man, and if we have seemed to be otherwise, we here and now thus publicly apologize to any whom we may have injured, especially to Mr. George B. Kulp and W. P. Kirkendall, and assure the community that we have no wish for the notoriety or fame of libelers and blackmailers, and the public is mistaken if it judged that we were ever influenced by such a motive. If this be craven or cowardly, we will take that yoke upon us, only assuring our readers that we are not repining, but stout-hearted, resigned, if need be, to suffer on our *twenty-three weary months*, and then issue forth to roll up our sleeves and enter the battle for bread and reputation. We are done.

"WOODWARD & DORIN.

"Prison Cell No. 33, February 4, 1878."

The Luzerne Legal Register.

VOL. 7. FRIDAY, MARCH 8, 1878. NO. 10.

COMMON PLEAS OF LUZERNE COUNTY.

In Re Exceptions to Report of Auditor distributing the proceeds of the Sheriff's Sale of the Real Estate of Jacob Adam.

1. A. endorsed B.'s note, taking a judgment against the latter of equal amount to secure himself, and entering it of record; when the note matured, A. was absent, and B. not being able to pay it, induced C. to endorse one in renewal of it, agreeing that A. might transfer his judgment to C. as security for the latter's endorsement in the former's stead; two days prior to C.'s endorsement, D. and E. each recovered a judgment against B; subsequently, A. assigned his judgment to C., who, afterwards, was obliged to pay the note he had endorsed in place of A.; the real estate of B. was, later still, sold by the sheriff; whereupon, D. and E. claimed the fund as against C.: *Held*, that their claim was untenable, and that the fund was applicable to A.'s judgment assigned to C.
2. Privity of contract is not necessary to support subrogation; it may, and often does, exist on principles merely of equity and benevolence.

The report of the auditor (Henry W. Palmer, Esq.,) quoted in part below, together with the opionion of the court following, furnish a full statement of the facts and questions involved as between the different claimants to the fund in dispute.

"A portion of the sum appropriated to judgment No. 218, Nov. T., 1874, Banker, assigned to Bauer, v. Adam, was claimed by P. R. Webster, plaintiff in No. 240, Nov. T., 1874, which is the tenth lien on the fund for distribution.

"The auditor finds the facts relating to judgment No. 218, Nov. T., 1874, as follows: The judgment was originally given to secure Philip Banker as an endorser of a note drawn by Jacob Adam, for the sum of $700, and discounted at the Wyoming National Bank. When this note was about to fall due, Adam requested Mr. Bauer to endorse one of like amount in Banker's stead, as Banker was then out of town, in order that a protest might be saved, and consequent injury to the maker's credit avoided. Bauer at first declined, but finally consented, on the representation by Adam that Banker held a judgment as security, and that, in case Bauer would assume Banker's place on the note, he should receive an assignment of the judgment. In pursuance of the agreement, the judgment was duly assigned; and the note, thus endorsed, was paid, after several renewals, by Bauer. The consideration of Bauer's endorsement was a transfer to him of the security held by Banker.

"P. R. Webster claims that the lien of the judgment thus assigned to Bauer must date from the time when Bauer became an endorser on the note, namely, December 9, 1874; and Webster's judgment having been entered December 7, 1874, he claims the balance of the fund.

"The auditor is not unmindful of the rule applicable to judgments given as security for future advancements or endorsements, viz: That their lien commences only when the advances are actually made, or liabilities actually incurred. But he holds the opinion, that the rule is not applicable in the case in hand. This judgment, No. 218, Nov. T., 1874, was given to secure the very note endorsed by Bauer, and upon the express condition that he should be protected by whatever indemnity it afforded. There can be no doubt that the lien of the judgment in Banker's hands dates from its entry, and what Banker had, Bauer contracted to have. The contract was lawful, duly consummated, and not injurious to creditors. If Bauer could not have received Banker's security, he would not have become liable; in which case, Banker would have remained liable, and would have been entitled to the fund. Subsequent creditors had record notice of the judgment, and are to be considered as affected with notice of what they might have ascertained by enquiring of the plaintiff or defendant. Any subsequent creditor who had *actual* or *constructive* notice of the agreement, cannot be allowed to strip the endorser of all the security upon which he assumed liability. When Webster's judgment was entered on the 7th of December, 1874, the Banker judgment was a valid, subsisting lien; and the auditor is not aware of any principle of law which points to the conclusion, that the agreement, formed two days later, duly ratified and confirmed by the subsequent assignment, could, in any way, operate to postpone the lien of the Banker judgment to that recovered by Webster."

Gustav Hahn, for the report.
S. J Strauss and McLean & Jackson, *contra.*

THE COURT.—This case may be stated thus: The real estate of Jacob Adam was sold by the sheriff, February 10th, 1877, for $4,010. Appropriation was made to the liens in their proper order, until all the fund was exhausted, except $471.35. As to this amount, a contest was inaugurated. Robert Bauer claimed, on the one hand, that this money was applicable to a judgment belonging to him. The facts upon which his claim was based appear in his testimony, from which we quote: "Mr. Adam came to me one day, and told me that a note upon which Mr. Banker was endorser was about to be protested, and that Mr. Banker was out of town. I said to him that I did not like to enter any deeper into liabilities for him; that I had done enough. He kept on soliciting; he said the note would be protesed, and thus his credit would be injured. He further said that

the note was protected by a judgment which had been given to Mr. Banker as security; and that, if I would take the place of Mr. Banker as an endorser, the judgment should be assigned to me. Upon that promise, I endorsed the note. When Mr. Banker returned, Mr. Adam and he came up, and Mr. Banker assigned me the judgment in pursuance of the arrangement."

The judgment referred to, had been entered of record sometime prior to the arrangement spoken of by the witness. It stood thus: Philip Banker v. Jacob Adam, Judgt. October 30th, 1874, $700.00. The note upon which Bauer became an endorser in place of Banker, and which, as the witness says, was made to renew the one secured by the judgment, was dated December 9th, 1874. Subsequently, it was renewed several times, but finally it was paid by Bauer. The actual assignment of the judgment by Banker to Bauer was not made until February 4th, 1875.

Messrs. Goldsmith Bros. and P. R. Webster claimed, on the other hand, that the money was applicable, *pro rata*, to judgments belonging to them, for the reason that both had been recoverd against the common debtor, Jacob Adam, December 7th, 1874, which was *two days* prior to the endorsement by Bauer of Adam's note, if not prior also to the alleged arrangement upon which that endorsement was made. These judgments stood upon the record thus: Goldsmith Bros. v. Jacob Adam, Judgt. December 7th, 1874, $407.77; P. R. Webster v. Jacob Adam, Judgt. December 7th, 1874, $323.28.

They further claimed that Bauer, according to his own showing, voluntarily discharged Banker's liability on an endorsement, without the latter's solicitation or knowledge; and, hence, there being no privity of contract between them, there can be no ground to warrant the subrogation of the former to the latter's rights under the judgment originally taken to secure that endorsement. Subrogation, they contended, was never accorded to mere volunteers, but only to those who, on some sort of compulsion, had discharged a demand against a common debtor.

The auditor, it seems, was not impressed by these views. On the contrary, he appropriated the money to the Banker judgment, assigned to Bauer; or, rather, *pro rata* to that and to another judgment of Bauer entered on the same day, and about which there was no contest. Exceptions were filed to this report, based, substantially, on the alleged errors of the auditor in not adopting the views urged in the interests of Messrs. Goldsmith Bros. and P. R. Webster, and appropriating accordingly.

The report is before us. We make haste to say that, in our judgment, it contains not only a clear statement of the facts involved, but a correct conclusion as to the law applicable to those facts. We will add, however, that privity of contract is not necessary to support subrogation; it may, and often does, exist on principles merely of equity

and benevolence: Cheesebrough v. Millard, 1 Johns. Ch. 409; Mosier's Appeal, 56 P. F. S. 76. How is the case here? Why, that Bauer, by becoming an endorser on Adam's note, under the circumstances as shown in the evidence, discharged Banker from liability on an endorsement that the latter had previously made, is true enough; but it is equally true that the note which Bauer thus endorsed was made specifically to renew the one Banker had previously endorsed; it is further equally true that, when Banker made his endorsement, he took a judgment from Adam to secure himself, which he subsequently entered of record: now, apart from the agreement which Adam made with Bauer in respect to that judgment, it cannot be denied that when Bauer was obliged to pay the note he had endorsed, he acquired an *equitable* right to Banker's judgment, and when the latter assigned it to him, he acquired a *legal* title to it, as a means of indemnity for himself: Bowers' Estate, 11 H. 294. Adam, the common debtor, could not object, certainly. How, then, can his subsequent judgment creditors object, who have no rights in the premises superior to those of their debtor? Ramsey's Appeal, 2 W. 232; Dunn v. Olney, 2 H. 223; Del. & Hud. Canal Co.'s Appeal, 2 Wr. 517.

The exceptions are overruled, and the report of the auditor confirmed.

Opinion by HARDING, P. J. February 20th, 1878.

The judges of the several courts would be pleased to receive from each attorney who prepares paper books a copy of the same.

In a recent case in Indiana, after the jury had retired to deliberate upon their verdict, the bailiff, without the consent of the defendant, or the leave of the court, furnished to them, at their request, a volume of Bishop's Criminal Law. This was held to be misconduct, both on the part of the officer and the jury, and such as to entitle the defendant to a new trial: Newkirk v. The State, 27 Indiana, 1.

On the trial of the Seven Bishops, during the argument of the Solicitor-General, who was counsel for the King, Mr. Justice Powell observed to the Lord Chief Justice, "My Lord, this is wide. Mr. Solicitor would impose upon us: let him make it out, if he can, that the King has such a power, and answer the objections made by the defendants' counsel." Lord Chief Justice: "Brother, impose upon us! He shall not impose upon me; I know not what he may upon you; for my part, I do not believe one word he says."

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VOL. 7. FRIDAY, MARCH 15, 1878. NO. 11.

COMMON PLEAS OF TIOGA COUNTY.

Navel v. Elliott.

Compulsory arbitration—Notice of meeting of arbitrators—Manner of service—Implied waiver by agreement of attorneys—Act of June 16, 1836—How far affected by Act of March 23, 1877—The latter act construed.

Rule to show cause why award should not be set aside.

Appeal from proceedings before justice of the peace. The docket contained the following entries:

October 3, 1877. Plaintiff enters rule to refer, etc.

October 23, 1877. Both parties appear, by attorney, and agree upon arbitrators to meet at office of J. W. Donaldson, Esq., November 22, 1877, at 10 A. M.

November 22, 1877. Award of $14.34, in favor of plaintiff. On defendant's default, entered of record same day.

THE COURT.—The reason urged in support of the motion in this case is, that no notice was given of the time or place of meeting of the arbitrators, as required by the Act of 1836.

The reply made is, that such service of notice was rendered unnecessary under the provisions of the Act of 1877, by reason of the fact that, upon the return of the rule to refer, the attorneys of both parties met at the prothonotary's office, and entered into an agreement in writing, naming the persons to serve as arbitrators, and the time and place when and where the trial should take place. The position taken is, that the Act of 1877 was intended to permit service upon the attorney in all cases, and that the agreement in writing, signed by the attorneys, is a virtual waiver of further service, and an acceptance of notice.

The question in this case turns, therefore, upon the construction of the Act of 1877. The Act of 1836 made service upon the defendant necessary, if he resided in the proper county. If not a resident in the county, service could be made upon the agent or attorney. If he had no agent or attorney, and personal service could not be made upon him, his family might reside in the next house, yet the party by whom the rule was entered was without remedy, and the proceedings under the rule were at an end. This was a great inconvenience, and one

often encountered in attempting to proceed under the compulsory arbitration law.

Now, the Act of March 23, 1877, is in these words: "That in all cases where arbitrators shall be chosen * * a certified copy of the record containing the names of the arbitrators, and the time and place of meeting, shall be served on the opposite party, his agent or attorney; but if said party have no agent or attorney, then it shall be lawful to serve said certified copy upon the opposite party in the same manner as a writ of summons in a personal action is now served." Section two provides, "That so much of the Act of 1836, relating to compulsory arbitrators, as is inconsistent herewith be and the same is hereby repealed."

This provides a remedy for the inconvenience felt under the Act of 1836, by authorizing a service in the case of a resident party who has no agent or attorney, and who cannot be served personally, by permitting the service at his dwelling in the same manner as a summons is served. The remedy is exactly adapted to meet the defect under the Act of 1836, and must have been the sole purpose of the Act of 1877.

It is argued, however, that the construction we have suggested is too narrow to give effect to the legislative purpose, which was to change the mode of service upon a party who has an agent or attorney by authoring the service on the agent or attorney, notwithstanding the party is a resident of the county, and within reach of personal service.

We cannot agree with this view of the subject. It is an established rule of construction that "every affirmative statute is a repeal of a previous affirmative statute when its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory to the former act in the very matter, and the repugnancy must be such that the two acts cannot be reconciled:" Wright v. Vickers et al., 31 P. F. Smith, 122. Another rule, equally well established, is, that acts relating to the same subject matter are to be construed together.

The Act of 1877 is an affirmative statute. It is "contradictory and contrary" to the Act of 1836 only in that provision which permits service of the certified copy in the manner in which a summons is served. All the other provisions are reconcilable with the Act of 1836. This construction harmonizes the provisions of both statutes, and makes a complete system.

Section first should, therefore, be read as follows: "That in all cases * * a certified copy * * shall be served on the opposite party, his agent or attorney (in accordance with existing laws); but if said party have no agent or attorney, then it shall be lawful to serve said certified copy * * in the same manner as a writ of summons in a personal action is now served."

This construction assigns to the Act of 1877 its true place, without disturbing, in any manner, the provisions of the Act of 1836, or the

decisions under them. As this is conclusive of the motion in this case, the award must be set aside.

Rule absolute.

Opinion by WILLIAMS, P. J. January 19, 1878.

COMMON PLEAS OF LANCASTER COUNTY.

Becker v. Watts et al.

1. A delaration may be amended after an award of arbitrators and appeal from it; also on second trial, after trial and reversal had.
2. A plaintiff cannot amend a declaration by the introduction of a new and entirely different cause of action, nor by the introduction of matter barred by the statute of limitations.
3. In trespass, however, a plaintiff may add a count, substantially different from the declaration, if it adhere to the original cause of action.

Rule to strike off additional count to narr.

Opinion by PATTERSON, J.

This suit was brought to February term, 1873, No. 60, and the original narr in the case was filed March 3d, 1877, and on May 5th, 1877, the plaintiff filed the additional count by leave of court. The rule to strike off, &c., was obtained by defendant on May 21st, 1877.

Should the motion to strike off prevail; or, in other words, is the amendment proposed to plaintiff's declaration allowable?

The motion to strike off is clearly recognized as a rule of practice, though demurrer may be invoked. The fact that the suit was at issue before the amendment was proposed will not preclude the amendment. A plaintiff may amend his narr after an award of arbitrators and an appeal from it: Dennison's Case, 4 W. 258. And also on second trial, after trial and reversal had: Lee's Case, 1 R. 149. It is true plaintiff cannot amend by the introduction of a new and entirely different cause of action, nor by introducing matter barred by the statute of limitations. But in an action of trespass a plaintiff may add a count, substantially different from the declaration, if he adhere to the original cause of action: See Knapp v. Hartung, 23 Smith, 290. It does not appear to the court that the additional count introduces a new cause of action. The additional count contains a mere specification of a trespass already substantially declared upon. The ruling in Knapp v. Hartung, we think, disposes of this motion, and that no error is committed in allowing the amendment.

Entertaining these views, we must discharge the rule to strike off the additional eount.

Rule discharged.—*Lancaster Bar.*

SUPREME COURT OF PENNSYLVANIA.

Indiana County v. Agricultural Society.

Section 7, Article IX. of the Constitution of 1874, does not affect laws prior to its adoption. The Act of the 29th of April, 1851, is not impaired by it.

Error to the Court of Common Pleas of Indiana county.

PER CURIAM. November 5th, 1877.

The right of the Agricultural Society to recover rests upon the fourth section of the Act of March 29th, 1851, P. L. 290. The plaintiff in error claims the act is made void by section 7, Article IX. of the Constitution of 1874. That section declares: "The General Assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual." This section deals only with legislative power. That power is thereby limited and restricted. It declares what it "shall not" do. It annulled nothing that the Legislature had done. It forbid such legislation thereafter. It struck down no law. Its prohibitions were wholly prospective. This conclusion is fully sustained by Lehigh Iron Co. v. Lower Macungle Township, 31 P. F. Smith, 482. It is there said the convention did not intend to repeal special tax laws, but to leave to legislative wisdom and conscience the time and manner of making them conform to the spirit of the Constitution. No legislative action has impaired the Act of 1851. It therefore remains in full force.

All the facts necessary to give the defendant in error the benefit of the act were found by the jury, and as we discover no error in the rulings of the court, judgment affirmed.

It seems that counsel had been assigned to advise Algernon Sidney, although they were not allowed to address the court. When Bamfield, one of these, rose as amicus curiæ, and suggested in arrest of judgment that there was a material defect in the indictment, the Lord Chief Justice blandly observed, "We have heard of it already; we thank you for your friendship, and are satisfied." He then proceeded to pass sentence of death upon the prisoner:" 9 Howell State Trials, 901.

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VOL. 7. FRIDAY, MARCH 22, 1878. NO. 12.

COMMON PLEAS OF LUZERNE COUNTY.

Allen et al. v. Dean et al.

1. The common law meaning, and the generally accepted meaning of the word, "par," is a state of equality, or equal value. Bills of exchange, coins, stocks, and the like, which bear upon their face a representation of equality with a given standard, are said to be *at par* when they are worth the equivalent of that standard; when worth more, they are said to be *above par;* when less, *below par.*
2. Where, however, corporations have authority for a given *maximum* amount of capital, accompanied with a right to do business whenever a fixed *minimum* amount thereof has been paid in, and certificates of shares, bearing upon their face the actual amount paid in on each, are issued, the *par value* of such shares is the equivalent of their face representation. Par value means dollar for dollar, no less, but *no more.*
3. Where an Act of Assembly provides for the taxation, at their par value, of "all the shares" of a bank having authority to do business whenever a fixed or *minimum* sum less than the whole amount of its capital has been paid in, and shares are issued accordingly, taxation of the shares upon the basis of the capital *paid in,* and not upon the basis of the *authorized* capital, is intended.
4. But where the specific words used in an Act of Assembly providing for the taxation of banks are, "capital paid in and secured to be paid in," shareholders are liable for taxes assessed upon the whole nominal value of the shares subscribed, without reference to the amount paid in. And the same is true, though the amount originally paid in has been diminished or impaired by subsequent losses.

In Equity. Application for special injunction.

Opinion by HARDING, P. J. March 18th, 1878.

The bill of the plaintiffs is based upon the following state of facts: The People's Savings Bank of Pittston was incorporated by an Act of the General Assembly of the Commonwealth of Pennsylvania, approved May 25th, 1871: P. L. 1159. Authority was given to the corporators, and to such other persons as might become associated with them as stockholders, to raise and form a capital of one hundred thousand dollars, to be divided into shares of one hundred dollars each, and paid in as should be required by the board of directors. Twenty *per centum* of the capital was to be actually paid in before the bank was authorized to commence business. Power was given, however, to the directors to increase the capital stock, as they might from time to time elect, to an amount not exceeding three hundred thousand dollars. Whether this power was exercised at the first organization of the bank, or subsequently, does not appear in the bill, nor is it material. It is enough that the sum of the capital stock was, sooner or later, fixed at the *maximum* amount, namely, three hundred thousand dollars. Certificates were issued to the stockholders accordingly. These certificates were signed by the president and cashier of the bank, and contained, in addition to the usual face emblazonry, words like these:

"People's Savings Bank, Pittston, Penn'a. Shares, $100.00 each. This is to certify, that John Jones is entitled to two shares in the capital stock of the People's Savings Bank, on which twenty-five dollars per share has been paid, transferable only on the books of the bank, in person or by attorney, on the surrender of this certificate."

Such was the business beginning of the People's Savings Bank of Pittston. That it was a well formed creature of the statute, in every respect, no one has ever pretended to deny. But to pass on: The directors of the bank, with a view to exempt the stockholders from all other taxation of their shares for the year 1877, and in supposed pursuance of positive law upon the subject, elected to collect, and did collect, from the shareholders a tax of one *per centum* upon the actual par value of all the shares of the bank, and paid the same to the treasurer of the commonwealth on the 20th day of January, 1877. The tax thus collected and paid amounted to the sum of seven hundred and fifty dollars, being the equivalent of one *per centum* upon the par value of the whole capital stock of the bank, so far as the same had been paid in.

After this had been done, the proper bank assessor of Luzerne county, for the year 1877, made an assessment of the shares of the bank, in conformity with the provisions of the several Acts of Assembly upon the subject, fixing the actual value of each share at twenty-five dollars, or, of the whole capital stock paid in, at twenty-five thousand dollars. This assessment he returned to the commissioners of the county on the 21st day of July of that year.

Upon the basis of the assesment thus returned, the latter officers, defendants in the bill, forthwith levied a tax of three mills for state purposes, and also a tax of seven mills for county purposes, upon the shares owned by the plaintiffs and other stockholders, which taxes amount in the aggregate to the sum of seven hundred and fifty dollars. The county commissioners further caused a duplicate to be made containing the names of all the shareholders in the bank, and the number of shares held by each, and also a statement of the several amounts of state and county taxes, respectively, which each shareholder was required to pay. This duplicate, together with the usual warrant for the collection of taxes, they placed in the hands of Patrick Winters, receiver of taxes for the borough of Pittston for the year 1877, and a defendant also in the bill. He now demands payment of these taxes from the plaintiffs and other stockholders of the bank, and threatens, if it is withheld, to enforce collection in the ordinary manner provided by law. A special injunction is prayed for to restrain the county commissioners and the receiver from collecting these taxes, on the ground that levying them in the first place, and collecting them afterwards, are alike without authority of law.

The defendants demur to the bill. This raises the question, did the election on the part of the bank to pay, and the payment to the

state treasurer on the 20th of January, 1877, of a tax of one *per centum* upon the amount actually paid in upon all the shares of the bank, defeat the right of the defendants to levy and collect a state and county tax upon the *assessed* value of these same shares, for the year 1877?

The section of the Act of Assembly under which the defendants claim the right to levy and collect these taxes is in these words: "All the shares of national banks, located within this state, and of banks and savings institutions, incorporated by this state, shall be taxable for state purposes at the rate of three mills *per annum* upon the assessed value thereof; and for county, school, municipal, and local purposes, at the same rate that now is, or may hereafter, be assessed and imposed upon other moneyed capital in the hands of individual citizens of this state."

The section under which the bank made the payment of January 20th, 1877, and which, as is claimed, gave the shareholders immunity against any further taxation of their shares for that year, is as follows: "In case any bank or savings institution aforesaid shall elect to collect annually, from the shareholders thereof, a tax of one *per centum* upon the par value of all the shares of said bank or savings institution, and pay the same into the state treasury on or before the 20th day of January in every year, the said shares, capital, and profits shall be exempt from all other taxation under the laws of this commonwealth."

The disposition of the main question, before stated, depends much upon the legislative intent in the use of the words, "par value," as applied to the capital stock of banks, or all the shares of banks, in the Acts of Assembly of April 12th, 1867 (P. L. p. 74), May 1st, 1868 (P. L. p. 112), December 22d, 1869 (P. L. of 1870, p. 1373), and May 31st, 1870 (P. L. p. 42)

Both the common law meaning and the generally accepted meaning of par is, a state of equality, or equal value. Bills of exchange, stocks, and the like, are at par when they sell for their nominal value—that is, the value expressed on their face; when they sell for more, they are said to be *above par;* when they sell for less, they are said to be *below par.* And so it is with coins. The silver dollar and the gold dollar of the United States each bear a face representation of equality, or equal value with one hundred cents. The former, for example, sells for ninety-nine cents, and is said to be below par; the latter sells for one hundred and one cents, and is said to be above par. To go back to the old state banks: Every one dollar note issued by them bore upon its face a representation that it was equal in value to one hundred cents, or one dollar; but, for causes generally understood, many of them came to be worth much less. Their actual value, however, was well known, or capable of ready ascertainment. Whenever, therefore, they were used in business transactions, they were paid out on the one hand and received on the other, not at their par value, but at their actual value. The same is true to-day, also, of certificates of

shares of bank stock, or other corporations. Whenever a certificate of a share is issued, which purports on its face to be the equivalent of one hundred dollars, the idea is conveyed, and is thus universally understood, that there has been paid in as part of the capital of the corporation an actual one hundred dollars, which such certificate represents: its par value, therefore, is one hundred dollars.

But the case is widely different where a bank or other corporation has authority to raise and form a capital of a fixed *maximum* amount, accompanied with a right to commence business whenever a fixed *minimum* amount of that capital has been paid in. Under such circumstances, the certificates of shares are issued bearing upon their face, perhaps, some indication of the *maximum* or permissive capital of the corporation, but always a statement of the actual amount paid in. They profess to be worth no more; they are received for no more; they are sold for no more; their par value is no more. Throughout the business world, par means equality, or equal value with a given standard; it means dollar for dollar, no less, but no more: State of Illinois v. Delafield, 8 Paige Ch. 526; Delafield v. The State, &c., 2 Hill, 159.

We come now to inquire whether there is any difference between the words, "capital stock of a bank," and "all the shares of a bank," as they are used in the statutes before referred to? Capital stock of a bank means the sum of money, divided into shares; which is raised by mutual subscription of the members of the corporation, and used for the purpose of banking: Angell & A. Corp. §§ 151, 556; State v. Morristown Fire Association, 3 Zabr. 195. Shares of a bank are the sums resulting from a division of the capital stock, by a given divisor, into equal amounts. Clearly, therefore, the terms, "capital stock of a bank," and "all the shares of a bank," cannot have different meanings; they are necessarily synonymous, and undoubtedly were so regarded by the Legislature.

In other connections, it is true enough that the meaning of capital or capital stock of banks, or of other corporations, is of much broader signification. It is said to be the fund upon which an incorporated company transacts its business, and which would be liable, in case of insolvency, to its creditors, and would pass to a receiver: International Life Assurance Society v. Commissioners of Taxes, 28 Barb. 318; Mutual Insurance Co. v. Supervisors, 4 N. Y. 442. Subscribers to the stock of a bank who had paid in but one-fourth of the authorized capital, would, in case of the insolvency of the institution, be liable to its creditors, not for the equivalent of their actual payments only, but for the whole nominal value of the shares subscribed. And so, too, in cases where the Legislature, in providing for the taxation of the capital stock of banks, has used the specific words, "capital paid in and secured to be paid in," shareholders could not successfully claim immunity from taxation beyond the amount actually paid on their

shares, but they would be liable for taxes assessed upon the whole nominal value of the shares subscribed. Under such circumstances, capital stock "secured to be paid in" means all that has been subscribed, no matter whether paid up in part or in whole: Bank of Utica v. The City of Utica, 4 Paige, 399; Farmers' Loan and Trust Co. v. The Mayor, &c., 7 Hill, 261. And the same would be true likewise, even though the capital actually paid in originally had been diminished or impaired by subsequent losses: State Bank of Wisconsin v. The City of Milwaukee, 18 Wis. 295.

Taxation, in one form or another, is of old time. The Hebrews, during all the ages of the theocracy, were taxed heavily in various ways. But never were the first fruits, nor the first born of domestic animals multiplied by *four*, and tribute exacted accordingly; never were their different products multiplied by *four*, and then tithed for the support of the priesthood. Taxing and tithing were, with them, always based upon things actually in existence; never upon things existing only in name. Under the laws of Solon, promulgated nearly six hundred years before the Christian era, the Athenians were taxed, but always upon the basis of actual values. Two hundred years later, Darius, a Pagan monarch, taxed the lands of his people to such an extent that they, in odium, styled him the Trader; and yet, he never multiplied quantities or values by *four*, and then exacted contribution accordingly. During the reigns of the Ptolemys, taxation was severe to an unparalleled degree, but a *fourfold* basis above actual values was not practiced. And taxation, in kind, was never in any age of the world, beyond a basis founded on actual increase or products: neither flocks, nor herds, nor measures of corn, nor of wheat, and the like, were multiplied by *four*, and then subjected to contribution for any purpose. No government of modern times, certainly, has ever adopted a system of taxation upon *things*, except upon a basis either of assessed or actual value.

But to recur directly to the matter in hand: We have already seen what the general, universal meaning of the words, "par or par value," is, as applied to certificates of stock bearing upon their face the actual sum which they represent; we have also seen what the meaning of the words, "capital or capital stock," is; we have further seen what the meaning of the words, "all the shares of a bank," is: Now, is it fair or reasonable to assume that the Legislature used these words or terms in *any* of the several acts referred to in a totally different and greatly enlarged sense? Is it fair or reasonable to assume that the Legislature intended to select specifically those banks and savings institutions incorporated by this state, having authority to do business whenever a fixed *minimum* sum of their authorized or *maximum* capital had been paid in, and impose upon them a tax for a common purpose *fivefold* greater than that exacted of like banks and savings institutions doing business upon an authorized or *maximum* capital fully paid up?

Is it fair or reasonable to assume that the Legislature intended to inaugurate in this commonwealth, upon a small and exceptional scale, a system of taxation unprecedented either in ancient or modern times, and alike unequal and unjust? And yet, this is the very monstrosity which the levy and collection of the taxes complained of in the plaintiffs' bill accomplishes. It will not do to say that the option accorded to national banks by the fifth section of the Act of April 12th, 1867, and extended to state banks and savings institutions by the first section of the Act of December 22d, 1869, was purposely modified in its application to those particular state banks and savings institutions having a right to do business upon a *paid in* capital less than their authorized or *maximum* amounts, by the fourth section of the Act of March 31st, 1870, as an equivalent for the special privileges granted the the latter, and as a fair compensation for the exemption of their shares from local taxation. The language of the fourth section of the Act of March 31st, 1870, will bear no such construction. Besides, if the Legislature had intended any such thing, language fitly adapted to the expression of that purpose would have been used.

In cases where corporations, other than state banks and savings institutions, possessing privileges of the same character as those of the People's Savings Bank of Pittston, but subject to taxation on their dividends in excess of six *per centum* upon their capital stock, for a specific purpose, have made large earnings on the amount of capital actually paid in, which they have attempted to distribute in dividends upon their whole *authorized* capital, so that nothing would be left to tax for the particular purpose specified in their charters, the courts have been invoked and have decided that the dividends in excess of six *per centum* upon the capital stock meant, under such circumstances, dividends in excess of six *per centum* upon the capital stock *paid in:* Citizens' Passenger Railway Co. v. The City of Philadelphia, 13 Wr. 251; Philadelphia v. Philadelphia and Gray's Ferry Pass. Railway Co., 2 P. F. S. 177; The Second and Third Street Pass. Railway Co. v The City of Philadelphia, 1 P. F. S. 465. To the average mind, there is no difference in the principle of these cases and that in the one before us. In the latter, the boot is simply on the other foot.

The prayer of the plaintiffs must be heeded. And now, March 18th, 1878, after due consideration of the plaintiffs' bill, and after hearing the arguments of counsel on the one side and the other, it is ordered, adjudged, and decreed that the defendants, N. N. Dean, Samuel Line, and Peter Jennings, commissioners of Luzerne county, and Patrick Winters, receiver of taxes of the borough of Pittston, for the year 1877, be restrained by the injunction of this court from collecting or receiving any part of the state or county taxes levied against the shares of the plaintiffs and others, stockholders of the People's Savings Bank of Pittston, as set forth in the bill.

C. S. Stark, for plaintiffs; Geo. B. Kulp, for defendants.

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VOL. 7. FRIDAY, MARCH 29, 1878. No. 13.

COMMON PLEAS OF LUZERNE COUNTY.

Frauenthal v. The Manhattan Fire Insurance Company.

A. insured with B., an insurance agent. The policy expired, A. refusing to pay the renewal premium because the rate was too high. Some months afterwards, A. solicited B. to renew at the old rate, which the latter, as A. testified, agreed to do, though no renewal premium was paid, for the reason, as A. further testified, that B. had been in the habit for years of renewing the former's policies, and then sending in the bill for the amount, which was always paid. B. failed to renew in this instance, and the property originally insured was destroyed by fire. The company denied liability for the loss; whereupon A. brought suit, but gave no evidence that the company had notice of B.'s mode of doing business: *Held*, that A. could not recover on the policy.

Samuel Frauenthal brought an action against the Manhattan Fire Insurance Company, of New York, to recover the sum of $2,500.00, which he claimed was the amount insured by that company on a stock of goods belonging to him, destroyed by fire on the night of January 1st, 1874.

The case was a novel one in some respects, and elicited more than ordinary attention. Its prominent features, as gathered from the testimony of Mr. Frauenthal, are about as follows: For a series of years prior to 1874, the plaintiff had insured different properties belonging to him in Wilkes-Barre in an agency known as that of Thompson Derr & Brother. Usually he informed these agents of the amount of insurance desired, and together they would agree upon the rate *per centum* to be paid. The policies would be issued accordingly, the Messrs. Derr commonly giving time for the payment of premiums. Renewals of these policies from year to year would be had in the same manner. Very often the renewal receipts would not be handed to the plaintiff until months after the policies had expired.

In June, 1873, however, the plaintiff declined to renew the policy upon which the action was brought, for the reason that the rate *per cent.* was too high. The Messrs. Derr were informed of the fact, and during that month the policy ran out. But subsequently, or about the early part of December of that year, as the plaintiff testified, discovering that he could obtain no insurance at a more favorable rate, he notified the Messrs. Derr that he would like to have the policy in the Manhattan Fire Insurance Company, which had expired in June previously, renewed upon his stock of goods, as it had been taken originally. Whereupon, as the witness testified, Mr. Harry Derr, of the firm of

Thompson Derr & Brother, came around and looked at the stock, inquired as to its value, and agreed to renew the policy at the old rate, and to send over the renewal receipt at once. No renewal premium was paid at the time; but, as the witness supposed, this was not material, as the Messrs. Derr had always sent their bill for insurance whenever they wanted their pay. No renewal receipt ever came. The policy was not renewed by the Messrs. Derr; and on the night referred to, the fire came, and the stock of goods was burned up.

The plaintiff was corroborated in his statements in some general respects, and also with reference to some collateral matters. But there was no evidence offered going to show that the defendants ever had any knowledge of the manner in which the Messrs. Derr conducted their business with the plaintiff.

At the conclusion of the whole testimony tendered in the plaintiff's behalf, counsel for the defendants moved the court for a compulsory nonsuit. Whereupon, the court (HARDING, P. J.) directed judgment of nonsuit to be entered. A motion to take off the nonsuit was subsequently denied. The plaintiff took a writ of error, assigning, *inter alia*, for error, that the "court erred in entering judgment of nonsuit, and in refusing to set aside the same."

The judgment of the court below was affirmed by the Supreme Court March 18th, 1878.

A. Ricketts, for plaintiff.

Henry M. Hoyt, H. W. Palmer, and J. V. Darling, for defendants.

Rosensky v. Convery.

1. A burgess exercises, within the borough limits, all the powers, jurisdiction, and authority of a justice of the peace in criminal cases.
2. The misfeasance of one magistrate is beyond review by another magistrate vested with no higher powers.
3. When the subject of complaint is the wrong or negligence of a public officer done or suffered in the exercise of his office, it is not within the statutory jurisdiction of a justice of the peace or alderman.
4. The refusal of a magistrate to pay back money collected by him in his judicial capacity cannot be taken cognizance of by a brother magistrate of no higher authority than himself.

Opinion by STANTON, J. March 18th, 1878.

The parties to this suit (which is an action of trover and conversion, to which defendant pleads "not guilty" and "to the jurisdiction") submit as a case stated the following facts for the opinion of the court:

"Maer Rosensky, the plaintiff, at the time of the grievance complained of, namely, about the 1st of July, 1876, was a foot peddler by occupation, and Patrick Convery, the defendant, at the time aforesaid, was burgess of the borough of Sugar Notch, in Luzerne county; that at said time plaintiff was without license, his old license having expired about a month previous; that he was about said date taken before the

said defendant by a policeman, without warrant, summons, or legal process; after hearing had, demand was made of him by the burgess, the said defendant, to pay the sum of twenty dollars as a fine, or, in default thereof, he would commit him to jail; plaintiff paid said twenty dollars to defendant; afterwards plaintiff made demand of said defendant for repayment of said sum; repayment of said sum not being made, suit in trover and conversion was brought before an alderman to recover said sum, and appeal taken from his judgment to this court; the burgess had made the following record upon his docket, namely, that the defendant, Rosensky, on complaint of policeman, was brought before him and fined twenty dollars for peddling without license."

If the alderman had not jurisdiction, neither has this court on the appeal from his judgment: Wright v. Guy, 10 S. & R. 227; Collins v. Collins, 37 Penn. St. Rep. 388.

The defendant, as burgess, exercised, within the limits of the said borough, the powers, jurisdiction, and authority of a justice of the peace in all criminal cases. As burgess, it was his duty, on complaint being made to him, on oath or affirmation, that Rosensky was selling, or exposing to sale, in said borough, as a hawker, peddler, or traveling merchant, any foreign or domestic goods, wares, or merchandise, without a license, as required by an Act of Assembly, approved April 13th, 1868, and its supplement, approved April 10th, 1873, to issue a warrant for Rosensky's apprehension, and to compel him to enter into recognizance, with sufficient sureties, for his appearance at the next Court of Quarter Sessions of Luzerne county, to answer said complaint; wherein, if he were duly indicted and convicted, he would be subject to a penalty of fifty dollars.

It is admitted that Rosensky had no license to peddle in Luzerne county at the time he was brought before Burgess Convery. The record of the burgess, as embodied in the facts submitted, sets forth that "Rosensky, on *complaint* of policeman, was brought before him and fined twenty dollars for peddling without license." The complaint thus made, the appearance (whether voluntary or otherwise, of which we are left in doubt by the expression "brought,") of Rosensky before the burgess, and the hearing in pursuance, present the burgess in the peformance of his legal functions. Thus far his proceedings bear the impress of legality. But after the hearing, instead of compelling Rosensky to enter into recognizance, with sufficient sureties, for his appearance at the next Court of Quarter Sessions, or, in default thereof, committing him to the county prison, the burgess required Rosensky to pay the sum of twenty dollars as a fine, or, in default thereof, he would commit him to jail. Rosensky paid the twenty dollars. In exacting this twenty dollars, the burgess used his magisterial powers in an oppressive manner, and thereby rendered himself liable to Rosensky in damages. But the misfeasance of one magistrate is beyond review by another magistrate vested with no higher powers.

The only jurisdiction a justice of the peace or alderman can exercise is such as is given him by statute, and when a cause of action is not embraced in such statutes, he can have nothing to do with it: Clark v. Lehigh Valley Railroad Co., 1 Luz. Leg. Reg. 90.

It is settled that when the action springs simply from tort, it lies not within the statutory jurisdiction of a justice of the peace or alderman; and this is emphatically so when the subject of complaint is the wrong or negligence of a public officer done or suffered in the exercise of his office: Seitzinger v. Steinberger, 12 Penn. St. Rep. 381.

Convery was acting in a judicial capacity when he collected the twenty dollars from Rosensky. His refusal to pay it back to Rosensky could not be taken cognizance of by a brother magistrate of no higher authority than himself: Montgomery v. Poorman, 6 Watts, 384.

The alderman not having jurisdiction, this court cannot take cognizance of the appeal from his judgment, and the defendant's plea to the jurisdiction is, therefore, sustained, and this case dismissed at plaintiff's costs.

E. H. Painter and D. M. Jones, for plaintiff.

C. D. Foster and John McGahren, for defendant.

A ludicrous attempt was made in a recent case (White v. Bluett, 23 L. J. N. S. Exch. 36) to fabricate a consideration. A father held a promissory note of his son, who had teased him with complaints of not having received so much money or so many advantages from his father as his other children, as, it was alleged, the father had admitted; and that he had agreed, that, if his son would cease forever to make such complaints, he should be absolved from payment of the note. The father died, and his executor, finding the note among the testator's papers, sued the son upon it at law; and he pleaded the facts as an answer to the action. The plea was demurred to as showing no consideration; and the son's counsel endeavored to support his case by alleging that he had a right to make the complaints alleged, and had subjected himself to a *detriment* by not being able to continue his ill-founded complaints! The court contemptously dismissed the plea. Baron Parke sarcastically asked, "Is an agreement by a father, in consideration that his son will not *bore* him, a binding contract?" "By the argument," said the Lord Chief Baron, "a principle is pressed to an absurdity, as a bubble is blown until it bursts. * * Looking at the words merely, there is some foundation for the argument; and following the words only, the conclusion may be arrived at. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no *consideration*."

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VOL. 7. FRIDAY, APRIL 5, 1878. No. 14.

COMMON PLEAS OF LUZERNE COUNTY.

Lynch, libellant, v. Lynch, libellee.

Libellant was awarded the usual writ; personal service was had on the libellee; an examiner was appointed, who fixed a time and place for taking testimony, notice thereof being served personally on the libellee; she paid no attention thereto; testimony was taken and reported to the court by the examiner; final decree was had thereon; one day previous to entering the decree, libellee had entered a rule to take testimony; this being brought to the notice of the court three days afterwards, decree was set aside, and the libellee thus enabled to have her rule executed; afterwards she abandoned her rule altogether, and demanded an issue: *Held*, first, that the demand for an issue was too late after the report of the examiner had been filed; and, second, that entering a rule on the part of the libellee to take testimony, as the case then stood, amounted to an election to have it disposed of by the court.

Application for a decree of divorce.

Opinion by HARDING, P. J March 25th, 1878.

There are some unusual features in this proceeding. A subpœna in divorce was awarded December 11th, 1876. Personal service of the writ was had upon the libellee January 11th, 1877. An examiner was appointed to take testimony January 12th, 1877. Notice of his appointment, and also of the time fixed by him for taking the testimony, was served on the libellee personally January 19th, 1877. The testimony was taken accordingly, and filed in court by the examiner February 3d, 1877. A divorce was decreed February 6th, 1877.

Subsequently, or on the 8th day of February, 1877, the fact was brought to the notice of the court, that the libellee had, on the 5th day of February, 1877, entered a rule to take depositions, which was one day before the decree of divorce had been granted; and further, that the time fixed for executing the rule had not, even then, arrived. Whereupon, the court, at the instance of the counsel for the libellee, granted a rule to show cause why the decree should not be set aside. This rule was made absolute at once by the assent of counsel on both sides.

The libellee, after this had been done, proceeding no further with her rule to take depositions; but waiting still a week longer, or on the 15th day of February, 1877, she put in a demand for an issue. She followed this, two days afterwards, with an application for an allowance for support, and for counsel fees. This my brother Handley denied, after full hearing. A decree of divorce, or final decree, is now asked for by the libellant on the testimony originally reported to the court by the examiner.

It is certain that the demand for an issue was too late, after the examiner's report had been filed: Allison v. Allison, 10 Wr. 321. Besides, the libellee had made her election that the matter should be heard and decided by the court, as was apparent by the rule she had entered to take depositions, before referred to.

The first final decree was set aside, not for the purpose of allowing the libellee to do what, through her laches, she had lost the right to do, but for the specific and only purpose of allowing her to take testimony under her then unexecuted rule.

The demand for an issue, or the answer, or the demurrer, or whatever it was, seems to have been filed February 15th, 1877, as indicated by the record; but that is all we know about it. The document itself is not in the files, nor has it ever been called specially to my attention. No issue has been asked for in pursuance of it, none has been ordered, none drawn up.

Whereupon, divorce decreed: decree to be drawn up in form, &c.

T. R. Martin, for libellant.

John Lynch, for libellee.

COMMON PLEAS OF LANCASTER COUNTY.

John Evans & Son v. The Lancaster City School Board.

1. School directors are entitled to witness fees in a case to which their school board is a party.
2. Where a case is arbitrated under the compulsory arbitration laws, and it takes more than five hours to hear it, the arbitrators are entitled, under the Act of March 22, 1877, to two dollars each per day.

Appeal from taxation of costs.

Opinion by PATTERSON, J.

The exceptions by plaintiffs are: First, the prothonotary erred in taxing witness fees for J. I. Hartman and C. F. Eberman, the former being president and the latter secretary of the Lancaster City School Board; second, the prothonotary erred in taxing witness fees for H. E. Slaymaker, Eml. J. Erisman, R. A. Evans, and Christian Zecher, they being members of the school board.

These exceptions, we think, are not tenable. The witnesses named were regularly subpoenaed and compelled to attend court. We can find no law to exclude them—none was cited in the argument. They are no party to the record.

In the many suits *pro* and *con*—turnpike companies tried in this court—stockholders of the company have often been witnesses on the trial, and for the same reason urged by exceptant, being a constituent part of the corporation, they should not be allowed witness fees, but the

court have never known of such a rule having been maintained before the court or allowed. For the reason urged by the exceptant, in a suit instituted by or brought against a banking institution in its corporate name, and if the officers or employees of the bank be called as witnesses, they would not be entitled to witness fees; but this court have decided that such officers and employees, when subpoenaed as witnesses, and compelled to attend court in an action where the bank is a party, *are* entitled to the witness fees and mileage to be taxed in the costs: First National Bank of Mt. Joy v. Greider, Lancaster Bar, Vol. V., of May 21st, 1873. We can see no sufficient reason why the fees of the witnesses named and excepted to in the present case should not be allowed; and the appeal of plaintiffs mentioned is accordingly dismissed, and taxation approved.

The exception by defendants to the taxation of the prothonotary is: "To the disallowance of three dollars paid to arbitrators."

We quote the exception as written, and it is far from clear what it means. Our duty is to interpret fairly the Act of March 22d, 1877. That act says, "That hereafter the compensation of arbitrators chosen under the compulsory arbitration laws of this commonwealth shall be two dollars for each day necessarily employed in the duties of their appointment, * * to be taxed with bill of costs in the case, and collected as the other costs of the case are collected." The following proviso follows: "Provided, that in all cases where no defense is made before said arbitrators, and in all cases in which said arbitrators shall be engaged less than five hours in hearing, their fees shall remain as heretofore."

The section clearly makes the compensation of the arbitrators two dollars for each day necessarily employed in the duties of their appointment, and by the application of the general rule in such cases, there is no fraction of a day. The subject matter of this statute is apparent; it was the compensation of arbitrators chosen under the compulsory arbitration laws of this commonwealth.

The compensation under the act of 1836 was one dollar per day. This statute altered the law of 1836 as to their compensation; it increased it to two dollars, but not absolutely, but conditionally. There is a proviso suffixed to the section, and that clause inserted in an act of the Legislature generally contains a condition that a certain thing shall not be done. In other words, the proviso here defeats the operation of the provisions of the main section conditionally.

What are the conditions of the proviso in question? They are: First, "provided, that in all cases where no defense is made before said arbitrators, their fees shall remain as heretofore;" and secondly, "provided, that in all cases in which said arbitrators shall be engaged less than five hours in hearing, their fees shall remain as heretofore." On the happening of either of the two conditions mentioned, the main section shall not take effect, and the fees shall remain as heretofore—

shall be one dollar per day. The latter condition is the one, and only one, demanding our attention in the present case; and it signifies clearly that if the arbitrators sat in hearing a case, say five different days, but the periods of time occupied in such hearing, all added together, were less than five hours, the arbitrators could only demand fees as heretofore. Whilst if the periods of time occupied in such hearing, taken all together, are not less, but greater than five hours, then this condition is fulfilled, and the provisions of the main section take effect, and the compensation of the arbitrators shall be two dollars for each day necessarily employed in the duties of their appointment. This statute affects the public generally; it is a public law, and imports by its provisions that the eyes of the legislators were directed, as a reason for its enactment, to the fact that a case requiring a hearing by arbitrators of more than five hours would naturally and most probably be a case of comparative importance, in either character, or in the magnitude of the sum at issue, and as such would demand the greater care and consideration of the arbitrators, and that they should be compensated accordingly.

Under the foregoing interpretation of this act, and the undisputed testimony adduced on the argument, showing that the time engaged by the arbitrators in hearing and deciding in the case greatly exceeded five hours, and that they met on three different days, we think the law secures them in this suit each the compensation of two dollars for each day so engaged; and we accordingly order the prothonotary to tax the fees of the arbitrators according to the opinion just announced.

Prothonotary's disallowance, as excepted to by the defendants, is dismissed.—*Lancaster Bar.*

In the time of that great admiralty judge, Lord Stowell, such was the paucity of legal business, that he objected at first to reports of the proceedings, "fearing lest the report should expose the nakedness of the land:" Coote New Practice of Court of Admiralty, Pref., p. v., 1st ed.

The rule of pleading by which a plea in abatement is required to give the plaintiff a better writ is lucidly stated in Britton: "If the tenant says that he does not hold the whole, then he ought to declare who holds the residue. For we will that before writs be abated for a fault or error, the tenants inform the plaintiffs how they shall purchase good writs."

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VOL. 7. FRIDAY, APRIL 12, 1878. No. 15.

COMMON PLEAS OF LUZERNE COUNTY.

Frantz, Administratrix, v. Ruggles.

A. trading in lumber in Pennsylvania, became largely indebted; he went to Virginia, where B., his father, resided, and sold to him his stock in trade. B. paid him for it, and gave him a power of attorney to do business in his (B.'s) name. No delivery of the property was made. A. returned, notified his employees, changed his books and bank account, but not his sign; he continued the business in the same manner as before, except that it was done in the name of B., his father. C. knowing of the transaction, and of its fairness as between the son and the father, subsequently became a creditor of A. The latter failed to pay; whereupon C. sued him, recovered a judgment against him, issued an execution, and levied upon B.'s goods in A.'s hands: *Held*, that the sale by A. to B., though unaccompanied by any transfer or change of possession, was not a fraud in law as to C., who was not a creditor of A. at the time of the sale of the latter to B.

[This case seems to restrain somewhat the application of the doctrine of "fraud in law." It was tried before Judge Harding, and his charge to the jury was reported by Mr. John F. Standish, Jr., Court Stenographer. Subsequently the case was removed to the Supreme Court. The ruling of the court below was affirmed March 18, 1878. The charge states the features at length. We publish it entire in our present number.—ED.]

Issue—Interpleader.

HARDING, P J.—This case is an issue between the administratrix of George Frantz, deceased, and Josiah Ruggles, to determine the ownership of certain property embraced in a schedule in evidence before you. Daniel Frantz conducted the business of a lumber yard in the borough of Plymouth, in the year 1870, and continued so to do until August 19, 1873. He had incurred considerable indebtedness in connection with it; and on or about the 19th of August, 1873, while still carrying on the business in his own name, he went to his father, who resided in Caroline county, Virginia, and there made a sale or transfer to him of all his property in and about the lumber yard. The consideration is named in the assignment or transfer, which has also been put in evidence. Fifty dollars, a part of the purchase money, is alleged to have been paid down. About the same time, a power of attorney was given by the father, George Frantz, to Daniel, the son, to take charge of the property as the property of George Frantz, and to

conduct the business, not, however, as that of Daniel E. Frantz, but as that of George Frantz, the latter still residing in Caroline county, in the state of Virginia. It is further in evidence that about the time of the transfer by Daniel, the son, to George, the father, one J. W. Frantz, then living in Virginia also, and a brother of Daniel, became joined in the alleged new ownership of the property and business in Plymouth, thus constituting a firm under the name of Frantz & Co., the individual members being George Frantz, the father, and J. W. Frantz, another son. The latter, it seems, joined in the original power of attorney referred to, or gave one subsequently to his brother, Daniel, authorizing him to conduct the business, at Plymouth, in the name of Frantz & Co. Daniel accordingly came back; he informed his exployees, particularly his book-keeper, of the transaction. A new set of books was thereupon opened, the book accounts were changed, and the business was forthwith started in the name of Frantz & Co. It was carried on under that name when the execution, which forms the basis of this controversy, was issued, namely, on the 8th day of October, 1875. J. W. Frantz had, in the meantime, resold to Geo. Frantz whatever interest he had in the property and business, thus making the latter sole owner. This occcurred on the 18th of February, 1874. The firm name, Frantz & Co., was not then, nor subsequently, changed; it continued, Frantz & Co. George Frantz having since died, that ownership is now represented by his administratrix, the plaintiff in the present issue.

But it has been shown by evidence adduced on the part of the plaintiff herself that, notwithstanding the alleged sale, Daniel E. Frantz continued to do all the business; and further, that he did it precisely as he had done before any alleged sale or transfer took place; he bought the lumber and sold it; he paid the men; he was master of the lumber yard; indeed, nothing was changed except the books of account, the bank book and account, and the name under which the establishment was conducted, "D. E. Frantz" simply gave place to "Frantz & Co." Even the sign, "D. E. Frantz," over the entrance to the lumber yard, was neither taken down nor changed: as far as we learn from the testimony, it is there yet.

Now, gentlemen, as matter of law, we say to you, if a man indebted to the extent it is admitted Daniel E. Frantz was, sells his property, it must, if it be susceptible of delivery, pass into the possession of the party to whom it is sold. No matter though the transaction between Daniel E. Frantz and his father was entirely honest; no matter though their intentions were exactly as expressed in the agreement shown here, still, if Daniel E. Frantz was indebted to different parties at the time of this sale or transfer, and no change of possession accompanied it; if he continued doing the business exactly as before, then a creditor of his might issue process against him, recover judgment, levy upon the property, and sell it, and the sale would be good;

because a transfer of that character would be a fraud in law. In other words, to make such a transfer conclusive against creditors, it must not only be made in good faith, but there must be a corresponding change of possession

In this connection, I will read a written point upon which the defendant desires me to charge you. It is as follows:

"Inasmuch as by the showing of the plaintiff herself, it appears that the actual possession of the property did not accompany the transfer to George Frantz" (and it did not, because he was down in Virginia at the time the transfer or sale was made) "on the 19th day of August, 1873, but continued under the active management and control of D. E. Frantz, such transfer is a fraud in law, without regard to the intent of the parties, and is void as against the creditors of D. E. Frantz, and the verdict of the jury should, therefore, be for the defendant."

We affirm that proposition: it is a correct statement of the law. If Mr. Ruggles, at that time, had been one of the creditors of Daniel E. Frantz; if he subsequently recovered a judgment against him, and proceeded in a legitimate way to collect it, then the transfer from the son to the father, even though entirely honest as between them, would not protect the property against such a proceeding; because, as to Mr. Ruggles, the sale or transfer would be a fraud in law. This, however, is on the supposition that Mr. Ruggles was a creditor at the time of the transfer, and subsequently pursued the collection of his debt in the legal way. If, then, you find the fact so to be, namely, that he was a creditor at the time of the alleged sale, your verdict should be for the defendant. And with this explanation or qualification, I affirm the point. Mr. Ruggles may have been a creditor of Daniel E. Frantz at the time of the alleged sale, but there is nothing in the testimony that exhibits that fact. It would seem, however, that on the 6th of June, 1874, upwards of nine months after the alleged sale, he recovered a judgment against Daniel for the sum of $874.85, which is the judgment on which the execution before referred to was issued. It would seem, also, from bill-heads put in evidence by the plaintiff in the issue, that, during the year 1874, commodities were charged by the firm of Ruggles & Shonk to the firm of Frantz & Co. Now, gentlemen, if Mr. Ruggles was not a creditor of Daniel E. Frantz at the time of the alleged sale, and he knew that the property had been sold by Daniel to his father without any purpose of hindering or delaying the creditors of the former in the collection of their debts, and knowing this, he subsequently sold to Daniel E. Frantz commodities to the extent of $874.85, and recovered a judgment for their value, then the rule making the transfer a fraud in law would not apply in Mr. Ruggles' behalf. There seems to be no testimony before us showing exactly the time when Mr. Ruggles' debt accrued. The judgment, as before stated, was recovered on the 6th of June, 1874; the transfer seems to have been

made on the 19th of August, 1873, nearly a year previously. The claim on which Mr. Ruggles' judgment was founded may have been a subsisting indebtedness against Daniel E. Frantz at the time the transfer was made, but there is nothing in the testimony to show that it was so.

Gentlemen, we come now to the second point of the defendant, which is as follows:

"If the jury find, upon all the evidence, that the transfer made on the 19th of August, 1873, by Daniel E. Frantz to George Frantz was simply intended to cover up the real ownership of the property, and hinder and delay the creditors of Daniel E. Frantz in the collection of their claims, and at the same time enable D. E. Frantz to continue in the active management of the property and business connected therewith, such transfer was fraudulent in fact, and therefore void as against the creditors of Daniel E Frantz, and their verdict should be for the defendant."

We most unqualifiedly affirm that proposition. If Daniel E. Frantz was indebted while carrying on his lumber business in Plymouth, and he went to his father in Caroline county, Virginia, and there, for the purpose of hindering or delaying his creditors in the collection of their debts, made a transfer to the latter of the property connected with this lumber yard, receiving from him a power of attorney which authorized the former, on his return to Plymouth, to conduct the business of the lumber yard in the name of Frantz & Co., and the former did so, making no change, except in name, and in the books and the bank account, but publishing in the newspapers the notice shown in evidence, then the transfer was a fraud in fact, and Mr. Ruggles would be entitled to recover. In all cases analagous to the one before us, I may say, that unless an actual delivery of the property accompanies the sale, the whole transaction, in the eye of the law, is suspicious, and the degree of suspicion is much greater where the transfer occurs in a family, as, for instance, a father to a son, or a son to a father. If you find, however, that the transfer in this case was not made for the purpose of hindering or delaying the creditors of Daniel E. Frantz in the collection of their debts, and that there was a delivery of the property to the extent, at least, that it was capable of delivery, and that the transaction was honest in every particular, then you may find generally in favor of the plaintiff.

Chas. E. Rice and H. W. Palmer, for plaintiff.

A. Ricketts and J. A. Opp, for defendant.

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VOL. 7. FRIDAY, APRIL 19, 1878. NO. 16.

COMMON PLEAS OF LUZERNE COUNTY.

Hibbs v. Woodward.

Findings of fact cannot be set aside except for plain mistake by the referee, or unless the referee strains and distorts the evidence in reaching his conclusions.

Opinion by STANTON, J. April 8, 1878.

The report in this case sets forth three conclusions of fact and one of law. The conclusion of law proceeds unquestionably from the facts found by the referee. The findings of fact cannot be set aside except for plain mistake made by the referee. The learned referee states in his report "that in the latter part of the year 1865 Charles L. Lamberton and George N. Reichard called at his printing office, in the city of Wilkes-Barre, and ordered some printing done. They stated the county committee would pay for it. The plaintiff refused to do any work for the county committee unless they would pay for it, or assume the amount of the bill individually. They would not do this, but left the office, and no printing for them or the committee was done. In about a week they came back, and told the plaintiff that they had seen the defendant, who was the chairman of the democratic county committee, and that he told them to order the printing, and that he would be responsible for the same."

The said Charles L. Lamberton and George N. Reichard were called as witnesses in this case by the plaintiff, and nowhere throughout their testimony do we find them, or either of them, to say that Mr. Woodward promised to be responsible for any printing, or to say anything even implying as much. The plaintiff testified in regard to the printing ordered by Messrs. Lamberton and Reichard "that was the soldiers' convention job," which the evidence shows amounted to only eight dollars.

In thus summarizing the testimony, and deducing therefrom that the defendant assumed the responsibility of paying, not this eight dollars, but the whole of the plaintiff's claim in this case, we certainly think the learned referee plainly mistook the evidence.

The ground work of this action is a book account. The evidence is that the account was not with the defendant, and the plaintiff's evidence is, "He" (Woodward) "told me he didn't want me to charge the printing to him. I suppose he meant the *county committee printing*."

This book account was offered in evidence. The evidence offered by plaintiff for the purpose of fixing this indebtedness on the defendant is in contradiction of this written evidence, or book account, and under the pleadings this book account is the highest and best evidence. Plaintiff further testifies he presented this bill to defendant, and he told him "to go to Steele" (treasurer of the county committee), "and he would pay it." In another portion of his testimony plaintiff says " did present my bills to Steele."

A reasonable inference from this testimony—and the only inference consistent with the book entries—is that in the first instance the plaintiff looked to the county democratic standing committee to pay this claim, and in default of payment by the committee, then to the defendant. But the agreement whereby to charge the estate of this defendant for the debt or default of the democratic standing committee for the sum claimed in this case must have been in writing, signed by the defendant, or by some person by him authorized, a fact that does not appear from the pleadings or the evidence.

Wherefore, we are of the opinion that the learned referee plainly mistook the evidence, and strained the same in reaching his conclusions of fact, as well as of law.

We, therefore, set aside the findings of fact and of law, and commit the report to the learned referee, Edward A. Lynch, Esq., for further action in this case, and order and direct that he fix a time and place for a further hearing; that he give notice thereof to the parties, their agents or attorneys; and then, after such hearing, make report to this court as directed by law.

Prendergast v. O'Donnell and Redington.

Great latitude will be accorded to aldermen and justices of the peace for any imperfections in their proceedings, and their acts, when done within the law, even though in an informal manner, will be affirmed by the court.

Opinion by STANTON, J. April 8, 1878.

The cause of action in this case is very ambiguously stated, and the judgment is more uncertain still. The record says, "judgment for plaintiff publicly given for defendant." If the action be "debt" simply, which the language of the judgment seems to imply by the phrase, "with interest," then it is difficult to determine whether said judgment, namely, "and damage thirty dollars and cost, with interest," was rendered "for plaintiff," or "for defendant," by the justice. Great latitude will always be accorded by us to justices of the peace and alderman for any imperfections in their proceedings, and we will always

affirm their acts when done within the law, even though in an informal manner, or to adopt more elegant phraseology, we will

"Be to their faults a little blind,
"And to their virtues very kind."

But a record of contradictions and uncertainties, such as is this, we will never affirm.

The judgment in this case is reversed.

H. W. Palmer, for plaintiff.

J. T. Lanahan, for defendants.

Moore v. Sutliff.

When judgment is rendered "by default," both the justice and constable are bound in every step they take to conform strictly to the law, and the justice's docket should show that he heard evidence in support of the plaintiff's claim.

Opinion by STANTON, J. April 8, 1878.

In this case judgment was rendered "by default." The constable and justice were, therefore, bound in every step they took in the case to conform strictly to the law. This course they did not pursue. The constable's return is not in the language of the Act of Assembly, and the justice's record does not show that he heard any evidence in support of the plaintiff's claim.

Judgment is, therefore, reversed.

QUARTER SESSIONS OF LUZERNE COUNTY.

In Re Widening of Montgomery Street, West Pittston.

1. Viewers, not the court, should make assessment for damages and contribution under the act of 1856.
2. A reveiw is the extent to which any court will go, unless it is shown that the persons who made such review acted dishonestly and unfairly.
3. A review is the proper remedy for an alleged insufficient allowance of damage, or for an alleged unfair assessment for contribution.

Opinion by STANTON, J. April 8, 1878.

The burgess and a majority of the town council of the borough of West Pittston, being about to widen Montgomery street, in said borough, presented, on September 26th, 1877, to this court a petition

setting forth the facts and describing the locality of said street, and praying for the appointment of seven disinterested freeholders of said borough to view the premises described, &c.

The persons appointed in pursuance of such petition made report of their proceedings in writing to this court on the 13th of December, 1877, and on the same day said report was confirmed *nisi*. On the 19th and 21st of January, 1878, exceptions to said report were respectively filed. On said 21st of January, a petition for a review of a portion of said premises was presented to this court, and on the same day seven other persons were appointed to review said premises. On the 28th of January, 1878, this court revoked the order for a review, but at the same time granted a rule to show cause why a review as prayed for should not be had.

Viewers appointed under the act of 1856, relating to boroughs, have the simple duty to perform of assessing and allowing damages to persons injured in their properties by the opening, widening, or extending of the borough streets or alleys, and also of assessing for contribution all such properties as may be benefited by the opening, widening, or extending of such streets, &c.

The question, then, presented in this case is, was the application for a review the proper remedy for the alleged insufficiency of the allowance of damage, and for the alleged unfair assessment for contribution. We are of the opinion that the courts have no right to interfere in the matter of assessment for damages or contribution. The law makes this the function of the persons appointed to view and review. The furthest the courts may go, as it seems to us, is to take testimony to see whether the parties applying for a review have sufficient grounds to warrant such application. Exceptions go to the regularity of the proceedings. A review tests the impartiality and fidelity of the former viewers. A review in this case will simply deal with the question of the insufficiency of damages alllowed to Thomas Ford, S. V. Messenger, G. Symington, M. J. Eastman, E. L. Ellithrup, M. H. Stevens, and John Lintern, and of the assessment for contribution made against G. B. Thompson. The report of the viewers in such particulars thereof as are not objected to will be confirmed absolutely. We have the power to modify the report of the viewers before confirmation, and we exercise that power in this case by striking from the report all such portions thereof as affect the said named persons, and we direct a review in relation to what is complained of by said persons. The apprehensions expressed against a review in this case are not, we think, well founded. A review is the extent to which any court will go, unless it can be shown that the persons making such review acted dishonestly and unfairly. A question passing in review before two tribunals, composed of entirely different persons, usually comes forth in an unexceptional form.

The rule is made absolute.

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VOL. 7. FRIDAY, APRIL 26, 1878. No. 17.

ORPHANS' COURT OF PHILADELPHIA.

Estate of Albert Schwartz, dec'd.

It is the duty of an administrator, when real estate of a decedent which is subject to a mortgage is sold by an auctioneer, to see that the auctioneer announces the existence of such incumbrance, otherwise upon petition of the purchaser, the sale will be set aside at the cost of the administrator.

Exceptions to master's report.

Opinion by ASHMAN, J. April 6, 1878.

Under an alias order of sale, certain real estate of the decedent was sold at the risk of a former purchaser to George C. Evans, the exceptant, for the sum of $6,850. There was a mortgage of $6,500 upon the premises at the time of sale. A petition to confirm the sale subject to the mortgage, was presented by the administrator, and counter and amended petitions by the purchaser, setting forth that the premises were sold free of incumbrance, and praying a confirmation accordingly. The examiner and master, appointed to report upon the facts and to frame a decree, advised that the sale be set aside at the cost of the purchaser, otherwise that it should stand confirmed and subject to the mortgage.

By the testimony returned with the report it appeared that at the former sale, the auctioneer, at the request of the counsel for the administrator, announced that the property would be sold free of incumbrance, and it was actually sold for $10,800. At the second sale nothing was said about incumbrances, and no reference thereto made in the handbills. Mr. Evans, the purchaser, testified that he asked the auctioneer, whether the property would be sold clear, and was answered in the affirmative. He was corroborated on this point by two other witnesses. Mr. Freeman, the auctioneer, testified that he sold it as clear of incumbrances, but that no notice to that effect were given at the sale. The particulars as set forth in the handbills at both sales were identical.

The announcement made at the first sale by the auctioneer, had no power to discharge the lien of the mortgage. He was merely the agent of the administrator, who, in his turn, was the instrument of the court for effecting the purpose of the law: Vandever v. Baker, 1 Har. 126. But it was calculated to mislead purchasers. The weight of the testimony is, that he repeated the statement at the second sale.

This is immaterial, however, as in the absence of all notice to the contrary, it might reasonably be assumed that the terms of sale were unaltered. While it is true that the purchaser was bound to inform himself of the incumbrances upon the property and the legal effect of the sale, his inquiry of the auctioneer tends to acquit him of negligence in this regard. The laches is rather upon the side of the administrator in taking no steps at the second sale to counteract the palpable error he committed in the announcement made at the first. If, by this neglect, a loss has accrued, he, and not the purchaser should suffer. For these reasons the sale is set aside, and the administrator is directed to pay the costs.

SUPREME COURT OF PENNSYLVANIA.

Winternitz v. Porter.

A *feme sole* trader, owner of real estate, may be sued in her own name for repairs done to it by her order, her husband need not be joined.

Error to the Court of Common Pleas of Lawrence county.

Opinion by AGNEW, C. J. January 7, 1878.

This case does not fall within the principle of Cleaver v. Scheets, 20, P. F. Smith, 496. That was the case of a set-off for *maintainance* against a married woman who never had acted or been declared a *feme sole* trader, and whose husband was residing in the same city and engaged in business. It was simply an attempt to make a married woman's separate estate liable for her husband's proper debt, contrary to the Act of 1848. Here, however, Mrs. Winternits was not only living apart, and an actual *feme sole* trader, but had been duly declared such by the court. She was also the owner of real estate, and the debt was contracted by herself for repairs to her real estate. It was a debt for which her own estate was properly liable, and she had conducted herself towards it as one who is a *feme sole*.

Being liable for the debt, and having at law the power to sue and be sued without joining her husband with her, it would be rather a fanciful distinction to hold that her husband must be joined with her in this suit; in other words, to hold that, as to all contracts concerning her grocery business, she could sue or be sued alone, but that she cannot sue for the rent of her real estate, or be sued for its repairs, without joining her husband. The case is clearly within the spirit of the Acts of 1718 and 1855 when taken together, and not against the Act of 1848. In the case of Cleaver et al. v. Scheetz, the wife was neither liable for the debt nor a *feme sole* trader in fact or in law. That

case does not refer to or in any manner speak of the exceptional liability of a married woman for necessary repairs and improvements to her separate real estate, which has been held to arise under the spirit of the Act of 1848. It therefore in no sense governs this case.

Judgment affirmed.

COMMON PLEAS OF PHILADELPHIA.

Mozart Building Association v. Friedjen.

Assumpsit for use and occupation will lie by the sheriff's vendee against a tenant who came into possession under a lease subsequent to the incumbrance under which the sheriff's sale was made, notwithstanding the purchaser at sheriff's sale has disaffirmed the lease by giving the tenant notice to quit.

Motion for judgment on the point reserved.

Opinion by THAYER, P. J. March 30, 1878.

This was an action for use and occupation. By the evidence it appeared that the plaintiffs had purchased the property at sheriff's sale under a judgment upon a mortgage given by a former owner. The defendant was a tenant of the grantee of the mortgagor and came into possession under a lease made by him. The plaintiffs, after their purchase, gave notice to the defendant, on the 2d of January, 1875, requiring him to surrender the possession within three months from the date of the notice, agreeably to the provisions of the Act of 16th of June, 1836 (Purdon, 660). The defendant remained in possession until the 3d of April, and the action was brought to recover for the three months occupation during the period intervening between the date of the notice and the date at which the possession was relinquished.

It was contended by the defendant's counsel that the action for use and occupation would not lie because the notice to quit disaffirmed the lease, and the possession of the defendant after the notice must be considered as the possession of a mere trespasser. But this position is altogether untenable, for it by no means follows that because the lease was disaffirmed the occupation during the three months was not permissive. Indeed, the contrary may be fairly inferred, from the fact that the owner brought no ejectment and resorted to no other means to put the defendant out during that period. A permissive occupation is all that is necessary to sustain this action. That the notice to quit does not operate as a bar to the action for use and occupation even where the tenant holds over beyond the time fixed for his departure by the notice, was ruled by the Supreme Court in the late case of Bush v. The Na-

tional Oil Refining Co., 5 W. N. 143. He is tenant by sufferance, and as such, liable in this action for the value of the occupation. *A fortiori* is he liable where, as in the present case, the action is for the value of the premises during the running of the notice. In Hemphill v. Tevis, 4 Watts, 535, which was much relied on by the defendant's counsel, the action was upon the contract contained in the lease, and not for use and occupation. This is quite apparent from the opinion delivered by Mr. Justice Sergeant in that case, although the contrary would seem to have been inacurately asserted by the reporter in his statement of the case. "We think," says Sargeant J., "the lease was at an end by the notice and that the purchaser could not afterwards sustain an an action *founded upon the contract* to recover rent. If the defendants are liable at all *it can only be for use and occupation*, or on some other ground than tl e contract:" 4 W. & S. 541.

There is therefore no conflict between Hemphill v. Tevis and Bush vs. The National Oil Refining Company. At any rate the point must be regarded as settled by the latter case already cited.

Judgment for the plaintiff on the reserved point.

Schwacke v. Langton, defendant, and Bonbright et al., garnishees.

A teacher is not a laborer within the Act of April 15, 1845, and money due him for tuition is not exempt from attachment in the hands of his patrons as wages or salary.

Rule to dissolve an attachment execution.

It appeared that the defendant, Langton, was head teacher and proprietor of a private school. That under a judgment against defendant money due defendant for tuition was attached in the hands of some of his patrons.

It was sought to dissolve the attachment, on the ground that a teacher was a laborer, and that money due him for his services was in the nature of wages or salary.

Verbal opinion by LUDLOW, P. J., March 30th, 1878.

We can find no authority to interpret the Act of April 15th, 1845, so as to include this case. The money attached cannot be considered as salary, and while, in one sense, all professional men are laborers, yet the wages exempted by the act are such as are earned by the personal manual labor of the debtor, as appears from Penn, Coal Co. vs. Costello, 9 Casey, 241.

In the present case defendant carried on a private school as a business enterprise, and employed assistants. We are unable to dissolve the attachment and must discharge this rule.—*Legal Intelligencer.*

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VOL. 7. FRIDAY, MAY 3, 1878. No. 18.

ORPHANS' COURT OF PHILADELPHIA.

Estate of Hiram W. Rank, dec'd.

1. Where there is a deficiency of personal assets to answer all the demands against an estate, including the widow's claim, and the real estate has been made subject to an order to sell, the widow may claim her allowance out of the proceeds of such sale.
2. Time for filing widow's claim to realty.

Exceptions to widow's claim.

Opinion by ASHMAN, J. March 30th, 1878.

Decedent died September 28th, 1876, and letters testamentary were granted to Margaret E. Rank, the widow, October 6, 1876. On the 13th of October, 1877, the executrix presented to the court her petition for the sale of decedent's real estate for the payment of debts. The petition showed that she had in her possession a considerable sum of money belonging to the estate, but not sufficient for the payment of all the debts. The land was sold by order of court, December 11th, 1877, and the exceptant became the purchaser. On the 24th of November, 1877, after the order of sale had issued, the widow petitioned for the benefit of the Act of April 14th, 1851, and craved an allowance of three hundred dollars out of the proceeds of said sale.

It was contended that personal property of the estate, sufficient to pay this claim, having been in her possession as executrix, the widow could not elect to take out of the realty. It was not denied that the personal estate was insufficient to pay debts; the order of court authorizing the sale of the real estate for that purpose being conclusive of the fact. But it was maintained that the real estate of a decedent can in no case be set apart or sold for the widow's claim, as long as there are personal assets out of which it may be paid. It is not necessary to decide whether, where the personal estate is ample for the payment of all debts, including the widow's claim, the widow may still elect to take out of the realty Scott's Appeal, 2 Ph. Rep 135, would seem to indicate that she may not. Thompson, P. J. says: "The fifth section of the Act of April 14, 1851, which requires the administrator of a decedent to have personal or real property, to the value of three hundred dollars, appraised, so that the same shall not be sold, but permitted to remain with the widow, was not designed to interfere with the descent of the real estate of an intestate, or to authorize his administrator to interfere with it, unless such real prop-

erty was to be sold for the purpose of settling the affairs of the decedent. It was not designed to give authority to the widow, or to the administrator, to make a selection from among the real estate of an intestate of such premises as either of them might deem most suitable to answer the demand of the widow, and by such selection to render it liable to be sold. This can only be effected where there is a deficiency of personal property to answer the demands against the estate, including the widow's claim."

The present case meets the two requirements which were wanting in that. There is not only a failure of personal assets, but the real estate has been made subject to administration under the order to sell. The widow's claim for an allowance out of the proceeds of that sale in no way interferes with the course of descent; and she prejudices no right. Had she chosen to assert her priority over creditors by claiming out of the personalty, the further deficiency thereby created would still have been made up out of the sale of the real estate.

But did she make her claim to the realty in time? This petition for allowance was filed a few days after the order to sell was issued, and seventeen days before the sale was made. The return of the appraisers set forth that the real estate could not be divided without spoiling the whole.

It is probable that some expenses had been incurred by the estate in the application for the sale before the widow's claim was filed. But those expenses were neither more nor less than they would have been if the claim had never been presented; and the claim itself did not in the least retard the granting of the petition for a sale. The cases, therefore, which hold that the widow's claim is too late when filed after expenses have been incurred in preparing for a sale, do not apply. That of Davis' Appeal, 10 Cas. 256, which was cited by the exceptant, is especially wide of the mark. There the widow had elected to retain some personal property and a small tract of land, together of less value than three hundred dollars. The inventory and appraisement of the property so taken had been filed and approved by the court. The administrator, relying upon the faith of her first election, incurred expenses in obtaining an order of sale of the remaining real estate; but before the day of sale she came in and demanded to have the balance of the realty set apart to her. In Neff's Appeal, 9 Har. 243, the widow's election was not exercised until after the sale, and she claimed against creditors whose liens had attached before the passage of the Act of 1849, under which the application was made, and as to which the act was held not to be retroactive. And in Lyman v. Byram, 2 Wr. 475, also cited, the widow, after appropriating to her own use three hundred dollars worth of the personal property of her deceased husband, made a claim upon the proceeds of sale of the realty, without asking an appraisement, and then sued the administrator for not setting out her property.

Objection was made to the petition that it did not comply with the rule of court, requiring that the facts and circumstances upon which the right of the claimant is founded shall be set forth, and also that it did not allege that the claimant and decedent were living together at the time of the death of the latter. In the absence of any set form of application, it cannot be said that the petition has violated the terms of the rule; and unless proof is made to the contrary, the legal presumption is always that the claimant is in all respects the lawful widow of the decedent.

It was alleged by the exceptant, and not denied by the counsel for the widow, that the latter had retained furniture of the decedent to the value of one hundred and seventy-nine dollars and sixty-one cents, and had not charged it to herself in the account. In dismissing the exceptions and allowing the petition, this amount is deducted from the claim, leaving as the sum awarded to the widow out of the proceeds of sale one hundred and twenty dollars and ninety-nine cents.—*L. Int.*

COMMON PLEAS OF PHILADELPHIA.

Kindt v. McDonald.

A bond conditioned that the defendant should apply at the next term of court for the benefit of the insolvent laws is forfeited if nothing is done at the next term. Proof of an application for a continuance at the term after "the next term" is no defense.

Rule for new trial.

Opinion by BRIGGS, J. December 29, 1877.

On the 17th day of July, 1875, Andrew J. McDonald, one of the defendants, being in custody, gave, with his co-defendant, bond to appear at the next term of the Court of Common Pleas of this county, and that the said Andrew should then and there present his petition for the benefit of the insolvent laws of this commonwealth, and comply with all the requisitions of said law, and abide all the orders of said court in that behalf; or in default thereof, and if he should fail in obtaining his discharge as an insolvent debtor, that he should surrender himself to the jail of said county.

The record in evidence showed that the petition for Andrew's discharge was filed September 4th, 1875, but failed to show that any other proceedings were had thereafter.

The defendants sought to supplement the record by oral testimony that Andrew appeared at the Court of Common Pleas, No. 3, in December term, 1875, and that his case was then continued until the

March term, 1876. This offer was rejected, and a verdict directed for the plaintiff.

It is complained that this rejection was erroneous. But was it so? By the very terms of the bond, and the law under which it was given, Andrew was required to obtain his discharge at the next term, which was the September term, unless he procured a continuance of his case. It was not attempted to prove that an application was made for a hearing, or that notice was given to creditors, or that anything was done, as required by the Act of Assembly, during the September term, except filing the petition for discharge.

With the expiration of September term, the bond became forfeited by the mandate of law, by reason of Andrew's failure to procure his discharge, a continuance to another term, or to surrender himself to jail: Horton v. Miller, 38 Pa. St. R. 270; McDonough's Case, 37 Id. 275; Bartholomew v. Bartholomew, 50 Id. 194. Nor is it an answer to say that he appeared at the December term, and procured a continuance to the March term, 1876; for, as already shown, the bond was then forfeited. This being so may account for the fact that the defendant's offer did not propose to show that anything has been done in the insolvent case since the alleged continuance in December term, 1875, to the March term, 1876. Even if there were regular continuances up to the last named term Andrew's supineness since then is fatal to the defense.

The position of counsel for the defense, so earnestly pressed, that the plaintiff in any event should move the Insolvent Court to a final disposition of the case before suing here on the bond, is alike unavailing. The creditor of a petitioner for insolvency has nothing to do—can do nothing—except oppose the discharge for want of compliance with the provisions of the law and the condition of the bond.

The petitioner, as said in Bartholomew v. Bartholomew, "is the actor and only one to set in motion the machinery of the law which is to result in his discharge. His creditor performs no part of it, is not bound to appear, and cannot prevent his discharge, except by showing that he is not a fit subject of relief. He may appear to do this, but it is not an act in furtherance of the discharge, but against it. The purpose, then, is relief; the provisions of the law must be pursued, and the debtor is the only one who sets them in motion and keeps them moving."

It is, therefore, evident that no error was committed in the rejection of the defendant's offer, as, had it been sustained by proof, it were entirely insufficient to prevent the plaintiff's recovery.

Rule discharged.—*Legal Intelligencer.*

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VOL. 7. FRIDAY, MAY 10, 1878. No. 19.

SUPREME COURT OF PENNSYLVANIA.

Appeal of P. R. Webster et al.

1. A judgment confessed by the maker of a promissory note in favor of an accommodation endorser to secure the latter upon his endorsement is a personal indemnity to the endorser, and not a collateral or cumulative security to the holder.
2. With the obligation of such endorser, the vitality of the judgment is destroyed, and an assignment of it to another, who, at the request of the defendant, the maker of the note, endorsed a renewal in discharge of the former endorser, cannot galvanize the judgment into fresh life.
3. The new endorser having been under no compulsion, moral or legal, to assume the obligation, is not entitled to be subrogated to the position of the plaintiff in the judgment. He is a mere volunteer, and cannot by a volunteered intervention create a duty to himself.
4. A endorsed B's note, taking a judgment against the latter of equal amount to secure himself, and entered it of record; when the note matured A was absent, and B not being able to pay it, induced C to endorse one in renewal of it, agreeing that A might transfer his judgment to C as security for the latter's endorsement in the former's stead. Two days prior to C's endorsement, D and E each recovered a judgment against B. Subsequently A assigned his judgment to C, who afterwards was obliged to pay the note he had endorsed in place of A; the real estate of B was, later still, sold by the sheriff; whereupon D and E claimed the balance of the fund as against C: *Held, reversing the court below*, that D and E were entitled to take the money, and that the judgment assigned to C had been extinguished by his act in discharge of A, and that no right to be subrogated existed in C.
5. Ramsey's Appeal, 2 Watts, 228, Dunn v. Olney, 2 H. 219, and D. & H. Canal Co.'s Appeal, 2 Wr. 512, commented on. Cottrell's Appeal, 11 Harris, 294, distinguished.

Appeal from Common Pleas of Luzerne county.

[For opinion of court below, see Vol. 7, p. 51.]

Opinion by WOODWARD, J. May 6, 1878.

On the 30th of October, 1876, Philip Banker obtained a judgment in the Common Pleas of Luzerne county against Jacob Adams for $700. He was the endorser of a note of Adams' for the same amount, which had been discounted by the Wyoming National Bank on the 7th of October, and the judgment was confessed in order to indemnify him against liability for its payment. The note matured on the 19th of December, 1874, and on that day, in the absence of Banker, at the solicitation of Adams, and upon his assurance that Banker's judgment should be assigned to him for his protection, Robert Baur endorsed a new note of Adams' for $700, which was received by the bank in lieu of that which Banker had endorsed. This new note was renewed from time to time, and was finally paid by Baur. Banker assigned his judgment to Baur on the 4th of February, 1875. In the meantime, on the 7th of December, 1874, judgments against Adams were obtained by Webster and Goldsmith Brothers, the appellants. In the distribution

the auditor applied the balance of the fund after payment of earlier *pro rata* to the judgment of Banker, and to one which had been confessed to Baur, both having been entered the same day, the court confirmed the auditor's report.

Banker had no part in the arrangement between Baur and Adams. His judgment had been obtained for a single purpose. It was to protect himself as the endorser of the note that was running in the bank. If it had been paid at maturity all the uses of the judgment would have been served, so far as Banker was concerned. Why was the note not paid when it was cancelled by the renewal? The judgment was a personal indemnity to them; it was not a collateral or cumulative security to the bank; it had no connection with the debt Adams owed, except that it had grown out of it as an independent contract. When the note of the 9th of December was accepted, the discharge of Banker from all obligations as endorser was absolute, and with that discharge why were not his rights under the judgment at the same time extinguished? It has been urged that the debt survived. It is true that Adams remained the bank's debtor for $700, but he was bound by a new contract in a new form, with which Banker had no concern and with the hazard that he might be called upon for payment of the note removed, the vitality of his judgment was destroyed, his assignment could not galvanize it into fresh life, for on the 4th of February, 1875, he had no interest to assign. If the rights of Adams and Baur were alone involved, there would be no objection to their agreement that it should retain or regain its original efficacy. But nothing which they could do, even in conjunction with Banker, could affect the rights of intervening creditors, which became vested, when, by the discharge of Banker as endorser, the conditions ceased to exist, which gave to the judgment all the validity it possessed.

Down to the moment when Baur endorsed the new note, he had not been in any way connected with the debt. He was under no obligation to Banker, Adams, or the bank. While his endorsement worked the release of Banker, yet it created no duty towards himself, as in Talmage. v Burlingame, 9 Barr, 21. The act was without Banker's knowledge or request, and was done as a "mere volunteer, and under no circumstances of compulsion, moral or legal." And Adams was not competent to clothe Baur with Banker's rights, for that would have been the making of a new consideration for and the writing of new conditions in the judgment. It was too late on December 9th to create a lien to have priority against other creditors from the 30th of October.

In no instance has the equitable doctrine of subrogation been carried to an extent that would support this decree. Ramsey's Appeal. 2 Watts, 228; Dunn v. Olney, 2 Harris, 219; and the Delaware and Hudson Canal Company's Appeal, 2 Wright, 512, which were relied on in the opinion of the President of the Common Pleas, were illustrations of Chief Justice Gibson's familiar rule, "that he who may at law con-

trol the application of two or more funds, shall not be suffered to use his legal advantages in a way to exclude the demands of a fellow-creditor whose legal recourse is restricted to but one of them." Cottrell's Appeal, 11 Harris, 294, was just the case this would be if the judgment against Adams had been held, not by Banker, but by the Wyoming National Bank. An endorser paying Adams' note would become entitled to subrogation to the rights of the bank under the judgment as a cumulative security for a single debt. In Cottrell's Appeal the endorser of the note of a defendant for the amount of a judgment paid it to the creditor, and took an assignment of the judgment. It was very justly ruled that he was entitled to payment in preference to a subsequent judgment entered before the note was given. "When an application is made for substitution," Judge Rodger's said in Erb's Appeal, 2 Pa. R., 296, "the court will take care that the subrogation of the surety shall work no injustice to the rights of others." While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer who, without any duty, moral or otherwise, pays the debt of another: Hoover v. Epler, 2 P. F. S., 522. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor: Mosier's Appeal, 6 P. F. S., 76. Chief Justice Thompson in that case said: "I regard the doctrine as applicable in all cases where a payment has been made under a legitimate and fair effort to protect the ascertained interest of the party paying, and when intervening rights are not legally jeopardized, or defeated." Taxes, assessed against an owner of land, were paid over, during several years, by the collector, without payment by the owner to him. Subsequently the owner confessed a judgment to the collector, as a collateral security. In the distribution of the proceeds of the sale of the owner's estate, it was held that the lien of the taxes was discharged by the payment over by the collector; that he was not to be regarded as surety; that subrogation could not be allowed except in a clear case, and where it would work no injustice to others; and that the collector had no priority over liens which preceded his judgment: Wallace's Estate, 9 P. F. S., 401. There was no privity of interest, and no contract relation between Baur and Banker. Baur could create no duty to himself by a volunteered intervention for Banker's relief. He became Adams' endorser without being under any legal or moral compulsion, and he had no existing interest, ascertained or contingent, to protect. He has no equity to entitle him to subrogation. At the moment when the new note was taken by the bank, and the liability of Banker on the former one was discharged, the only reason for the efficient existence of the indemnifying judgment was swept away, and the judgments of the appellants took its place in the order of priority of liens.

The decree of the Court of Common Pleas is reversed, at the cost

of the appellee, and it is now ordered and adjudged, that the residue of the fund in court, after the payment in full of the judgment of Robert Baur, No. 47 November Term, 1876, be distributed *pro rata* to the judgments Nos. 240 and 359, November Term, 1874, in favor of P. R. Webster and Goldsmith Brothers, appellants.

McLean & Jackson and S. J. Strauss, for appellants.

Gustav Hahn, *contra.*

SUPREME COURT OF WISCONSIN.

Daliels v. Bailey.

A sale of an interest in standing timber, or of an interest in a contract of sale of standing timber, is a sale of an interest in land; and if by parol, and wholly unexecuted, is void under the statute of frauds.

Appeal from Circuit Court of Portage county.

Opinion by RYAN, C. J. April 18, 1878.

Before it was amended, the complaint was for the consideration of a sale of the respondent's interest in the standing timber upon certain land. As amended after the verdict, it is for the consideration of a sale of the respondent's interest in a contract of sale of the standing timber. Whether of the one or of the other, the sale proved was by parol, wholly unexecuted; was equally the sale of an interest in the land, and void under the statute of frauds: Strasson v. Montgomery, 52 Wis. 52; Young v. Lego, 36 ib. 394; Richardson v. Johnson, 41 ib. 100.

The judgment is reversed, and the case remanded to the court below for further proceedings, according to law.—*Chicago Legal News.*

In the Year-Book, 30 & 31 Edw. I. pp. 503-507, is this case: A man was arraigned for felony, but on producing a charter of pardon was discharged. Another man arraigned for harboring him, and, notwithstanding the acquittal of the principal, he was made to pay a fine. The report concludes thus: "Note, the justices did this rather for the king's profit than in accordance with law; for they gave this decision 'in terrorem.'"

The Luzerne Legal Register.

VOL. 7. FRIDAY, MAY 17, 1878. No. 20.

COMMON PLEAS OF LUZERNE COUNTY.

The Delaware and Hudson Canal Company et al., Plaintiffs,

v.

The School District of the City of Scranton et al., Defendants.

1. The board of school controllers of the Scranton school district levied a school tax for the year 1878 on all property in gross, thereby paying no attention to the requirements of the act of 1875, which provides for the classification of real property into three separate and distinct classes. When the tax thus levied was about to be collected, the taxpayers moved for preliminary injunction; whereupon the school controllers filed demurrer to the matter contained in the plaintiffs' bill: *Held*, that the demurrer must be overruled, and preliminary injunction awarded as prayed for.
2. Where a city of the third class is incorporated under the Act of the 23d of May, 1874, *prior* to the approval of the supplement thereto, approved March 18th, 1875, the law requires the passage of an ordinance by the city authorities to bring such city within the provisions thereof. Otherwise where such city of the third class has been incorporated under the provisions of the act of 1874 *after* the passage of the act of 1875.
3. Whenever tax is illegal or irregular, injunction is the proper remedy to protect the rights of the taxpayers.

In Equity. Application for preliminary injunction, and demurrer to plaintiffs' bill.

Opinion by HANDLEY, J. May 13th, 1878.

The plaintiffs in this case complain and say, that they are taxpayers in the city of Scranton; that the board of school controllers on the 9th day of January, 1878, levied their school tax for the year 1877, placing their duplicate for taxes on that day, with their warrant, in the hands of the defendant, W. W. Winton, as their collector; that the said tax is levied on the gross valuation of each taxable person at the rate of nine mills on the dollar of such valuation, as made by the proper authorities of said city, but without regard to the classification of the real estate and the improvements thereon, as is made by said authorities; that the proper authorites of said city in making their assessment of real estate divided the same into three classes, called the first, second, and third class, in accordance with the provisions of the Acts of Assembly, approved May 23d, 1874, and March 18th, 1875; * * * that the school tax should be levied in accordance with the rates established by such supplement, and not with a common rate over all classes; that the plaintiffs are respectively assessed for school

taxes upon the following gross valuation, and for the following respective amounts, namely:

	ASSESSMENT.	VALUATION.	TAX.
Rockwell & Gilbert	$ 54,000	rate 9 mills	$ 486.00
Edward F. Hodges, Trustee	66,600	rate 9 mills	599.40
D. L. & W. R. R. Co	409,115	rate 9 mills	3682.03
Del. & Hud. Canal Co	22,255	rate 9 mills	200.29
Alfred Hand	10,200	rate 9 mills	91.80

That the valuation which the proper authorities have assessed upon the plaintiffs are as follows, to wit:

	1ST CLASS.	2D CLASS.	3D CLASS.
Rockwell & Gilbert			$ 54,000
Edward F. Hodges, Trustee			66,660
D. L. & W. R. R. Co	$14,800	$125,300	252,415
Del. & Hud. Canal Co			22,255
Alfred Hand			10,200

That the board of controllers of said district being in doubt in regard to the legality of the said tax, so as aforesaid levied by them, in order to raise the proper amount in case said tax should be declared illegal, by resolution have provided for a tax to be rated according to the Act of Assembly, to be levied at the rate of twelve mills on the valuation of the first class property, eight mills of second class property, and six mills of third class property; * * that the amount of taxes which the plaintiffs would be liable to pay under such rated assessment would be as follows, to wit:

Rockwell & Gilbert	$ 324.00
Edward F. Hodges, Trustee	399.60
Delaware, Lackawanna and Western Railroad Company	2694.49
Delaware and Hudson Canal Company	133.53
Alfred Hand	61.20

That the city of Scranton is a city of the third class under the Act of Assembly dividing cities of this state into three classes, approved May 23d, 1874; * * that in making the assessment for the city of Scranton, the councils of said city, in revising the returns of the assessment of said city, having in view the supplement to the Act of Assembly dividing cities into three classes, * * * reduced the valuation of all property of the first class, and raised all property of the second and third classes in such manner as to make the several persons pay the same rate of city tax as heretofore; that the result of said assessment so made, when adopted by the school controllers, has been to largely increase the tax on third class property, and thus add increased burdens upon the third class property above what the law itself would produce by a common rate of levy upon all classes; that the assessment made by the said authorities of said city for the year

1876 for same property belonging to the plaintiffs was as follows, viz:

Rockwell & Gilbert	$
Edward F. Hodges, Trustee	23,525
Delaware, Lackawanna and Western Railroad Company	162,643
Delaware and Hudson Canal Company	4,564
Alfred Hand	3,467

That by virtue of the original charter of the city * * * it is provided that all taxes levied and collected within said city for any purpose whatever, whether poor, county, school, or special, * * * shall be levied upon the adjusted valuation made for city purposes; that no duplicate was issued by the said board of controllers to the treasurer of said city by reason of the delay on the part of the authorities of said city, * * but the duplicate was placed directly in the hands of the collector; that the plaintiffs bring this suit as well for themselves as for all other taxpayers similarly situated, and, therefore, pray that a perpetual injunction may be granted to restrain the collection of said tax as now assessed at nine mills on the gross valuation, and that a preliminary injunction may issue until the final hearing of this case.

To the matter contained in the plaintiffs' bill the defendants demurred, and assigned the following reasons for cause thereof:

1. The said plaintiffs have not, as affirmed by their said bill, made out any title or right to the relief thereby prayed.

2. The said Act of March 18, 1875, has never been accepted by the authorities of the city of Scranton; the acceptance of the same, so far as was attempted by the said ordinance, in said plaintiffs' bill set forth, being illegal and void.

3. That the taxes mentioned and referred to in said Act of March 18th, 1875, do not include school taxes.

The thirty-second rule of Equity Practice, page 18, provides that "no demurrer * * shall be allowed to be filed to any bill, unless supported by affidavit that it is not interposed for delay." As the demurrer filed in this case is not supported by affidavit, we might dispose of the questions raised without any further investigation; but this being a matter of the greatest importance to the public, we will treat this demurrer the same as if the necessary affidavit required by the rule was attached.

A demurrer necessarily admits the truth of the facts stated in the bill, so far as they are relevant, and are well pleaded; but it does not admit the conclusions of law drawn therefrom: Story's Eq. Pl. § 452; Brightley's Eq. § 603. Hence we may take it for granted that all the facts set forth in the plaintiffs' bill of complaint are true.

The defendants' first cause for demurrer cannot be sustained. While it is the rule in equity that there can be no injunction allowed to restrain the collection of taxes, unless it is alleged that the tax

attempted to be collected is illegal or irregular, as was ruled in the case of Maloney v. McNeish, Jr., 6 Luz. Leg. Reg. 158; yet that is the very point raised in this case. When, therefore, it is raised, injunction is the proper remedy to protect the rights of the taxpayers: St. Clair's Appeal, 24 P. F. Smith, 256; Cooley on Taxation, 536.

The second and third reasons for demurrer may be considered together. The first section of the act of 1875 provides how all taxes in a city of the third class may be levied, and by this real estate is classified. In the case of Wheeler v. Philadelphia, 27 P. F. Smith, 349, it was held that for the purpose of taxation real estate may be classified, * * * and may be divided into distinct classes, and subjected to different rates. See also Kittanning Coal Co. v. Commonwealth, 29 P. F. Smith, 104; Central Board v. Phelps, 5 Weekly Notes, 61.

It cannot be denied but that the act of 1875 is a supplement to the act of 1874, creating cities of the third class; nevertheless, it is contended that the city of Scranton, although a city of the third class, never did accept the provisions of this supplement. The certificate of acceptance issued by the governor expressly says that the provisions of the act of 1874 and the supplement thereto were accepted for the management and government of the city of Scranton. It is true that the ordinance accepting the provisions of the act of 1874 and its supplement was passed by the common council on the 15th day of March, 1877, and by the select council on the 16th of March, same year. It is, however, provided by the fifth section of the act of 1875 "that no city of the third class, nor any city of less population than ten thousand inhabitants, heretofore incorporated, shall not become subject to the * * provisions of this act until the same are accepted by an ordinance duly passed by a majority of the members elected by each branch." But it must be borne in mind when the act of 1875 was passed, and approved on the 18th day of March, 1875, Scranton was then not a city of the third class, and did not have at that time a population less than ten thousand. Hence it was not required, as pressed on the argument of this demurrer, that an ordinance should be passed before the city of Scranton became subject to the provisions of the act of 1875. We have no hesitation in saying that a city of the third class, incorporated prior to the approval of the act of 1875, under the act of 1874, must pass an ordinance, as required by the fifth section, before she can become subject to the provisions of the act of 1875. But this law does not apply to a city of the third class incorporated after the approval of the act of 1875.

We, therefore, overrule the demurrer of the defendants, and award a preliminary injunction as prayed for; not to issue, however, or become operative, until the plaintiffs shall have given bond in the sum $500.00, conditioned according to law, and approved by the court, and thereupon court direct rule to issue to show cause why the injunction shall not be dissolved. Returnable Friday, May 17, 1878, at 10 A. M.

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VOL. 7. FRIDAY, MAY 24, 1878. NO. 21.

COMMON PLEAS OF LUZERNE COUNTY.

Woolsey et al. v. Durkin et al.

1. Thomas Durkin, one of the defendants, was elected treasurer of the city of Scranton, and by virtue of his office became *ex officio* treasurer of the school funds. To secure sureties, such as the board of school controllers demanded on his official bond, Durkin entered into a combination, by which certain portions of his fees were to be paid to other parties; and in addition thereto, the board of school controllers agreed to pay four per cent. of the school taxes to his deputy collector. The citizens and taxpayers moved for an injunction, which was allowed: *Held*, on argument of the rule to dissolve, that the agreement to pay four per cent. of the school taxes was waste or fraud, and contrary to law.
2. The board of school controllers levied the school taxes for the year 1877 at the rate of nine mills on the dollar, gross valuation: *Held*, first, that the assessment and levy should have been made strictly in accordance with the first section of the act of 1875, which provides for the classification of all real estate for taxable purposes; and second, that the levy not having been made as the statute requires, the injunction heretofore granted must be continued until further order.

In Equity. Rule to dissolve preliminary injunction.

Opinion by HANDLEY, J. May 20, 1878.

The plaintiffs in this proceeding complain and say, that they are citizens, residents, and taxpayers of the city of Scranton, and as such are bound by law to pay all taxes justly assessed and levied on their real estate, and as such citizens, residents, and real estate owners are directly interested in every question which can or may in anywise whatever increase or augment the amount of said taxes chargeable upon their property in said city and school district, and in the lawful econominal administration of the affairs thereof; that Thomas Durkin was according to law elected treasurer of the city of Scranton, and by reason thereof is *ex officio* school treasurer of the Scranton school district, and as such has been duly qualified, and has undertaken the discharge and duties thereof, and now fills the said office; that W. W. Winton was by the said school controllers of the said Scranton school district appointed collector and receiver of the school taxes of the said district; that the said W. W. Winton was appointed * * at a time not authorized by law; that the school controllers of the said district are wasting the school taxes by unlawfully appropriating four per centum of the gross sum collected to the said W. W. Winton as commissions for the collection thereof; that the said Winton is unlawfully and wrongfully imposing fines and penalties upon the plaintiffs, as well as other citizens, residents, and taxpayers of the district aforesaid, for the non-payment of the said taxes; that the city of Scranton, which

now comprises the said district, is a city of the third class by ordinance and letters patent issued by the governor of the commonwealth of Pennsylvania, and by reason thereof is subject to the provisions of the Act of the General Assembly, * * approved the 23d of May, 1874, entitled "An Act dividing cities of this state into three classes," and the supplement thereto; that the annual assessment for school taxes levied in said district for the year 1877 was not made and completed on or before the first day of June, in said year, as required by law; that the real estate * * of the plaintiffs, as well as the real estate of the other taxpayers of said district, was not classified and arranged into three classes as required by the act of 1875; that the duplicate of the said school district for the year 1877 was not made and placed in the possession of the said treasurer on or before the first day of July, 1877, as required by law; that the councils of said city and the board of controllers therein did not at the first stated meeting of their respective bodies in the month of September, 1877, severally elect tax collectors to collect the city taxes and the school taxes respectively, which should remain unpaid on the first day of January, 1878, as required by law; * * that the said treasurer and the *ex officio* treasurer of the said school tax did not, after the first day of January, 1878, place correct and detailed statements, or any statements whatever of the taxes then remaining unpaid in the hands of the city solicitor, who should then forthwith proceed to collect the same as provided for by existing laws; that the said school tax of the district aforesaid now attempted to be collected from the plaintiffs * * is wholly illegal and void; and that the said Thomas Durkin, W. W. Winton, the school controllers, nor any other person or persons appointed by them, or with their consent, have no legal authority whatever to demand or collect the said school tax of the district aforesaid, assessed, levied, and imposed as herein stated, for the year 1877, from the plaintffs, or from the other citizens of Scranton; that the said school tax is levied on the gross valuation of each taxable person at the rate of nine mills on the dollar of such valuation, as made by the authorities of the said city, without any regard to the classification of the real estate and improvements thereon, * * in pursuance of the provisions of the acts of 1874 and 1875; that the school tax should be levied in accordance with the rates established by the act of 1875, and not with a common rate over all classes; that in making the assessment for the city of Scranton, the councils of said city, in revising the returns of the assessors, having in view the provisions of the act of 1875, reduced the valuatlon of all property of the first class, and raised all property of the second and third classes, in such manner as to make the several persons pay the same rate of tax as heretofore, thereby increasing the tax on third class property more than the law itself would produce by a common rate of levy upon all classes; wherefore, the plaintiffs pray that a preliminary injunction may issue restraining

the said Durkin and Winton from collecting the said tax, and thereafter, upon proper showing, the said injunction to be made perpetual.

Preliminary injunction was awarded, and at the hearing of the rule to dissolve the defendants filed their affidavits by way of answer. Mr. William Connell, president of the board of school controllers, says, in his answer, that W. W. Winton was duly elected tax collector to collect the school taxes for said district for the year 1877-8, * * and gave bond, with sureties, for the faithful performance of his duties according to law; that the duplicate for school taxes placed in the hands of Mr. Winton is the duplicate of school taxes for the Scranton school district for the year 1877-8, which remained unpaid on the first day of January, 1878; and that the tax attempted to be collected by the said board of control through said Winton is the regular assessed tax necessary to keep the schools of said district in operation, not less than five nor more than ten months, and for building purposes, for said school year; and that the taxes which said Winton was authorized to collect are taxes which remained unpaid on the first day of January, 1878; that the said taxes were levied upon adjusted valuations made for city purposes for the year 1877-8; that the said valuation for city purposes was not made and computed until after the first day of June, 1877, owing to the delay of the city authorities in making and computing the same; hence the board of controllers could not have the duplicate of school taxes prepared any earlier than they did; that Durkin did not give bond, as required by law, to the authorities of said school district until late in December, 1877; and that said board of controllers made every effort and used all reasonable diligence in preparing the duplicate of school taxes, and placing the same in the hands of the proper officer, but that they were prevented from doing so by the delay of the city authorities in completing the valuation for city purposes, and by the failure and neglect of the said Durkin to qualify and give bond as *ex officio* school treasurer. The affidavit of Mr. R. T. Black, a member of the school board, was also presented, filed, and read upon the argument of the rule. Mr. Black's affidavit contains the same statements set out in the affidavit of Mr. Connell; hence we need not refer to it here in detail.

The bill and answer here presented raises several very important legal questions for our consideration; but so far as the disposition of this rule is concerned, the only two questions we are called upon to decide at this particular point in the history of this case are:

1. Whether the tax now attempted to be collected was assessed and levied according to law?

2. Whether the board of controllers of the Scranton school district are authorized under the law to pay four per cent. of the school funds for the collection thereof?

It was ably argued on the part of the board of school controllers that the Scranton school district is not subject to the laws of 1874 and

1875, and yet in the face of this argument every official act of the controllers since Scranton became a city of the third class is contrary to the doctrine then and there enunciated. Prior to the adoption of the provisions of the acts of 1874 and 1875 we had at least four separate and independent school districts within the territory of the city of Scranton: now, however, these districts are all consolidated into one body. The governor of this commonwealth on the 4th day of April, 1877, issued his certificate announcing that "the city of Scranton was incorporated by an act of assembly, * * and that on the 3d day of April, 1877, there was filed in the office of the secretary of the commonwealth a certified copy of an ordinance passed by the select council of the city of Scranton on the 15th day of March, 1877, and by the common council on the 16th day of March, 1877, * * accepting and adopting the provisions of the Act of the 23d of May, 1874, and the supplement thereto, for the management and government of the city of Scranton." The fifty-seventh section of the act of 1874 provides that after such acceptance, and the issuing of the certificate by the governor, such city "shall be governed, controlled, and regulated by and under the provisions of the act" of 1874.

We now have the city of Scranton, according to the model made by the law-making power, erected into a city of the third class, subject to the laws dividing cities of this state into three classes. The instant the governor attached his signature to the certificate in question, the city of Scranton surrendered her old charter and all the rights she had acquired under the law made in pursuance thereof, except only such "rights, powers, privileges, and franchises heretofore by law conferred on such city *not* inconsistent with the provisions of this act."

The forty-first section of the act of 1874, P. L. p. 254, provides that "each of the said cities of the third class shall constitute one school district, * * and the members of the board of school controllers * * shall have power to levy and collect taxes." And by the fifty-eighth section of the same act it is provided that "in any cities in which there may be more than one school district, the several directors shall meet jointly, and perform all the duties pertaining to the consolidated district until the next municipal election, *but no longer*." This provision is specially applicable to the city of Scranton, she having had more than one school district within her corporate limits. The forty-third section of said act provides that "the annual assessment of school taxes shall be completed on or before the first day of June in each and every year." But whether the school controllers did make the assessment for the year 1877 in time, or whether they complied with any of the provisions of said section, we will not now decide.

This brings us, therefore, to the first question, namely, whether the tax now attempted to be collected was assessed and levied according to law?

The thirty-sixth section of the act of 1874, P. L. p. 2-9, provides that "the annual assessment for *all taxes* levied in said city shall be completed, * * and upon the duplicate having been made, * * the same shall be placed in the possession of the city treasurer, who shall receive and collect said taxes." Article IX., section 1, of the constitution of 1874, provides that "taxes shall be uniform upon the same class of subjects, * * and shall be levied and collected under general laws." Section 20, clause 1, of the act of 1874, P. L. 238, provides that "cities of the third class in their corporate capacities are authorized and impowered * * to levy and collect taxes for general revenue purposes, not to exceed ten mills on the dollar, in any one year, on all real, personal, and mixed property within the limits of said cities, according to the laws of the state; the valuation of such property to be taken from the assessed valuation * * under the provisions of law regulating the same." Section one of the act of 1875, P. L. 15, provides that "it shall be lawful for cities of the third class to provide * * for the assessment and collection of taxes, and that the judges of the Court of Common Pleas of the county in which said city shall be situated shall have power, and are hereby required, to appoint * * one assessor in each ward of the city; such assessors shall make a full and complete valuation and assessment of all taxable property; * * such assessment and modification shall be deemed and considered as the annual assessment required in any city by existing laws; and that in all cities of the third class all real estate and the improvements thereon shall for taxable purposes be classified and arranged in three classes, as follows: The *first class* shall include such as shall be occupied in whole or in part by stores, hotels, boarding houses, saloons, offices, banks, bankers, storage places, lumber yards, or as places where any and all other kind or kinds of business may or shall be controlled or carried on; * * the *second class* shall include such as shall be used for private dwellings, with the out-buildings, together with the lot or portion of ground used in connection with said improvements, and garden not exceeding in the aggregate two acres; * * and the *third class* shall include all such as shall be held and used for agricultural, horticultural, and farm purposes, and such as may be wholly vacant and unimproved; but no improvements shall be subject to pay a tax until the same be completed, or ready for use, and occupied; that all taxes authorized to be collected in said cities, whether for general or special purposes of such city of the third class, shall be assessed, levied, and collected as follows: Upon property of the first class a full rate, and upon property of the second class a two-third rate, and upon property of the third class a one-half rate."

In the case of the Delaware and Hudson Canal Company et al. v. The Scranton School District et al., 7 Luz. Leg. Reg. 93, we held that the city of Scranton, having accepted the provisions of the act of 1874

after the passage of the act of 1875, is a city of the third class and under the provisions of the act of 1875, notwithstanding the ordinance required by the fifth section had not been passed.

It seems strange that an intelligent body of gentlemen, such as compose the board of school controllers, could err in making the assessment and levy after reading the plain instructions of the act of 1875. Yet they have erred. Instead of following the path pointed out to them by the law-making power, they preferred to assess the school tax in gross, when the assessment and levy should have been classified as required by the act of 1875.

The second question needs no very elaborate investigation. The school controllers exceeded their authority when they agreed to pay four per cent. of the school fund to W. W. Winton. Such an act, in these times, is either waste or fraud. There is no other compensation allowed for the collection of the taxes assessed and levied in cities of third class than that allowed by law, and there is certainly nothing in the act of 1874 and its supplement that authorizes the payment of four per cent.

We must, therefore, hold that the assessment and levy in gross for school tax is contrary to law, and hence order and direct the injunction heretofore granted to be continued until further order.

J. H. Campbell and C. Smith, for plaintiffs.

Gunster & Welles and A. H. Winton, for defendants.

There is a curious case in Coke's "Second Institute," p. 562, ed. 1797. Indictment against a parson for conspiracy, who pleads that he was "communis advocatus," and so justified as attorney to the other. It was found that he was "communis advocatus," and not guilty.

In a recent case (Birks v. Allison, 9 Jurist N. S. 694, 695; 13 C. B. N. S. 12, 23) Mr. Justice Byles observed: "I was much struck with the quotation from Webster's Dictionary where one of the definitions given of 'tenant' is, one who has the occupation or temporary possession of lands or tenements whose title is in another." The quotation is from Cowley:

O fields, O woods, O, when shall I be made
The happy *tenant* of your shade?

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VOL. 7. FRIDAY, MAY 31, 1878. NO. 22.

SUPREME COURT OF PENNSYLVANIA.

Sturges' Appeal.

1. The lien of a *fi. fa.* against personal property, pending a rule to show cause why execution shall not be stayed, does not continue beyond the return day, without previous levy; but if a levy has actually been made, its lien is preserved until the rule is disposed of, although no order to that effect is made.
2. A levy may be made by virtue of a writ of *fieri facias* at any time before and on its return day, but not afterwards.
3. It is the duty of the court on staying executions to direct a levy to be made, when not previously done, for the purpose of preserving liens.

Appeal from Court of Common Pleas of Luzerne county.

Opinion by TRUNKEY, J. April 1, 1878.

The power of the court to stay the writ has not been questioned. In the execution of such power, the duty of the court to direct levy to be made, and preserve the lien during pendency of the rule, is well settled. Without special order that the lien of the writ will continue till the return day may be conceded. The lien of a levy will continue pending the rule, though no order be made: Batdorf v. Focht & Bro., 8 Wr. 195. In the absence of a levy, that the lien of a *fi. fa.* continues after the return day, is unheard of in the jurisprudence of this state.

Among principles not gainsaid are these: A levy may be made by virtue of a writ of *fieri facias* at any time before and on its return day, but not afterwards. By levy on personalty, the officer acquires a special property in the goods seized, which he may sell before or after the return day in satisfaction of his writ. Except for the purpose of detention and sale of the property previously levied upon, an execution after its return day is dead. An officer making levy and sale after his writ has expired is a trespasser, and the purchaser acquires no title: Freeman on Ex. § 106.

The research of counsel has discovered no case where the lien of a *fieri facias*, without levy, did not end with the writ. How it could be otherwise is difficult to imagine. The officer can do nothing with a defunct writ but return it. No process has been devised whereby goods, which had once been subject to the lien of an execution expired and returned, may be seized and sold in satisfaction of the lost lien.

The effect of an order of court staying an execution until after the return day was well stated by Bell, J., in Commonwealth v. Magee, 8

Barr, 240: "Its functions were thus suspended until by lapse of time its vitality was extinguished. Beyond the return day its operation and vigor could only have been preserved by an actual levy; * * but a levy being wanting, it had no hold on the goods after the return day. Consequently, the second execution was the only effective one in the hands of the sheriff at the time of the sale of the goods. The proceeds were, therefore, properly applied in satisfaction of it." If this be a dictum, and unnecessary to the decision of that case, it is an accurate expression of the law applicable here.

The plaintiff had a right to execution of his judgment. For apparent cause, before execution issued, the court could have granted a rule and stayed execution. Pending the rule, the defendants goods might have been seized by another creditor, and the plaintiff's judgment become worthless. In such case, no power, legal or equitable, exists to give him the proceeds of the goods. He issued execution, and, for apparent cause shown to the court, rule was granted and proceedings on the writ stayed. The writ was returned unexecuted afterwards. The defendant's goods were sold on another execution. The plaintiff has no better title to the proceeds than if he had been prevented from issuing execution. Such consequences should induce judges to observe the oft-repeated admonition, "on staying execution, to direct levy to be made when not done, and preserve liens." The serious result of the mistake in staying the writ, and suffering it to die without a levy, has led the original party to demand the money on the ground that the court will redress the wrong done by their own act. This is urged the more because the court, when distributing a fund in their possession, will always overlook technicalities, and do equity. A hardship must be distinguished from a right. If the appellant has no right to the fund, no equity power can give it to him. The lien on the property which expired before the sheriff's sale gave no right to its proceeds. That the court, in the exercise of their judicial functions, struck down the lien, is a hardship; and now to give the money to the sufferer, who thereby lost his right, would be another wrong. A court of equity may not take money of A. to redress their own wrong done to B. With no lien upon the property at the time of sale, the appellant has no right to the fund, and without right has no footing in equity.

Decree affirmed, and appeal dismissed at the cost of the appellant.

Alfred Hand and E. B. Sturges, for appellant.

Geo. R. Bedford and W. H. Gearhart, for appellee.

The Irish statute-book opens characteristically with "An Act that the King's officers may travel *by sea* from one place to another with *the land* of Ireland."

SUPREME COURT OF NEW YORK.

Catharine Curry v. Robert Curry. The Same v. John Curry.

1. An ante nuptial agreement by which a woman, in contemplation of marriage, and without other consideration, except the proposed marriage, agrees to forego right of dower in certain lands of the proposed husband, is contrary to public policy and not binding on the woman.
2. A provision in an agreement that the said agreement shall not affect the proposed wife's rights to be acquired by the marriage in respect to other lands or property, constitutes no sufficient consideration for the relinquishment of the right of dower in the specified lands.

These two cases, which were based on the same facts, tried at the same time before the same referee, were argued and considered together on appeal from the report of the referee in favor of the defendant in each case. Each case was an action of ejectment for dower in a farm in Monroe county, which had been devised by Robert J. Curry, dec'd, to the defendants, his two sons, respectively. The referee reported in favor of the defendant in each case, giving effect to an ante nuptial agreement made between the plaintiff and Robert J. Curry, entered into between the parties in contemplation of marriage, and about an hour before the marriage took place.

The ante nuptial agreement was duly executed and acknowledged by the parties, and in substance recites that the plaintiff (then Catharine Barry) in consideration of a marriage about to be had and solemnized between the parties, and in consideration of one dollar, "doth hereby covenant and agree with the said Robert J. Curry, that the said Robert J. Curry, his heirs and assigns, shall, and will forever hereafter, stand siezed of and sole owners to" the said two farms, "to the use of the said Robert J. Curry, his heirs and assigns, freed from all claims of dower or interest therein of the said Catharine, both before and after the decease of the said Robert J. Curry." And it was further stated in the said agreement that it was thereby intended that the said agreement should operate as a release and discharge of all claims for dower which the said Catharine might acquire by virtue of her marriage with said Robert J. Curry, and that the said two farms should be and the same were thereby discharged of and from all claims which the said Catharine might have or acquire by such marriage; and it was furthermore provided that the said agreement was not to affect or impair any claim of the said Catharine by virtue of said marriage in any other real or personal estate of the said Robert J. Curry.

The instrument was executed under seal by both parties, and was duly acknowledged by each. The marriage was duly solemnized immediately after such execution and acknowledgment, and, as the referee finds as matter of fact, "in reliance upon it, and in the belief that by its provisions two parcels of land therein described were free and clear from all claim for dower or other interest therein to which

the plaintiff would otherwise be entitled by said marriage." There was no actual consideration paid or given to the plaintiff as the consideration for the execution of said agreement. The agreement was made in 1864, and the parties lived together in wedlock until the year 1875, when Robert J. Curry died seized of the two farms in question and of several other parcels of land.

Held, that an ante nuptial contract of a female that she will not claim her dower in the event of her intended marriage is contrary to public policy, and unless founded on consideration of some provision for her in lieu of dower will be ineffectual both at law and in equity: 4 Kent's Com. 56, note *b;* Power v. Shiel, 1 Mallory, 296; Miller v. Folger, 14 Ohio, 610; Gould v. Vomack, 2 Ala. 83.

The marriage itself, however advantageous to the woman it may appear, is not a sufficient consideration to support the contract to forego dower.

By the Rev. Stat., 1 R. S. 741, § 9, the settlement of lands upon any intended husband and wife, or the wife alone, for the purpose of creating a jointure, and with her assent, is sufficient to bar dower. So, by section 11, any pecuniary provision made for the benefit of an intended wife in lieu of dower, and with her assent, is sufficient.

The assumption by the referee that the provision in the ante nuptial agreement, that the release therein contained should not affect or impair the right of the plaintiff to any other of the property of her intended husband, did not imply a covenant on his part to do nothing to affect or impair her rights in regard to his other property was, in itself, entirely useless and of no effect, as without it the argreement could not affect any rights not specified in it, and constituted no valid consideration for the attempted relinquishment of dower in the two farms.

Judgment in both cases reversed, and new trial ordered, with costs to abide the event.

Opinion by TALCOTT, J.

A woman libelled in the Arches against another for calling of her jade, and a prohibition was prayed and granted, because the words were not defamatory. And Reeve said that for whore or bawd no prohibition would lie, but they doubted of quean: March, pl. 235.

If judges in any court, said Lord Robertson (Miller v. Hope, 2 Shaw Appeal Cases, p. 134), were liable to be called to an account for words spoken in their judicial capacity, it may be said, in the words of Lord Stair, "No man but a beggar or a fool would be a judge."

The Luzerne Legal Register.

VOL. 7. FRIDAY, JUNE 7, 1878. No. 23.

The next Sheriff's sales day will be on Saturday, July 20. The last day for advertising will be June 24.

TO SUBSCRIBERS AND ADVERTISERS.

A large number of bills have been sent out by us, to a considerable number of which no response has been made. We need money, and hereby call the attention of our readers to their unpaid accounts, and ask for a remittance of dues.

COMMON PLEAS OF LUZERNE COUNTY.

The Delaware and Hndson Canal Co. v. The Scranton School District.

Preliminary injunction will be continued on the hearing to dissolve unless the defendant, by answer or affidavit, denies all the material facts alleged in the plaintiff's bill.

Rule to dissolve preliminary injunction.

Opinion by HANDLEY, J. May 31, 1878.

This rule was argued on the part of the defendants before filing answer and affidavit. It is well established in equity practice that where preliminary injunction is awarded, such injunction will be continued until further order, unless the defendant, by answer or affidavit, denies all the material facts alleged in the plaintiff's bill: O'Hora v. Horn, 5 Luz. Leg. Reg. 67. In this case, however, we do not desire to hold the defendants to this rule. We have examined the point raised on the argument of this rule, namely, that the city of Scranton was from the date of the approval of the Act of the 23d of May, 1874, entitled "An Act dividing cities into three classes," &c., a city of the third class. We cannot assent to this proposition. Scranton, as we have

said before when this case was up on demurrer, became a city of the third class only from the 4th day of April, 1877, that being the day when the governor issued his certificate announcing that she surrendered her former charter, and adopted the laws pointed out by the act of 1874 and its supplement.

We, therefore, order and direct the injunction heretofore granted in this case continued until further order.

A. Hand, for plaintiffs.

F. W. Gunster, for defendants.

Matthews et al. v. The City of Scranton et al.

1. The plaintiffs filed their bill praying that the city of Scranton, and certain officials named, be restrained by injunction from performing certain official acts. Preliminary injunction was allowed as prayed for, and upon the return day of the rule to dissolve, the defendants moved to have the plaintiffs' bill dismissed for want of jurisdiction: *Held*, first, that the motion must be dismissed; second, that the courts have equity power over municipal corporations for the prevention or restraint of acts contrary to law and prejudicial to the interests of the community, or the rights of individuals.
2. Whenever a municipal corporation is grossly abusing its privileges, and encroaching upon the rights of individuals, the courts may, while sitting in equity, interfere by injunction.

Motion to dissolve plaintiffs' bill for want of jurisdiction.

Opinion by HANDLEY, J. May 31, 1878.

When this case was called for argument counsel for the defendants moved that plaintiffs' bill be dismissed for want of jurisdiction, and filed the following reasons, viz:

1. That the plaintiffs' bill in this case ought not to be entertained or considered by the court for the reason that the defendants therein named are a municipal corporation, and the duly constituted officers thereof, and the said bill is brought for the purpose of restraining the official acts of said officers, * * in regard to which matters * * this court has no jurisdiction in this form of action

2. That the bill should be dismissed because the defendants set forth no irreparable injury * * done or about to be done to them.

We are not called upon at this particular point in the history of this case to pass upon any other question connected with this motion, except only the first question, namely, jurisdiction. It cannot be denied but that the city of Scranton is a municipal corporation, and that the several officers named in the plaintiffs' bill were at the time this bill was filed and the injunction allowed the officials of the city. The Act of the 16th of June, 1836, relied upon by the city solicitor to sustain this motion, provides, among other things, that this court, sitting in equity, "shall have the supervision and control of partnerships and corporations, other than municipal corporations." These words standing

alone would oust the jurisdiction of this court, so far as the city of Scranton is concerned. But the fifth clause of the thirteenth section of the act of 1836 must be considered in connection with other parts of the law. The language of this clause is clear, precise, and to the point. It gives us equity power for "the prevention or restraint of acts contrary to law and prejudicial to the interests of the community, or the rights of individuals," without restraint, or in any manner, excepting municipal corporations. Hence whenever a municipal corporation is grossly abusing its privileges and encroaching upon the rights of individuals, this court may, while sitting in equity, interfere by injunction. Upon this principal, before the adoption of the constitution of 1874, a perpetual injunction was granted in 1849 against the mayor and council of the city of Allegheny, when the public acts of that municipal corporation were shown to be injurious to the public and the rights of individuals. This decision was, on an appeal, affirmed by the Supreme Court. See Commonwealth v. Rush et al., 2 Harris, 186; Hayner v. Heyberger, 7 W. & S. 107; Kerr v. Trego et al., 11 Wright, 292. If this doctrine was recognized and sustained by the highest court of our state away back in 1849, how much stronger is the reason for equity courts to interfere with the affairs of municipal corporation since the adoption of the constitution of 1874, and the laws made in pursuance thereof? There can be no doubt now about our jurisdiction since the Supreme Court decided the question involved in the case of Wheeler v. Philadelphia, 27 P. F. Smith, 344. In that case, decided in 1875, it was held that municipal corporations may be restrained by injunction "from over-stepping the boundaries of their authority, and trampling both laws and constitution under foot."

It would be a brave man who would face the taxpayers of Scranton and say that a part of her municipal officers have not joined hands with the thieves who have grown rich while plundering the city of her money and other valuable property since the day she was first incorporated. But without saying anything more of the manner in which the financial affairs of this city are managed, and her debt created, and how the taxpayers have been robbed from year to year, it is sufficient to say that a municipal corporation may be restrained by injunction whenever her officers have transcended their lawful authority, or have violated their legal duties in any mode, especially when such acts injuriously affect the taxpayers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property: 2 Dillon, 829, § 731.

We must, therefore, refuse this motion, and direct counsel to proceed with the argument of the rule to show cause why this injunction shall not be dissolved. Motion refused.

J. H. Campbell, for plaintiffs.

I. H. Burns, for defendants.

COMMON PLEAS OF PHILADELPHIA.

In Re Charter of the West Park Avenue Methodist Episcopal Church.

1. Approval of charter of a church withheld until amended so as to conform strictly to the provisions of Act of 26th of April, 1855.
2. The charter should be written on one sheet of paper.

Opinion by BRIGGS, J. May 27, 1878.

The draft of charter presented for approval does not conform to the provisions of Act of April 26, 1855, which require that the property of the corporation shall be held and inure subject to the control and disposition of the lay members of the corporation, or such constituted officers or representatives thereof as shall be composed of a majority of lay members, citizens of Pennsylvania, having a controlling power. And that "no charter hereafter granted by any court for any church, congregation, or religious society, shall be valid without requiring such property to be taken, held, and to inure subject as aforesaid." By the decision of the Supreme Court in the application of the Alexander Presbyterian Church, that provision should be inserted in the charter in the words of the law: 3 Casey, 154.

The charter should also contain a provision expressly limiting the value of the real and personal estate of the corporation, so that the annual value thereof shall not exceed the maximum declared in the eighth and twelfth sections of the act above cited.

The charter should also be written on one sheet of paper: 9 Philada. R. 237; 6 Casey, 144; 8 Philada. R. 229.

Approval withheld until these defects be cured.—*Leg. Int.*

A woman shook a sword in a cutler's shop against the plaintiff, being on the other side of the street; and in trespass for assault and battery, there was a verdict of the assault, and not guilty of the battery. It was prayed to give no more costs than damages, and so granted; which was a noble: Smith v. Newsam, 3 Keble, 283.

A man grants all trees in such a close, excepting one plump of oaks, being eight in number, and there were nine of them, and the grantee did cut them all down, and that plump among the rest, and holden the exception abovesaid not good for the variance, but all did pass: Clayton, 149.

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VOL. 7. FRIDAY, JUNE 14, 1878. No. 24.

SUPREME COURT OF PENNSYLVANIA.

Sanderson et nx. v. The Pennsylvania Coal Company.

Defendants, in the ordinary process of mining coal, pumped mine water to the surface, whence it flowed, by the natural water-shed, over their land and into a natural stream: *Held*, that, although the chemical condition of the water thus pumped was not changed by any act of the defendants, they might be liable in damages to a lower riparian owner.

The plaintiff, a riparian owner in possession, introduced the water of the stream into his residence for domestic purposes. Subsequently, the defendants established a colliery higher up the stream, and suffered the water pumped from the mine to flow over their own land and into the stream. There was evidence that the water of the stream was rendered impure by the admixture of the mine water: *Held*, that the defendants mining operations causing the collection of mine water in such volume as to require its ejection "in such direction as to render what was harmless in its natural state a source of material discomfort, mischief, and disaster," they are liable.

Error to Court of Common Pleas of Luzerne county.

Opinion by WOODWARD, J. May 6, 1878.

In the year 1868 the plaintiffs purchased a tract of land in the city of Scranton, and began the erection of a house upon it, which was finished in the year 1870. Before the purchase a stream of water, which ran through the land, was examined by Mr. Sanderson, who traced it to its source. It appears from his testimony that the existence of this stream was a leading inducement to the plaintiffs to buy and build. It was called by some of the witnesses "Meadow brook," and was of an average width of perhaps seven feet throughout the distance from the house of the plaintiffs to the springs from which it flowed. Mr. Sanderson testified that when he traced it in 1868 the water was perfectly pure. Dams were built across it for the purposes of a fish and ice pond, and to supply a cistern. Water was carried in pipes from the cistern to a ram, and thence to a tank in the attic of the house. After the improvements were completed, the defendants established a colliery on lands belonging to them along the stream, and about two miles above the land of the plaintiffs. A drift was first made into their mine, and a shaft was afterwards sunk. The water which collected in the drift, as well as that pumped by powerful engines from the shaft, ran into Meadow brook, and was carried to its outlet in the Lackawanna river. It was alleged on the trial that the effect of the mine water was to corrupt the water of the stream, and to render it worse than worthless for any domestic or household use. There

was evidence that the fish in the brook were destroyed; that the willows along the banks died; that the pipes connecting it with the cistern, the ram, and the house were corroded and eaten out; that the water became unfit for domestic uses as early as 1873, and that its use for all purposes was abandoned in 1875. After the evidence of the plaintiffs had been given, it was held by the court to be inadequate to warrant or support a verdict, and a nonsuit was directed.

In the summary disposition that was made of the cause, sight appears to have been lost of some distinctions which the law has settled, and a mistake seems to have been made in choosing the class of precedents that were followed. The water in the mine of the defendants was in the ground before the colliery existed, but the drift and shaft collected it in such volume, and the mining operations made its ejection necessary in such direction as to render what was harmless in its natural state a source of material discomfort, mischief, and disaster. Undoubtedly the defendants were engaged in a perfectly lawful business, in which large expenditures had been made, and with which wide-spread interests were connected. But however laudable an industry may be, its managers are still subject to the rule, that their property cannot be so used as to inflict injury on the property of their neighbors. "Every man," Lord Turso observed in Egerton v. Earl Brownlow, 4 H. L. Cases, 195, "is restricted against using his property to the prejudice of others." The invasion of an established right will in general *per se* constitute an injury, for which damages are recoverable; for in all civil acts the interest of the actor is less regarded than the consequences to the party suffering. Thus, if a man lop a tree, and the boughs *ipso invito* fall upon another, or he shoot at a bull, and hit another unawares, an action lies. So one is liable who has land through which a river runs to turn his neighbor's mill, and lops the trees growing on the river side, and the lopping impedes the progress of the stream, which hinders the mill from working: Broomsley Man. 366, 367. To render a particular case an exception to the general principles controlling the exercise of dominion over property by its proprietor, it must be ascertained to be exceptional in its surroundings or its facts. From necessity, the principles are sometimes relaxed. They do not apply where it is impossible to gather safe facts to become basis for safe rules. With respect to water flowing in a subterraneous course, it has been held that the owner of land through which it flows has no right or interest which will enable him to maintain an action against an owner who is carrying on mining operations in his own land, in the usual manner, drains away the water from the other's land, and lays the well dry. Acton v. Blundell, 12 M. & W. 324, Haldeman v. Bruckhart, 9 Wr. 514, and Wheatly v. Baugh, 1 Cas. 528, were ruled in the same way. So rights and liabilities in respect of artificial streams, when first flowing on the surface, are in some particulars distinct from those respecting natural streams so flowing. They are distinct at least

to the extent that the user of the easement of sending on the water of an artificial stream to the land of a neighbor is no evidence that the land from which the water is sent has become subject to the servitude of being bound to send it on: Gavèd v. Martin, 19 C. B. (N. S.) 758. Perhaps Smith v. Kenrick, 7 C. B. 715, may be classed as an exceptional case also in its circumstances, although as a precedent it will probably prove of doubtful value. It was held there that each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine. But, except where it is qualified by the existence of peculiar conditions, the duty of the owner of property is defined by the maxim, *Sic utere tuo ut alienum non laedas.* Can it be said as a conclusion of law that the duty of these defendants is qualified by such conditions? They created an artificial water-course from their mine to Meadow brook. The plaintiffs insisted that the act resulted in grave injury to them. Why ought not the jury to have been left to determine the truth or falsity of their allegation? It was declared in Gaved v. Martin, *supra*, that if the water in an artificial stream, when brought to the surface, is made to flow on the land of a neighbor without his consent, it is a wrong, for which the party causing it so to flow is liable. If a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his own peril, and is liable for the consequences if it escapes and does injury to another: Jones v. Festiniog, L. R. 3 Q. B. 736. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir (Harrison v. Great North Western R. R. Co., 3 Hurl. & Colt. 238), or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works (St. Helen's Smelting Co. v. Tipping, 11 H. L. Cases, 642), is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it was confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property: Fletcher v. Rylands, L. R. 1 Ex. 280. In an elaborate and carefully considered opinion in Mason v. Hill, 5 B. & A. 1, Denman, C. J., held that the possessor of land through which a natural stream runs has the right to the advantage of that stream, flowing in its natural course, not inconsistent with a similar right in the proprietors of the land above and below; and that neither can any proprietor above diminish the quantity or injure the quality of the water; nor can any proprietor below throw back the water without his license or grant. It was one of the features of that case, that water which the defendant had the right to use, subject

to the duty of returning it, was heated when it was returned to the stream, and the jury had assessed damages for that. The chief justice said in entering judgment, "As to the right to recover for the injury sustained by the water being returned in a heated state, there can be no question." In Wood v. Sutliff, 16 Jur. 75, and 8 E. L. & Eq. R. 217, an injunction was granted to restrain the defendant, against whom a recovery had been had at law, from pouring dye wares, dye liquors, madder, indigo, or potash into a channel that connected his dye works with a stream called the "Bowling Beck," on which, below the works, the cotton mill of the plaintiffs was situated, and in the use of the water of which they claimed prescription rights. "I am satisfied from the evidence," the vice chancellor remarked in the course of his opinion, "that to some considerable extent the pollution of this stream is inevitable, and that no court of law, or court of equity, nor all the courts in the world, except there were a power of removing all that mass of human beings which now congregate about its banks, ever could restore it to the state in which it once was. But still it does not follow, because there be a certain degree of pollution which cannot be very accurately measured, and which is inevitable, that, therefore, everybody has a right to pollute the stream by pouring in immense quantities of filth and pollution from his own works to make it ten thousand times worse." Pennington v. Brinksop Hall Coal Co., 5 C. Div. 769, was a case where an injunction was granted to restrain the defendants from pumping water from their colliery into Borsdane brook, by which the water in use for the cotton mill of the plaintiffs had been corrupted. While their claim included the assertion of a presc iptive right, it was discussed mainly in view of the position of the plaintiffs as sub-riparian owners by the justice who granted the injunction. In answer to the suggestion, that in lieu of the remedy sought, damages should be awarded, it was said that "the rights of the plaintiffs as riparian owners are not limited to their present modes of enjoyment. It is impossible to foresee what new modes they or their successors in title may resort to, or the extent of damages which would be compensation for the injury which the continued pollution might cause to such new modes of enjoyment." While a right by prescription was the main element of the title of the plaintiffs to a decree in Wood v. Sutliff, and a partial element in the title of the plaintiffs in Pennington v. Brinksop Hall Coal Co., it did not enter at all into the consideration of Mason v. Hill. There, indeed, it was expressly put aside. "We do not wish," the chief justice declared, "to rest a judgment for the plaintiff on this narrow ground." Pennington v. The Coal Company was decided so lately as last May, and it would seem that in England this branch of the law has been definitely and firmly settled.

And the question is by no means a fresh one in Pennsylvania. In Barclay v. The Commonwealth, 1 Cas. 503, the defendant had been

convicted of a nuisance, in the Quarter Sessions of Bedford, for permitting the wash and waste from his barn-yard to escape into the springs dedicated by the Penns to the use and benefit of the inhabitants of the town of Bedford. In this court the judgment was reversed for an irregularity in the sentence, but the conviction was approved. The Little Schuylkill Navigation Company, 7 P. F. Smith, 142, was an action to recover damages for injury to the plaintiffs' forge dam in the Little Schuylkill river, caused by throwing of coal dirt, slate, and loose earth into the channel of the stream by the servants and employees of the defendants. The refuse matter was carried down the river by the action of the water, and deposited in the dam. Other persons were shown to have cast the refuse of their mines into the water, and the court below had charged, in substance, that the defendants were liable for the combined results of all the deposits. This instruction raised the main question on the writ of error. It was held here that the liability of the defendants began with their act on their own land, and was wholly separate and independent of concert with others, and that their tort having been several when committed, did not become joint because its consequences united with the consequences of the acts of others, but it was not suggested that under any theory or doctrine of public policy the defendants had the right to use the river-bed as a dumping ground for the rubbish of their mines. The corruption of the water was not alleged, it is true, but it is not readily apparent how a principle could be sound that would justify the destruction of the water of a running stream for one purpose, and not justify the destruction of its uses by the same or a similar agency for all purposes whatever.

In the argument here the ground was distinctly taken that immense public and private interests demand that the right which the defendants exercised, in ejecting the water from their mine, should have recognition, and be established. It was said that in more than a thousand collieries in the anthracite regions of the state, the mining of coal can only be carried on by pumping out the percolating water which accumulates in every tunnel, slope, or shaft, and which, when brought to the surface, must find its way by a natural flow to some surface stream. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral, reaching to the annual extent of twenty millions of tons, should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine water would naturally run. These are considerations that are entitled to be well weighed. In the trial of questions like this before a jury they ought to be kept steadily in view. The proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences, or occasional annoyances, they ought not to be held responsible, and in dealing with such complaints juries should be

held with a steady hand. Only when some material and appreciable injury has been sustained should a recovery of damages against them be allowed. But there must be one rule of law for all men; and by that rule all men's rights must be tried and tested. The view so earnestly and ably presented by the counsel here was pressed upon Mr. Justice Mellor in the trial of St. Helen's Mining Company v. Tipping, 11 H. L. Cases, 642, a precedent in every way of interest and value. After the verdict a motion for a new trial was heard, and refused by the Court of Queen's Bench, and on appeal to the Exchequer Chamber, and afterwards to the House of Lords, the judgment was affirmed. In charging the jury the judge used this language: "The defendants say, if you don't mind you will stop the progress of works of this kind. I agree that this is so, because no doubt in the county of Lancaster, above all other counties where great works have been created and carried on—works which are the means of developing the national wealth. You must not stand on extreme rights, and allow a person to say, I will bring an action against you for this, that, and so on. Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore, the law does not regard trifling and small inconveniences, but only regards essential inconveniencs—injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected." In another part of the same lucid charge, the jury were instructed that "if a man by an act, either by the erection of a lime kiln, or copper works, or any work of that description, sends over his neighbor's land that which is noxious and hurtful to an extent which sensibly diminishes the comfort and value of the property, and the comfort of existence on that property, that is an actionable injury." The consequences that would flow from the adoption of the doctrines contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations in one direction, would be logically followed by the same relaxation and remission on the same grounds in all other directions. One invasion of individual right would follow another, and it might be only a question of time when under the operations of even a single colliery a whole country side would be depopulated.

Judgment reversed, and *procedendo* awarded.

Dissenting opinion by PAXSON, J. May 6, 1878.

This case involves a question of vast importance to the mining interests of Pennsylvania, and a careful consideration of it has led me to a different conclusion from that adopted by the majority of the court. In an ordinary case it would be sufficient to announce my dissent without more, but the principle decided being one of first impressions,

and is so far reaching in its consequences, that I desire to place upon record the reasons which have compelled me to differ from my brethren.

The plaintiffs are the owners of a tract of land within the limits of the city of Scranton, upon which they have erected a handsome residence and other improvements. It was supplied with water by a mountain stream for culinary and bathing purposes, as well as for a fish pond located in the ground attached to the house. Some time after the completion of the improvements the defendants opened a coal mine about three miles up the stream, and near its head. In opening said mine a drift was made, out of which the water flowed without the application of machinery, and, following the law of gravity, found its way into the stream of plaintiffs. Soon after this the fish in the pond died, the pipes in the plaintiffs' house corroded, and the water became unfit for domestic purposes. No analysis was furnished of the water, but was conceded that it became acid and unfit for use, although perfectly clean, and to the eye unchanged. The court below having nonsuited the plaintiffs, it must be assumed that the mine water was the cause of the injury. Under this state of facts, were the plaintiffs entitled to recover damages? The court below held they were not, which ruling the majority of this court decided to be error.

It is a fact not without significance, that this question has never been decided in Pennsylvania. For a period of about fifty years mining operations have been carried on here, increasing in extent yearly, until it has become the overshadowing interest of the commonwealth, and there is now hardly a mountain stream in the mining region that is not affected just as the plaintiffs' stream was. That no riparian owner has complained before, goes far to establish the fact that the common sense and the common judgment of the people of those regions were against such an assumption. It is true, the question was raised in the single case of the New Boston Coal and Mining Company v. The Pottsville Water Company, 4 P. F. S. 164, in which the water company sought to enjoin the coal company from pumping their mine water into the stream. The court in that case refused the injunction upon other grounds, and left the main question undisposed of.

The plaintiffs rely upon a class of cases which, while they are admitted law, have no application to the case at bar, such as Howell v. McCoy, 3 R. 256, Wheatley v. Christman, 12 Harris, 298, and McCollum v. The Germantown Water Company, 4 P. F. S. 40, in each of which the water had been fouled by the admixture of dye stuffs, or some other injurious substance. The only case cited by the plaintiffs which seemingly sustain them is Pennington v. Brinksop Coal Co., Law Rep. Vol. 5, Chan. Div. 769. This is an English case, and not authority here; nor is there anything in the decision to commend it to favor. It was not a well considered case, was decided by a single judge, and the few authorites he cites do not sustain him. He evidently decided it upon the ground of fouling the water, and had in his mind the line

of English decisions bearing upon the question raised in our own case of McCollum v. The Water Company, *supra*. The facts are not fully given, and it is quite possible they may have justified his ruling. There is nothing in his opinion to indicate that his mind grasped the broad question involved in this case, nor do I regard English cases as safe precedents upon such a question. They are influenced to some extent by the social and political conditions of the country. The mines in England are generally located in highly improved sections, where the land possesses great intrinsic value, and the streams are filled with choice fish; the sole right to which is in the nobility and landed gentry. Under such circumstances, we could hardly expect the English judge to lay down a rule suited to the rough mountain lands which, in the main, constitute the mining regions of Pennsylvania. We must not overlook the further fact that in England the costly improvements of the country ante-date mining operations in many instances for centuries, while here for the most part the mining region was a wilderness at the commencement of mining operations. Its population, wealth, and improvements are the result of mining, and of that alone. The plaintiffs knew when they purchased their property that they were in a mining region; they were in a city born of mining operations, and which had become rich and populous as the result thereof. They knew that all mountain streams in that section were affected by mine water, or were liable to be. Having enjoyed the advantages which coal mining confers, I see no great hardship, nor any violence to equity, in their also accepting the inconveniences necessarily resulting from the business.

It was not alleged, nor is there any proof, that the defendants did anything to foul the water. It flowed from the drift just as it fell from the clouds, excepting in so far as it had been affected by the coal and other mineral substances with which it came in contact after percolating through the surface soil. It was also a natural flow of water. It is true, some of it was pumped out, generally at night, but this was after the injury of which the plaintiffs complain was done. There was no distinction, however, as to the character of the water flowing from the drift and that which was pumped out at the shaft.

While there is no decided case in Pennsylvania which rules this question, there are certain principles which may be considered as settled that have a direct bearing upon it. It must be conceded the defendants have a right to mine their coal. It is equally clear that they have a right to free their mine from water by pumping, if necessary. Without it no mine could be operated for any considerable length of time. A man may use and enjoy his own property in a lawful manner, and if in doing so, without negligence, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*. If in excavating any lands for a lawful purpose, as in digging a cellar, or in opening a quarry, I strike a spring, which flows over the lower land

of my neighbor, I am no more responsible for such flow than if the water had fallen from the clouds upon my land, and then ran off upon his. There is no principle of natural law better settled than that water will seek its level according to the law of gravity. There is no rule of human law more firmly established than the principle incorporated into the jurisprudence of all civilized nations, that the water which falls upon the earth, or comes out of its bosom from springs, must follow its natural channel. Hence, no court has ever decided that the owner of mountain land was responsible for the torrents which at times pour down its sides to the devastation of the plains below. In towns and cities the rule is different. They have, as a general rule, no natural drainage; it is all artificial. Of course, in cities a man may not throw the water from his roof upon his neighbor's roof or yard. In this the law is but common sense, or as Blackstone puts it, "the perfection of reason."

As before remarked, the defendants had a right to work their mine, and to pump out the water therein. "The right to work mines is a right of property which, when duly exercised, begets no responsibility:" Wilson v. Waddle, H. T. Law Rep. 2 Scotch Appeal, 1876, p. 95. It is also settled that the disturbance or destruction of subterranean springs or streams in a proper course of mining is not a ground of action: Trout v. McDonald, 2 Norris, 144. In Wheatley v. Baugh, 1 Casey, 528, it was held that where a spring depends for a supply upon percolations through the land of the owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence. Says Lewis, C. J., at page 532: "Percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land; accordingly, the law has never gone so far as to recognize in one man the right to convert another's farm to his own use for the purpose of a filter. The Roman law, founded upon an enlightened consideration of the right of property, declared that 'he who in making a new work upon his own estate uses his right without trespassing either against any law, custom, title, or possession which may subject him to any service towards his neighbors, is not answerable for the damages which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others without anvantage to himself.'" Again at page 535: "In conducting extensive mining operations, it is in general impossible to prevent the flow of the subterranean waters through interstices in which they have usually passed, and many springs must be necessarily destroyed, in order that the proprietors of valuable minerals may enjoy their own. The public interest is greatly promoted by protecting this right, and it is just that the imperfect rights and lesser advantage should give place to that which is perfect and infinitely the most beneficial to individuals

and to the community in general." So, if in sinking a well upon one's own land it destroys the well of his neighbor, it is *damnum absque injuria:* Washburne on Easements, 369; Angell on Water Courses, 183; Frazer v. Brown, 12 Ohio; Routh v. Driscoll, 20 Conn. 533.

It is clear, under the authorities in this state and elsewhere, that if the defendants in proper course of mining had destroyed the subterranean springs which supply the plaintiffs' stream, and thus destroyed the stream itself, it would have been a loss for which they would not have been entitled to damages. While Kauffman v. Griesemer, 2 Cas. 407, and Martin v. Riddle, *id.*, distinctly recognize the principle that in favor of agricultural and mining operations, the volume of water may be increased by the owner of the upper or superior heritage, and thrown upon the lower or subservient heritage by its natural or accustomed channel. The plaintiffs have no cause to complain of the increased volume of water. In fact, they do not complain of such increase. They object to nothing but the change in the character and quality of the water. Are they entitled to recover damages for this? I would answer this question affirmatively if the defendants had fouled the water which is discharged from their mines. But, as before said, they have not. They pump it out, or allow it to flow from the mine, without any admixture of any kind. As nature created it, so they discharge it, leaving it to seek its natural channel. The answer is found in Prescott v. Williams, 5 Mass. 29, and recognized in Kauffman v. Griesemer, *supra:* "Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenements for the discharge of all waters which by nature rise in, or flow or fall upon the surface. Hence, the owner of a mill has an easement in the land below for the free passage of the water from the mill in the natural channel of the stream, accompanied with a right to enter upon the land for the purpose of clearing out the stream, and removing obstructions to the free flow of the water." This decision is undoubted law. In terms, it applies to "all waters which by nature rise in, or flow or fall upon the surface." It applies with equal force to such subterranean springs in a man's land as in the pursuit of his lawful use of his land are brought to the surface. They then rise in his land, and flow upon the surface. In such case it is beyond his control. Water is said to be a common enemy. It passes from the superior to the servient heritage, and so on by the irresistable law of gravity to the ocean, where it finds its level. Each riparian owner has the use of it, but no right of property beyond the use. It literally has no owner. If damages are to be recovered for the mere flow of water, where no act has been done to change its character or diminish its purity, it is manifest that results of a serious character must follow to the mining and other industrial interests of the country.

If the plaintiffs have a right to recover in this suit, they have a right under all the authorities to an injunction to restrain the defend-

ants from pumping or even permitting the flow of water for the future. Such an injunction might be effective, at the cost of the destruction of the mine, so far as the pumping is concerned, but how the defendants are to stop the natural flow from the drift is not clear to my mind. The argument that it might have been carried into the Lackawanna or some other stream by a tunnel is without force, for the reason that the riparian owners upon most streams would have the same right to object that the plaintiffs have. Nay, more; they would have the clear right to enjoin against taking the water out of its natural channel to their hurt. If a court of equity should refuse to grant an injunction against the defendants to restrain the flow of the mine water for the future, the same result (stoppage of the mine) can be compelled by the common law action of a case for a nuisance, and recovery in the present action would be no bar to a subsequent suit for continuing the flow of water. And if the first verdict should be for a nominal sum, the second and subsequent verdicts would be such as to empty the cash box of any coal company, and make mining practically impossible. For in such cases the jury would be instructed to give such damages as would punish the defendants, and secure the abatement of the nuisance. Of the readiness of a jury to comply with such instructions, I entertain no doubt. What has been said as to the plaintiffs is true as to every other riparian owner in the mining region. The former have no rights that are not common to all. They have made a different use of the water, and have been more inconvenienced by reason thereof. But that does not affect the principle. If the flow of mine water is an injury, for which the owner of the mine is responsible in damages, I am unable to see how such mines can be operated in the future, excepting by the consent of the riparian owners.

It is impossible under any system of government, or any code of laws, that equal and exact justice should be meted out in all cases. Under no state of society, save the savage, can a man enjoy all his natural rights. He is compelled to relinquish a portion of them for the common good. There are many instances in which the prosecution of a man's lawful business occasions annoyance and loss to some one. The law compels compensation for some; others, if unaccompanied with negligence, it regards as *damnum absque injuria*. The distinction between the two classes of cases is very narrow, and it sometimes requires the highest order of wisdom to properly define it. In the present case, I think a broader view might have been taken of the question under discussion, which would have been entirely in harmony with well settled principles of law. The trifling inconvenience to particular persons must sometimes give way to the necessities of a great community. Especially is this true where the leading industrial interest of the state is involved, the prosperity of which affects every household in the commonwealth.

A. Ricketts, for plaintiffs; McClintock and Hoyt, for defendants.

ORPHANS' COURT OF ALLEGHENY COUNTY.

In Re Estate of John D. Robinson, deceased.

Names of devisees may be supplied where necessary to effectuate intention of testator.

In partition.

Opinion by HAWKINS, J. March 4, 1878.

It is evident from a careful examination of the will of John D. Robinson, deceased, that the name of Margaret Blanche Millard has been accidentally omitted from the third and fourth items. The intent of the testator was that his whole estate should be subject to the payment of the annuities given to Mary Hays and Nancy Gallagher. This is clearly expressed in the first and second items of the will, and the same idea appears in the first part of the third item. The remaining portion of the latter item is, so far as it goes, consistent with this intent, but the whole intention of the testator is not fully expressed It is a repetition, by reference, of the provisions of the immediately preceding (2) item of the will, and for the purposes of construction these two items (second and third) must be read together. The "sums devised and ordered to be paid hereinbefore to William Robinson Blair, Mary Blair, and James Anderson Robinson" were not in terms, nor intended to be reduced, but postponed as they had been postponed in the second item of the will. Any other view would reduce the will to an absurdity. It would be inconsistent with the general intent of the testator, and make the first and last clauses of the third item inconsistent with each other. The testator directs that the annuities shall be paid out of the income, &c., of his "estate"—not any particular portion of his "estate," but out of his "estate" generally—"before payment" of those "sums" as provided "*hereinbefore.*" "Hereinbefore" those "sums" were made fixed and certain; and, so far as the Blairs and Robinson were concerned, their payment was postponed only to payment of one-half of these annuities. How shall the other half of these annuities be paid? That question is answered by reference to the first item in the will, in which the share of Margaret Blanche Millard is expressly charged therewith. It is evident that the intention of the testator is not fully expressed in the third and fourth items of his will, and that the defect can only be supplied and the will made harmonious by the insertion therein of the name of Margaret Blanche Millard along with those of William Robinson Blair, Mary Blair, and James A. Robinson. That names may be supplied when necessary to effectuate the intention of a testator is settled beyond question: 1 Wm. Exts. 1084; McKeehan v. Wilson, 3 P. F. S. 14.

The exceptions must, therefore, be dismissed.

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SUPREME COURT OF WISCONSIN.

Cotzhausen v. Judd et al.

One partner cannot, without the consent, express or implied, of his co-partner, allow a debt due the firm to be off-set against his individual debt. Nor does it make any difference that such arrangement is made to advance the interests of the firm, as for the purpose of retaining a customer that would otherwise be lost.

Where the fact of such disposition of a firm debt is brought to the knowledge of the co-partners, they must repudiate the transaction within a reasonable time, or they will be bound by it.

A third person, to whom a debt due a firm has been assigned, may bring an action at law thereon, even though one of the firm had before the assignment, but without authority of his co-partners, assumed to cancel and apply such debt in payment of a debt due from him to the firm debtor.

Appeal from Circuit Court of Milwaukee county.

This action is to recover a balance alleged to have been originally due from the defendants to the firm of Brockhaus & Bradley on a current account between them, and by that firm assigned to the plaintiff. It appeared on the trial that Brockhaus & Bradley were indebted to the plaintiff, or to the firm of which the plaintiff was a member, and the account was assigned to plaintiff in payment or part payment of such indebtedness.

It further appeared that the defendants held a note for several hundred dollars against Bradley, which was given for his individual debt before he became a partner of Brockhaus. Before the account was assigned to the plaintiff, Bradley made an agreement with the defendants to apply the balance due on the same in part payment of his note, and the amount of such balance was accordingly endorsed by them in installments on Bradley's note, pursuant to such agreement. Before such agreement was made, Brockhaus was applied to by Bradley, and also one of the defendants, for his consent thereto, but he refused to consent to the proposed arrangement. The facts above stated are proved by the undisputed evidence.

The testimony on behalf of the defendants tends to show that the defendants rendered accounts from time to time to Brockhaus & Bradley of their mutual dealings, and that the latter were charged therein with the sums endorsed on Bradley's note; and further, that no objection was made by that firm to such charges until several accounts had been thus rendered. It seems that these accounts were all delivered in the

first instance to Bradley; and Brockhaus testifies that he had no knowledge of them, or of the agreement between Bradley and the defendants, until three accounts had been rendered, and he thereupon made out a statement of their accounts and sent it to the defendants, from which the credits to the defendants for the sums endorsed on Bradley's note were omitted.

The circuit judge instructed the jury, in substance, that Bradley had no authority without the consent of his partner, Brockhaus, to bind the firm by an agreement to apply the demand of the firm against the defendants in payment of his individual debt to them; but if the accounts rendered by the defendants containing charges for the sums endorsed on Bradley's note were brought to the attention of Brockhaus, and he retained them, without objecting to their accuracy, beyond a reasonable time, that would be a ratification of the agreement on his part which would bind the firm.

Verdict and judgment for the plaintiff for the balance claimed. The defendants appeal from the judgment.

LYON, J.—Without the assent, either expressed or implied, of his co-partner, Bradley had no legal authority to apply a debt due from the defendants to the firm in payment of his individual debt to the defendants. If authorities are required to support a rule which is an elementary one in the law of partnership, they will be found cited in the opinion by Mr. Justice Cole in Viles v. Bangs, 36 Wis. 131.

But it is argued that the agreement between Bradley and the defendants was entered into by the former for the purpose of retaining the custom of the latter, which custom was valuable to Brockhaus and Bradley, and could be retained in no other way; and that Bradley had authority to make the agreement, because it was manifestly for the best interests of the firm. We think the position unsound. A similar reason might be given in almost any case where a partner has appropriated the assets of the firm to his own use, and thus the rule above stated would become practically inoperative. The true principle is that the firm, and not the debtor partner alone, must be allowed to decide whether it will pay the debt of such partner out of its assets.

It is not claimed that Brockhaus ever expressly assented to the agreement between Bradley and the defendants, but it is claimed that his assent thereto must be implied if bills were rendered to the firm by the defendants in which the sums endorsed on Bradley's note were charged to the firm, unless reasonable objection was made thereto. The charge of the learned circuit judge on this branch of the case seems unexceptionable. It is to the effect that if Brockhaus was made aware of the agreement by the charges in the bills thus rendered, and neglected to repudiate the transaction within a reasonable time thereafter, the firm is bound by the agreement, otherwise not. This is undoubtedly the law. The verdict for the plaintiff is, necessarily, a

finding by the jury that Brockhaus did not delay unreasonably to repudiate the agreement between his partner and the defendants after he was informed of it. Upon that question the verdict is conclusive.

The learned counsel for the defendants contend that, had the demand in suit not been assigned, an action at law could not be maintained upon it by the firm of Brockhaus & Bradley, for the reason that the recovery would enure to the benefit of Bradley as well as Brockhaus, and thus the former would be permitted to rescind his own act on the ground that it was a fraud on his partner. It is said that a suit in equity against Bradley and the defendants is the only remedy left to Brockhaus.

It must be conceded that the plaintiff is in no better position in respect to the demand in suit than was the firm before the demand was assigned to him. If the firm could not have maintained an action upon it before it was assigned, the plaintiff cannot maintain this action.

To sustain the position that this action cannot be maintained counsel cite Calkins v. Smith, 38 N. Y. 614. That case was decided by the commission of appeals—two of the five commissioners dissenting—and the majority opinion sustains the position of counsel. No cases are referred to in the opinion, and the earlier decisions of the courts of that state (hereinafter cited), holding the opposite doctrine, seem to have been entirely overlooked. There are also cases in other courts holding the doctrine of Calkin v. Smith. Some of these are cited in Viles v. Bangs, *supra.*

But that question is not an open one in this state. It was settled in Viles v. Bangs, which in all essential particulars was a case like this. It was there held that the assignee of a demand due to the firm may maintain an action at law upon it, although before the assignment one of the partners had, without authority, assumed to apply such demand in payment of his individual debt to the defendant. The reasoning which led to that result is equally applicable here.

It may be remarked, however, that the grounds of the judgment in that case, as stated in the opinion, are somewhat special; but we think the judgment may also rest on the general principle, that the act of a partner who, without authority, assumes to discharge a debt due his firm by applying the amount of it in payment of his individual debt (his creditor knowing the circumstances), if not absolutely null and void, is void unless the other partner or partners assent to or in some way ratify the act. In the absence of such assent or ratification, such act of the debtor partner cannot affect the firm or its assignee. The debt thus attempted to be discharged remains a debt as well after as before the attempted discharge; and the individual debt of the partners remains a debt owing by him, unaffected by his unauthorized attempt to apply the assets of the firm to its payment. This seems to be the result of the best considered cases on the subject: Evernghim v. Ensworth, 7 Wend. 326; Dob v. Halsey, 16 Johns. 34; Gram v.

Cadwell, 5 Cow. 489. See also Collier on Partnership, § 501; Story on Partnership, § 132.

But whatever grounds may be assigned therefor, the judgment in Viles v. Bangs rules this case, and establishes the right of the plaintiff to maintain this action.

The judgment of the Circuit Court must be affirmed.—*Northwestern Reporter.*

SUPREME COURT OF PENNSYLVANIA.

McCauley's Appeal.

No appeal lies from the taxation of costs in the Court of Common Pleas to the Supreme Court.
The materiality of witnesses in a trial before a jury depends on facts known to the court below, whose discretion in the allowance of fees to witnesses cannot be examined without the evidence, which is not brought up either by appeal or certiorari.

Certiorari to the Common Pleas of Philadelphia county.

Appeal and certiorari by Daniel McCauley from the taxation of costs in the case of McCauley v. Dixon.

The plaintiff, who was a livery stable keeper, brought suit against Dixon for deceit, in that he hired a horse and wagon of the plaintiff, and so recklessly drove and abused the horse that he subsequently died. The jury found a verdict for the defendant. The defendant's bill of costs contained charges for witness fees of five persons, who were in attendance at the trial, but were either not examined or knew nothing about the case. This bill of costs was allowed by the prothonotary. The court below overruled and dismissed the plaintiff's appeal from the taxation of costs. The plaintiff took this certiorari and appeal, assigning for error this action of the court.

Lucas Hirst, for the appellant. This was a case of oppression, and the courts should interfere to break up the system of calling large numbers of witnesses, who know nothing about the matter in dispute, merely to swell the costs: DeBenneville v. DeBenneville, 3 Yeates, 558.

PER CURIAM. February 11, 1878.

No appeal lies from a taxation of costs by the Court of Common Pleas to this court. A writ of error reaches only the record, and errors apparent on the record only can be corrected. The materiality of witnesses in a trial before a jury depends on facts known to the court below, whose discretion in the allowance of fees to the witnesses cannot be examined without the evidence, which is not brought up either by appeal or certiorari. The appeal and certiorari in the case quashed at the cost of the plaintiff in error.

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With No. 27 we propose to drop a number of our subscribers who have not paid us for some years. It is not at all pleasant to write the names of persons from week to week through years with the knowledge that they are indebted to us, and should pay. It would be well for all such who are indebted to us to pay up, and receive the LUZERNE LEGAL REGISTER as usual.

COMMON PLEAS OF LUZERNE COUNTY.

Mathews et al. v. The City of Scranton et al.

1. The plaintiffs, citizens and taxpayers, filed their bill, and prayed for preliminary injunction to restrain the municipal authorities of the city of Scranton from collecting tax not assessed and levied according to law; from assessing and levying more than one per centum upon the assessed valuation in any one year; from increasing the debt of the city more than two per centum without first having complied with the requirements of the Act of the 20th of April, 1874; from wasting the public money, and from paying interest on one hundred thousand dollars of the city bonds isued and sold contrary to law. Preliminary injunction was allowed, and after hearing rule to dissolve, *Held*, first, that the injunction must be continued until further order; second, that the city of Scranton only became a city of the third class on the 4th day of April, 1877: third, that the assessment and levy for 1877 was not made according to law; fourth, that the public money is being wasted by the city officials, and the public defrauded; and fifth, that the bonds issued and sold in pursuance of city ordinance number one hundred and sixty-nine were issued and sold contrary to law.
2. Any citizen and taxpayer may have municipal authorities restrained by injunction where money is to be raised by taxation, or expended by the treasury, to test the validity of the law under which the proposed assessment or expenditure is to be made.
3. The only writ left to the citizens and taxpayers that compels municipal officers to act within the law, and to administer the law as required by their oaths of office, is the writ of injunction; and while courts must at all times be careful not to allow this writ, except in cases coming clearly within equity jurisdiction, yet in matters affecting a whole community, if there is a doubt about the law, or the right of the authorities to act, that doubt must be resolved by the chancellor in favor of the public, and the writ allowed to issue.

Rule to dissolve preliminary injunction.

Opinion by HANDLEY, J. June 17, 1878.

The plaintiffs filed their bill in this case setting forth, *inter alia*, that they are residents and taxpayers of the city of Scranton, and the

owners of real estate therein, and as such are bound by law, and do pay, all taxes justly assessed and levied thereon, and as such citizens, residents, and owners of real estate are directly interested in every possible question which may or can in anywise whatever increase the amount of the city taxes chargeable upon their property in said city, and in the lawful and economical administration of the affairs thereof; that the city of Scranton is a city of the third class, * * and by reason thereof subject to the provisions of the Act of Assembly approved the 23d of May, 1874, * * and the supplement thereto; that the annual assessment for taxes levied in said city for the government of the same and the improvements therein was not made and completed on or before the first day of June, 1877, for the fiscal year ending the first day of April, 1878, as required by law; that the duplicates for said city and taxes and levies * * were not made and completed by the proper authorities, and the same placed in the possession of the city treasurer on or before the first day of July of said year, as required by law; * * that after the first day of October in said fiscal year the duplicates were not placed in the hands of collectors, nor were any collectors appointed by the city treasurer to collect said taxes in the said duplicate then unpaid, as required by law; that after the first day of January, 1878, in said fiscal year, the said city treasurer did not place correct and detailed statements, nor any statement whatsoever, of the taxes then remaining unpaid in the hands of the city solicitor, as required by law; that the debt of the city of Scranton exceeds two per centum upon the assessed value of the taxable property therein, as fixed by the last assessed valuation; and notwithstanding this, the mayor and councils of said city are increasing the debt without the assent of the electors thereof first obtained, as required by law; that the amount of taxes levied for the city of Scranton, and for the necessary improvements therein, as assessed and levied and imposed for the fiscal year ending the first day of April, 1878, is more than one per centum upon the assessed valuation of the taxable property in said city; that the city councils in making the assessment for the city of Scranton for the fiscal year ending April 1, 1878, and in revising the return of the assessors thereof, having in view the supplement of the Act of Assembly of 1874, * * approved the 18th of March, 1875, * * reduced the valuation of all property of the first class, and raised all property of the second and third class, in such manner as to make the several persons pay the same rate of city tax as heretofore, and in effect wholly disregarded the returns made by the sworn assessors of the said city; that the authorities of said city are greatly increasing the indebtedness of the city by causing surveys to be made, at great expense, for the construction of city water works, and by actually contracting for the erection and construction of gas lights in out of the way places in said city, and are contracting other and new liabilities to a large amount without

any previous ordinance therefor, and without first giving notice, during at least thirty days, by weekly advertisements in at least three newspapers published therein, of an election, to be held at the usual places of holding elections in said city, for such increased indebtedness, and without any notice of a statement of the amount of the last assessed valuation, of the amount of the existing debt, the amount and percentage of the proposed increase, and of the purposes for which the indebtedness is to be incurred; * * that the select and common councils of the said city have paid out large sums of money as interest, and are about to appropriate and pay out large sums of money of the said city for interest falling due on bonds issued to the amount of one hundred thousand dollars under ordinance number one hundred and sixty-nine, dated August 3d, 1876, which ordinance provided for increasing the city indebtedness by the issuing and sale of the bonds aforesaid, * * without first having complied with the provisions of the Act of Assembly, approved the 20th day of April, 1874, and that forty-four thousand one hundred and sixty-one dollars and eleven cents of the proceeds of said bonds was paid out for city orders issued and bearing interest after the 20th day of April, 1875, contrary to law; that the councils of the said city did not, in the month of January last, for the fiscal year ending April, 1878, publish a statement of receipts and expenditures, nor any statement of the financial condition of the said city, showing all of its liabilities, permanent and temporary, and schedule of its assets, once a week, during four weeks, in all the newspapers published therein, as required by law; that the said city taxes for the fiscal year ending the first day of April, 1878, now attempted to be collected from them, as well as from other citizens, residents, and taxpayers, * * is wholly illegal and void, and that Thos. Durkin, city treasurer, nor any other person or persons appointed by him, has no legal right or authority whatever to demand or collect the said city taxes, or any part thereof, as assessed, levied, and imposed for the fiscal year, from the plaintiffs, or any other citizens, residents, and taxpayers of the said city; that the said Durkin is paying large sums of money out of the city treasury to the members of the select and common councils and their respective committees in violation of existing laws; that the city authorities have and are exceeding their legal duties, powers, and privileges in incuring new liabilities without the consent of the electors of said city; that the tax rates and levies have not been made and assessed as required by law; * * and thereupon pray that a preliminary injunction may issue restraining the city of Scranton and her officers from doing or performing any other act or thing connected with the civil administration of the affairs of the said city, except only the preservation of the peace thereof, and that no other or further sum of money shall be collected, paid, laid out, or expended, until the debt of the city is ascertained according to law, and that no debt or liability be incurred for the city, save only

the per diem pay of her civil officers, members of the select and common councils excepted; that the assessment for the year 1877 be set aside for irregularity, and that an examiner be appointed to take testimony, and report as master whether any and what liabilities have been incurred without due authority of law; if any, the amount, and by whom and for what purpose or purposes; and thereafter, upon proper hearing and determination, the injunction to be made perpetual.

Preliminary injunction was awarded as prayed for, and rule to show cause why the same shall not be dissolved made returnable on Tuesday, the 26th day of February, 1878. Upon the coming in of the rule, the city solicitor moved to have the plaintiffs' bill dismissed for want of jurisdiction, and filed his reasons to sustain such motion. Whereupon the hearing was continued until the 5th day of March, 1878. At that time we read, at chambers, our opinion overruling the motion of the city solicitor to dismiss plaintiffs' bill. For our opinion in full, see 7 Luz. Leg. Reg. 108. We then directed counsel to proceed with the argument of the rule to dissolve the preliminary injunction. Whereupon the city solicitor filed his answer and affidavit of Mayor McKune. The defendants in their answer say, that the statement of facts set forth in plaintiffs' third, fourth, fifth, sixth, seventh, and eighth paragraphs are substantially correct, but the defendants allege that the delay in the matter of assessing and collecting city taxes for the year 1877 was unavoidable, because the assessors were not appointed in time to allow them to properly make and complete the assessment before the first day of July, 1877, and such assessment not having been completed before the first day of July, 1877, the defendants could not place the duplicates in the hands of the treasurer; * * that the adoption of a new charter and different regulations in regard to the workings of the municipal machinery of the city of Scranton, made delay inevitable; that in assessing and levying of said taxes all due diligence, consistent with a proper performance of their duties, was used; that they do not know what the exact debt of the city of Scranton is, but believe it is true, as alleged by the plaintiffs, that it exceeds two per centum of the last assessed valuation of city property; the defendants admit that there has been no vote of the people of Scranton authorizing any increase of such debt; * * the defendants also admit that the total tax levy for 1877 is more than one per centum, but aver that it is not in excess of the amount authorized by law; that it is not true the councils raised or lowered the valuation of property; * * that such power is discretionary with the board of revision and appeal, and the decision of such board is made final and conclusive by law; * * that certain sums of money have been paid to members of councils; that some expense has been incurred for the items named in plaintiffs' bill; * * that no statement was made on the first day of January, 1878, as the defendants are informed, and believe that the same is not required until sixty days after that date.

The affidavit of Mayor McKune, which was filed and read, contains about the same statement of facts, except that the mayor claims that the assessed valuation of city property is about eighteen millions of dollars, and that the present city debt is more than two per centum of the adjusted valuation.

The only questions we are called upon to discuss under this bill, answer, and affidavit are—

1. Whether Scranton is a city of the third class under the act of 1874 and its supplement.

2. Whether the assessment and levy for the year 1877 was made according to law.

3. Whether the city debt exceeds two per centum upon the assessed valuation of city property.

4. Whether the amount of tax assessed and levied exceeds one per cent. upon the assessed valuation of taxable property in said city.

5. Whether the public money is being wasted by the city officials.

6. Whether $100,000 in bonds were issued contrary to law, and interest paid on part of the city debt contrary to law.

The first question may be answered in the affirmative. In the case of the Delaware and Hudson Canal Company v. The Scranton School District, 7 Luz. Leg. Reg. 107, and in the case of Woolsey et al. v. Durkin et al., 7 Luz. Leg. Reg. 100, we held that Scranton is a city of the third class under the act of 1874 and its supplement.

The second question may be answered in the affirmative. The assessment was made according to law, but not at the time designated by law. The act of 1875, P. D. p. 2043, § 31, provides that all taxes levied shall be completed on or before the first day of June in each and every year. The right to tax is given by statute, and this right affects the property of individuals. Hence the statute giving this right must be strictly pursued. In the case of Farrell v. Tomlinson, 5 Brown Par. Cases, 438, the court held that "whenever a statute prescribes a thing to be done within a certain time, the lapse of a day is fatal; because no inferior court can admit of any terms but such as directly and precisely satisfy the law." In the case of Williamsport v. Kent, 14 Ind. Rep. 306, where a statute provided that the board of trustees shall before the third Tuesday in May in each year determine the amount of general tax for the current year, the court held that the board of trustees could not exercise the power after the third Tuesday in May. In the case of the People v. McGreevy, 34 Cal. Rep. 432, where a statute provided that "on or before the first Monday of May, annually, the board of supervisors shall levy the amount of taxes, and the order levying the tax was passed on the first Monday of May, but the approval of the mayor, which was necessary to the completion of the levy, was not obtained until the next day, the court held that the tax thus levied was illegal." It cannot be denied but that the board of revision and appeal so altered the assessment for the year 1877 by

lowering the assessment on first class property, and increasing the assessment on second and third class property, that the several classes became blended into one body, and thus the assessment and classification lost its distinctive features and identity. This conduct on the part of the board of revision and appeal placed greater burdens upon the owners of second and third class property than the law-making power intended, and will compel the owners of such properties to pay more tax than if a common rate had been levied upon all classes of property. This injury is made plain by the exposition of the work of the board of revision and appeal in the case of the Delaware and Hudson Canal Company v. The Shool District of Scranton, 7 Luz. Leg Reg. 94.

The third question is conceded. The defendants admit in their answer that the debt of the city exceeds two per centum upon the last assessed valuation of taxable property.

The fourth and fifth questions may be answered together. The defendants admit that the rate levied exceeds one per centum, but claim that it is not in excess of the amount authorized by law. The law provides for the assessment and collection of taxes *not* to exceed one per centum upon the assessed valuation in any one year on all persons, real and personal property, and all other matters and things taxable for state and county purposes, for the payment of loans to support the government, and make the necessary improvements in the city. This one per centum of course includes all city taxes that can possibly be collected from the citizens in any one year. The official records of the city show that twenty-three thousand one hundred and seventy-nine dollars and forty-four cents was paid out to the members of councils for meeting as committees. This amount is made up about in this manner: A bill of sixty-five cents is presented to the councils for repairing one of the fire engines of the city; thereupon a committee of three is appointed to ascertain if the bill is correct, and to report; the committee meets, and reports that the bill is "correct;" and at the same time presents a bill of six dollars, that amount being their fee as committeemen. Is this not wasting the public money? And yet this illustration is only one of the many cases mentioned upon the argument of this rule. The border line between this conduct and stealing is so close that it requires no bridge to span the space between waste and stealing. We, therefore, answer these two questions in the affirmative, knowing full well that the master appointed to take the testimony in this case will fully ascertain how the public money is being wasted.

The sixth question grows out of the issue and sale of one hundred thousand dollars in city bonds, in pursuance of ordinance number one hundred and sixty-nine. The validity of the proceedings under this ordinance by the municipal authorities of the city was fully discussed in the case of Scranton v. Vail et al., City Auditors, 6 Luz. Leg. Reg. 238. At the time this ordinance was passed, and the bonds were issued and sold, the municipal debt of the city exceeded two per cent.

of the assessed valuation of property. Hence no increase of such indebtedness could be made or incurred without first having complied with the second section of the act of 1874, P. L. 1874, p. 66. This provision of the law the authorities of the city of Scranton did not comply with, and hence the issuing of these bonds and the increasing of the debt of the city are acts contrary to law. In the case of the Mayor and City of Springfield v. Edwards, Chicago Legal News, 51, the Supreme Court of Illinois filed their opinion in October, 1877, in this case. The question raised in that case was, Can the city be restrained by injunction from increasing the debt? The constitution of that state provides by Art. IX., § 12, that "no county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment of state and county taxes previous to the incuring of such indebtedness." The Supreme Court, while disposing of this question, held "that under the constitution a city cannot become indebted in any manner or for any purpose to an amount * * * exceeding five per centum on the value of taxable property therein; * * and if a city, for any purpose whatever, exceed the constitutional limitation, it may be perpetually enjoined at the suit of any citizen and taxpayer." The constitution of Pennsylvania, Art. IX., § 8, provides that "the debt of any county, city, borough, township, school district, or other municipality or incorporated district * * shall never exceed seven per centum upon the assessed value of taxable property therein, nor shall any such municipality or district incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property, without the assent of the electors thereof at a public election in such manner as shall be provided by law." This prohibition against increasing the indebtedness of the cities of this commonwealth is the same as that in the constitution of our sister state Illinois, and was fully discussed in the case of Wheeler v. Philadelphia, 27 P. F. Smith, 351. It cannot be denied but that the debt of the city of Scranton was increased, as charged in plaintiffs' bill, contrary to law. The grand jury of our county, when this fraud was laid before them for investigation, so made return to the court, after a very careful examination of all the facts connected with this transaction. And the finding of that grand jury stands as a monument pointing to the infamy of the officers of this city who violated their oaths of office in this particular. This bond fraud, and the stealings that grew out of the issue and sale thereof, we fully explained in the case of this City v. Vail et al., *supra*. Nothing we could say will more fully explain how the laws were violated when these bonds were issued and sold than the report of the grand jury, who, as we have said before, fully and fairly made investigation into

this question. The jury in their findings, filed of record in our court on the 21st day of November, 1877, say that they do present "that the authorities of the city of Scranton * * having in charge the finances of said city, in the matter of issuing city bonds in the year 1876, violated the provisions of the Act of April 20th, 1874, entitled 'An Act to regulate the manner of increasing the indebtedness of municipalities, to provide for the redemption of the same, and to impose penalties for the illegal increase thereof,' in neglecting to prepare a statement showing the actual indebtedness of said city, the amount of the last preceding assessed valuation of the taxable property therein, the amount of the debt to be incurred, the number and dates of maturity of the obligations to be issued therefor, and the amount of the annual tax levied and assessed to pay the said indebtedness, and in not filing such statement in the office of the clerk of the Court of Quarter Sessions of the county of Luzerne before issuing the bonds aforesaid." We, therefore, hold that these bonds were issued contrary to law, for which the city is not liable. While holding court, we filed an order continuing this injunction, stating at the same time that we would file this opinion during vacation.

J. H. Campbell, for plaintiffs.

I. H. Burns, for defendants.

In striking contrast with the inflated eulogies prefixed to the posthumous editions of some of the old reporters in the preface to Durnford and East, par excellence the "Term Reports:" "In a work of this kind all that can be expected is accuracy; to polish and digest properly requires long time and much labor." For care and accuracy of finish, and a matchless propriety of style, which they everywhere maintain, these reporters have never been surpassed.

In "Hortensius," p. 259 note, a most amusing instance of identification of counsel with client is related. It occurred in the case of a counsel for a female prisoner who was convicted on a capital charge, and on her being asked what she had to say why sentence of death should not be passed upon her, he rose and said, "If you please, my lord, *we are with child.*" He was, however, wrong in point of law,—for pregnancy cannot be taken advantage of in arrest of judgment, but only in stay of execution."

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VOL. 7. FRIDAY, JULY 5, 1878. No. 27.

COMMON PLEAS OF LUZERNE COUNTY.

Delaware and Hudson Canal Co. et al. v. Scranton School District et al.

The board of controllers of the Scranton school district assessed and levied a tax of nine mills in gross on the valuation of taxable real estate in the city of Scranton, notwithstanding the act of 1875 provided for the classification of real property into first, second, and third classes for taxable purposes. The taxpayers moved for an injunction to restrain the collection of taxes thus assessed and levied, which was allowed, and after hearing the same was continued. Whereupon the school controllers petitioned the court to modify the injunction so as to allow the collection of a nine mill tax on first class property, a six mill tax on second class property, and a four and one-half mill tax on third class property: *Held*, that notwithstanding the tax was not assessed and levied according to law in the first instance, the injunction must be so modified as to allow the collection of the tax, when classified according to law.

In Equity. Application to modify injunction.

Opinion by HANDLEY, J. July 1, 1878.

In this case, involving the question of the right of the board of controllers to levy a school tax in gross, we filed an opinion on the 13th of May, 1878, overruling the defendants' demurrer; and in the case of Woolsey et al. v. Durkin et al., involving the same question, we filed our opinion on the 20th day of May, 1878. The injunction in each case, after hearing, was continued until further order. The defendants by their application show, that they are now willing to levy the school tax for 1877 in accordance with the act of 1875, which provides for a full rate upon property of the first class, a two-third rate upon property of the second class, and a one-half rate upon property of the third class. The tax enjoined was levied in gross at the rate of nine mills on the dollar valuation. The valuation, as ascertained, is $2,131,673 first class property, $6,005,061 second class property, and $2,008,179 third class property, making a total of $10,144,913. At the rate of nine mills on the dollar this would produce $94,529, and if levied at the rate of twelve mills, and classified as the law directs, will produce $85,669.74. Taking, however, the assessment at $10,144,913, and the levy at the rate of nine mills on first class property, six mills on second class property, and four and one-half mills on third class property, $64,252.26 will be produced. The official statement of expenses for the school year ending June, 1878, shows that the total amount expended for all purposes is about $65,000. Add the state appropriation of over $11,000 to this sum of $64,252.26, and sufficient

funds will be placed in the hands of the proper officers to pay the debt incurred in full for 1877-8.

The taxpayers who have watched these proceedings will be surprised to learn that the assessed valuation of property in this city upon all classes is only $10,144,913, whereas the city officers who issued $100,000 in bonds for "expected liabilities" fixed the assessed valuation at $18,000,000, and actually had it sworn to at that figure. But what is $8,000,000 discrepancy to municipal officers who desire to saddle this city with a debt created in violation of law, when the desire is to cover up disgraceful transactions. If this injunction had not issued, $94,529.47 would have been collected from the taxpayers of this school district for school purposes in 1877; but when the district was forced to exercise reasonable economy in the administration of its affairs, the total amount expended and needed is only $65,000. The injunction, therefore, saved the taxpayers the handsome sum of $29,529.47 in one year. This is a lesson, we hope, never to be forgotten by the present or any subsequent board of controllers in this city. The weak point in the administration of the school laws by school boards is the multiplicity of employees. This of itself is sufficient to bankrupt the taxpayers of the several school districts in this county. Two or more inefficient teachers are employed when one efficient teacher is sufficient. This is done to satisfy the grasping propensities of school controllers, who desire to make places for needy relatives. The law on this point will have to be amended so as to prevent controllers or directors from having any relative appointed to the position of a teacher during his or her term of office. The official report of this school district shows that two teachers are employed for an average of *twenty-three* scholars. This, if not a fraud upon the taxpayers, is simply waste. There should not be more than one teacher to every forty scholars. Hyde Park district, now in this district, is noted for her schools and the proficiency of the scholars attending her schools, and yet the average cost for each pupil for tuition, fuel, and contingencies is only $13.70, while in Scranton it is $21.77. Here is a difference on each scholar of $8.07. If the controllers can reduce the cost of each scholar in the Scranton district to $13.70, then there will be an additional saving to the taxpayers of $28,245. This item is ascertained upon the basis of 3,500 scholars in the district. The next weak point in the administration of the school laws is the changing of the school books from time to time. The state should publish and furnish to parents and others all books used in the public schools at a nominal price. This will prevent any further stealing on that point; and the state is certainly as well able to furnish the public schools with books as she is to furnish the state laws of each year to every lawyer in the state at a nominal price.

Having full confidence, however, in the integrity of the present board of controllers, and knowing full well that it is composed of gentlemen who would spurn the idea of committing a fraud upon the

taxpayers, or allowing the money of the schools to be embezzled or wasted in any manner, the modification petitioned for is allowed.

And now, July 1st, 1878, the court order and direct that the preliminary injunction in this case be so modified as to allow the present board of school controllers and their collectors to collect a nine mill tax on first class property, a six mill tax on second class property, and a four and one-half mill tax on third class property. As to all other matters, including the payment of four per centum for the collection of the school tax, the injunction is continued.

A. Hand, for plaintiffs.

F. W. Gunster, for defendants.

Von Storch v. Evans.

1. The plaintiff was elected city treasurer of the city of Scranton at the spring election in 1878; the defendant was a candidate for the same office at the election held in 1876, and although he did not receive the certificate of election, contested the sucessful candidate then declared elected by the counting court; upon final hearing, decree was made that Evans was duly elected by a majority of three; whereupon the defendant in that case appealed to the Supreme Court, which appeal is yet pending; notwithstanding all this, however, the councils of the city approved the official bonds of Evans, and thus recognize him as the treasurer of the city; Von Storch filed his bill, and prayed for preliminary injunction to restrain Evans from acting; to this bill and prayer, the defendant demurred: *Held*, after argument, that the plaintiff mistook his remedy, and that injunction must be refused, and plaintiff's bill dismissed.
2. *Quo warranto* is the specific statutory remedy to test title to office.

In Equity. Application for injunction.

Opinion by HANDLEY, J. June 24, 1878.

The plaintiff filed his bill in this case setting forth that he is a citizen and taxpayer of the city of Scranton, and is interested in the safe keeping of the money belonging to said city; that at the municipal election in the city of Scranton February 16th, 1876, Thomas Durkin was duly elected to the office of city treasurer for the term of three years, as shown by the returns of said election; that Reese T. Evans was the defeated candidate for the office of city treasurer at said election, and contested the election of Thomas Durkin, and on the 11th of April, 1878, a decree of the Quarter Sessions of Luzerne county was entered declaring the said Reese T. Evans to have been legally elected to the office of city treasurer at the aforesaid election of 1876; from this decree Durkin appealed on the 20th of April, 1878, to the Supreme Court, in which court said contest is now pending; that at a municipal election held in the city of Scranton on the 19th of February, 1878, the plaintiff was duly elected city treasurer for the city of Scranton for the term of two years, and that the term of his predecessor ended on the first Monday of April, 1878; since which time the plaintiff is informed and believes that he has been the legal

treasurer of the city of Scranton; that Reese T. Evans is attempting to exercise the duties of city treasurer of the city without first having been elected to said office, or having any real or apparent right thereto; and that the said Evans is attempting to collect the mercantile tax * * without any legal right whatever; and therefore prays that a preliminary injunction may issue against said Evans to restrain him from collecting the said tax, and from performing any other duties of treasurer of the city of Scranton, and that after proper hearing and determination, the said injunction to be made perpetual.

To this bill the defendant demurred, and assigned for cause,—first, want of jurisdiction; and second, that the plaintiff's proper remedy is by writ of *quo warranto*.

In the case of the Buck Mountain Coal Company's Appeal, 8 Pittsb. Leg. Jour. 176, the Supreme Court, in a per curiam opinion, held, where the court below directed plaintiffs' bill to be dismissed before answer or demurrer, that "it was palpable error for the court below to dismiss plaintiffs' bill; * * that on the question of the right to an injunction, the plaintiffs were entitled to a full hearing. * * Had there not been a final dismissal of the bill, the plaintiffs' appeal would have been quashed, there being no appeal from an interlocutory decree refusing a special injunction."

In the case of Updegraff et al. v. Craus, 11 Wright, 105, the Supreme Court held, in a case involving the right of the court below to restrain borough officers from entering upon official duties, that "the complainant below mistook the remedy for testing the rights of persons claiming to be borough officers. *Quo warranto* is the specific statutory remedy for such a case. * * This specific remedy at law ousts the equitable jurisdiction of the case. There should have been judgment on the demurrer for the defendant, and the bill dismissed."

By refusing injunction in this case, we expedite the final disposition of the much vexed question, Who is the treasurer of the city of Scranton? It is due to the people of this city that the highest court in our state should be allowed immediately to say whether Mr. Durkin, Mr. Courtright, Mr. Evans, or Mr. Von Storch is the proper officer to receive and pay out the public money. We will, therefore, so mould our decree whilst disposing of this application for an injunction that an appeal may be taken forthwith therefrom.

Injunction refused, and judgment directed to be entered on the demurrer for the defendant, and we do further order and direct plaintiff's bill dismissed.

I. H. Burns, for plaintiff.

C. Smith and H. M. Edwards, for defendant.

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VOL. 7. FRIDAY, JULY 12, 1878. No. 28.

COMMON PLEAS OF LUZERNE COUNTY.

Morris v. Muntz.

1. A partner, when sued individually, may set-off a firm account with the assent of the other partners.
2. Under the plea of payment simply, a claim of set-off is inadmissible as evidence.
3. After the plaintiff has closed his testimony, defendant should not be allowed to introduce or add the plea of set-off.
4. Under the plea of payment, there must be notice of special matter whenever anything but direct payment is intended to be proved.

Motion for new trial.

Opinion by STANTON, J. June 29, 1878.

Defendant asks for a new trial because on the trial of this cause on February 1st, 1878, he was not allowed to introduce as evidence of a set-off a partnership claim (of which partnership he was a member) against plaintiff's claim in this case. At the time this offer of evidence was first made, defendant had only filed and entered of record the pleas of "non assumpsit, payment, &c.," and at this time also he had not the assent of the other partners to use said claim as such set-off. Objection was made by plaintiff's counsel to the admission of this evidence, principally on the ground that a partnership claim could not be used by one of the partners as a set-off to a claim against him individually. This objection was overruled on the grounds laid down in Wrenshall v. Cook, 7 Watts, 464, Tustin v. Cameron, 5 Wharton, 379, Craig v. Henderson, 2 Barr, 261, and Golliday v. Bissell, 2 Jones, 347, to wit, that a partner, when sued individually, may set-off a firm account in such case with the assent of the other partners. The evidence was excluded, however, for the reason that we considered it inadmissible under the plea of "payment" simply. Under the plea of "payment" there must be notice of special matter whenever anything but direct payment is intended to be proved: Erwin v. Seibert, 5 W. & S. 103. And set-off cannot be given in evidence under the plea of "payment" only: Glamorgan Iron Company v. Rhule, 3 Smith, 92.

After this offer of evidence was excluded defendant, by our allowance, filed the following additional pleas: "Payment, with notice of defalcation," "Payment, with leave to give special matter in evidence," "Set-off, &c." When these pleas were entered of record, defendant

again offered in evidence the said partnership claim, of which he had obtained, for the purpose of being used as a set-off in this case, a written assignment from the other members of the firm. Although the assent of the other partners to such use of said claim having been obtained after suit brought, was urged as an objection to its competency as evidence, yet this assignment could not be, and was not, excluded for this reason. The principle was clearly enunciated in the cases of Smith & Co. v. Myer & Apert, 10 Harris, 40, Silverburg v. Pineas, 6 Phila. 533, and Hart v. Porter, 5 S. & R. 200, that the assent necessary to the use of a partnership claim by one of the members of the firm, may be given after suit brought. We again refused to admit the evidence, not that it was inadmissible under the amended pleadings, but because at this stage of the case it was error in us—the plaintiff having then closed his evidence—to allow the defendant to introduce the plea of "set-off, &c.:" Glazer v. Lowrie, 8 S. & R. 498; 1 T. & H. 473. This error we could have remedied either directly by striking off said additional pleas, or indirectly by refusing to admit such testimony as was only competent under it. We adopted the latter course, although we think our proper and best course was in the first instance to not allow said additional pleas to be introduced.

While a liberal construction should be given to the statute of defalcation (Hunt v. Gilmore, 9 Smith, 450), yet a construction prejudicial to the rights of the plaintiff in this case, when such construction is not even necessary to preserve the rights of the defendant, would be, to say the least, inequitable.

The plaintiff in this case had no notice that the defendant would offer evidence of a set-off, until after he had closed his testimony. If the defendant were allowed to introduce this evidence of set-off, the first notice of his intention to offer such evidence being given after the plaintiff had closed or rested his case, the plaintiff, even though having other claims of which he omitted to give testimony, thinking them, perhaps, cancelled by or applied on this very claim now offered in evidence by defendant, would be unable to avail himself of them thereafter as a set-off; for a set-off cannot be used against a set-off: Ulrich v. Berger, 4 W. & S. 19; Ayres v. Findley, 1 Penn. 501; Gable et al. v. Parry et al., 13 Penn. 181. While the law does not favor multiplicity of suits, yet without violence to law or right it may periphrastically be said, let suit on suit be instituted, if, to protect the interests of the humblest citizen, a multiplicity of actions be necessary.

The claim that defendant offered in evidence in this case as a set-off can be made the subject of a separate action, and as he has this remedy (8 S. & R. 498) we must remand him to it.

The motion for a new trial is overruled, and the rule is discharged.

John McGahren and W. J. Philbin, for plaintiff.

Q. A. Gates, for defendant.

COMMON PLEAS OF ALLEGHENY COUNTY.

Schwartz's Executors v. McClurg.

The first writ of scire facias on a mortgage having been returned nihil, an alias may issue to any different return day of the same term, and on a second return of nihil judgment may be entered by default. It is not necessary that the alias scire facias should issue to the next term.

Petition of Mary McClurg to intervene, and to have judgment set aside and alias writ quashed, &c.

Opinion PER CURIAM. June 29, 1878.

We are unable to see that the petitioner is specially interested in this proceeding, if the facts be as she alleges. If, as she claims, the title of William A. McClurg and of the mortgagees is subject to her right of dower, proceedings on this mortgage will not affect her. If, however, it appeared that the issuing of the alias scire facias and the entering of judgment was without warrant of law, we might of our own motion set the proceedings aside. The first Monday of July is the term return day. In this case the first scire facias was returnable to the first Monday of May, the alias scire facias was returnable to the first Monday of June, both being intermediate monthly return days of the July term. To each of these writs the sheriff returned "nihil."

The cases of Magaw v. Stevenson, 1 Grant, 402, and Haupt v. Davis, 29 P. F. Smith, 238, have settled the question as to the legality of issuing such writs returnable to the monthly return days. The only question in this case, then, is as to whether or not the alias writ should be made returnable to the next term.

There is no statute providing that a judgment by default may be entered on the second return of "nihil." It is old established practice, and based on the rule that "two nihils are equivalent to a garnishment, a service of the writ of scire facias, or a return of scire feci by the sheriff:" Warder v. Taintor, 4 Watts, 274, and cases there cited; Archbold's Practice, Vol. II., p. 99.

In Troubat & Haley's Practice, Vol. II., p. 397, it is said that "an alias scire facias issues returnable to the next ensuing term," but no authority is cited, nor is any reason given in support of the assertion. Such expressions were very likely to be made when there was but one return day for each term, and the alias scire facias was necessarily returnable to another term. The reason for this has passed away with the enactments relative to monthly return days for the courts of this and other counties. The essential maxim on which rests the authority for entering judgment on two nihils is as above stated—that long practice has made "two nihils equivalent to a return of scire feci."

The Act of the 12th of June, 1839, relating to the District Court of Allegheny county—and now in force in the courts of this county—provides expressly that the party after the monthly returns "may do

all matters and things in the prosecution of suits that might be done if the said writs were returned on the first return day of any term of said court." It also provides that all process issuing from the court, except summons in partition, be made returnable to the monthly return days. Why, then, should it be necessary that the alias scire facias should issue to the next term? Not on account of time elapsing between the return days of this writ. In Magaw v. Stevenson, 1 Grant, 402, the two writs, which the Supreme Court held to be good and sufficient in law to warrant the judgment, were returnable respectively to the first and fourth Mondays of January, only three weeks intervening. In Haupt v. Davis, 29 P. F. Sm. 238, only two months intervened, and the alias issued to a monthly return day. True, the accident of one writ being technically in one term, and the alias in another, occurred, or is stated to have occurred, in each case, though it is difficult to reconcile the methods of computing terms in the two cases. The reasoning of Judge Williams in the court below in Magaw v. Stevenson, and of the Supreme Court in both cases, would sustain the judgment in this case.

Seeing no reason, either technical or equitable, for holding otherwise, we are of the opinion that the alias writ in this case was properly issued to a different return day in the same term, and the sheriff's return of "nihil" to each writ justified the entry of the judgment.

The prayer of the petitioner is refused, and the rule to show cause is discharged.—*Pittsb. Leg. Jour.*

In the Emperor of Austria v. Day, Lord Campbell, Lord Chancellor, observed: "Notwithstanding my sincere respect for the authority of that great American jurist, Justice Story, I cannot concur with him in his recommendation of a mysterious obscurity to be preserved by courts of equity respecting special injunctions, and the caution which should make them 'decline to lay down any rule which shall limit their power and discretion as to the particular cases in which such injunctions should be granted or withheld.' The recommendation of mystery and obscurity in treating of judicial jurisdiction is only fit for the Star Chamber, which was called 'a Court of Criminal Equity.'"

It has been said by first-class authority, that in the opinion in the case of Brattle Square Church v. Grant, "the law assumes the beauty and precision of the exact sciences."

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COMMON PLEAS OF LUZERNE COUNTY.

Barrett et al. v. The Workingmen's Building and Savings Fund Asso'n.

1. The allegations of fact in the answer, responsive to and in denial of the allegations of fact in the bill, must prevail.
2. The directors and officers of building associations, and of all other corporations, may be restrained by injunction from committing a breach of trust, by diverting or misapplying the funds or credit of the association, or doing any other act in excess of the charter powers.
3. Chancery will not decree an injunction, except in a clear case of the invasion of a public or private right; nor will it enforce abstract legal rights. There must be first substantial, irreparable injury attempted.
4. Affidavits may be read by the plaintiff to support the injunction after answer.

In Equity. Motion to dissolve preliminary injunction.

Opinion by STANTON, J. June 29, 1878.

In defendant's answer and accompanying affidavits in the nature of answers, submitted at the hearing of the argument to dissolve this injunction, paragraphs one, two, and three of plaintiffs' bill are admitted to be true, except as to Michael Crane being a stockholder; paragraphs four, seven, and nine are absolutely denied; paragraph five is not denied or answered in its specific averments; paragraph six is not answered at all, and the eighth paragraph is denied only in part.

The allegations of fact in the answer responsive to and in denial of the allegations of fact in the bill must prevail: City of Philadelphia's Appeal, 28 P. F. Smith, 33. The directors and officers of building associations, and of all other corporations, may be restrained by injunction from committing a breach of trust, by diverting or misapplying the funds or credit of the association, or doing any other act in excess of the charter powers: 6 Luz. Leg. Reg. 33; Manderson v. Commercial Bank, 4 Cas. 379; Allen v. Curtis, 26 Conn. 456; Robinson v. Smith, 3 Paige, 233. Chancery will not decree an injunction, except in a clear case of the invasion of a public or private right; nor will it enforce abstract legal rights. There must be first substantial, irreparable injury attempted: City of Philadelphia's Appeal, 28 P. F. Sm. 33.

Then, are the invasions of their rights complained of by the plaintiffs in their bill, and not denied by defendants, of a character to invoke the offices of chancery? The averments of the fifth paragraph, not denied, are—"First, by permitting the secretary to act as president, secretary, and treasurer of said association: Second, by loaning the money of the association without taking proper security therefor:

Third, by neglecting to appropriate ten per cent. of the money received to a reserve fund: Fourth, by neglecting to keep the moneys of the several series of stock in said association separate and distinct: Fifth, by refusing to pay withdrawing stockholders in the order of their applications to withdraw: Sixth, by indirectly receiving money for preference in paying withdrawing members: Seventh, by investing money of the association in the purchase of a horse and buggy: Eighth, by appropriating money of the association to private uses."

And the averments of the sixth paragraph, not denied, are—"That the officers of the said association, previous to the present incumbents, to wit: President, H. H. Chapin; Treasurer, E. R. Mills; Secretary, I. H. Burns; Directors, William Humphrey, H. W. Bessac, Max Reese, G. P. Matthews, and P. McNamara, grossly mismanaged and neglected the affairs of the said association—First, by not keeping minutes of the proceedings of the association: Second, by neglecting to furnish statements of the finances of said association: Third, by neglecting to keep any books or accounts of the moneys received from stockholders for the association, and of the moneys paid out for the association: Fourth, by neglecting to take good and sufficient bonds from the treasurer for the faithful performance of his duties: Fifth, by neglecting to audit the accounts of the treasurer of the association."

And the averments of the eighth paragraph, denied only in part, are—"That by reason of the gross neglect and mismanagement of the present officers of said association and their predecessors in office, the said association has become insolvent."

The affidavits of Patrick Roach, James Barrett, and Henry E. Hess were read on the argument of the rule in support of the bill.

Affidavits may be read by the plaintiff to support the injunction after answer. The practice on this subject is more liberal in America than in England: Poor v. Carlton, 3 Sumner, 70; Diller et al. v. Rosenthal et al., 6 Luz. Leg. Reg. 35.

The Roach affidavit sets forth that "E. L. Riggs, secretary of the Workingmen's Building and Savings Fund Association, told him that he (E. L. Riggs) acted as president, secretary, and treasurer of the said association, and that there were no acting directors of the said association, but he was conducting the whole thing himself; that the association was in a bad shape, because the former secretary * * and the treasurer * * had robbed the association."

The Barrett affidavit sets forth "that he, M. D. Osterhout, and L. G. Flory were appointed a committee by the stockholders of the association defendant to demand and get the books of the said association for the purpose of making an examination of the same; that he, M. D. Osterhout, and L. G. Flory accordingly went to the secretary of the said association, E. L. Riggs, and demanded from him all the books, papers, leases, contracts, deeds, charters, and accounts whatsoever of the said association; that the said E. L. Riggs gave them a

bundle of books and papers, which he said were all the books and papers in anywise belonging to the said association; that this said bundle they delivered into the custody of H. E. Hess for the purpose of making an examination of the same; that the said E. L. Riggs informed your deponent that there were no minutes of the association for the first five years of its existence; that for the said five years there were no books kept, except some loose slips of paper, which were handed to him by E. R. Mills, who remarked that he thought they were all there, but his little boy might have burned some of them; that he had no vouchers for the money paid out of the association for the first five years of the association; that all the books they had were what were made from these slips and the books of the stockholders; that * * the former secretary had robbed the association; that * * the former treasurer had no bonds; that he had purchased a horse and buggy with the funds of the association."

The Hess affidavit sets forth the following: "That James Barrett, M. D. Osterhout, and L. G. Flory, representing themselves to be a committee of the Workingmen's Building and Savings Fund Association, brought to him a lot of books and papers of the Workingmen's Building and Savings Fund Association, and employed him to examine the same; that he has done so, and finds that previous to March 20, 1875, there are in these said books and papers no minutes of the transactions of the said association; that the only way he can ascertain the receipts of said association is by figures contained in a book called the installment book; that from this book he finds the receipts of the association to have been $50,294.04; that of this sum $23,139.34 appears to have been received since the 20th of March, 1875; the dues from March, 1875, and since that time, appearing to have been collected by E. L. Riggs; that the order book, by the stubs contained therein, shows orders to have been charged as follows: Permanent loans, $24,569.95; office expenses, $617.50; temporary loans, $8,820.72; salaries, $1,893.00; shares withdrawn, $18,961.88; object not stated, and miscellaneous, $4,873.28; amounting to a total of $59,736.33; of which sum there appears to have been drawn $27,991.81 since the 20th day of March, 1875; that of the said sum orders appear to have been drawn in favor of E. L. Riggs amounting to $10,517.17; in favor of Elizabeth Riggs, $533.11; in favor of William D. Riggs, $2,338.69; that for many of these orders no vouchers have been furnished him; that no stubs have been furnished him of the certificates of stock issued; that there does not appear to be any account of the stock kept, except such showing as is made upon the installment book; that no account of their bank deposits or checks has been rendered, with the exception of one bank book showing only one side of account in 1871-2; that he can find no list of the loans made by the association; that he can find no list of the securities held by the association; that he can find no list of real estate owned by the association; that

there have been no bonds of the secretaries or treasurers furnished him, except the individual bond of E. R. Mills, treasurer; that he can find no account of a reserve fund; that the stock appears to be in five series, but the receipts in all have been kept in one fund; that he finds the stockholders have not been paid in the order of their applications to withdraw; that he finds no systematic accounts whatsoever of the receipts or expenditure of the association; that any result desired to be ascertained can only be arrived at by great labor and trouble in collating and arranging the figures contained in the books and memoranda furnished."

The facts set forth in the bill, not denied by defendant, present no doubtful question. There has been a clear invasion of the rights of the plaintiffs, and the injury already done them is irreparable in our present view. The trust committed to this association was one of the most sacred character, but it seems not to have been held in this high esteem. The association was instituted to aid poor men to build homes. If through her agency any homes have been founded, they certainly, from the plaintiffs' exposition, have been built on sandy foundations, and if the gates are not open to let forth such a flood as will wash them away, the officers and directors are seemingly not to be thanked therefor. There is no warrant in the law for the transaction of the duties of president, secretary, treasurer, and board of directors by Mr. Riggs; and by what authority of law E. L. Riggs, Elizabeth Riggs, and William D. Riggs had orders drawn in their favor for the sum of $13,388.97 out of the total sum of $23,139.34 received since the first of March, 1875, without any vouchers appearing therefor, does not appear.

We see no safety for the stockholders in the present condition of the association, except in a continuance of this injunction. To do justice and maintain the plaintiffs' rights, we can do nothing less.

We, therefore, order and direct the injunction heretofore granted to be continued.

Lord Denman, delivering judgment in the House of Lords, in a celebrated case, took occasion to remark, that a large portion of the *legal opinion* which has passed current for law falls within the description of "law taken for granted;" and that, "when, in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

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QUARTER SESSIONS OF LUZERNE COUNTY.

In Re Road in Dallas and Kingston Townships.

1. In a conflict of reports by viewers and reviewers, it rests with the court to adopt either; the court in so doing, however, to have regard as to which report contains recommendations most conducive to the public interests.
2. Under the act of 1855, it is not necessary for the purposes of a review that a majority of the original petitioners should sign the petition.

Opinion by STANTON, J. June 29, 1878.

On the 27th day of January, 1875, a petition, signed by one hundred and eighty-six citizens of Dallas and Kingston townships, was filed in this court, asking that viewers be appointed to view and lay out a road from a point at or near Demond school house, down along Toby's creek, intersecting the turnpike at or near Bisher's mill, in the village of Trucksville, in Kingston township. Theodore Smith, Josiah Ruggles, and William H. Sturdevant were appointed viewers, on same day, pursuant to prayer of said petition. They met, viewed, and laid out a road between said points, and made report thereof, which report was absolutely confirmed by this court on December 10th, 1875. Subsequently an order for the opening thereof was issued to the supervisors of said Dallas and Kingston townships. The part of said road viewed and laid out as aforesaid in said Dallas township, except about three-fourths of a mile, was duly opened. The other part of said road has not yet been opened.

On the 27th day of January, 1876, a petition, signed by one hundred and seven persons, representing themselves as citizens and taxpayers of the townships of Kingston and Dallas, was filed in this court, setting forth that they labored "under inconvenience for want of a public road to begin at a public road at or near the Spencer school house, in said township of Dallas, and to end in the public road running from Trucksville to Dallas, at or near the foot of the John Shafer hill, in the said township of Kingston," and asking for the appointment of three persons "to view the ground proposed for such road, and if they should see occasion to lay out the same, to inquire of and vacate the public road now opened, or about to be opened, running from a point near the said Spencer school house to the village of Trucksville, which last mentioned road will, by reason of the laying out of the proposed road, become useless," &c. On the same day,

James Sutton, P. B. Reynolds, and Charles Sturdevant were appointed viewers in accordance with the prayer of said petition. On the 17th day of April, 1876, the order to view said road was continued to the next session of the Court of Quarter Sessions, to be held in June, 1876. On June 15th, 1876, said viewers made report, in which they say: "We have reviewed the same, and are of opinion that there is no occasion for such a road, or for any change of the road now opened, or about to be opened, as set forth in the petition, and that the new road or change, as asked for in this petition, is not necessary for a public road." This report was confirmed *nisi* June 15th, 1876, and on September 12, 1876, exceptions thereto were filed by A. H. Dickson, attorney for petitioners, as follows: "First, that the viewers mistook their duty, and made a review instead of a view, as ordered by the court: Second, general exceptions as to matter and the form of the report."

On September 11th, 1876, another petition was filed in this court, signed by fifty-nine persons, none of them signers of the last mentioned petition, asking for the appointment of three persons to review the said roads respectively proposed to be laid out and opened, and to be vacated as aforesaid. On the same day, this court appointed Albert Polen, William Schooley, and Irving A. Stearns to make such review. On December 4th, 1876, the persons so appointed made report (which on same day was confirmed *nisi*), setting forth "that they are of opinion that the said road leading from a public road at or near the Spencer school house, in the township of Dallas, and ending in the public road running from Trucksville to Dallas, at or near the foot of the John Shafer hill, would be unnecessary for a public road, and that they have not laid out the same; that the said public road now opened, or about to be opened, running from a point near the said Spencer school house to the village of Trucksville, is useless, inconvenient, and burdensome, and they are of opinion that the same should be vacated and abandoned. They, therefore, report to vacate the said last mentioned road, and not to lay out the said first described road." To this report exceptions were filed on December 5th, 1876, by W. P. Ryman, attorney, on behalf of certain citizens and taxpayers of said townships, as follows: "First, because the petition on which said reviewers were appointed was not signed by a majority of the original petitioners for the road laid out and partly opened, which they attempt to vacate, as required by the act of assembly: Second, general exceptions: Third, because said reviewers erred in finding that the public road now opened, or about to be opened, running from a point at or near said Spencer school house to the village of Trucksville, is useless, inconvenient, and burdensome, and that the same should be vacated and abandoned."

The view and review, made as above set forth, present to us the simple question, whether the part of the road laid out by the viewers

appointed the 27th day of January, 1875, to wit, that part running from a point near the said Spencer school house to the village of Trucksville, should be vacated as recommended by the persons appointed to review said road on the 11th day of September, 1876, or whether it should stand as recommended in the report made by the persons appointed on the 27th day of January, 1876.

In this conflict of reports, it rests with us to say which of them contains recommendations most conducive to the public interests (Ashton Township Road, 4 Yeates, 372), and to adopt and confirm that one (Buckwalder's Road, 3 S. & R. 236; Backman's Road, 1 Watts, 400; Paradise Road, 29 Pa. St. Rep. 20).

Depositions have been filed by both parties. The testimony of those who favor the road as now laid out is that it will cost from about ten to fifteen hundred dollars to complete that part of the road yet unopened, to wit, about three-fourths of a mile in Dallas township, and one and a-half miles in Kingston township, and one of said witnesses offers to bind himself in satisfactory security to open it for fifteen hundred dollars. Of the witnesses produced by those who seek to vacate said part of said road, one testifies that to open it will cost six thousand dollars, another fifteen thousand dollars, and another twenty thousand dollars. It has been testified to, on the part of those who opened that part of said road now opened, and lying in Dallas township, about three miles, that it only cost three hundred dollars to open this distance.

The exceptions to the report filed the 15th day of June, 1876, raise no material question. The viewers made the mistake of using the word "reviewed" instead of the word *viewed* in their report; but the sense of the matter set forth in the report would be the same as it now is, even if the viewers had employed the word *viewed*. The exceptions to the report filed the 4th day of December, 1876, by the persons appointed to make a review, raise, however, a somewhat new question. The petition for a review in this case was not signed by any of the original petitioners. Prior to the act of 1855, the law made no provision for vacating the whole or any part of any public or private road "laid out * * and opened in part." "Laid out * * and opened in part" was the condition of said road from the Demond school house to Trucksville at the time when both said view and review, to inquire as to the propriety of vacating a part of it, was had.

The eighteenth section of the act of 1836, relating to the vacating and altering of roads (Pamphlet Laws, p. 558), provides that the courts "shall, within their respective counties, have authority, upon application to them by petition, to inquire of, and to change or vacate the whole or any part of any private or public road which may have been laid out by authority of law, whenever the same shall become useless, inconvenient, or burdensome; and the said court shall proceed therein by views and reviews in the manner provided for the laying out of the public roads and highways."

The nineteenth section of said act of 1836 provides that "roads laid out and confirmed as aforesaid, but not opened, may be vacated and annulled upon the petition of a majority of the original petitioners for the said road, resident within the respective county, in the same manner as other roads may be vacated."

The act of 1855 (Pamphlet Laws, p. 422), under which said view and review were had, provides that "the several Courts of Quarter Sessions of this commonwealth shall have power, within their respective counties, to inquire of, and to change or vacate the whole or any part of any public or private road which may have been laid out by authority of law, and opened in part; and the said court shall proceed therein by views and reviews in the manner provided for the vacating of other roads by existing laws."

We do not find anything in the act of 1855 that bears out the construction put upon it by the exceptants to the review. Its scope is larger than the said nineteenth section of the act of 1836; for it not only provides for *vacating*, but also for *changing*. It is, in terms and purposes, the same as the eighteenth section of said act of 1836. If this act of 1855 provided simply for vacating, as does the said nineteenth section of said act of 1836, then we would concede merit to this exception; but, as we now regard it, the mode of procedure under it must be analogous to the manner of making a view or review under said eighteenth section of the act of 1836. We cannot endorse the views of those who say that it is necessary for the purposes of a review under this act of 1855, that a majority of the original petitioners should sign the petition.

We have, therefore, before us the reports of viewers and reviewers, to neither of which irregularity attaches. The question before us, then, resolves itself into this, which report contains recommendations most conducive to the interests of the taxpayers of said Dallas and Kingston townships. The testimony taken shows quite a great variety of opinion as to the cost of completing said road from the Demond school house to Trucksville. But after a thorough investigation of the whole question, we are fully satisfied that the road from the Demond school house to Trucksville, as laid out by the viewers in the report confirmed the 10th day of December, 1875, is a necessity, and that the same can be completed at a very reasonable expense to the taxpayers of said Dallas and Kingston townships. Five hundred and seventy-seven persons throughout the sparsely settled section of country in which this road lies earnestly remonstrate against the vacating of any portion of it. That no portion of said road should be vacated, seems to be the wish of the great majority of the taxpayers of both said townships. The persons who made said review reported to vacate a part of said road, but provided in lieu no other route for the accommodation of the public. To vacate any portion of said road,

under the circumstances, seems to us a disregard of the rights of the great majority of the citizens of said townships.

For these reasons, said review is set aside, and the report of the viewers appointed the 27th day of January, 1876, which leaves the road from Demond school house to Trucksville as reported by Theo. Smith, Josiah Ruggles, and William H. Sturdevant as aforesaid, is adopted and confirmed by us.

W. P. Ryman, for view.

A. H. Dickson, H. W. Palmer, and H. M. Hoyt, *contra.*

COMMON PLEAS OF BERKS COUNTY.

Muhlenberg v. Eiler, Garnishee.

Moneys in the hands of a treasurer of a railroad company are held in his fiduciary and official capacity, and cannot be attached by process issued on a judgment against the company, and service on the treasurer as garnishee.

Rule for judgment on the answers of the garnishee.

Opinion by WOODWARD, P. J.

The plaintiff having obtained a general judgment against the bridge company, issued a fieri facias, by virtue of which the real estate of the corporation, consisting of the bridge and its appurtenances, was levied upon and condemned. This attachment was then issued, the treasurer of the company being the garnishee, and the funds attached being moneys received for tolls.

It was said in Fowler v. The Pittsburg, Fort Wayne, and Chicago Railroad Company, 11 Casey, 22, that "the purpose of an attachment execution is to reach the effects of a defendant in the hands of third persons." In that case an effort had been made to collect a judgment against the corporation by an attachment, in which its ticket agents were made garnishees, and the funds in their hands had been produced by the sale of tickets to passengers. It was held that the creditors could not touch such funds.

The exceptional and peculiar case of Reed v. Penrose's Executrix, 12 Casey, 214, recognized the same general doctrine. General Reed, the president of the Erie Canal Company, was a banker. The moneys collected for tolls and water rents were deposited with him by the treasurer, under a contract that they should be returned on call, and that meanwhile the deposit should bear interest. The moneys were attached, and it was held that the plaintiff was entitled to recover, on the ground that the garnishee held the relation of a contract debtor to

the company. The Supreme Court said: "Nor is there anything in the fact that he was president. That might be important if we were inquiring for the expectations of the depositors, or seeking for an honorary obligation. But his presidency did not prevent his making any contract with the company, and he did contract as banker. Not as president did he receive the money. Not as president is he sued, but as a party to a contract."

In the present case the fund in controversy is admittedly and unmistakeably in the very grasp of the corporation. The treasurer is the garnishee, and the moneys in his hands are held in no other than his fiduciary and official capacity.

The rule to show cause is discharged.

COMMON PLEAS OF LUZERNE COUNTY.

Schneider v. Hess.

A claim for "work and manual labor done" is such a claim as is contemplated by the Act of Assembly, approved April 20th, 1876, entitled "An Act regulating appeals from the judgment of justices of the peace and aldermen in this commonwealth for the wages of manual labor," &c., and the defendant in a case in which judgment is rendered on such a claim must, before taking an appeal from such judgment, make the oath or affirmation required by said act.

Rule to strike off appeal.

Opinion by STANTON, J. June 29, 1878.

The Act of April 20th, 1876, Pamp. Laws, 43, prescribes "that in all cases in which judgment shall have been rendered by any justice of the peace or alderman in this commonwealth for wages of manual labor, that before the defendant shall be entitled to an appeal from the judgment of the justice or alderman, he, or his agent or attorney, shall make oath or affirmation that the appeal is not intended for the purpose of delay, but that he believes that injustice has been done him, which affidavit shall be attached to and sent up with the transcript of appeal."

In this case judgment was rendered by the alderman on a claim for the sum of ninety-eight dollars and eighteen cents for "work and manual labor done." The appeal from this judgment should have been taken conformably to said act, for the claim unquestionably is of that character contemplated by said act. The defendant (or any agent or attorney on his behalf) not having made the oath or affirmation required on taking an appeal, has no standing in this court, and the rule to strike off the appeal at the cost of defendant is, therefore, made absolute.

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VOL. 7. FRIDAY, AUGUST 2, 1878. No. 31.

COMMON PLEAS OF LUZERNE COUNTY.

Wickizer v. Blair, Executor.

1. The oath required to be made on appealing from an award of arbitrators, may be made by one who styles himself the appellant's agent.
2. When one ratifies the act of another, it is as if done by himself.
3. When an agent exceeds his authority, or a person acts as agent without authority, the principal, or alleged principal, is bound to disavow the act as soon it comes to his knowledge, otherwise he makes himsel responsible.

Rule to strike off appeal.

Opinion by STANTON, J. July 20, 1878.

We are asked to strike off this appeal, because the oath required to be taken is in the following form: "Joseph Fellows, agent for the ex'r, being duly sworn according to law, deposes and says, that it is not for the purpose of delay the appeal in this case is taken, but because he firmly believes that injustice has been done." This is signed by "Joseph Fellows, agent for ex'r."

The act of assembly regulating appeals from awards of arbitrators, approved June 16th, 1836 (Pamp. Laws, 723), requires that "the party appellant, his agent or attorney, shall make oath or affirmation that it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done."

M. L. Blair, the party appellant, says in his testimony, "I am the defendant in this case. I was informed by the heirs of the estate, before the time for the appeal had gone by, that there was a defense to this suit, and that the heirs wanted the case appealed. I went to Wilkes-Barre for the purpose of appealing the case. This was before the time for an appeal had gone by. When I got to Wilkes-Barre, I found that Jos. Fellows had appealed the case—a nephew of Sylvanus Fellows, deceased. So I became satisfied with that appeal, instead of appealing myself."

The oath may be made by one who styles himself the appellant's agent: Duffie v. Black, 1 Penn. St. Rep. 388.

When one acts as agent for another under an authority, whether real or pretended, and the person for whom such pretended agent acts accepts and confirms such act, he ratifies the same, and the act becomes his own: Klopp v. Witmeyer, 7 Wright, 226; Kelsey v. National Bank of Crawford, 19 P. F. Smith, 429; Mitchell v. Freedley, 10 Barr, 205; Garrett v. Gunter, 6 Wright, 146.

When an agent exceeds his authority, or a person acts as agent without authority, the principal is bound to disavow it the first moment the fact comes to his knowledge, and if he does not, he makes the act his own: 1 Parsons on Contracts, 49, and notes; 14 S. & R. 27; 19 P. F. Smith, 426.

M. L. Blair, the party appellant, in his testimony, expresses himself satisfied with the agency of Joseph Fellows. He was "satisfied" with Fellows' agency and acts in this case before the day for appeal had gone by, and he has not as yet disavowed or disowned them. The oath made on taking the appeal is, therefore, competent and sufficient, and the rule is discharged.

Loomis, Mayor, v. The Council of the City of Wilkes-Barre.

1. The general department appropriations form the bases of the tax-levy for each fiscal year.
2. Every cent paid out of the city treasury must first be ordered out or appropriated by an ordinance or resolution, and drawn on a warrant made pursuant to such ordinance or resolution.
3. Such ordinance or resolution, before going into effect, must be presented, duly engrossed and certified, to the mayor for his approval.

Rule to show cause why attachment shall not issue against defendants for contempt, &c.

Opinion by STANTON, J. July 20, 1878.

The above named parties have resorted to this rule to get from us a further exposition of our views on a point not fully, they claim, elucidated in our opinion filed the 23d day of January, 1878, in this court, in a case then pending between them.

The following is the disputed passage in that opinion: "There is no question but that it is unlawful for the council of the city of Wilkes-Barre to contract any debt, or make any appropriation on behalf of said city, without first passing an ordinance or resolution to that end, and then presenting such ordinance or resolution to the mayor for his approval; and if the city treasurer should pay out of the city funds a warrant drawn otherwise than in pursuance of an appropriation so made, he would be guilty of a misdemeanor."

It is now claimed, on behalf of the defendants, that they understood us to mean by the word "appropriation," in the above quoted passage, the general appropriation for the various departments of the city government made at the beginning of each fiscal year. Such is not the sense of the word "appropriation," as used by us, and we did not understand the defendants to so hold at the time we rendered said opinion; for in that opinion we used this language: "To meet this phase of the law, however, the defendants reply by their affidavits, read on the hearing of this case, that the appropriations of city moneys are made on warrant, and that it is not necessary to obtain the mayor's approval to such warrant. This position, if tenable (which we deny),

under the act incorporating the city, and its supplement, must be abandoned by the defendants when confronted by the following provisions of the act dividing the cities of the state into three classes, &c., approved May 28, 1874. Section seven of said act says: 'No money shall be paid out of the city treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof.' Many persons step over the bridge before they reach it, and the defendants made such a mistake in reaching the warrant, without first treading the bridge of legislation."

We, also, in that opinion, cited the third paragraph of section four of said act of 1874—to wit, "Every legislative act of councils shall be by resolution or ordinance, and every ordinance or resolution, except as hereinafter provided, shall, before it takes effect, be presented, duly engrossed, and certified to the mayor for his approval"—in order that the sense of the phrase, "made by law," used in section seven of said act, might be made manifest, and, also, in order that it might be understood out of the mouth of the act itself, to what extent the mayor is entitled to participate in legislating for the city.

The total sum appropriated for any department of the city government is never paid out on a single warrant. The general department appropriations form simply the bases of the tax-levy for each fiscal year; but the thirty and forty dollars per month that are paid to the laborer on the streets, the forty and fifty dollars that are monthly paid to the policeman—these sums, appropriated by ordinance or resolution, as provided in the third paragraph of section four of said act of 1874, form the groundwork of the warrant.

We hold that not one cent can be lawfully paid out of the treasury of the city of Wilkes-Barre, except upon an appropriation made by an ordinance or a resolution first presented, duly engrossed and certified, to the mayor for his approval.

There being no willful disregard of the terms of the injunction by the council, the rule is discharged.

COMMON PLEAS OF BERKS COUNTY.

Treichler v. Hauck.

Where during the attendance of a defendant in a criminal case upon his own trial, he is served (outside of the court house) with a writ of summons, it will be allowed to stand. Where a capias issued against him, the personal service will not be interfered with, but he will be discharged on common bail.

Rule to set aside service of writ.

Opinion by WOODWARD, P. J.

A writ of capias ad respondendum was served on this defendant while he was in Reading in attendance on the Court of Quarter

Sessions on an indictment for fornication and bastardy. The service was made on the day of the trial of the indictment The entry of bail to the capias was waived by the plaintiff's counsel, and it was agreed that the service of the writ should stand with the effect of the service of a summons, subject to the opinion of the court on the final disposition of the rule as to the defendant's liability to be effected by civil process of any kind.

The uniform current of authority shows that a party to a civil suit is privileged, during his attendance on the trial, from the service of any writ in any other civil proceeding, and the general current of authority is against the existence of any such privilege where the party served is a defendant in any criminal indictment. The reason for a definite and unqualified distinction of this kind is not perceptible. There would seem to be as much inconvenience resulting from seizing a defendant under a capias while attending a criminal court, and holding him in custody in default of bail, as could possible arise from the service of a summons on a party attending the court upon the trial of a civil action. There may be some recondite philosophical reason for the distinction, but the probability is that it originated in the same popular and professional feeling towards persons charged with crime, which, even in Pennsylvania, down almost to the commencement of this custody, prompted the legal rule that held a perfectly innocent man in custody after his acquittal until he paid the costs of prosecution. If this court were at liberty to act upon their own convictions, they would be constrained to apply precisely the same rule to parties in civil and criminal cases. But to the extent of holding a defendant in an indictment to be subject to the service of a summons, the rule has been invariable. Beyond that point, however, there has been a conflict of authority. In some courts it has been held that it was competent for a party to issue a capias, and hold a defendant to bail. In others, while the personal service has been sustained, the practice has been to set the demand for bail aside. It is believed that the latter practice is that which it is the duty of this court to recognize and adopt. Where during the attendance of a defendant in a criminal case upon his trial he is served (outside the court house) with a writ of summons, it will be allowed to stand. Where a capias issued against him, the personal service will not be interfered with, but he will be discharged on common bail. This course is in accordance with the precedents of Bours v. Tuckerman, 7 Johns. 538, Hopkins v. Coburn, 1 Wendell, 292, and Sanford v. Chase, 3 Cowen, 381. The effect of the agreement of counsel, made when this rule was granted, has been to leave the defendant liable to answer to the action, while he has been relieved of the necessity of giving bail.

The rule to show cause is discharged.

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COMMON PLEAS OF BERKS COUNTY.

Souders v. Potteiger.

Bail in an appeal from the judgment of a justice of the peace must be perfected within the twenty days allowed by law.

Rule to strike off appeal.

Opinion by WOODWARD, P. J.

By the fourth section of the Act of the 20th of March, 1810, the entry of bail within twenty days after the judgment of a justice of the peace is made absolutely essential to sustain an appeal to the Common Pleas. In this case the judgment was entered by the alderman on the 17th of January, 1870. The time for perfecting the appeal expired on the 6th of February, and after that the plaintiff's right to execution was absolute. An appeal was applied for on the 29th of January, and the recognizance signed by the surety appears on the transcript as dated on that day. The alderman certifies, however, that the "bail was signed February 9th," and this is in accordance with parol proof. There was no neglect or mistake of the officer which the defendant can set up here. When he called at the office to say that the bail was out of town, and the alderman told him that it would make no difference if he brought him in within a few days, there was still eight days within which to perfect the appeal. He chose to wait eleven days, and then the bail was brought in, after the plaintiff had directed the alderman to issue execution.

The rule to show cause is made absolute.

COMMON PLEAS OF SCHUYLKILL COUNTY.

Dorner v. Handwick.

A justice of the peace has no jurisdiction of an action for damages for a loss deducible from the existence of a contract: Zell v. Arnold, 2 Pa. Rep. 292.

Opinion by WALKER, J.

The records show that this suit was instituted on July 16, 1872, before a justice of the peace to recover damages for the neglect and

refusal of the defendant to furnish the plaintiff below with a lease upon a small drift, or colliery, which Dormer had previously sold to Handwick. Judgment was given by the justice for $99.99 for Handwick, and the proceedings are removed into this court by certiorari. Want of jurisdiction is assigned as the only error. The jurisdiction of a justice of the peace in civil causes, under the first section of the act of 1810, is confined to contracts expressed or implied, and must appear upon the face of the record: Clark v. Lehigh Valley Railroad Co., 1 Luz. Leg. Reg. 90; McCabe v. Kulp, 28 Leg. Int. 260; Paine v. Godshall, 29 Leg. Int. 12. The damages are consequential, and, as the record shows, sounding in tort, and consequently are not within the jurisdiction of the justice. The case of Shannon v. Madden, 1 Phila. 254, relied upon, was for unliquidated damages, not damages for a tort, deducible from the existence of a contract: Zell v. Arnold, 2 Pa. Rep. 292.

The judgment is, therefore, reversed.

Moore v. Whitney.

W. obtained a judgment against B., and issued execution; the sheriff levied upon certain personal property; M. claimed the goods, gave bond, and an issue was framed under the sheriff's interpleader act to try the title; during the pendency of this issue, Morgan & Armstrong on two judgments issued executions against M., levied upon the identical property covered by the levy against B., and sold the same to W. for twelve thousand dollars; W. paid for the property, removed it, and sold it to other parties. In a trial on a feigned issue, *held*, first, that the action of W. was an affirmance of M.'s title, and that he was estopped from setting up title in B.; second, that his purchase and sale of the property to third parties destroyed the lien of his levy, by putting it out of the power of M. to have the goods forthcoming, if required.

Rule to show cause why judgment should not be entered for the defendant non obstante veredicto.

Opinion by WALKER, J.

This rule was granted to enable us to ascertain, after argument, whether there was error in instructing the jury that if they believe the evidence embraced in the plaintiff's first offer—to wit, that L. F. Whitney became the purchaser at sheriff's sale of the articles in question as the property of W. D. Moore, which were covered by his levy in the execution against John H. Bracken—and the other evidence in the cause, then their verdict should be for the plaintiff.

The doubt that arose at the time, and which prompted the rule, was not as to the admission of the evidence, but as to its controlling effect in determing this case. The facts, briefly stated, are as follows: Lawrence F. Whitney obtained a judgment of two thousand and fifty-five dollars against John H. Bracken, and issued execution on it. The sheriff levied upon certain personal property at the Charter Oak colliery, Eagle Hill, in this county. William D. Moore claimed the property, gave bond to the sheriff, and an issue was formed under the

sheriff's interpleader act to try the title to the property. While these proceedings were pending, Morgan & Armstrong issued executions on two judgments obtained against Moore, and this identical property was levied upon and sold as Moore's property to L. F. Whitney for twelve thousand dollars. Whitney paid for the property, removed it, and sold it to other parties.

Upon this state of facts, the question arose whether the action of Whitney in purchasing these identical articles (levied upon by him in his execution against Bracken) as the property of Moore, did not destroy the lien of his levy, and estop him from recovery in this issue. This is the sole question.

The lien of an execution when once attached upon personal property continues until there is a judicial sale of the property, unless it is discharged by the laches of the party or of the sheriff. Under the sheriff's interpleader act, the goods levied upon and in the hands of the claimant, after bond given, are in the custody of the law. The sheriff is required to withdraw from the possession of the property, and the bond is the security for their forthcoming after the determination of the issue. Until that time, the levy is a valid, subsisting lien, and does not lose its priority to subsequent executions: Bain v. Lyle, 18 P. F. Smith, 60. A subsequent execution and levy on goods in the hands of the claimant, if against the defendant, would be void, and could be set aside upon application. The lien of the levy is not discharged by receiving the bond, and the property is free from the reach of other process as it would be in the sheriff's hands. The property is in the custody of the law: Hogan v. Lucus, 10 Peters, 400. For interlocutory orders shall not impair vested liens: Badorff v. Focht, 8 W. 196 (Woodward, J.) A sale by the claimant of the goods left in his possession conveys no title, unless he is the owner: Johnson v. Minor, T. & H., Vol. I., part 2, 903. And the person who buys them takes them with an implied warranty of the title of the vendor, nothing more: Ibid, p. 904.

Apply this law to the facts of the present case: If Moore was not the owner of the property in question, the sale upon the execution of Morgan & Armstrong passed to the purchaser no title. But Whitney claims to hold the property by this title. It does not lay in the mouth of Whitney, after he purchased the property as Moore's, and took possession of it, and probably made a profit out of it, to turn around now and deny that the property belongs to Moore. Yet this he must do, if he can recover in this proceeding. His act must be considered an affirmance of Moore's title, and consequently he cannot claim them by virtue of his levy as the property of John H. Bracken. In other words, he cannot hold them by virtue of his purchase as Moore's property, and hold them by virtue of his levy as Bracken's. Any other conclusion would be illogical and illegal. If Bracken owned the property, Whitney acquired no title to it by the sale, no

more than a bona fide purchaser from a wrongful possessor can acquire title. He is, therefore, estopped by his own act.

In Robinson v. The Atlantic and Great Western Railroad Co., 16 P. F. Sm. 160, the Supreme Court says: "That when the plaintiff levied upon property mentioned in the sheriff's description as the property of the defendant, and prepared to sell it as such, he affirmed the defendant's title by his own act."

Again, when Whitney bought the articles covered by his levy, removed them away, and sold them to third parties, he as effectually destroyed his lien on them—both in law and fact—as it was possible for a party to do. We hold, then, that Whitney's action in a two-fold aspect determines this question against him—first, his purchase of the property was an affirmance of Moore's title, and his sale to others was an implied guarantee of the title; second, that his removal and sale of the articles to other persons destroyed the lien of his levy by rendering it impossible to have the goods forthcoming under the conditions of the bond, if required. Rule discharged.

The proposition for conducting all law proceedings in English was most strenuously opposed. The reporters, who delighted in the Norman French, were particularly obstreperous. "I have made these Reports speak English," says Style in his preface (A. D. 1658), "not that I believe they will be thereby more generally useful, for I have been always, and yet am of opinion, that that part of the common law which is in English hath only occasioned the making of unquiet spirits contentiously knowing, and more apt to offend others than to defend themselves; but I have done it in obedience to authority, and to stop the mouths of such of this English age, who, though they be confessedly different in their minds and judgments, as the builders of Babel were in their language, yet do think it vain, if not impious, to speak or understand more than their own mother tongue." And Bulstrode, in the preface to the Second Part of his Reports, says "that he had many years since performed the work in French, in which language he had desired it might have seen the light, being most proper for it, and most convenient for the professors of the law."

Lord Chancellor Thurlow held, upon the construction of the statute of frauds, which requires that a will of lands shall be subscribed by the witnesses in the presence of the testator, that a will was well executed where a lady who made it, having signed it in an attorney's office, got into her carriage, and the carriage was accidentally backed by the coachman opposite to the window of the office, so that, if she had been inclined, she might have let down the glass of the carriage and seen the witnesses subscribe the will.

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VOL. 7. FRIDAY, AUGUST 16, 1878. No. 33.

SUPREME COURT OF PENNSYLVANIA.

Siewers et al. v. Commonwealth, to the use of Hausman.

1. For the accuracy and truthfulness of his search and certificate, the prothonotary is responsible to the person for whom it is made and not to others.
2. But where a certificate was given to A. (the borrower of money), and B. (the lender's agent) not relying on it, went with A. to the officer, who reaffirmed its correctness, and at B.'s request made a new search, and returned the certificate to him (B.) saying it was correct: *Held*, that there was both privity and liability to the lender on the part of the officer.

Error to the Court of Common Pleas of Carbon county.

Joseph H. Siewers, the plaintiff in error, was prothonotary of the Court of Common Pleas of Carbon county, and on July 30th, 1868, one James Anthony procured a certificate from him of judgments against him, the said Anthony, and paid for it. On August 7th following, Anthony and one Thomas Beck, agent for Alex. Hausman, came to Siewers' office, Beck exhibited the certificate which Siewers had given Anthony, and asked whether it was correct, and was told that it was; Beck then asked the prothonotary to look over it again; whereupon Siewers took the certificate, looked over his books, and said it was correct. Beck thereupon requested him to draw up a judgment note for $2,500, which was signed by Anthony, handed over to be entered, and the money paid by Beck to Anthony, and the prothonotary's charges also paid by Beck. A judgment in favor of one Straub for $750 was not mentioned in the certificate. The real estate of James Anthony was sold December 6th, 1873, and brought less than the judgment liens against it, whereby the Hausman judgment fell short of realizing the full amount some $500. This suit was brought upon the official bond of J. H. Siewers, prothonotary. Upon the trial the foregoing facts were proved. Defendants submitted the following points:

1. That as the evidence is uncontradicted, that the defendant, Siewers, made out a certificate of judgments at the request of James Anthony, and delivered the same to James Anthony on July 30th, 1868, who paid him therefor at that time, the plaintiff cannot recover.

2. That as James Anthony, at the time he ordered the search, and received and paid for the search, was not the agent of Hausman for that purpose, there was no breach of the condition of the bond, and the plaintiff cannot recover.

3. That if the jury believe that, at the time James Anthony ordered the search and received and paid for the search, he was not

authorized by Hausman to procure the search and certificate, then there was no breach of the condition of the bond, and the plaintiff cannot recover.

These points were answered in the negative. The court below (Dreher, P. J.) charged, *inter alia*, as follows: "Among other duties of the prothonotary is that of making searches for judgments and giving his certificate of the result of such search, for any person who may choose to apply to him therefor, and pay him his fee allowed by law. In the accuracy and truthfulness of such search and certificate the prothonotary is responsible to the person for whom it is made. He is not responsible to anybody else. A person, desiring to have the personal pecuniary responsibility of the prothonotary or his sureties, must himself apply for and have the search and certificate made. He need not apply in person. It is sufficient if the application is made and the search and certificate procured by his agent for him."

Verdict for the Commmonwealth $5000, the penalty named in the bond, and for the plaintiff, Alexander Hausman, the sum of $673.20, and judgment. Defendants took this writ, assigning for error, *inter alia*, the admission in evidence of the certificates of search to James Anthony, and the refusal of their points, as aforesaid, and the charge of the court, to the effect that it the jury should "find the facts to be as just stated in regard to what occurred in the prothonotary's office, then the plaintiff would be entitled to recover, and the verdict should be in his favor."

Opinion by AGNEW, C. J. May 6, 1878.

The learned judge below followed closely the current of decisions in this state. He held that for the accuracy and truthfulness of his search and certificate the prothonotary is responsible to the person for whom it was made, and not to others: Commonwealth v. Harmer, 5 Amer. Law Reg. 214, N. G. (also 6 Philada. Rep. 90); Houseman v. Girard L. and B. Ass., 31 P. F. Smith, 256. The reasons given in Commonwealth v. Harmer appear to be satisfactory. The officer owes a single duty, which is to him who employs him to search and certify. If a new duty to another arises, it must be because of a new demand and a new privity. If without this new privity successive liabilities can arise to others, the cause of action necessarily changes, both as to the time of its origin and the measure of the loss, and thus the statutory limitation as to official bonds will be postponed from time to time, and a variable standard of recovery arise with each succeeding claimant who holds the certificate. This is not only harsh and unjust to the officer, whose liability is thus made to continue onward without new compensation or a fresh search. A fresh search may reveal the omitted incumbrance, and thus give the officer a *locus penetentiæ*, as well as an equivalent compensation for the new risk to be assumed.

The plaintiff in error had the benefit of this view of the law in the charge. But the facts of this case are wholly different from those

in the Commonwealth v. Harmer, and take it out of the rule therein stated. Hence the court properly left it to the jury on the facts. The certificate was given, it is true, to Anthony, the borrower of the money from Hausman, but Beck, the agent, not relying on it, went with Anthony to the officer, who reaffirmed its correctness. Not content with this, Beck requested a search, which he (the prothonotary) made and returned the certificate to him, saying again it was correct. Upon this, and at Beck's request, the prothonotary drew up a judgment note, which was signed, and handed over to be entered, and the money then paid by Beck to Anthony. Certainly this was a republication of the certificate made directly to Beck, the agent of the plaintiff, it was a renewal and re-delivery of the certificate by the prothonotary himself, directly to the plaintiff, and therefore there was not only privity but liability to him on the part of the officer. He must then respond in damages for his omission, on the principles of Zeigler v. Commonwealth, 2 Jones, 228; McCarnahan v. Commonwealth, 5 W. & S. 21, and Houseman v. Girard L. and B. Ass., *supra*.

Judgment affirmed.

Missimer v. Ebersole.

A. issued a *fi. fa.*, upon which a levy was made; subsequently the writ was stayed by order of court, the lien of the levy being preserved; afterwards the writ was returned "writ stayed by court;" A. issued an *alias fi. fa.*: *Held*, that the lien of the levy on the first *fi. fa.* was lost by this proceeding, and that the assignee for benefit of the creditors of the defendant, to whom defendant assigned his property between the dates of the levy under the first *fi. fa.* and the issuing of the *alias fi. fa.*, came in prior to the latter.

Error to Common Pleas of Lancaster county.

Opinion by PAXSON, J. May 20, 1878.

On the 3d day of April, 1877, Abraham Ebersole (defendant in error) issued a writ of *fieri facias* against Samuel Blecker, and on the 5th of April the personal property of Blecker was levied upon by the sheriff. Subsequently the writ was stayed by the order of the court below, the lien of the levy being preserved by said order, and a rule granted to show cause why the judgment should not be opened. This rule was discharged on the 25th of September following. In the meantime (April 23d, 1877) Blecker, the defendant in the execution, executed an assignment for the benefit of his creditors, which was delivered to the assignee on the same day, accepted by him, and duly recorded. After the discharge of the rule to open the judgment, the said writ of *fieri facias* was returned by the sheriff to the office of the prothonotary at the request of the counsel of the defendant in error. The return is, "writ stayed by court." At this point the execution creditor had a valid and subsisting levy, and his right to have issued a *venditioni exponas* and proceed to sell the property could not have been denied. He did not do so, but issued an *alias fi. fa.*, under which the sheriff made a new levy. His return makes no reference to the

levy formerly made on the *fi. fa.* It was conceded at bar, however, that most of the property seized under the *alias* was the same property previously levied upon under the *fi. fa.* There were, however, a number of articles not included in the first levy. These items were subsequently stricken out by the court. The court below was asked to set aside the *alias fi. fa.* on the ground that it was irregular, and that it was an abandonment of the levy upon the *fi. fa.* This motion was refused, and forms the subject of the three assignments of error.

It was held in Pott's Appeal, 8 Harris, 253, that issuing a new execution, without disposing of the levy on the old one, was an irregularity, but one that could be taken advantage of by no one but the defendant. In that case the *alias fi. fa.* was levied upon the same property that had been seized upon the prior writ. This fact is stated in the return to the *alias*, as well as the further fact that it was made "subject to all prior claims and levies made on same." It will thus be seen that in Pott's Appeal there was an irregularity, but no abandonment of the prior levy. The return to the *alias* shows the property to be the same, and evinces a clear intention to retain the lien of the *fi. fa.* In the case in hand there is nothing to connect the property levied upon under the *alias* with the property seized under the *fi. fa.* excepting similarity in description. For aught that appears from the return, the property may have been entirely different. In point of fact a portion of it was different, as has been already said. We think the *alias fi. fa.* and the levy under it amounted to an abandonment of the *fi. fa.*, and that the lien thereof is gone. If it was intended not as an abandonment, but to do what actually was done, to seize on property not before seized, it was, as was said by this court in Ingham v. Snyder, 1 Wharton, 115, "a most unheard of proceeding, and one whose consequences could have been averted but by relinquishing it at the threshold." In that case the lien of the levy on the *fi. fa.* was preserved only by the withdrawal of the *pluries* prior to any action upon it. When the lien of the *fi. fa.* was lost by an abandonment of the levy, the rights of the assignee for creditors attached, and there could be no valid levy under the *alias* upon the assigned property. For a mere irregularity in the execution, no one but the defendant can complain, as was said in Pott's Appeal, *supra*, but a voluntary assignee represents the assignee, and stands in his shoes. What the assignor may do his assignee as his representative may do for him. The assignor made the motion in the court below to set aside this execution. Besides, the abandonment of a levy would seem to be a different matter than a mere irregularity in the execution, and one which purchasers or creditors could take advantage of. A discussion of this question, however, is not essential to this case.

The order of the court below of the date of October 27th, 1877, discharging the rule to set aside the *alias fi. fa.*, is reversed, and it is now ordered that said rule be made absolute.

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VOL. 7. FRIDAY, AUGUST 23, 1878. NO. 34.

COMMON PLEAS OF LANCASTER COUNTY.

Marietta Building and Loan Association v. Hanlen. Same v. Brink. Same v. Pickle. Same v. Eppler. Same v. Eder.

Under the Act of April 12th, 1869, building associations cannot charge a member for neglecting to pay his monthly dues or monthly interest on loans more than ten cents fine for each share, and ten cents fine for each loan of two hundred dollars, each and every month.

The provision of a charter that "he shall forfeit and pay the additional sum of ten cents per month for each and every dollar of dues, interest, and other charges that he or they may be indebted to the association," cannot be enforced.

The method as to ascertaining fines, dues, and settlements defined.

Rules to open judgment, &c.

Opinion by PATTERSON, J. July 3, 1878

It appears that a charter incorporating the said Marietta Building and Loan Association, according to the provisions of the acts of assembly in such case made and provided, was obtained by the decree of the Court of Common Pleas of the county of Lancaster on the 19th of April, 1869. An exposition of the law as contained in that charter, and the act or acts of assembly relating to building associations, will explain and determine the rights of the parties in the suits already stated. In all the foregoing cases the Marietta Building and Loan Association is the plaintiff, and has obtained judgment against the several defendants named, and on these judgments has issued executions to collect the same. The said defendants, execution being in process against them, have made affidavits severally that they do not owe the whole amount of the judgments, and asked stay of execution, and that the judgments may be opened and they let into a defense. Stay of execution was thereupon ordered, and rules granted accordingly in each case. Upon the argument of said rules the several defendants maintained, by their counsel, that the controversy between them and the association as to what amount of the several judgments are due and owing, or as to whether anything is due or not, arises entirely from the mode in which plaintiff has calculated the interest on the debt, and upon the monthly dues, and upon the manner in which fines have been imposed by the association. That being the case, it becomes the duty of the court to examine the several acts of of assembly, as well as the charter provisions of this corporation, and endeavor to ascertain what is the law regulating the matters in dispute

between the parties in said suits. We regret that the counsel for the parties have contributed so little in anything addressed to the court in their argument to aid us in the solution of the questions to be determined. The laws regulating building associations, though special and peculiar, ought to be, and doubtless are, well understood by the solicitors of these institutions, yet we heard little from them to help us in the determination of the issues made. We must proceed, therefore, to the task without the more experienced opinion of the solicitors, and depend on our much more limited experience to make an exposition of the law in the premises. The plaintiff's charter was obtained under and subject to the provisions of the Act of April 12, 1859 (P. L. 544), "to confer on certain associations of citizens of the commonwealth the powers and immunities of corporations and bodies politic in law, and to confirm charters heretofore granted." That act and the plaintiff's charter contain the law in the premises. The act of assembly is paramount authority, but should the charter contain any provision not prescribed in the act, and not inconsistent with its terms, and not repugnant to the charter itself, then such charter provisions are binding. In the opinion of the court, the building association has misinterpreted the law of their charter in reference to the imposition of fines. The first section of Art. X. is very plain on that subject. The association cannot charge a member for neglecting to pay his monthly dues or monthly interest on their loans more than ten cents fine for each share, and ten cents fine for each loan of two hundred dollars, each and every month. Hence, a defaulting borrower, such as Jacob M. Hanlen, who had nine share, and had borrowed $200 on each of the nine shares, could be charged only $1.80 fines for each monthly default. For six months his fines would be $10.80. This follows, evidently, from the reading of said first section; whereas, the wording of charters of most building association is, "he shall forfeit and pay the additional sum of ten cents per month for each and every dollar of dues, interest, and other charges that he or they may be indebted to the association." As regards the settlement of the premium bid by buyers of money or loans, the third section of Art. VIII. says: "He, the stockholder, shall either pay or allow to be deducted the premium offered by him." And under that section, the association has the right to demand payment of the full amount of premium bid in cash, and then the bidder or borrower is entitled to two hundred dollars in money per share bid for or bought. It is usual, however, and which is virtually the same thing, to deduct the premium from the amount of money bought, and pay over the balance to the borrower. It is manifest, also, from the provisions of that same section third, that the association has the right to demand satisfactory security by "judgment bond or mortgage and policy of insurance," within one month from date of purchase for, and demand payment of the purchaser for the whole amount of money bid for—that is, for the amount of two hundred dollars for each and every

share so purchased and paid to him. By section third and section sixth of said Art. VIII., the stockholder taking loans shall pay the association interest for the loan at the rate of not less than six per cent. per annum; and, also, shall pay that interest every month at the rate of one-half of one per cent. per month. Such are the provisions of the charter of said association, and the act of assembly, also, has legalized the collection of such premiums, fines, and interest, so that no plea of usury can be set up. The Act of April 12th, 1859, sec. 6, says: "No premiums, fines, or interest on such premiums that may accrue to the said corporation according to the provisions of this act, shall be deemed usurious, and the same may be collected as debts of like amount are now by law collected in this commonwealth." And by section two of Art. II., it is provided that "each stockholder shall punctually pay his monthly dues (including those shares transferred as collateral security for loans), interest, and fines, and to fulfill all regulations of these articles." From what has been said, the calculations of interest and payment of dues would be as follows: The real debt to the association is two hundred dollars for each share loaned upon, and one-half per cent. per month is one dollar per share. The said defendant, Jacob M. Hanlen, having borrowed upon nine shares, his payments to the association monthly would be nine dollars for dues and nine dollars for interest, as well as the monthly fines for non-payment, as before explained. According to the receipt book of Jacob M. Hanlen, it seems that the monthly dues and interest charged against him by the association are correct and proper. We will next consider the mode of adjusting a loan or debt due by a stockholder, and which he wishes to repay. On this subject, the charter of the association is silent; hence, the law of the state will control the question. The fifth section of the act of 1859 directs that "a borrower may repay a loan at any time; and in case of the repayment thereof before the expiration of the eighth years after the organizatian of the corporation, there shall be refunded to such borrower one-eighth of the premium paid for every year of the said eight years then unexpired; and in case of recovery of loans by process of law, where the amount collected by or distributed to the said corporation shall exceed the amount of loan taken by the borrower, with interest and charges, the money shall be reloaned at the next stated meeting, and the excess recovered beyond the amount required to pay the loan, with interest and charges, shall be returned to the borrower from whom the money was collected, or his or her legal representatives." The provisos to that section direct that the reloans shall be made to the stockholders of the same series; and if the premium offered on reloan be greater than that given by the defaulting borrower, the amount of the original premium only to be paid to such defaulter; and, also, that such defaulting borrower may, at any time after said reloaning, demand the amount required to be paid to a stockholder withdrawing his stock,

saving that the corporation has the right to retain so much of the whole thereof as will save it from loss in case the amount recovered shall not suffice to pay the reloan. It will be seen that the provisos qualify or explain the mode of carrying out the section. But the section just quoted explains and defines the principal step in the case of a repayment of a loan by the stockholder himself. The section secures the right to a borrower to repay a loan at any time, and says he should be entitled to a reduction of one-eighth of the premium bid for each unexpired year in a term of eight years. The formula in such case is: Suppose it was a loan on one share of $200 at 20 per cent. premium, and it was repaid during the sixth year, then a deduction of one-fourth of the premium would follow. One share of $200 at 20 per cent. premium is $40; deduct one-fourth of same, equals $10; or the one-eighth of $40 is $5, and that multiplied by 2, the number of unexpired years, is $10; taken from $200 would leave $190 to be paid by borrower. The usual and most equitable mode of calculating premium on voluntary repayment of loans, and which, we think, conforms to the law, is to charge for the number of months from the time the loan was taken up to the time of repayment. Suppose a loan on one share be taken, say January, 1869, and the borrower would make repayment in July, 1869, the formula is as follows:

1869.

8 years.—January is . . . . . 96 months.
February . . . . . 95 "
March . . . . . 94 "
April . . . . . 93 "
May . . . . . 92 "
June . . . . . 91 "
July . . . . . 90 "

6 months.

One share of $200 at 20 per cent. would make $40, to be deducted from the $200, and would leave net $160 00

Take the 90-96 of $40 from $200 00

$40
90

96)3600(37 50
288

720
672

480
480

Deduct same 37 50

Makes amount due $162 50

Or, add 6-96 of $40 to the net balance of $160, viz:

6-96 of $40
6

96)240(2 50
192

480
480

Add same 2 50

Makes amount due $162 50

Mr. Hanlen purchased his nine shares from J. Culhune and D. Gould, whom the depositions, taken in this rule, show were stockholders from the first organization of this association in 1869, and consequently Hanlen will occupy the same position as they would have done under the above section. In 1877, the year he ceased to discharge his dues, interest, and fines, and got behind in payment for a period of six months, this association had been organized and in operation eight years. In Mr. Hanlen's case, therefore, there are no unexpired years of the eight years after the organization, and he can be allowed no deduction of part of the premium paid, as presented in the above formula. It seems that, under the law, after the expiration of the eight years from the organization of the association, the benefit of one-eight of the premium is no longer to be estimated, but becomes merged in the net value of the whole stock when it shall be sufficient to divide to each share of stock the sum of two hundred dollars, as set forth in section three of Art. II. of the charter.

It remains only to present the mode sanctioned by the law when a stockholder is a borrower, or takes loans, and suffers the interest for the same, at the rate of one-half of one per cent. each month, and the dues or installments to remain unpaid more than six months. When that occurs, both the eighth section of said Act of April 12, 1859, and the charter of this association (§ 6, Art. VIII.) authorizes the directors to enforce the payment of principal and interest, without deducting the premiums paid or interest thereon, by proceeding on the borrower's bond or mortgage according to law—the amount collected to be applied as directed by section fifth of said act. It seems that the charter or by-laws of this association has no provision directing otherwise. Whenever the principal and interest is thus collected, and the amount shall exceed the amount of loan taken by the borrower, with interest and charges (the word "charges" clearly signifying costs of suit), and the money is reloaned, then the said section fifth of the act of assembly governs and controls the settlement between the association and the borrowing stockholder. Then in that case the defaulting borrower may demand from the association the amount of the original premium paid by him for his loan, provided the premium offered and paid for the reloan be greater than that which he originally paid; and then, also, he, the defaulting borrower, may demand from the association the amount required to be paid to a stockholder withdrawing his stock; saving and excepting, however, to the association the right to retain so much, or the whole of said premium or stock, as may be requisite to save it from loss, by reason of said loan, in case the amount recovered shall not suffice to pay the reloan.

We have thus endeavored to determine and announce the law affecting the plaintiff and defendants in the writs before us in every contingency that may arise under plaintiff's charter and the act of assembly before cited; and, with the exposition now given, we believe

the task of ascertaining the legal rights of the parties to the writs we are considering, as well as the rights of the parties in other suits that may be instituted by this association, will not be a difficult one.

From the views submitted in this opinion, it is manifest that mistake has occurred in the mode of estimating and imposing fines by this association, under its charter, upon these defendants, and that the court must set aside the writs of execution in the several cases mentioned, and sustain the rule asked by the several defendants.

Writs of *fi. fa.* set aside, and the rule in each, to open judgment, is now made absolute.

And now, July 12th, 1878, the court, on consideration, revoke so much of the decree entered and filed July 3d, 1878, as occurs after the words, "writs of *fi. fa.* set aside," namely, "and the rule in each, to open judgment, is now made absolute," leaving the original decree as follows: "Writs of *fi. fa.* set aside."—*Lancaster Bar.*

It is actionable to call a counsellor "a daffadowndilly," if there be an averment that the words signify an ambidexter;" or to say of an attorney, that "he hath no more law than Master Cheyny's bull," even although Master Cheyny actually have no bull; for if that be the case, as Keeling, Chief Justice, observed, "the scandal is the greater." And it is quite clear to say that a lawyer has "no more law than a goose" is actionable; and the reporter adds a quære, whether it be not actionable to say a lawyer "hath no more law than a man in the moon." 1 Siderfin, 424.

Mr. Justice Redfield thus speaks of the celebrated case of Cornfoot v. Fowke, 6 M. & W. 358: "This case is certainly a most remarkable instance of self-delusion, brought about by the severity of one's own discriminations. Lord Abinger, who dissented from the opinion of the majority of the judges, seems to have readily comprehended the delusion under which his brethren were laboring, as, indeed, he always did all intricacies of thought and language." And after stating the opinion of the majority of the court in Cornfoot v. Fowke, he continues: "One is almost compelled to doubt if, indeed, these men can be serious. It almost strikes the mind as matter of mere badinage. It is scarcely surpassed, in its ethical or metaphysical acumen, by the sophistry of the ancient schoolmen, by which it was attempted to be proved, by syllogistic reasoning, that in a foot race Hercules never could overtake the lobster."

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VOL. 7. FRIDAY, AUGUST 30, 1878. No. 35.

UNITED STATES CIRCUIT COURT FOR COLORADO.

First National Bank of Trinidad v. First National Bank of Denver.

BANKS AS COLLECTION AGENTS—DILIGENCE REQUIRED—MEASURE OF DAMAGES IN CASE OF NEGLIGENCE.

A bank which acts as collecting agent for another bank must use reasonable care and dilligence in making collections, and if loss occur through the negligence of the bank, it will be held liable therefor.

Under the circumstances of this case, the measure of damages, by reason of loss occurring through the neglect of the defendant, was held to be the amount of the draft forwarded for collection.

The defendant bank received from the plaintiff bank a sight draft for collection, drawn by the plaintiff on a third bank against funds actually to the credit of the drawer; the defendant received this draft for collection January 10, and transmitted it directly to the drawee, its correspondent, on the same day; it ought to have reached the drawee in two days; the drawee continued good until January 29, when it failed; the drawee did not acknowledge the receipt of the draft, and, in fact, the draft was miscarried and never reached the drawee; the defendant made no inquiries about it until February 9th; the plaintiff and defendant both supposed. meanwhile, that it had been paid; the defendant gave the plaintiff no notice of any kind in respect to the draft until February 11th; the plaintiff sued the defendant for its negligent omission to give it notice: *Held*, that defendant was liable. *Held*, also, that the usage or custom set up by the defendant, to the effect that it was not required to make inquiries concerning such remittances prior to the receipt of the regular monthly statement of accounts between banks, was not established by the evidence.

On the day of its date, the plaintiff bank drew the following:

$5,000. TRINIDAD, Col., January 9, 1878.

Pay to the order of D. H. Moffat, cashier [of defendant bank] five thousand dollars. GEORGE B. SWALLOW, Cashier.

To the First National Bank, Kansas City, Missouri.

The plaintiff was the correspondent of the defendant bank, and both were the correspondents of the above-named bank, at Kansas City. Defendant (to the order of whose cashier the draft was payable) received the same in due course of mail, January 10th, and without delay transmitted it on the same day for credit and advice directly to the drawee, the Kansas City bank. When the draft was drawn by the plaintiff, it had more than the amount actually on deposit with the Kansas City bank, and it at once credited the last named bank with the amount. According to usage, the defendant on the receipt of the draft credited, January 10, the amount to the plaintiff, and charged the amount to the Kansas City bank. This was done in anticipation that the draft would reach the drawee in January, and be duly paid when it arrived. The letter containing the draft, which was sent by the defendant to the Kansas City bank, would in due course of mail have reached the drawee January 13th, at the latest on January 14th. The

Kansas City bank never received the letter containing the draft. That bank continued to do business until January 29, 1878, when it closed its doors, and afterwards the comptroller of the currency appointed a receiver, and the bank is now in process of liquidation. If the draft had been presented at any time before January 29th, it would have been paid.

The Kansas City bank did not, of course, acknowledge the receipt of the draft, since its president testifies that it was never received. Singularly enough, another draft for $5,000, drawn about the same time by the plaintiff, on the same Kansas City bank, and forwarded for collection through a bank in Pueblo, was never received by the Kansas City bank—so its officers testify. The defendant bank made no inquiries prior to February 9th, 1878, concerning the draft here in question, or why the receipt of it had not been acknowledged by the Kansas City bank. The defendant's officers assumed that it had been received and credited until February 9th, when, on receiving the monthly statement or account current of the Kansas City bank, it learned therefrom that it was not credited with the draft in question. The defendant immediately (February 9) telegraphed the Kansas City bank that it had on January 10th transmitted the draft, which did not appear in their statement just received. On February 10th the Kansas City bank wrote the defendant that it had never received the remittance. This letter being received by the defendant February 11, the defendant at once, on that day, notified the plaintiff, and charged back the amount to it. Until this, the plaintiff supposed the draft had been paid. The plaintiff objected to the defendant charging back the amount, but the defendant insisted, and refused upon demand to restore the credit or to pay the amount to the plaintff. The plaintiff's action is against the defendant to recover the amount, and is based upon the defendant's alleged negligence, as the agent of the plaintiff, in omitting to give the plaintiff notice that the draft had not been credited or received prior to the failure of the drawee.

The defendant denies the imputed negligence, and sets up in its answer a custom or usage among the banks in Colorada, to the effect that in transmitting bank checks and drafts to correspondents on whom they are drawn, it was usual and customary to await for advices (the regular and usual monthly statement), and that such custom or usage did not require the defendant to make any inquiries concerning such remittance prior to the receipt of the regular monthly statement.

The replication denies the existence of any such custom or usage or any knowledge thereof by the plaintiff.

A jury was waived, and on the trial by the court the facts appeared substantially as above set forth.

DILLON, J.—The plaintiff treats the defendant as its agent to collect the draft in question, and the ground of the action is the alleged

negligent omission of duty on the part of the defendant, resulting in loss to the plaintiff. I have fully examined the adjudged cases relating to the duty and responsibility of a bank which undertakes to act as a collecting agent for its customers, or for other banks. They clearly show that the defendant bank ought to have ascertained within a reasonable time whether the draft transmitted had been received by its correspondent, and, if not, to have advised the plaintiff thereof. The practice of banks to send such checks or drafts directly to the drawee (as in this case), is attended with some obvious additional peril, and does not weaken, if, indeed, it does not increase, the diligence required of the collecting bank in respect to inquiry and notice. The defendant bank allowed an unreasonable time to elapse before it made inquiry concerning the draft; and more than a reasonable time had elapsed before the failure of the Kansas City bank occurred. It was this negligence that caused the loss, since it is established by the evidence that the draft would have been paid if it had been presented at any time before the suspension of the drawee, on the 29th day of January. Here, then, was an unexcused delay for fifteen or sixteen days to make any inquiry or give any notice. Aside from the custum or usage pleaded in defense—to be noticed presently—the decisions in England and this country are uniform that such delay to make inquiry and omission to notify the party interested, as occurred in this case, impose a liability if loss is thereby occasioned.

The alleged custom or usage in derogation of the otherwise legal rights of the plaintiff, is one which scarcely seems consistent with reasonable vigilance or the well known practice of business men and banks to acknowledge promptly the receipt of money remittances. The evidence in this case showed that it was the uniform practice to make such acknowledgements. The defendant claimed that all the banks in Denver and Colorado relied on the monthly statements, and that it was not customary or usual to inquire after remittances in the *interim* between monthly statements. The evidence failed to show any such custom or usage common to all, or even to the majority of the banks in Denver. In fact, it failed to show that there was any such uniform usage in the defendant bank, whose business seems to be well regulated. The cashier of the defendant frankly testified that if his attention had been called to the fact that no letter or advice had been received in due course from the drawee, that he would have made inquiries. At all events, the usage of the defendant was at most its private usage or mode of doing business. It was not known to the plaintiff, and if it was invariably adhered to by the defendant, it was of such a nature that the plaintiff was not bound to take notice of it. It was shown in evidence that the defendant bank did a very extensive business; and it was claimed by the cashier on the witness stand that it was impracticable to look after all the paper sent forward to correspondents for credit in the interval between the transmission of such paper and the

receipt of the monthly statement. But the evidence did not sustain this claim. On the contrary, it showed that banks in general were in the habit of so keeping their books as to have their attention called to a failure to receive advices, in order that they might institute the needful inquiries, and that it was the usual practice to make such inquiries, unless upon the eve of the date when the monthly statement was due. The fact that the defendant transacts a large business cannot relieve it from the duty of giving due attention to every piece of paper it undertakes to collect. The measure of diligence cannot fluctuate with the amount of business which a given bank may do. And the defendant would not, perhaps, like to be discharged from liability on the ground, judicially declared, that it was not bound to the same degree of care as smaller banks in transacting the business of its correspondents. I consider the liability of the defendant beyond any reasonable doubt. Under the circumstances, I regard the rule of damages as equally clear. The plaintiff had more than the amount actually on deposit, subject to draft in the Kansas City bank. The draft would have been paid if it had been presented in time. If plaintiff had been notified within a reasonable time that the draft had miscarried, it could have protected itself against loss. The Kansas City bank has failed. There was no evidence what dividend, if any, its creditors will receive.

The draft in question was drawn in favor of the defendant, and it had and has the legal title thereto. The plaintiff when it drew the draft credited it to the drawee and charged it to the defendant, and received in turn credit from the defendant therefor. The defendant having the legal title to the draft, will be entitled to prove it as a lost instrument against the Kansas City bank, and to receive all dividends which may be declared. Under these circumstances, the defendant is liable for the full amount of the draft, and will be entitled to hold the draft as its own, or to have a duplicate if it desires. There is no other practicable rule of damages in the posture in which the case stands, and this rule cannot fail to measure the exact loss which may eventually ensue.

Judgment for plaintiff.—*Chicago Legal News.*

In the Year-Books, 30 & 31 Edw. I. pp. 503-507, is this case: A man was arrainged for felony, but on producing a charter of pardon was discharged. Another man was arrainged for harboring him, and, notwithstanding the acquittal of the principal, he was made to pay a fine. The report concludes thus: "Note, the justices did this rather for the king's profit than in accordance with law; for they gave this decision 'in terrorem."

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VOL. 7. FRIDAY, SEPTEMBER 6, 1878. No. 36.

COMMON PLEAS OF LUZERNE COUNTY.

Semple, Birge & Co. v. Martin and Cressler, Assignees of Bachman.

1. Replevin lies whenever a person claims goods in the possession of another.
2. Under the plea of "property," the defendant can show a general or a special property in himself, either by bill of sale, delivery from the plaintiff, or otherwise.
3. The plaintiff, in the first instance, is bound to show and prove an absolute or a special property or title in himself.
4. The weakness of the defendant's title is no ground upon which to base an action of replevin. Under this action, there can be a recovery only on the strength of the plaintiff's title.
4. Judgment cannot be entered in this action for a return of the property.

Opinion by STANTON, J. June 29, 1878.

This is an amicable action in replevin for five white water wagons, valued each at one hundred dollars. To the action, the defendants plead "property." By agreement of counsel, on February 6th, 1878, the case was referred to Alfred Darte, Jr., under the Act of March, 1870, and its supplements, "to ascertain whether, under a certain contract between plaintiffs and Daniel Bachman, five white water wagons, valued at one hundred dollars each, are the property of plaintiffs or defendants."

The learned referee found as matter of fact—

"1. That by virtue of agreement, 24th May, 1876, between Semple, Birge & Co. and Daniel Bachman, the said Daniel Bachman became the agent of said Semple, Birge & Co. for the sale of the five white water wagons referred to in the evidence.

"2. That the said five wagons are now in the possession of T. R. Martin and A. L. Cressler, assignees of Daniel Bachman, these defendants

"3. That they are of the value of one hundred dollars each, amounting to five hundred dollars."

And the learned referee found as matter of law—

"1. That the said T. R. Martin and A. L. Cressler took no title to said wagons as assignees of Daniel Bachman.

"2. That judgment should be entered in favor of the plaintiffs for a return to them of the said five white water wagons, of the value of five hundred dollars, by these defendants, with six cents damages and full costs; and that in the event of no exceptions being filed, judgment be entered accordingly,"

To these findings the plaintiffs filed the following exceptions:

"1. The referee erred in his second finding of matters of law, that judgment should be entered in favor of plaintiffs for a return to them of the said five white water wagons, of the value of five hundred dollars, &c."

"2. He should have found that a judgment should be entered in favor of plaintiffs and against A. L. Cressler and T. R. Martin in the sum of five hundred dollars, the value of the wagons, and costs and six cents damages for the detention."

The defendants also filed the following exceptions to the referee's findings:

"1. As a matter of fact, we think that the referee has erred in finding that the said Daniel Bachman became the agent of Semple, Birge & Co. by virtue of agreement dated 24th of May, 1876. It is admitted that the property in dispute was in the possession of said Daniel Bachman prior to the 1st day of October, 1876, and continued in the possession of him up to the date of the execution of the assignment.

"2. There is no evidence before the referee that plaintiffs ever demanded the return of the property, or the value thereof.

"3. There can be no doubt, from the tenor of said agreement, that the said Bachman, on October 1st, 1876, became the absolute owner of the property in question—hence, as a matter of law, passed title of the same to the said assignees."

The learned referee based said findings on the following agreement, offered in evidence before him, to wit:

"Memorandum of an agreement entered into this 24th day of May, 1876, by and between Semple, Birge & Co., of St. Louis, and D. Bachman, of Wilkes-Barre, Pa., with reference to certain white water wagons, as per inventory hereto attached, now in the hands of D. Bachman. For value received, D. Bachman agrees as follows: That he will assume all responsibilities for the safety and good condition of said wagons, hold them subject to the order of Semple, Birge & Co., free of all charges, sell them for cash or good notes, with interest, on reasonable time, and that he will remit the proceeds of sales, whether cash or note, immediately to Semple, Birge & Co.; said notes to be endorsed by D. Bachman, and he to be credited on account at the net prices stated in the inventory. D. Bachman agrees to pay interest on the amount of said wagons until sold, and if on the 1st day of October, 1876, any of said wagons remain unsold or unsettled for, D. Bachman agrees that he will then, or at any time thereafter, if required by Semple, Birge & Co., pay for the said wagons in cash when demanded. Semple, Birge & Co. agree to the aforesaid as basis of settlement for said wagons.

"Done at date above SEMPLE, BIRGE & CO. [L. S.]

"Mentioned at Wilkes-Barre, Pa. D. BACHMAN. [L. S.]

INVENTORY.

3 3½-inch T. S. with seat and brake on gearing, $80 50 . .	$241 50
1 3¼-inch T. S. with seat and brake on gearing, $79 50 . .	79 50
1 2-inch I. A. with seat and brake on gearing, $93	93 00
3 1⅞-inch I. A. with seat and brake on gearing, $91 50 . .	274 50
1 2¼-inch I. A. with seat and brake on gearing, $98	98 00
1 3¼-inch T. S. with seat and brake on gearing, $79 50 . .	79 50
1 3½-inch T. S. stiff tongue, on gearing, $85 50	85 50
	$951 50

And the following facts agreed upon by the parties, to wit:

"1. That about the 24th day of May, 1876, Semple, Birge & Co. sent to Daniel Bachman eleven wagons in accordance with an agreement between Semple, Birge & Co. and said Bachman, dated 24th May, 1876, now in possession of referee.

"2. That on the 28th day of September, 1877, Daniel Bachman made an assignment for the benefit of his creditors to the defendants; five of the said wagons, known as white water wagons, remaining in the possession of said Bachman under the terms of said agreement, the same being now in possession of defendants."

Replevin lies with us whenever a person claims goods in the possession of another. Under the plea of "property," which is the only plea in this case, the defendants were at liberty to show either a general or a special property in themselves, either by bill of sale, delivery from the plaintiff, or otherwise: Murray v. Paisley, 1 Yeates, 197. But the plaintiffs in the first instance were bound to show and prove in themselves an absolute or a special property or title to the wagons in question: Winslow et al. v. Leonard, 12 Harris, 14. Under this action there can be a recovery only on the strength of the plaintiffs' title. The weakness of the defendants' title is no ground upon which to base an action of replevin: Remheim v. Hemingway, 11 Casey, 432.

By virtue of the terms of the reference in this case, it was the duty of the referee to find the facts the same as a jury, and to set forth the conclusions of law thereon: Act of 1869, page 725. The report of the learned referee does not state that he found the title to the property in question to have vested at any time in said plaintiffs. He has not found that a general or a special property in said wagons at any time vested in said plaintiffs. The documentary evidence and the facts agreed upon, submitted to the referee, were insufficient, we think, to warrant him in so finding. In the absence of a such finding, a judgment in favor of the plaintiffs is erroneous. Besides, the form of the judgment that must be entered on the report would be objectionable. The property itself could in no event be recovered at law from the defendants: Fisher v. Whoollery, 1 Casey, 197.

We, therefore, set aside the conclusions of law, and commit the

report to the learned referee, Alfred Darte, Jr., for further action in the case, and direct that after taking such action, he make report to this court again as required by law.

Holgate et ux. v. Chase.

1. An award cannot exceed the terms of the submission.
2. The question of "the title of real estate" may be voluntarily arbitrated, and an award thereon be entered of record.

Opinion by STANTON, J. June 29, 1878.

Although the agreement in this case submits a question respecting "the title of real estate," we deem the award properly entered of record thereon, notwithstanding the rulings in the case of Steele v. Lineberger, 59 Penn. St. Rep. 308, are to the contrary. The matter of the award itself is, however, objectionable. The arbitrators, in awarding "to the plaintiff the sum of three dollars and fifty cents for damage done by defendant along the line in dispute, by reason of the fact that N. K. Chase did place a quantity of stones in the creek in such a manner that the water was carried over to the plaintiff's side, and washed out his fence," exceeded their powers under the submission. The written agreement controls in this case. The award cannot jut beyond or overlap its boundaries. This agreement simply submits to the arbitrators the question of fixing and determining "the line between said Holgate and wife and N. K. Chase." As the arbitrators were not content with going thus far, all their labor must now go for naught.

The award and execution are hereby set aside.

A., the attorney of B., brought an action against C. for saying to B., "Your attorney is a bribing knave, and hath taken twenty pounds of you to cozen me." Judge Warburton was of opinion that the words were not actionable, for an attorney cannot take a bribe of his own client; but Lord Hobart said he might when the reward exceeds measure, and the end of the cause of reward is against justice; as if he will take a reward to raze a record, etc. And Hobart reports that after he had spoken, Justice Warburton said that he began to staggar in his opinion, and the plaintiff had judgment: Hobart, 8, 9; 1 Rolle Ab. 53.

The Luzerne Legal Register.

VOL. 7. FRIDAY, SEPTEMBER 13, 1878. NO. 37.

COMMON PLEAS OF LUZERNE COUNTY.

Deats v. The Borough of Scranton.

1. Where a constable adds new names to a summons, without the authority of the justice, the whole process is vitiated, and should be quashed on motion.
2. Where the return does not show any service, the judgment would be defective, unless waived by an appearance of the defendant.

Certiorari.

CONYNGHAM, P. J.—If it were not for certain matters returned on the transcript of the justice, there would be no question but that the proceedings in this case were irregular. Where it appears, by the affidavit filed, and apparently not contradicted, the constable added new names to the summons, without authority of the justice, the whole proceedings was vitiated, and ought to have been quashed on motion by the justice. These names, however, do not seem to have been entered on the docket, and so far as the copy of the record shows, the only parties recognized by the justice are the plaintiff and the borough of Scranton. The return does not show any service on the borough, and the judgment would be defective unless waived by an appearance. The plaintiff alleges that Stillwell and others, upon whom the process was served, were the proper corporate officers, and that service on them was service on the borough; but this we cannot consider, as the constable does not so return. Bearing in mind that the only defendant or party recognized by or entered on the docket of the justice is the borough of Scranton, it would seem that they must in some way have had notice of the suit, and chose to appear and try it. The justice's transcript states that on the 30th of May the parties appeared, and the defendants asked for an adjournment, which was granted; again, on the 31st the parties appeared, etc., and after hearing the parties (this being after the affidavit and amendment, to be implied from the justice's docket), judgment was given for the plaintiff. We repeat, as the borough was the only party defendant known to the justice, the only one entered on his docket, and clearly the only one left at the time of the final trial and hearing, how can we say from the record but that the borough appeared and defended the suit? If so, and we can come to no other conclusion, the judgment must be affirmed.

SUPREME COURT OF PENNSYLVANIA.

Sharpe's Appeal.

Where letters of administration have been rightly issued, they will not be revoked on a subsequent claim by one who was of full age, but incompetent at the time of the grant.

Letters of administration upon the estate of a non-resident decedent were granted to a competent person at the request of the next of kin residing in the state; subsequently, the widow having come into the state to reside, the register revoked his grant, and issued letters to the widow: *Held* (reversing the judgment of the court below), that the register had no power so to do, and that his original grant must be restored, and the letters issued to the widow vacated.

Appeal of A. B. Sharpe from the decree of the Orphans' Court of Cumberland county, dismissing his appeal from the order of the register of wills, revoking letters of administration upon the estate of Robert E. Sharpe, deceased, granted to appellant, and issuing letters upon said estate to Delia R. Sharpe.

The following facts appeared: Prior to 1869, Robert E. Sharpe was a resident of Cumberland county, Pennsylvania, where he owned considerable real estate, consisting of a valuable farm, heavily mortgaged however, several dwelling houses, and a tract of mountain land. In 1869 he went to Louisiana, where he purchased an interest in an orange plantation, and in August, 1873, was married to the appellant, a resident of New Orleans. From 1869 to his death, in January, 1876, he remained principally in Louisiana in business, returning to Pennsylvania occasionally to look after his interests in Cumberland county. Before the register and the Orphans' Court it seems to have been considered by all parties that his residence at the time of his death was in Louisiana, and the appellee, in her affidavit before the register, describes herself as "the widow of Robert E. Sharpe, late of the city of New Orleans, La., deceased." At his death he left a widow and several brothers and sisters, but no issue.

The brothers and sisters filed their renunciations, and at their request, and at that of some of the creditors of the decedent, letters of administration were issued on the 25th of May, 1876, to A. B. Sharpe, the appellant, who was a stranger, by the deputy register of Cumberland county. No notice was given to the widow, Delia R. Sharpe, but having received private information of it, she immediately came to Pennsylvania, declaring that she had abandoned her home in Louisiana, and had come for the purpose of permanently residing in Pennsylvania. On the 29th of June, she filed her *caveat* against the granting of letters to the appellant, and requested that a citation be issued to him, to show cause why the letters granted should not be revoked, and letters granted to her; which citation was issued, returnable on the 24th of July. The parties appeared on that day, and were heard; after which the register made an order revoving the letters granted to A. B. Sharpe, and issued letters to Delia R. Sharpe.

From this order A. B. Sharpe appealed to the Orphans' Court, and after argument the court (Herman, P. J.) dismissed the appeal. Whereupon A. B. Sharpe took this appeal, assigning for error the decree of the court dismissing his appeal from the order of the register.

John Hays, for appellant.

Delia R. Sharpe was not a resident of Pennsylvania at the time of the grant of letters to A. B. Sharpe; she was therefore incompetent: Act of 15th March, 1832, § 27; Act of 29th March, 1832, § 27; Sarkie's Appeal, 2 Barr, 157.

The widow being incompetent, and the next of kin having renounced, the grant of letter to A. B. Sharpe was proper.

There is no doubt of the power of the register to revoke letters *improvidently* granted, but that power does not extend to this case, where the grant was proper at the time it was made, and no statutory cause for revocation had intervened.

L. Todd (with him A. M. Rhoads) *contra.*

Robert E. Sharpe was a native and citizen of Cumberland county, Pennsylvania. It has not been shown that he intended to abandon his domicile in Pennsylvania and acquire one elsewhere. This he could have done only by a removal from the state, with an intention to reside permanently elsewhere: *Ex parte* Casey, 1 Ash. 126; Peters v. Coby, 24 Pitts. L. J. 99.

No such intention having been shown, it follows that his legal residence was in Pennsylvania at the time of his death; and as the wife's domicile or residence follows that of her husband, her's was here also: Dougherty v. Snyder, 15 S. & R. 84; Hollister v. Hollister, 6 Barr, 449.

She was, therefore, not incompetent at the time of the issuing of letters to appellant, and the order of the register appealed from was proper.

But even if she was not a resident of this state at the time of the issuing of the letters to the appellant, she acquired a residence here by abandoning her home in Louisiana, and coming into this state with intention to remain. She thereby became entitled to administration, and the order of the register and the subsequent decree of the Orphans' Court simply put her in possession of that right.

THE COURT.—On behalf of the appellee it is averred that the decedent's domicile, at the time of his death, was in Pennsylvania. Starting with this premise, the argument is conclusive of her right to administer his estate. The structure is complete, but the evidence reveals that it has not even a foundation of sand. The contest was commenced by Delia R. Sharpe's affidavit, showing "that she is the widow of Robert E. Sharpe, late of the city of New Orleans, La.," followed by testimony that he became a resident of that state in 1869, was married there, and resided there till his death in 1876, and con-

cluded by the register and court respectively treating it as an unquestioned fact that his domicile was in Louisiana, and that his widow abandoned her home and came to Pennsylvania in the following June. Over four months after the decedent's death letters of administration of his estate in Pennsylvania were granted to A. B. Sharpe. All interested persons who then resided in this state were and are content. There was no unseemly haste in taking out letters; nor is cause for removal assigned, or any pretext that it exists. The revocation was for the alleged reason that the letters were improvidently granted; and if they were, there was no error. The inquiry is narrowed to the single question—when letters have been rightly issued will they be revoked on subsequent claim of one who was of full age and incompetent at the time of the grant? No statute or precedent warrants such a procedure. The law provides for granting letters during minority, subject to be terminated at the instance of the person entitled on his arrival at full age; for the removal of an administrator for cause; for revocation of letters improvidently granted. But when letters were lawfully issued to a fit person, with consent of every one who was entitled before him, he is not subject to arbitrary dismissal. It was said by the learned judge that letters were "granted to the appellant improvidently by the deputy, without any notice to the widow, or assent on her part." Neither notice to her, nor her assent, was necessary, for the conclusive reason that she was a non-resident of the state, and therefore incompetent to administer: Sarkie's Appeal, 2 Barr, 257. Notice to and assent of persons to whom letters cannot be granted, because they are non-residents, are never required before the issuing of letters to a fit and competent person. The subsequent coming into the state by the incompetent widow or kindred of the deceased, does not make that improvident which was providently done.

Decree reversed, and now it is considered and decreed: (1) That the order of the register, revoking the letters issued to A. B Sharpe, be set aside. (2) That the letters granted to Delia R. Sharpe be and are hereby vacated. (3) That the costs of this appeal, and in the Orphans' Court, and before the register, be paid by the appellee.

Opinion by TRUNKEY, J. SHARSWOOD, J., absent.

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VOL. 7. FRIDAY, SEPTEMBER 20, 1878. No. 38.

COMMON PLEAS OF LUZERNE COUNTY.

Crandall's Estate.

Where a second extension is had on a defendant's real estate, the moneys arising under the second extension are to be applied on the judgments in their regular order, as in the case of a sheriff's sale.

Exceptions to auditor's report.

The real estate of the defendant was first extended at the sum of $600 per annum, and subsequently was again extended at $800. An auditor was appointed to marshal the liens, and, *inter alia*, reported as follows: "It has been suggested to your auditor, that the money payable semi-annually to the liens, under the first extension, has been so permanently fixed and established by the solemn act of inquisition, that the liens included therein can in no manner be the sooner liquidated by the increased semi-annual installments payable under the second extension, and that they shall continue to be discharged as at first contemplated, leaving the surplus of $100 on each installment to be applied to the liens under the second extension in their order. Although such an arrangement would in time pay the said liens, yet it would in every case postpone the latest acquired liens under the first extension to the foremost incumbrances under the second; and in this particular case, judgment No. 84, November term, 1858, upon which the property was first extended, although the latter has the priority—a state of things never intended."

CONYNGHAM, P. J.—The report of the auditor is confirmed; the reasons given by him are sufficient to sustain the ruling. We add, however, briefly: the money is to be appropriated to the liens in the same manner as would be done if the property were sold by the sheriff. Surely, it would not be asked that the first liens in such a case be postponed. The effect of the first extension was to tie up the action of the judgment creditors in existence *quod* the extension, but no further. When another judgment was afterwards obtained, and a new extension returned, they might, if they desired, avail themselves of the rent paid in under this new extent. Suppose one piece of property be extended, and afterwards upon another judgment another piece is extended, the earlier judgment creditor will be entitled to both extents,

and the installments under them. So here, though there are two extents, we do not feel disposed to interfere with the rule adopted by the auditor.

SUPREME COURT OF PENNSYLVANIA.

Bonbaker v. Okeson.

1. Nothing short of an agreement to give time, which binds the creditor, and prevents his bringing suit, will discharge a surety.
2. Such an agreement cannot be inferred from declarations, made by a creditor to a surety, to the effect that he considered the debtor possessed of property sufficient to discharge the liability, that he either had given or would give him time, that the debtor would pay the debt, and that he did not want the surety any longer.
3. The duty of determining the meaning of words used in conversation, and what the parties intended to express by them, devolves upon the jury and not upon the court.

Error to the Common Pleas of Juniata county.

STRONG, J.—The original liability of Okeson to pay the debt was established, and, indeed, it was not denied. It was, therefore, incumbent upon him to show affirmatively his discharge from liability. This he attempted to do by evidence that he was surety, and that the creditor had told him on one occasion that Shirlock, the principal debtor, was good enough for the money; that he did not want him (Okeson); that he had been to the west to see Shirlock; that he had a good crop of wheat, a fine appearance for a good crop of corn, and a good stock of horses and cattle on his farm; that he had given him time, or would give him time, and that Shirlock would pay it, and that he did not want Okeson any longer.

The court charged the jury, that "if this conversation occurred, and it was all the conversation that occurred between the parties, and Okeson was the surety of Shirlock, it would discharge Okeson, and be an available defense on the ground that it would lull the surety into security, and prevent him from taking any action for his own security or indemnity; and it would be a fraud upon the surety for the creditor afterwards, contrary to his assurance, to call upon the surety for payment." To this instruction the plaintiff excepted, and he has assigned it here for error.

It is noticeable that the learned judge did not submit to the jury to find what the plaintiff intended, or what the defendant understood by the expressions, he had "given time" to Shirlock, and that "he did not want Okeson any longer." The court construed the language of the witness, and took away from the jury all inquiry as to its meaning.

The rule, however, is undoubted, that the meaning of the words used in conversation, and what the parties intended to express by them, is exclusively for the jury to determine: 9 Watts, 59. It is obvious that the testimony is utterly inadequate to prove a direct and binding release of the surety. The creditor said "he did not want Okeson any longer," but this did not amount to an agreement to discharge him, and if it did, it was entirely without consideration, and therefore inoperative. Nor does the expression of the creditor, that he had given time to the principal debtor, necessarily amount to proof of an equitable release of the surety. It was quite possible for him to give time without affecting in the least the liability of Okeson. Nothing short of an agreement, which binds the creditor and prevents his bringing suit, will discharge the surety. Mere delay, without such binding agreement, will not. Now, if such an agreement may be inferred from a simple declaration of the creditor, that he had given time (which we do not admit), it is not to be inferred by the court as *presumtio juris et de jure*. Whether the jury were at liberty to draw such an inference need not now be considered. How they could, certainly is not manifest; for giving time, and a contract to give time, are distinct and independent things. Proof of the existence of a subject matter, about which a contract may be made, would seem to have no tendency to prove that one, in fact, had been made. Indeed, the learned judge of the Common Pleas does not appear to have rested the defendant's case upon either of these grounds. His view was that the defendant was discharged, because the language of the plaintiff, alleged to have been proved, would lull him into security, and prevent his taking any action for his own indemnity, and because it would be a fraud upon the surety for the plaintiff afterwards to call upon him for payment. The simple meaning of this is, that the plaintiff was estopped, not by matter of record or by deed, but by matter *in pais*. The objection to it is, that there was nothing in the evidence to warrant the conclusions that the defendant had been injured by the declarations of the plaintiff, or that he was in any worse condition than he would have been in had those declarations never been made. Certainly, it was not for the court to say, as a matter of law, that he had been injured. But is it essential to an equitable estoppel by matter *in pais*, that he who sets it up should show that he has been misled or hurt: Dezell v. Odell, 3 Hill, 215; Patterson v. Little, 1 Jones, 53; Hill v. Epley, 7 Casey, 334. It never yet has been held that a declaration of the creditor, that the principal debtor was good enough, that the surety was in no danger, and that the debt would be collected from the principal, without more, was sufficient to estop the creditor from proceeding against the surety. Such declarations are exceedingly common. They are often made to induce the surety to go into the contract, and they are repeated afterwards without any design to mislead, or without being understood as a waiver of any rights. They are made and received as expressions

of opinion. They neither invite confidence, nor is confidence often reposed in them. Standing alone, they will not discharge the surety. Bank v. Klingensmith, 7 Watts, 533, does not sustain the charge of the court in this case. There the creditor held a judgment against the principal and surety. The surety called upon the creditor, requested that an execution might be issued to seize the principal's property, about being removed. He stated that he wished to be released, and that the principal had property sufficient within reach of an execution to pay the debt. The creditor refused compliance, stated that the principal was good enough, and that he would give the defendant clear of his endorsement. No execution was issued. There is no similarity between that case and the present. There the surety was in motion to secure himself. He had a right to insist that execution should be issued, and he did insist. There was proof of actual injury in withholding the execution, an execution to which the surety was entitled on his request, and the case was put upon the ground, both in the court below and in this court, that he had sustained injury, not from the declaration of the creditor, but from the withholding of the execution. The case of Harris v. Brooks, 21 Pick. 196, relied upon by the defendant in error, is not unlike Bank v. Klingensmith. There the surety was also in motion. He called upon the creditor, stated that if he had to pay the debt, he wished to attend to it soon, as he then could get security of the principal. The creditor assured him that he (the creditor) would look to the principal for payment, and that he (the surety) need not give himself any trouble about the note, for he should not be injured. The case was put to the jury with the instruction, that if in consequence of this assurance of the creditor the surety omitted to take up the note, and secure himself out of the property of the principal debtor, he was discharged. The defense, therefore, as in Bank v. Klingensmith, rested not on the declaration of the creditor alone, but on them and superadded evidence that there had been actual harm resulting from them to the defendant. This essential to estoppel *in pais* was, therefore, not wanting, as it is in the present case. The language of Chief Justice Shaw is to be understood as applicable to the case he then had in hand, a case in which the jury had found that injury had resulted from the declarations of the creditor, and the only question, therefore, was, whether they were such as to warrant his relying upon them, and guiding his action by them. Surely, without having been the occasion of injury to the defendant, the creditor can not be guilty of a fraud upon him by calling upon him to pay a debt which he has promised to pay, and no declaration which has not, in fact, influenced his conduct, can have done the surety any harm. In losing sight of this, consists the error of the charge, and for this reason, pointed out in both of the assignments of error, the judgment must be reversed.

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

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VOL. 7. FRIDAY, SEPTEMBER 27, 1878. No. 39.

ORDERS IN THE ORPHANS' COURT.

In Re Order Concerning Publication in the Orphans' Court.—Now, September 2, 1878, it is ordered that the orders concerning publication of notices, dated January 12th, 1875, and September 13th, 1875, be and the same are hereby revoked; and it is hereby further ordered that the LUZERNE LEGAL REGISTER be and is hereby designated as the publication in which, in compliance with the acts of assembly, shall be published a concise and intelligible abstract of all legal notices required to be published in cases pending in or under process issuing out of the Orphans' Court of Luzerne county; and it is further ordered that all auditor's notices, including audits by the court, be published in said LUZERNE LEGAL REGISTER as one of the public newspapers of Luzerne county, and the clerk is hereby directed to publish the argument and distribution lists therein: *provided, however*, that in no case shall more than three dollars be charged for any one such abstract, nor more than one dollar for each estate in advertising the audit or distribution lists.

BY THE COURT.

In Re Order Concerning the Publication of Notices in the Orphans' Court.—Now, September 16, 1878, the order of September 2, 1878, in relation to the publication of notices, is modified so as to relate only to the change of the legal publication in which notices are to be published. In all other respects, the order of September 13th, 1875, and all former orders on the subject, not inconsistent herewith, are reinstated.

BY THE COURT.

Judge Grier, late of the United States Supreme Court, was once trying a case in Pennsylvania. A blundering jury returned an unjust verdict. As the clerk turned to record it, Judge Grier said: "Mr. Clerk, that verdict is set aside by the court. It may as well be understood that in this state it takes thirteen men to steal a man's farm."

ORPHANS' COURT OF LANCASTER COUNTY.

Estate of Maria Mishler, deceased.

1. Auditors are *quasi* judicial officers, and their findings, when confirmed by the court, are regarded as verdicts.
2. Courts have no power to inquire into the facts, as found by an auditor, except where they are clearly and manifestly against the evidence.
3. The duties and functions of an auditor commented upon.

Exceptions to auditor's report.

Opinion by PATTERSON, J. August 17, 1878.

The exceptions to the auditor's report are—

1. The auditor erred in rejecting Mrs. Sarah Heinsey as a witness.

2. The auditor erred in disallowing Sarah Heinsey's claim for nursing and attending to Mrs. Mishler for the ten months she was at her son Daniel's house.

3 (1). The auditor erred in not putting the costs of the audit on Mrs. Sarah Heinsey.

4 (2). The auditor erred in not allowing the claims of Henry R. Mishler for holding funeral of decedent at his house

Auditors have now become *quasi* judicial officers. Their decisions are regarded in the same light as verdicts, and often questions determined by them are of the highest importance. Important to all concerned in the subject matter, and important, also, because being officers of the court, and appointed to hear matters of detail which the court has not time to hear, the court is responsible for their opinion, if adopted, and its results—their duty being only to inform the conscience of the court as to facts which are essential to be known before a particular decree or judgment can be pronounced.

It will not, therefore, be surprising that many of the courts of this commonwealth decline invariably to appoint to that office any but members of the bar, and that some courts require such appointee to be an attorney of at least two years' standing. And in this view of the important functions of an auditor, and the responsibility of the court appointing them, it should not be a matter of surprise or criticism that this court makes such appointments outside of the profession with extreme reluctance.

The functions, and, as a consequence, the ability and intelligence of the auditor, is most important, because his adjudication, like that of a court of common law, is conclusive of those matters which must be presumed to have been adjudged, until reversed or set aside. It is true, if his report be excepted to, the court may, after argument or submission, confirm it, or modify it, or set it aside, or refer it back to the auditor for amendment.

But this action of the court in relation to auditors' report is not merely discretionary, but is limited and controlled by judicial rules and precedents that are binding and conclusive upon the court. One of these controlling rules is that the decision of the auditor upon the facts of a case is, with one exception, conclusive; in other words, when a party in the controversy has acquiesced in the submission of a matter of fact to an auditor, he is concluded by his finding, unless such finding is clearly and manifestly against the evidence. The law condemns interference by the court on any other ground or for any other reason.

We should remark that we have not made these preliminary remarks with the least intention of condemning the selection of the auditor in this instance, or of reflecting upon his findings or conclusions, for they must be sustained. We make them only as grounds of the disposition we feel compelled to make of exception second, which involves questions of fact. That exception is taken to the rejection of the claim of Sarah Heinsey by the auditor. In the confiict of testimony submitted in relation to that claim, we feel bound, under the rule of law stated, to sustain the auditor's conclusion and disallowance of her claim.

His finding of the facts we consider is not clearly wrong. On the argument we received a different impression, but on a careful reading of the evidence we cannot say it was against the weight of the evidence. We must, therefore, overrule the second exception.

The auditor was plainly correct in rejecting Sarah Heinsey as a witness, and the first exception is overruled.

The costs, we think, there being distribution, were properly put on the estate, and exception "3 (1)" is dismissed.

And for the cogent reason adduced by the auditor, we consider exception "4 (2)" should not be sustained, and it is accordingly dismissed.

The court, therefore, confirm the report of the auditor absolutely. —*Lancaster Bar.*

COMMON PLEAS OF PHILADELPHIA.

Stadelman v. Pennsylvania Trust Co.

In a *scire facias* against heirs to show cause why execution should not be levied of their lands, judgment cannot be taken for want of an affidavit of defense.

Sur rule to strike off judgment against heirs of decedent.

The plaintiff, having obtained a verdict and judgment against the Pennsylvania Company for Insurance on Lives and Granting Annuities,

as administrator, issued a *scire facias* against the heirs of the decedent to show cause why execution should not be levied of their lands. Judgment was taken against the administrator and the heirs for want of an affidavit of defense.

For the rule, it was claimed that there was no authority for requiring heirs to make an affidavit of defense under these circumstances.

Against the rule, it was argued that the Act of March 28, 1835, section 2 (Purdon, p. 495, pl. 13), authorizes judgments to be entered in all cases of *scire facias* on judgments. That the judgment having been taken against the administrators since the death of the decedent, they were compelled to file an affidavit of defense: Umberger v. Zearing, 8 S. & R. 163. That the court having, in the judgment obtained, determined that the debt was due by the decedent, and such judgment being *prima facie* evidence against the heirs, there could be no hardship in compelling them to set out their defense by affidavit. That the practice should be analogous to that under a *scire facias* to continue the lien of a judgment and *qu. ex. non* where an affidavit is required: 2 T. & H. Pr. 537.

The court said that the heirs could not be presumed to have any knowledge of an intention to levy on their lands previous to the *scire facias*. Executors are not supposed to have sufficient knowledge of the matter in question to be required to make an affidavit in a suit against them by a creditor of the decedent, although they are usually persons who have close business relations with the testator, and while the executors are concluded by the judgment against them since the death of the decedent, the reasons which exempt executors from filing an affidavit of defense in the original suit would seem to apply with even greater force to the heirs under the *scire facias*, for they should be placed in no worse position than they would have been if they had been joined as defendants in the original suit, where it is admitted that judgment could not have been obtained against them for want of an affidavit of defense.

Rule absolute.—*Legal Intelligencer.*

An innkeeper recently appeared at the Borough Police Court, on a summons which charged him with having his house open before one o'clock on the 19th of August, that being "the Lord's day." It was objected by the counsel who appeared for the defendant, that the term "Lord's day" was a misnomer according to the act of parliament, which specified "Sunday;" and the objection being sustained by the magistrates, the case was dismissed.

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VOL. 7. FRIDAY, OCTOBER 4, 1878. No. 40.

COMMON PLEAS OF LUZERNE COUNTY.

Commonwealth v. Benscoter and Henin.

Where the defendant on a trial for felony is acquitted, the county and not the defendant is liable for the costs.

CONYNGHAM, P. J.—The county is bound to pay all costs when the defendant is acquitted of felony. When Henin was acquitted at January sessions, the costs of November sessions as well as January became imposed upon the county. At any rate, the defendant was discharged from them. The effect of insisting upon the recovery of the November costs against Benscoter now would be to make the defendant pay them, contrary to the spirit of the law, as he would be bound to refund the amount to his surety, Benscoter, he having placed him in default by neglect to appear. Under these circumstances, the recognizance of Benscoter is ordered to be remitted upon payment of the costs in the Common Pleas.

Oakley v. Griffin.

Under the rules of court, though the recital of the counsel's name in the narr is sufficient without signature, the copy of the claim filed must be attested before the defendant can be compelled to file an affidavit of defense.

CONYNGHAM, P. J.—We consider the judgment irregular. In the summary entry of judgments, under our rules of court, for want of an affidavit, we must require some sort of care and attention upon the part of the plaintiff in filing his declaration and copy. Here the plaintiff did not sign his narr, though, perhaps, the recital of the name of the counsel in the body of it might be sufficient; but the copy of the plaintiff's claim requires some attestation or certificate of its correctness, or the defendant cannot be bound to notice it. Here it is said a copy was filed; but when the attorney forgot to certify to it, how was the defendant to know that it was the copy of the claim on which he was sued?

We must, to protect the rights of defendants, require that when a plaintiff desires to file a copy of his claim, under the rules of court, so as to entitle him to an affidavit of defense, he must, over his own or his attorney's signature, attest that such copy of the claim is the foundation of the action, and only when so attested is the defendant bound to notice it.

COMMON PLEAS OF LANCASTER COUNTY.

Shertzer v. Gonder & Son.

1. A certiorari is a writ of right, and will not be stricken off for failure to enter bail, but to be effective as a supersedeas bail must be entered.
2. A party cannot have an appeal and a certiorari in the same case at the same time, but one remedy may be substituted for the other within twenty days.
3. A party who takes and perfects an appeal, but fails to file it to the proper term, and it is afterwards stricken off, cannot, after twenty days from the rendition of judgment, have a certiorari.

Rule to show cause why the certiorari should not be quashed or stricken off, &c.

Opinion by LIVINGSTON, P. J. August 17, 1878.

The proceedings before, and returned by the justice, are as full of errors, which are patent upon the face of the transcript or record, as the porcupine is full of quills. Errors from beginning to end. And after the return of the proceedings, numerous exceptions were filed, setting forth many of the most flagrant errors. But on April 25, 1878, reasons were filed, a motion made, and rule granted to show cause why the writ of certiorari should not be quashed or stricken off, &c.—

1. Because no recognizance or bond was filed.

2. Because said defendants had previously taken an appeal from the judgment certioraried, and entered the same in this court to February term, 1878, No. 38.

3. Because the certiorari was not issued within the time fixed by the act of assembly, in such case made and provided.

The argument was on this rule particularly, although the exceptions to the proceedings returned by the magistrate were argued at some length at the same time, and in case we find that the certiorari should not be quashed or stricken off, we must, of course, dispose of the exceptions to the proceedings of the magistrate.

The first reason assigned for the rule is not tenable, and the writ of certiorari could not be quashed or stricken off on that account. This court, in Rohrer v. Musselman, 6 Lancaster Bar, 50, held that a certiorari might be issued without bail, and if so issued would not be quashed or stricken off on that reason; but when so issued it would

be no supersedeas, security being essential for that purpose. The Act of March 21st, 1810, is silent upon the subject of bail, the only prerequisite to the allowance of the writ being an oath or affirmation that it is not for the purpose of delay, &c. In Cook v. Rinehart, 1 Rawle, 221, Welker v. Welker, 3 Pa. Rep. 224, and also in Young's Petition, 9 Barr, 216, our Supreme Court has decided that a certiorari is a writ of error in all respects but its form, its only office being to remove the proceedings for the inspection of the court. And it, like a writ of error, is of right to any one who desires to have a judgment or decree of a court of record in any matter in which he may be interested, but it is no supersedeas, unless bail in error is put in and approved as the law requires.

The second reason is because the defendants had previously taken an appeal from the judgment certioraried, and entered the same in this court to February term, 1878, No. 38. The law is, as is said in the City v. Kendrick, 1 Brews. 406, and W. N. C. 72, that "a defendant cannot have an appeal and a certiorari in the same case at the same time." The same general principal is most fully recognized in Ewing v. Thompson, 7 Wr. 372. To preserve its symmetry and congruity of its results, the courts have concluded, where an appeal is not a mere nullity, as was the case in Commonwealth v. Fegle, 2 Phila. 215, that the entry thereof (that is, of the appeal) shall be sufficient ground for quashing a certiorari subsequently issued; and that a certiorari regularly issued and served, shall in like manner bar an appeal. This, however, will not and is not to be understood as preventing a party from withdrawing one remedy, and substituting another within twenty days, at the risk of his security, and subject to the supervision of the court. The defendants, having taken their appeal within the twenty days allowed by law, shows that they had full notice of the entry of judgment against them, and their having pocketed and held possession of the appeal, and failing to enter it at the then next term of the court, and holding it over until the second term, it was, on motion, stricken off, because not filed and entered in time, have, in the judgment of the court, by their own laches deprived themselves of the benefit of this writ of certiorari.

The third exception is, because said certiorari was not issued within the time fixed by the act of assembly, in such case made and provided: Purd. Dig. 608, pl. 28. The act of assembly provides that no judgment shall be set aside in pursuance of a writ of certiorari, unless the same is issued within twenty days after the judgment was rendered, and served within five days thereafter, and no execution shall be set aside in pursuance of the writ aforesaid, unless said writ is issued and served within twenty days after the execution issued. The defendants were, therefore, if they desired to take advantage of any error in the proceedings before the magistrate, bound to issue their certiorari within the time prescribed by the act of assembly, in such

cases provided—that is, within twenty days after the decision or judgment of the justice became known to them. This they have wholly failed to do. The judgment was entered by default December 12th, 1877; they, on December 12, 1877, entered an appeal from the judgment of the justice, and perfected it by entering bail, and lifting the appeal from the justice; they had on that day, or prior thereto, full knowledge that judgment had been passed and entered against them; they, however, held the appeal, and retained it in their possession, and did not enter it to the next, or January term of the court, as required by law, but did enter it to the February term, 1878, No. 38, on January 24th, 1878. Here they rested. On January 26th, 1878, a motion was made, reasons filed, and a rule granted to show cause why the appeal should not be stricken off, because it was not entered and filed in time. And on February 20th, 1878, the rule was made absolute, and the appeal was stricken off. The justice, on February 27th, 1878, issued an execution, and on March 20th, 1878, he issued an alias execution. After the alias execution was issued, the defendants, on March 29th, 1878, issued their writ of certiorari. It is said in the City v. Kendrick, 1 Brews. 496, that a defendant cannot have the advantage of an appeal and a certiorari. The same general principle is fully recognized in Ewing v. Thompson, 7 Wr. 372. And to preserve its symmetry and the congruity of its results, the courts have concluded, where an appeal is not a mere nullity, as in Commonwealth v. Fiegle, 2 Phila. 215, that the entry of an appeal shall be ground for quashing a certiorari subsequently issued, and that a certiorari regularly issuing and served shall in like manner bar an appeal. This is not, however, to be understood as preventing a party from withdrawing one remedy and substituting another within the twenty days, at the risk of his security, and subject to the supervision of the court. The defendants in this case having taken their appeal, and perfected it by the entry of bail, and actually lifting it from the justice, having held it in their possession until after the proper time for entering and filing it, then filing it, and the court having stricken it off for the laches of the defendants, or, in other words, for the reason that the defendants, after taking their appeal, failed or neglected to file it within the time prescribed by law, and they having waited until after an alias execution was issued to collect the judgment, some ninety days after they had taken their appeal, have, in our judgment, by their own laches deprived themselves of the benefit of the writ of certiorari, it not appearing that the justice had no jurisdiction of the subject matter, and the court can now, under the authorities, do nothing but quash and strike off the certiorari. After such laches, and causing such delay, the plaintiff is entitled to hold his judgment and collect the amount due thereon.

We, therefore, make the rule absolute, and quash the writ of certiorari.—*Lancaster Bar.*

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VOL. 7. FRIDAY, OCTOBER 11, 1878. No. 41.

COMMON PLEAS OF SUSQUEHANNA COUNTY.

Leary v. McKeeby.

When the plaintiff's claim before a justice does not exceed five dollars and thirty-three cents, and the defendant pleads an offset, of which the justice has jurisdiction, of more than that sum, either party has the right of appeal.

It is not necessary that the record of the justice should show that evidence was offered in support of such setoff, or that defendant pleaded such setoff. Parol proof of such plea is sufficient to support the appeal.

But the appeal may be set aside when it clearly appears that the claim of setoff was a mere trick to obtain it.

Rule to show cause why defendant's appeal should not be stricken off.

Opinion by JESSUP, P. J. August 26th, 1878.

In this case the transcript shows that Leary brought suit before A. W. Berthoff, justice of the peace, against the defendant, McKeeby. "June 25th, 1877, parties appear. Plaintiff claims $5 for witness fees for himself in suit of Sautter v. McKeeby, &c., at Apr. and Aug. terms, 1876. Defendant pleads general issue, setoff of $70, nil debit, payment with leave, &c. T. Leary, same for plaintiff. Judgment publicly in favor of plaintiff for the sum of $4.85 and costs." From this judgment the defendant appeals, and the plaintiff obtained this rule to show cause why the appeal should not be stricken off or quashed.

The only ground set up by the plaintiff for this rule is, that his demand being under five dollars and thirty-three cents, the judgment of the justice is final. This depends upon the construction of the act of 1810. If it is the claim set up by plaintiff which governs, then the appeal must be quashed; but the Supreme Court have settled this construction in the case of Klinginsmith v. Nole, 3 Pa. 120, where Justice Kennedy, delivering the opinion of the court, says: "The third section of the Act of March 20th, 1810, provides that 'if the parties appear before the justice, either in person or by agents, the justice shall proceed to hear their proofs and allegations, and if the demand shall not exceed five dollars and thirty-three cents, shall give judgment as to right and justice may belong, which judgment shall be final; but if the demand or sum in controversy shall be more than that sum, and shall not exceed one hundred dollars, and either party shall refuse to submit the determination of the case to the justice, he shall in that case request them to choose referees,' &c. And the fourth section proceeds further to declare that 'if either party or their agents shall refuse to refer, the justice may proceed to hear and examine their

proofs and allegations, and thereupon give judgment publicly as to him of right may appear to belong, either party having the right to appeal within twenty days after judgment being given, either by the justice alone, or on award of referees, when such sum shall exceed the sum of twenty dollars.' The fourth section also enacts that a defendant who shall neglect or refuse in any case to setoff his demand, whether founded upon bond, note, penal or single bill, writing obligatory, book account, or damages in assumption against a plaintiff, which shall not exceed the sum of one hundred dollars, before a justice of the peace, shall be, and is thereby, forever barred from recovering against the party plaintiff by any after suit. It is clear from the words of the third section that it is the amount of the demand, and not the amount of the judgment given by the justice, which regulates the right of appeal to the Court of Common Pleas. Nor is it confined to the amount of the plaintiff's demand; for I consider that upon a fair construction of the act, the word 'demand,' or at least the expression, 'sum in controversy,' will refer to and embrace the demand which the defendant may offer to setoff, or claim a judgment for, against the plaintiff. This construction seems necessary, not only to do equal justice between the plaintiff and defendant, and to place the defendant upon an equal footing with the plaintiff, but to preserve to him the right of trial by jury inviolate as before the adoption of our present state constitution. By the seventh section of the act, it is expressly declared that if the defendant shall in 'any case,' no matter what the amount of the plaintiff's claim may be, whether above or below five dollars and thirty-three cents, neglect to setoff his demand, if it does not exceed one hundred dollars, he shall ever afterwards be debarred from recovering the same of the plaintiff. This provision of the act compels the defendant to setoff, or bring forward on such claim against the plaintiff, if he has it, or otherwise forfeit all right to demand or sue for it afterwards, which could never have been intended by the legislature, without giving to the defendant ultimately by appeal the benefit of a jury trial in deciding upon his claim, where it shall exceed five dollars and thirty-three cents, and the justice shall have decided against him." And the case of Downey v. Ferry, 2 Watts, 304, farther decides that it is not necessary for the docket of the justice to show such setoff, but it may be proven by parol.

The transcript in the present case shows that the defendant pleaded a setoff of seventy dollars, and thus set up his cross demand exceeding the amount which would make the decision of the justice final. So far as appears from the transcript, the setoff was one of which the justice had jurisdiction. Had it appeared otherwise, then, under the authority of Mack v. Thayre and Wheaton, 2 Phila. 291, a case which went up from this county in 1857, we should hold that the judgment of the justice was final. It is not necessary that the record of the justice should show that evidence was offered in support of the

setoff; but in case it should appear to the court that the claim of setoff was a mere trick to obtain an appeal, I think the court would be warranted in quashing the appeal. It would have to be a very clear case, however, before the court would thus summarily deprive a party of his right of trial by jury.

In the present case we hold that the record of the justice shows that the sum in controversy exceeds five dollars and thirty-three cents, and, therefore, under the Act of March 20th, 1845, the right of appeal is reciprocal (11 Pa. St. Rep. 410), and the defendant having that right, the rule to quash the appeal is discharged.

Commonwealth v. Wilmarth.

Under the Act of April 13, 1867, the husband or father is liable for desertion whether the wife or children are chargeable upon any district or not, or whether the husband has a residence here or not.

The act of desertion is complete when the party has left his wife or children, and is not a constantly accruing or continuing offense.

The question of jurisdiction not one of domicile of the parties, but of where the offense was committed. The offense must occur in this state to be triable here.

Case stated.

Opinion by JESSUP, P. J. August 15, 1878.

The facts agreed upon are made a part of this opinion, and are, briefly, that the defendant in December, 1877, was and had been living at Hancock, New York, with his wife and family. He then deserted his family, and came to this county, leaving them in possession of his house, shop, and all household effects in Hancock, and has resided here until his arrest for the desertion, upon the information of his wife, who came here for that purpose, and who has no actual residence here.

These proceedings are instituted under the Act of April 13, 1867: 2 P. D. p. 1159, pl. 33. This act differs from the act of 1836, and is much more general in its provisions. It is entitled "An Act for the relief of wives and children deserted by their husbands and fathers within this commonwealth." It matters not whether the wife or children are chargeable upon any district or not, or whether the husband has a residence here. If there is a desertion without reasonable cause, or a failure to maintain them, he is answerable to this for the first time criminal charge.

Desertion is an act. It is complete when the party has left his wife or children. It is not a constantly accruing or continuing offense. The having of two wives or two husbands at the same time constitutes the statutory offense of bigamy in this state, and yet it is held not to be a continuing offense. And upon this point the court say in Gise v. Commonwealth, 81 Pennsylvania State Reports, 432: "The doctrine of continuing offenses is novel. No text writer in England or America has ever asserted it. No respectable authority has ever

recognized it. It is wholly unknown to the criminal law. There is a period in the history of every crime when it is completed, and the offender becomes liable to the penalties of the law." Therefore, when the defendant deserted his wife and children at Hancock, in the state of New York, the offense was complete, and was committed in the state of New York. Our criminal jurisdiction does not extend over that state, and we do not think it was ever the intention of the legislature to attempt to punish a defendant in such a case. We hold that the desertion must be committed within this state to give our courts jurisdiction of the offense. In this view, we are sustained by the opinion of Justice Paxson, of our Supreme Court, where, in the Quarter Sessions, in the case of Guardians of the Poor v. Bailey, 2 Leg. Gaz. 399, he says: "The act of 1867 would seem to create a distinct offense—namely, that of desertion—which may be committed within our jurisdiction whether the parties are domiciled here or not, just as a non-resident may be arrested for an assault and battery or a larceny committed by him. This would seem to be the reasonable construction of the act. * * The whole scope of the act implies that the desertion must take place within this state. Indeed, this is always necessary to give jurisdiction in a criminal case."

As the desertion charged against the defendant was committed in the state of New York, we hold that we have no jurisdiction of the offense, and the defendant must be discharged.

Guernsey v. Gage.

In a charge of trespass for unlawfully shutting up another's cattle, a justice has no authority to issue a warrant of arrest. His power of arrest restricted.

Certiorari.

Opinion by JESSUP, P. J. August 26, 1878.

The record of the justice in this case shows that a warrant of arrest was issued against the plaintiff in error (Guernsey), charging him with trespass for unlawfully shutting up the cows of the defendant in error (Gage); that the defendant below was arraigned by the justice, and plead not guilty; that an adjournment was refused, case was heard, and judgment rendered against the plaintiff.

By the act of 1810 (1 P. D. 850) justices were authorized to issue a summons or warrant of arrest in case the defendant was not a freeholder; but by the act 1842 (*ibid*, p. 851, pl. 42-3) this warrant was restricted to cases where the action is brought for the recovery of money collected by any public officer, or for official misconduct.

The record showing that such was not the case, there was no authority for the warrant issued, and the judgment must be reversed. —*Susquehanna Legal Chronicle.*

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VOL. 7. FRIDAY, OCTOBER 18, 1878. No. 42.

Sic transit gloria mundi, et sic curia Lackawanna.

COMMON PLEAS OF SUSQUEHANNA COUNTY.

Donnelly v. Purcell.

Where in an appeal from a justice bail was properly entered, but the costs required by the act of 1873 were not paid within the twenty days, and the transcript was not filed in the Common Pleas until after the next return day, held that the appeal was not valid.

The court will relieve when appellant fails to file transcript in the Common Pleas before next return day by reason of being misled by the justice, or when the justice is in default, but not when the justice is acting as his agent.

Court will not relieve where appeal is not perfected within the twenty days. Failure to do this is laches from which ignorance will not excuse.

Rule to strike off appeal.

Opinion by JESSUP, P. J. August 26th, 1878.

This is a rule to show cause why this appeal should not be stricken off. The transcript shows the judgment was entered by the justice February 13, 1878; that the same day bail for the appeal was properly entered; but the costs required by the act of 1873 were not paid until April 10, 1878, when the transcript was taken, which was filed April 11, 1878. The next return day of the Common Pleas, after the judgment was entered, was on April 8, 1878. The defendant shows by his deposition that the justice informed him at the time he entered bail that if his transcript was filed on April 15th it would be in time; and upon this claims his right to the appeal, because he was misled by the justice. It is held in Houk v. Knop, 2 Watts, 72, that where a party makes the justice his agent to file his transcript, then he is bound by the negligence of such agent; and this was affirmed in Sherwood v. McKinney, 5 Whart. 435; for there the act was outside his official duty. But if the party be prevented from filing his appeal in time by the default of the justice, the court will permit it to be done *nunc pro tunc*: Lauderbach v. Boyd, 1 Ash. 380; Snyder v. Snyder, 7 Philada. 391; Kelly v. Gilmore, 1 W. N. C. 73; Moore v. Krier, 2 W. N. C. 724. These are cases where the defendant tried to do what the law

required in time, but was prevented by the absence of the justice, and the defendant was in no fault. But when the defendant is not in any fault, has done all the law requires, and fails to file his appeal in time, because he was misled by the justice, in such case the court will relieve: Sloan v. Boyd, 1 Pitts. L. J. 50. Is this such a case? The act of 1873 requires the prepayment of the justice's costs, and we have held in Bloxham v. Roberts, 1 Susque. Leg. Chron. 1, that this was imperative. The defendant does not claim that the justice misled him in this respect. He was bound to know the law relating to appeals, and his appeal was not perfected until after the twenty days had gone by. Had he perfected his appeal within the twenty days allowed by law, we should have relieved him from the justice's error as to filing it in the Common Pleas. The first day of the term having gone by before he perfected his appeal, or offered to do so, this was laches on his part from which we cannot relieve.

Rule absolute.—*Susquehanna Legal Chranicle.*

ORPHANS' COURT OF LUZERNE COUNTY.

Estate of Davis Dean, deceased.

Where the estate of a decedent is insolvent, and there is both a personal and real estate fund before the court for distribution, judgment creditors may, but are not obliged, first to claim a dividend out of the personal estate, and then resort to the real estate for any deficiency, merely for the purpose of benefitting a junior judgmeut creditor to the injury of a general creditor.

In the absence of any express demand on either fund, it is presumed that judgment creditors elect to claim payment out of the real estate fund, for it is that fund which they have in their more immediate grasp, and which will the most directly satisfy their demand.

Exceptions to audit.

Opinion by RHONE, J. October 9, 1878.

We have for distribution two funds—the one personal, the other real; and we have two classes of creditors—the one general creditors, without judgments, the other had judgments before decedent's death, which were liens on his real estate. The estate is insolvent, and the real estate fund is not sufficient to pay the judgment lien creditors. In the distribution, as made up, we first applied the real estate fund to the satisfaction of the judgment liens upon it in the order of their priority, until it was exhausted, and then put the unpaid judgment creditors with the general creditors, and gave them a *pro rata* share of the personal estate. The unpaid judgment creditors have excepted to this distribution, and now claim that all the judgment creditors should have first shared *pro rata* in the personal estate fund, and then

taken the balance of their claims out of the real estate fund, the result of which would have been to give the junior judgment creditors a larger share of the above estate, and the general creditors a smaller one than has been awarded them, while the senior judgment creditors would remain unaffected.

The contest, then, is between the junior judgment creditors and the general creditors of the decedent. The legal propositions bearing on the case are these:

1. That *all* debts of a decedent are liens on both his personal and real estate, while judgments obtained against him in his lifetime are preferred claims on a fund raised from real estate; that is, the *lien* of both classes of creditors is the same, but those having judgments before decedent's death are *preferred in their payment* to the general creditors, where the fund for distribution is from real estate alone, so that the doctrine of marshaling assets where there are two funds, and its corollary subrogation, are not applicable here.

2. That the personal estate is the primary fund for the payment of *all* debts of an intestate, and, *if sufficient*, must be exclusively resorted to, so that no sale of real estate will be allowed for the payment of his debts until there appears to be a deficiency of personal estate. So that, if the fund now for distribution were personal estate only, all the judgment creditors could claim a *pro rata* share of it with the general creditors, and then afterward go upon the real estate for any deficiency, which would have brought the result now claimed by the exceptant.

3. Then it must follow from the former propositions that, if the fund now for distribution were from real estate alone, the personal estate being insolvent, the judgment creditors would have a right to claim payment of their liens in full out of it, according to their priority in date, and thus compel any unsatisfied judgment creditor to go upon any personal estate fund which might afterwards arise for their *pro rata* share with the general creditors, which would have brought the result arrived at in the audit as now made up.

So far there is no conflict of opinion in this case, but the apparent dilemma lies in the fact that we have the two funds for distribution at once. We think the proper solution of *this case* depends upon this further proposition, that where an estate is insolvent judgment creditors *may*, but are not *obliged*, first to claim a dividend out of the personal estate, and then resort to the real estate for any deficiency; and that in the absence of any express demand on either fund, it is presumed that they elect to claim payment out of that fund which they have in their immediate grasp, and which will the most directly satisfy them: 10 Harris, 442; Scott, 205-6. It is elementary law that no one will be forced upon a fund simply to accommodate another claimant, unless such fund is sufficient to satisfy his whole demand. No one will be compelled to split up his claim, and roll it around until he finds satisfaction, when he has under his immediate control a single fund, if the

purpose is simply to accommodate a stranger to him. We cannot, for such a purpose, without his consent, substitute the real estate security of a judgment creditor of a decedent for the personal bond of an administrator and his sureties, given for personal estate only, and thus oblige him, in case of the default of the administrator, to pursue two sets of sureties—one for that part which is to be paid out of personal estate, and another for the balance awarded out of real estate. In this case the exceptant has no superior equity, for his present demand cannot be complied with without injuring the general creditors, and at least endangering the rights of the senior judgment creditors. We find no precedent in conflict with these conclusions, and find some *dicta* in their favor. In Moliere's Lessees v. Noe, 4 Dallas, 454, Justice Tilghman says: "I am clearly of opinion that they" (the proceeds of real estate) "must be applied to the payment, in the first place, of the liens which existed in the life of the intestate, according to their respective priority." See also Girard v. McDermott, 5 S. & R. 128. The strongest *dicta* against this conclusion will be found, perhaps, in Ramsy's Appeal, 4 Watts, 71; but that was a contest between general creditors and judgment creditors, wherein the general creditors desired to control the others in their election, which was not permitted by the court. There are a large number of reported cases wherein the contest arose between legatees and devisees, or judgment creditors, but such are settled on some principles which are not connected with this case, and hence need not be discussed with those which control here.

The exceptions to this part of the report of the audit are not sustained, and are dismissed.

The third exception is sustained to the extent of forty dollars as a clerical error.

The additional exception is also sustained, as undoubtedly the exceptant has a right to a *pro rata* dividend on the whole amount of the judgment as claimed: Graeff's Appeal, 29 Smith, 146, and cases there cited.

The clerk will restate the audit in accordance with this opinion.

If B. have a right of entry into his house, he ought to have a common entrance at the usual door, and shall not be made to enter at a hole, a back door, or a chimney; and if they leave the common door open and make a ditch, so that B. cannot enter without skipping, the condition is broken. So if I am obliged to suffer J. S. to have a way over my land, and when I see him coming, I take him by the sleeve and say to him, "Come not there; for if you do, I will pull you by the ears," the condition is broken: Latch, 47.

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VOL. 7. FRIDAY, OCTOBER 25, 1878. NO. 43.

COMMON PLEAS OF LUZERNE COUNTY.

Bailey v. The Wyoming Valley Ice Company.

1. Bailey sold to the Wyoming Ice Company, by articles of agreement, a piece of land containing about three acres, situate in the city of Wilkes-Barre, for nineteen thousand dollars. Before the execution of the agreement, the plaintiff discovered that the land was misdescribed; whereupon he refused to execute the agreement. Relying, however, upon the representations made by the solicitor of the company and its president, "that all errors in description would be corrected when the deed was called for," the agreement was executed and possession delivered. When the purchase money became due, the company refused to pay until the plaintiff would allow a rebate in the purchase money for the alleged deficiency: *Held*, (1) that when a vendor is induced by representations made by one of the parties to the agreement that errors in description would be corrected when the deed was called for, such vendor may show by parol that a verbal promise was made at the time of the making of the contract, and that such promise was made to obtain the execution of the writings. (2) Such evidence is allowed upon the principle that the attempt afterwards to take advantage of the omission in the contract is a fraud upon the person induced to execute it. (3) The general rule undoubtedly is, that no parol evidence is admissible for the purpose of contradicting, varying, or altering a written contract. Whenever, therefore, evidence is admitted for any such purpose, it must generally have a foundation in pre-existing evidence of fraud, accident, or mistake. (4) And evidence of fraud or mistake ought to be of what occurred between the parties at the the time of the execution of the contract, and ought to be clear and precise.
2. Where monuments on the ground are called for and found, they must control, and courses and distances must be corrected to correspond with such monument.
3. The right of a defendant to be allowed, or to recover, for a deficiency in the quantity of land purchased may arise in three ways. The first is, when the contract is entirely executory, an action thereon being equivalent to a bill to compel the specific performance of a contract, the defendant is not compelled to pay for more land than he actually receives, unless it appear from the evidence that he undertook and meant to take the risk that the quantity was as represented when the contract was consummated. The second class is, where the contract has been carried out by the execution of a deed, and bonds or securities given for the purchase money, and the contract was for a round sum of money, the defendant will not be allowed for a deficiency in the quantity, unless there be fraud or mistake. The third class is, where the contract is fully executed, and all of the purchase money paid, the transaction cannot be ripped up without proof of actual fraud or mutual mistake.

HANDLEY, J.—Benjamin F. Bailey brings this action of ejectment to recover a certain piece of land situate in the city of Wilkes-Barre. The land is fully described in the writ in this case, and hence I will not detain you now to read it over and point out to you specially the parts in dispute. So far as the disposition of this case is concerned, it may be conceded that Benjamin F. Bailey made and executed a written contract with the Wyoming Valley Ice Company for the land in dispute. It may also be conceded that the ice company paid Mr. Bailey certain sums of money upon this contract from time to time, and that the ice company took possession of the property, and that they are now in possession. You will bear in mind it was admitted at the beginning

of this case, that the title to this land is out of the commonwealth and was in Benjamin F. Bailey, the plaintiff, at the time he made this sale to the ice company. About the only important question in this case grows out of an alleged misdescription of the property. To that point I will now call your attention—first, however, explaining to you the law controlling this case and some of the evidence admitted upon trial. The law controlling this case is the contract made and executed between these parties, and delivered on the 22d, if you so find, or on the 24th of April, 1871, and to that contract, unless there is something else in this case controlling the contents thereof, we must hold these parties. Is there anything, then, in the history of this case which should lead us to lay aside this contract in part, or in whole, and to receive evidence to explain, modify, or alter it in any way? Now, it is claimed by the plaintiff, Mr. Bailey, that the description set out in the contract known as the "Nicholson contract" is not correct, and that he was induced to execute that contract by representations then made to him, namely, that if he would execute the contract as drawn up, receive the first installment of the purchase money, and deliver possession, the errors then pointed out by the plaintiff would be corrected when the deed was called for. In a question of this nature, the law allows the vendor to show by parol that a verbal promise was made by one of the parties to the written contract at the time of making it, if it was used to obtain the execution of the writing; and such promise, if made, may be received in evidence. This rule is upon the ground that the attempt afterwards to take advantage of the omission in the contract of such promise is a fraud upon the party who was induced to execute it upon such promises and representations thus made. But the general rule undoubtedly is, in Pennsylvania, that no parol evidence is admissible for the purpose contradicting, varying, or altering a written contract. The writing is the most exact, as well as the most deliberate and solemn act of the evidence of the execution and delivery of the contract. Whenever, therefore, evidence is admissible for any such purpose, it must generally have a foundation in pre-existing evidence of fraud, accident, or mistake. Evidence of fraud or mistake ought to be of what occurred between the parties at the time of the execution of the contract, and ought to be clear and precise. Now, what is the evidence in this case when applied to the rule of evidence as I have here laid it down? Mr. Bailey, when called, stated to you in detail all that took place between these parties. But to come down to a few sentences which you will no doubt remember when I call your attention to them: He testified that he met these parties on Saturday; that he signed this contract; that he took it home, and kept it in his possession until Monday morning; that on Saturday or Sunday he went upon the premises, and there, upon a personal examination, he discovered that the description was not correct. He then goes on to testify and show that on Monday he met these parties in the bar office

of the court house, and that he then and there refused to execute this contract, or deliver possession, unless these corrections were made. He then adds that Mr. G. B. Nicholson was present and Mr. Hillard, president of the ice company, and defendant in this case; and that Mr. Nicholson urged him to exeeute the contract, receive a payment then and there, and to deliver possession of the property; that the errors of description in the contract then pointed out would be corrected when the deed was made. He then further adds that upon this inducement and upon these representations, he made, executed, and delivered the contract in question. In connection with this you will bear in mind that Mr. Hillard, when called, testified that it was true he was in the bar office on Monday morning, and that when Mr. Bailey pointed out an error in the description in the contract drawn up by Mr. Nicholson, he (Hillard) took his pencil out and wrote under the place pointed out the word "error." The contract will be sent out with you, and, upon examination, it is for you to say whether such ear-mark is to be found upon it. Of course, it is your duty not alone to take up the testimony of Mr. Bailey and examine it in detail; but it is your duty, in passing upon this particular point in the history of the case, to take up all of the evidence in this case, and examine it with care and proper attention. After you have examined all of the evidence in the case, you will then ask these questions: Is it true that the plaintiff pointed out the errors of description to the defendants on that Monday morning? Is it true that Mr. Nicholson induced Bailey to sign the contract by representations such as stated in the evidence? Is it true that because of these representations, and because of the inducement then and there held out to Bailey, he did execute this contract, and did deliver possession of this property? Now if, after you have examined all the evidence, and given this case the attention that you are in duty bound to give it, you should find these questions in the affirmative, then that is the end of this case; you need proceed no further; you have nothing more to do than simply to find a verdict for the plaintiff; and in that verdict you will say that you find for the plaintiff for the lands described in the writ; upon condition, however, that if the defendants pay to the plaintiff the sum of (naming the amount and the time—the amount is agreed upon, and will be sent out with you, with interest and costs of this case), then judgment to be entered against the plaintiff and in favor defendants; the plaintiff to deposit in the prothonotary's office of Luzerne county a proper deed for such land, within (naming the same time that you give for the payment of the money) to and for the defendants, upon the payment of the money aforesaid. Now if, after you have taken up this case, and proceeded so far into it as these questions, and cannot find that Mr. Bailey was induced, as he stated on the witness stand, to execute this contract and deliver possession of this property, and that the defendants made no representations to him whatever, that the description in his contract was correct, then you

will take up another important question in this case, and that is, what allowance is to be made to these defendants for the deficiency in the amount of land sold? Now, the law controlling this point is very clear indeed, and I will now call your attention to it. The right of a defendant to be allowed, or to recover, for a deficiency in the quantity of land purchased by him, as described in his deed or articles of agreement, may arise in three different ways. The first is, where the contract is entirely executory, as where the agreement has not been carried out by a conveyanee and the giving of bonds or securities for the purchase money, as the action is to recover the purchase money, it may be regarded as equivalent to a bill to enforce the specific performance of a contract. The defendant in such a case ought not to be compelled to pay for more land than he actually receives, unless it appear from all the evidence in the case that he undertook and meant to take the risk that the quantity was as represented when the contract was made and the bargain consummated. The second class of cases is where the contract has been carried out by the execution of a deed, and bonds or other securities given for the purchase money. In such cases the law is well settled in Pennsylvania that where the contract was for a round sum of money, the defendant will not be allowed for a deficiency in the quantity, unless there be fraud, or, as it is said, the difference is so very great as to show an evident mistake. The third class of cases is where the contract is fully executed, and all of the purchase money paid. In such case the transaction cannot be ripped up without actual proof of fraud or mutual mistake. The case that we are now trying belongs to the first class of cases to which I have just called your attention. Hence I say to you, that if, after you have fully and fairly examined all the evidence in this case, you find that the defendants did not undertake, and mean to undertake, the risk that the quantity was as represented and described in the agreement, then the defendants ought to be allowed a reasonable rebate from the purchase money for the deficiency ascertained, and your verdict may be for the plaintiff, after ascertaining and allowing for that deficiency, describing it as I have stated to you before. This brings us to the question, then, which draft you will adopt to ascertain what deficiency, if any, there is in the quantity of land thus conveyed. The map presented by the defendants shows a deficiency on Terrace street of nine and three-tenths feet, and on Collins' line some forty-five feet in width. The map presented on the part of the plaintiff, known as the "Hartwell map," shows no deficiency in front, but a deficiency in the rear of some thirty-three feet. The price fixed for the value of this piece of land has been estimated according to both maps, so that when you retire to your room you will have no difficulty in arriving at a just estimate, no matter which map you may adopt, to ascertain the amount that ought to be allowed for the deficiency, provided you find there is a deficiency.

The plaintiff and the defendants, by their counsel, have presented several legal points which they desire me to charge you upon. I will now read to you each point, and as it is reached instruct you thereon. I will first call your attention to the points presented on the part of the defendants.

1. If the jury believe that the contract was prepared from a draft or description furnished by the plaintiff himself, then the plaintiff is bound to make good that description, and if a mistake be made, even in a material point, he and not the defendant must bear the consequence of such mistake, and the defendant will be entitled to a conveyance of all the land described in the contract, or to such an abatement in the price called for in the contract as is fairly represented by the value of the land inclosed by mistake.

This point we affirm.

2. In order to entitle the plaintiff to recover on the ground of alleged mistake, it must be shown that the misapprehension is mutual. Equity relieves against no other.

This point we affirm, but say to you if you find from all the evidence in the case that Mr. Bailey went upon the land and pointed out the property to these parties, or if you find that before the contract was delivered and possession taken, he pointed out the errors of description mentioned in the evidence, and refused to execute this contract until these errors were corrected, and refused to receive any portion of the purchase money until such errors were corrected, and that, finally, by representations made to him by the company, or its agent or attorney, he was induced to sign the contract upon representations that when the deed was called for these errors would be corrected, then this proposition, although we have affirmed it, should not control your verdict in this case.

3. Where a misapprehension is made as to quantity, though innocently, the purchaser is entitled to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the misrepresentation.

As I said to you in my general charge, if you find from the evidence that the defendants did undertake the risk of quantity, as represented by Bailey, we cannot affirm this point. If, on the other hand, you find from the evidence that they did not undertake the risk as to quantity, and that the land was not pointed out to them, and their attention was not called to the errors of description, then we affirm this point.

4. That if the jury believe, under the evidence, that before the execution and delivery of the contract, the plaintiff knew that the line

on Terrace street was misdescribed, and should have been three hundred and sixty-seven feet instead of three hundred and forty-seven feet, then he was bound to communicate this knowledge distinctly and specifically to the defendants, and his failure to do so estops him from setting up such mistake subsequently, and from making a deed different from contract as to said description.

This point we affirm.

I will now call your attention to the points presented on the part of the plaintiff.

1. That where monuments on the ground are called for and found, they must control, and courses and distances must be corrected to correspond with such monuments.

This point we affirm.

2. If the jury believe that at the time of delivery of the contract and payment of first installment, the defendants had notice that there were errors in the description of the land sold, and agreed that there should be a survey, and the errors corrected when deed was made; that the land sold was pointed out, and possession taken as described in the writ, the plaintiff is entitled to recover.

This point we affirm.

3. That under any view the jury may take of the testimony, the defendants cannot retain the land in possession, and refuse to pay the balance of the purchase money; affirming the contract, the defendants must pay, if the contract stands, for the land, deducting only the fair value of that portion for which the plaintiff cannot give title.

This point we affirm.

4. That the tender set up by the defendants is not sufficient to stop interest, and interest must, therefore, be allowed on the balance of the purchase money from the 1st of January, 1875.

You have heard the evidence in the case on this point, and we may say to you that it is not sufficient to warrant us in affirming this point, and, therefore, we cannot affirm it.

Verdict for plaintiff, $3,493.50.

A. T. McClintock and A. M. Bailey, for plaintiff.
Stanley Woodward and W. S. McLean, for defendants.

The Luzerne Legal Register.

VOL. 7. FRIDAY, NOVEMBER 1, 1878. No. 44.

COMMON PLEAS OF LUZERNE COUNTY.

Ex Parte Butler.

1. The governor of the commonwealth of Pennsylvania issued his requisition warrant to arrest and deliver the respondent, said to be a fugitive from justice, to an agent appointed by the governor of the state of New Jersey. After arrest, the respondent sued out his writ of *habeas corpus*, and was brought before a judge of a court of record in accordance with the provisions of the Act of the 24th of May, 1878. After hearing: *Held*, (1) That the act of 1878 was not in conflict with Article IV., section 2, § 2, of the constitution of the United States, and the laws made in pursuance thereof, except only that portion of the second section which limits the rights of the accused to the mere question of identification. (2) That notwithstanding a part of an act may be unconstitutional, that does not invalidate the whole act.
2. Before a person charged with an offense can be delivered up as a fugitive from justice, the warrant of the governor must show upon its face, where the crime charged is obtaining money by false pretences, that such crime is contrary to the statute of the state claiming the fugitive, and also that it is not the duty of the judge hearing the case to take judicial notice of the laws of such state.

Opinion by HANDLEY, J. October 28, 1878.

The respondent was arrested by P. J. Kenny, sheriff of Luzerne county, under and by virtue of a requisition warrant issued by John F. Hartranft, governor of the commonwealth of Pennsylvania, on the 18th day of October, 1878. In this warrant Governor Hartranft sets forth "that whereas it has been represented to him by his excellency, George B. McClellan, governor of the state of New Jersey, that said Butler 'stands charged with the crime of obtaining money under false pretences, committed in the county of Passiac;' and that the said Butler has fled from justice in that state, and taken refuge in the state of Pennsylvania; and the said governor having, in pursuance of the constitution and laws of the United States, demanded of the said Hartranft that he shall cause the said Butler to be arrested and delivered to Henry McDonald, who is duly authorized to receive and convey the said Butler back to the state of New Jersey, there to be dealt with according to law; that the said representations and demand is accompanied by a copy of the indictment aforesaid, which is certified as authentic by the said governor, and is now on file in the office of the secretary of the commonwealth." The requisition warrants then adds, "that the sheriff of Luzerne county is, therefore, authorized and required to execute this warrant in accordance with the act of the general assembly, entitled 'An Act to regulate proceedings under requisition upon the governor of this commonwealth for the apprehension of fugitives from justice,' approved the 24th day of May, 1878."

Under the act of 1878, it is provided by the first and second sections that "it shall be the duty of the governor in all cases where, by virtue of a requisiton made upon him by the governor of another state, any citizen, inhabitant, or temporary resident of this commonwealth is to be arrested as a fugitive from justice, * * to issue and transmit his warrant for such purpose to the sheriff of the proper county; that before the sheriff shall deliver the person arrested into the custody of the officer named in the requisition, it shall be the duty of the sheriff to take the prisoner before a judge of a court of record, who shall inform the prisoner of the cause of his arrest, the nature of the process, and instruct him that if he claims not to be the particular person mentioned in said requisition, * * he may have a writ of *habeas corpus* upon filing an affidavit to that effect: *Provided*, the investigation and hearing under said writ shall be limited to the question of identification, and shall not enter into the merits or facts of the charge referred to in the requisition." The third section of said act provides that "it shall not be lawful for any person or officer to take any person out of this commonwealth upon the ground that the person consent to go, or by reason of his willingness to waive the proceedings described in the first and second sections, * * without first taking him before a judge of a court of record, shall be guilty of a misdemeanor; and, upon conviction, be sentenced to one year's imprisonment:" P. L. 1878, pp. 137 and 138.

Counsel for the alleged offender presented his petition and affidavit for *habeas corpus;* whereupon the writ was allowed, and Mr. Butler was brought before us. At the hearing, counsel for Marshal McDonald contended that the court was, upon the hearing, limited to the question of indentification under the act of 1878. On the other hand, counsel for Mr. Butler argued that notwithstanding the act of 1878, his client was entitled to be heard; and that the act in question was unconstitutional, it being in direct conflict with Article IV., section 2, § 2, of the constitution of the United States.

The article and section of the constitution thus referred to provides that "a person charged in any state * * with treason, felony, or other crime, who shall flee from justice, and shall be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." To carry this portion of the constitution into effect, congress passed the act of 1793, which prescribes a mode by which fugitives from justice may be demanded and delivered up: 1 Brightley's Dig. U. S. L. 293. In a general sense, this act may be said to cover the whole ground of the constitution, so far as the same relates to fugitives from justice. If this be so, then it would seem, upon first principles of construction, that the legislation of congress, if constitutional, must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it. If congress have a

constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that state legislatures have a right to interfere. In the case of Houston v. Moore, 5 Wheaton, 21-22, it was held by the Supreme Court of the United States that where congress have exercised a power over a particular subject given them by the constitution, it is not competent for the state legislative to add to the provisions of congress upon that subject. See also Sturgis v. Crowninshield, 4 Wheat. 122; Priggs v. Commonwealth, 16 Peters, 539.

Is the act of 1878, relative to fugitives from justice, constitutional? It is true that a grant of power to the general government does not necessarily operate as a prohibition of the same power by the states. There are subjects over which the general government and the states may exercise concurrent jurisdiction. If the terms of the grant are not exclusive, and there is no express prohibition upon the states, and no repugnancy or inconsistency in its exercise by the states, the authority is concurrent: The People *ex rel.* Barlow v. Curtis, 50 N. Y. Rep. 326; Holmes v. Jamison *et al.*, 14 Peters, 576. To justify a court in pronouncing an act of the legislature to be unconstitutional, the incompatibility must not be speculative, argumentative, or to be found only in hypothetical cases or supposed consequences; it must be clear, decided, inevitable, such as presents a contradiction at once to the mind without straining, either by forced meanings or to remote consequences: Livingston v. Moore, 7 Peters, 663; Falconer v. Campbell, 2 McLean, 195; 1 Pet. Dig. 565-8. The constitution was made for the benefit of every citizen of the United States, and there is no citizen, whatever his condition, or wherever he may be within the territory of the United States, who has not a right to its protection: United States v. Moore, 3 Cranch. 160. No state laws can take away rights and privileges secured by the constitution and laws of the United States: United States v. Rathburn, 2 Paine, 579. We must, therefore, hold that the act of 1878, relative to fugitives from justice, is constitutional, except only that portion of the second section which limits the rights of the accused to the mere question of identity when brought before a judge of a court of record on *habeas corpus*. The rights or the liberty of an American citizen, when charged with an offense against the laws of the land, cannot be limited to the simple question of identification. His rights are, and his liberty is, based upon a broader and more firm foundation in the social compact than that of identity. Whilst, however, a portion of an act of assembly may be unconstitutional, that does not render the whole act unconstitutional: Mott v. Pennsylvania Railroad Co., 6 Casey, 9; Breitenbach v. Bush, 8 Wright, 313; Clark v. Martin, 13 Wright, 299; Allentown v. Henry, 23 P. F. Smith, 404.

This brings us to the question, shall the respondent be discharged? In order to give the executive authority of any state or territory jurisdiction in a case of this nature, under the act of congress of 1793, three

things are requisite—First, the fugitive must be demanded by the executive of the state or territory from which he fled: Second, a copy of an indictment found, or an affidavit made before a magistrate charging the fugitive with having committed the crime: Third, such copy of the indictment or affidavit must be certified as authentic by the executive: *Ex Parte* Douaghey, 2 Pitts. 166. In the case of *In Re* Clark, 9 Wend. 217, it was held that if these three pre-requisites have been properly complied with, then the warrant of the governor has properly issued, and the prisoner is legally restrained of his liberty. See also *Ex Parte* Smith, 3 McLean, 121; State v. Schleum, 4 Harrington, 579; Romean's Case, 23 Cal. 585; Kingsbury's Case, 106 Mass. Rep. 225. The sheriff's return to the *habeas corpus* shows that Mr. Butler is held "by virtue of a warrant, dated the 18th day of October, 1878, issued by his excellency, John F. Hartranft, governor of the commonwealth of Pennsylvania." The governor's warrant fails to show upon its face whether Mr. Butler has violated any of the statute laws or common law of New Jersey; nor does it state that obtaining money by false pretences is made a crime by the laws of New Jersey. It has been held that the provisions of the constitution applies to the offense of obtaining money by false pretences, *when that is made a crime by statute;* and it is not the duty of the court, upon the hearing of the *habeas corpus* in a case of this nature, to take judicial notice of the laws of the state claiming the alleged offender: People *ex rel.* Lawrence v. Brady, 56 N. Y. Rep. 183; *In Re* Greenough, 31 Vermont, 279; *Ex Parte* White, 49 Cal. 434; *Ex Parte* Cuberth, 49 Cal. 436; Morton v. Skinner, 48 Ind. 123. In the case of Brown, 112 Mass. 409, where a citizen of Vermont was arrested under a warrant of his excellency, the governor of the commonwealth of Massachusetts, it was held that a statement in the warrant for the arrest and delivery of the fugitive from justice, that the fugitive is "charged with the crime of selling and furnishing intoxicating liquors, contrary to the laws of Vermont, and represented to be a fugitive from the justice of the said state of Vermont," shows that the respondent has been charged, within the meaning of the law, with a crime against the laws of that state. In an indictment for a cheat at common law, the false token must be alleged, and in an indictment for false pretences, the pretences must be averred, so that the accused may be prepared to meet the accusation, and that the court may see that an indictable offense is charged, for there are many cheats which are not indictable, and false pretences which are not within the statute: 2 Term. Rep. 586; East. Crown Law, 837; People v. Williams, 4 Hill, 9; People v. Crissen, 4 Denio, 529. It would be a dangerous precedent if it should be held that a man could be deprived of his liberty and removed to another state upon an accusation so vague and unsatisfactory as that contained in the warrant in this case. It is a reasonable rule, supported by obvious considerations of justice, that where a surrender is sought upon proof, the *ex parte*

statements of the accusser, that the offense should be distinctly and plainly charged in the warrant of arrest, and the law, if there be one, of the state controlling such charge referred to in some manner. In our busy world of inter-communication between the people of the several states of the Union, security to person and liberty demands this, and the state will meet the full measure of its obligations to the most humble of its citizens, if it requires this, before consenting to the arrest and removal of alleged offenders. See 6 Pa. L. J. 412.

The prisoner is, therefore, discharged.

John Lynch, for writ.

William S. McLean, *contra.*

Storz v. Weiss.

1. Where there is inadequacy of price, slight additional grounds will be sufficient to set aside sheriff's sale of real property.
2. Where property is bounded on one side by an alley, it should be so described.

Rule to set aside sheriff's sale.

The sheriff of Luzerne county sold the property of the defendant, known as the Harmonie Garden, in the city of Wilkes-Barre. The amount bid was not enough to satisfy all the liens. This rule was taken on behalf of defendant and former lien creditors, whose claims were not reached by the fund. The depositions showed substantially that the sheriff's description omitted a bowling alley and shooting gallery, and a building used as a wash house, also the mention of fruit trees. It was also stated in the description that the property was bounded on one side by the Anning Dilley line, whereas it was on that side bounded by Smith's alley, a public street eighteen feet in width. It was also alleged that the price was inadequate.

Brundage, for rule.

The price is inadequate, and the property was not fully described. Defendant is willing to give security that on a resale the property will bring a greater price.

Hahn, in reply.

The words in the advertisement, "necessary fixtures and accommodations," cover all the substantial improvements on the premises: Steinmetz v. Stokes, Troubat & Haley's Practice, 999, note; Gilbert v. Jackson, Id.; Passmore v. Gordon, 1 Brown, 320; Whitaker v. Birkey, 2 W. N. 476.

Halsey, for purchaser.

The aggregate value of all property omitted in the description does not exceed two hundred dollars. The trees are a part of the

land, and require no special description. If the defendant is present when the sale is made, and makes no objection, the sale ought not to be set aside. The defendant was present, and had Burgunder bid for him. The description is sufficient: Groom v. Overbeck, 2 W. N. 272; Brown v. Shepard, 1 W. N. 103.

No reported cases go to the length of deciding that the mere omission to describe back buildings and an alley, and inadequacy of price, are grounds for setting aside sheriff's sale: Scherer v. Harshaw, 4 W. N. 495.

Pike, in reply, for rule.

The test is, has the law been substantially complied with. Substantial improvements must be described: 2 T. & H. 1012; Moyer v. Ibbotson, 2 W. N. 29.

The property is described as bounded by the Anning Dilley lot, when it should have been to Smith's alley. The price is inadequate, and in such case the court will seek sufficient grounds on which to set aside the sale: Twells v. Conrad, 2 W. N. 30.

THE COURT—The rule in this case will have to be made absolute, but upon conditions. This property was not fully described. It is also claimed that there is great inadequacy of price. The property sold for $11,010, while it it alleged that its real value is about $22,000. Where there is inadequacy of price, slight additional grounds are sufficient to set aside a sale: Twells v. Conrad, 2 W. N. 30. The map and depositions show that this property is bounded in the rear by Smith's alley, and yet this alley is omitted in the description. An alley has become an important item in setting aside sheriff's sales. If an alley is crowded with houses of ill-fame, and such alley is mentioned in the description, when, in fact, it should not have been, the court will set aside the sale, because such mention tends to injure the sale: Whitaker v. Birkey, 2 W. N. 476. While, on the other hand, if there is an alley, and it bears a good name, and the mention of it in the description is omitted, such omission is a fatal mistake: Chadwick v. Patterson, 2 Phila. Rep. 275. It was the duty of the defendant, immediately after he discovered his property was up for sale, to ascertain whether it was properly described, and if he discovered it was not, then to move in the matter. This he failed to do, and for this reason alone this sale ought not to be set aside. Upon condition, however, that within three days from the date of filing this opinion in court, the defendant shall give security in fifteen thousand dollars, with two or more sureties, to be approved by the court, that upon a resale of the property in question it shall bring an increased price, and that the defendant shall forthwith pay all costs thus far made, this rule is made obsolute, otherwise it is discharged.

Opinion by HANDLEY, J.

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VOL. 7. FRIDAY, NOVEMBER 8, 1878. NO. 45.

COMMON PLEAS OF LUZERNE COUNTY.

Fisher v. Hughes.

The court will set aside an appraisal made under the Act of April 9, 1849, where it is manifest there is great inadequacy of price.

CONYNGHAM, P. J.—We are always desirous to sustain the proceedings of an officer in a case like the present—approving of the action of appraisers—but, under the circumstances shown here, this cannot now be done. The exemption law is to be liberally construed for the benefit of a debtor and his family, but an abuse of it should never be countenanced. Here the evidence is undisputed, and without conflict; it plainly shows that, either through want of knowledge or otherwise, the appraisers must have been greatly misled as to the value of the lot set off to the defendant; their finding, too, being without notice to the plaintiff, or an opportunity to him, where his interest was so materially affected, to test the propriety of their allotment. We should think a sheriff should, in all cases of levy upon real estate, and where there is necessarily the delay of a return and time for an inquisition, give notice to the plaintiff of defendant's demand of an exemption, so that he also may be heard before the appraisers. Perhaps it would not require us in all cases to set aside such an appraisement because no notice was given; but such want of notice would seem to require us to examine the proceedings very closely. The undoubted testimony here puts the value of the lot set off to defendant at from eight hundred to one thousand dollars, with an annual rental of about seventy-five dollars. To ask the court to say that the appraisers have done right in valuing such a lot at two hundred dollars, and in their taking from creditors some five hundred dollars to seven hundred dollars of property liable to execution, would be asking them to countenance a palpable abuse of the statute. We will not examine such appraisements and valuation very critically, so as in all cases to induce a retrial by the court; but here the fact complained of, or mistake, is so palpable, we cannot shut our eyes and refuse to discover the evident injustice of the proceeding.

The appraisement must be set aside, costs to abide the eventual recovery.

Interest upon a judgment ceases from the time of the return and confirmation of a sheriff's sale.

CONYNGHAM, P. J.—The question is whether interest can be awarded to the judgment creditors out of the surplus claimed by Melvin, the purchaser from the original defendant. The rule laid down in Ramsay's Appeal, 4 W. 73, and Carlisle Bank v. Barnett, 3 W. & S. 252, is, that interest on a judicial sale ends from the return day of the writ, or the bringing of money into court. Here the money is presumed to have been in court, and though the right to it was in dispute between Melvin, the purchaser from the defendant, and the judgment creditors, I cannot see that the circumstance will justify the award of interest to be paid out of the money of Melvin; though his deed was considered fraudulent as against the judgment creditors, it was good against the defendant. It must be considered that the creditors' judgments are to be paid out of the money in court, with interest to the return of the sale, and the surplus belongs to Melvin.

COMMON PLEAS OF PHILADELPHIA.

Ward v. Biddle et al.

1. The act of 1872, P. L. 35, securing to a married woman her separate earnings, does not make her a feme sole trader, though it entitles her to the same enjoyment of her earning as a feme sole.
2. Without doubt the private earnings of a married woman are protected under this act; nevertheless, if a married woman supplies her husband with money to carry on business, and he carries it on ostensibly as his own, the property is not protected from his creditors.

Judgment had been obtained against James Ward, execution issued, and a levy made, covering the stock and fixtures of a certain grocery store, corner of Transcript and Silliman streets, also a horse, wagon, and harness, together with certain household furniture in the dwelling house attached to the store. All of the property levied on was claimed by Bridget Ward, wife of said James Ward. A sheriff's interpleader was ordered, and the case came on to be tried as a feigned issue.

Plaintiff offered in evidence petition of Bridget Ward, which was duly allowed by the Court of Common Pleas under the act of 1872, for the protection of right to her separate earnings. It appeared from the evidence of the plaintiff, which was uncontradicted, that a grocery store was kept at the corner of Transcript and Silliman streets by the husband; that the name over the store was "Ward's Store;" that the stock and fixtures levied on were the stock and fixtures of that store, and that the horse and wagon were procured for and used in the busi-

ness. Plaintiff testified that her money stocked the store and carried on the business. She testified: "I lend my husband money to buy the goods for the grocery store." Mr. Ward testified: "My wife carries on the business; I tend the store, with my two sons; I do the outside buying; Mrs. Ward furnished the store from the start." On cross-examination he said: "I don't own anything; I come into town and buy goods; I buy along the wharf, sometimes for cash; sometimes I buy on credit; I have bought goods on credit from Robert & White and Burns & Smucker; I permitted a judgment to go against me in this case, and for the claim of Burns & Smucker; I did not consider that I should pay them." It was also testified by plaintiff and Mr. Ward that when they were married, thirty-two years ago, plaintiff had received five hundred dollars from her father, and that since that time she had earned money by sale of milk and poultry and investing in real estate; that she always had plenty of money—"a pocket full of money."

The defendants admitted the claimant's title to the household goods, but contested her claim to the stock and fixtures of the store, and to the horse, wagon, and harness, and put in evidence the record of the judgment against James Ward and the execution against him.

THAYER, P. J., October 25th, 1878, charged the jury as follows:

"As to all the furniture in the house, the defendant's do not contest Mrs. Ward's title, and you will find a verdict as to that for the plaintiff. But as to the stock and fixtures of the store, and the horse, wagon, and harness, the defendants deny that it is protected from their execution.

"Without doubt the private earnings of a married woman are protected by law against the claims of the husband's creditors; nevertheless, if a married woman advances money to her husband to carry on business, and he carries it on as if he were proprietor and owner, the wife's money so invested is not protected. No other rule can protect persons dealing with the husband from fraud and imposition.

"A married woman cannot be permitted to hold her husband out to the world as carrying on business for himself, and claim that the money which she has put into a business so conducted exempts the property from the claims of her husband's creditors.

"If you find that the plaintiff furnished to her husband the money with which the business was carried on, and that he carried it on under circumstances which indicated to the world that he was the master and owner of the place, you should find a verdict for the defendants in this issue.

"The act of 1872, under which the plaintiff filed her petition, does not make her a feme sole trader. It entitles her to her separate earnings, but does not permit her to carry on business in her husband's

name. If she does that, the transaction is to be regarded as a loan by her to her husband, and the property is liable to be taken in execution for his debts."

The jury found a verdict for the plaintiff as to the household furniture, and as to the stock and fixtures, and the horse, harness, and wagon, they found for the defendants.

(It was held by the Court of Common Pleas, in the case of Ward v. Whitney, Legal Intelligencer, June 7th, 1878, that the act of 1872 does not entitle a married woman, who had filed her petition under that act, to give her own bond in a sheriff's interpleader.)—*Legal Intelligencer.*

SUPREME COURT OF PENNSYLVANIA.

Kleber & Bro. v. Ward et al.

Where a chattel is hired for a rent payable at regular intervals, with an agreement that the bailee may purchase the chattel at a specified price, upon which all rent paid should be a credit, the property is not changed until the price be paid.

A chattel so hired, found upon demised premises, occupied as a private residence, is subject to distress for rent.

Error to the Court of Common Pleas of Allegheny county.

This was a replevin for a piano, stool, and cover, found upon premises leased by William Ward to J. H. Smith, and occupied by him as a dwelling, which had been distrained by the landlord for rent due by Smith. The piano, etc., had been hired by Kleber & Bro. to the lessee's wife at fifty dollars per quarter, with an agreement that she might purchase them during the hiring for five hundred dollars, "in which case all sums paid for rent will be deducted from the above said sum." The court (Bailey, J.) charged that, under the agreement with Mrs. Smith, the piano, etc., remained the property of Kleber & Bro., and that if the jury found the facts as above (which were not in controversy), they should find for the defendants.

PER CURIAM.—The piano in this case was simply the property of a stranger, found on the demised premises, left for no purpose of trade or other purpose requiring protection as a matter of public policy. It did not belong to or further the business of J. H. Smith, but was simply leased to his wife at a rental for her private benefit. The fact that the Act of Assembly of 13th May, 1876, was passed to exempt pianos, melodeons, and organs from levy and sale in such a case is a legislative interpretation of the law as it stood before. We see no error.

Judgment affirmed.—*Pittsburg Legal Journal.*

The Luzerne Legal Register.

VOL. 7. FRIDAY, NOVEMBER 15, 1878. No. 46.

ORPHANS' COURT OF LUZERNE COUNTY.

Estate of Frank Smith, deceased.

Where persons related by blood or lawful marriage live together as members of a family, there can be no *implied* contract for wages on the one hand, nor for maintenance on the other; and this is also true of the relation of guardian and ward.

The question of ability or inability to support the relative is not involved in the rule; nor is the legal liability of some to support their near relatives involved in it. The question upon which such cases turn is the one of contract, and there can be no recovery in any form of action without proof of an express one.

The relation existing between guardian and ward, who live together as members of a family, is continually inconsistent with the idea of an implied contract for either wages or maintenance.

Exceptions to account of guardian.

Opinion by RHONE, J. November 11, 1878.

The second, third, fourth, fifth, seventh, eighth, tenth, eleventh, twelfth, fifteenth, and sixteenth exceptions were withdrawn on the argument, and the seventeenth is dismissed because it is so general as to mean nothing.

The first is dismissed, as we conclude that the services and expenses specified were necessary, and the charges for the same are reasonable; and the sixth is also dismissed for the same reason.

The ninth is sustained, as we consider the services unnecessary, and so the charges are, of course, unreasonable. If a crime had been committed amounting to a felony, the law had provided all necessary expenses in bringing the offender to justice. The county paid this accountant thirty-five dollars for his witnesses, and she also paid the expenses and costs of all officers necessary to carry on the case, including an attorney. We conclude that the charge of sixty-three dollars was for what is known as "the luxury of a law suit."

The thirteenth and fourteenth exceptions relate to one and the same subject, and will be disposed of together. Before entering upon a discussion of this branch of the case, we will remark that the conduct of this guardian in many pariiculars is not commendable. The ward's pension was her only estate, and he claims credit for having expended for her in ten years fifteen hundred and forty-nine dollars and sixty-five cents, and at the end of that time turns her out on the world indebted to him three hundred and ninety dollars and eighty-five cents, without an education or any trade or skill with which to help herself along in life. He has no account to present showing dates,

items, or values, alleging that he lost or *mislaid* his account book about the time when he was called upon to give an account of his trust. During these many years he filed no statement or account, and did not even file this final one until he was cited and attached. In view of all these things, he is entitled to no more than the application of the plain rules of law to his case. The father of this ward died in 1862 in the United States army, when she was about three years old. In 1864 her mother married the present guardian, who was appointed such in 1865, and he, at the end of two years of more than ordinary trouble and expense, secured for her a pension of eight dollars per month, which was afterwards increased to ten dollars per month. The mother died in September, 1867, and the girl continued to live entirely with her stepfather until 1871, attending public school some of the time, and doing such work as such girls usually do in the neighborhood where she lived. In 1865 Mr. Pace had five children beside this ward to support—one a daughter, who died in 1866, one a son, who was then sixteen years of age, and two daughters younger than the son, who were married in 1871, and this same year the other daughter went to live with Dr. Bacon, where she has since been, and the son left his father's house. During the years spoken of Mr. Pace, the guardian, owned a small property worth in all about twenty-five hundred dollars. In 1871 the girl, being about twelve years of age, commenced to work out among the neighbors occasionally, still attending the public school some, and when not employed lived with her stepfather until 1875, when she cut loose from him altogether. We conclude, as matter of fact, that from April 1, 1871, the ward did earn, or, if the guardian had done his duty toward her, could have earned such "victuals and clothes" as she got, and that, therefore, as matter of law, arising out of the fact stated, he is not entitled to anything for her maintenance after that date. The ward had no estate before December 2d, 1867, when her pension commenced, so that it seems clear to us that the support of the ward up to that date was a mere gratuity. We find, as matter of fact, that during the period from September 10th, 1865, to December 2d, 1867, this stepfather was able to support and clothe this stepdaughter; indeed, it would seem idle to find the fact to be otherwise, for he actually did support her when she had no estate, and when it was not known that she ever would have any. This leaves in dispute the charge for maintenance from December 2, 1867, to April 1, 1871, a period of three years and four months, at the rate of two dollars and seventy-five cents per week. We find, as matter of fact, that during this latter period the stepfather was unable to support this his stepdaughter and ward, and that two dollars and seventy-five per week is a reasonable price for board. We find, also, that there was no express contract, agreement, or understanding with any one about the maintenance, and that there was no order of allowance from the court. The ward resists this claim on the

ground that, as matter of law, he is not entitled to anything. It has been settled by a long line of cases collected by Justice Read in Duffey v. Duffey, 8 Wr. 399, followed by Ruckman's Appeal, 11 Smith, 251, and by Douglass' Appeal, 1 Norris, 169, that where persons stand to each other in a family relation, and live together as members of one family, there can be no *implied* contract for wages on the one hand, nor for maintenance on the other. The last cases cited show that this family relation exists between stepfather and stepdaughter, and this court concluded in White's Estate, Law Times, Vol. IV., No. 7, 1876, that this same family relation exists between guardian and ward. It has always been classed as one of the domestic relations. The question of ability or inability to support, clothe, and educate the relative is not involved in the rule of law just cited: Cummings v. Cummings, 8 Watts, 366. Nor is the question of the legal liability and obligation to support a near relative involved in it, for the rule extends beyond those who are bound to support their pauper kindred: 9 Barr, 309. Nor is the question of consideration necessarily involved, although the law presumes that the natural love and affection existing between the parties thus situated is a sufficient consideration, in the absence of any express one, to compensate for either services or support: *Supra.* The point in such cases is, that there is no contract; that there can be no recovery without a contract; and if there be no express one, there can be none at all, for the law does not allow the parties to set up an implied one. Where a stranger is guardian of a child, he may contract with one of its kindred (even a father or mother, if unable to support it themselves) for its support, and under such circumstances, if no previous allowance has been ordered by the court, the contract, if reasonable, will be ratified by the court, as was done in Pennock's Estate, 32 Leg. Int. 169. If a parent is guardian of his own child, he may, if unable to support it himself, contract with a stranger to do it, and the law will sanction it. Either a stranger or a parent may himself maintain the ward at his own home as one of his own family out of the ward's estate, if he previously secure an order of the Orphans' Court for an allowance. A stranger may, under certain circumstances, pick up an orphan child in need, and supply it with necessaries, and recover their value from its guardian on the ground of an implied contract with him; but no guardian, especially if related by blood or lawful marriage, can take his ward and treat it as a member of his own family, and in after years turn around and claim that he kept it as a lady or gentleman boarder. The relation assumed is continually inconsistent with, and rebuts the presumption of a contract. The ward resists it because it knows best about the circumstances; the common instincts of humanity resist it as being inconsistent with the love and affection that is presumed to exist between persons thus situated; and the law says that the rule forbidding it is founded also on public policy, for it prevents family feuds and estrangements, and

drives from the courts a flood of cases founded on vague, conflicting, and unsatisfactory evidence. The rule may bring about harsh results sometimes, as it seems to in this case, but we shall continue to apply it in all cases, until instructed by authority to do otherwise. The remedy lies with the guardians, and it is hoped they will not be slow to learn their duty.

There has been no demand for interest, and, as a gratuity, this is quite an item in favor of the guardian. There has been no objection to allowance for medical attendance, which is also in his favor.

The guardian is, therefore, surcharged with the sum of the two items specified in exeeptions thirteen and fourteen, namely, five hundred and eighty-five dollars, and five hundred and twenty-eight dollars; and with the item specified in exception nine, namely, sixty-three dollars; in all the sum of eleven hundred and seventy-six dollars. From this sum is deducted the balance shown by the account to be in favor of the guardian, namely, three hundred and ninety dollars and eighty-five cents, which leaves against him a balance of seven hundred and eighty-five dollars and fifteen cents, for which sum judgment is entered against the guardian and in favor of the ward, with the costs of this proceeding.

George R. Bedford, for guardian.

H. W. Palmer and H. A. Fuller, for ward.

SUPREME COURT OF PENNSYLVANIA.

Horton's Appeal.

A compromise receipt given to an executor is peculiarly a fit subject of scrutiny.

Appeal from Common Pleas of Chester county.

WOODWARD, J.—Whether Mrs. Simpson was imposed upon and entrapped into signing a receipt in full for one hundred and fifty-five dollars, when two hundred and eight dollars and eighty-eight cents were really due to her, was a question of fact inquired into and decided by a very competent auditor, and as the court below saw no reason for reversing his finding, so we see none. A receipt is always open to explanation. And this one, given by a widow to an executor, "on compromise in full of all claims and demands against the estate," was a peculiarly fit subject of scrutiny. Whether upon the evidence we should have attained the same conclusions the auditor did, is not the question before us, but as we see no adequate reason for reversing his conclusions, the decree is affirmed.

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VOL. 7. FRIDAY, NOVEMBER 22, 1878. No. 47.

COMMON PLEAS OF LUZERNE COUNTY.

Volroth v. Dunn et al.

1. An injunction will lie to restrain interference with the organization of a municipal body having a *prima facie* title by another body claiming to have been duly elected.
2. The continuing members of a school board, when met to organize for the ensuing school year, are concluded as to who shall be admitted as members of the new board by the election returns then presented to them.
3. Where there has been an authorized election for the office in controversy, the certificate of election, which is sanctioned by law or usage, is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law.
4. The continuing members of a school board cannot constitute themselves a tribunal to try the question as to who was elected school director. Such questions must be determined by the courts.

In Equity.

Opinion by STANTON, J.

The prayer of the plaintiff in this case is:

"1. That an injunction may issue restraining John Dunn, Thomas R. Williams, Samuel Keithline, A. A. Lape, and Timothy Downing, and those persons acting under them, from taking possession of or interfering in any manner whatever with the school property of said district.

"2. To enjoin Timothy Downing, A. A. Lape, and Samuel Keithline from participating or acting as school directors of said district at the meetings or deliberations of the board of directors."

The grounds on which we are asked to enjoin said persons are substantially these: That on the third Tuesday of February, 1878, an election for three school directors was held in the borough of Nanticoke; that at said election John T. Jones, George Blakey, and Luke W. Casey were elected as such directors, the vote cast being 99 for Lape, 91 for Keithline, 87 for Downing, 228 for Casey, 229 for Jones, and 229 for Blakey; that said Casey, Jones, and Blakey, on the first Tuesday of June, A. D. 1878, met with the three directors continuing in office, namely, Joseph Sheppard, John Dunn, and Thomas R. Williams, to organize the school board for the following school year, the said school board consisting of six members; that said continuing members refused to act with said Casey, Jones, and Blakey, although the three latter then and there presented their certificates of election; that said continuing members adjourned to meet on the following Thursday for the purpose of organizing the school board; that on said

Thursday said Dunn, Sheppard, Casey, Jones, and Blakey met and organized the school board by electing said Casey as president of the board, and said Jones as secretary; that in a few days thereafter said Dunn and Williams, in conjuction with said Lape, Downing, and Keithline, organized another board of school directors for said borough; that on the 21st day of June, A. D. 1878, the said alleged school board of which Casey, Jones, and Blakey were members, met and declared the seats of said Dunn and Williams vacant, and appointed in their places Thomas McNeish and Patrick Shea; and that now said Dunn, Williams, Keithline, Lape, and Downing hold possession of part of the school property of said school district, and "are attempting by threats and violence, with the aid of great bodies of dangerous and lawless men, to take possession of the balance of said property, to the great annoyance and terror of * * the * * citizens and taxpayers of said borough."

At the hearing of the rule to dissolve the injunction granted, depositions on behalf of both plaintiff and defendants were read by agreement of the parties. The testimony produced on behalf of the plaintiff sustains the allegations contained in the bill. Dunn, one of the defendants, being sworn on behalf of plaintiff, said, substantially, in his testimony, that he believed the meeting stood adjourned until Thursday at four o'clock, at the call of the president, but that in the meantime, without notice to either said Jones, Casey, or Blakey, he and said Sheppard, Williams, Keithline, Lape, and Downing met at his house, and organized the school board by electing said Keithline president, said Downing secretary, said Lape treasurer, and himself collector. Dunn also being called as a witness by the defendants, testified as follows: "Myself, Thomas R. Williams, and Sheppard were the continuing members. We met on Tuesday, the 4th day of June, for the purpose of organizing a school board. I was elected temporary chairman of the meeting, and Joseph Sheppard was elected secretary *pro tem.* A. A. Lape, Samuel Keithline, Timothy Downing, Luke Casey, John T. Jones, and George Blakey were all present, and each claimed the right to be received as director, as having been elected at the spring election. Jones, Blakey, and Casey claimed their seats on the ground that they had received a majority of the votes polled at the election. Messrs. Lape, Keithline, and Downing claimed their seats on the ground that they had received all the votes polled at said election, with the term of office specified on the tickets. The board was not organized that night. After the parties claimed their seats, the old members were at a loss how to decide the matter, and they agreed among themselves to adjourn the meeting, and come to Wilkes-Barre, and take advice from Mr. Kulp, and act according to his instructions. I think the meeting was adjourned to meet on Thursday, at four o'clock, or at the call of the president." Downing, one of the defendants, testified: "If I recollect right, the adjournment Tuesday was to Thursday,

at the call of the president. I suppose we had no president on Tuesday before the board organized. The president, John Dunn, and John Smoulder gave us notice. They gave us notice on Wednesday evening, about a half hour before the meeting. I did not have a certificate, and did not see either Lape or Keithline present any certificate on Wednesday evening. I did not see the return list or tally list at that meeting." Keithline, one of the defendants, testified that "Mr. Dunn gave me notice to attend the meeting on Wednesday night. Neither of us three men there that night claiming seats had any certificates of election. I had no certificate. The certificates that have been presented here for Lape, Downing, and Keithline were made out after that meeting." Other testimony was offered and read, in the nature of answer to the allegations contained in the bill, by the defendants, at the hearing of the rule to dissolve the injunction. This testimony denies that an organization of the school board was effected on Thursday, as alleged in the bill.

The allegations on the one side and the other impress us that not only does confusion exist in the school affairs of Nanticoke borough, but that also human life will be in danger in that hitherto law-abiding community until there is an adjudication of this question. These unseemly contests and disputes have become quite too common of late years. This condition of things arises not so much from imperfectly constructed statutes, as from the fact that men close their eyes to the true and plain construction of them. There is no necessity that we see for any confusion in the school matters of Nanticoke borough, and there would not be confusion if all parties would comply with the statutes regulating the common schools. But as long as men think more of victories resulting from sharp practice, than of the success of the schools, there will be such confusion.

The bill in this case sets forth facts sufficient to invoke the offices of chancery; for an injunction will lie to restrain an interference with the organization of a municipal body having a *prima facie* title, by another body claiming to have been duly elected: Kerr v. Trego, 47 Pa. St. Rep. 292.

While in the disposition of this case the principle that such allegations of fact in the answer as are responsive to and in denial of the allegations of fact in the bill must prevail (City of Philadelphia's Appeal, 28 P. F. Smith, 33), will be kept fully in view by us, yet when one party alleges that on a certain day the school board was organized, and the other party denies that it was then organized, we see no opposition of fact requiring an application of this principle. Such allegations are conclusions of law. Organization is the sum of a number of facts or circumstances.

It is not disputed or denied that Jones, Casey, and Blakey received each a majority of the votes cast for school directors at the election held on the third Tuesday of February, A. D. 1878, and that they

presented the certificates of that fact, or the returns of that election, at the meeting of directors held on the first Tuesday of June, 1878, for the purpose of organization as aforesaid. The testimony of said Casey, who was sworn on behalf of the plaintiff, on this point, and relative to that Tuesday's meeting, is as follows: "Between eleven and twelve o'clock that night (the night of the first Monday in June, 1878), John Dunn told me in the presence of several others, 'Casey, the school board will meet to-morrow at eight o'clock for organization.' Jones, myself, and Blakey were present there the next morning. Dunn, Sheppard, and Williams were present of the continuing members. Major McNeish, Jerry O'Brien, Patrick Shea, Mr. Williams, and others were there. They, the continuing members, constituted themselves a board for the purpose of hearing the claims of those who wanted to be school directors, and elected a secretary and president. We—that is, myself, Blakey, and Jones—were not permitted to either vote or have anything to say in the election of these men as chairman and secretary. We had read and shown the certificates of our election, marked A, B, and C exhibits, to the continuing members before the election of a chairman and secretary, and claimed our seats by virtue of that and the election. We subsequently handed them over to the secretary, and we left them with him, Mr. Sheppard. They adjourned to have counsel to see who they would admit. They adjourned till Thursday following, at four o'clock, at the same place." There was, then, a temporary organization of the school board of Nanticoke borough, and all the election certificates or returns of the vote presented and read there having shown that Blakey, Jones, and Casey were elected school directors, it only remained for the continuing members to enter into a permanent organization with them by choosing a president, secretary, and treasurer. Instead of then and there so doing, however, they adjourned to meet on the following Thursday. But in thus adjourning, they did not transcend the law. The adjournment was regular and proper, but the action of the continuing members during the intervening time cannot be thus characterized. It seems that between said Tuesday and Thursday, the continuing members, Dunn, Williams, and Sheppard, met with said Keithline, Lape, and Downing in a room at Dunn's house, and there went through the forms of organizing a school board for Nanticoke borough. And now we are asked to recognize the body so organized as the legitimate school board of this borough. We see nothing of legitimacy about it. Dunn, Sheppard, and Williams should have met with Casey, Jones, and Blakey in pursuance of the adjournment of Tuesday, as aforesaid. After the three latter had presented their certificates of election, they were entitled, in the absence of other such certificates, to recognition and admission as members of the board. The continuing members of a school board, when met to organize for the ensuing school year, are concluded as to who should be admitted as members of the board by the election

returns presented to them. They cannot constitute themselves a tribunal to try the question who was elected school director. Such contests must be determined by the courts. "Where there has been an authorized election for the office in controversy, the certificate of election, which is sanctioned by law or usage, is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law: Kerr et al. v. Trego et al., 47 Pa. St. Rep. 296. Even a court of equity cannot set aside an election, though some of the returns be palpable forgeries, in the absence of proof of fraud on the part of the return judges; the election must be contested in the mode prescribed by law: Hulseman v. Rems, 41 Pa. St. Rep. 396. There is no sufficient reason assigned, nor can there be, we are of opinion, why we should recognize the organization formed at Dunn's house on Wednesday evening as aforesaid as the board of school directors of Nanticoke borough. At that meeting no certificates of election, or election returns, showing that any votes had been cast for said Keithline, Lape, or Downing for the office of school director, were before them.

Jones, Casey, and Blakey tried to organize a school board also, but we hold that they did so without success. They met on Thursday pursuant to said adjournment, but accomplished nothing. They allege that they met with Dunn and Sheppard, and effected an organization by electing said Casey president, and said Jones secretary. This is denied by the defendants. Dunn and Sheppard put in an appearance there, but in no sense did they participate in the manner required by law in any action looking to an organization of a school board. One organization is as defective as the other, and the borough of Nanticoke is at present without such an organization as a board of school directors. It seems to us that a great majority of the citizens of Nanticoke desire that Messrs. Jones and Blakey should serve as school directors for that borough for the term of three years, and that Mr. Casey should serve in the same capacity for the term of two years; and that they, in conjunction with Messrs. Dunn, Sheppard, and Williams, the continuing members, should compose the board of school directors of that borough during the present school year.

If these gentleman should, however, by childish bickerings and contentions keep the public schools closed much longer, the citizens of that borough, anxious for the education of their children, may cry out "a plague o' both your houses," and ask us to declare their seats vacant, and appoint others in their stead. If, after the lapse of a few days, complaint should be made to us that said Dunn, Sheppard, Williams, Casey, Blakey, and Jones have not organized as the board of school directors of Nanticoke borough, and that they have not opened the schools, we will, by virtue of the power vested in us by law, declare their seats vacant, and appoint others in their stead.

The injunction heretofore granted is continued.

Mattes v. Ruth.

In all proceedings in equity practice according to equity forms, courts may permit amendments.

In Equity. Application to amend plaintiff's bill.

Opinion by HANDLEY, J. October 5th, 1878.

The plaintiff in this case moves to amend his bill of complaint by adding to the first section the following words: "And your orator further says, that the said property is in the county of Lackawanna, a county erected in pursuance of law, to which your orator begs leave to refer." Counsel for the commissioners of Luzerne county object to this amendment.

We have no hesitation in saying that this amendment ought to be allowed. In the case of Welhelm's Appeal, 32 Leg. Int. 456, Sharswood, J., says that "our acts of assembly have very much extended the right and power of amendment in actions of law, so that we may assert, without much hazard, that the rules upon this subject at law and in equity are the same." It is expressly provided by the act of 1874, section 2, that "in all proceedings in equity according to equity forms, the several courts * * may permit * * amendments:" Perry v. Maurer et al., 5 Luz. Leg. Reg. 99.

And now, October 5, 1878, plaintiff's bill amended as prayed for.

I. H. Burns, for plaintiff.

Geo. B. Kulp, for defendant.

SUPREME COURT OF PENNSYLVANIA.

Pluumer and Cravy, to use, &c., v. Reed.

Benefits derived through fraud will not be permitted in equity.

Error to Common Pleas of Clarion county.

WOODWARD, J.—Equity will not permit one to hold a benefit which he has derived through the fraud even of another, and much less will it do so if he has acquired it by means of his own fraud.

Reed was entitled to have the legal title on complying with his contract, and if he surrendered his position to the plaintiffs on terms alleged, it was a valuable consideration for their agreement, and their action, brought in disregard of their promise, ought not to be sustained.

Judgment reversed.

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VOL. 7. FRIDAY, NOVEMBER 29, 1878. No. 48.

IN THE SUPREME COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Amendment to Hour List Rule adopted May 20, 1878.

All causes remaining over, undisposed of, from former terms, and set down for argument on the hour list, shall be placed at the head of that list in the order of their numbers and terms.

By the Court: D. AGNEW, Chief Justice.

THE RESIDENT MAGISTRATES' COURTS.

Keast and McCarthy v. Elder.

1. The contract is void where beer is supplied to an unlicensed person for retail by him, in fraud of the revenue, and an action to recover the amount due will not lie.
2. A principal is responsible for the act of his agent in the course of his master's business, even to the extent of fraud or wrong, if committed in the course of the service and for the master's benefit, though no privity of the master be proved.

This was an action to recover 59£ 1s 3d, balance due on account current, extending over several years, for beer supplied by the plaintiffs (brewers) to the defendant (a storekeeper, carrying on business at the Portobello road.) The defendant was unlicensed. Usually, on an average, he received two barrels of ale and two dozen of bottled porter monthly.

Stewart, for the defendant, contended that the beer, having been supplied to an unlicensed person for retail by him, in fraud of the revenue, the contract is void, and an action to recover the amount due cannot lie.

BATHGATE, R. M.—A defense of this nature, coming as it does from the party chiefly guilty of the illegality, must be narrowly considered. The importance of the point to the brewers generally also requires that it should have careful consideration. The defendant founded on the case of Meux v. Humphries, 3 C. & P. 79, in which Lord Tenterden, C. J., said: "I am clearly of opinion that the brewers cannot charge any one as their debtor, in the first instance, except the

party who is licensed to keep the house, because this is a fraud on the excise." At one time the law on this point was unsettled. In the case of Hodgson v. Temple, 5 Taunt. 181, Sir James Mansfield said: "The merely selling of goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment." In the same year (1813), five months previously, in the King's Bench, a decision in the case of Langton v. Hughes, 1 M. & S. 593, was given to a precisely contrary effect. The plaintiffs sought to recover the price of drugs sold to the defendants, brewers, for the purpose of mixing with beer. Bayley, J., said: "If a principal sell articles in order to enable the vendor to use them for illegal purposes, he cannot recover the price." The whole question was discussed in a later case, Cannan v. Bryce, 3 B. & Ald. 179, when the decision in Langton v. Hughes was upheld, and it was ruled that where means were furnished for the purpose of accomplishing an illegal object, the lender could not recover. In that case the plaintiff had lent the defendant money to enable him to settle for differences on stock bargains. The settlement of such time bargains was illegal by statute. Abbott, C. J., said: "If it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment?" This decision, arrived at after the court had taken time to consider, must be held as settling the law on the point. The same principle was adopted in later cases. See McKinnell v. Robinson, 3 M. & W. 435; Pearce v. Brooks, L. R. 1 Ex. 212; Taylor v. Chester, L. R. 4 Q. B. 309; Lightfoot v. Tenant, 1 B. & P. 556. The case of Brooker v. Wood, 5 B. & Ad. 1052, modifies Lord Tenterden's opinion in Meux v. Humphries, before quoted. In that case a brewer was held to be entitled to recover from an unlicensed person for beer delivered to a particular licensed house, but the reason given was that the beer was supplied on the credit of the party to be retailed in a licensed house, and that being so, there was no fraud on the revenue. This case is not contrary to the principle affirmed in Cannan v. Bryce. Looking at the whole circumstances of the present case, I find that the plaintiffs supplied the defendant with beer knowing that he was unlicensed. On the question of the knowledge of the plaintiffs' traveler of the nature of defendant's establishment, raised by plaintiffs' counsel, I have looked into the case of Cornfoot v. Fowke, 6 M. & W. 358, referred to, but I am of opinion it does not bear on the present case. There is no doubt that a principal is responsible for the act of his agent in the course of his master's business, even to the extent of fraud or wrong, if committed in the course of the service and for the master's benefit, though no privity of the master be proved: Barwick v. English Joint Stock Bank, L. R. 2 Ex. 265. I would, therefore, have held that the scienter of the traveler was the scienter of the master; but the belief I have of the plaintiffs' knowledge does not rest solely on the traveler's knowledge. In coming to the conclusion that this action cannot be maintained, I

regret that the defendant should thus be a gainer by his own illegal acts; but the law is, in my opinion, so plain on the point that I have no alternative. I need scarcely add that the decision is justified by public policy, and if brewers were more careful in their dealings, illicit traffic in country districts, if not in towns, would not be so easily carried on, to the prejudice both of the licensed trader and the public.

The plaintiffs will be nonsuited.—*New Zealand Jurist.*

COMMON PLEAS OF ADAMS COUNTY.

Assigned Estate of Abdiel F. Gitt.

1. The Act of 22d of April, 1854, giving wages of labor not exceeding one hundred dollars a preference in assignments, supplied by Act of 9th of April, 1872, only in the cases specified in the latter act.
2. Mechanics, farm and other manual laborers not engaged at works, mines, or manufactory, where clerks, miners, or mechanics are employed, are, in assignments, still protected by the former act.

Opinion by McCLEAN, P. J. September 28, 1878.

The argument of the learned counsel for the exceptors goes too far. Its effect, if carried out, would be to entirely exclude in assignments the claims of the general class of laborers from the preference allowed by the Act of 22d of April, 1854. This is more than was done by the Supreme Court in the case of Johnston's Estate, 9 Casey, 511. The claims of the mechanics and laborers in that case were within the Act of 2d of April, 1849, yet by the terms of that act they were not entitled in preference to lien creditors.

Here we have, in the most general terms, a beneficient provision that in all assignments of property, whether real or personal, by any person to assignees, on account of inability to pay his debts, the wages of laborers employed by such person shall be first preferred and paid by such assignees before any other creditor of the assignor: *Provided*, that any one claim thus preferred shall not exceed one hundred dollars. This is an act entitled an act for the protection of mechanics and laborers. It was designed for all those who perform with their own hands the contract they make with the employer. The legislative intention is clearly to protect a class of persons who are wholly dependent upon their manual toil for subsistence, and who cannot protect themselves. It is to secure to the manual laborer the fruits of his own work for the subsistence of himself and family.

Now, when we come to the Act of 9th of April, 1872, which, by express terms, protects only wages at works, mines, or manufactory, where clerks, miners, or mechanics are employed, we do not find the large and meritorious general class of laborers provided for at all. They are not within the purview of the act. How, then, can it be

argued that the protection expressly given them by the act of 1854 has been taken away? There is no room or place for inconsistency or repugnancy. The latter statute is not made concerning the same matter, does not introduce a new rule upon the subject, for it does not touch the subject, and, therefore, was not intended as a substitute for the former law. The latter act was manifestly to protect the clerks and workmen of those who are engaged in the developing of the great mining and manufacturing resources of the commonwealth. It gave their wages a lien and preference under certain limitations: provided, that they might give notice in writing of their claims in all cases of executions, &c., to the officers executing the writs, and that the officers should pay them out of the proceeds of sale the amount each is justly entitled to receive, not exceeding two hundred dollars; and in cases of assignment of any person or chartered company "engaged in operations as hereinbefore mentioned," the lien of preference mentioned in the first section of the act is extended to the property of said persons or chartered company. It does not touch the farm or general laborer. It leaves him where he was carefully provided for by the act of 1854. How can he be excluded, either directly or by implication? Mr. Brightley's note (e), on page 91, of Purdon's Digest, is not to be taken without restriction. The act of 1872 supplies the act of 1854 in certain cases only. The whole course of legislation is to be so construed that every part and word shall have its effect, if it consistently can, and the will of the legislature be completely executed. The provision by the act of 1854, in cases of assignments for the claims of laborers not protected by the later act, is to prevail and not to perish; therefore, the exceptions are dismissed, and the report of the auditor is confirmed.

LITTELL'S LIVING AGE FOR 1879.

The extra offer to new subscribers for 1879, and the reduced clubbing rates, are worthy of note in the prospectus of this standard periodical published in another column. The remarkable success of *The Living Age* is well attested by the fact that on the 1st of January next it begins its one hundred and fortieth volume. It affords the only satisfactorily complete compendium of a current literature which is now richer than ever before in the work of the ablest writers upon all topics of interest. It merits careful attention in making a selection of reading matter for the new year. The more numerous the periodicals, indeed, the more valuable becomes a work like this, which, in convenient form and at small expense, gives the best of all. Its importance to American readers can hardly be over-estimated, as no other single periodical enables one, as does this, to keep well informed in the best thought and literature of the time, and fairly abreast with the work of the most eminent living writers.

The Luzerne Legal Register.

VOL. 7. FRIDAY, DECEMBER 6, 1878. No. 49.

COMMON PLEAS OF PHILADELPHIA.

Wheeler and Wilson Company v. Moore.

1. The Common Pleas have no power to open judgment on a transcript.
2. The judgment of a magistrate entered in the Common Pleas on a transcript is only for the purpose of lien. For all purposes, except lien, the judgment still remains before the magistrate.
3. A capias ad satisfaciendum should not issue on a transcript in the Common Pleas, and will be set aside.

Rule to open judgment and to set aside execution.

Opinion by YERKES, J. November 23, 1878.

The plaintiffs obtained judgment before an alderman. No appeal or certiorari was taken. An execution was issued, to which the constable made the return of "no goods." A transcript was then taken and entered in this court, and a capias ad satisfaciendum was issued.

All the cases upon the subject hold that the Common Pleas has no power to open judgment on a transcript. The question of the propriety of the issuing of the execution against the person is a different one. The purpose of the Act of March 20th, 1810, permitting transcripts to be filed, is expressed to be the binding of real estate, and the execution permitted to be issued from the Common Pleas is presumably to be only for the purpose of making the money from the estate so bound, for the act itself recognizes the right of the justice to issue execution as still existing, although the transcript has been filed. In Brannan v. Kelly, 8 S. & R. 480, Judge Gibson says: "The docketing of the transcript is for the purpose of binding and having execution of the defendant's land, with which it was intended that the justice should have nothing to do, the judgment for the purpose of affecting the land being considered as in the Common Pleas, and for the purpose of having execution of the person or goods as still remaining with the justice." In the case of Rockwell v. Sweet, unreported, but cited by Judge Lewis, in Rochenbaugh v. Arnold, 2 Clark P. L J. 527, it was held that, notwithstanding a return by the constable of "no goods," and notwithstanding a revival in the Common Pleas of a judgment entered on a transcript, a fieri facias could not be levied upon the personal goods of the defendant, because the transcript was only entered in the Common Pleas for the purpose of binding and proceeding against his land. In Green v. Leymer, 3 Watts, 381, it was held that a fieri facias was properly issued upon a judgment on a scire facias

to revive a judgment on a transcript entered in the Common Pleas, although there had been a return of "no goods" to a fieri facias issued by the justice; but it does not appear whether this execution was levied upon personal or real property. Hitchcock v. Long, 2 W. & S. 169, certainly decides that an attachment execution may issue upon such a transcript, and it seems to decide that any writ of execution may issue. This decision is criticised by Judge Lewis, afterwards of the Supreme Court, in Rochenbaugh v. Arnold, already cited. The exact point decided in Hitchcock v. Long was simply that an attachment execution might issue. Whatever else was said may be met by quoting as follows from the per curiam opinion in Boyd v. Miller, 2 P. F. Sm. 431: "The judgment of the justice entered in the Common Pleas on the transcript of the justice is only for the purpose of lien. * For all purposes, except lien, the judgment still remains before the justice." There is ample authority sustaining the right to issue an attachment execution upon a transcript; but, in view of the phraseology of the act itself, and of the cases cited, we do not feel inclined to extend the power to issue such executions against the person of the defendant until sanctioned expressly by decided cases.

It is, therefore, held that the writ of capias ad satisfaciendum in this case was improperly issued.

Execution set aside; the rest of the rule discharged.—*Legal Int.*

SUPREME COURT OF PENNSYLVANIA.

Wood v. Fishburn.

The law treats the compass and the chain as it does other witnesses; if they disagree, the jury must decide which is more creditable; and so it is if mere calculations are substituted for actual measurements.

Error to Common Pleas of Cumberland county.

LOWRIE, C. J.—This question was properly disposed of as one of fact, and not of law. The thing to be done is to mark on the ground a line, which is described with only approximate accuracy. We have a known line from a known corner, and what we want is a corner on that line that will give us the line to the third known corner. This would be quite simple if we had but one witness; but we have three—the course of the unknown line, and the distance of the unknown corner from each of the other two—and no two of these agree together. Which shall we prefer? The law does not declare any preference. It is not a question of science, but of art, and the surveyors are the experts on whose testimony it ought to be solved. The law treats the

compass and the chain as it does other witnesses; if they disagree, the jury must decide which is the more creditable; and so it is if mere calculations are substituted for actual measurements. If the character or accuracy of either as a witness is questioned, the law leaves it to the jury. Legal experience teaches us continually that both may be wrong. If the division line was merely calculated, and not run on the ground, it must be inaccuarate; and besides this, it may have been miscalculated. It is apparent, therefore, that such a line is not equivalent, as a witness, to one that has been actually run upon the ground; and the corner ought to have been fixed according to the distance given in the deed, rather than according to the estimated course and distance of the other corner, or of the line from it. We understand the court to have so instructed the jury. But if they had not done so, we could not have said they were in error, for we see no kind of evidence that the division line was a mere calculated one.

Judgment affirmed.—*Legal Inteligencer.*

Bradshaw's Appeal.

1. A decree of distribution by the Orphans' Court is conclusive upon all questions until reversed.
2. An administratrix cannot setoff a debt due her against the claim of a distributee. The Orphans' Court is not competent to try such an issue, but it properly belongs to the Common Pleas.

Appeal from the Orphans' Court of Allegheny county.

THOMPSON, J.—We are of opinion that the questions presented on this appeal are all to be considered as concluded by the decree of distribution against the administratrix. That had passed before the rule for the order to pay the money into court was granted. Such a decree is conclusive until reversed, both upon authority and the Act of Assembly of the 29th of March, 1832, P. L. 190. See authorities cited. Meaklein v. Trapnell, 10 Casey, 142.

The thirty-ninth section of the Act of February 24, 1834, provides for what is to be done by an executor or administrator when distribution is required. He is to deduct all demands against the estate which he has paid, and a sufficient amount to pay the principal, interest, and all costs of such as may still be in dispute, and then distribution may be made of the residue, under the direction of the Orphans' Court.

If the claim of Mary Campbell was known before the decree of distribution, it should have been presented then, when a refusal to allow it might have been the subject of appeal. If made afterwards, it cannot be any more effectual in controlling the decree. The claimant in this case, if successful, would have to look to the refunding bonds of the distributees. If the court takes into its custody for distribution

the fund, it will be disposed of, doubtless, so as to save the interests of all parties concerned in the estate, which may be by requiring refunding bonds, or modifying the decree of distribution to meet contingencies. But whatever they may do with it, the administratrix will be safe by their final disposition of it. It is out of her hands when she surrenders it to the court, and she can be held no longer responsible for it. But treating, as we must do, the decree of distribution as conclusive until reversed, we see nothing in the respondent's answer or points raised here to prevent the court from making the order on the administratrix to pay the money into court.

The administratrix could not claim a setoff of a debt due her against the distributee. This would be to mingle her private affairs with her trust duties, which the law will not allow. The Orphans' Court is not competent to try issues which belong to the common law courts, and the claims of Mrs. Bradshaw against her stepson and his counter claims were of this nature. Such a controversy does not belong to the Orphans' Court. These were the only objections to the order.

The decree of the Orphans' Court is affirmed at the costs of the appellant.

Guthrie's Appeal.

Appeal from the Orphans' Court of Chester county.

STRONG, J.—The limitation of the remainder of an estate in a will was "to such of the children of E. B., or their heirs, as may survive her as tenants in common, that is, the child or children of any deceased child of her's shall hold the same interest and right that the deceased parent would have held if living" At the time the will was made, E. B. had several children, and all her children were born before the will was proved, and probably before the death of the testator.

Held, that E. B. took only an estate for life. McKee v. McKinley, 9 Casey, 92, Williams v. Leech, 4 Casey, 89, and Naglee's Appeal, 9 Casey, 89, overruled.

Caldwell v. Copeland.

Error to Common Pleas of Westmoreland county.

WOODWARD, J.—After severance of title to mine right from that of the surface, whether by reservation or grant, the possession of the surface is not possession of the underlying mineral.

Judgment reversed.

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VOL. 7. FRIDAY, DECEMBER 13, 1878. No. 50.

ORPHANS' COURT OF LUZERNE COUNTY.

White's Estate.

1. Where persons stand to each other in a family relation, and live together as members of the same family, there can be no implied contract for wages on the one hand, nor for maintenance on the other.
2. This rule extends to the relation between stepparent and stepchild, and between guardian and ward.
3. The rule falls, however, in case of an express contract with the guardian, or where the stepparent is also guardian, by such acts as are equivalent thereto.
4. Accountant was both stepmother and guardian She kept boarders for a living, and treated her ward not as a member of the family but as a boarder, sending her to a select school, and hiring servants when unable to do the work herself: *Held*, that it being impossible to make a contract with herself as guardian, she did those things which, under the circumstances, were equivalent to it, and was entitled to allowance for support and education furnished.
5. But, under the rule already stated, no compensation in this case allowed accountant for care of the person of her ward, nor, under the circumstances, for care of her estate, other than usual commissions.
6. The necessity urged of complying with section 13, Act of 29th of March, 1832, regarding the allowance of maintenance by the court.

Exceptions to account of guardian.

Opinion by RHONE, P. J.

Where a child, even after arriving at age, lives with his parent, he cannot, in the absence of an express contract, recover wages for his services: Hertzog v. Hertzog, 5 C. 465; Mosteller's Appeal, 6 C. 473. Nor can a stepdaughter, under like circumstances, recover wages for services performed for her stepfather: 7 Harris, 366. Nor a nephew for services performed for an uncle: 9 Barr, 309. Nor can a concubine recover against one with whom she has lived as a wife: 5 W. & S. 357. Neither can a ward recover against his guardian: 17 S. & R. 374.

On the other hand, it has been decided that a father, who is of ability to support his child, cannot recover against his estate, in the absence of an express contract, for the support of the child while a member of the family: 5 R. 323. Neither can a mother, under like circumstances, recover against a child: 8 W. 366. Nor a grandfather against the estate of a grandchild: 8 W. 399. Nor a stepfather against a stepchild: 11 S. 251.

The broad rule of law to be deduced from the cases cited is, that where persons stand to each other in a family relation, and live together as members of the same family, there can be no implied contract for wages on the one hand, nor maintenance on the other. If this rule of law be as broad and unvarying as stated, then it extends to the claim

of a stepmother against a stepdaughter, and to those of a guardian against his ward, for they both stand in *loco parentis*.

This case is somewhat complicated, from the fact that the guardian is also stepmother of the child. We shall, therefore, express our views of the rights and duties of the litigants—first as stepmother and stepchild, and then as guardian and ward.

We have stated the rule of the law to be, that a stepmother and stepdaughter stand in the same family relation to each other as a stepfather and his stepchild, and their relation in regard to the matter in dispute in this case is well stated by Justice Sharswood, in Douglas' Appeal, 1 Norris, 169, as follows: "When a stepfather takes a stepchild to reside with him as one of the family, while the one cannot claim for services, the other is precluded from compensation for expenditure." But in Ruckman's Appeal, 11 Smith, 251, we have this qualifying rule, "that where a stepdaughter resides with her stepfather as a member of his family, the father cannot recover compensation for her maintenance, etc., without proof of a contract with her guardian."

In this case the stepmother and guardian are one and the same person, so that it is impossible to prove such a contract; but we have concluded that so far as the claim for board is concerned, she did those things which, under the circumstances, are equivalent to an express contract. She did not treat the child as a member of her family, but as a boarder, for she was poor, and kept boarders for a living. She sent the child to a select school all the time, and hires her servants when unable to do the work herself. The witnesses all agree that the child was treated as the other boarders, except that she did some occasional light work.

The rule of law cannot be so harsh and unbending as not to allow a stepmother anything for the support and education of a stepchild, after such mother has boarded and clothed the child luxuriously for four years, and kept her at school at an academy the whole time, when it is known that she had no means to do it with, except what she could earn as a boarding house keeper. In the case of Ruckman's Appeal, *supra*, something was allowed. If the mother had been of sufficient ability, or if the child had been at school but a small portion of the time, and had performed diligent hard labor in the interim, we would come to a different conclusion. As it is, we have concluded to allow the claim for board in full, as the price per week is undoubtedly a reasonable one, and we, therefore, dismiss the sixth exception.

The rule of law as stated compels us to dismiss, also, the second exception; but we shall lose sight of the fact that the child did some work when we come to the question of the compensation to be allowed the mother in her capacity as guardian.

The next question that presents itself is the one raised by the fifth exception, which is that of the charges of the accountant for services as guardian. This exception is sustained to the fullest extent,

so as not to allow anything for services as guardian, for the following reasons:

First. That the guardian cannot, under the circumstances of this case, recover anything for her care and trouble in looking after the person of the ward, as per rule of law already stated.

Second. She is not entitled to anything for managing the estate of her ward, because it was managed without risk or expense, and was but indifferently done. The farm was "a fine one," the interest or share of the ward in it was worth at least a thousand dollars, and yet the annual rent only amounted to about forty-two dollars, when money was worth from eight to ten per cent. The farm was rented on shares, and the only labor to be performed in this case would be to receive the share when delivered. The rest of the estate was paid all in a lump, and a large portion of it was at once applied on the child's board bill. It was paid without risk or litigation, and so, under the most favorable circumstances, the guardian, if a mere stranger, could expect but a very small commission for such services.

Third, and finally. We consider the services of the guardian worth no more than the services rendered her by the ward, and that, under the law, neither are entitled to any compensation.

The third exception is dismissed, as it appears in the account that the guardian has charged herself with what appears to be a full interest account for any money which she may have held liable to draw interest.

The first and fourth exceptions were withdrawn on the argument.

This disposes of the case as presented on the record, but we cannot close our remarks without again pointing out to guardians and their counsel the old maxim, that "an ounce of prevention is worth a pound of cure."

We refer to the wise provision of section 13 of the Act of 1832, which says: "When any one shall die, leaving an infant child, or children, without having made an adequate provision for the support and education of such child, or children, during their minority, the Orphans' Court may direct a suitable periodical allowance out of the minor's estate for the support and education of such minor, according to the circumstances of each case, which order may from time to time be varied by the court according to the age of the minor and the circumstances of the case."

If this provision of the law were observed in every case, all risk and disappointment would be avoided, and many heartburnings and family estrangements which so often arise from this neglect would never happen.

In this case, then, we deduct from the claim of credits the sum of two hundred and fifty dollars for charges for services as guardian, which leaves the balance in the hands of the guardian seven hundred and forty-nine dollars and eight cents, and for this sum we enter judg-

ment against the guardian and in favor of the ward, each party to pay their own costs of this proceeding.

DEATH OF JABEZ ALSOVER, Esq.

Jabez Alsover, Esq., departed this life, at Hazleton, on Monday, December 2d, 1878. He had been sick but about ten or twelve days with that dreaded and always fatal disease, Bright's disease of the kidneys. Mr. Alsover was a promising young attorney, and a genial, whole-souled friend and companion. He leaves a wife and family of five children to mourn his untimely death. His interment took place at Mauch Chunk on the 5th inst. He was born in Easton, September 26th, 1843, and was married in Mauch Chunk in 1865 to Miss Hannah Dodson. He studied law there with Daniel Kalbfus, Esq., and had been practicing his profession at Hazleton for about eight years. At the time of his death he was one of the attorneys of the Lehigh Valley Railroad Company, and also of several coal companies, and, in addition, had a large private practice. During the late civil war he served in the three months' service under Captain Horn, afterwards enlisted for three years, and was discharged from the Frederick City (Md.) hospital after serving two years.

BAR MEETING.

A meeting of the members of the Luzerne county Bar was held on Thursday, December 5th, 1878, of which John Lynch, Esq., was chosen President, and William S. McLean, Esq., Secretary. The following committee—Hon. G. M. Harding, Hon. A. T. McClintock, and Messrs. J. G. Miller, Geo. B. Kulp, and B. M. Espy—was appointed to draft resolutions expressive of the sense of the meeting as to the sudden demise of their fellow member, Jabez Alsover, Esq. The resolutions reported, which were unanimously adopted, were as follows:

WHEREAS, We have learned with sorrow of the sudden and unexpected death of Jabez Alsover, Esq., a young and rising member of the Bar of Luzerne county, residing at Hazleton; be it, therefore,

Resolved, That the Bar of Luzerne county have lost a promising, upright, and companionable gentleman, his wife and children a kind and affectionate father, and the community in which he lived a useful citizen.

Resolved, That we tender to his bereaved wife and children our heartfelt sympathies in the great sorrow which has fallen upon them.

Resolved, That an engrossed copy of these resolutions be transmitted to the family of the deceased, and that they be published in the papers of the county.

AN ORDER *fixing the number of the regular terms of the Court of Common Pleas for the county of Luzerne, and establishing the times for holding the same.*

Now, December 13th, 1878, it is ordered by the Judges of the Court of Common Pleas for the county of Luzerne, that the number of the regular terms of said Court be fixed at four; and that, until otherwise ordered, the times for holding the same shall be the first Monday of January, to continue two weeks; the first Monday of April, to continue two weeks; the first Monday of September, to continue two weeks; and the third Monday of November, to continue two weeks. BY THE COURT.

AN ORDER *fixing the number of Argument Courts for the county of Luzerne, and establishing the times for holding the same.*

Now, December 13th, 1878, it is ordered by the Judges of the Court of Common Pleas, Court of Oyer and Terminer and General Jail Delivery, and Courts of Quarter Sessions of the Peace for the county of Luzerne, that the number of Argument Courts be fixed at four; and that, until otherwise ordered, the times for holding the same shall be the fourth Monday of December of the present year, to continue one week; and for each ensuing year thereafter, the fourth Monday of March, to continue one week; the fourth Monday of August, to continue one week; the second Monday of November, to continue one week; and the third Monday of December, to continue one week. BY THE COURT.

AN ORDER *fixing the number of the regular terms of the Court of Oyer and Terminer and General Jail Delivery and Courts of Quarter Sessions of the Peace for the county of Luzerne, and establishing the times for holding the same.*

Now, December 13th, 1878, it is ordered by the Judges of the Court of Oyer and Terminer and General Jail Delivery and Courts of Quarter Sessions of the Peace for the county of Luzerne, that the number of the regular terms of said Courts be fixed at four; and that, until otherwise ordered, the times for holding the same shall be the third Monday of January, to continue two weeks; the third Monday of April, to continue two weeks; the third Monday of September, to continue two weeks; and the first Monday of December, to continue two weeks. The term beginning on the third Monday of January, 1879, to be held as under existing order.

It it further ordered by the said Judges, that the Grand Jury for the January term of the Courts of Oyer and Terminer and General Jail Delivery and Courts of Quarter Sessions of the Peace be summoned in the same manner as required by existing laws, to meet at the Court House, in the city of Wilkes-Barre, on the third Monday of the preceding December; that the Grand Jury for the April term of the said Courts be summoned as aforesaid, to meet at the Court House, in the city of Wilkes-Barre, on the fourth Monday of the preceding March; that the Grand Jury for the September term of the said Courts be summoned as aforesaid, to meet at the Court House, in the city of Wilkes-Barre, on the fourth Monday of the preceding August; and that the Grand Jury for the December term of said Courts be summoned as aforesaid, to meet at the Court House, in the city of Wilkes-Barre, on the second Monday of the preceding November. The meeting of the Grand Jury for January term, 1879, commencing December 23d, of the present year, to be held as under existing order.

Constables, Aldermen, and Justices of the Peace will make all such returns as they are required to make under existing laws as follows: For the January term of said Courts, on the third Monday of the preceding December; for the April term of said Courts, on the fourth Monday of the preceding March; for the September term of said Courts, on the fourth Monday of the preceding August; and for the December term of said Courts on the second Monday of the preceding November.

Aldermen and Justices of the Peace will hold prosecutors under recognizance to appear and prosecute on the several respective days hereinbefore fixed for the meeting of the Grand Jury, and also to appear and prosecute on the several days hereinbefore fixed for the commencement of the several terms of said Courts. They will further hold defendants to appear and answer on the several respective days fixed for the commencement of the several terms of the said Courts.

BY THE COURT.

AUDITOR'S NOTICE.

The undersigned, an Auditor, appointed by the Court of Common Pleas of Luzerne county to distribute the fund arising from the Sheriff's sale of the real estate of E. H. Keen, E. M. Keen, and Ellis Gruver, will attend to the duties of his appointment, at his office, Court House, Wilkes-Barre, on Saturday, the 28th day of December, 1878, at 10 o'clock A. M., at which time and place all persons interested must make their claims before the Auditor, or be forever debarred from coming in upon said fund.

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49-52 D. M. JONES, Auditor.

The Luzerne Legal Register.

VOL. 7. FRIDAY, DECEMBER 20, 1878. No. 51.

ORPHANS' COURT OF LANCASTER COUNTY.

Estate of Carl Vogt, deceased.

Where the principal in an administration bond fails to comply with the law, in neglecting to file an inventory and widow's appraisement, the sureties have a right to demand counter-security for their protection.

Attachment issued against Judith Vogt, administratrix *c. t. a.* of Carl Vogt, deceased, to show cause why she should not enter counter security to indemnify those who became her sureties to enable her to obtain letters, &c., from loss by reason of their becoming sureties for her, &c. Answer of Judith Vogt filed.

Opinion by LIVINGSTON, P. J.

In her answer Judith Vogt admits that she became administratrix, &c.; that Michael Wolf and C. A. Oblender became her sureties on February 4, 1878; that she possessed herself of the goods and chattels of the decedent; that she filed no inventory of said goods and chattels, rights and credits. She swears she has paid all debts and funeral expenses of the decedent except one which she designates. But how can she tell or be expected to know? Creditors have a year within which to present claims and she has settled no account. She has, however, paid a number of claims which she sets forth in her answer, and for which she is, of course, entitled to credit.

In her answer she alleges that she has a claim and right to all the personal property of the decedent, under act of assembly of April 14, 1851, allowing to widows, &c., three hundred dollars out of the estates of decedents, but she has taken no measures to have it set apart under that act. She also alleges that under the will of the decedent she is entitled to his whole estate, after payment of debts; but her claim may be disputed by decedent's children, and the court may not construe the will as she does. How are her bail to know or be expected to know?

She has simply taken out letters of administration; and, although more than five months have elapsed since she did so, she has filed no inventory, no widow's appraisement, nothing in regard to the personal estate which the law requires her as administratrix to do, and her sureties, having availed themselves of their rights under the law, are, on account of her failure to comply with the law, entitled to have

counter-security entered by her to indemnify and protect them from loss on account of their having become her surety. The bond to be in the same amount as the bond on which they are sureties for her, and to be filed within ten days from this date.

SUPREME COURT OF PENNSYLVANIA.

The Madison School House Road.

On petition of a majority of the original petitioners, viewers appointed under the 19th section of the road law of June 13th, 1836, may report in favor of vacating a part of the unopened road, return the remainde for public use.

Certiorari to the Quarter Sessions of Westmoreland county.

WOODWARD, J.—The 18th and 19th sections of our general road law of 1836—Purdon 720—give the Courts of Quarter Sessions full power to "vacate the whole or any part of any public or private road," but they make a distinction in the exercise of this power between roads which have been laid out and opened, and roads laid out only but not opened. If a particular road has been laid out and opened the power to vacate can be exercised only when the road has become useless, inconvenient, or burdensome—if it have been laid out and not opened the power to vacate can be exercised only when a majority of the original petitioners for said road, resident in the county, invoke it. The occasions or grounds for calling the power of the court into exercise are thus distinguished, but the power is the same in both cases. And it could scarcely be delegated in larger or more comprehensive terms —the power to vacate the whole or any part of any private or public road. This plenary power was lodged with the court for the convenience of the people, and whilst it is to be exercised in the precise manner prescribed, it is not to be abridged or enfeebled by judicial refinement. The occasion contemplated by the statute occurring—that is, on the petition of the majority of the original petitioners—the power of the court to vacate part of a road laid out but not not opened, is precisely what it is to vacate part of an open road on the happening of the statutory contingency—and it is plenary in both cases.

In the case of the road in Greenwich township, 1 Jones, 186, it was held that a road laid out and half of it opened, could not be vacated by proceedings under the 19th section, on the petition of a majority of the original petitioners—that it was not in fact an unopened road—and so not within that section. The effect of that ruling was simply to put the party to his proceeding under the 18th section as for an

open road. But this does not touch this case, for there is no pretense that any part of this road had been opened before the institutition of this proceeding.

We see, therefore, no reason why the 19th section should not be applied to this case, and the decree of the court is accordingly reversed and a procedendo awarded.

COMMON PLEAS OF LUZERNE COUNTY.

Dotro, assigned, v. Dotro et ux.

A judgment entered on the note of a married woman for the purchase money of real estate, will not be stricken off, unless she rescinds the contract and reconveys the land to the grantor.

Rule to show cause why judment shall not be stricken off as to Ellen Dotro.

CONYNGHAM, P. J.—It is agreed that Ellen Dotro is and was at the time of giving the note upon which this judgment is entered, a married woman, the wife of Charles Dotro. It is further agreed, that the note was given to secure the price of a piece of land, conveyed in consideration of it by deed to the said Ellen, at the same time; which land she still holds and claims, and we have no intimation to us, but that she still intends to do so. The present application shows, however, that while she intends to keep the land, she would prefer not to be bound to pay for it. If the present rule be made absolute, she would thus, by a technical objection, be enabled to practice what, it is not using harsh language to say, would be a gross fraud; or rather, she is asking the court to place her in a situation where she may commit this fraud. If we can do it, it will be better to save her from the temptation.

If she should desire to avoid her contract by rescinding, we would free her from all liability for the price, duly reconveying to the grantor. But administering the law here, as we profess to do in equity, we cannot aid her to defraud the party out of land and money both. It is true, she cannot keep the land if she refuse to pay for it on the ground of coverture, as decided in Heacock v. Fly, 2 Har. 540; but if she and her husband should sell to a bona fide purchaser without notice, actual or legal, the right to the land might be transferred.

While we fully recognize the principle decided in Glyde v. Keisler et ux., 8 Casey, 85, that a judgment note on land, given by a married woman to encumber property actually belonging to her, is invalid and void, as well since the married woman's act of 1848 as before; yet we

still think she may charge real estate, conveyed to her with an incumbrance, for the purchase money, agreed to be given to secure the payment, and executed or completed simultaneously with the deed for the land. The later decisions have given us no reason to doubt the propriety of the opinion of Chief Justice Lewis in Patterson v. Robinson, 1 Cas. 83.

In conformity with that decision, we refuse to make the rule herein absolute, but will modify the judgment as to Ellen Dotro so as to confine its lien and collection only to the property to secure the purchase money of which it was given, and to discharge it otherwise as to any other property of the said Ellen Dotro.

We direct the plaintiff's attorney to file as of the records of the case a description of the property above referred to, as the property liable for the payment of this debt.

COMMON PLEAS OF PHILADELPHIA.

Posey v. Loutey.

Attachees of the sheriff's office are not such competent and disinterested persons as are considered qualified to serve as appraisers under the act of April 9, 1849 (P. L., p. 583).

Rule to set aside appraisement made under claim of exemption.

The facts shown by deposition were as follows:

1. That one of the appraisers was a messenger in the sheriff's office, and that the other two were watchmen in the sheriff's office.

2. That there were other goods not appraised.

3. That plaintiff considered appraisement grossly inadequate, and was ready and willing to give double the sum for them.

Counsel for plaintiff argued: That the appraisement was grossly inadequate, and that it was therefore within the province of the court to set it aside, and cited Sleeper v. Nicholson, 1 Phila. 348; Stappler v. Wells, 2 W. N. 139; Chestnut v. Meace, 3 W. N. 240.

Furthermore, attachees of the sheriff's office are not such disinterested and competent persons as the act of assembly contemplates.

LUDLOW, P. J., in a verbal opinion, said:

Deputy sheriffs, who are messengers, watchmen, &c., employed in the sheriff's office, are not such "disinterested" persons as the act requires, and should not be appointed appraisers. The sheriff is, as it were, a party to the execution, and none of his employees are disinterested.

The rule is therefore made absolute and the appraisement set aside.—*Legal Intelligencer.*

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Now, December 13th, 1878, it is ordered by the Judges of the Court of Common Pleas for the county of Luzerne, that the number of the regular terms of said Court be fixed at four; and that, until otherwise ordered, the times for holding the same shall be the first Monday of January, to continue two weeks; the first Monday of April, to continue two weeks; the first Monday of September, to continue two weeks; and the third Monday of November, to continue two weeks.

BY THE COURT.

AN ORDER *fixing the number of Argument Courts for the county of Luzerne, and establishing the times for holding the same.*

Now, December 13th, 1878, it is ordered by the Judges of the Court of Common Pleas, Court of Oyer and Terminer and General Jail Delivery, and Courts of Quarter Sessions of the Peace for the county of Luzerne, that the number of Argument Courts be fixed at four; and that, until otherwise ordered, the times for holding the same shall be the fourth Monday of December of the present year, to continue one week; and for each ensuing year thereafter, the fourth Monday of March, to continue one week; the fourth Monday of August, to continue one week; the second Monday of November, to continue one week; and the third Monday of December, to continue one week.

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It it further ordered by the said Judges, that the Grand Jury for the January term of the Courts of Oyer and Terminer and General Jail Delivery and Courts of Quarter Sessions of the Peace be summoned in the same manner as required by existing laws, to meet at the Court House, in the city of Wilkes-Barre, on the third Monday of the preceding December; that the Grand Jury for the April term of the said Courts be summoned as aforesaid, to meet at the Court House, in the city of Wilkes-Barre, on the fourth Monday of the preceding March; that the Grand Jury for the September term of the said Courts be summoned as aforesaid, to meet at the Court House, in the city of Wilkes-Barre, on the fourth Monday of the preceding August; and that the Grand Jury for the December term of said Courts be summoned as aforesaid, to meet at the Court House, in the city of Wilkes-Barre, on the second Monday of the preceding November. The meeting of the Grand Jury for January term, 1879, commencing December 23d, of the present year, to be held as under existing order.

Constables, Aldermen, and Justices of the Peace will make all such returns as they are required to make under existing laws as follows: For the January term of said Courts, on the third Monday of the preceding December; for the April term of said Courts, on the fourth Monday of the preceding March; for the September term of said Courts, on the fourth Monday of the preceding August; and for the December term of said Courts on the second Monday of the preceding November.

Aldermen and Justices of the Peace will hold prosecutors under recognizance to appear and prosecute on the several respective days hereinbefore fixed for the meeting of the Grand Jury, and also to appear and prosecute on the several days hereinbefore fixed for the commencement of the several terms of said Courts. They will further hold defendants to appear and answer on the several respective days fixed for the commencement of the several terms of the said Courts.

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VOL. 7. FRIDAY, DECEMBER 27, 1878. No. 52.

For the kindness, courtesy, and patronage received from the public during the past seven years, we feel truly thankful. In January, 1872, we first issued THE LUZERNE LEGAL REGISTER, and from that day to this it has not missed a single issue. We feel a pride in the realization of the fact that THE LUZERNE LEGAL REGISTER, during its seven years existence, has done much towards making the practice of the law here a pleasure, and has taken away many of the burdens of the practice which, prior to the commencement of this publication, existed. By publishing the opinions of our judges, their labors are preserved in printed form, so that attorneys can refer to them with ease. We hope to make volume eight of much greater value and interest than the preceding volume, and would feel gratified if our professional friends and others would interest themselves in obtaining new subscribers for us. Each present subscriber can induce one other or more to take the paper, and thus double our circulation, and enable us to improve our paper accordingly.

COMMON PLEAS OF ALLEGHENY COUNTY.

The City of Allegheny v. Heyl.

Doubted whether councils of a city have a right to declare a cattle yard, used as such, a nuisance, irrespective of its being actually offensive or disagreeable in some perceptible manner.

The ordinance of Allegheny City, approved May 21, 1874, declaring it to be a nuisance "to erect, construct, or maintain any yard, pen, shed, or enclosure of any kind for the standing or custody of cattle, sheep, or swine, within the city limits," declared invalid, as, under that ordinance, the erection of such constitutes a nuisance, though no use may ever have been made of such buildings for the purposes prohibited.

The facts of this case arise by virtue of an ordinance passed by the councils of the city of Allegheny, agreeably to a provision contained in the fourteenth section of the third chapter of the charter of said city, approved March 31st, 1870, whereby councils, among other things, are delegated the power to declare nuisances.

The ordinance in this case was enacted May 21st, 1874, and prohibited the erection or maintenance of "yards, sheds, pens, or enclosures for the standing or custody of cattle, sheep, or swine, within the city limits."

On April 27th, 1877, the defendant was charged by information with "maintaining certain yards, pens, sheds, or enclosures for the standing or custody of cattle, sheep, or swine, on Buena Vista street, within the limits of said city, contrary to said ordinance." The defendant was arrested, and on hearing was fined twenty-five dollars and costs, from which conviction he appealed to court, claiming, first, that the delegation of the power by the legislature to the city of Allegheny to define and declare nuisances was of questionable constitutionality, which point, however, was not urged so much as the second one, that the ordinance made *that* an offence which might not yet have been perpetrated, to wit, the mere erection of such buildings, rendered citizens liable to the penalty of said ordinance, even before any cattle, sheep, or swine had occupied the same.

STOWE, P. J.—The question raised by the case stated is solely as to the validity of the ordinance of the city of Allegheny, dated May 21, 1874, a copy whereof is hereto attached. The ordinance declares that after October 1, 1875, it shall be deemed a nuisance to erect, construct, or maintain any yard, pen, shed, or enclosure of any kind for the standing or custody of cattle, sheep, or swine, within the city limits, excepting enclosures attached to slaughter houses, and used for the temporary custody of animals intended for slaugher upon the premises; and also farmers and dairymen having sheds or enclosures upon their premises, used as farms or dairies, for the shelter of stock.

The plain terms of this ordinance would prevent any one from erecting, keeping, or using any shed, stable, or other place for the purpose of keeping horses, cows, or other domestic animals. This, clearly, was never intended by councils, and if it were, is, we think, just as clearly beyond their powers. There is nothing in the ordinance looking to the injurious or noxious use of the place erected or maintained. The best appointed and kept stable in the city is as much within its terms as the dirtiest and most offensive cattle pen that may be found in the Second ward. And it will not do to say that because this was a cattle yard, and, therefore, such a thing as the councils might have declared a nuisance, we can sustain this precedent. Even admitting (what I most seriously doubt) that the councils may declare a cattle yard, used as such, a nuisance, regardless of its being actually offensive or disagreeable in some perceptible manner, the record here shows nothing more than that defendant erected and maintained pens, sheds, or enclosures for the standing or custody of cattle, &c., and it nowhere appears that he or anybody else ever had or kept any cattle or other forbidden things in them. Without we can say the erecting

a shed or pen to keep cattle in, that is, with the intention of keeping cattle thereafter, is a nuisance before, or without cattle ever having been placed within them, it will be absolutely impossible to sustain the judgment rendered in this case. Can we do this? It is not very strongly urged by counsel for the city, yet the question is raised by the record, and the ordinance, at first blush, seems to be within the provisions of the fourteenth section of the Act of 31st of March, 1870 (charter of Allegheny), which reads thus: "Councils shall have power," *inter alia*, "to abate and remove nuisances, and punish the authors thereof by penalties, fines, and imprisonments, and to define and declare what shall be deemed nuisances, and authorize and direct the summary abatement thereof."

To define and declare what shall be nuisances, and punish the authors, is very broad language, and if it is construed in its widest sense, gives the city councils of Allegheny unlimited power to declare what shall be a nuisance in Allegheny City. But will it be pretended that the legislature intended such should be the case, that the councils should create nuisances in Allegheny at their whim and pleasure, and regardless of private rights? Could they say that it should be a nuisance for one to drive over their streets, or that a man who was in his shirt sleeves, or that had a dilapidated coat or toeless shoe, a scarred face, should be a nuisance? The question carries with it its own answer. Perhaps even the legislature, with its almost omnipotent power to declare what shall be legal and what illegal, could not do so. We will not now undertake to say Can it be that city councils can lay down a fixed rule, if they please, as to how large houses shall be built, and upon what plan of architecture? Can they even prohibit one from keeping and using horses in the city? And if not, can they prevent one from having a place in which to keep them, except so far as the public safety and comfort may require a restriction? We answer, certainly not.

This clause must be interpreted by the spirit and reason of it. Its fair and reasonable meaning must be, that in such matters or acts as work injury to others, and where the public health, comfort, or safety are involved, the councils may legislate specially, and declare them to be a nuisance, punishable under the ordinance—not to confer upon them the power to declare whatever they please a nuisance, regardless of these necessary considerations.

Since writing the foregoing, we have found the same conclusion arrived at in a case decided by the Supreme Court of New Jersey, 5 Dutcher, 175, Whipley, C. J., as follows: "The common councils, in the exercise of their power to declare nuisances, may not declare anything such which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience."

If in this case the ordinance had been against the noxious use of cattle pens, stables, or what not, or, in other words, had declared it a

nuisance to so use such place as to occasion or cause disagreeable or unwholesome effluvia, we would have had no difficulty in sustaining its validity; but, as it stands, it is clearly invalid, and the judgment in this case must be reversed.

COMMON PLEAS OF PHILADELPHIA.

Bradley v. Ward.

1. A writ of fieri facias against personalty cannot be issued upon a transcript from the docket of an alderman filed in the Court of Common Pleas. The purpose of such a transcript is to bind the real estate.
2. Wheeler and Wilson Co. v. Moore, 35 Leg. Int. 456, 7 Luz. Leg. Reg. 233, Yerkes, J., followed.

Rule to set aside fi. fa. and levy.

In this case a transcript from the docket of an alderman was filed in the Common Pleas, and on October 3, 1878, a fi. fa. was issued and a levy was made on the personalty of the defendant.

The counsel for the rule argued: The Common Pleas has no jurisdiction in this case against the personal property. The fi. fa. mentioned in the Act of March 20th, 1810 Purd. 863, is against real estate and not personalty. The purpose of filing a transcript is to create a lien on the real estate: Brannan v. Kelly, 8 S. & R. 480; King v. King, 1 P. & W. 20; Rockwell v. Sweet, referred to in 2 Clark P. L. J. 527; Green v. Lymer, 3 W. 382; Hastings v. Lolough, 7 W. 541; Moore v. Risdon, 5 P. L. J. 429; Lacock v. White, 7 Har. 495; Boyd v. Miller, 2 Sm. 432; Wheeler and Wilson Company v. Moore, 35 Leg. Int. 456; 7 Luz. Leg. Reg. 233.

The counsel against the rule contended: It is the established practice to issue a fi. fa. on a transcript from an alderman's docket filed in the prothonotary's office. The transcript as filed is a judgment of the Common Pleas for the purposes of execution, and comes under the act of 1836, which regulates the order of execution as follows: First, on personalty; second, on realty; third, against the person: Hitchcock v. Long, 2 W. & S. 169; Hamilton v. Dawson, 2 Clark, 141.

December 14, 1878. Rule absolute.

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