PENNSYLVANIA

SUPERIOR COURT REPORTS.

VOL. 6.

CONTAINING

CASES ADJUGDED

IN THE

Superior Court of Pennsylvania.

BY

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STATE REPORTER,

AND

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CONTAINING

CASES DECIDED AT NOVEMBER TERM, 1897, AND JANUARY AND FEBRUARY TERMS, 1898.

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JUDGES

OF THE

SUPERIOR COURT OF PENNSYLVANIA

DURING THE PERIOD OF THESE REPORTS.

President Judge,	CHARLES E. RICE.
Judge,	JOHN J. WICKHAM.
Judge,	JAMES A. BEAVER.
Judge,	HOWARD J. REEDER.
Judge,	GEORGE B. ORLADY.
Judge,	PETER P. SMITH.
Judge,	WILLIAM W. PORTER.

ATTORNEY GENERAL,

MR. HENRY C. MCCORMICK.

JUDGES OF THE COURTS BELOW

DURING THE PERIOD OF THESE REPORTS.

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No. 2: SAMUEL W. PENNYPACKER, P. J.; MAYER SULZBERGER and WILLIAM W. WILTBANK, JJ.

No. 3: THOMAS K. FINLETTER, P. J.; JAMES GAY GORDON and CHARLES B. MCMICHAEL, JJ.

No. 4: MICHAEL ARNOLD, P. J.; ROBERT N. WILLSON and CHARLES Y. AUDENRIED, JJ.

Orphans' Court.

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

3d—Northampton County.

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

4th—Tioga County.

JOHN I. MITCHELL, P. J.

5th—Allegheny County.

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No. 2: THOMAS EWING, P. J.; JOHN W. F. WHITE and ROBERT S. FRAZER, JJ.

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

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23d — Berks County.

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CASES

IN THE

SUPERIOR COURT

OF

PENNSYLVANIA.

The Right Reverend Tobias Mullen, Appellant, *v.* Ernest Juenet, Collector of the City, County and Poor Taxes, for the First Ward of the City of Franklin, and T. B. La Rue, Wm. Brosang and James T. Wallace, Commissioners of Venango County.

Taxation—Exemption—Public charity—Church school.

A school, the title to which is in an individual, which is under the domination and control of the Roman Catholic Church, is not a public charity within the meaning of the constitution so as to be exempt from taxation by virtue of the facts that no tuition fee is charged, and that up to the present time all children, whether members of the church or not, are received and taught.

The property cannot be said to be regularly and permanently devoted to purely charitable purposes.

Argued May 18, 1897. Appeal, No. 191, April T., 1897, by plaintiff, from decree of C. P. Venango County, Jan. Term, 1896, No. 1, dismissing bill for injunction to restrain collection of taxes on exempted property. Before RICE, P. J., WICKHAM, BEAVER, REEDER, and ORLADY, JJ. Affirmed.

Bill for injunction to restrain collection of taxes on exempted property. Before CRISWELL, P. J.

The facts sufficiently appear in the opinion of the court below.

This cause came on to be heard upon bill, answer, replication and evidence, C. I. Heydrick, Esq., appearing for the plaintiff, and W. H. Forbes, Esq., for the defendants; after argument and due consideration we find the following facts:

1. That lots Nos. 185 and 188, each in size sixty by one hundred and fifty feet, in the city of Franklin, said county, were, on and prior to October 1, 1879, owned in fee simple by Rev. Thomas Carroll, then of Franklin Pa., who, by deed bearing said date, conveyed the same to Tobias Mullen, of the city and county of Erie, Pa.

2. In the premises of this deed the party of the second part, the grantee, is described as follows, viz: "Tobias Mullen, of the City and County of Erie, and State aforesaid, in trust for the members of St. Patrick's Roman Catholic Church, Franklin, Pennsylvania, party of the second part." In the subsequent parts of the deed no trust is expressed, but there is the usual formal conveyance of the lots, "to the said party of the second part, his heirs and assigns," with a clause of general warranty.

3. That prior to the month of September, 1894, by funds contributed by the members of said St. Patrick's Roman Catholic Church and others, there was erected partly upon each of said lots, a large three-story brick building, principally adapted and designed for school purposes, containing four school rooms, a hall for school entertainments, three small living rooms, a small chapel, a dining room, kitchen and two small class rooms. On the outside of the building is the name "Catholic School."

4. Since September, 1894, except during the customary vacation seasons, there has been maintained in this building a school in which the usual common branches and some others have been taught, with about two hundred pupils in attendance, occupying the four schoolrooms, with four teachers, members of the ecclesiastical order known as "Sisters of Mercy," in addition to the resident priest, the Rev. J. P. McCloskey, who assists in teaching, hearing recitations in certain branches, the church and parish residence occupied by him being on adjoining lots.

5. That since the opening of said school it has been maintained as a free public school; that is to say, all scholars making application for admission thereto have been admitted, and up until date of this hearing there have been in attendance

thereat, at different times sixteen scholars who were not members of or adherents to the Catholic Church, all others being members or children of members or adherents of said church.

6. No tuition is paid by the pupils, the expense of maintenance being met by the church congregation and voluntary contributions. The school is not maintained for profit in any manner, but the sisters engaged in teaching have their home in the building, using the three living rooms, the chapel, dining room and kitchen.

7. At the opening and closing of the schools each forenoon and afternoon there are certain religious exercises, such as repeating the Lord's Prayer, the Creed and the Ten Commandments.

8. The said school is under the general direction, control and management of the resident pastor, Rev. McCloskey, who receives his instructions in relation thereto from the plaintiff, who it appears is his ecclesiastical superior, being a bishop of said Roman Catholic Church, who may change such instructions at pleasure.

9. That said lots do not include more land than is reasonably necessary for said school building and its occupancy for the purpose for which it was intended and is used.

10. The said lots were regularly assessed and returned for taxation at a valuation of $5,500 as the property of "Catholic School H," and county, poor and city rates were levied and assessed thereon.

11. The defendant, Ernest Jeunet, is the collector of county, poor and city taxes in the ward of said city within which the said lots are situated, and has for collection taxes duly and regularly assessed thereon as follows, viz: County taxes, $22.00, poor taxes, $5.50, and city taxes, $68.75, and threatens to proceed by distress upon the personal property on the premises to collect the said taxes.

Upon these facts, the question is presented: Is the said school property exempt from taxation under the constitution and laws of the commonwealth?

We must determine not upon the equities involved. To the extent that the school accommodates and furnishes instruction to the youth of the city, it relieves the burden of taxation upon the general public within the limits of the city, which consti-

tutes one school district. The burden from which the plaintiff now seeks to be relieved is small compared with the expense of educating two hundred scholars for whom the school district would otherwise have to furnish school facilities and instruction. The city could therefore well afford to barter the taxes in question for the relief and exemption which the school affords. But it is not the city alone which is concerned in this controversy. The defense is being made by the county commissioners, in behalf of the taxpayers of the county. If the property be exempt, then to the extent of their proportion of the tax the burden of those outside of the city is increased. Other interests, therefore, than those of the city are at least to this limited extent involved.

Nor are we to dispose of the question by what the local authorities in other localities may have done or are doing with respect to taxing such property. Unfortunately, the laws are not uniformly executed or adhered to. While to a limited extent the usage of other localities and their practice and understanding of the law, may furnish a guide to courts in construing the law in some cases, yet as against the plain letter of the law and its construction as determined by the high court whose duty it is to construe it, we cannot take cognizance of local usages and practices.

Prior to the adoption of the present constitution of the state there was no prohibition against the exemption of property from taxation by the legislature, and the enactment of numerous laws for that purpose, exempting all classes of properties, was recognized as an evil which should be remedied. To do this the people by their constitution provided as follows, viz: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used for private or corporate profits and institutions of purely public charity."

It will be observed, therefore, that by the terms of the constitution the power of the legislature to exempt property is limited. They may exempt only such as belongs to one or the other of these four classes: (*a*) "Public property used for pub-

lic purposes," that is, property the title to which is in the public and which is used for public purposes. (*b*) "Actual places of religious worship," such as churches. (*c*) "Places of burial not used for private or corporate profit." (*d*) "Institutions of purely public charity."

It is clear that the property in question does not belong to either of the first three classes indicated. If exempt, therefore, it must be as an "institution of purely public charity."

The legislature by Act of May 14, 1874, P. L. 158, designated certain classes of institutions which should be exempt under this clause of the constitution, and in doing so gave to the language quoted a very liberal interpretation, by providing that "All hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed and maintained by public or private charity" should be exempt.

This act has not been held to be unconstitutional, but it has always been construed by the courts with reference to the language of the constitution, so that many of the institutions have been held to be not exempt, notwithstanding they are apparently covered by its general language. The question as to whether or not they were exempt has always turned upon the question as to whether or not they came within the limits defined by the constitution and were in fact "institutions of purely public charity."

The question as to what institutions were purely public charities has, upon given facts, been determined in a number of cases by the Supreme Court, and unfortunately in several of them by a divided court. The judgment of that court, however, although dissented from by some of its members, is as binding upon this court as one sustained by the unanimous opinion of its judges. In this case, however, we do not have to rely upon decisions wherein there have been dissenting opinions, as we think the questions here presented are ruled by adjudications from which there has been no dissent.

It will be observed that the title to the property is in Tobias Mullen, his heirs and assigns, and we do not understand that by the conveyance to him there is raised any trust in favor of the members of St. Patrick's Roman Catholic Church of Frank-

lin. The only use expressed in the deed is in favor of the grantee, "his heirs and assigns." So far, however, as this inquiry is concerned, we deem it immaterial whether the plaintiff holds the title to the lots for himself or as trustee for the members of the said church, as it was no doubt intended that he should. He holds the legal title and the equitable title is either in him or in the membership of the church. If it be in him he has the legal right to control its use. In either case the use is private and personal and there is no evidence whatever of any dedication of the property to a public or a different use. It is true that the congregation has erected a building thereon which is now being used as a school building, and assuming that the equitable title and legal use is vested in them, yet they may at any time change the use of the property and building. A way may be used by an entire community, but if it has an owner who may close it, it is not a public way. Another may be used by but few, yet if all have the right to use it, it is a public way. While today a school is being maintained in the building, which is open to all comers, those having the right to the use of it may lawfully say tomorrow that none but members or adherents of their particular church shall be admitted. The question is not will they do so, but may they do so. Should they do so, would those who are excluded have any remedy or a right to one? By so doing the members would do only that which they might lawfully do; and no one would question the propriety of their so doing. Such would also be the case if the property be held by the plaintiff in his own right and for his own use.

If the Rev. Thomas Carroll had conveyed the lots in question to the plaintiff upon an express trust that they be held and used for free school purposes to which all, or those of some natural division, of those of school age should be entitled to admission upon compliance with such reasonable regulations and requirements as might be necessary for the proper conduct of the school, or if by some proper unequivocal act there had been a dedication and setting apart of the property for a public purpose, subject to reasonable and general restrictions and requirements, a different question would have been presented.

The school as maintained is undoubtedly a charity. It is not in any way intended for profit, but it is in no sense, as we understand it, within the meaning of the provisions of the consti-

tution a "purely public charity." The public has in no sense any vested interest therein or control thereover. Both the ownership and control are private.

In the case of Miller's Appeal, 10 W. N. C. 168, two bills in equity were filed, each praying for an injunction to restrain the collection of taxes, one by William O'Hara, Roman Catholic Bishop of Scranton, and the other by a corporation known as the "Society of Sisters of Christian Charity." The facts in relation to the ownership and control of the property as assessed were very similar to the facts hereinbefore found in this case. A preliminary injunction having been granted by the court below, the same was by the Supreme Court on appeal dissolved. The order being interlocutory and not final, no opinion was filed nor reasons given, as is customary in such cases. In a subsequent case, however, that of Philadelphia v. Women's Christian Association, 125 Pa. 572, PAXSON, C. J., gives the reasons. Among others he says: "Yet it did not appear in that case, upon the hearing upon the preliminary injunction, however the fact may have been, that the real estate taxed was stamped with any public charity; nor was there anything to show that the regulation of the schools might not have been changed at any time and converted into a source of profit."

The same is true of Thiel College (a Lutheran denominational institution) v. County of Mercer, 101 Pa. 530. Of this college the same judge says: "It can convert the very land it seeks to exempt from taxation into money and apply it to its own corporate use;" and in Philadelphia v. Women's Christian Association, supra, PAXSON, C. J., says of it: "So far as appeared in the case there was nothing in its charter to stamp it as a public charity over any other college, and whatever may have been the regulations of its management, there was nothing to prevent these regulations from being changed at any time."

Speaking of Hunter's Appeal, 22 W. N. C. 361, and other cases, the same judge says: "Nor was its charitable character, in either of the cases, so stamped upon the institution itself, upon its organic law, that the mode of administering it might not have been changed at any time."

One of the most recent cases upon the subject is that of Philadelphia v. Masonic Home, 160 Pa. 572, wherein the property was held by a divided court to be not exempt. This was

an incorporated institution and its charter provided that its object should be "to provide for indigent, afflicted or aged Free Masons, their widows and orphans, in the State of Pennsylvania, and for such others as may be placed in its charge." This was held to be not a "purely public charity."

In view of the facts found and these authorities, we have reached the following conclusion of law:

That the property upon which the taxes in question have been levied is not devoted to a purely public charity, and that the school maintained thereon is not an institution of purely public charity within the meaning of the provisions of the constitution and the act of assembly passed in pursuance thereof relating to the exemption of property from taxation, and that the property mentioned in the plaintiff's bill of complaint as having been assessed and returned for taxation is not exempt from taxation.

From this it follows that the plaintiff's bill of complaint must be dismissed.

Errors assigned were (1) In finding as follows: "It will be observed that the title to the property is in Tobias Mullen, his heirs and assigns, and we do not understand that by the conveyance to him there is raised any trust in favor of the members of St. Patrick's Roman Catholic Church of Franklin." (2) In finding as follows: "In either case the use is private and personal and there is no evidence whatever of any dedication of the property to a public or a different use." (3) In finding as follows: "While today a school is being maintained in the building which is open to all comers, those having the right to the use of it may lawfully say tomorrow that none but members or adherents of their particular church shall be admitted. The question is not will they do so, but may they do so?" (4) In finding as follows: "By so doing the members would do only that which they might lawfully do, and no one would question the propriety of their so doing." (5) In finding as follows: "The public has in no sense any vested interest therein or control thereover. Both the ownership and control are private." (6) In finding: "That the property upon which the taxes in question have been levied is not devoted to a purely public charity within the meaning of the provisions of the constitution

and the act of assembly passed in pursuance thereof relating to the exemption of property from taxation, and that the property mentioned in the plaintiff's bill of complaint as having been assessed and returned for taxation is not exempt from taxation. From this it follows that the plaintiff's bill of complaint must be dismissed." (7) In the decree, to wit: "And now, March 22, 1897, this cause came on to be heard and was argued by counsel, whereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz: That the preliminary injunction heretofore granted in this case be dissolved; that the plaintiff's bill of complaint herein be dismissed, and that the plaintiff pay the costs of this suit."

C. Heydrick, with him *Carl I. Heydrick*, for appellant.—The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite and unrestricted quality that gives it its public character: Donohugh's Appeal, 86 Pa 306; Mullen v. Commissioners, 85 Pa. 288.

Where there are no apparent reasons to traverse it, the presumption is that the existing state of things will continue: Miller v. Henry, 84 Pa. 33.

The use defines the exemption, not the mode of dedication. The public use is the only thing that the exemption is conditioned upon. The legislature has not designated any mode of dedication as a condition precedent to exemption.

The congregation of St. Patrick's Church, though an unincorporated association, has a quasi-corporate existence, and has power to hold the equitable title to the land and build appropriate buildings thereon: Phipps v. Jones, 20 Pa. 260.

The objection that the property may at any time be diverted from the public charitable use, and lawfully so, at the will of the plaintiff, is not well considered. The funds contributed for the maintenance of the school are bound to be applied in furtherance of that charity and not otherwise: Bethlehem v. Fire Co., 81 Pa. 445.

That the school property is not taxable because the school is "denominational," was decided in 1892: Episcopal Academy v. Philadelphia, 150 Pa. 565.

Wm. H. Forbes, for appellees.

OPINION BY REEDER, J., July 23, 1897:

This is a bill in equity for an injunction to restrain the county of Venango from assessing and collecting taxes from the plaintiff for property of the Roman Catholic Church, upon which a building is erected which is used as a school.

The only question raised by the assignments of error is: Is this a purely public charity, such as will, under the statutes of this state and the provision in the state constitution, be exempt from taxation?

While it is in evidence, and may be accepted by us as a fact, that the attendance upon this school is not limited to children of members or adherents to the Roman Catholic Church, but that children of all sects are admitted and taught there, and that no tuition is paid by the pupils, the expense of its maintenance being met by voluntary contributions principally from the congregation of the church, yet it is under the domination and control of the Roman Catholic Church, and the property is their exclusive property.

The property in question is not the property of a corporation. Its use, control, management and regulation are entirely within the power of the plaintiff. The title is conveyed to him in trust for the members of the congregation. The owners of the building can at any time assert their right to exclusive benefit therefrom. The conduct and management are rendered no part of the institution by its organic law, but can at any time, by the act of the owners thereof, be restricted entirely, absolutely and exclusively to the children of members of the congregation.

In interpreting the Act of May 14, 1874, P. L. 158, which designated certain classes of institutions as being exempt from taxation, and within the letter of which act this institution might come, we must read into it the provision of the constitution of the state, which provides that "the general assembly may by general laws exempt from taxation public property used for public purposes and institutions of purely public charity."

Therefore, no institution falling within the act of 1874 can, under it, be exempt from taxation, unless it also falls within the provision of the constitution, and is purely a public charity.

The question as to what are institutions of purely public char-

ity has been considered and determined by the Supreme Court in a very large number of cases. For the purposes of this case it is only necessary to cite a few of the principles which have the most direct application to the case before us. There can be no doubt that this school, under the evidence, is a charity. It is not carried on for profit, and all children, whether members of the church or not, are at present received and taught in the school without being charged anything for tuition. There is no obligation upon the owners of this property to continue this course, and, in the nature of things, it is but a fair presumption that when the children of the members of this congregation become numerous enough to require the entire space contained in the school building for their education, the tuition will be restricted to the children of the people to whom the school belongs.

In Philadelphia v. Woman's Christian Association, 125 Pa. 572, Chief Justice PAXSON says: "Yet it did not appear in that case upon the hearing of the preliminary injunction, however the fact may have been, that the real estate taxed was stamped with any public charity nor was there anything to show that the regulation of the schools might not have been changed at any time and converted into a source of profit."

In Thiel College v. County of Mercer, 101 Pa. 530, the same Chief Justice says: "It can convert the very land it seeks to exempt from taxation into money and apply it to its own corporate use."

In Philadelphia v. Masonic Home, 160 Pa. 572, "the defendant was an incorporated institution, and its charter provided that its object should be to provide for indigent, afflicted or aged free masons, their widows and orphans in the state of Pennsylvania, and for such others as may be placed in its charge." This was held to be not a public charity.

"The property must be regularly and permanently devoted to purely charitable purposes to entitle it to exemption from taxation:" Contributors v. Delaware Co., 169 Pa. 305.

We can add nothing further to the excellent opinion filed by the court below which will give additional strength to what it has said in the disposition of this case.

The exceptions are dismissed and the decree affirmed.

Comly, Flanigan & Co., Appellants, v. William S. Simpson.

Practice, C. P.—Affidavit of defense—Insufficiency—Running account.

An affidavit of defense is insufficient which, alleging payments on an alleged running account, suggests an hypothesis that if a statement were made, showing all credits and debits between the parties, affiant could determine what was due by him if anything, and fails to aver that the amount claimed is not correct.

Practice, C. P.—Affidavit of defense—Construed against defendant.

An affidavit of defense is to be taken most strongly against the defendant; it is to be presumed that he has made it as favorable to himself as his conscience would allow.

Argued Oct. 21, 1897. Appeal, No. 136, Oct. T., 1897, by plaintiffs, from judgment of C. P. No. 2, Phila. Co., Dec. T., 1896, No. 1180, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Reversed.

Assumpsit for goods sold and delivered.

The facts sufficiently appear in the opinion of the court.

The court refused the rule for judgment for want of a sufficient affidavit of defense. Plaintiffs appealed.

Error assigned was discharging plaintiffs' rule for judgment for want of a sufficient affidavit of defense.

Cipraino Andrade, Jr., with him *Charles C. Lister*, for appellants.—The language of an affidavit of defense should be taken most strongly against defendant: Comly v. Bryan, 5 Wh. 261.

The alleged payments set forth in the affidavits are quite insufficient to prevent judgment, because there is nowhere any allegation that said payments were on account of the demand in suit: Selden v. Building Assn., 2 W. N. C. 481.

Samuel J. Taylor, for appellee.—Defendant in his affidavits fully and satisfactorily accounts for his inability to set forth more clearly his defense to this suit: Brightly v. McAleer, 3 Pa. Superior Ct. 442; Hubbard v. French, 1 Pa. Superior Ct. 218.

OPINION BY ORLADY, J., November 19, 1897:

The plaintiff claims to recover "for goods, to wit, groceries sold and delivered by the said plaintiff to the said defendant, at the defendant's special instance and request, at the times and in the amounts specified in the following copy of plaintiff's original account with the defendant, taken from the plaintiff's book of original entries," and he appends to the statement an account beginning November 9th and ending December 15, 1896, aggregating the sum of $568.19. In the affidavit of defense filed, it is averred "that he has purchased from the plaintiff during the last two years about $5,000 worth of goods annually; that he was not furnished with any statements showing the amount of purchase and payments, but that he only received bills for the articles purchased; that he made payments from time to time, generally by check, for which no receipts were given; the account was what was known in trade as a running account, and without a statement of credits it is impossible to say positively whether credit had been given for all the payments made; that the statement does not set forth all the goods purchased since November 9, 1896, and does not set forth any payments made since that date; that seven cash payments, giving the date and amount thereof, have been made since November 9, 1896, which exceed the plaintiff's claim by $264.57," and concludes, "I believe and therefore aver that upon a proper examination of the books of said firm, it will appear that I am not indebted to said firm in the amount set forth in the statement filed by them in this case, and for that reason, and that by reason of the failure to furnish me with statements from time to time, and especially to set forth a statement of my credits in the statement filed by them I am unable to more clearly and definitely set forth my defense."

And in a supplemental affidavit he avers "that many of the papers, bills, receipts and checkbooks and canceled checks were in some way lost or destroyed, so that they are not in my possession or control, and I do not know where they are," and concludes, "In view of the fact that I have not in my possession or control my receipts and checks showing all of my transactions with plaintiffs, and also in view of the fact that they have not furnished me with a statement whereby I could see if they have given me credit for the checks and receipts I hold, I am

unable to state whether their statement of my indebtedness to them is correct, but I do believe the statement as filed is not correct, but admit that without the information above referred to I am unable to state wherein the same is not correct."

The affidavits do not aver that the amount claimed is not correct; or that the plaintiff has been paid in full; or that the defendant requested of the plaintiff a statement of their entire business dealings, which had been refused; or that the cash payments mentioned should have been credited on the particular claim in suit. His farthest contention is that "upon a proper examination of the books of said firm it will appear that I am not indebted to said firm in the amount set forth in the statement filed." We may admit all that he alleges, and he may have been properly credited on another account with what he has paid to the plaintiff, and yet owe the amount claimed. We cannot relieve the defendant from the effect of his carelessness in not preserving the original statements, or in not securing or trying to secure, one containing the whole account, or in his bad system of doing business in not taking receipts.

This case is not brought within the ruling in Hubbard v. French, 1 Pa. Superior Ct. 218, cited for the appellee.

The affidavit of defense is to be taken most strongly against the defendant. It is to be presumed that he has made it as favorable to himself as his conscience would allow.

The fact that he has paid a sum in excess of the one claimed does not imply, under his affidavits, that the particular account is paid in full any more than that other dealings between the parties may have been properly credited with the excess.

We think the affidavits insufficient, the judgment of the court below is reversed, and we direct judgment to be entered against the defendant for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the court below why such judgment should not be so entered.

Charles M. N. Killen v. William R. Brown, Appellant.

Practice, C. P.—Affidavit of defense—Sufficiency—Essentials.

An affidavit of defense should state the facts specifically and with sufficient detail to enable the court to say whether they amount to a defense, and to what extent they amount to a defense and also to inform the plaintiff, with some degree of certainty, what will be interposed to defeat his claim.

Argued October 21, 1897. Appeal, No. 2, October T., 1897, by defendant, from judgment of C. P. No. 3, Phila. Co., Dec. T., 1896, No. 96, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Affirmed.

Assumpsit for goods sold and delivered.

The affidavit of defense was as follows:

"William R. Brown, being duly sworn according to law, deposes and says that he is the defendant named in the above case, and that he has a just, true, full and legal defense to the whole of the plaintiff's claim of the following nature and character, to wit:

"That it is true that the defendant employed the plaintiff to perform certain paper hanging in the defendant's premises, named in the plaintiff's statement of claim, and on the terms and conditions therein set forth, but that the said work was done in an unworkmanlike manner, and that the material furnished was of an inferior quality, and not in accordance with his contract with the plaintiff therefor, and that soon after said work was done, said paper faded and became loosened from the wall. By reason of which the defendant has suffered damages in an amount at least equal to the sum claimed by the plaintiff."

The court made absolute the rule for judgment and damages were assessed for $320.58. Defendant appealed.

Error assigned was entry of judgment for want of a sufficient affidavit of defense.

J. H. Brinton, for appellant.—If the averments of the affidavit contain what in law or equity amounts to a substantial defense to the plaintiff's claim, it follows that the learned court erred

in entering judgment: Church v. Jones, 132 Pa. 462; Johnson v. Fitzpatrick, 27 W. N. C. 250.

Frank P. Prichard, with him *Thomas S. Gates*, for appellee. —The vague and evasive averments of the affidavit are insufficient to carry the case to a jury. A reference to three cases is ample to justify this seemingly obvious contention: Server v. Heppe, 11 Montg. 171, Bank v. Miller, 179 Pa. 412 and Bonneville v. Hamilton, 18 C. C. Rep. 31.

PER CURIAM, November 19, 1897:

This action was brought to recover a balance alleged to be due for papering five houses. The affidavit of defense alleges "that the said work was done in an unworkmanlike manner," without specifying how, or in what respect it was unworkmanlike; "that the material furnished was of an inferior quality, and not in accordance with his contract," without alleging that the plaintiff contracted to furnish paper of superior quality or setting forth what the contract was; and "that soon after said work was done, said paper faded and became loosened from the wall," without alleging that this was in consequence of the plaintiff's unskillful workmanship or of his failure to use such materials as he was bound by his contract to use.

Upon these allegations the defendant bases another, namely, that he has "suffered damages in an amount equal at least to the sum claimed by the plaintiff" without specifying, otherwise than as we have stated, how he was damaged. We are of opinion that the affidavit was wholly insufficient to prevent judgment. If the paper faded and loosened from the walls in consequence of the plaintiff's unskillful workmanship, or of his use of improper materials, this fact might, and should, have been distinctly averred and not left to mere inference: Peck v. Jones, 70 Pa. 83. The first two averments are not sufficiently specific. We repeat in this connection what we said in Port Kennedy Slag Works v. Krause, 5 Pa. Superior Ct. 622 and what has been said in many earlier decisions of this court and of the Supreme Court: "An affidavit of defense should state the facts specifically and with sufficient detail to enable the court to say whether they amount to a defense, and to what extent they amount to a defense, and also to inform the plaintiff with some degree of certainty what will be interposed to defeat his claim."

Judgment affirmed.

William G. Carson, Appellant, *v.* Annie K. Ford, deceased; Michael Ford, Jr., Executor of the last will and testament of Annie K. Ford, deceased; Michael Ford, Jr., Charles Ford, Joseph J. Ford and Mary M. Ford.

Judgment—Restricted lien—General verdict on sci. fa. to revive.

A judgment on single bill specifically restricted to certain property designated to the exclusion of all other estate, real and personal, is not extended by a general verdict for the plaintiff on a scire facias to revive, and judgment will be entered thereon so as to conform to the original proviso in the bill single.

Argued Oct. 7, 1897. Appeal, No. 60, Oct. T., 1897, by plaintiff, from restricted judgment of C. P. No. 2, Phila. Co., June Term, 1894, No. 203, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Sci. fa. to revive judgment. Before PENNYPACKER, J.

It appeared from the evidence that one Michael Roach owned the house 1605 South street and William G. Carson, the plaintiff, had a general judgment against Michael Roach. Annie K. Ford also had claims against Roach and agreed to loan him more money and take a conveyance of the house. Carson, the plaintiff, satisfied his judgment and took the judgment note of Annie K. Ford for his debt and agreed to restrict the lien to the conveyed premises, the proviso being as follows:

"Provided, however, that said judgment when entered as aforesaid shall be restricted to and binding only upon the real estate and premises No. 1605 South street, in the city of Philadelphia, now owned by me, and not to affect or bind any other property or estate, real or personal, now owned or which may hereafter be owned by me."

Some six months after Mrs. Ford died and a scire facias was issued by the plaintiff to revive his judgment generally against the heirs of the decedent, Mrs. Ford.

The verdict was for the plaintiff for $413.79. Defendants filed motions and reasons for a new trial. After argument of

the rule for the new trial the court discharged the rule and ordered judgment to be entered as follows:

"That judgment be entered on the verdict, provided, however, that said judgment when entered as aforesaid, shall be restricted to and binding only upon the interest of Annie K. Ford, deceased, in the real estate and premises No. 1605 South Street in the city of Philadelphia, and not to affect or bind any other property or estate, real or personal, now owned or which may hereafter be owned by the estate of said Annie K. Ford, deceased." Plaintiff appealed.

Errors assigned were (1) in attaching a restriction or proviso to the judgment for plaintiff entered on the verdict, reciting proviso. (2) In not entering a general judgment for plaintiff, without condition or restriction.

John Dolman, for appellant.—Relied on Stanton v. White, 32 Pa. 358, Dean's Appeal, 35 Pa. 405, and McMurray v. Hopper, 48 Pa. 468.

Walter George Smith, with him *William Rudolph Smith*, for appellees.—The cases cited by the appellant have no bearing on the real question at issue. In none of the cases cited was any agreement proved, as in this case. The appellees' contention is that their case is brought clearly within the principles laid down in the case of Irwin v. Shoemaker, 8 W. & S. 75. See also, Hoeveler v. Mugele, 66 Pa. 348, and Sankey v. Reed, 12 Pa. 95.

OPINION by BEAVER, J., November 19, 1897:

Judgment was originally entered in the court below on a single bill with warrant of attorney to confess judgment, which contained the following proviso: "Provided, however, that such judgment when entered as aforesaid shall be restricted to and binding only upon the real estate and premises No. 1605 South Street in the City of Philadelphia, now owned by me, and not to affect or bind any other property or estate, real or personal, now owned or which may be hereafter owned by me." After the death of Annie K. Ford, a scire facias was issued to revive the judgment against the heirs and personal representatives of the

decedent. On the trial of this scire facias a general verdict for the plaintiff was taken, but, upon a motion for a new trial, the rule granted therein was, upon hearing, discharged, and judgment was directed to be entered upon the verdict in accordance with the restrictions contained in the proviso which was part of the original obligation. From the decree restricting the effect of the judgment this appeal is taken, the only error assigned being the entry of the judgment with the restricting clause attached, instead of a general judgment, without condition or restriction.

It is only necessary to examine the bill single, upon which the original judgment was entered, which constitutes the contract between the parties to ascertain what their intention was. That the parties to a judgment can restrict the liability of the obligor as well as its lien is recognized in all the cases. It is to be observed that this is not the case of Stanton v. White, 32 Pa. 358, in which the restriction was "This judgment to be a lien only upon lands conveyed to me by the said obligees by deed of this date, April 16th, 1856;" nor is it the case of Dean's Appeal, 35 Pa. 405, in which it was provided that "The lien of the judgment should be restricted to the real estate this day conveyed," referring to the date of the bond, the judgment in which case was revived amicably by confession during the lifetime of the defendant without limitation or restriction as to its lien; nor is it the case of McMurray v. Hopper, 43 Pa. 468, in which it was agreed that the original judgment "was to be a lien upon the property sold and upon the house and lot opposite to it directly across said road and not to affect any other part of said McMurray's estate or property." In all of these cases there was a simple restriction of the lien of the judgment entered to property specifically described, without in any way, directly or by implication, affecting the obligation or debt upon which the judgments were based respectively. The proviso in this case is much more comprehensive and far reaching in its terms and consequent effect than any of those referred to in the cases cited. In addition to the restriction of the lien to the premises No. 1605 South street in the city of Philadelphia, it is expressly provided that the judgment is "not to affect or bind any other property or estate, real or personal, now owned or which may hereafter be owned by me." Inasmuch as the judgment entered

in pursuance of the warrant of attorney, to which this proviso is attached, could not in itself affect personal property nor, until subsequently revived, real estate thereafter acquired, it is evident that the obligor intended not only to limit the lien of the judgment to the premises described therein but to limit the obligation itself to the said premises, so that no execution issued upon the said judgment nor any subsequent revival thereof should by any possibility affect or bind any other property or estate, real or personal, then owned or which might thereafter be acquired by her. That she had the right to so limit her liability cannot be doubted, and that the obligee agreed to such limitation by the acceptance of the bill single with the proviso is equally clear. The paper, proviso included, constituted the agreement between the parties and by its terms they are bound. We are satisfied that the court below gave practical effect to what the parties intended by restricting the effect of the judgment entered upon the verdict in the scire facias, and this upon a proper consideration of the contents of the paper itself. The parol testimony offered in the case in no way strengthened or enlarged the restricting clause contained in the paper upon which the original judgment was based. Considering that proviso or restriction in itself, and construing it without reference to parol testimony, the court was entirely justified in limiting the effect of the judgment entered upon the verdict in accordance with the stipulation contained in the original obligation.

The assignments of error are, therefore, both overruled, and the judgment is affirmed.

Frank V. Hoffner *v.* Henry D. Prettyman and Richard H. Parish, individually and trading as Prettyman & Parish, Appellants.

Negligence—Master and servant—Question for jury.

Builders under contract to furnish the necessary scaffolding for a subcontractor are liable for injuries resulting from its negligent construction.

The evidence being conflicting on the question of negligence, the case is properly for the jury.

Argued Oct. 6, 1897. Appeal, No. 39, Oct. T., 1897, by defendants, from judgment of C. P. No. 1, Phila. Co., June T., 1896, No. 1250, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass. Before BRÉGY, J.

It appeared from the evidence that the defendants erected a scaffold to be used by plaintiff and others while working on a building being erected by defendants, that it was alleged that it was improperly braced and supported, and that defective and insufficient materials were used; that plaintiff was in the employ of Bohem & Bros., who were under an independent contract with defendants to do the cornice and tinwork of the building, and that while plaintiff was at work on the scaffold it broke and fell by reason of its negligent construction and the improper materials used, whereby plaintiff was injured.

There was evidence, although conflicting, of the alleged negligent construction of the scaffold.

The court refused to give binding instructions for defendants.

Verdict and judgment for plaintiff for $500. Defendants appealed.

Error assigned was refusal of binding instructions for defendants.

Alex. Simpson, Jr., with him *T. M. Daly*, for appellants.—That the scaffold might have been built stronger, or not, is not the test: Fick v. Jackson, 3 Pa. Superior Ct. 378; Kehler v. Schwenk, 144 Pa. 348.

That the result shows it could have been built stronger is no proof of negligence: Sykes v. Packer, 99 Pa. 465; Railway v. Husson, 101 Pa. 1.

It is not the duty of the employer, after having provided material, ample in quantity and quality for the work his employees are engaged in, to supervise the selection of the material from the common stock: Ross v. Walker, 139 Pa. 42. See also Devlin v. Iron Co., 182 Pa. 109; Coal Co. v. McEnery, 91 Pa. 185.

Thad. L. Vanderslice, with him *Charles L. Smyth* and *Christopher H. Murray*, for appellee.—Where there is conflicting testimony as to the reasonable safeness of appliances, etc., the question is for the jury: Railroad Co. v. Keenan, 103 Pa. 124.

Binding instruction to the jury is only proper where the evidence is not conflicting: Spear v. Railroad Co., 119 Pa. 61.

Where there is any evidence of negligence on the part of the defendant it must be submitted to the jury: Murphy v. Crossan, 98 Pa. 495.

OPINION BY PORTER, J., November 19, 1897:

The defendants were engaged in a building operation. The plaintiff was in the employ of a firm who were doing the metal cornice work thereon, under a contract which required the defendants to furnish the necessary scaffolding. While the plaintiff was at his work, a part of this scaffolding fell with him, whereby he was injured. He sued to recover damages. The cause was submitted to the jury on the question of the negligent construction of the scaffold. The verdict was for the plaintiff. The defendants assign for error the refusal of the court below to give binding instructions to the jury to find for the defendants.

The scaffold in question was erected for a particular and temporary purpose. The plaintiff had a right to be upon it. The duty of the defendants was to erect and maintain it in a safe condition for the purpose intended.

In an effort to bring the case within the rule laid down in Kehler v. Schwenk, 144 Pa. 348, and Fick v. Jackson, 3 Pa. Superior Ct. 378, respecting the liability of employers to furnish safe appliances for their employees, one of the defendants offered his own testimony and that of some of his employees to show that the scaffold was originally erected "in the usual and ordinary manner" for such a purpose as that intended, but no other witness was called by the defendants "in the same line of business" to prove that the construction was according to the "general, usual and ordinary course." On the other hand, Cook, a witness for the plaintiff, testified: "Q. Can you say from that model if this is a proper way to build a scaffold? A. No, sir, I do not think it is. Q. Why? A. They usually have a figure four or a piece nailed down on the window or else upright on this piece, that is the piece that pulled out."

Havens (called as an expert by the plaintiff) testified that he did not consider the scaffold properly built or safe, and described the usual method of construction.

There was thus a sufficient conflict of testimony to require the case to be submitted to the jury on the question of the defendant's negligence, and the trial judge was not warranted in directing a verdict for the defendants.

Judgment affirmed.

Isaac S. Smyth and John Field, trading as Young, Smyth, Field & Co., Appellants, v. Rosa Levy.

Judgment—Execution—Funds in sheriff's hands—Standing of junior judgment creditor.

The proceeds of a sheriff's sale of a defendant's personalty under an execution in the hands of the sheriff are bound by an execution issued by a bona fide creditor, upon a judgment obtained after the sheriff's sale; such judgment will bind such proceeds and give such creditor a standing to contest the validity of the prior judgment, on the ground of fraud.

Practice, C. P.—Parties to record.

No man can make himself a party to pending litigation between others by his own act or statement on the record: it follows, therefore, that a senior judgment creditor has no standing to intervene by petition to have set aside a levy made on a junior execution.

Argued October 21, 1897. Appeal, No. 91, October T., 1897, by plaintiffs, from order of C. P. No. 2, Phila. Co., Dec. T., 1896, No. 320, setting aside levy on an execution. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Reversed.

Attachment under act of 1869.

The following facts appeared from the record:

On the 2d day of December, 1896, there was issued in court of common pleas, No. 2, as of September term, 1896, No. 320, a writ of attachment under the act of 1869, in favor of Isaac S. Smyth and John Field, trading as Young, Smyth, Field & Co. against Rosa Levy. By virtue of this writ of attachment the sheriff levied upon the goods and chattels of the said Rosa Levy,

which had been previously levied upon by him under five certain writs of fi. fa., issued out of court of common pleas, No. 1, as of September term, 1896, Nos. 1031, 1032, 1057, 1056 and 1120, and also under a writ of attachment under the act of 1869, issued out of court of common pleas, No. 2, as of December term, 1896, No. 308. A portion of the property so levied upon was claimed, and feigned issues were framed to determine its ownership. The remainder of said goods and chattels so levied upon, were sold by the sheriff, on December 3, 1896, for the sum of $3,314. On January 9, 1897, judgment for want of an affidavit of defense was obtained by Isaac S. Smyth and John Field, trading as aforesaid, in their suit begun by this attachment, and damages were assessed at $615.25, and execution was issued thereon upon the fund in the hands of the sheriff. On March 13, 1897, on defendant's rule, the attachment of Young, Smyth, Field & Co. was dissolved, and on March 15th the fi. fa. was issued. On April 10, 1897, Charles P. Wieder and Joseph W. Salus, two of the plaintiffs in the executions above indicated, took their rules upon plaintiffs, Young, Smyth, Field & Co., to show cause why the levy of the sheriff by virtue of the fi. fa. issued on the judgment of Young, Smyth, Field & Co., on the fund in his hands under the fi. fas. issued In re Wieder v. Levy, and Salus v. Levy, should not be set aside. On April 15, 1897, these rules were made absolute.

From this decree of the court, the plaintiffs, Young, Smyth, Field & Co., appeal.

Error assigned was making absolute the rule to show cause why the levy of the sheriff under and by virtue of the fi. fa. issued in the above case, should not be set aside.

John Weaver, with him *John Sparhawk, Jr.*, for appellants.—The only question in this case is whether money in the hands of the sheriff, realized on a prior sheriff's sale on a judgment against the same debtor, is subject to the levy of a fi. fa. That such a fund is liable to such levy, follows from sec. 24, of act of 1836, which authorizes a levy upon "current gold, silver or copper coin, belonging to the defendant: Sullivan v. Tinker, 140 Pa. 35; Herron's Appeal, 29 Pa. 240; Rudy v. Commonwealth, 35 Pa. 166.

E. W. Kuhlemeier, with him *George S. Russell*, for appellee. —The appellants' proceeding is a subterfuge to evade the requirements of the acts of 1836 and 1846: Filbert v. Filbert, 9 C. C. 149; Moore v. Dunn, 147 Pa. 359.

Money or property in the hands of a sheriff, under any process, is not the subject of a subsequent execution issuing out of a court of co-ordinate jurisdiction: Metzner v. Graham, 57 Mo. 404; Bates Co. Nat. Bk. v. Owen, 79 Mo. 429; Patterson v. Mater, 26 Fed. Rep. 31.

OPINION BY PORTER, J., November 19, 1897:

This appeal is taken from an order making absolute a rule to set aside the levy made under the fieri facias issued in the cause. The judgment as appears by the record, was properly entered. The fieri facias was regularly issued and delivered to the sheriff, in whose hands were funds arising from the sale of the defendant's property under executions issued on confessed judgments. It cannot be doubted that under the authority of Sullivan v. Tinker, 140 Pa. 35, the fieri facias bound the fund in the sheriff's hands. In that case it is said: "It is true the appellee's judgment was not obtained until after the sale of the personal property by the sheriff, but we are of opinion that the fieri facias issued upon the appellee's judgment bound the fund in the sheriff's hands. It was the money of the defendants in the execution. . . . Money of a defendant not on his person may be seized and taken in execution."

It is asserted that the fund in the hands of the sheriff will not pay the preceding executions in full. If this be so, they will take by their priority whatever fund there may be. The levy of the fieri facias in this cause however, gives the plaintiff a standing to attack the bona fides and validity of the preceding judgments upon which the fund was raised. If this attack be successfully made, all the funds in the sheriff's hands will be the funds of the defendant, subject to the fieri facias of the present appellants. We are of opinion, therefore, that the levy of the writ should not have been set aside.

The order was made by the court below apparently on the application of two strangers to the record, who appeared by petition and who alleged that they held judgments prior to the judgment in the present cause. What rights these strangers to

the record had in this cause it is difficult to see. They were neither plaintiffs nor defendants. "No man can make himself a party to pending litigation between others by his own act or statement on the record:" Phila. to use v. Jenkins, 162 Pa. 451, WILLIAMS, J.

The petitioners have no standing in the present cause. Their rights are limited to the causes in which they are parties litigant, or they may proceed against the sheriff to compel him either to distribute the money under the executions which they claim to control, or to pay the money into court where the rights of the several execution creditors in the fund can be determined.

The order of the court below is, therefore, reversed, and the order striking off the levy set aside.

Appeal of D. C. Gibboney and as Secretary of The Law and Order Society from the order of Quarter Sessions of Philadelphia County, granting a retail liquor license to Otto Schellenberg.

Liquor law—Intervention of volunteers as appellants—Record.

Where the record fails to show that, during the pendency of proceedings for the granting of a liquor license by the court below, any person was present, either in person or by counsel, in accordance with the third section of the act of May 13, 1887, no right of appeal is lodged, either by the provisions of the said act or otherwise in a person who voluntarily intervenes subsequently for the purpose of appealing.

Argued Oct. 20, 1897. Appeal, No. 116, Oct. T., 1897, by D. C. Gibboney, from decree of Q. S. Phila. County, March Term, 1897, No. 2415, granting a retail liquor license. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Appeal quashed.

Application for retail liquor license.

The record discloses the following abstract or brief of petitions, orders and reports: February 4, 1897, application of Otto Schellenberg for a retail liquor license. March 26, 1897, indorsed on application: "On motion of petitioner and after hear-

ing in open court, it is ordered that the prayer of the petitioner be refused." July 10, 1897, motion filed to open the order of March 26, refusing the license and to award the said license. July 12, 1897, indorsement on said motion: "Order opened and license granted to Otto Schellenberg."

Errors assigned were, (1) in granting on July 12, 1897, a retail liquor license to Otto Schellenberg. (2) On July 12, 1897, in opening the decree of March 26, 1897, and changing and reversing the said decree. (3) In July term, 1897, in opening, changing and reversing their final decree made in March term, 1897, in the matter of the application of Otto Schellenberg.

Lewis D. Vail, for appellant.—It was error for the court to open a judgment entered after a hearing or to grant a new trial after the term at which the judgment was entered has passed: Hill v. Egan, 2 Pa. Superior Ct. 596; Hill v. Harder, 3 Pa. Superior Ct. 473.

After the term a sentence cannot be reconsidered, amended or changed: Com. v. Mayloy, 57 Pa. 291; Turnpike Co., 97 Pa. 260.

In the present case Mr. Gibboney was notified, was present at the rehearing and objected, giving the judges a paper-book with his authorities.

Edward A. Anderson, with him *John H. Fow* and *Charles Knittel*, for appellee.—The law contemplates that after a term of the court another tribunal shall exercise the discretion of correcting errors or mistakes: Reed's Appeal, 114 Pa. 452; Toole's Appeal, 90 Pa. 376.

A license court has power where no vested rights are affected to reverse its decisions and correct its errors.

OPINION BY BEAVER, J., November 19, 1897:

Upon a motion to quash this appeal, we determined to hear arguments upon the merits of the appeal as well as upon the motion to quash, at the same time, which was done. A careful examination of the record of the case leads us to the conclusion that the appeal must be quashed and it is unnecessary, therefore, to consider the important questions which are raised by the record in the appeal itself.

Under the provisions of the third section of the act of May 13, 1887, "the said Court (the court of quarter sessions) shall fix by rule or standing order a time at which application for said licenses shall be heard, at which time all persons applying or making objections to applications for licenses may be heard by evidence, petition, remonstrance or counsel." The record fails to show that on the 15th of March, 1897, when the petition was originally heard, and on the 26th of March following, when the case was disposed of, any person was present, either in person or by attorney, desiring to be heard in opposition to the application of the appellee. The same is true of the hearing on the 12th of July, 1897. The failure of the record to show the fact of the presence of any one remonstrating or desiring to remonstrate against the granting of the license is at least negative evidence that no such person was present. We do not understand the appellant to allege that any one was present at the original hearing remonstrating against the granting of the appellee's application, although he does allege that he was present on the 12th of July. This, however, in no way appears upon the record and we are bound to consider the case as if no one had appeared in opposition to the appellee's application. This raises the question as to whether or not, after the court of quarter sessions has made a final disposition of an application for license, no person during the pendency of the proceedings having appeared to oppose the granting of the same by remonstrance or otherwise, any one who may feel himself aggrieved thereby has a legal right to appeal from such decree to an appellate court. This question, so far as we can discover, has not been distinctly ruled in Pennsylvania. There is no lack of cases, however, in which questions strongly analogous thereto have been decided. In Lawrence County's Appeal, 67 Pa. 87, Mr. Chief Justice THOMPSON said: "It is a rule without exception, I believe, that persons having no interest in judicial proceedings shall not be heard as parties to impugn them for irregularity merely, and this must be the condition of this appellant, unless it be made to appear to the judicial mind in some way that she was entitled to consideration in the decree made." Hower's Appeal, 127 Pa. 134, where citizens of the borough of Selinsgrove sought to intervene in a proceeding by a creditor in the court of quarter sessions under the Act of April 22, 1887,

P. L. 61, to enforce by mandamus the collection of a special tax sufficient to pay an alleged indebtedness, the court of quarter sessions refused to permit them to intervene, and the Supreme Court, upon motion, quashed the appeal from that decree. We do not now determine what the effect of a petition by the appellant to the court of quarter sessions, to be heard as late as the 12th of July, might have been, if the record had shown that such a petition had been presented, but we are clearly of the opinion that, where a record fails to show that during the pendency of proceedings for the granting of a license in the court below any person appeared in person or by counsel in accordance with the provisions of the third section of the act of 1887, supra, no right of appeal is lodged, either by the provisions of said act or otherwise, in a person who voluntarily intervenes subsequently for the purpose of appealing. The record fails to show also that any exception was taken to the decree of the court below at any stage of the proceeding which would seem to emphasize the silence of the record as to the presence of any one remonstrating in any way against the granting of the license. For these reasons the appeal is quashed.

The City of Philadelphia, to the use of William H. Achuff, John H. Little, and William P. Clement, trading as Achuff & Company, *v.* John W. Christman, Owner or Reputed Owner, Appellant.

Amendments—Statutes liberally construed.

The acts regulating amendments are to be liberally construed and an amendment will be allowed, the effect of which simply is to make clear what was imperfectly indicated.

Appeals—Practice, Superior Court—Amendments—Municipal lien.

An appeal does not lie from the refusal to strike off a municipal lien for the reason that there is no definitive decree, nor from an order permitting an amendment, the action being still pending.

Argued Oct. 15, 1897. Appeal, No. 105, Oct. T., 1897, by defendant, from order of C. P. No. 4, Phila. Co., Dec. T., 1891, No. 48, M. L. D., making absolute a rule to amend claim.

Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Appeal quashed.

Rule to amend lien.

The claim filed was for vitrified brick paving and the essential portion of the lien was as follows: "For work done and material furnished within six months last past in paving the cartway on Atlantic Street in front of said lot of ground and premises per bill and statement rendered as follows." A rule was taken to show cause why the claim should not be amended by inserting after the words "six months last past," the following words, to wit: "between the first day of June, 1891, and the second day of July, 1891," and also by inserting opposite the charge in the bill and statement rendered the date "July 2, 1897."

The court made the rule absolute. Defendant appealed.

Errors assigned were (1) In making the rule absolute. (2) In not striking off the lien.

A. E. Stockwell, for appellant.

John K. Andre, with him *Henry F. Walton*, for appellees.

PER CURIAM, November 19, 1897:

The defendant obtained a rule to strike off the municipal lien in question. Without formal disposition of this rule, the court permitted the lien to be amended; and although a sci. fa. upon the lien was and is still pending, the defendant appealed. An appeal does not lie from the refusal to strike off the lien for the reason that there is no definitive decree or judgment. When the court strikes off a lien the case is otherwise, for its action is final: Carter v. Caldwell, 147 Pa. 370. For the same reason an appeal does not lie from an order permitting an amendment; the action being still pending. Appeals should not be resorted to when the effect is to bring cases into appellate courts by instalments; such a practice is attended with obvious disadvantages and unnecessarily delays their final disposition: Lauer v. Lauer Brewing Co., 180 Pa. 593; Yost v. Davison, 5 Pa. Superior Ct. 469.

But as we have been pressed by the appellant to decide the questions raised by the assignments of error, we will say, that, even if the claim was defective, (a point not decided) it was not incurably so. It avers that the work was done and the materials were furnished within six months last past; the accompanying bill or statement is dated July 2, 1891; and it contains a charge of interest from that date. The effect of the amendment was simply to make clearer what, to say the worst, was only imperfectly indicated before. There was enough in the claim and bill to amend by, and the Act of April 21, 1858, P. L. 385, gave the power. "Such acts as this should be liberally construed, and while amendments are not a matter of right, they should be allowed when it can be done without prejudice to intervening rights:" Allentown v. Hower, 93 Pa. 332; Philadelphia v. Richards, 124 Pa. 303.

The appeal is quashed and the appellant directed to pay the costs.

George W. Jackson v. James E. Farrell, Appellant.

Landlord's breach of contract—Measure of damages.

The measure of damages where a landlord fails to keep a covenant to move or do something to or about a leased building is the difference between the worth of the premises in the condition in which they remained and that which they would have been in, had the landlord's covenant been performed; or so much less as they would have rented for without the covenant. Supposed loss of trade and possibly resulting profits are not to be considered.

Practice, C. P.—Affidavit of defense—Landlord and tenant—Breach of landlord's covenant.

The nonperformance by the landlord of a covenant to move a building cannot be set up as a defense for nonpayment of rent. The tenant could have moved the building and defalked the cost or he could have surrendered possession, or if retaining possession he is only entitled to deduct the rental value of the building unmoved from what it would have been if moved. An affidavit is defective which does not allege such difference of rental value as the measure of tenant's damages.

Argued Oct. 13, 1897. Appeal, No. 94, Oct. T., 1897, by defendant, from judgment of C. P. No. 1, Phila. Co., Dec. T.,

1896, No. 594, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit for goods sold and delivered.

Plaintiff claimed on an oral agreement of lease of a certain store on the boardwalk at Atlantic City, rented to defendant as a candy store for the season of 1896 at a rental of $800, of which $200 was paid by defendant on January 18, 1896, the balance to be paid before the expiration of the year 1896; the defendant occupied the premises during the season and still had possession of the same on the 13th day of January, 1897; and that he, the defendant, refused to pay the balance of $600.

The defendant filed the following affidavit of defense:

James E. Farrell, being duly sworn according to law, deposes and says, that he is the defendant in the above case, that he has a just and legal defense to the entire claim of the plaintiff of the following nature and character, to wit: The plaintiff in his statement filed has not set forth the full and entire agreement between him and the defendant. At and before the time when defendant agreed to rent the premises in question the plaintiff expressly promised and agreed that said candy store should be on the said boardwalk, and if the said boardwalk should be moved out towards the ocean, as was then contemplated, that he, the plaintiff, would move the said store out to the new boardwalk; that this promise and agreement on the part of the plaintiff was relied on by the defendant and induced him to lease the premises in question; that the season for business at said place is during the months of July and August; that on or about the —— day of June, 1896, the said boardwalk was moved out about one hundred and fifty feet from the said store of defendant; that the plaintiff, though often requested, neglected and refused to move defendant's store out to said boardwalk, and even refused to allow defendant to do so at his own expense; that in consequence of the neglect of the plaintiff to move said store out to said boardwalk the defendant's business was ruined and destroyed, and by reason thereof he lost in his business more than $1,000.

Defendant, relying on the promise and agreement of the plaintiff to move said store out to the new boardwalk, if erected

during the term of his lease, paid to the plaintiff the sum of $200, on account of the said rent, on January 18, 1896, that said boardwalk was moved out at the season when the business of the defendant just commenced, and that defendant was not able to secure at that time any other store. That the business of said store depended on its being situate on the boardwalk solely, that after the boardwalk was moved out, and all other candy stores were moved out to it, the defendant's store remained about 150 feet back in its old position, and was inaccessible to the people passing along the said boardwalk, and was worthless to defendant, who by reason of the plaintiff's neglect to move said store out to the said boardwalk as agreed, suffered damages to the amount of $1,000, which he will claim against the plaintiff at the trial, and ask for a certificate in his favor.

S. Morris Waln, being duly affirmed, says that he is the attorney for defendant in the above case; that defendant recently moved from Philadelphia to Atlantic City, where he now resides; that deponent wrote plaintiff's attorney to wait a few days until he could find defendant's address and to write plaintiff, who also lived in Atlantic City, for the address of defendant; that in consequence of a letter from plaintiff's attorney, which is hereto attached, deponent makes this affidavit for defendant, who is out of the city; that the above affidavit is true to the best of his information and belief.

Error assigned was making absolute the plaintiff's rule for judgment for want of a sufficient affidavit of defense.

S. Morris Waln, for appellant.—The tenant may set off the landlord's breach of contract against the landlord's claim for rent: Depuy v. Silver, 1 Clark, 385; Fairman v. Fluck, 5 Watts, 516; Peterson v. Haight, 3 Wharton, 150; Phillips v. Monges, 4 Wharton, 226–8. Claims which arise ex contractu, or are capable of liquidation by a jury, are the subject of set-off: Shoup v. Shoup, 15 Pa. 361; Hunt v. Gilmore, 59 Pa. 450.

Eugene C. Bonniwell, with him *S. Edwin Megargee*, for appellee.—The landlord cannot do any act which will deprive the tenant of that beneficial enjoyment of the premises to which he

is entitled under the lease. If he does, the tenant may remove and successfully defend against a claim for rent accruing after removal. But if he remains in possession he must render the price thereof, according to his agreement. He cannot assert the property is uninhabitable and yet inhabit it unless he pays the rent therefor: Sutton v. Foulke, 44 Leg. Int. 5; Wilcox v. Palmer, 163 Pa. 109.

The affidavit does not state how the damages claimed are arrived at. Certainly a sweeping assertion that defendant "suffered damages to the extent of one thousand dollars," unsupported by any detail showing how the amount is computed or in what manner it was suffered, is insufficient: McBrier v. Marshall, 126 Pa. 390; Hopple v. Bunting, 3 W. N. C. 472; Sitgreaves v. Griffith, 2 W. N. C. 705.

Loss of profits in business is not a legal element of damage or a matter of set-off: Fairman v. Fluck, 5 Watts, 516.

The facts being sworn to on information and belief, there should also be added that he expects to be able to prove the facts contained therein: Black v. Halstead, 39 Pa. 64; Thompson v. Clark, 56 Pa. 33; Hermann v. Ramsey, 5 W. N. C. 188.

OPINION BY BEAVER, J., November 19, 1897:

The affidavit of defense in this case is made by the attorney of the defendant. All the statements therein contained are, of course, based upon information and belief. Technically there should have been an averment of an expectation on the part of the defendant to prove the facts thus stated. The affidavit, however, is in itself so faulty that it is not necessary to rely upon this technicality to affirm the judgment of the court below. Admitting, that the covenant on the part of the plaintiff to move the building occupied by the defendant to the board walk thereafter to be erected was a part of the agreement for the lease of the building, and admitting also the failure of the plaintiff to comply with his agreement, after notice and request by the defendant, two courses were open to the defendant. He could have moved the building, in accordance with the terms of the agreement, and defalked the cost of moving it from the amount of the rent, or he could have surrendered the possession, or offered to surrender it, and have relieved himself from the payment of the rent, or he could have retained the

possession and deducted from the rent the difference between the rental value of the store room as it would have been, if the stipulations of the agreement as alleged by him had been complied with, and its rental value as occupied by him: Peterson v. Haight, 3 Wharton, 150; Warner v. Caulk, 3 Wharton, 193.

The allegation in the affidavit of the amount of damages sustained by the defendant "by reason of the plaintiff's neglect to move the store out to the boardwalk" is vague and uncertain. This estimate of damages was evidently based upon supposed loss of trade out of which prospective profits were to be realized. This is not a proper measure of damages in such a case. The rule laid down in Fairman v. Fluck, 5 Watts, 516, based upon Schuylkill Navigation Co. v. Thoburn, 7 Sergeant & Rawle, 411, which is a leading case, is that the measure of damages for the breach of such a covenant as this on the part of the landlord "ought to be the difference between the worth of the premises in the condition in which they remained and that which they would have been in, had the landlord's covenant been performed; or, in other words, so much less as they would have rented for without the covenant." The defendant makes no effort to inform the court as to the difference in rental value between the store as it was to be under the covenant alleged by him, and the store as it was during his tenancy. The affidavit of defense was, therefore, insufficient, and the court was clearly justified in making absolute the rule for judgment.

Judgment affirmed.

Commonwealth of Pennsylvania v. Jacob Miller and Samuel Harris, Appellants.

Criminal law—Misrecital of date—Indictment—Variance.

Where the crime charged in the indictment is not based upon a record or other official writing, a variance of one day between the indictment and proof in fixing the date of the crime is not a fatal variance; time not being of the essence of the offense.

Criminal law—Conviction defined.

When the law speaks of conviction, it means a judgment, and not merely a verdict which in common parlance is called a conviction.

Criminal law—Perjury—Evidence—Competency of witness.

A person found guilty by a verdict of the jury of perjury but not sentenced, is a competent witness in a trial of others on a charge of subornation of perjury incident to the same perjury for which the witness was tried.

Perjury—False swearing in examination for bail.

False swearing in a matter before a magistrate touching the sufficiency of bail offered for a man charged with a criminal offense, is perjury at common law and under the statutes. Whether the inquiry touching the bail be made at the examination of the charge or afterward is immaterial.

Argued Oct. 19, 1897. Appeal, No. 35, April T., 1897, by defendants, from judgment of Q. S. Allegheny Co., March Sess., 1897, No. 320, on verdict of guilty. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Indictment for subornation of perjury. Before KENNEDY, P. J.

It appears from the record and evidence that the defendants were indicted, tried and convicted on a charge of subornation of perjury.

Other facts sufficiently appear in the opinion of the court.

Verdict of guilty and sentence thereon. Defendants appealed.

Errors assigned were, (1) In not quashing the indictment. (2) In overruling the defendants' objection to the admission of the testimony of James Nolan. (3) In refusing binding instructions for defendants. (4) In charging the jury as follows: "Now, as I have said to you, you have the testimony of this man Nolan, stating substantially that the oath which he took in that case was false, and you have other circumstances in the case tending to show the same thing. You have his own testimony tending to show that these defendants both knew that he was swearing falsely, and that they induced him to take the false oath. He states that he met them here on the day in question, somewhere in the vicinity of the courthouse, that he was under the influence of liquor at the time, and that after some talk between them, or persuasion upon their part, he was induced to go before the alderman and take, as he said, this false oath. He says that he told them at the time that he had no property, that they knew without his telling them that he had no property, but they told him that mattered not, that he

would not get into any serious trouble by it, and induced him to go and make what he claims to have been this false oath. In other words, they procured him, as is claimed by the commonwealth, or suborned him to make the false oath, and if you are convinced of that beyond a reasonable doubt, it will be your duty to find a verdict of guilty." (5) In not charging the jury that in order to convict the defendants the commonwealth must prove each material part of its case by the testimony of two witnesses, or one witness and corroborating circumstances, and that James Nolan being a particeps criminis, his testimony should not have the weight of one witness at any material point. (6) In not giving any instruction to the jury as to what constituted corroboration, and as to the parts of the testimony necessary to be corroborated. (7) In not instructing the jury as to what weight should be given to evidence of good character. (8) In charging the jury as follows: "Perjury, so far as this case is concerned, may be defined to be the wilful and corrupt false swearing in some judicial proceeding under an oath legally administered, and by an officer duly authorized to administer it. Subornation of perjury is the procuring, or suborning, of a person to make this false oath." (9) The indictment in this case is assigned as error for the reason that it is fatally defective in the following particulars: (*a*) The indictment does not allege that Nolan was duly or lawfully sworn. (*b*) It does not aver that Nolan was sworn or took any oath. (*c*) It does not allege what oath he took. (*d*) It does not allege that the testimony of James Nolan was necessary or material. (*e*) It does not allege that Harris or Miller knew or believed that Nolan would wilfully and corruptly testify to facts which he knew to be false. (*f*) It does not allege that Nolan became bail or was accepted as such for J. F. Latimer, or that Latimer was released from custody, or that the alderman was in any way influenced by the testimony of Nolan in disposing of the cause then and there pending. Any testimony he may have given was not material, unless he was so accepted as bail. (*g*) It was fatally defective in that it lays the crime as having been committed on the 10th day of November, whereas the evidence produced showed it to have been committed on the 11th day of November.

Jos. R. McQuaide, for appellants.—As to admission of evi-

dence of one James Nolan, defendants relied on Act of May 23, 1887, P. L. 158, sec. 2.

The word "convict" means to find guilty of a criminal offense by verdict of a jury: Anderson's Law Dict., 256.

A man is convicted when he is found guilty or confesses the crime before judgment had: Shepherd v. People, 25 N. Y. 406.

In an indictment for perjury the day on which the perjury was committed must be truly laid: U. S. v. McNeal, 1 Gall. 387; U. S. v. Bowman, 2 Wash. C. C. 328; Com. v. Monahan, 9 Gray, 119.

A man convicted of perjury is not competent to testify: People v. Evans, 40 N. Y. 3.

Chas. A. O'Brien and *John C. Haymaker*, district attorney, for commonwealth.—There must be a judgment on the verdict in order to constitute a conviction: People v. Whipple, 9 Cowen, 707; 1 Phillips on Evidence, 18, note 12; 1 Greenleaf on Evidence, sec. 375; Bishop's Criminal Law, sec. 975.

As to the alleged variance all the cases cited by the appellants on this point refer to a record oath: Matthews v. U. S., 161 U. S. 500.

The law relating to corroboration in perjury, as adopted in nearly all the states, is stated in 1 Greenleaf on Evidence, sec. 257.

OPINION BY SMITH J., November 19, 1897:

The appellants, Jacob Miller and Samuel Harris, were indicted and convicted of subornation of perjury. One J. F. Latimer, having been arrested on a warrant issued by an alderman of the city of Pittsburg, charging him with a criminal offense, in default of bail was committed for trial. Subsequently James Nolan, accompanied by the appellants, appeared before the alderman, and offered himself as bail for Latimer's appearance at court. Being sworn and examined by the alderman as to his ownership of property, he stated that he owned real estate in Pittsburg worth $2,000, clear of all incumbrances; whereupon he was accepted as bail in the sum of $500. Latimer failed to appear for trial, and the recognizance was forfeited. Upon investigation it was found that Nolan was insolvent at the time of becoming bail. He was indicted for perjury in having thus sworn

falsely as to his ownership of property, and convicted. Before he was sentenced, the appellants were put on trial charged with having suborned him to make the false statement for which he had been tried, and he was the principal witness against them.

The indictment is sufficient to warrant a prosecution and sustain a judgment. The variance of one day between the indictment and the proof as to the time laid is not a fatal defect. Had the assignment of perjury been based upon a record, deposition, affidavit or other official instrument, a misrecital of the date might be a serious error, because the writing, being a very material part of the case, should be accurately described. But here the crime charged is not based on a record or other official writing; and, furthermore, time is not of the essence of the offense. The mistake as to date could not have misled or injured the appellants, and the variance was immaterial.

The competency of Nolan as a witness is a principal feature of the appellant's argument. It is contended that, having been found guilty of perjury by the verdict of a jury, he was incompetent to testify, under the act of May 23, 1887. That act provides that "A person who has been convicted in a court of this commonwealth of perjury, which term is hereby declared to include subornation of perjury, shall not be a competent witness for any purpose, although his sentence may have been duly complied with, unless the judgment of conviction be judicially set aside or reversed," except in cases involving his personal security or his right of property.

With respect to some purposes and consequences, the words "convicted" and "conviction," when used in a statute, mean no more than the judicial ascertainment of guilt by verdict or plea. But "no conviction is complete until sentence is passed and recorded:" County v. Holcomb, 36 Pa. 349, LOWRIE, C. J. Therefore, when conviction is made the ground of some disability or special penalty, a final adjudication by judgment is essential. In such cases, "when the law speaks of conviction, it means a judgment, and not merely a verdict, which in common parlance is called a conviction:" Smith v. Com., 14 S. & R. 69, TILGHMAN, C. J. The distinction has been discussed and illustrated in numerous cases in our own and other states, among which, besides those already referred to, are York County v. Dalhousen, 45 Pa. 372; Wilmoth v. Hensel, 151 Pa. 200;

Shepherd v. People, 25 N. Y. 406; Blaufus v. People, 69 N. Y. 107; Com. v. Gorham, 99 Mass. 420; Com. v. Lockwood, 109 Mass. 323. Further consideration, however, of the basis of this distinction is unnecessary, since the decision of the question in hand rests on grounds independent of it.

Whatever the authority of Fitz v. Smallbrook, 1 Keble, 134, it has been uniformly held, at least since the ruling by Lord MANSFIELD in Lee v. Gansel, Cowp. 3, that conviction of an infamous crime, by verdict or plea of guilty, does not work disqualification as a witness unless followed by judgment. The issue is not necessarily closed by such conviction; a new trial may be granted, or judgment may be arrested. In the only reported case, so far as I have been able to find, in which the question has been raised in this state (Skinner v. Perrot, 1 Ash. 57), this was recognized as the law. Nothing in the act of May 23, 1887, shows an intention to change this well-settled principle. The purpose of that act is not to restrict but to enlarge the competency of witnesses. It makes no one incompetent who was previously competent. Before its passage, a person against whom a verdict had been given was still competent as a witness until judgment was pronounced. Hence he still remains competent until judgment. The conviction that disqualifies, under the statute, is the conviction that had previously disqualified; the final determination of the issue by judgment of conviction. This further appears from the provision, inapplicable to a verdict only, that the disqualification shall continue, though the judgment be carried into effect by full compliance with the sentence, "unless the judgment of conviction be judicially set aside or reversed." The evident purpose of the act is to restrict disqualification by reason of crime to conviction of perjury and subornation of perjury, and to preserve the existing requirement of judgment of conviction in order to disqualify. Under the statute, in brief, nothing creates the disability but a judgment of conviction; nothing removes it but the judicial setting aside or reversal of this judgment; or a pardon: Diehl v. Rodgers, 169 Pa. 316.

It is the duty of aldermen and justices of the peace to admit to bail, "by one or more sufficient sureties," accused persons brought before them. They are required to pass upon the sufficiency of the bail offered, and for this purpose must make in-

quiry into the matter. When a person is charged before an alderman with a criminal offense, it is the magistrate's duty to inquire into the charge, and commit the prisoner, hold him to bail, or discharge him, as the evidence may warrant. If he decides to hold the prisoner to bail, his duty to inquire into the solvency of the surety is no less than to inquire into the sufficiency of the complaint. Either inquiry involves the exercise of judgment and discretion, and in both he acts judicially. They are equally part of a judicial proceeding which the alderman has the power to conduct, and in so doing to examine under oath. False swearing respecting a material question in such a proceeding is perjury, at common law and under the statutes. And whether the inquiry touching the bail be made at the examination of the charge or after, is immaterial: Moore v. Com., 6 W. & S. 314; Com. v. Ross, 6 S. & R. 427.

While it would have been proper to caution the jury respecting the weight to be given to the testimony of Nolan, we are not convinced that the case should be reversed because of an omission on this point. There was other evidence corroborative of his testimony which, if believed, entirely justified the finding of the jury. The learned trial judge clearly and accurately defined the nature of the offense, and the evidence necessary to establish it, and the jury were told that they must be convinced of the defendant's guilt beyond a reasonable doubt before they could convict. If special instructions on particular phases of the evidence were desired, the court should have been requested to give them. It is unnecessary to notice the specifications of error in detail, they are all overruled.

The judgment of the court below is affirmed, and it is now ordered that Jacob Miller and Samuel Harris, the appellants, be forthwith remanded to the custody of the keeper of the Allegheny county workhouse, there to be confined according to law for the terms of imprisonment for which they were sentenced respectively, and that the record be remitted to the said court with instructions to carry this order into effect.

William E. Lake v. O. M. Weber, Appellant.

Fraudulent misrepresentation—Credulity of other party no defense.

However negligent a party may have been to whom an incorrect statement has been made, yet that is not ground upon which the party making the incorrect statement can stand. No man can complain that another has relied too implicitly on the truth of what he himself stated.

Contract—Assertion of untruth—Rescission—Defense.

To assert for truth what one professes to know and may fairly be supposed to know, but does not know it to be so, is equivalent to the assertion of a known falsehood, and may be so treated in determining the right of the other party to rescind the contract, or if the falsity of the declaration be discovered too late for that, to defend an action upon it.

Misrepresentation as defense to a contract.

A misrepresentation, which possibly might not be sufficient ground of an action for damages, may be sufficient to entitle the party deceived to rescind the contract or to defeat or to defend pro tanto, an action upon it.

Argued Oct. 7, 1897. Appeal, No. 64, Oct. T., 1897, by defendant, from judgment of C. P. No. 1, Phila. Co., March T., 1897, No. 204, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit for services rendered.

It appears from the record that the plaintiff claimed $100 for services rendered the defendant in securing and obtaining for him a certain contract with one Joseph Bird.

The defendant filed the following affidavit of defense: "O. M. Weber, being duly sworn according to law, deposes and says that he is the defendant in the above case, and that he has a just and true defense to the whole of plaintiff's claim of the following nature and character, to wit:

Deponent says that plaintiff's statement of claim filed in above case is defective, and insufficient to require an affidavit of defense, or to base a judgment upon in this: that said statement does not contain the name of defendant, and further, does not aver that any sum is "justly due" to the plaintiff, wherefore defendant demurs to plaintiff's statement of claim.

Deponent further says that on or about the latter part of July, or early part of August, 1896, the defendant (who is engaged in the making of woodwork for building operations) was requested by the plaintiff to submit an estimate for the purpose of obtaining the contract for furnishing the millwork for a church building to be erected by Joseph Bird, contractor, and plaintiff thereupon obtained the specifications, and defendant inspected them with plaintiff and commenced preparing an estimate for the millwork required by said specifications.

While defendant was engaged in going over the specifications and plans of said church in company with plaintiff, defendant came to the louver frames in tower of said church building, and was proceeding to place an estimate for the items of louver frames when plaintiff informed defendant that he (defendant) would not be required to furnish said louver frames for said tower, as said louver frames were to be copper, whereupon defendant struck from his estimate said louver frames and proceeded with said estimates, the same amounting to $2,650 after excluding the louver frames, and the estimate was then submitted to said contractor, Joseph Bird, and the contract for said millwork was therefore awarded to said defendant. After defendant entered upon the execution of this contract with said Joseph Bird, he learned that the said plaintiff had fraudulently and falsely informed defendant in regard to the louver frames not being required in the tower for the purpose of getting defendant to make the lowest possible estimate on said millwork in order that it would be accepted by said Joseph Bird, and deponent was required by said Joseph Bird to furnish the louver frames which deponent had to do at an actual cost to defendant of $110. Deponent therefore avers that he is not indebted to plaintiff in any sum whatever, but plaintiff is indebted to the defendant, and deponent will ask for a certificate against plaintiff in the sum of $10.00 at the trial of this case, that being the amount of loss which deponent suffered (after allowing credit to plaintiff in the sum of $100) by reason of plaintiff fraudulently and falsely informing deponent as to the requirements of said specifications and plans for said church.

All of which deponent avers, believes and expects to be able to prove upon the trial of this cause.

Judgment for want of a sufficient affidavit of defense. Defendant appealed.

Error assigned was entry of judgment for want of a sufficient affidavit of defense.

William M. Stewart, Jr., with him *Frederick S. Drake* and *John Sparhawk, Jr.*, for appellant.—That in order to defeat a recovery upon a contract, it is sufficient to allege that there was a fraudulent representation as to any part of that which induced the defendant to enter into the same: Brown v. Eccles, 2 Pa. Superior Ct. 192; Edelman v. Latshaw, 180 Pa. 419; Land & Improvement Co. v. Mendinhall, 4 Pa. Superior Ct. 398.

A representation is fraudulently made when made with a knowledge of its untruth; or, if in regard to a material matter, when made in ignorance of whether it is true or not: Braunschweiger v. Waits, 179 Pa. 47.

It is no answer to Weber's claim to be relieved from his promise that he might have learned the truth by inquiry: Land & River Imp. Co. v. Mendinhall, 4 Pa. Superior Ct. 398; Braunschweiger v. Waits, 179 Pa. 47.

Charles H. Pile, for appellee.

Opinion by Rice, P. J., November 19, 1897:

This is an action upon the defendant's promise to pay the plaintiff $100 in consideration of the plaintiff procuring for the defendant from one Joseph Bird, the builder, a contract whereby the defendant was to furnish the necessary millwork for a certain building and was to receive the sum of $2,650 therefor.

It is difficult to state the defense without reciting at some length the material averments of the affidavit of defense, and this we think it important to do. The affidavit avers, that the plaintiff (having first come to an understanding with Bird that he, the plaintiff, should endeavor to get an estimate for a sum not exceeding $2,650, and receive a commission from the person to whom the contract might be awarded) brought the plans and specifications of the building to the defendant and requested him to make and submit an estimate on the millwork required therefor; that in making his estimate he was about to include the louver frames in the tower, and the frieze and moulding under the truss, when he was informed by the plaintiff that the former were to be made of copper and the latter of plaster, and

hence were not included in the millwork; that, relying upon this representation, and complying with the plaintiff's express request not to include these items, he omitted them from his calculation, and submitted an offer to furnish the millwork for $2,650, which included the commission of $100 to be paid to the plaintiff if the defendant's bid was accepted; that the general contractor, Bird, accepted the bid or estimate and awarded to him the contract; that after he entered upon the execution thereof he learned that the plaintiff's representation was false and was made for the express purpose of inducing him to make his estimate sufficiently low to obtain the contract; that had he not been induced by the plaintiff's false and fraudulent statements to omit the cost of these things from his estimate his bid would have been more than $2,650, and in that event the contract would not have been awarded to him—a fact which was well known to the plaintiff; and, finally, that the latter knew the amount at which the contract could be obtained by the defendant, and purposely deceived him in order that he, the plaintiff, might get the commission.

It is argued, that, even admitting the truth of all the defendant's averments, he has no defense, but must still pay the commission; and the court below so held. In this conclusion we are unable to concur.

There are several views which may be taken of this transaction. One that is well worthy of consideration is, whether the representation did not enter into the terms of the contract sued upon and form a substantive part thereof. This position is strengthened by the fact that the representation was accompanied by an express request that the defendant should omit the cost of the louver frames and the frieze and molding from the calculation. Taking this view, how can the plaintiff say that he procured for the defendant the contract that he undertook to procure, and which both parties had in mind when the defendant made his promise? It is answered that the defendant's failure to obtain a contract to furnish the mill-work, excluding these things, for $2,650, was due to his own negligence in not having the contract so drawn. But that position is not tenable; for it is distinctly averred that the contract would not have been awarded to him upon those terms. In other words, the plaintiff did not perform, and could not have performed,

what he undertook to, even if the defendant had been as vigilant as he says he ought to have been.

But assuming that the representation was not a term in the contract, and treating it as a representation merely, we fail to see why the affidavit does not present a good defense to an action for the commission, whatever may be said of its sufficiency as a statement of an independent cause of action for deceit. The representation was false; it was of a material fact of which the plaintiff professed to have knowledge and the defendant had not; to say the least, the plaintiff had a self-seeking motive for wishing that it should be believed by the defendant; it was made with the intention, and express request that it should be acted upon by the defendant; it was believed by him, and he was thereby actually induced to act upon it; and in consequence he was damaged. True, the affidavit does not distinctly aver, in so many words, that the plaintiff knew that the representation was false, but it does aver that it was fraudulently made, with the purpose to deceive and that it had that effect. In determining the effect of these facts upon the liability of the parties to the contract, it is important to notice, that we are not dealing with an action for damages based on an alleged deceit, but with the question of the right of the defendant to be relieved, to the extent that he was injured by the misrepresentation, from liability on his promise. A misrepresentation which, possibly, might not be sufficient to ground an action for damages, may be sufficient to entitle the party deceived to rescind the contract or to defeat, or defend pro tanto, an action upon it. We shall not undertake to review the law upon that subject. It is perfectly safe to say, however, that so far as the right of the promisor to defend the action is concerned it is immaterial whether the other party knew that the representation was false or made it without any knowledge upon the subject. In either case, the law, as well as the common rules of fair dealing, forbids that he should make a misrepresentation for the purpose of deceiving, which does deceive, and profit thereby to the other's injury. There are cases and this is one, where to assert for truth what one professes to know, and may fairly be supposed to know, but does not know to be so, is equivalent to the assertion of a known falsehood, and may be so treated in determining the right of the other party to rescind the contract; or if

the falsity of the declaration be discovered too late for that, to defend an action upon it: Fisher v. Worrall, 5 W. & S. 478; Bower v. Fenn, 90 Pa. 359; Braunschweiger v. Waits, 179 Pa. 47; Land Imp. Co. v. Mendinhall, 4 Pa. Superior Ct. 398; Sutton v. Morgan, 158 Pa. 204.

But it is said that, before signing the contract, the defendant should have made inquiry of the builder as to the millwork he would be required to furnish, and that he was negligent in not doing so. As between the builder and the defendant this would be true, and for that very reason the latter was compelled to furnish the louver frames, notwithstanding the fact that he was induced by the plaintiff to believe that they were to be made of copper, and therefore did not come under the head of millwork. The contractor made no representations whatever; therefore as between him and the defendant the latter could not be heard to say that he was deceived as to the requirements of the contract he signed. It is to such a case that the single decision cited by the plaintiff (Kern v. Simpson, 126 Pa. 42) applies. But how is it as between the parties to this suit? Can the plaintiff say to the defendant: "You had the plans and specifications before you when we contracted, therefore, you ought not to have believed me when I told you that the louver frames were to be made of copper and the frieze and moulding under the truss were to be made of plaster; it is your own fault if you trusted me too implicitly and complied with my express request." Clearly he could not be heard to say that, if the plans and specifications left it uncertain as to the materials of which these things were to be made; and even if the specifications showed that they were to be made of wood they were subject to such changes and modifications as the parties to the principal contract might see fit to make, and the defendant swears, in effect, that he was induced to believe that such changes had been made. Therefore, in either case, the representation was as to a fact of which the plaintiff professed to have knowledge and concerning which the defendant had no knowledge, and could acquire none from an inspection of the written plans and specifications alone. He was obliged to rely on the plaintiff's representation, or to make inquiry elsewhere. He was induced to rely on the former, and in consequence was deceived as he alleges, to his injury in a greater sum than he promised to pay the plaintiff. As was

held in Sutton v. Morgan, supra, and Land Imp. Co. v. Mendinhall, supra, his neglect, or want of prudence, cannot justify the falsehood or fraud of one who practiced upon his credulity; the doctrine of contributory negligence cannot be invoked in such a case. The defendant's failure to make inquiry of the builders may be a fact affecting the good faith of his action, but clearly it is not the basis of a positive conclusion against him: McGrann v. R. R., 111 Pa. 171.

In a rule for judgment for want of a sufficient affidavit of defense every material averment of fact in the latter must be taken as true. Observing this rule, we conclude without further discussion of the case before trial, that the affidavit was sufficient to prevent judgment.

Judgment reversed and procedendo awarded.

The Fidelity Insurance, Trust and Safe Deposit Company, Trustees, under the will of John Matthew Hummel, deceased, v. Frederick J. Hafner, Appellant.

Party walls—Liability of next builder—Act of 1721.

Liability arises for use of a party wall under the Act of February 24, 1721, 2 Sm. L. 124, where ownership exists in the plaintiff and where the defendant, the next builder, supported the roof of his building on timbers, the ends of which rest in holes in said party walls.

Argued Oct. 11, 1897. Appeal, No. 77, Oct. T., 1897, by defendant, from judgment of C. P. No. 4, Phila. Co., March T., 1897, No. 515, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit for use of party wall.

The facts sufficiently appear in the opinion of the court.

Judgment for plaintiff for $116.01. Defendant appealed.

Error assigned was, Entry of judgment for want of a sufficient affidavit of defense.

Charles L. Smyth, for appellant.—The plaintiff's statement does not allege a complete cause of action: Bank v. Ellis, 161 Pa. 241.

The defendant shows by the affidavit of defense that he is a mere lessee of the premises and is not an owner thereof in fee. The action should be brought against the owner and not against the tenant: Heiland v. Cooper, 38 W. N. C. 560.

William M. Stewart, Jr., with him *John Marshall Gest*, for appellee.—The liability of the defendant is clear under the Act of February 24, 1721, Sm. L. 124.

The question as to the right to recover for such use of the party wall has been decided by the Supreme Court of Iowa under a similar act of assembly: Deere v. Weir-Shugert Co., 59 N. W. 255.

OPINION BY BEAVER, J., November 19, 1897:

The judgment in this case was properly entered. The plaintiff's statement was sufficient. It distinctly averred the ownership of the premises upon which the party wall was built; that the defendant was the owner or lessee of the adjoining premises, and that he was the next builder, having erected and built a messuage upon the adjoining premises and making use of the plaintiff's party wall therefor. It avers that the "proper surveyor and regulator duly set the charge and value of the portion of the said party wall so used by the said defendant as aforesaid, of which the defendant had notice," and that defendant refused to pay.

Under the provisions of the Act of February 24, 1721, 1 Sm. L. 124, and of the Act of April 10, 1849, P. L. 600, the defendant was liable for the amount assessed by the surveyor or regulator as compensation for the use of the wall made by him. See Voight v. Wallace, 179 Pa. 520.

The affidavit of defense is not sufficient. The defendant himself alleges that he used the party wall; that the roof erected by him "is supported by light pieces of scantling, the timbers or ends of which rest in small holes about two inches in the said party wall, extending along the said party wall the length thereof." This is a clear admission of such a use of the wall as makes him liable. The act of 1721 provides that "the

first builder shall be reimbursed one moiety of the charge of such party wall or for so much thereof as the next builder shall have occasion to make use of before such next builder shall anyways use or break into the said wall." The defendant's entire structure at least upon the one side depended, upon his own admission, entirely upon the party wall. Having used it, he should pay the amount assessed by the officer duly constituted to assess the value of the use of said wall made by him.

The judgment is affirmed.

B. F. Lamb *v.* E. J. M. Leader, W. W. Leader and A. M. Halberstadt, trading as Progressive Steam Power and Job Printing House, Appellants.

Practice, Superior Court—Defective assignment—Rule XVI.

Where the error assigned is to the charge of the court, the part of the charge referred to must be quoted totidem verbis, as provided by Rule XVI of the Superior Court.

Replevin—Evidence—Question for jury.

The evidence being undisputed that the title of an engine replevied by plaintiff was in him, the court was clearly correct in leaving to the jury, as the only question for their consideration, the value of the property in controversy.

Argued October 21, 1897. Appeal, No. 43, Oct. T., 1897, by defendants, from judgment of C. P. No. 1, Phila. Co., Dec. T., 1891, No. 1296, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Affirmed.

Replevin for boiler and engine. Before BEITLER, J.

The following facts appear from the charge of the court below:

Gentlemen of the jury:—According to my views of this case there is only one thing that requires any action on your part, and that is to determine the value of this engine at the time it was claimed by the defendant. On the part of the plaintiff

there is some testimony that it was worth some $400; on the part of the last witness on the stand, that it was worth $300.

I may be wrong in the law as to this case; but if I am the court in banc will correct me, but Leader & Colt rented certain machinery embraced in the schedule attached to this lease, and amongst other machinery was this engine. This engine, it is stated, was subject to an unpaid claim of the balance of cost, $350. The lease does not say that that should be paid by Mr. Lamb. It does not say that it should be paid by Mr. Leader. But the lease does provide that the annual rental shall be $1,180, and that if the lessee pays any obligation of the lessor he shall have credit for that payment. If the lessees had shown here that they had paid $1,180 in cash and also paid this $350, or a portion of this $350 on the engine, there might have arisen a question whether that $350 ought to have been paid by Mr. Lamb to the lessees; but in the absence of any evidence as to the payment of the $1,180 the utmost the lessees have paid, if they have paid the entire $350 in cash, is simply the $350 on account of the rent if that sum ought to have been paid by Mr. Lamb.

I therefore say to you that under the law in this case your verdict must be for the plaintiff.

Verdict and judgment for plaintiff for $435.50. Defendant appealed.

Errors assigned were (1) In charging the jury to find a verdict for plaintiff. (2) In not directing the jury to find a verdict for the defendant.

John McDonald, for appellants.

J. S. Freeman, for appellee.

OPINION BY BEAVER, J., November 19, 1897:

The paper-book of the appellants violates two rules of this court. Rule 16 provides that "when the error assigned is to the charge of the court or to answers to points or to findings of fact or law, the part of the charge or the points and answers or findings referred to must be quoted totidem verbis in the assignment." The observance of this rule was all the

more important in this case for the reason that instead of printing the charge of the court immediately preceding the assignments of error, as required by Rule 26, it is printed in the appendix after the testimony. The court below charged, as a matter of law, that the plaintiff was entitled to a verdict, leaving to the jury to determine the value of the property in controversy. This is practically the only error assigned.

The appellants succeeded to the ownership of certain personal property leased by an agreement in writing by Lamb, the appellee, to Leader & Colt, to which was attached a schedule of the personal property leased, including an engine which is admittedly the property in dispute. This engine is scheduled as being "subject to a payment of a balance in cost $350.00." The only rental stipulated to be paid for the use of the articles in said schedule mentioned was $1,180. By the terms of the agreement the lessees had the privilege of discharging obligations for which the lessor was liable to an amount not exceeding $500. There is no allegation, so far as we can find in the testimony that the lessee paid any portion of the rent. The possession of the engine in controversy in this case was secured by the appellants from Leader & Colt who secured the possession thereof from the appellee by virtue of the lease above referred to. The appellants allege, however, that the engine was leased from the Campbell Printing Press Company and held by the appellee as a bailment subject to certain unpaid instalments; that the Campbell Printing Press Company replevied the engine in their possession and that they purchased it from said company. The testimony in regard to this transaction was extremely vague and unsatisfactory.

The agreement, if there were any, under which the appellee held the engine from the Campbell Printing Press Company, was not offered in evidence, nor was there any competent testimony as to the terms of the bailment, if such it was. It plainly appears by the testimony that the engine, when replevied by the Campbell Printing Press Company was never actually delivered to them, that it remained in the possession of the appellants after the replevin as it was before, and that the appellants paid the balance due upon the engine and had the action of replevin marked "discontinued." It is quite evident that the possession of and whatever title to the engine the appellants had prior to

the action of replevin was acquired through the lease between the appellee and Leader & Colt. Whatever title, therefore, the appellants secured from the Campbell Printing Press Company they were bound to hold in trust for the appellee; and, inasmuch as no rent was ever paid by Leader & Colt, as distinctly admitted by Mr. Leader in his testimony, and there was consequently money in their hands out of which the balance due the Campbell Printing Press Company could have been paid, we cannot see that the appellants had any title, either legal or equitable, to the engine which was the subject of this replevin. The view taken by the court below seems to have been correct, so far as we can gather from the facts as they appear in the testimony, and the judgment is therefore affirmed.

John M. Kennedy, Jr., v. William H. Quigg and James McLinden, Appellants.

Mortgage—Usury—Right of mortgagor to defend when he has sold property with an agreement so to do.

The act of assembly expressly gives a borrower the right to defend against a claim for interest in excess of the legal rate, and courts will not permit a creditor to defeat this right through a confusion of legal principles.

A mortgagor sold the premises subject to a mortgage covering usurious interest, covenanting with his vendee to defend against the mortgage to the extent of the usury. *Held*, that the filing by the mortgagee of a written release of the mortgagor of all personal liability and restricting the lien of the judgment and execution to the real estate bound by the mortgage will not defeat the mortgagor's right to defend nor operate in evasion of the statute.

Mortgage—Attorney's commission—Demand—Usury.

A demand before the issuance of a scire facias sur mortgage is not necessary in order to recover attorney's commissions.

The fact that a portion of the mortgage covers usurious interest does not defeat the right to recover attorney's commissions on the amount actually due. It is not unlawful to contract for or to receive more than six per cent.

Argued Oct. 13, 1897. Appeal, No. 99, Oct. T., 1897, by defendants, from judgment of C. P. No. 1, Phila. Co., June T.,

1896, No. 1347, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Reversed.

Sci. fa. sur mortgage. Motion for judgment non obstante veredicto.

Motion for judgment non obstante veredicto was made on the following point reserved:

"The court instructs the jury to find a verdict for the plaintiff for $2,231.10, subject to the point reserved, whether or not, in view of the releases filed of record, a defense can be interposed to the $600 bonus included in said verdict, the defendants having sold the properties covered by the mortgage to one John Meighan, agreeing to defend against the plaintiff's claim to the extent of said usury. If the court shall be of opinion that the sale of the property and the releases filed debars the mortgagor and terre-tenant from setting up that defense, the verdict to stand; otherwise, the verdict to be reduced to $1,200, with interest from April 4, 1894; the Court also to decide whether or not, in that event, plaintiff is entitled to a commission of five per cent on that sum, demand for the whole principal having been made, but no tender of any kind having been made to plaintiff, and to add said amount of five per cent, if legally entitled thereto."

Verdict and judgment for $2,231.10. Defendants appealed.

Error assigned was in dismissing defendant's motion for judgment on the reserved point non obstante veredicto, reciting same.

Alex. Simpson, Jr., for appellants: It is admitted that under the act of May 28, 1858, the defense of usury is personal to the borrower and he only can defend on that ground: Reap v. Battle, 155 Pa. 265; Trust Co. v. Roseberry, 81 Pa. 309.

But the facts of this case meet all the requirements laid down in these cases for the borrower sets up the defense; the consideration of the purchase was the agreement to defend; the borrower is living up to his agreement.

While the borrower remains liable on his bond or has a pecuniary interest to conserve by setting up the defense, he unquestionably can do so: Parker v. Sulouff, 94 Pa. 527; Huchenstein v. Love, 98 Pa. 518; Price's Appeal, 84 Pa. 141.

The collection fee is not chargeable in this case: Titusville Bank's Appeal, 96 Pa. 460; Lindley v. Ross, 137 Pa. 629; Wilson v. Ott, 173 Pa. 253.

William C. Ferguson, for appellee.—A terre-tenant who purchases land incumbered with a mortgage has no standing in court to defend the suit on the ground of usury: Stayton v. Riddle, 114 Pa. 464.

If the mortgagor's right to defend is limited to the one object of protecting himself in his liability on his bond, then it logically follows that if that liability be removed the right to defend ends: Reap v. Battle, 155 Pa. 265.

The fact of a vague promise to defend, which promise is kept, does not entitle the mortgagor to defend, the property having been sold: Broomell v. Anderson, 8 Atl. Rep. 764.

There can be no doubt as to the plaintiff's right to recover the attorney's commission. He is guilty of no wrongdoing: Lindley v. Ross, 137 Pa. 629; Iron Co. v. Morton, 348 Pa. 72.

OPINION BY SMITH, J., November 19, 1897:

A scire facias was issued on a mortgage which admittedly included the sum of $600, as a bonus. The defendants had conveyed the mortgaged property to John Meighan, and agreed to defend against the plaintiff's claim to the extent of the usury; but whether the conveyance was before or after the institution of this suit does not appear. The defendants filed an affidavit setting up the defense of usury, and upon this the issue was joined. On the trial the plaintiff filed a written release of the defendants from all personal liability for the debt, and restricted the lien of the judgment to be recovered, and all executions thereon, to the real estate bound by the mortgage. The court thereupon directed a verdict for the plaintiff for $2,231.10, subject to a point reserved "whether or not in view of the releases filed of record, a defense can be interposed to the $600 bonus included in the verdict, the defendants having sold the properties covered by the mortgage to one John Meighan, agreeing to defend against the plaintiff's claim to the extent of the usury. If the court shall be of opinion that the sale of the property and the releases filed debar the mortgagors and the terre-tenant from setting up that defense, the verdict to stand, otherwise the verdict to be reduced to $1,200 with interest from April 4, 1894. The court also to decide whether or not in that event plaintiff

is entitled to a commission of five per cent on that sum, demand for the whole principal having been made but no tender of any kind having been made to the plaintiff, and to add said amount of five per cent, if legally entitled thereto." A motion by defendants that judgment be entered for the plaintiff non obstante veredicto for the sum of $1,200, with interest from April 4, 1894, only, on the reserved point, was dismissed, and judgment was entered on the verdict.

Evidently the releases were filed for the purpose of precluding the defense of usury, and to evade the provisions of the act of May 28, 1858. It has been held in many cases that where a debtor has been wholly released from liability for the debt in suit, without fraud or mistake, and has no interest in the action, and will neither gain nor lose by the judgment, he cannot interpose a defense of usury, which is purely personal to himself, to the prejudice of third parties; nor can the latter do so to the prejudice of either. But the facts of this case exclude it from the doctrine of those decisions. This action is between the original parties to the mortgage, and they alone can be heard. The terre-tenant has not been joined, and could not be heard as the record stands. It is clear from the reserved question that the terre-tenant may hold the defendants to their contract notwithstanding the releases filed, and that if the judgment is allowed to stand they must reimburse him "to the extent of the usury." If the plaintiff may resort to the land for the usurious interest, the terre-tenant in turn may have recourse to the defendants for indemnity. Practically, the interest of the defendants in the question at issue has not been lessened or affected, and unless they are permitted to make defense here, their rights under the act of 1858 will be swept away, while their liability to the terre-tenant will remain.

There is no principle of law that warrants, much less demands, this result. The defendants had a lawful right to sell the land and also preserve their right to defend against the usury included in the mortgage in the manner agreed upon. Their course involves neither fraud nor deceit. Had it been a judicial sale the situation of the parties would be substantially the same; yet it will hardly be contended that by such event a debtor loses his right of defense. The act of assembly expressly gives a borrower the right to defend against a claim for interest in excess of the legal rate; or, if paid, to recover it back by action

within six months from the date of payment. Courts will not permit a creditor to defeat this right through a confusion of legal principles, in the manner attempted here. None of the cases cited on behalf of the appellee sustain his contention; they are all in harmony with the views here expressed. This feature of the case needs no further discussion.

The claim to attorney's commissions under the provisions of the mortgage requires but brief notice. According to the reserved question, a demand for the whole principal was made, but there was no tender of any sum. If a demand were necessary we are unwilling to admit that the one made in this case was insufficient because it included the usury covered by the mortgage. It is not unlawful to contract for or to receive more than six per cent. The right to do so is impliedly authorized by the act of 1858. There is then no reason why it should not be embraced in the demand. Until otherwise informed, the creditor has a right to assume that the debtor will fulfill his agreement. So far as this record shows, the first notice of the defendants' election not to pay the bonus was about two weeks after the proceedings were begun; and no tender of the sum lawfully due or of a judgment therefor, was ever made.

But this question has been settled by higher authority. In Warwick Iron Co. v. Morton, 148 Pa. 72, it was expressly held that a demand before the issuance of a scire facias sur mortgage is not necessary in order to recover attorney's commissions; and this decision was followed and the same ruling made in the later case of Walter v. Dickson, 175 Pa. 204. The case of Wilson v. Ott, 173 Pa. 253, upon which the appellant relies, is not inconsistent with those referred to; it holds that as the allowance of attorney's commissions is "within the control of the court in the exercise of its equity powers," the refusal to allow them was not error, "in view of the nature of the contest and the special circumstances of the case."

The judgment of the court of common pleas is reversed, and judgment is now entered in favor of the plaintiff for the sum of fifteen hundred sixteen dollars and eighty cents.

Principal .	$1,200.00
Commissions	60.00
Interest to date	256.80
	$1,516.80

Joseph J. Keenan v. William H. Quigg and James McLinden, trading as Quigg and McLinden, Appellants.

Judgment—Motion to strike off—Laches—Review.

Where the defendant took no appeal from a judgment and failed to proceed with a rule to strike off same for some eighteen months, such laches is manifested that the appellate court will not disturb the action of the court below in discharging a second rule to strike off the judgment and stay proceedings, taken after execution had proceeded to a venditioni exponas.

Argued Oct. 22, 1897. Appeal, No. 25, Oct. T., 1897, by defendants, from order of C. P. No. 3, Phila. Co., June T., 1894, No. 1234, discharging rule to strike judgment from record. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Affirmed.

Rule to strike off judgment.

It appears from the record that judgment was entered in the above case for want of an affidavit of defense, and damages assessed for $264.56.

The facts sufficiently appear in the opinion of the court.

The court discharged the rule to strike the judgment from the record. Defendants appealed.

Error assigned was refusal to strike judgment from the record.

M. J. O'Callaghan, for appellants.—Before the passage of the procedure act of 1887, it was held that a rule to plead, and a plea filed in response thereto, was a waiver of the right to enter judgment for want of a sufficient affidavit of defense: Johnston v. Ballentine, 1 W. N. C. 626; Fuoss v. Schleines, 15 W. N. C. 192; O'Neill v. Rupp, 22 Pa. 395.

It has been held that the new procedure act of 1887 did not change the rule of law in this particular: Bank v. Stadelman, 153 Pa. 634; Richards v. Mink, 46 L. I. 138; Bolt & Nut Works v. Schultz, 6 C. C. Rep. 346.

It may be conceded that the right to an affidavit of defense may be waived: Horner v. Horner, 145 Pa. 258; Richards v. Mink, 46 L. I. 138.

Being for irregularity apparent on the face of the proceedings it, a rule to strike off a judgment, is in the nature of a demurrer to the record, and is not confined to any particular kind of judgments, nor limited as to the time it may be taken advantage of, nor affected by matters dehors the record, except so far as defendant may have put himself in position to be estopped from making the objection: Mitchell on Motions and Rules, 75, quoted in North v. Yorke, 174 Pa. 349; Adams v. Grey, 154 Pa. 258.

The court has power to strike off a judgment for want of jurisdiction or other fatal irregularity appearing on the face of the record: France v. Ruddiman, 126 Pa. 257; North v. Yorke, 174 Pa. 349; Phila. v. Jenkins, 162 Pa. 452; Miller v. Neidzielska, 176 Pa. 409.

J. L. Long, for appellee.—As to the question of laches, cited Littster v. Littster, 151 Pa. 474.

It has never been decided that a rule to plead and a plea filed in answer thereto was a waiver of the plaintiff's right to require any sworn defense whatever: Barnitz v. Bair, 2 Chest. Co. 480; Hoffman v. Locke, 19 Pa. 57; Endlich on Aff. Def. sec. 650.

OPINION BY PORTER, J., November 19, 1897:

The record in this case discloses an anomalous method of procedure. The summons was returned served on the first Monday of August, 1894. On December 5, 1894, a plea was filed to a statement and rule to plead served on the defendants, but which statement and rule seem not to have been filed of record until January 30, 1895. On February 1, 1895, an affidavit of service of a copy of statement on November 24, 1894, was filed. On March 13, 1895, a judgment was entered for want of an affidavit of defense, notwithstanding the fact that the cause would seem to have been at issue on the plea. On April 18, 1895, a rule appears to have been entered to strike off the judgment, but was neither proceeded with nor disposed of. Nearly eighteen months thereafter, on October 14, 1896, a writ of fieri facias was issued, and subsequently, on November 13, 1896, a venditioni exponas. On November 19, 1896, a second rule was entered to strike the judgment from

the record, proceedings to stay, sur petition of one of the defendants. On January 16, 1897, the rule was discharged, and on January 25, 1897, an appeal was taken to this court from that order.

We do not find it necessary in this case to determine whether a rule to plead is, since the Procedure Act of 1887, a waiver of the right to an affidavit of defense.

The defendants took no appeal from the original judgment, and failed to proceed with the rule taken on April 18, 1895, to strike off the judgment. This was such laches on their part as to prevent their successful appeal to the court for relief. We are the more reluctant to disturb the action of the court below, in view of the fact that nowhere on the record have the defendants attempted to set up a substantial defense on the merits of the cause.

Judgment affirmed.

Mary R. Kimbrough *v.* Walter Hoffman, Superintendent, and Theodore Voorhees, Chairman of Advisory Committee, representing themselves and others who are associated together as the Philadelphia and Reading Railroad Relief Association, Appellants.

Railroad relief association—Contractual liability—Words and phrases—Connected and associated or affiliated companies.

Where the whole project and intendment of a railroad relief association is based upon the control of the business by persons who are interested in the contributions and benefits and where membership is limited to employees of railroads connected and associated with the Reading Railroad, the term "connected and associated" is to be construed as applicable to railroads so recognized by representation in the relief association: it cannot be forced by strained construction to cover companies "affiliated" with the Reading Company in a limited, special and contractual manner, the employees of which were never recognized as eligible to membership in the relief association.

Practice, C. P.—Province of court and jury—Construction of contract.

The province of the jury is to settle disputed questions of fact. If no disputed facts exist there is nothing for them to do, and it is for the court to determine the legal effect of the contract.

Argued Oct. 15, 1897. Appeal, No. 107, Oct. T., 1897, by defendants, from judgment of C. P. No. 3, Phila. Co., June T., 1896, No. 131, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit to recover benefits. Before GORDON, J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $556.50. Defendant appealed.

Errors assigned were (1) In submitting to the jury as a question of fact the construction and effect of the written regulations of the Philadelphia and Reading Railroad Relief Association. (2) In submitting to the jury as a question of fact the construction and effect of the written contract between the Atlantic City Railroad Company, the Delaware River Ferry Company and the South Jersey Railroad Company. (3) In refusing binding instructions for defendants.

John G. Lamb, for appellants.—The contracts should have been construed by the court: Palmer v. Farrell, 129 Pa. 162; Duffield v. Hue, 129 Pa. 94; Kneedler v. Goodman, 47 L. I. 4; Elliott v. Wanamaker, 9 C. C. 497; Sun Fire Office v. Ermentrout, 11 C. C. 21; Middleton v. Stone, 111 Pa. 589; Bryant v. Hagerty, 87 Pa. 256; Fisher v. Moyer, 17 W. N. C. 500; Foster v. Berg, 104 Pa. 324; Dumn v. Rothermel, 112 Pa. 272.

J. Whitaker Thompson, for appellee.—It was not error to submit to the jury the meaning of the word "affiliated" within the intention of the parties: Jones v. Kroll, 116 Pa. 85.

An ambiguity on the face of a written document is for the judge to explain, but if it arises from extrinsic evidence it must be solved by the jury: Beatty v. Ins. Co., 52 Pa. 456; Iron and Railroad Co. v. Stevens, 87 Pa. 190; Krauser v. McCurdy, 174 Pa. 174.

OPINION BY ORLADY, J., November 19, 1897:

The defendant is an association composed of the employees of the Philadelphia & Reading Railroad Company, and the employees of its affiliated, controlled and leased lines, the ob-

ject of which, "is the establishment and management of an association to be known as the 'Relief Association' for the payment of definite amounts to the contributors to the fund, who under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in the event of their death, to the relatives or other beneficiaries specified in the application of such contributors."

On July 23, 1894, the plaintiff's husband, Matthew A. Kimbrough was an employee of the Philadelphia & Reading Railroad Company, on what was known as the Reading Division of its system, and on that date he became a member of the defendant relief association. On February 2, 1895, he withdrew from service in the Philadelphia & Reading Railroad Company, and became an employee of the South Jersey Railroad Company. During the next month, and while in the service of the South Jersey Railroad Company, he became sick and went to a hospital where he remained under treatment until May 31st, when he died. On February 28, 1895, in pursuance of the regulations governing the relief association, the Philadelphia & Reading Railroad Company deducted from the wages due by it to Kimbrough for February 1st and 2d (which he had not demanded on retirement from service), his fixed contribution for the relief association for the month of March. The association did not then know that Kimbrough had resigned from the service of the railroad company on February 2d, and on being informed of that fact during the month of March, dropped his name from the rolls of the association, and issued a refunding check for the amount of his contribution for the month of March, which was not delivered to him on account of not knowing his whereabouts.

This suit is brought by the beneficiary, named in his application, to recover from the association the amount to which she would be entitled had he remained in his original employment of the Philadelphia & Reading Railroad Company.

The learned trial judge left it to the jury to find as a question of fact whether the South Jersey Railroad was affiliated with the Philadelphia & Reading Railroad Company within the meaning of the regulations of the relief association. The facts were not disputed. The interpretation of the regulations of the association and the tripartite contract between the Atlantic City

Railroad Company, The Delaware River Ferry Company and Logan M. Bullit, the performance of whose covenants was assumed by the South Jersey Railroad Company, and to determine whether the last named company was affiliated with the Philadelphia & Reading Railroad Company were questions of law for the court, and the construction of these writings must be made in the light of the plaintiff's claim as the beneficiary of her husband.

Her right to recover for death benefits can rise no higher than his right, if living, to recover for disablement benefits.

It was proved, and not disputed at the trial, that none of the employees of the South Jersey Railroad had ever become members of this relief association; that when an employee ceased to be in the employ of the railroads enumerated in the regulations of the relief association, and became an employee of the South Jersey Railroad, a transfer certificate continuing his membership in the association was not issued to him; that the South Jersey Railroad was not named in the list of companies entitled to representation on the advisory committee of the association, though the edition of the regulations in evidence was issued the year following the tripartite agreement.

In the application for membership in the association, which was signed by the plaintiff's husband, it is provided, inter alia, "I do hereby further acknowledge, consent and agree that . . . . my resignation from the service of the said company (Philadelphia & Reading) my employer, or my being relieved from employment and pay therein at the pleasure of the company, or its proper officers, shall forfeit my membership in the aforesaid relief association, and all benefits, rights or equities arising therefrom. . . .

"The responsibility of the relief association to any member shall end when he ceases to be employed by the company, excepting for benefits to the payment of which he shall have become previously entitled by reason of accident or sickness occurring while in the service."

By paragraph 14, of the regulations it is provided: "In referring to the employee of the company, the expressions 'service' and 'in the service,' will refer to employment upon or in connection with any of the railroads or works, the employees of which shall be admitted to membership in this relief association,

and the service of any employee shall be considered as 'continuous' from the date from which he has been continuously employed, without interruption, upon or in connection with either of such railroads or works, or two or more of them successively."

It was admitted by the defendant that the majority of the stock of the Atlantic City Railroad Company and of the Delaware River Ferry Company was owned by the Philadelphia & Reading Railroad Company, and that these companies were controlled lines within the meaning of the regulations of the relief association. It is evident, from the regulations of this association, that only persons entitled to membership therein as contributing members should be entitled to receive the benefits provided for, and that the membership should be limited to employees of railroads connected and associated with the Philadelphia & Reading Railroad Company, so as to make each individual vote potential in the selection of the officers who would direct the affairs of the association.

The whole project is based upon the control of the business by persons who are interested in the contributions and benefits.

This is not a controversy between the railroad companies, and its solution depends on the status of Kimbrough at the time he became an employee of the South Jersey Railroad, and on his relation to the relief association at that time.

He ceased to be an employee of the Philadelphia & Reading Railroad Company on February 2, 1895, when by paragraph 56 of the regulations the responsibility of the association ended as to him, if he did not go into the employ of an affiliated company. Under the undisputed evidence, the court should have held that the South Jersey Railroad Company was not affiliated with the Philadelphia and Reading within the meaning of the regulations of the relief association. If the South Jersey Railroad is affiliated with the Philadelphia & Reading Railroad, within the meaning of the regulations of this association, by reason of the tripartite agreement, another railroad having similar relations with the South Jersey Railroad might well claim to be affiliated with the Philadelphia & Reading Railroad under the reasons urged by the appellee. It may be conceded that the South Jersey Railroad is affiliated with the Philadelphia & Reading Railroad in a limited, special and contractual manner, but the ingenious argument of the appellee puts upon the

word a strained and narrow construction, repugnant to and inconsistent with the purpose and spirit of the regulations of the relief association.

The erroneous detention of the contribution for March out of the wages due for February 1st and 2d, does not change the result. This was done without knowledge of the facts of the case, as Kimbrough failed to give the required notice of withdrawal, and failed to surrender his certificate. By leaving in the hands of his employer the two days' wages, he could not continue in force the contract he had voluntarily canceled.

Taken as a whole, in the light of the admitted facts and circumstances under which Kimbrough became a member of the association, the construction of his contract was a question of law with which the jury had nothing to do. The object of interpretation and construction is, if there be any uncertainty as to the meaning of a contract, to find the intention of the parties. If the contract is clear and unambiguous, there is no room for construction. The parties, in the absence of fraud, accident or mistake, are bound according to the plain words of the contract: Shafer v. Senseman, 125 Pa. 310.

The province of the jury is to settle disputed questions of fact. If no disputed facts exist there is nothing for them to do, and it is for the court to determine the legal effect of the contract: Elliott v. Wannamaker, 155 Pa. 67; Baranowski v. Aid Society, 3 Pa. Superior Ct. 367.

The assignments of error are sustained, and the judgment is reversed.

M. C. Shanahan *v.* The Agricultural Insurance Company, Appellant. M. C. Shanahan *v.* The London & Lancashire Fire Insurance Company, Appellant.

Insurance—Clerical error in description—Question for jury.

Where by a clerical error of the agent of an insurance company the description of the property insured designated one stable instead of two, and where it was the intention of the insured and insurer to cover two stables instead of one, such clerical error will not enable the defendant company to avoid the policy to the injury of the insured. The question as

to how the error arose was one purely of fact and was properly for the jury, the evidence being ample to warrant a verdict for the plaintiff.

Insurance—Error in policy—Act of agent—Laches.

An erroneous description having been inserted in a policy by the act of the agent of the insurance company, the defendant cannot be released from its contract because the plaintiff, acting in good faith, accepted without examination the policy written by its agent.

Practice, Superior Court—Review—Refusal of new trial.

The appellate court will not, except in clear cases of abuse of discretion, review the discretion of the trial court in refusing a new trial.

Practice, Superior Court—Appeals—Defective assignment.

Assignments are defective under Rule XVII., which allege error in admitting or refusing evidence but which fail to quote the full substance of the bill of exceptions or to copy the bill in immediate connection with the assignment.

Submitted Oct. 7, 1897. Appeals, Nos. 61 and 62, Oct. T., 1897, by defendants from judgments of C. P. No. 1, Phila. Co., June T., 1896, Nos. 234 and 235, on verdicts for plaintiffs. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit on policy of insurance.

It appears from the record that these suits were brought to recover from the defendant companies the sum of $750 each, claimed to be the value of certain stable buildings which were destroyed by fire owned by the plaintiff and, as contended by him, covered by certain policies of insurance issued to him by the defendant insurance companies.

The defendant denied the liability because the buildings destroyed were not the one described in the policy.

Verdict and judgment for plaintiff in each case in the sum of $792.15. Defendants appealed.

Errors assigned were, (1) In admitting the testimony of M. C. Shanahan and Joseph O'Kane, concerning the alleged mistake of the latter in preparing the form of insurance attached to the policy upon which suit is brought in this case, and to which exceptions were taken at the time of the trial by the defendant. (2) In refusing to allow the defendant to prove, by Milton A. Nobles, that as district agent of the Agricultural Insurance Company, the said company would not have issued

a policy in the form such as the one offered in evidence here had the word therein been "buildings" instead of "building:" and that also, as a general insurance expert, that no insurance company in the United States would issue such a policy, nor, in his experience, has he ever known such a policy being issued by any insurance company. (3) In making answer to the second point submitted by the defendants. Said point and answer are as follows: "In undertaking to determine the loss which the plaintiff in this case has sustained, the jury must take into consideration the fact that the conditions existing at the time of the fire had most materially depreciated the selling value or renting value of this stable building, and the amount, if anything, which the plaintiff, under these circumstances, would be entitled to recover, must be found by deducting the market value of the land itself from the actual market value of the building and land at the time of the fire." "As to that point, gentlemen, I want to say that the effect of the testimony is not for me to say; it is for you to consider. Considering the circumstances which were alluded to in that point, what do you believe was the money value of the building under all the circumstances of the situation and surroundings at the time of the fire? And in that connection, I call your attention to the testimony of the witnesses as to the value. The last witness said he put the value at over $1,600, and my memory of it is that he said that that building was worth that at the time of the fire, and there is no contradiction of whatever he did say on the subject. Whenever there is a difference of opinion as to what the witness says and what a judge gives you, take your own memory and not mine." (4) In refusing to affirm the third point submitted by the defendants, which was as follows: "The policies of insurance of the defendant companies in this case did not cover the stable building which was destroyed by the fire, and your verdict, therefore, must be for the defendants." (5) In refusing to affirm the fourth point submitted by the defendants, which was as follows: "Under all the circumstances, the verdict in these cases must be for the defendants." (6) In refusing to grant a new trial to the defendants, upon the ground of after-discovered testimony submitted to them. (7) In entering judgments upon the verdicts rendered in these cases.

F. R. Shattuck, for appellants.—The point here made, is, that in the present cases, the effort is to make a policy of insurance cover a building not described or referred to in any way in the policies, so that no notice or knowledge concerning the character thereof is brought home to the companies; and this is going further and beyond any decision heretofore rendered. To allow this to be done would be a practice of the most dangerous kind and character.

In the case of a building which cannot be said to have a market value, the amount which the insured is entitled to recover, in case of a loss, is not what it would cost to rebuild, but what is shown to have been the money value of the building under all of the circumstances of its situation and surroundings, at the time of the fire: Insurance Co. v. Creaton, 98 Pa. 451; Brinley v. Insurance Co., 11 Metc. (Mass.) 195; Ætna Insurance Co. v. Johnson, 11 Bush (Ky.), 586.

The after-discovered testimony submitted to the court certainly required that the defendants should have been given the benefit of a new trial.

Even where the credibility of the witness to testimony discovered after the trial is strongly attacked, nevertheless a new trial should be allowed, as the credibility of the witness is entirely for the jury: Green v. Traction Co., 5 Dist. Reps. 284.

Jacob Singer and *Emanuel Furth*, for appellee.—As to the construction of the policy of insurance, cited Machine Co. v. Ins. Co., 173 Pa. 53; Dowling v. Ins. Co., 168 Pa. 234; Davidson v. Assurance Co., 176 Pa. 525.

OPINION BY ORLADY, J., November 19, 1897:

These two cases were tried together, and one appeal is taken by consent. The plaintiff brought suit on a policy of insurance against each of these defendants to recover from each the sum of $750. The policies issued were of the standard form and described the property as follows: "$1,500 on the frame stable building and additions thereto, on the north side of Jersey avenue near Charles street, Gloucester City, N. J., other insurance permitted without notice until required." The plaintiff was the owner of two stables, of equal value, which were used for a common purpose and which were separated from each other by a distance of ten or twelve feet.

An application was made by the plaintiff to the local agent of the defendant companies for an insurance of $3,000 on the two stable buildings. The local agent examined the properties, approved the risk and issued a policy of insurance for $1,500 in each of the defendant companies, and in both the property was described as before quoted. One of the stables was totally destroyed by fire, and when suit was brought to recover for the loss, each company made the same defense: "That said stable building so insured is still standing at said location, and has not been in any way or manner injured or damaged by any fire whatever; that the fire referred to in said plaintiff's statement was in another building altogether than the one insured under said policy, which other building was in no way or manner connected with the building insured, and was not an addition thereto, but an entire, separate and distinct building, not situated on the north side of New Jersey Avenue near Charles street, Gloucester City, N. J., but was situated in the rear of the building insured under said policy at a considerable distance therefrom."

The plaintiff contended that the policies were intended to cover the two stables and in this he was supported on the trial by the direct testimony of the local agent of the defendant companies, and this fact was found by the jury in favor of the plaintiff. The description of the property was made on typewritten slips, in the office of the local agent, and these slips were signed by him in the name of his firm, and then affixed to the printed policy in a blank space provided for that use. The verdict determines as a fact that in the typewritten description the word "building" instead of "buildings" was erroneously used, and the whole controversy arises from this alleged error.

The first and second assignments of error are not considered for the reason that they are framed in disregard of Rule 17 of this court: Denniston v. Phila. Co., 1 Pa. Superior Ct. 599; Com. v. Smith, 2 Pa. Superior Ct. 474, and counsel violate this rule at their peril in this as the similar rule in the Supreme Court: Raymond v. Schoonover, 181 Pa. 352. The case was fairly presented to the jury by the learned trial judge: "If you believe that these policies were made out in the shape that they are, by accident and oversight, that it was the intention of the person that applied, and the companies who issued these policies, to cover the two stables instead of one—then the verdict ought to be for the plaintiff."

It was purely a question of fact, and there was ample evidence to warrant the verdict. In Eilenberger v. Protective Mutual Fire Ins. Co., 89 Pa. 464, it was held that the fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by an insurance company, will not enable the latter to avoid a policy to the injury of the insured, who innocently became a party to the contract, and in Insurance Co. v. Cusick, 109 Pa. 157, in referring to the Eilenberger Case, it is said: "In the case cited the agent committed a fraud by setting down false answers in the application; in the case in hand the agent committed a blunder by incorrectly describing the property insured. In neither was the act complained of in any proper sense the act of the insured; in neither can the company be permitted to cast upon the insured the consequences of the crime or blunder of its own agent. The cases cannot be distinguished in principle." The case now before us is much milder in its facts than either of the two first cited, as the insured and agent of the companies agree, that both stables were intended by them to be covered by the insurance, and that by the clerical error of a typewriter a letter was dropped so as to make the description refer to a building instead of buildings.

There was no written application in this case; the local agent was familiar with the premises and intended to have the two policies cover just what the insured desired—both stables. The erroneous description was the act of the agent alone, in the face of light and knowledge, and it was unknown to the insured until after the loss occurred. The defendant cannot be released from its contract because the plaintiff, acting in good faith, accepted without examination the policy written by its agent: Dowling v. Merchants Ins. Co., 168 Pa. 234.

After the verdict was rendered, the defendant submitted some ex parte affidavits as ground for a new trial, but the court below refused to be moved by them. Upon an examination of these affidavits, and applying them to the proof adduced on the trial we do not feel warranted in interfering with the decree entered; as, except in clear cases of abuse of discretion, refusal of the court below to grant a new trial is not assignable for error, and there is nothing in this case to make it an exception to the rule: De Grote v. De Grote, 175 Pa. 50.

It does not necessarily follow that the perjury of a witness

can be made a ground for equitable interference even though not discovered until after the trial: Ins. Co. v. Erb, 2 Chest. Co. 537; and whether or not this should be done, is largely a matter of discretion with the trial judge.

The assignments of error are each overruled and the judgment is affirmed.

Haverford College v. James M. Rhoads and John Lynch, Supervisors of Roads and Collectors of Road Taxes, for the Township of Haverford, and the Township of Haverford, Appellants.

Charity—College, when a public charity.

A college is a charity if it is conducted in a way beneficial to the public at large. Whether a particular college is a public charity is a question of fact, and the test is that it is not confined to privileged individuals but is open to the indefinite public.

Public charity—Revenue from beneficiaries does not destroy status.

There may be a revenue, arising in the operation of a charity, derived from its beneficiaries, to aid in its maintenance, without removing its status as a public charity; but this revenue must not exceed its expenses.

Public charity—Taxation—Haverford College nonsectarian.

Haverford College, being a college open to all persons, educationally qualified, upon the same terms, its funds not being diverted to the education of the children of any sect in preference to others, is a public charity and as such is exempt from taxation.

The fact that its board of managers is controlled by members of the Society of Friends is immaterial, as is also the fact that certain free scholarships are restricted to Friends, since others are free to all who apply.

Argued Nov. 17, 1897. Appeal, No. 73, Oct. T., 1897, by defendants, from decree of C. P. Delaware Co., June T., 1898, No. 2, in equity, restraining the collection of road taxes assessed and levied against the corporation plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Injunction to restrain the collection of $405 road taxes assessed for the year 1892 on the college buildings and about fifty acres of ground. Before CLAYTON, P. J.

The bill claimed that the assessment was illegal "because Haverford College, the plaintiff, is an institution of learning founded, endowed and maintained by private charity, within the act of assembly approved the 14th day of May, 1874, and is therefore, a purely public charity within the meaning of said act and of the first section, Art. IX. of the constitution of Penna."

After answer filed an injunction was awarded on May 1, 1893, which was made perpetual by decree filed April 5, 1897, after reference to a master.

Other facts sufficiently appear from the report of the master, which is as follows.

FINDINGS OF FACT.

The master appointed by the said court in the above matter, as appears by the certified copy of his appointment attached hereto, from the testimony submitted by the examiner in the above stated cause, finds the following facts:

1. That the "Haverford School Association" was duly incorporated by an Act of the General Assembly approved April 4, 1833, P. L. 131, having a capital stock of 600 shares of $100 each, for the purpose of establishing a seminary in which young men should be instructed in the liberal arts and sciences, which corporation it was provided should have for its officers, a secretary, treasurer and twenty-four managers, to be chosen by ballot from among its members; by a supplement to said act approved January 25, 1835, the said corporation was authorized to increase its capital stock to a sum not exceeding $100,000.

2. That the said association became possessed of a tract of land containing about two hundred acres, situate mainly in the township of Haverford and county of Delaware aforesaid, upon a part of which, situate in the township of Haverford, containing about fifty acres, the founders erected a large edifice and other buildings, and conducted a school therein for many years in pursuance of the objects for which it was established. Upon the remaining part of said land they conducted farming to assist in maintaining said school.

3. That the general assembly, by Act of March 15, 1856, P. L. 123, enacted "that the Corporation now known by the name, style and title of Haverford School Association, be authorized

to establish and maintain a college for the education of youth and other persons in the various branches of science, literature and arts.

"And the Board of Managers of said Association shall have power to confer such degrees in the arts and sciences upon the students of the College and others, when by their proficiency in learning they shall be entitled thereto, as are conferred in other colleges and universities in the United States."

4. That the said corporation thereupon established a college, and has since conducted and maintained the same in the buildings and upon the premises in and upon which said school had been theretofore maintained, to wit:—The aforesaid tract of fifty acres, which tract, with the said buildings, is necessary for the occupancy and enjoyment of the said college.

5. That the said court of common pleas of said county, on the 6th day of December, 1875, decreed an amendment to the charter of said corporation by which the title of said corporation was changed from "Haverford School Association," to "The Corporation of Haverford College," and by a further amendment decreed by said court on September 19, 1878, it was provided that "The representation and ownership of the property and franchises of 'The Corporation of Haverford College,' by means of a capital stock divided into shares, is hereby terminated, but each of the present shareholders shall remain a member of the Corporation," and it was further provided that "The Corporation shall have power to enact by-laws, providing for the election of new members and prescribing their qualifications." By a further amendment decreed by the said court on the 23d day of June, 1886, it was provided inter alia that the corporation might take and hold for the purposes of its incorporation, such amount of personal estate as might be bequeathed or given to it from time to time, and that no estate of the corporation, real or personal, should ever be divided among the members thereof.

6. That a large proportion of the original certificates of stock contained a proviso that no profits should ever be divided on the stock. Indeed the testimony of Mr. Hartshorne would tend to show that all the certificates were so framed, but this is not very material now, when we consider the fact that the stock has been abolished by the consent of all the stockholders. The

master, however, finds as a fact that the college was founded by the voluntary contributions of persons desirous of promoting its objects.

From the report of the examiner the master has thought it well at this stage of his findings to give a brief resumé of the contributions for the founding and maintenance of the college, including those by the state of Pennsylvania referred to by Mr. Vaux and a statement of its present endowment about $250,000.

The said college was founded by the voluntary contributions of people interested in the cause of education and desirous of promoting its objects. Since the time of the founding and during the history of the institution, large sums of money have been contributed from time to time for relieving the deficiency in its income. In the year 1840, one fund of $30,000 was contributed to pay off the debt of the corporation, and in 1845, owing to the pressure of financial difficulty, the college was closed and was not reopened until 1847, when an additional sum of $50,000 was contributed as a permanent endowment fund, whereby it was able to recommence operations. This fund has been increased by contributions and legacies to $100,000, and is constantly being drawn upon to meet the deficiences in the ordinary income of the institution. In the year 1873, the sum of $18,000 was raised for the purpose of paying off accumulated deficiencies, and quite a number of smaller subscriptions have been made at different times for the same purpose. Barclay Hall, a building erected at a cost of $80,000 for the purpose of providing dormitories and study rooms for the students in 1876, was built almost entirely by subscriptions, as the sum of $73,000 was donated for that purpose.

During the three years prior to 1884, a subscription of $8,000 per year was made and paid by friends of the college for the purpose of increasing the efficiency of the college, to meet the deficiency in the income, and to reduce the debt of the institution; and in that year a sum of $50,000 was subscribed and nearly all of it paid as a further contribution to liquidate existing debt, caused by deficiencies in the income of the college, and prior to 1894, five friends agreed each to give $3,000 a year for five years, to apply, first, to all the scholarships that were necessary, and second, to apply to other current expenses.

The master also finds as a fact that that proportion of the 200 acres devoted to farming has been run at a profit ever since the college took charge of it itself, about eight years ago, and the profit is credited to the farm account and to the general expenses of the year. And notwithstanding this, and notwithstanding the contributions of its friends, by which the college has been at times relieved from debt, the results of the operations of the college have constantly been on the wrong side of the ledger, and that at the present time the debt is upwards of $64,000, of which $36,000 was incurred in operating the college. The loss in operating the college last year was $12,000, and the cost of each student was $670, the regular charge being $500.

7. The master also finds that the allegations of the seventh paragraph of the plaintiff's bill are facts, substantially as alleged. The college is open to the admission of all persons educationally qualified upon the same terms, and the funds of the corporation do not go to the education of the children of Friends or of any other sect in preference to others. The testimony upon this point, which is uncontradicted, is even more emphatic than the bill.

The objects of the institution are very clearly set forth in the act of assembly creating the "Haverford School Association," "approved April 4, 1833, and the supplement thereto, approved March 15, 1856," and are "For the education of youth and other persons in the various branches of science, literature and the arts," and for the purpose of conferring "Such degrees in arts and sciences upon the students of the college and others, when by their proficiency in learning they shall be entitled thereto, as are conferred in other colleges and universities in the United States," and the practice of the college in carrying out these objects is clearly set forth in the forcible and intelligent testimony of Mr. Asa S. Wing. There can be no doubt, and the master accordingly finds as a fact, that the fifty acres of land in question are absolutely necessary for the proper operation of the college. In 1884, when Mr. Wing became treasurer of the institution, there was a debt of about $30,000 or $40,000. Just before that time a subscription had been raised amounting to $50,000, which enabled the college to cancel its debt, so that at the close of the year 1887, the managers re-

ported the college free from debt. Since that time, notwithstanding large contributions in each year to meet current expenses, etc., the debt has yearly increased, until, at the close of the fiscal year in 1893, the debt was reported at $64,000; $36,000 of this had been incurred for running expenses of the college over and above current receipts.

Seventeen thousand dollars of it was for the cost of the double dwelling in Montgomery county. Twenty-five hundred dollars of it was for stock on farm, and about $9,000 of it for the purchase of two houses in Delaware county, occupied by Professors Crew and Leavenworth on the college property, and which the college was bound to buy from them on the termination of their services for the college. The present number of scholarships is probably about half of the whole attendance of the college, either whole or partial scholarships. The average number of scholars is between ninety and one hundred.

These scholarships are paid for from the following sources:

First: From the income of the I. V. Williamson fund; second, from the income of the Thomas P. Cope fund; third, from the income of the Edward Yarnall fund; fourth, from the income of the Richard T. Jones fund; and fifth, from the contributions made by friends of the college from year to year. The total amount credited for scholarships during the last nine years has been about $73,000. That is, the student is charged with the full price for board and tuition if he lives in the college, or for tuition only if he lives at his own home, and he is credited with whatever allowance is arranged for with him by the president of the college and the committee on scholarships, which arrangement is made before the beginning of the college term, and he finds the balance if there is any balance. Of this $73,000 about $32,000 has been from the income of the funds of the college, and the balance from donations especially for that purpose.

Some years ago the board of managers passed a minute directing that $1,000 per year should be appropriated from the income of the general or endowment fund of the college for scholarship purposes, and that has been done ever since, and the amount is included in the above $32,000. The only distinction as to terms is that the scholarship student under the I. V. Williamson fund is charged $300 per year instead of $500 per year, and in the

case of the Richard T. Jones fund, which amounts to only $5,000, the board passed a minute on receipt of this fund agreeing to give a full scholarship each year for the income of this fund whatever it might be.

8. The master also finds that the allegations of the eighth paragraph of the plaintiff's bill are facts, with the additional fact that the houses of the professors which are located on the fifty acres are separately assessed and taxed, and no exemption is asked as to them; the premises to which exemption is asked comprises the residue of the fifty acres, all of which is in the immediate use of the college, for its buildings or recreation grounds, and is reasonably necessary for that purpose. The buildings consist of the original college known as Founders' Hall, used for lecture and class rooms and laboratory, and also for dining-room, kitchen, college offices and quarters for the help, with the annex containing other of the laboratories and the gymnasium; Barclay Hall, used for dormitories and study rooms; Chase Hall, used for class rooms; Alumni Hall and Library, a large house used as a residence for students, two observatories, a machine shop, laundry, pumping station, ice house, cricket shed and some outbuildings.

SUPPLEMENTARY FINDINGS OF FACT.

9. In addition to the facts previously found, the master finds it to be a fact that the services of all the members of the board of corporators, as well as those of the board of managers, are rendered gratuitously to the college, and that none of the officers of either board receive any compensation for their services.

In accordance with the foregoing facts, and after having examined carefully all the cases cited by counsel on either side, the master concludes as follows:

Previous to the adoption of the constitution of 1874, all exemptions from taxation were made by means of special act of the general assembly; but that great charter restricted the power of the legislature in this respect, and provided (art. 9, sec. 1) that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places

of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

And in accordance therewith, the legislature enacted, Act of May 14, 1874, sec. 1, P. L. 158, inter alia, that "all hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed and maintained by public or private charity, be and they are hereby exempted from all and every county, city, borough, bounty, road, school and poor tax."

Upon this legislation must the case be decided. To do so it will be necessary to discuss, first, Is the plaintiff within the act of 1874; that is, a college, founded, endowed and maintained by public or private charity?

It was founded by subscriptions to capital stock which contained a proviso that no profits should ever be divided on the stock. In other words, the subscriptions were gifts of that much money to the corporation. This conclusion is made stronger by the fact that all the certificates of stock have been rendered up to the college, and all stock has been abolished by the consent of all the stockholders without any return for the same. We have found it to be a fact that it was founded by the voluntary contributions of persons desirous of promoting its objects, which objects were stated in the charter, "to establish and maintain a college for the education of youth and other persons in the various branches of science, literature and the arts." It has been heavily endowed from time to time by contributions of money from the state as well as from private donors, gifts of buildings, etc., and has been maintained by the income from these gifts, by large additional charitable gifts from time to time, by a profit from the farm it possesses and operates as a part of its plant, and by a low charge for the tuition and boarding of some of its beneficiaries. As the latter two items would not be sufficient to maintain the college at the present low charge for tuition, it therefore complies with the terms and meaning of the act.

It remains to be seen then, whether such a college is purely a public charity, and falls within the class of institutions the legislature is allowed to exempt by the constitution.

That a college, an institution of learning, is a charity, has

long been decided, if it is conducted in a way beneficial to the public at large. The education of youth and the support of schools has been recognized as a charitable use since before the statute of 43 Elizabeth, and the doctrine has been uniformly held by our courts: Episcopal Academy v. Philadelphia, 150 Pa. 565.

At this institution, by means of charitable gifts to it, education has been furnished at rates considerably below the cost to the college and far lower than was possible without such gifts, while nearly one half of the students, the more needy ones, were aided by means of scholarships, or credits of money, and several received tuition and board entirely without cost. That such a college is a charity has been frequently decided: Lafayette Col. v. Co. of Northampton, 128 Pa. 132.

Is it a public charity? The solution of this question is one of fact, and the way has been made clear to a correct interpretation of the facts by the able opinion of Judge MITCHELL, then of the lower court, but now of the Supreme Bench, which was approved by the Supreme Court in Donohugh's Appeal, 86 Pa. 306.

"The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite or unrestricted quality that give it its 'public character.' The smallest street in the smallest village is a public highway of the commonwealth, and none the less so because a vast majority of the citizens will never use it. It is enough that they may do so if they choose. So there is no charity conceivable which will not, in its practical operation, exclude a large part of mankind, and there are few which do not do so in express terms, or by the restrictive force of the description of the persons for whose benefit they are intended."

As it is the right to maintain a bar across it which makes a road private, so it is the restrictions which are placed upon the beneficiaries of the charity which makes it private. In all practical charities there must be some restrictions, as to whom shall be benefited; the courts have told us which restrictions are permissible, and which constitute the bar across the road.

Perhaps in the Burd Orphan Asylum v. The Borough of Upper Darby, a divided court, when it reversed itself on a rehearing of the case, went the farthest in its dictum that "A

home for the support of poor widows is a public charity; why should not a home for the support of poor Episcopalians be?" "The legal effect is the same whether the words used for the purpose of defining the beneficiaries of the donor's bounty be seamen, Episcopalians, blind persons or Catholics," etc. But in Philadelphia v. The Masonic Home, 160 Pa. 572, Judge DEAN discovers the true reasoning which distinguishes a public from a private charity. "As long as the classification is determined by some distinction which involuntarily affects or may affect any of the people, although only a small number be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which does not concern the public at large." And his able opinion further shows that the restriction must be exclusive.

For he approves of the finding in the Burd Orphan Asylum case, although he disapproves some of the dicta, including that quoted; and the facts in that case show that the charity was limited to female orphans of a certain age, baptized into the Episcopal church, residing in Pennsylvania, after whom, until the capacity of the institution was reached, all other female orphans of that age might be admitted, the orphans of Episcopal clergymen being always preferred. In other words, the asylum was public because the general public was not excluded, but might be benefited by it, while in the case of the Masonic Home, under discussion, every one not a Mason was excluded absolutely.

In Episcopal Academy v. Philadelphia, 150 Pa. 565, the facts show a purely donominational school, under the control of the Episcopal church. Children of other denominations were not excluded by the charter, rules or practice of the school, although they were very evidently not preferred, for out of sixteen free scholars a preference was given to the number of ten, and the remainder were selected from nominations invited from the various Episcopal congregations in the city. But it was held to be a public charity because others than Episcopalians might be and were admitted.

The facts in the present case show that the plaintiff admits to its benefits all persons educationally qualified upon the same terms; that there are no restrictions, no bars across the road in

either its charter or practice, and that the funds of the institution do not go to the education of Friends, or any other sect in preference to others. That while some of the free scholarships are restricted to Friends, others are free to all who apply. The mere fact that many of its patrons and donors are Friends has no bearing on the case, provided that its objects are charitable; as it is the object accomplished, not the motive, that insures its public charity: Fire Insurance Patrol v. Boyd, 120 Pa. 624.

From these facts and the law in the cases cited, the master concludes that it is a public charity. It remains to be seen if it further complies with the provisions of the constitution, in that it is purely public charity; and Judge MITCHELL in Donohugh's Appeal, gives us the test. "Are the objects of the institution entirely for the accomplishment of the public purpose, or is there some admixture of private or individual gain?"

By the terms of the plaintiff's charter as amended, the ownership of its property is in the corporation for the purposes of its incorporation, and no part of that property can ever be divided among its members. Its members have no individual interest, for the capital is not divided into shares of stock.

And the officers of the corporation serve without remuneration; there can be no taint of private gain here. In its operation, however, a small fee is charged some of its students, which fee is shown to be less than the actual cost to the college notwithstanding its large endowments of real and personal property, and this is applied to defraying its expenses. But it has been decided in many cases that there may be a revenue arising in the operation of a charity, from its beneficiaries, to aid in its maintenance, without removing its status as a purely public charity; this revenue must not, however, exceed the expenses, and in our case it falls far short of equaling them: Philadelphia v. Woman's Christian Asso., 125 Pa. 572; Penna. Hospital v. Delaware Co., 169 Pa. 305; Lafayette College v. Co. of Northampton, supra; Episcopal Academy v. Philadelphia, supra.

There is no element of individual or corporate gain, and the entire benefit goes to the public. It is contended that there is nothing to compel the corporation to maintain free scholarships. But under the terms of the trusts by which the money is held, free scholarships are compulsory. That some are restricted to Friends does not make it any the less a public charity if from

others the public are not excluded, but may and do receive the benefits: Burd Orphan Asylum, supra.

It is true that there is nothing in the charter compelling the admission of all comers, although should it refuse it would fail in its express object, as stated in the charter to "furnish instruction to young men." There is surely nothing prohibiting it, and it is the prohibitory clause, the bar across the road, which makes a private charity. All persons educationally qualified may make use of the benefits the college offers. It is in theory and practice purely public charity, founded, endowed and maintained by both public and private charity, and as such the master concludes that it is entitled to the exemption asked.

The following exceptions were taken to the report of the master: 1. The learned master erred in his finding of facts on the seventh paragraph of the plaintiff's bill. 2. The learned master erred in his conclusion of law that the corporation plaintiff is a purely public charity. 3. The learned master erred in his conclusion of law that the corporation plaintiff is entitled to exemption from taxation. And were dismissed in the following opinion by CLAYTON, P. J.

December 7, 1896. The Court. [Under the ruling of the Supreme Court in the cases cited by the master, it is difficult to see how he could arrive at any other conclusion than the one adopted by him. Whatever my own personal judgment may be, as expressed in similar cases, we must obey the superior judgment of our court of last resort, which seems to hold such institutions of learning, as the evidence in this case shows the Haverford College to be, as free from taxation.

The exceptions to the report of the master are, therefore, dismissed and the report confirmed. Let a decree be drawn by counsel and be submitted sec. reg.] [4]

DECREE.

[Now, April 5, 1897, this cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the injunction formerly granted in this cause be made perpetual, and it is further ordered that the said defendants pay the costs of suit.] [5]

Defendants appealed.

Errors assigned were (1–3) In overruling defendant's exceptions, reciting same. (4) In holding the corporation plaintiff free from taxation in the opinion filed, reciting same. (5) In making the decree perpetual as to the injunction, reciting same.

E. H. Hall, with him *T. Speer Dickson*, for appellants.—Instead of Haverford College being in the line of cases which are relied upon by the master and affirmed by the court, it is respectfully submitted that it should be decided by Miller's Appeal, 10 W. N. C. 168.

Upon the hearing it did not appear that the real estate taxed was stamped with any public charity, nor that the regulations might not be changed into a source of profit; it was held to be taxable: Thiel College v. Mercer Co., 101 Pa. 530.

The charter of this college enables it to receive charities, but imposes no liability on it to bestow any on the public.

The Episcopal Academy case would hardly be decided as it was, with the Supreme Court constituted as it now is, and with the same view as to what constitutes a public charity as was laid down in the case of Phila. v. Masonic Home, 160 Pa. 572.

John G. Johnson and *A. Lewis Smith*, for appellee.—As conceded by the argument of the appellants in this case, the question for consideration is a narrow one. The very exhaustive report of the master would seem to leave no margin to distinguish the case of the appellee from those in which the Supreme Court has sustained a claim for exemption.

The assertion that the plaintiff corporation is not subject to visitation is made in defiance of elementary principles. Since the case of Philips v. Bury, 1 Ld. Raymond, 5, this subject has been well understood. "To eleemosynary corporations a visitorial power is attached as a necessary incident:" 2 Kent's Com. 300. This power always rests somewhere. If in trustees, they in England are in turn subject to the "general superintending power of the court of chancery:" 2 Kent's Com. 303, 304. In Pennsylvania, since the Act of June 16, 1836, section 13 P. L. 784, the courts of common pleas have the jurisdiction and powers of a court of chancery "in the control, removal and dis-

charge of trustees, and the appointment of trustees, and the settlement of their accounts" and in "the supervision and control of all corporations other than those of a municipal character." It has been held that this supervision and control not only extend to all corporations other than those of a municipal character, but that under this section "the equity powers of the court, though contracted as to individuals, are general and unlimited over corporations, and are to be exercised in the ordinary mode of a court of chancery:" Sarver's Appeal, 81* Pa. 183. This principle has been asserted in many cases since. See Girard v. Philadelphia, 7 Wallace, 1.

OPINION BY PORTER, J., December 13, 1897:

This is an appeal by the township of Haverford from the decree of the court of common pleas of Delaware county, restraining the collection of road taxes, assessed and levied against the plaintiff corporation. The cause was referred to a master whose report the court below adopted without supplemental opinion. Little can be added by us to the report, which is comprehensive and well considered. Some of the findings of fact have been challenged, but an examination of the testimony has not served to convict the master of error.

The "Haverford School Association" an incorporated association, was, by act of assembly of March 15, 1856, "authorized to establish and maintain a college for the education of youth and other persons in the various branches of science, literature and arts" and to confer degrees. By decree of the court of common pleas of Delaware county on December 6, 1875, an amendment was made to the charter, changing the name of the institution to "The Corporation of Haverford College." A further amendment was similarly made September 19, 1878, by the consent of all of the stockholders, providing that "The representation and ownership of the property and franchises of the corporation of Haverford College by means of capital stock divided into shares, is hereby terminated" etc. A still further amendment on June 23, 1886, provided that the corporation might take and hold for the purposes of its incorporation, such amount of personal estate as might be bequeathed or given to it from time to time, and that no estate of the corporation, real or personal, should ever be divided among the members thereof.

The premises, upon which the tax is levied, are the educational plant of the institution. They are occupied by buildings for lecture and class-rooms, laboratories, dining-room, kitchen, college offices, quarters for the employees, gymnasium, dormitories, study rooms, observatories, etc. The remainder of the ground sought to be exempted is used for athletic purposes, recreation grounds, lawn, etc. We have thus a college or institution of learning "with the grounds thereto annexed and necessary for the occupancy of the same" which if "founded, endowed and maintained by public or private charity" and conducted as "a purely public charity," is exempted from taxation under the act of May 14, 1874, passed pursuant to the Constitutional provision. We have thus seen how the corporation was legally founded. Although the original subscriptions were represented by certificates of stock, they were not made with the anticipation that there should be a return in profit. Subsequently these subscriptions were changed, by amendments of the charter, into donations and all private interests in the assets of the corporation were (if any existed) swept away.

The original subscriptions to the college have been supplemented from time to time by charitable gifts to maintain the organization and extend its facilities until the valuable property now sought to be made the subject of taxation, has been acquired.

At the stated annual meeting of "Haverford School Association" held May 10, 1847, the stamp of charitable foundation was set upon the general fund of the institution by the following resolution: "Resolved, That the sum of $50,000 having been subscribed by a number of Friends for the aid and support of Haverford School by the gratuitous admission of young men or otherwise, it being expressly understood that the interest only of the sum thus raised shall be expended, the treasurer is hereby authorized to collect the sums of money thus subscribed and under the direction of the board of managers securely to invest the same, the interest thereof to be applied to the purposes above recited, it being expressly understood that when any part of the principal sum shall be paid in, it shall as early thereafter as practicable be reinvested and in no case shall the said principal sum be expended or diminished." There can, therefore, be no doubt that the foundation and endowment have been by private charity.

It remains still to consider whether the institution is maintained by public or private charity. The sources of maintenance are from unconditional gifts, from special gifts or legacies in trust for specific purposes, and from the fees paid by a part of the students.

The first is palpably charitable maintenance. The second equally charitable although charged with a trust for certain educational uses or for preferred students. The third source of maintenance is derived from full-pay students and the payments made by the holders of partial scholarships. The holders of scholarships, whole or partial, as found by the master, constitute, probably about one half of the whole attendance at the college.

The fact that some of the students are so-called full-pay students, does not deprive the institution of its character as a charity. There is no profit derived therefrom. The total receipts are expended in the carrying out of the charitable design. This, however, was settled by the Episcopal Academy v. Phila., 150 Pa. 565. The maintenance of the college is, therefore, of the kind comprehended by the act of 1874.

Is there anything in the method of conducting the institution to make it other than a public charity? The only complaints seem to be that the board of managers is controlled by members of the Society of Friends and that youth of that particular sect are preferred as recipients of the benefits of the college. The first objection if sustained, might require an inquiry to be made as to the denominational connection of every member of the boards of all of the great charitable institutions, lest perchance a majority might belong to a particular sect or denomination. In point of fact, if the matter were carefully examined, it might be found that the management of some of the largest hospitals, homes and institutions of learning has, by design or accident, fallen into the control of those belonging to a particular sect. So prevalent is this that when the contrary is true, the charity is apt to announce the fact that it is non-sectarian, as if its case were exceptional. There is nothing in the objection that a majority of the managers (all of whom serve gratuitously) are of a particular sect.

Finally: Is there anything in the assertion that the college gives a preference to students of a particular sect, and thus deprives itself of the claim to be a "public" charity? The

decision above cited has answered the question against the defendant. Further than this, however, the master finds as facts: "That the plaintiff admits to its benefits all persons educationally qualified upon the same terms; that there are no restrictions, no bars across the road in either its charter or practice, and that the funds of the institution do not go to the education of Friends or any other sect in preference to others; that while some of the free scholarships are restricted to Friends, others are free to all who apply."

We do not regard it as necessary to retravel the path already well marked out by the master, through the decisions of the Supreme Court on this general question. Counsel for the defendant has endeavored to show that the master has gone astray, but the distinctions drawn do not convince us that any mistake has been made.

We therefore conclude that this college (with its college grounds) is founded, endowed, and maintained by private charity as required by the act of 1874; that its doors open to the public under reasonable restrictions make it a purely public charity within the meaning of the constitutional provision, and that its property is exempt from the tax sought to be collected.

The decree of the court below is affirmed.

In the Matter of the Application of the Doylestown Distilling Company, Limited, for a Distiller's License.

Liquor law—Petition for a license is to the discretion of the court.

A petition for a license is addressed to the judicial discretion of the license court, a discretion resting on reasons to be found in the line of inquiry marked out by the statute from which it is derived.

Liquor law—Judicial discretion not reviewable, arbitrary discretion is.

The appellate court can inquire into nothing but the regularity of the proceedings and the character of the discretion exercised by the license court. The findings of fact and conclusions of judgment by which the discretion of the license judge is to be regulated, when within the field of investigation assigned to him by law, are not subject to review.

When, however, the judge passes beyond this field he quits the sphere of judicial discretion. The law having fixed the standard by which the right of a petitioner for a distiller's license is to be judged a discretion not

regulated by this standard but determined by tests unknown to the law, is not judicial, but an arbitrary abuse of discretion which the appellate court should review.

Liquor law—Abuse of discretion—Review by appellate court.

The Act of June 9, 1891, P. L. 257, excludes the determination of the question of the necessity of a brewer's or distiller's license from the requirements to entitle a license, and where the license court assigns the absence of necessity for a distiller's license as a reason for refusing the license, he not only goes beyond the requirements of the statute in quest of a reason for refusal, but rests his decision on a reason which the statute expressly excludes from consideration. Such a ruling therefore is a marked instance of the exercise of an arbitrary discretion, and presents such abuse of discretion as requires correction by the appellate court.

Argued Nov. 19, 1897. Appeal, No. 143, Oct. T., 1897, by the Doylestown Distilling Co., Ltd., from decree of Q. S. Bucks Co., refusing distiller's license. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed. RICE, P. J. and BEAVER, J., dissent.

Application for distiller's license. Before YERKES, P. J.

The application for the license, bond and other proceedings were in regular form. The application having been heard according to the rules of court the license was refused upon the ground that there was no necessity for it, in an opinion by YERKES, P. J., as follows:

This petition seems to rest upon peculiar grounds. It is not stated that a license is needed for the accommodation of the general public, but rather to enable the applicants an opportunity to make a market for their peculiar brand of liquors by convincing the public through experience, that their liquors are alone beneficial to them, as a remedy for various diseases to which the human family is subject. The principal testimony and exhibits laid before us seem to establish that this want is felt in Wallingford, Connecticut, to a good deal greater extent than here.

It is true one Doylestown physician presents a rather guarded certificate of the results of the use of the liquor in cases of feeble digestion and prostration which, with his limited experience, encourage him to give it further trial. It does not appear, however, that the stimulating effect here referred to is different

from that of the use of other alcoholic drinks. From time immemorial the result of the use of such has given encouragement to further trial.

Another witness bases his testimony upon his idea of the benefits which will accrue to the community by the use of this kind of intoxicant from what has been represented to him, and the character of certain members of the company to whose standing he testifies. The basis for the first reason is of a somewhat beclouded character, and the second was unnecessary, the high character of the parties named being well known.

He somewhat damages the doctor's certificate by proving that "liquor is used as medicine throughout the world."

It is also said that the farmers will be benefited by this house being licensed. No farmers have so declared, however.

The usual number of petitioners, who always sign petitions, has certified to the benefits to be derived from this license.

None of this testimony throws light upon the only questions which, under the law, are material to the inquiry before us, viz: The necessity for the license, and the fitness of the place and the person who may conduct the business.

Doylestown already has two licensed wholesale liquor stores, both well located to accommodate public demands, and, so far as has been shown, they supply liquors in quantity and quality sufficient for all purposes. One of these is the house of Mrs. Huber, who appears to be the second largest holder in value in the petitioning company. These licensed houses no doubt would willingly dispose of the cold distilled spirits if there be such a crying demand for it, and at reasonable profit.

We have seen no evidence that Mrs. Huber or the other members of the company, who, by their long residence here, are well acquainted with the necessity for this license, are desirous, particularly, that it be granted. The place is also unsuitable. Mrs. Huber's store is within four doors from it and is located so as not to unduly annoy private dwellers. The latter are entitled to some degree of protection from unpleasant surroundings.

To impose another liquor store upon that immediate neighborhood could only be justified by the clearest necessity.

We regard the special plea, that only one kind of whiskey will be sold, of a superior medicinal quality, as a clever device to obtain a valuable privilege without establishing such necessity as the law requires for its grant.

The license is refused.

Errors assigned were (1) In refusing to grant distiller's license to the Doylestown Distilling Co., Ltd., upon the ground that the same was not necessary. In refusing the license the learned judge saying: "It is not needed for the accommodation of the general public." "That it is a clever device to obtain a valuable privilege without establishing such necessity." And again: "None of the testimony throws light on the questions which, under the law, are material, viz: Necessity." (2) In comparing the application with that of Mrs. Huber and H. P. Beerer, they holding wholesale licenses. (3) In not approving the bond.

J. D. James, with him *N. C. James*, for appellant.—The Act of June 9, 1891, P. L. 257, provides in section 4, Art. V. as follows: "That the place to be licensed is necessary for the accommodation of the public: Provided, that the provisions of this section as to whether the place to be licensed is necessary shall not apply to a brewer or distiller."

The application of the Doylestown Distilling Co., Ltd., comes directly within the requirements of this provision, and therefore the question of necessity should not have been considered. The reason of record is "No necessity." The reason assigned is not a legal and valid reason: Gemas' Appeal, 169 Pa. 43; Doberneck's Appeal, 1 Pa. Superior Ct. 99; Lauck's Appeal, 2 Pa. Superior Ct. 53.

No argument offered or paper-book filed for appellee.

OPINION BY SMITH, J., December 13, 1897:

The principles that must govern the decision of this case have been settled by repeated and well considered adjudications. These principles, with the authorities on which they rest, have been so recently reviewed, in Donoghue's Appeal, 5 Pa. Superior Ct. 1, that no extended discussion of them is here necessary.

A petition for license is addressed to the discretion of the license court. This is not an arbitrary or unregulated discretion, but a judicial discretion, resting on reasons to be found in the line of inquiry marked out by the statute from which it is

derived. These reasons relate in part to matters of fact, susceptible of direct proof, such as citizenship, ownership of the place to be licensed, interest in the business to be conducted there or elsewhere, etc.; and in part to conclusions of judgment to be formed by the court upon evidence or personal knowledge, respecting such matters as the petitioner's moral character, his fitness to receive a license, the necessity for the house, etc. The discretion of the license judge is to be governed by the facts ascertained and the conclusions reached by him respecting the matters to which his inquiry is by law directed.

The appellate court can inquire into nothing but the regularity of the proceedings and the character of the discretion exercised by the license court. The findings of fact and conclusions of judgment by which the discretion of the license judge is to be regulated, when within the field of investigation assigned to him by law, are not subject to review. When, however, he passes beyond this field, he quits the sphere of judicial discretion. The law having fixed the standard by which the right of the petitioner is to be judged, a discretion not regulated by this standard, but determined by tests unknown to the law, is not a judicial but an arbitrary discretion. Such a mode of exercise is an abuse of the discretion committed to the license court. Where no reasons are given for the decision, the law will presume adequate grounds for it. But when reasons are given which are based on matters not within the scope of inquiry defined by law, but show a clear departure from the statutory tests, an abuse of discretion is manifest, which it becomes the duty of the appellate court to correct.

So far as the record in the case before us shows, there was no remonstrance or other opposition to the petition. The license court, in an opinion accompanying the refusal of the license applied for, based its decision solely on the ground that the petitioner sought the license "without establishing such necessity as the law requires for its grant." The conclusion of the license court (based on personal knowledge), that the necessity in question had not been established, must be here accepted, for we cannot review its judgment on this point. If therefore the law demands that such necessity be established in this case, the court was right in refusing the license.

The petition was for a license as a distiller. The act of

June 9, 1891, upon which the court proceeded in the premises, while enumerating the requirements to be met by the applicants for certain licenses, contains this express exception: "Provided, That the provisions of this section as to whether the place to be licensed is necessary shall not apply to a brewer or distiller."

Thus the license court not only went beyond the requirements of the statute in quest of a reason, but, in resting its decision on the absence of necessity, decided the case against the petitioner on a ground which the statute expressly excludes from consideration. Upon the principles established by the authorities already referred to, it is impossible to regard this as the exercise of a judicial discretion. On the contrary, it is a marked instance of the exercise of an arbitrary discretion, in direct disregard of the enactment designed to regulate the discretion of the court in the case before it; in brief, an abuse of discretion, requiring correction by this court. But a single reason having been assigned for the decision, it must be presumed that no other was found. That reason being wholly without validity, there was no ground for refusing the license, and it should have been granted.

The order refusing the license is reversed, and it is ordered that a license be issued by the court below, as prayed for, upon payment of the license fees fixed by law.

RICE, P. J., and BEAVER, J., dissent.

Commonwealth of Pennsylvania *v.* William H. House, Appellant.

Practice—Criminal law—Additional instructions in absence of defendant —Adjournment.

It is reversible error where the trial judge, after adjournment of court, permits the jury to come in for additional instructions which he gives in the absence of defendant and his counsel and without notice to either. A person under trial for a crime has the right to be present during the entire trial; he has a right to assume that no further instructions will be given during the adjournment of court. No waiver or consent can be implied from his absence under such circumstances.

While the court has the discretionary power to recall the jury for fur-

ther instructions or to withdraw or to correct erroneous instructions such instructions should be given in open court.

Evidence—Criminal law—Proof of independent crime, when admissible.

Generally evidence of the defendant's commission of another distinct and independent crime cannot be received for the purpose of proving his commission of the offense for which he is being tried; yet under some circumstances such evidence may be given: To establish identity; to show that the act charged was intentional and wilful, not accidental; to prove motive; to show guilty knowledge and purpose, etc.

Evidence—Criminal law—Pertinent cross-examination.

Evidence being given by defendant, charged with embezzlement of public funds, that his alleged false representations made to the officers of the city were innocently, if mistakenly made, it was competent for the commonwealth to cross-examine him on this subject and admissions, made by him, that he was receiving interest on the money in question from banks of deposit, are relevant testimony as tending to rebut the theory of mistake set up in his direct examination, and as tending to show a personal interest to be served in making the false and misleading statements and in withholding the money.

Evidence—Criminal law—Scope of cross-examination of defendant.

Where defendant in a criminal case goes upon the stand, admissions made by him are not inadmissible because elicited under cross-examination; by consenting to take the stand and by swearing to tell the truth, the whole truth, he waives his constitutional privilege and may be cross-examined, not only the same as any other witness, but he cannot object to legitimate cross-examination upon the ground that his answers will tend to criminate him.

Evidence—Criminal law—Testimony of defendant at former trial admissible.

The testimony of defendant can be used against him on a second trial of the same indictment even if he elects not to go upon the stand. His constitutional privilege as far as that testimony is concerned has been waived, and cannot be reclaimed in any subsequent trial of the same indictment.

Evidence—Testimony of former trial—Method of proof—Practice, C. P.

The proper method of proving what was said by a witness on a former trial is by the official stenographer.

Evidence—Criminal law—Proof of admissions on former trial.

When the commonwealth desires simply to prove certain admissions of a defendant made on a former trial, it is not necessary to put in evidence his whole testimony; but if anything is omitted which may tend to explain or qualify those admissions the defendant may call it out upon cross-examination.

Argued Oct. 18, 1897. Appeal, No. 32, April T., 1898, by defendant, from judgment of Q. S. Allegheny Co., June Sess.,

1896, No. 452, on verdict of guilty. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Indictment for embezzlement of $26,652.74. Before KENNEDY, P. J.

It appears from the record that defendant was indicted in the court below on numerous counts charging him with embezzlement as a municipal officer, jointly with W. C. Moreland, who had been for many years city attorney of the city of Pittsburg.

At the trial of the case all the counts were abandoned excepting one charging that the said defendant did embezzle the sum of $26,652.74, in aiding and abetting and as accessory to the unlawful conversion and embezzlement of the said sum.

On the trial of the case the commonwealth was permitted, under objection, to examine L. W. Mendenhall, the official stenographer of the court, in regard to the testimony of the defendant taken at a previous trial (see former report of the case, 3 Pa. Superior Court, 304), the defendant having at the second trial declined to take the stand.

The examination of the witness Mendenhall was as follows: [L. W. Mendenhall, sworn. Direct examination by Mr. Yost: "Q. You are the official stenographer of common pleas No. 3? A. I am. Q. And by virtue of that office you were official stenographer at the former trial of this case? A. Yes, sir. Q. Did you take notes of the testimony of the case? A. I did. Q. Did you take notes of the testimony of William H. House, the defendant, on the former trial of this case? A. I did. Q. Will you look at your notes of the testimony of the defendant, House, at the former trial, and tell us what he stated in regard to the duties of his office?"

Mr. O'Brien: Objected to, on the ground that if they have any right to offer the testimony, they must offer the testimony complete; they have no right to offer a part of it in that way.

Mr. Yost: I propose to prove the admission of the defendant as to his duties during the period covered by this indictment, and his relations to the principal and codefendant, Moreland.

Mr. Patterson: We object, as the act of assembly, section 3, of the act of 1887, expressly provides the use of the testimony for another trial, and we object to it on the ground that the only

knowledge the witness has upon the subject upon which he is interrogated is what he derived as official stenographer in taking the testimony at the former trial of this defendant upon the same charges, and that it is not allowable on the part of the commonwealth to prove against the defendant on trial his testimony taken at a former trial of the same cause. 2. That the witness, being capable of testifying only in his capacity as a reporter in the other case, should be called upon, if at all, to give his entire version of Mr. House's complete testimony at that time, if it is competent to prove it at all. It is incompetent and improper to allow the representative of the commonwealth to select particular parts of that testimony, which they may regard as incriminating, and have that detailed without giving the entire testimony.

By the Court: The objection is overruled.

To which ruling of the court counsel for defendant request an exception. Exception allowed and bill sealed.

"A. The following question was asked Mr. House: I wish you would tell the jury, in a general way, what the line of your duty was there from the time you first went in under Mr. Bigelow, until you ceased in October, 1895? To which he made this reply: Why, to receive assessments on streets, grading, paving and curbing, sewers, openings, damages by grading, to pay parties who were entitled to money, pay the city treasurer, grading, paving, curbing and sewers, or any other moneys that might come into my hands that he was entitled to receive."

"Q. State if he was interrogated, Mr. Mendenhall, as to his method of satisfying liens in the court house in the prothonotary's office, and what he said upon that subject."

"A. He was asked the question: Then who paid the costs? To which he made this reply: Then I would make out a list —I might have one, or I might have a dozen names—and I would go to the prothonotary's office and satisfy these liens, W. C. Moreland, per House, and pay the costs; or I might have forty or fifty, and I would go in to the prothonotary's office, and I would leave a list with him, and tell him to write up the satisfactions, and I would go in there the next morning, before working hours—maybe I would be in there before eight o'clock, and I would sign my name, and pay him the costs on the whole thing."

"Q. Was he asked anything further immediately after that in regard to costs?"

"A. He was asked this question: And were the costs usually paid in currency? To which he made the following answer: Yes, sir, always, I don't recall just now of any ever having been paid by check, although there might have been some costs, but my recollection tells me that I always paid the costs in money."

"Q. Could you state whether he was asked how he paid damages, whether by check or not, how they were drawn and what he said upon that subject?

"A. The following appears on my notes: Now, when you paid damages by check, how were the checks drawn? To which he replied: The checks were signed by W. C. Moreland. Q. In blank? A. To the order of W. H. House; when I paid those checks out I would indorse them over to the parties that were entitled to the money."

"Q. Later on, you may state whether or not he was interrogated as to how frequently he was at the office, and whether he had charge of Moreland's bank book, and tell us what he said upon that subject. A. The following appears: Q. You were there every day at the office, weren't you? A. I was there every day, as a general thing: I might have been away or something of that kind. Q. You had charge of the bank books containing the accounts of W. C. Moreland with these various banks? A. They were in the office; yes, sir. Q. They were not in Mr. Moreland's private office, in the St. Nicholas building, but in the office you occupied? A. Yes, sir. Q. You sent or took these books to banks as the moneys were deposited. A. Yes, sir. Q. And you had them balanced, did you? A. Yes, sir. Q. And you had full access to them, so that you could see exactly what they contained? A. Yes, sir."

"Q. State whether towards the conclusion of his cross-examination he was interrogated as to deposits of the moneys he received, and as to how he did it and what he said upon that subject. A. I find this in my notes. Q. Mr. House, you have said that you deposited the funds coming into the city attorney's office, under your supervision, and prepared the deposit slips in the name of W. C. Moreland alone? A. Yes, sir. Q. In the First National bank of Pittsburg, the Allegheny

National bank, the Tradesmen's, and the Freehold? A. Yes, sir. Q. In 1893, is it not a fact that in the Tradesmen's, Allegheny National, and First National, at the time you told Mr. Gourley that about all the money you could pay in was $30,000, that there were quarterly balances there in each bank of at least fifty to eighty thousand dollars? A. There might have been. Q. That there were quarterly balances in those banks to the amount of one hundred and fifty or two hundred thousand dollars? A. Well, I couldn't say as to the amount. Q. Well, it would aggregate in that neighborhood; you had deposited the greater portion of that money in those banks by the direction of Major Moreland? A. Yes, sir."

"Q. In that immediate connection state whether or not he was interrogated as to whether he drew interest upon these moneys that were in bank, and what he said upon that subject."

Mr. Patterson: Objected to, not only upon the grounds already stated, but that this particular question now asked is incompetent and irrelevant, for the reason that it seeks to draw from the witness a former statement of the defendant relating to an entirely distinct and different offense from that upon which he is upon trial, and an offense which is shown by the records of this court to be the subject-matter of three or four indictments against the defendant and W. C. Moreland, only one of which has been disposed of, and the other three are still pending; and it is an offer of matter not contained in notice furnished the defendant by district attorney in his bill of particulars.

By the Court. Objection overruled.

To which ruling of the court counsel for defendant request an exception. Exception allowed and bill sealed.

"A. The following question was asked Mr. House: Q. Mr. House, did you not yourself, quarterly, within the four years prior to the finding of this bill of indictment, regularly draw interest on those deposits which I have mentioned? A. Not all of them. Q. In the Tradesmen's National bank, didn't you draw interest down until January, 1895, on the deposits remaining there? A. I don't know whether it was that month or not. Q. Well, about that time? A. Well, I couldn't say that; it might have been. Q. Well, in the fall of 1894, the quarters for drawing interest were January, April, July and October, weren't

they? A. Yes, I believe there was interest drawn. Q. Well, didn't you in July and October, 1894, and on the first of January, 1895, draw three per cent interest, or about three per cent interest on that balance deposited there? A. Well, I may have done so. Q. Down to February, 1895, do you know the fact that there was a balance deposit of $40,000 in the First National bank, or about that? A. There might have been; I don't recollect. (Book shown witness, and he states): Yes, that seems to be correct. Q. Didn't you draw the quarterly interest on that, both in October of 1894, and January 1 of 1895, or about those dates? A. Well, I may have done it. Q. You did draw interest about that time? A. Yes, I went there and got interest. Q. What per cent at the First National? A. I couldn't tell that. Q. What at the Tradesmen's. A. I don't know that. Q. Do you know what per cent at the Allegheny National? A. I do not. Q. You drew the interest there also did you not, down until about July of 1895, at the Allegheny National? A. Well, I couldn't say that. Q. There was a large deposit still there on the 1st of July, 1895, was there not? A. There might have been. Q. Well, didn't you go there and draw interest on whatever deposit was there down until July, 1895? A. I couldn't say that I did. Q. Can you say absolutely that you did not? A. No, sir, I can't. Q. There were large deposits almost daily in the Allegheny National down until September of 1895, was there not? A. Yes, sir. Q. Running from one thousand to three or four thousand dollars at a time? A. Yes, sir, just as it is represented there. Q. Now, isn't it a fact that down until the July quarter for drawing interest, you drew interest from the Allegheny National? A. Well, sir, I couldn't say whether I did or whether I did not. Q. Well, you know that you did draw there in 1894 and 1895, don't you? A. Oh, yes, there was interest drawn. Q. And by you? A. Yes, sir. Q. It was drawn regularly as the quarters came? A. Well, I rather think it was."] [2]

It further appears from the record that on the afternoon of May 6, 1897, after the court had adjourned, the following proceedings were taken, to wit: The jury having been recalled in response to a message from them that they could not agree, the court addressed them as follows:

[I have received your communication stating that it is im-

possible for you to agree. The case has been tried twice, and, as you know, at considerable expense to the county, and I do not think I can discharge you until you have made further effort to agree. It strikes me as a case in which you ought to be able to reach a conclusion without very great difficulty, and I think it is my duty to say to you that, while no juryman should sacrifice his individual opinion, yet it should be a matter of careful consideration with the minority, if small, as to whether or not they may be mistaken. Now, it seems to me the best thing we can do for you is to give you a little more comfortable quarters than you have now, and send you back for further honest efforts to agree, taking the suggestion I have made to you. I have no idea how you stand; it is not proper for me to know. I only suggest that those of you who are in the minority consider carefully whether or not you are mistaken. I am told your room is not very large, and there are larger rooms in the upper story of the courthouse, used by jurors in capital cases, which are most comfortable, and where there are cots upon which you may rest. We will send you there for further deliberation of the case.

By a juryman. Q. What bearing has the collection of interest on this case?

By the Court: It has a bearing upon the motive of the defendant. This, I thought was fully explained at the time of the admission of the evidence upon that point, and subsequently in the charge. You understand that you cannot, under this indictment, convict him of the embezzlement of that interest, but it has a bearing upon the motive of the defendant and his relation to the principal, Moreland, who has already plead guilty to the charge. If there are any other questions which you have to ask, I will try to answer them; and I believe, if you make vigorous efforts, you will be able to agree. It is not desirable to have to try the case over again. It was very carefully and ably tried upon both sides, and I think as much light shed upon it as there could ever be in the future, and I think it has had as good a jury as we would be able to get. Now, as I have said before, we will find you more comfortable quarters, where you will be able to discuss the case more calmly and comfortably together. The room I have suggested in the third story, where there are cots, will be ready for you in a few moments, and we will send you there.

By a juryman: Q. Your honor, are we to take into consideration only whether House aided or abetted Mr. Moreland in the embezzlement of that $26,000?

By the Court: Yes, that amount, or any portion of it; that is, whether he aided or abetted Moreland in the act; if he did, he is guilty under this indictment. Now, gentlemen, you may retire.] [3]

The foregoing proceeding took place on Thursday afternoon May 6, 1897, after the jury had been out about twenty-four hours and after the court had received a note from the jury, signed by the foreman, stating that it was impossible for them to agree, and asking to be discharged. Neither the defendant nor his counsel were present.

I hereby certify the foregoing to be correct. John M. Kennedy, P. J.

[I further hereby certify, that at the time the foregoing proceeding took place, the court had adjourned for the day, such adjournment having taken place shortly after 2 o'cock; that before the presiding judge had left the courthouse, and during the usual court hours, viz: about 3 o'clock, he received the note referred to in the foregoing certificate, when he immediately ordered the jury to be brought into the court room, which was still open, and the foregoing proceeding took place. The district attorney and other attorneys and persons were present; neither the defendant nor his counsel were notified to be present. Subsequently, and before 4 o'clock, the regular hour for adjournment, the jury returned into the court room, with their verdict, and defendant's counsel being sent for, the verdict was taken in their presence. John M. Kennedy, P. J.] [1]

The jury subsequently found a verdict of guilty as indicted on the count of the indictment designated as A on the margin thereof, and recommended him to the extreme mercy of the court.

On June 7, 1897, the court sentenced the defendant in open court to pay a fine of $1,000 to the commonwealth, the costs of prosecution, and undergo imprisonment in the Western Penitentiary of Pennsylvania for a period of two years. Defendant appealed.

Errors assigned were (1) To the proceedings taken on the

afternoon of May 6, 1897, in the absence of the defendant and his counsel, and without any notice to them, or any of them, after the jury had been charged by the court, and had remained out, engaged in their deliberations, about twenty-four hours, and the time when, and the circumstances under which, they were taken, are set forth in the following certificate of Hon. John M. Kennedy, presiding judge, before whom the case was tried, and the said proceedings were taken, to wit: reciting said proceedings. (2) In overruling defendant's objections to the testimony of L. W. Mendenhall, which testimony, in so far as it is alleged to be injurious to the defendant, together with the objections thereto, was as follows, to wit: reciting same. (3) In refusing to discharge the jury on the afternoon of May 6, 1897, upon receiving their communication that it was impossible for them to agree, and in what was said to them in connection with said refusal, to wit: reciting same. (4) In entering judgment upon the verdict, which verdict was manifestly secured by the instructions hereinbefore set forth and referred to in the third assignment of error.

Chas. A. O'Brien and *D. F. Patterson*, with them *Chas. W. Ashley*, for appellant.—A very grave question is raised by this record as to the constitutional rights of the defendant, and the proper method of procedure in criminal trials. The decision of this court on the matters here involved will certainly establish an important precedent for the guidance of courts of criminal jurisdiction in their interpretation of the meaning of the 10th section of the bill of rights, as actually applied in the trial of causes.

In Prine v. Com., 18 Pa. 103, it was held that a defendant could not waive his right to be present at his trial for felony. But subsequently, in the case of Lynch v. Com., 88 Pa. 189, it was decided that a defendant, on trial for larceny, might waive his right to be present on the taking of the verdict, by voluntarily absenting himself, being out on bail. Whatever distinction may exist as to the defendant's right of waiver in felony and misdemeanor, there certainly is no longer any doubt of the defendant's right to be present and to be heard by himself and his counsel at all stages of his trial whether for felony or mis demeanor: Stewart v. Com., 117 Pa. 378.

The conduct of the learned trial judge was a denial of the constitutional right of the defendant, which he had not waived, but vigorously and consistently asserted and maintained. There is a striking uniformity of decision in all the states, that it is a fatal error in a criminal cause for the trial judge to hold private communications with the jury concerning the case submitted to their determination: Wade v. The State, 12 Ga. 25; McNeil v. The State, 47 Ala. 498; Kirk v. The State, 14 Ohio, 511; Collins v. The State, 33 Ala. 434; Thompson and Merriam on Juries, sec. 355.

The rigid rule contended for here extends not only to criminal cases, but has been almost universally applied to civil cases as well. Notable among these is Sargent v. Roberts, 18 Mass. 337; Plunket v. Appleton, 41 N. Y. Superior Ct. 159; O'Brien v. Ins. Co., 38 N. Y. Superior Ct. 482; Merrill v. Nary, 92 Mass. 416; Bunn v. Croul, 10 Johns, 239; Bank v. Mix, 51 N. Y. 558; O'Connor v. Guthrie, 11 Iowa, 80.

With respect to the second assignment of error, it seems clear that the testimony of House as taken at the former trial could not be offered against him at this trial under the provisions of sec. 3 of the Act of May 23, 1887, P. L. 158.

The commonwealth were allowed to call the stenographer who reported the former trial, and were allowed to prove by him that House made certain admissions, at the former trial, which he reduced to writing at the time, and he was allowed to read to the jury such portions of the writing as counsel for the prosecution chose to select. This procedure amounted to the actual introduction of selected portions of House's testimony at the former trial, which is even more objectionable than the admission of his entire testimony.

We ask the court to consider the point made at the former hearing of this case (3 Pa. Superior Ct. 304), that the testimony offered was wholly irrevelant to this issue to prove that House received interest on the quarterly balance on Major Moreland's bank accounts. We again urge upon the consideration of the court that such receipt of interest on public funds improperly continued on deposit, does not tend in the slightest degree to establish the charge that House aided Moreland in the embezzlement of public funds; and, moreover, that the admission of such evidence renders him liable to be convicted of two distinct offenses for the same act.

John C. Haymaker, district attorney, with him *John S. Robb*, *William Yost* and *C. A. Fagan*, for appellee.—As to the first assignment of error the principle to be deduced from the cases seems to be a sound one. If the jury, after an adjournment, put a question, respecting the facts of the case, to the court, it will be irregular to state the evidence relating to it; but if they desire instructions upon a mere question of law, that may be answered. It should undoubtedly be answered in such way that the parties may have an opportunity to have it corrected, if there is any error in the answer, and in this way all the rights of both parties are secured as effectually as if the answer was given in open court: Thayer v. Van Vleet, 5 Johns, 111; Bunn v. Croul, 10 Johns, 239; Allen v. Aldrich, 29 N. H. 66; Goldsmith v. Solomons, 2 Strobh. L. 296; Thompson & Merriam on Juries, 423; School District v. Bragdon, 23 N. H. 516; Shapley v. White, 6 N. H. 172; Davis v. State, 14 Ind. 358; State v. Dudoussat, 47 La. Ann. 977.

The case of Lynch v. Com., 88 Pa. 189 settled the right of the court, in a larceny case, to take the verdict of the jury in the absence of the defendant; and also to pronounce judgment upon him, while absent.

On this point the following cases were also cited: Meece v. Com., 78 Ky. 586; State v. Pike, 65 Maine, 111; Gandolfo v. Ohio, 11 O. 114; Com. v. Kelley, 165 Mass. 175; Cooper v. Morris, 48 N. J. L. 607.

The question embraced in the second assignment of error appears to be within the limits of legitimate cross-examination of a party, as indicated in the character of the issue: Com. v. House, 3 Pa. Superior Ct. 304. The identical question has been ruled by the Supreme Court in Com. v. Doughty, 139 Pa. 383.

There was no error in what was said in connection with the refusal to discharge the jury: Allen v. United States, 164 U. S. 492.

In urging a jury to agree it is not error to comment on the expense of the trial and to set forth that the public interests would be served by an agreement: State v. Gorham, 31 Atl. 845; Johnson v. State, 60 Ark. 45; State v. Garrett, 57 Kansas, 132; Jackson v. State, 91 Wis. 253, 47 La. Ann. 977; Cox v. Highley, 100 Pa. 249.

OPINION BY RICE, P. J., December 13, 1897:

The general proposition that the testimony of a defendant cannot be used against him on a second trial of the same indictment, if he elects not to go upon the witness stand, is not strongly urged in the present case, and is not well founded upon principle or authority. He cannot be compelled to give evidence against himself, but if he gives it voluntarily he cannot object to having it used against him. His constitutional privilege, as far as that testimony is concerned, is waived, and cannot be reclaimed in any subsequent trial of the same indictment. As was said in Com. v. Doughty, 139 Pa. 383, his admissions or declarations would be evidence against him; and if so why not his testimony under oath?

Nor, where the commonwealth desires simply to prove certain admissions of a defendant made upon a former trial, is it necessary to put in evidence his whole testimony; but if anything is omitted which may tend to explain or qualify those admissions the defendant may call it out upon cross-examination. See Calhoun v. Hays, 8 W. & S. 127; Thomas v. Miller, 151 Pa. 482. This was the course pursued in the present case, and it is not claimed that the jury did not have before them all of the testimony, favorable to the defendant, which he gave upon the former trial concerning the subject-matter of the alleged admissions.

The method of proving by the official reporter what was testified to was proper and in accordance with well settled practice: Wh. Cr. Ev., sec. 231; and this too although the stenographer did not recollect the testimony independently of his notes: Rhine v. Robinson, 27 Pa. 30; Brown v. Com., 73 Pa. 321.

Some of the admissions put in evidence by the commonwealth were elicited upon the cross-examination of the defendant, and it is argued that proof of them was not admissible upon the present trial, (1) because they were irrelevant; (2) because they were made in answer to questions which were not within the legitimate scope of cross-examination, and were objected to at the time. Both of these objections were raised when the case was here before, and were overruled: 3 Pa. Superior Ct. 304. At the earnest request of the defendant's counsel we have carefully reconsidered the ruling, and see no reason for coming to a different conclusion. Were the facts testified to relevant to the issue? Was the cross-examination proper, or was it an

infringement of the defendant's constitutional privilege not to give evidence against himself? In determining the latter question the case must be looked at as it was presented when the testimony was given. The defendant has no right to have that question reconsidered in any other light. This requires a brief review of what preceded the defendant's cross-examination.

W. C. Moreland was city attorney, and the defendant was his regularly appointed assistant. It was the defendant's duty to collect assessments for grading, paving, curbing and sewering, and assessments of benefits upon the opening of streets and the like, and to pay the money so collected to the city treasurer, or to parties awarded damages in the proceedings referred to. The money thus collected, or at least a large portion of it, was deposited by him in four banks to the credit of the personal account of Moreland. As a general rule, payments to the city treasurer and other parties were made by checks drawn by Moreland to the order of the defendant. The defendant had charge of, or access to, the bank books, and at all times had full knowledge of the condition of the accounts. The defendant was jointly indicted with Moreland under the 65th section of the Act of March 31, 1860, P. L. 400. Moreland was charged with having converted over $26,000 of the public funds to his own use, and with being a defaulter as to the same, and the defendant was charged with aiding and abetting and being accessory to the act of Moreland. Moreland pleaded guilty, and on the first trial of the defendant, as well as upon his second trial the commonwealth proved, amongst other things, that the defendant made false representations to the city officers, and to others entitled to receive the money as to the reception of the money and as to the amount on hand that could be paid into the city treasury. Persons to whom damages had been awarded in street opening cases and the like were put off with the false representation that the benefit assessments had not been paid in, and proof was given of false statements made to the city controller as to the amount on hand that could be paid into the city treasury. We need not recite the evidence upon this subject in detail. It is sufficient for present purposes to say that it was ample, if unexplained, to warrant an inference of fraudulent intent. On the first trial the defendant attempted to meet this evidence either by denial, or by explanation to the effect, that, although he might have made mistakes,

yet, if any of his statements were untrue, they were not made with intention to mislead or deceive. To lend plausibility to this theory he asserted directly, and by inference, that he was a mere subordinate, acting simply for his superior officer in depositing and paying out the money, and that he had no personal interest or motive for deceiving any one with regard to the reception of the money, or the amount on hand. There can be no question that the representations made by him were efficient in the consummation of the embezzlement charged in the indictment, and it was of the highest importance to him to convince the jury that they were innocently made. His assertion that he had no interested motive for making false statements, if believed by the jury, would have been strongly corroborative of his other assertion that he had not intentionally misrepresented the facts. It, therefore, was competent for the district attorney to cross-examine him upon this subject. This elicited the admission, that, at the time when the defendant was making these statements to the city controller and others as an excuse for not paying over these public moneys, he, personally, was receiving quarterly interest on the same, from the banks in which they were deposited. This admission strongly tended, not only to rebut the theory of mistake set up in his direct examination and thus to discredit him as a witness, but also to show that he had a personal interest to be served in making the false and misleading statements, and in withholding the money. This was pertinent cross-examination: Fulmer v. Com., 97 Pa. 503.

Incidentally, the defendant's admission tended to show a violation of the 63d section of the act of 1860 which prohibits officers from entering into any contract or agreement with any bank by which such officer is to derive any benefit, gain or advantage from the deposit with such bank of any money which may be in his possession or under his control by virtue of his office. This is a distinct and independent offense, but it does not necessarily follow that proof of it was inadmissible on the trial of the indictment framed under the 65th section. It might, or it might not be, according to the circumstances of the particular case on trial. Generally, evidence of the defendant's commission of another distinct and independent crime cannot be received for the purpose of proving his commission of the

offense for which he is being tried. Yet under some circumstances such evidence may be given. "Thus it may be to establish identity; to show the act charged was intentional and wilful, not accidental; to prove motive; to show guilty knowledge and purpose, and to rebut any inference of mistake; in case of death by poison, to prove the defendant knew the substance administered to be poison; to show him to be one of an organization banded together to commit crimes of the kind charged; and to connect the other offense with the one charged, as part of the same transaction:" Goersen v. Com., 99 Pa. 388; Wh. Cr. Ev. sec. 53; Com. v. Johnson, 133 Pa. 293; Com. v. Tadrick, 1 Pa. Superior Ct. 555; Com. v. Bell, 166 Pa. 405; Com. v. Cover, 6 Cent. Rep. 585; Turner v. Com., 86 Pa. 54; Ferrigan v. Com., 44 Pa. 386; Kramer v. Com., 87 Pa. 299. If, for example, one indicted for breaking and entering a dwelling house with intent to commit the felony of larceny should admit the breaking but should deny the intent, I take it that upon cross-examination he could be asked if he did not commit the larceny. The cross-examination in the present case was as pertinent to the matters testified to in chief as would be the cross-examination in the case supposed.

It was earnestly argued, when the case was here before that the court erred in refusing the request of the defendant's counsel to instruct him that it was his privilege to decline to answer the questions, if his answers might tend to criminate him. The court committed no error in refusing this request. The defendant is a member of the bar, and must be presumed to have known his rights. The privilege was not claimed by him but by his counsel for him. But we do not put our ruling upon that ground. We are of opinion, that, even if the defendant had personally asked to be excused from answering the questions, the court would have been justified in overruling his request. A defendant in a criminal case cannot be compelled to testify, and under our statute no inference can be drawn from, nor comment be made on, his failure to do so. But by consenting to take the stand, and swearing to tell the truth and the whole truth he waives his constitutional privilege, and may be cross-examined in the same manner as any other witness. There is this difference, however, between an ordinary witness, and a defendant testifying in his own behalf; the former goes

upon the stand by compulsion, the latter voluntarily. Having waived his constitutional privilege to keep silent, he cannot give testimony which makes in his favor, and then object to legitimate cross-examination, upon the ground that his answers will tend to criminate him. This doctrine is supported by the great weight of authority: Wharton's Cr. Ev. secs. 432, 470; State v. Witham, 72 Me. 531; State v. Thomas, 98 N. Carolina, 599; People v. Connors, 50 N. Y. 240; Com. v. Nichols, 114 Mass. 285; Com. v. Tolliver, 119 Mass. 312. See also 9 Cr. L. Magazine, 306; State v. Ober, 52 N. H. 459.

The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests, which the law has devised for the discovery of truth. It is not easy for a witness, who is subjected to this test to impose on court or jury; for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended: 1 Gr. Ev. sec. 446. There is good reason for not making the test less rigid where the witness is a deeply interested party. The extent to which a defendant in a criminal case may be subjected to this test is a question upon which the authorities do not wholly agree. In some of the states of the Union it is held that he may be cross-examined as to the whole case; in others that the cross-examination should be confined to facts and circumstances connected with matters stated in the direct-examination. In either view of the right of cross-examination, the court did not transgress the rules of evidence, nor violate the defendant's constitutional right, by holding, that the questions were pertinent to the matters stated in his direct examination and that it was his duty to answer them. The facts admitted were pertinent to the issue, and the admissions were not obtained by illegal compulsion.

The second assignment of error is overruled.

Plainly stated, the question raised by the first assignment of error is, whether the defendant in an indictment for a misdemeanor can be denied the right to be present when the court charges the jury in his case, and the conviction be sustained? We use the word "denied" advisedly, for while the defendant was not forcibly excluded from the court room, and while there is not the slightest evidence or intimation that the learned and

impartial trial judge intended to deprive him of any legal right, yet the practical effect of his calling the jury into the court room, after the court had regularly adjourned for the day and then advising them as to their duties as jurors, and instructing them as to the law of the case, in the absence of the defendant and his counsel, and without any effort to notify them to be present was to deny him the right to be present. He was not bound to remain in the court room after the court had adjourned for the day. He had a right to presume that no further instructions would be given to the jury, either there or elsewhere, during the adjournment. No waiver or consent can be implied from his absence under the circumstances stated in the bill of exceptions. He must be considered "as standing upon all his legal rights and waiving none of them;" and one of them was the right to be present either in person or by counsel when his case was being tried. We cannot conceive of a trial for a crime resulting in forfeiture of the citizen's liberty where the law, or the court in the administration of it, can deny him the privilege of being present. The right is inherent in the very nature of the proceeding, and, moreover, is secured to him in the fundamental law. "It is his right to have everybody know for what he is tried, and why he is condemned, and to witness the tone, manner, and temper of his prosecution, that he may be subjected to no other influence than truth and law; nor is he bound at all to trust the court or the judge in this matter. It is his great privilege, and no power can impair it:" Kirk v. State, 14 Oh. 511. Although the accused may waive the right to be present in misdemeanors, yet the court cannot deprive him of it. Nor can its action in doing so (however well intended and however free from arbitrariness) be justified by balancing probabilities as to the injury done to him in the particular case.

"In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face" is the language of our Declaration of Rights, and by fair implication it secures the right to be present, not only when the witnesses are testifying, but also when the jury are being instructed as to their duties, and as to the facts and law of the case. For, how can he be heard, if neither he nor his counsel has an opportunity to be present? To deprive him of this priv-

ilege is, of itself, error, if the instructions, although free from error, might have influenced the verdict against him. Such error cannot be wholly cured by putting the instructions in writing after the rendition of verdict and allowing the defendant an exception; for, if he or his counsel had been present, explanatory instructions might have been asked and given, which, for aught we know, might have produced a different result. This consideration, alone, shows the importance of the right secured to the accused, if, indeed, argument be needed to prove it.

It seems hardly necessary to say, that instructions given to a jury after they have retired to deliberate upon their verdict, of the character of those embraced in the bill of exceptions, are as much a part of the trial as the original instructions. The reasons why the accused should have the privilege of being present are as vital in the former case as in the latter. As was said in a New York case, where this question was considered, they may "influence the verdict quite as much, if not more, than the instructions given before the jury retired:" Maurer v. People, 43 N. Y. 1. We may fairly assume that they had an influence upon the verdict in the present case; for, although the jury had been out for twenty-four hours, they agreed upon a verdict within an hour after the additional instructions were given. We are not to be understood as intimating, even, that the presiding judge brought any improper influence to bear upon the jury, or that the instructions were erroneous in themselves. The question does not turn upon the legal correctness or incorrectness of the instructions, but upon the right of the trial judge, during the adjournment of court, in the absence of the accused and his counsel, and without attempt to notify either of them to be present, to give any instructions that might influence the jury to bring in a verdict against him.

So important to the accused is this right to be present when his case is being tried, that it was at one time held that neither he nor his counsel could waive it in any felony case. "It is undoubtedly error," said Chief Justice GIBSON, "to try a person for felony in his absence, even with his consent. It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with

indulgence. Never has there heretofore been a prisoner tried for felony in his absence:" Prine v. Com., 18 Pa. 103. The Supreme Court modified this ruling, so far as it applied to the felony of larceny, to the extent of holding that "voluntary absence when the verdict is received is an error of which he cannot complain:" Lynch v. Com., 88 Pa. 189. Possibly there should be the same modification of the rule laid down by Chief Justice GIBSON in other felonies triable in the quarter sessions. Be that as it may, in this case the defendant's absence was not voluntary. He consented to nothing and waived no right; and no Pennsylvania case has held, or, as we firmly believe, ever will hold, that a defendant, whether indicted for a felony or a misdemeanor, can be tried in his absence, unless he has expressly or impliedly waived the right to be present.

Unquestionably the court has discretionary power, of its own motion, to recall the jury and give them further instructions, or withdraw or correct erroneous instructions. As far as we are informed the usage of the courts of the commonwealth has been to give such additional instructions only in open court, and this is the safer and the better practice. At all events this much is established by the overwhelming weight of authority that it is reversible error to give them after the adjournment of court in the absence and without the knowledge of the parties or their counsel: McNeil v. State, 47 Ala. 498; Collins v. State, 33 Ala. 434; Wade v. State, 12 Ga. 25; Fisher v. People, 23 Ill. 283; Crabtree v. Hagenbaugh, 23 Ill. 349; Fish v. Smith, 12 Ind. 563; O'Connor v. Guthrie, 11 Iowa, 80; Sargent v. Roberts, 18 Mass. 337; Merrill v. Nary, 92 Mass. 416; Read v. Cambridge, 124 Mass. 567; Benson v. Clark, 1 Cow. 258; Moody v. Pomeroy, 4 Den. 115; Taylor v. Betaford, 13 Johns. 487; Bank v. Mix, 51 N. Y. 558; People v. Maurer, 43 N. Y. 1; Hoberg v. State, 3 Minn. 262; Kirk v. State, 14 Ohio, 511; State v. Patterson, 45 Vt. 308.

"Against this weight of authority" (quoting from the opinion of Mr. Justice GRAY in Read v. Cambridge, supra), "the only cases brought to our notice which countenance a different rule are two in New Hampshire and one in S. Carolina. And in the latter the point adjudged related only to instructions as to the form of the verdict given by the judge to the foreman in open court; and the criticism upon the judgment of this court

in Sargent v. Roberts, (18 Mass. 337,) was based upon the singular theory that the intercourse between the jury and the bench is so confidential that often communications from the jury ought not to be disclosed to the bar." The New Hampshire decisions called to our attention relate only to the practice in civil cases and do not discuss the right of the accused in criminal prosecutions. Moreover, if additional instructions are given during the recess the precaution is taken to put them in writing, and to require the jury to return them with their verdict; so that no question can ever arise as to what the instructions were. In Meece v. Com., 78 Ky. 586, the additional instructions were given in open court; they were beneficial to the defendant; and his counsel was present. In Davis v. State, 14 Ind. 358, the defendant had notice that the court would meet at the ringing of the bell to receive the verdict. All that was decided in State v. Pike, 65 Me. 111 was, that "there is no rule of law requiring the court to send for counsel who choose to absent themselves while their cases are being considered by the jury." To the same effect is Com. v. Kelley, 165 Mass. 175. "In contemplation of law the parties and their counsel remain in court until a verdict has been rendered, or the jury discharged from rendering one:" Cooper v. Morris, 48 N. J. L. 607. Let this be granted; but surely it cannot be contended, that it is their duty to remain in the court room, after the court has been regularly adjourned for the day. None of these cases sustain the contention of the commonwealth in the present case.

The assignment of error under consideration is not based on a "mere technical nicety," but raises a question of substantial right, as well as a question of practice of the highest importance in the administration of criminal justice. If one instruction may be given in the absence of the accused and without his knowledge, there is no good reason why the whole of the instructions may not be given in his absence and without his knowledge. So also, if, after the regular adjournment of the court, in the absence, and without the knowledge, of the accused, or of his counsel, the trial judge may call the jury into the court room and there instruct them as to the law of the case, and as to the bearing of the evidence, we see no reason why he may not call them to his chambers, or go to their room for the same purpose. Conceding that the convenience of

jurors would sometimes be subserved if the trial judge had such power, and also that the power would be lodged in hands highly responsible for the exercise of it, nevertheless, it would be liable to abuse. It is better that jurors, in exceptional cases, suffer some slight inconvenience than that countenance be given to a practice, which, followed to its logical results, would destroy one of the safeguards of the accused, which reason and experience combine to show is of the highest value. It has been well said of another constitutional guaranty and may be said as appropriately here: "It is the capability of abuse and not the probability of it, which is regarded in judging of the reasons which lie at the foundation, and guide in the interpretation of constitutional restrictions:" Emery's Case, 107 Mass. 172. "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied:" Mr. Justice MILLER in Ex parte Lange, 85 U. S. 163.

We do not think we have overestimated the importance of the question; for we are firmly convinced that to hold the error complained of to be harmless would be, virtually, to deny the right of the accused to be present at an important part of his trial, and would establish a dangerous precedent, contrary to the just and humane principles of the fundamental law, and inconsistent with orderly procedure, and long established usage as shown by the adjudged cases. It is better that this case should be tried a third time than that such a precedent should be established.

The judgment is reversed and a venire facias de novo awarded.

H. P. Anderson, Appellant, v. Cecil McMichael and William Snyder.

Appeals—Interlocutory order—Practice, Superior Court.

No appeal lies from an order of the common pleas refusing a rule to show cause why an appeal from a magistrate should not be dismissed, appellants having failed to make an affidavit required by the Act of July 14, 1897, P. L. 271, provided that the proper affidavit is made within fifteen days. Such order is interlocutory and is neither a final judgment nor an order in the nature thereof, and an independent appeal does not lie. Yost v. Davison, 5 Pa. Superior Ct. 469, followed.

Argued Nov. 19, 1897. Appeal, No. 154, Oct. T., 1897, by plaintiff, from order of C. P. Chester Co., discharging rule to show cause why an appeal from a magistrate should not be dismissed. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Appeal quashed.

Appeal from judgment of magistrate.

It appears from the record that judgment was rendered by a magistrate in favor of the plaintiff for $19.75. On July 26, 1897, appeal filed and entered. On September 27, 1897, a rule was granted to show cause why the appeal should not be dismissed for the reason that defendant had failed to make the affidavit required by the Act of July 14, 1897, P. L. 271. On October 11, 1897, the court dismissed the rule under consideration, provided the proper affidavit is made within fifteen days from date. Plaintiff appealed.

Error assigned was to the order of the court, dismissing the rule to show cause why appeal should not be dismissed, based on the admitted fact that the appellant did not make the affidavit required by law.

W. S. Harris, for appellant, cited Act of July 14, 1897, P. L. 271, Cressman v. Bossing, 9 Atl. 191, and Wilson v. Kelly, 81 Pa. 411.

Thomas W. Pierce, for appellee.

PER CURIAM, December 18, 1897:

The question raised by the motion to quash is ruled by our decision in Yost v. Davison, 5 Pa. Superior Ct. 469, and the cases there cited, and needs no discussion. The order appealed from is neither a final judgment nor an order in the nature of a final judgment, but is interlocutory, and from it an independent appeal does not lie.

The appeal is quashed at the cost of the appellant and the record remitted with a procedendo.

James W. Cooke and Lydia S. Cooke, Trustee, trading as Cooke & Co., v. J. Edward Addicks, Appellant.

Lex loci—Lex fori—Promissory note—Irregular indorsement.

The right to introduce proof dehors the instrument for the purpose of showing what in fact the contract was, is an essential part of the contract itself, and is not a mere incident to the remedy. Such right being secured to a New Jersey contract the lex loci governs and not the lex fori.

An irregular indorsement of a promissory note executed in New Jersey may in a suit on said note in Pennsylvania be shown to be a contract of surety in accordance with lex loci.

Argued Oct. 12, 1897. Appeal, No. 89, Oct. T., 1897, by defendant, from judgment of C. P. No. 2, Phila. Co., Sept. T., 1895, No. 706, overruling demurrer to statement. Before RICE, P. J., WICKHAM, BEAVER, REEDER, SMITH and PORTER, JJ. Affirmed.

Assumpsit on a promissory note.

It appeared from the record that plaintiffs sued upon a note made by the Staten Island Terra Cotta Lumber Co. to them, and irregularly indorsed by the defendant, J. E. Addicks, and subsequently indorsed by the plaintiffs.

In the statement it was alleged by the plaintiffs that defendant did, in consideration of forbearance on their part, agree and undertake to become personally liable to them as surety for said note and that in pursuance of this agreement and understanding the note was executed, indorsed by defendant, and delivered to the plaintiffs in the state of New Jersey, where it was

to be payable, and that the application of the law of the state of New Jersey, under the decisions of the courts thereof to the facts as therein stated, made the defendant liable on the note to the plaintiffs as surety.

There was no evidence of any agreement on the part of the defendant by any writing signed by him saving and excepting the note.

Defendant demurred on the ground that the action could not be brought in Pennsylvania, because of the first section of the Act of April 26, 1855, P. L. 308.

Judgment for plaintiffs on demurrer. Damages assessed at $516.38. Defendant appealed.

Error assigned was overruling defendant's demurrer.

C. Berkeley Taylor, for appellant.—This action cannot be sustained under the statute of frauds in Pennsylvania: Act of April 26, 1855, P. L. 308; Schafer v. Bank, 59 Pa. 144.

It is well settled that although the lex loci contractus governs the construction of a contract, the lex fori governs the remedy, both as to the bringing of a suit, and as to the evidence to be produced: Leroux v. Brown, 12 Common Bench, 801.

Although this case has been criticised it has been followed steadily in England: Williams v. Wheeler, 8 C. B. N. S. 299; Gibson v. Holland, L. R. 1, C. P. 1. Finally in 1879, in Britain v. Rossiter, 11 L. R. Q. B. D. 124; Downer v. Chesebrough, 36 Conn. 39; Pritchard v. Norton, 106 U. S. 124.

H. E. Garsed, for appellees.—The plaintiff submits, therefore, that the promise of the defendant to pay according to the terms of the note was a contract made in New Jersey to be performed in that state, and of course is governed by the law of New Jersey, where the rule established in Pennsylvania, in Schafer v. Bank, 59 Pa. 144, not only is not recognized, but directly the opposite rule is established.

In the leading case of Chaddock v. Vanness, 35 N. J. L. 517, where the facts were identical with those of the case at bar, a rule directly opposite of the Pennsylvania rule was adopted.

So far as the statute of frauds is concerned, it is of no consequence whether the defendant is regarded as an indorser, guarantor or maker.

The doctrine of this case was reasserted in Haydon v. Weldon, 43 N. J. Law, 128, and in Johnson v. Ramsey, 43 N. J. Law, 279, and again in Building, etc., Society v. Leeds, 50 N. J. Law, 399, where the court, by Mr. Chief Justice BEASLEY, said: "Over sixteen years ago this court, in the case of Chaddock v. Vanness, 35 N. J. L. 517, decided that the signature of a third person on the back of a negotiable note, before it was put in circulation by the maker, neither expressed nor implied, by its own intrinsic signification, any contract whatever on the part of such indorsers."

The right of the plaintiff to show the real nature and exact terms of the defendant's contract is not matter of remedy and governed by the law of the forum, but is an essential part of the contract itself, and controlled by the law of the place where the contract was made: Forepaugh v. Railroad Co., 128 Pa. 217; Coup v. Railroad Co., 56 Mich. 111; Tenant v. Tenant, 110 Pa. 478; Sea Grove Building Assn. v. Stockton, 148 Pa. 146.

The precise question at issue in the case at bar was determined in Baxter National Bank v. Talbot, 154 Mass. 213, where the principle upon which reliance is here placed was laid down and the leading case of Forepaugh v. Railroad Co., 128 Pa. 217, was relied upon.

OPINION BY PORTER, J., November 19, 1897:

This is an appeal from the order of the court below overruling a demurrer to the plaintiff's statement of claim. The promissory note set forth in the statement was made in New Jersey, by a New Jersey corporation. It was indorsed by the defendant in New Jersey and was to be paid in that state. Nothing is lacking to make it a New Jersey contract. The defendant irregularly indorsed the note by placing his signature above that of the payee. In respect thereto the plaintiffs aver in their statement that "when the said defendant indorsed the note he did . . . . promise and agree to become and did become surety to the plaintiffs for the payment of the said note, and as evidence of and in pursuance of said agreement, did so indorse the note." By evidence dehors the writing the plaintiffs thus propose to prove that the irregular indorsement was in fact agreed to be a contract of suretyship. This under the law of New Jersey, is clearly admissible, and, under the law of Pennsylvania, as clearly

inadmissible. The contract was made in New Jersey. It is sought to be enforced in Pennsylvania. If lex loci contractus is applicable, the plaintiffs are entitled to judgment on the demurrer. If lex fori governs, the court below has erred. We are of opinion that the former applies and hold that the right to introduce the proof dehors the instrument for the purpose of showing what in fact the contract was, is an essential part of the contract itself, and is not a mere incident to the remedy. It was a right given by the law of the place of the making of the contract, in contemplation of which the parties must be held to have contracted.

In Forepaugh v. D., L. & W. R. R., 128 Pa. 217, Tenant v. Tenant, 110 Pa. 478, and Sea Grove Association v. Stockton, 148 Pa. 146, the Supreme Court has enforced the obligation of contracts made in other states containing provisions quite as much at variance with the policy of the law of Pennsylvania as those in the present case. These cases, while not directly in point, substantially sustain the view of the law we take in this case. They are fortified by the case of Baxter National Bank v. Talbot, 154 Mass. 213, wherein a similar question was discussed at length and determined,—the case of Forepaugh v. D., L. & W. R. R., supra, and many other authorities, being cited as authority.

We therefore hold that the plaintiffs are entitled to the enforcement of their contract as set forth in their statement of claim, and that the judgment on the demurrer must be sustained.

Judgment affirmed.

Samuel Russell *v.* The Spring City Glass Works, Limited, Appellant.

Evidence—Written agreement—Modification thereof by oral agreement.

A written agreement may be modified or set aside by parol evidence of an oral promise or undertaking, material to the subject-matter of the contract, made by one of the parties at the time of the writing, which induced the other party to put his name to it; but where the parties met, discussed the contract and separated, with instructions to plaintiff to write out the agreement subsequently made, and both parties signed the agreement thus prepared without objection, no evidence of what was said at the first

meeting will be admitted. It is not error for the court to exclude from the consideration of the jury negotiations which the parties themselves excluded from the contract.

Argued Nov. 16, 1897. Appeal, No. 49, Oct. T., 1897, by defendant, from judgment of C. P. Chester Co., April T., 1896, No. 18, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit to recover $750 salary due under a written contract. Before WADDELL, P. J.

The plaintiff claimed a balance due from the defendant as salary under a written contract. The defense was based on certain parol evidence tending to vary the terms of the written contract which the defendant alleged to have been the inducement or moving cause for signing said written contract.

The court below excluded the offer of the parol evidence from the consideration of the jury and, on motion, a new trial was refused in an opinion by WADDELL, P. J., reported in 6 Dist. Rep. 458.

Other facts appear in the opinion of the court.

Verdict and judgment for plaintiff for $830.62. Defendant appealed.

Errors assigned were, (1) in the answer by the court to the plaintiff's first point. The point and answer are as follows: "1. There is nothing in the facts which took place antecedent to the making of the contract in writing or in its procurement to avoid it or to vary the terms of it. *Answer:* I affirm that point. You will understand from that, as has already been said in your hearing, that we have eliminated from this case all that took place prior to the signing of this agreement, what was said and done prior to the time the agreement was executed, to wit: July 7th, I think, and you have nothing to say about that. We have said that that does not effect the solution of this case, and, therefore, counsel have not turned their attention to that in their argument, because we took occasion to say in the early stage of the argument that in our judgment it has nothing to do with this case. Although we admitted it, in our opinion the proofs did not come up to the requirements of the law, and, therefore, it is to be disregarded by the jury." (2) In answer to plaintiff's second point, which point and answer are as follows:

"2. If the jury believe that the plaintiff performed his part of the written contract in good faith, and to the best of his ability, he was illegally discharged. *Answer:* I have already said that to you in substance and I affirm that point." (3) In answer to plaintiff's third point, which point and answer are as follows: "3. Unless there was fraud, or bad faith, or gross inattention on the part of the plaintiff in his performance of the written contract, he was illegally discharged. *Answer:* I affirm that point. I have already virtually so said in my charge to you." (4) In answer to defendant's fourth point, which point and answer are as follows: "4. If the jury find that the contract in suit was executed by the defendants on the promise and agreement of the plaintiff that at the time of the execution of the paper he had a flint glass business that netted him $600 profit, which profit the defendant would receive, that he had an established business as a glass dealer amounting to from $40,000 to $60,000 a year, the benefit of which the defendants would have and that he could sell the entire product of the defendant's factory, and if they further find that without these representations the contract would not have been made, then the plaintiff cannot recover if these promises and agreements have not been fulfilled by him. *Answer:* I disaffirm that proposition, gentlemen. I refuse to submit to you those considerations that are involved in this point. If the point had said that these representations were false, then I might have affirmed it. But there would be no proof, in my judgment, in the case which would justify you in concluding that they were untrue. So I refuse the point and submit the case to you under the suggestions which I have already made."

J. Frank E. Hause, for appellant.—The court below erred in not submitting to the jury the question of fact involved in defendant's point: Phillips v. Meily, 106 Pa. 536; Ferguson v. Rafferty, 128 Pa. 337; Clinch Valley Co. v. Willing, 180 Pa. 165.

Are the falsity of the representations and the fraudulent intent of the party making them, material inquiries? Renshaw v. Gans, 7 Pa. 117; Rearich v. Swinehart, 11 Pa. 233; Lippincott v. Whitman, 83 Pa. 244; Hoopes v. Beale, 90 Pa. 82; Thomas v. Loose, 114 Pa. 35; Greenawalt v. Kohne, 85 Pa. 369.

The testimony offered by the defendant met the measure of proof required in causes of this character: Thomas v. Loose, 114 Pa. 35; Ferguson v. Rafferty, 128 Pa. 337; Smith v. Harvey, 4 Pa. Superior Ct. 377.

In order that parol stipulations may be introduced in cases of this character, it is only necessary to show that such stipulations continued from the time they were made up to the time of the actual execution of the contract: McGinity v. McGinity, 63 Pa. 45.

R. T. Cornwell and *Herbert A. Drake*, for appellee.

OPINION BY SMITH, J., December 13, 1897:

The defendants, who were doing business as copartners, under the name of The Spring City Glass Works, Limited, made a written contract with the plaintiff by which they engaged him as salesman for the term of three years from July 15, 1893, at $1,800 per year and expenses. The plaintiff entered upon his duties under the contract and continued to perform them until December 1, 1894, when he was discharged by the defendants. In May, 1895, he found other employment. He subsequently brought this suit for wages for the interval between December 1, 1894, and May, 1, 1895, under the agreement, and recovered a judgment for the amount of his claim.

At the trial, the defendants, to justify their discharge of the plaintiff, alleged that he was negligent in the performance of his duties. On this subject testimony was introdnced by both parties. This question was submitted to the jury who, by their verdict, exonerated the plaintiff from the charge. The principal ground of complaint here, however, is that the court below erred in withdrawing from the consideration of the jury the testimony as to what took place prior to the execution of the agreement, which, the appellants argue, induced them to sign the contract. It is alleged that at a meeting between the directors of the defendant company and the plaintiff, a few days before the writing was executed, he stated that he had a flint glass trade from which he derived an annual profit of $600; that he sold, as a glass broker or jobber, from $40,000 to $60,000 worth of glass annually, and that all of this together with his Philadelphia office would be turned over to the advantage of the de-

fendants, if he engaged with them. But when they asked him to guarantee that he would make a certain amount of sales for them—that he would sell the product of their factory—he positively refused to do so; and the written agreement, which he submitted some days afterward, was signed by the defendants without other guaranty or assurance than is contained therein.

The representations of the plaintiff related to his business standing and experience, and may or may not have been true. Nothing was shown on the trial which necessarily disproved them, unless the disappointed expectations of the defendants be accepted as such proof. But the vital point is that they formed no part of the contract made by the parties. This appears by the testimony of the defendants themselves. It may be that the defendants, in making the contract, were influenced by the plaintiff's representations; but there is no evidence of falsehood, fraud or promise by which they were induced to close the bargain. At most the alleged representations by the plaintiff were designed to impress the defendants with a belief in his ability to sell their product; but he declined to bind himself to do this, and the stipulation that he would do so was excluded from the writing. Under these circumstances the learned trial judge was right in ruling that nothing was shown which would justify the jury in modifying the written contract; and that all the preliminary negotiations were presumed to be merged in the written agreement. We are now asked to say, substantially, that the court below erred in excluding from the consideration of the jury that which the parties themselves excluded from their contract.

The appellant's argument is based on the assumption that there was a contemporaneous parol agreement on the faith of which the writing was executed and without which it would not have been signed, and authorities are cited for the proposition that "where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed," this may be shown by parol, even if by doing so the whole contract will be set aside. This is a correct statement of the law. But the difficulty with the appellant's case is that it fails to show any contemporaneous agreement, or any agreement, other than that embodied in the

writing; and therefore there was nothing to which this proposition could apply. There was here no use of the instrument, or any attempt to use it, for any other purpose than the one for which it was intended, or in violation of any condition or representation upon which it was procured. The representations referred to did not constitute an agreement, promise or condition of any kind, and were, therefore, properly excluded.

What has been said sufficiently covers the matters complained of in the first and fourth specifications. The second and third specifications were not pressed at the argument; they were properly abandoned.

The judgment is affirmed.

S. Abeles, trading as S. Abeles & Company v. Francina D. Powell, Appellant.

Promissory note—Married woman as guarantor—Affidavit of defense.

In a suit on a promissory note signed jointly by husband and wife an affidavit, on behalf of the wife, is sufficient, which avers coverture, no indebtedness to the plaintiff, and that the wife signed the note upon which suit is brought as a guarantor.

Practice, Superior Court—Appeal—Refusal to open after term expired.

The court below is without authority to open a judgment after the end of the term at which it was rendered, unless it be a judgment by default or confession, which every court has power to open without limit of time, in order to give the parties a hearing or trial.

A judgment for want of a sufficient affidavit of defense is not a judgment by default or confession.

Argued Oct. 15, 1897. Appeal, No. 113, Oct. T., 1897, by Francina D. Powell, one of the defendants, from judgment of C. P. No. 3, Phila. Co., Dec. T., 1896, No. 1171 for want of a sufficient affidavit of defense, and from order of discharging rule to open judgment and quash attachment and let defendants into a defense, proceedings to stay. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpt on promissory note signed by Francina D. Powell and Samuel Powell.

Suit was brought on a promissory note signed by Francina D. Powell and Samuel Powell. Francina D. Powell, one of the defendants, filed an affidavit of defense as follows:

"Francina D. Powell, one of the defendants in the above stated action, being duly sworn, says that she has a true, just and legal defense to the whole of the plaintiffs' claim of the following character, to wit: That she, the deponent, is the wife of Samuel Powell, one of the defendants above-named. That she is not indebted to the said plaintiffs in the above suit in any sum and never was, but, that after the making of the said promissory note by her husband, which is the subject of this suit, a representative of the payees in the said promissory note, called upon her at her residence, and alleged that it was necessary to have deponent affix her name to said note, thereby inducing her to sign as a guarantor, and as she is advised by counsel and verily believes is prohibited by the act of general assembly, approved June 3, 1887. Deponent further avers, that she is informed and verily believes and expects to be able to prove on the trial of the cause, that the above-named plaintiffs are not the bona fide holders of said promissory note, but that the same is in the possession of the payees, as in the said obligation named. All of which deponent says is true."

The court entered judgment for want of a sufficient affidavit of defense. Subsequently, after the expiration of the term on which the judgment was entered, a rule was taken to open the judgment and quash an attachment, and let defendants into a defense, which rule was discharged in an opinion by the court below, as follows: "After consideration of the depositions in the above case, the rule to open the judgment is discharged. The court is of the opinion that under the authority of Hill v. Egan, 2 Pa. Superior Ct. 596, it is too late to open the judgment."

Damages were assessed under the judgment in favor of the plaintiff for $398.97. Defendant, Francina D. Powell, appealed.

Errors assigned were (1) In entering judgment against Francina D. Powell for want of a sufficient affidavit of defense. (2) In discharging the rule to open the judgment and let defendant, Francina D. Powell, into a defense.

Wm. F. Johnson, for appellant.—Prior to the passage of the Married Person's Property Act of June 3, 1887, P. L. 332, a joint promise by the husband and wife was declared to be, in law, but the promise of the husband: Cummings v. Miller, 3 Grant, 146.

Whilst the act of 1887 was expressly repealed by the Act of June 8, 1893, P. L. 344, the proviso that nothing therein contained shall enable a married woman to become accommodation indorser or surety for another was, practically, word for word, retained in the latter act.

The burden is on the wife when she seeks to avoid her contract to bring it within one of the few exceptions of the act: Patrick v. Smith, 165 Pa. 526. And while it is to be regretted that the affidavit of defense was not drawn with more care, its inartificiality does not obscure its intent and the facts relied upon, in the language of Patrick v. Smith, avoid the contract and bring it in within one of the exceptions.

Thomas Leaming, for appellee.—The affidavit of defense was insufficient. The averments in the affidavit are simply (1) a general denial of indebtedness; (2) the statement that appellant signed the note at the request of payees; (3) averment of the naked conclusion that she signed as "a guarantor."

It is fully apparent that such an affidavit is absolutely lacking in the essentials always required by the courts of this state. There is no averment of the particular facts and the transaction upon which was based defendant's contention that she signed as "a guarantor." And to simply aver what is a mixed conclusion of law and fact is never held sufficient in an affidavit of defense, as is often exemplified in affidavits which aver "fraud," and do not state the particular facts which constitute the alleged "fraud."

The wisdom of the principle compelling defendants to aver with particularity the facts on which they rely, is exemplified by this case. For, the facts brought out upon appellant's depositions show that her case is without a shadow of merit, and it is unnecessary to further argue the case upon what was intended by the affidavit, when all the facts are before this court.

OPINION BY SMITH, J., December 13, 1897:

The appellant, a married woman, was sued jointly with her

husband on a promissory note signed by both. Judgment was taken against him for want of an affidavit of defense. The appellant filed an affidavit of defense setting up her coverture, and alleging that she is not indebted to the plaintiff in any sum and never was, and that she signed the note as guarantor. A rule for judgment for want of a sufficient affidavit of defense was granted, returnable February 20, 1897. This rule was duly served on appellant's attorney of record and on the return day it was made absolute, neither the appellant nor her counsel being present. A fi. fa. was afterwards issued and returned nulla bona, and, subsequently, an attachment execution was issued returnable the first Monday of April, under which funds of the appellant were attached. On March 31, 1897, a rule to open the judgment and to quash the attachment proceedings was granted. Depositions in support of the rule were submitted, and, after argument, it was discharged, because, in the opinion of the court, "under the authority of Hill v. Egan, 2 Pa. Superior Ct. 596, it is too late to open the judgment." Whereupon the present appeal was taken.

It is clear that the court below was without authority to open the judgment after the end of the term at which it was rendered, unless it was a judgment by default or confession. Every court has power to open such judgments, without limit of time, in order to give the parties a hearing or trial. But where judgments have been entered after defense made, the reason for the rule ceases, and it is settled that judgments thus taken cannot be opened after the expiration of the term at which they are entered: King v. Brooks, 72 Pa. 363. Hence the only question before us is whether the judgment in the present case was entered upon a default by the defendant or upon defense made.

A default by the defendant is where, having been duly summoned, he fails to appear, or, having appeared, fails to make defense in the manner and within the time fixed by law. It has, however, no relation to the adequacy of the defense offered; it arises only from neglect—from the absence of an appearance or an offer of defense. At common law, judgment against the defendant for default of appearance was unknown, the penalty for his contumacy being distress infinite and outlawry. But if, after appearing, he neglected to make defense by plea or demurrer within the time allowed, judgment by nihil dicit,—"he

says nothing"—might be taken against him. In Pennsylvania, provision for judgment for default of appearance was made at an early day. By the act of 1725, on default of appearance, the plaintiff could enter a common appearance for the defendant, and in the absence of a plea take judgment by nihil dicit. The entry of a common appearance was soon dispensed with, and judgment was entered by default on the defendant's failure to appear. By subsequent legislation, judgment for default of appearance was expressly authorized. A third ground of default was introduced in 1795, by an agreement, signed by all the attorneys of the Supreme Court except two, to confess judgment unless the defendant made affidavit "that to the best of his knowledge and belief there was a just cause of defense to the action;" and this was enforced by the court as to the signatory parties. In 1799, a rule to the like effect was adopted by the Supreme and Circuit Courts. In 1809, the common pleas of Philadelphia adopted a rule directing judgment of course against the defendant unless he made affidavit that there was a just defense, to the best of his knowledge and belief, with a proviso respecting a partial defense; and this rule was sustained by the Supreme Court: Vanatta v. Anderson, 3 Binn. 417. A similar rule was adopted by the district court of Philadelphia. The first legislation on the subject was the act of 1835. This authorized "a judgment by default" in certain actions in the district court of Philadelphia, unless the defendant "filed an affidavit of defense, stating therein the nature and character of the same." From this provision, subsequently extended to other courts by statute, or adopted by rule, arose the practice of inquiring into the sufficiency of the defense thus set up, and of taking judgment for want of a sufficient affidavit of defense. The act of 1874 authorized an appeal to the Supreme Court from a decision against the right to such a judgment. The procedure act of 1887 directs that in actions of assumpsit the declaration "shall be replied to by affidavit," and provides for judgment "for want of an affidavit of defense, or for want of a sufficient affidavit, for the whole or part of the plaintiff's claim, as the case may be, in accordance with the present practice." Where the defense is partial, the act of 1893 permits judgment for the amount admitted to be due; while the act of 1897 allows judgment to be taken for the portion as to which the affidavit shall be insufficient; with an issue

as to matters remaining in dispute. And by the act of 1889, the defaults, for which judgment is of course, are, want of an appearance, want of a plea, and want of an affidavit of defense, with judgment against the plaintiff for want of a declaration.

But a judgment for want of a sufficient affidavit of defense has never, under the existing practice, been regarded as a judgment by default. Nor is there any ground on which it can be so regarded. With reference to the result, indeed, an insufficient affidavit of defense is practically the same as none. But so also is an insufficient defense before a jury. In either case the defendant suffers judgment, but in neither is it a judgment by default. The filing of the affidavit is a prescribed step in the cause, whereby the defense is laid before the court. Default in the premises is only in neglecting to take this step; in omitting to make defense in the prescribed method. The declaration having been replied to by affidavit, the requirement of the statute on this point is satisfied and a default avoided. Should the defense thus presented be held insufficient, its presentation is not thereby turned into a default. The affidavit is in the nature of a plea, for the insufficiency of which the plaintiff may have judgment on demurrer, but not by nihil dicit as for a default. If adjudged insufficient, it is an adjudication of the cause on its merits. Whether the defense be addressed to the court by affidavit, or to a jury by evidence, a judgment resting on its insufficiency is a judgment upon defense made, and not on a default.

The limitation on the power of the courts to open judgments has not been modified by legislation, and to modify it would be clearly against public policy. The Acts of May 20, 1891, P. L. 101 and of June 24, 1895, P. L. 212 (the Superior Court act), extend the right of appeal to these applications, and confer upon the appellate courts the power to review the decisions of the common pleas thereon. But those statutes do not enlarge or affect the power of the lower courts in the premises.

Enough has been said to show that the learned judge correctly held that he was without power to open the judgment in the present case. The judgment was duly entered after an examination of the defense as presented in the affidavit. The matter in controversy had regularly passed to final judgment, and the term of the court at which it was rendered had ended, before

the application to open was made. It then became res judicata, and passed beyond the power of the court to open.

However, the question of the sufficiency of the affidavit of defense is not beyond the reach of this court. The appeal is from the action of the court below in entering the judgment, as well as from the subsequent refusal to open it, and thus the record of the case is brought before us. The judgment was entered on February 20, 1897, and the appeal to this court was noted as of July 23, 1897, more than three months after the entry of judgment. But by section 4 which went into effect July 1, 1897, it is provided: "That in civil cases in which the right of appeal to the Superior Court has now expired, an appeal may be taken and perfected within three months after this act goes into effect." The present case comes within the express terms of this proviso, and, as it is a proper exercise of legislative power (Waters v. Bates, 44 Pa. 473.) the appeal is properly taken.

There can be no reasonable doubt about the sufficiency of the affidavit of defense. It avers coverture, no indebtedness to the plaintiffs, and that she signed the note upon which suit is brought as a guarantor. While it may not exhibit the accuracy and fullness of detail necessary on two of these points, it is sufficient in its terms to raise the question of her liability under the averment of a guaranty. It states that after her husband signed the note it was brought to her, and upon the allegation that it was necessary for her to affix her name to it she was induced to sign it as a guarantor. If it be true that she signed merely as a guarantor there can be no doubt as to her nonliability under the express prohibition of the act of June 8, 1893. We have recently passed upon the powers of a married woman under this statute, in Henry v. Bigley, 5 Pa. Superior Ct, 503, and it is unnecessary to discuss the matter further here. The judgment entered February 20, 1897, for want of a sufficient affidavit of defense, cannot stand, and the subsequent proceedings based thereon must fall with it.

The judgment is reversed and a procedendo awarded.

Appeal of Class & Nachod in the Matter of the Transfer of License at Morton and distribution of $2,000 paid into court.

Transfer of license—Jurisdiction, Q. S.—Payment of money into court.

The court of quarter sessions has no jurisdiction to order the payment into court of the proceeds of a proposed sale of a hotel as a condition to the approval of the transfer of the license, nor will the consent of all parties confer such jurisdiction.

Appeals—Jurisdiction, Q. S.—Payment of money into court.

On an application for transfer of license the court made the following order: "On paying into court $2,000, the balance of purchase money to abide the further order of court, the license may be transferred." Judgment creditors of the vendor united in petitioning for the appointment of an auditor to distribute the fund. After participating in the proceedings before the auditor certain creditors appealed, alleging want of jurisdiction in the quarter sessions to order the money into court. *Held*, that the whole proceeding must be regarded as a common law reference and that the appellate court will not review the decree of distribution made in such an anomalous proceeding, but will quash an appeal taken by a participating creditor. Queried: Whether the vendor might not have had the right to an appeal.

Argued Nov. 17, 1897. Appeal, No. 56, Oct. T., 1897, by Class & Nachod, from the order of Q. S. Delaware Co., transferring license upon the payment into court of $2,000, remainder of purchase money, to abide the further order of the court. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Appeal quashed.

It appears from the record of the auditor that Frank Schoener had a licensed hotel at Morton, Delaware county, that he became involved financially, was unable to pay his debts and confessed certain judgments on which executions were issued.

After levy was made an agreement was entered into by which Andrew Hayes agreed to purchase from Schoener the good-will, fixtures, furniture and license for $3,000, provided the court would approve of a transfer of the license; $1,000 was paid down, $2,000 was paid into court, and the transfer of the license allowed.

To this agreement execution creditors assented and stayed their executions.

The judgment creditors, including the appellants, subsequently united in a petition for the appointment of an auditor for the distribution of the fund paid into court. The auditor in making such distribution exhausted the fund before reaching the claim of the appellants, amounting to $2,150, who filed exceptions to the report of the auditor, which were dismissed by the court.

Errors assigned were to the dismissal of appellants' exceptions, reciting same, which assigned error in the scheme of distribution reached by the auditor, and especially (14) The court of quarter sessions has no jurisdiction over the fund.

W. Roger Fronefield, for appellants.—Want of jurisdiction may be shown in the appellate court even where the question was not raised in the court below: Hill v. Tionesta Twp., 129 Pa. 525.

The balance of appellants' argument was directed to the merits of the case as to the distribution reached by the auditor, which, not being considered by the Superior Court, need not be set out here.

Wm. F. Johnson, with him *Charles H. Pile*, for appellees.—It is not true that the court directed the money to be paid into the court of quarter sessions. It was a suggestion to pay "into court"—"where, if there were any disputes as to ownership, the same could be judicially determined." As a matter of fact it was paid to the prothonotary, but was considered by all the parties as being in the quarter sessions. The appellants, being the only parties objecting to the transfer, particularly and solely invoked it, and there was common consent. The court took jurisdiction by reason of that invocation and common assent, nobody objected at any stage of the proceedings, and it is too late now to raise the question of jurisdiction.

OPINION BY WICKHAM, J., December 13, 1897:

Frank Schoener was a licensed innkeeper who owed more than he could pay. A number of his creditors, including the

appellants, were pursuing him with executions. In this emergency, one Andrew Hayes came forward and agreed to buy Schoener's lease of the hotel, together with the personal property used in and about the premises, agreeing to pay therefor $3,000, if a transfer of the license could be obtained, otherwise the contract to be void. One third of the purchase money was to be paid in five days, and a note at three months given for the remainder, all moneys paid to be returned if the agreement were not consummated.

When application was made to the court of quarter sessions for the transfer, the appellants protested against its being allowed, this evidently with the sole view of securing some of the proceeds of the sale on their judgment, which stood at the foot of the list, but on which they had previously issued an attachment execution, to reach the moneys in Hayes's hands. Finally an amicable understanding seems to have been reached between all parties in interest, that the objections to the transfer should be disregarded, and that $2,000 of the purchase money should be paid into the court of quarter sessions. The court assented to this arrangement, and made the following order, to wit: "On paying into court $2,000, remainder of purchase money, to abide further order of court, the license may be transferred." It will be observed that this is not an order specifically directing the money to be paid into court, but an allowance of the transfer in case the money were so paid.

On October 6, 1896, the day after the making of the order, the money was paid to the clerk, and thereupon the appellants united with the other judgment creditors of Schoener in petitioning the court to appoint an auditor to distribute the fund, which was accordingly done. The appellants made a vigorous effort to secure, through the audit, a part of the money, but being unsuccessful, took their appeal to this court, and assigned for error, inter alia, that the court below had no jurisdiction over the fund. This is quite true, but it is a sword which cuts both ways, and to say the least, the objection comes with an ill grace from the appellants, particularly at this late day. The quarter sessions, as such, of course had no right to order the money into court, nor could the counsel for the parties interested, by any agreement they might make, give that tribunal a jurisdiction it possessed neither at common law, nor by statute. As well

might they have gone into the orphans' court to settle their disputes respecting the distribution of the proceeds of the sale of the hotel, as to attempt to use the machinery of the court of quarter sessions for the same purpose. It was never contemplated that the latter tribunal should be called on to adjust such controversies, or be employed to collect claims of which the common pleas only has cognizance.

The whole proceeding must be regarded as being in the nature of a common-law reference. That the learned judge of the court below shared somewhat in this view, is perhaps inferable from the fact that he made no absolute order, as said before, to pay the money in, and the further fact mentioned in the testimony of one of the counsel, that he suggested that all parties in interest should join in the petition for the appointment of the auditor.

The appellants and the other claimants to the fund created a court of their own for the settlement of their differences. Properly viewed, the auditor, at the most, was only a common-law referee, deriving his powers entirely from the agreement and consent of those who secured his appointment, and voluntarily submitted their claims to his arbitrament.

Schoener who, by the way, is not here complaining, was not compelled to pay the money into court, but he chose to do so at the instance of the court and his creditors, so as to obtain a larger price for his hotel property, by having the license go therewith. The appellants were not summoned or cited into the quarter sessions, and were not bound to take any part in the proceedings had there. They still had their original rights and remedies, whatever they were, on their judgment in the common pleas, unless they chose to renounce them. They took their chances before the auditor, and we cannot help them.

By way of illustration, let us suppose that A, in consideration of B, C, D, and E, his creditors, withholding or withdrawing objections to a decree for which he is asking in the orphans' court, at their instance and on the judge's order, pays $2,000 to the clerk for the benefit of the creditors, whose intermeddling results solely from their supposed discovery of a new way to collect old debts. The court then at the request of these creditors appoints an auditor to determine their respective rights to the money. It will hardly be contended that this court can or

should review the decree of distribution made in such an anomalous and unauthorized proceeding. An appeal by the party, paying in the money, from the order directing its payment, might stand on a better footing. In Harbison v. Gilliland, No. 217, October and November term, 1886, a case decided by the Supreme Court at Pittsburg, but not reported, it appeared that in a sheriff's interpleader the parties in interest assented to the appointment of an auditor, and made their fight before him, instead of having an issue framed and trying the case before a jury, as provided by statute. The court refused to interfere, and quashed the writ of error. We are constrained to pursue the same course in the case at bar.

Appeal quashed.

Mary H. Rohbock *v.* Grant McCargo and C. E. Dickson, Appellants.

Landlord and tenant—Evidence—Degree of proof to establish a surrender.

Where a case turns on whether there has been a surrender by a lessee of his term and an acceptance thereof by the lessor, the proof requisite to establish such surrender must establish a clear and explicit agreement, and the landlord's acceptance of the surrender also must be established by a fair and full preponderance of evidence. It is error however, for the trial judge to instruct the jury that a defendant lessee, in order to meet the burden of proof cast upon him, must, to establish a surrender, prove all the terms and conditions of the alleged rescission or surrender and acceptance by evidence that is "clear, precise and indubitable."

There is no reason for requiring the exceptionally high measure of proof necessary to take the case out of the statute of frauds, or to reform a writing.

Argued May 6, 1897. Appeal, No. 170, April T., 1897, by defendants, from judgment of C. P. No. 3 Allegheny Co., November Term, 1894, No. 587, on verdict for plaintiff. Before RICE, P. J., WILLARD, WICKHAM, BEAVER, REEDER, ORLADY and SMITH, JJ. Reversed.

Appeal from judgment of alderman on an action for rent in arrears. Before KENNEDY, P. J.

It appears from the record that, although the claim as origi-

nally brought was for one month's rent amounting to $150, pending the determination of the case in the court below, the total term of the lease expired.

By agreement of counsel the present suit was designed to cover all claims which the plaintiff might have growing out of said lease. The question arose under the terms of the contract of lease, which provided, inter alia, as follows:

"That the said party of the first part (Mary A. Rohbock) doth hereby lease and let unto the said parties of the second part (Grant McCargo and C. E. Dickson) from the 26th day of January, 1891, for and during the term of one year, two months and six days, with the privilege of remaining in possession until the first day of April, 1896, for the annual rental of $600, payable as follows, viz: $100 on April 1st, 1891, and thereafter $150 on the first days of July, October, January and April of each and every year during said term until the whole amount of said rent is paid; the following described premises, etc."

The defendants contended that under the terms of the lease they were merely tenants from year to year after April 1, 1892, and proof was given of notice and intention to vacate prior to April 1, 1894.

There was also evidence tending to show an understanding reached between the plaintiff's agent, Armstrong, and the defendant, McCargo, by which plaintiff was to receive the same rent monthly, and the defendants were to occupy the premises for a few weeks after April 1st, and until such time as a new building erected for their occupancy was ready. The defendants remained in the premises until about June 1, 1894, when they removed and tendered the rent for April and May, which was refused. The court left the question to the jury as to whether there had been a surrender and acceptance of the lease, charging the jury, inter alia, as follows: "As I have said, the lease was perfectly good up to the first of April, 1896, unless its cancellation and the surrender of the premises was agreed to, and Mr. Armstrong and Mrs. Rohbock say it never was agreed to by them. All that Mr. Armstrong admits having said was, that he would hold them liable for the balance of the rent if the lease was good. I think you understand the question for your determination: Was this old agreement canceled and the prem-

ises surrendered and accepted by Mrs. Rohbock, either by herself or her agent, Mr. Armstrong? The defendants claim that after this 1st of April, the circumstances show a ratification by Mrs. Rohbock of the surrender and acceptance by them, although the transaction, as I have told you, was entirely with Mr. Armstrong the agent; but they say the circumstances show not only the positive acceptance by Mr. Armstrong, but its subsequent ratification by Mrs. Rohbock. All those circumstances are for you. If you find there was a surrender of the premises, and an acceptance by Mrs. Rohbock, then that is a virtual cancellation of the old lease, and the defendants would not be liable, and your verdict must be for them. But if there was no such surrender of the premises, and acceptance by Mrs. Rohbock or her agent, then the defendants are liable for the amount claimed. The burden is upon the defendants to satisfy you by the weight of the testimony that there was such a surrender of the premises, and an acceptance by Mrs. Rohbock, as would amount to the cancellation of the old agreement before you can find a verdict." [5]

The plaintiff's points and the answers thereto were as follows:

1. That defendants having remained in possession after the first of January, 1892, they elected to avail themselves of the privilege granted in the lease, namely, of remaining in possession until the first of April, 1896, and having so elected they were bound to pay the rent provided for in said lease, to wit, the sum of $150 on the first days of July, October, January and April, of each and every year during said term, until the whole amount of said rent is paid, unless said contract of letting was rescinded by defendants, and the premises surrendered to and accepted by plaintiffs. *Answer:* Affirmed. [1]

2. The contract of letting or lease between the plaintiff and defendants in this case being for a period or term exceeding three years from the making thereof, and being in writing, no parol rescission or surrender would be a defense against the rent claimed by the plaintiff, unless such parol rescission or surrender were accompanied by a surrender of the possession of the leased premises by the defendants to the plaintiff, or her agent, and his or her acceptance thereof. *Answer:* Affirmed. [2]

3. The contract of lease between plaintiff and defendant being in writing and under seal, the burden of proving a rescis-

sion or surrender thereof is upon the defendants who allege it, and all the terms and conditions of the alleged rescission or surrender must be proved by evidence that is clear, precise and indubitable. *Answer:* Affirmed. [3]

4. That under all the evidence in the case the verdict should be for the plaintiff for the full amount of her claim. *Answer:* Refused.

Defendant's points and the answers thereto were as follows:

1. Under all the evidence the verdict should be for the defendants. *Answer:* Refused. [4]

If this point is refused, then

2. If the jury believe that after the defendants had notified the plaintiff of their intention to vacate the demised premises on April 1, 1894, the plaintiff or her agent expressly consented, or by any course of action in effect consented to their remaining temporarily thereafter until the new building was ready for their occupancy, the verdict should be for the defendants. *Answer:* Affirmed.

Verdict and judgment for plaintiff for $818.75. Defendants appealed.

Errors assigned were, (1-3) In affirming plaintiff's first, second and third points, reciting points and answers thereto. (4) In refusing defendant's first point, reciting same. (5) To a portion of the judge's charge, reciting same.

H. G. Wasson, with him *W. K. Jennings*, for appellants.—The court erred in instructing the jury that the burden of proof was upon the defendants to establish a surrender and acceptance of the lease by evidence that was clear, precise and indubitable: Gillion v. Finley, 22 W. N. C. 124.

We are utterly unable to reconcile the learned judge's affirmance of the plaintiff's first point with the affirmance of the defendant's second point. The defendant's second point is wholly predicated upon the defendant's right to terminate the lease on April 1, 1894. Under all the evidence, having affirmed the second point for the defendants we maintain that the first point ought also to have been affirmed.

The plaintiff had full cognizance of the arrangement by which the defendants were to temporarily occupy the demised prem-

ises after April 1, 1894, but even if she had not her agent's authority to make it was ample. Such is the ruling in Weightman v. Harley, 20 W. N. C. 470.

Although timely notice of the defendants' intention to vacate April 1, 1894, was given, no act of assembly requires notice on the part of a tenant: Brown v. Brightly, 14 W. N. C. 497; Cook v. Neilson, 10 Pa. 41.

J. I. Buchanan of *Montooth Bros. & Buchanan*, for appellee. —The act of the appellants in holding over or remaining in possession after April 1, 1892, was an election upon their part to avail themselves of the privilege granted by the lease to remain in possession until April 1, 1896. They were not, therefore, merely tenants from year to year: Clarke v. Merrill, 51 N. H. 415; Delashman v. Berry, 20 Mich. 292; Tracy v. Exchange Co., 7 N. Y. 472; Kramer v. Cook, 73 Mass. 550; Montgomery v. Board of Commissioners, 76 Ind. 362; McBrier v. Marshall, 126 Pa. 390; Harding v. Seeley, 148 Pa. 20.

A contract of letting on lease between plaintiff and defendants, being in writing, for a period or term exceeding three years, no parol rescission or surrender would be a defense against the rent claimed by the plaintiff unless such parol rescission or surrender were accompanied by a surrender of the possession of the leased premises by the defendants to the plaintiff, or her agent, and his or her acceptance thereof: Auer v. Penn, 92 Pa. 444; Auer v. Penn, 99 Pa. 370; Breuckman v. Twibill, 89 Pa. 58; Milling v. Becker, 96 Pa. 182; Teller v. Boyle, 132 Pa. 56.

The defendants do not set up a surrender by abandonment or implication, but allege an express contract or agreement which in effect abrogates and avoids the covenants of the lease and amounts to a rescission of a writing under seal, and it is certainly not error to instruct the jury that the burden of proving such a contract or agreement is upon the defendants, who allege it, and that all the terms and conditions of the alleged agreement must be proven by evidence that is clear, precise and indubitable: Spencer v. Colt, 89 Pa. 314; Hart v. Carroll, 85 Pa. 508; Sacks v. Schimmel, 3 Pa. Superior Ct. 426.

OPINION BY WICKHAM, J., July 23, 1897:

The plaintiff in this case leased to the defendants, by a writ-

ing, dated January 23, 1891, certain premises in the city of Pittsburg. The following clause of the lease gave rise to the present controversy, to wit: "The said party of the first part doth hereby lease and let, unto the said parties of the second part, from the 26th day of January, 1891, for and during the term of one year, two months and six days, with the privilege of remaining in possession until the 1st day of April, 1896, for the annual rental of $600, payable as follows, viz: $100 on April 1, 1891, and thereafter $150 on the first days of July, October, January and April of each and every year during said term, until the whole amount of said rent is paid."

There was thus created a certain term, ending on April 1, 1892, with the option of a renewal, on the part of the lessees for another term of four years, on the same agreements and stipulations, except the covenant of renewal: Cairns v. Llewellyn, 2 Pa. Superior Ct. 599. No question of rescission or cancelation was raised by the evidence, the only proper inquiry being whether or not the lessees elected to renew, it being their privilege and not the lessor's to decide this matter. Nor was the case affected by the principles which apply to a technical surrender, that is, a yielding up of the demised premises and an acceptance thereof by the lessor. It was a matter of no moment whether the lessor accepted or not, provided that the lessees gave up possession, at the end of the first term. This, however, they did not do, but remained in possession until June 1, 1892.

Without explanation, their remaining over would be conclusive evidence of an election to hold for four years longer: McBrier v. Marshall, 126 Pa. 390; Cairns v. Llewellyn, supra, and authorities therein cited. It may be remarked here that the decision in Gillion v. Finley, 22 W. N. C. 124, cited for the appellants in support of the contrary view, is not in harmony with later decisions of our Supreme Court. But the defendants allege, and this is conceded, that, before the first term ended, they notified the plaintiff that they would not accept the second. They further aver that in March, 1892, they made a special arrangement with the plaintiff's agent to hold over, at the same rent, until the building they were then erecting would be ready for their occupancy, perhaps two or three months after April 1, 1892, and if this be true, their retention of the premises

would, of course, be attributable to the new contract, instead of to their right under the option.

The jury should have been instructed, that if the agent entered into this agreement, and it was within the scope of his employment, their verdict should be for the defendants, otherwise the plaintiff was entitled to recover. There was nothing more in the case. The plaintiff's first, second and third points, instead of being affirmed, as they were, should have been refused. The first is so framed as to lead the jury to infer that, unless there was a rescission or surrender, after April 1, 1892, the defendants were liable. It is at least so doubtful in its meaning as to be confusing. As said before, the question of rescission is not in the case. It was merely a matter of acceptance or refusal of the option, on the part of the defendants, and the words "rescission," "cancelation," and "surrender," in the sense wherein they were used, were likely to mislead.

The second point is open to the same objections as the first, and to the further one, that it assumes that the lease was for a period exceeding three years. As we have already indicated, the lease was what it purported to be on its face, that is, for one year, two months and six days, with a provision that the lessees, at their own pleasure, might extend it for a further term of four years.

The third point, besides being liable to some of the objections that lie to the first and second, calls for too high a degree of proof in support of the defense. It was not necessary to establish it by "clear, precise and indubitable evidence," a preponderance was enough. The defendants were not seeking to modify, add to, contradict, or rescind the written lease. The oral agreement set up was independent of it, and was made after the defendants had notified the plaintiffs, as is admitted, of their intention not to renew, the notice having been given and the agreement made, if made at all, before April 1, 1892. The defendants, even if they had not given the notice, were still entirely free, so far as accepting or refusing the option was concerned, and the oral agreement would in itself be a refusal. Of course, if their story as to this agreement were rejected by the jury, their subsequent holding over, notwithstanding their previous notice, impliedly created a new term.

The first, second, third and fifth specifications of error are sustained.

Judgment reversed and a venire facias de novo awarded.

A motion for reargument being duly allowed, a reargument was had before the court in Philadelphia, November 1, 1897.

H. G. Wasson, with him *W. K. Jennings*, for appellants.—The judgment of the lower court ought to be reversed if for no other reason than because of the error manifest in the affirmance of the plaintiff's third point.

The defendants should not have been held to measure their proofs by this standard: Spencer v. Colt, 89 Pa. 314; Hain v. Kalbach, 14 S. & R. 158; Woods v. Farmare, 10 Watts, 195; McGinity v. McGinity, 63 Pa. 38; Plumer v. Guthrie, 76 Pa. 441; Hart v. Carrol, 85 Pa. 508.

Parol agreements of like character do not infringe the rule that extrinsic verbal evidence is not admissible to contradict or alter a written instrument, neither are they in violation of the statute of frauds, and are supported by judicial authority: 1 Greenleaf on Evidence, par. 303; Kiester v. Miller, 25 Pa. 481; McBrier v. Marshall, 126 Pa. 390; McCauley v. Keller, 130 Pa. 53; Harvey v. Gunsberg, 148 Pa. 294; McClelland v. Rush, 150 Pa. 57; Walker v. Githens, 156 Pa. 178; Washburn on Real Property.

J. I. Buchanan of *Montooth Bros. & Buchanan*, for appellee.—The words "clear, precise and indubitable," have often been used by the courts in describing the kind of evidence necessary in such cases: Spencer v. Colt, 89 Pa. 314; Hart v. Carroll, 85 Pa. 508; Sacks v. Schimmel, 3 Pa. Superior Ct. 426.

Opinion on Reargument by Wickham, J., December 13, 1897:

Owing to a misapprehension as to dates, a portion of the opinion heretofore handed down in this case, is inapplicable to the facts. It appears that the defendants' notice of their intention to quit the leased premises was given, and the alleged new contract made, long after the second term had commenced. The learned judge of the court below was, therefore, right in

holding that the whole controversy centered in the surrender and acceptance set up by the defendants.

If necessary, the case of Gillion v. Finley, 22 W. N. C. 124, so strongly relied on by the defense, can be distinguished, in its facts, from the one in hand. In Gillion v. Finley, the lease was for "the term of one year with the privilege of three years from first day of April, A. D. 1885, at the rent of two hundred and four dollars per year to be paid in twelve monthly portions." Nothing was said as to the three years constituting an integral term, and it was held that the language used meant, that the tenant had the right to remain from year to year, not exceeding three years.

In the present case, however, the lessees are given the privilege of holding from April 1, 1891, the end of the definite term, "until the first day of April, 1896," and this second period was evidently in the minds of the parties when they use the words "during said term" in the clause fixing the times for the payment of the rent. The lessees were given the right to hold for and during the continuous period of time intervening between April 1, 1891, and April 1, 1896. This is the plain and obvious meaning of the language used. When they accepted the option, they at once took this integral term and not a portion thereof, nor a mere tenancy from year to year.

We feel obliged to adhere to our original view respecting the degree of proof requisite to establish the surrender. Of course the agreement, as to this matter, should be clear and explicit. If it be of that character, we think that it is enough that it, and the landlord's acceptance, be established by a fair and full preponderance of the evidence. This is not an attempt to reform, modify or contradict a written instrument, but an effort to prove a new and executed contract based on a new consideration, namely, the restoring to the landlord, of the leased premises: 1 Greenl. Ev. 303; Malone v. Dougherty, 79 Pa. 46. Nor is it an attempt to escape the operation of the statute of frauds. In the language of Chief Justice THOMPSON in Pratt v. Richards Jewelry Co., 69 Pa. 53, "I cannot see wherein the statute of frauds had anything to do with it." So also in Auer v. Penn, 92 Pa. 444, it was said: "The fact that a lease is for a longer term than three years does not prevent a rescission thereof, by agreement of the parties, when accompanied by a surrender of

the term and possession, by the tenant to the landlord, and the acceptance thereof by the latter. It is not like a sale and transfer, to a stranger, of an interest in land greater than a term of three years, and therefore is not within the statute of frauds. It is a yielding up, to the reversioner, the limited estate derived from him whereby the future tenancy is rescinded. The relation of landlord and tenant is thereby ended."

There is no reason, therefore, for requiring the exceptionally high measure of proof necessary to take a case out of the statute, or to reform a writing. The degree of evidence that would support an allegation of the termination of the tenancy, or suspension of rent as the result of forfeiture, eviction or abandonment, ought, on principle, to be sufficient.

It is true, that in Hooks v. Forst, 165 Pa. 238, the court below told the jury that the evidence of surrender must be clear, precise and indubitable. As the defendants, who were the parties likely to be injured by this instruction, prevailed at the trial, they had no occasion to complain of it elsewhere. It is significant, however, that the Supreme Court uses language in referring to the instruction, which contains some ground for the inference that, in the opinion of that tribunal, the plaintiffs had been, if anything, too favorably treated.

It is due to the learned trial judge to say that, in his general charge, he laid down the correct rule as to the measure of proof required of the defendants, but unfortunately this was nullified by his later (and, perhaps, inadvertent) affirmance of the plaintiff's third point. Because of this error, we are compelled to allow our judgment, heretofore rendered, to stand.

Estate of Francis F. Lowry, deceased. Appeal of Mary E. Lapp et al.

Appeals—Credit given to findings of auditing judge—Domicil.

Where the principal question before the orphans' court was one of fact, namely, the domicil of the decedent, and the auditing judge found that he had not lost his domicil of origin by residence abroad, which finding was sustained on exception by the court in banc; the appellate court will not disturb the conclusion in the absence of manifest error, there being sufficient evidence to sustain the finding and decree of the court below.

Evidence—Depositions regularly taken and filed.

Where depositions regularly taken are filed by order of the court they thereupon become proper evidence for either party.

Argued Oct. 4, 1897. Appeal, No. 181, Nov. T., 1896, by Mary E. Lapp and others from the decree of O. C. Phila. Co., April T., 1894, No. 260, in distribution. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Exceptions to adjudication. Before PENROSE, P. J.

It appears from the record that the estate of Francis F. Lowry was distributed in accordance with an agreement entered into by all of the distributees except to the extent of $2,803.46 which, in accordance with the adjudication of the court and the agreement of the parties should remain with the accountant "to answer the contest between Sophia L. Warden of the one part and Mary E. Lapp, Lewis C. Lowry, Agnes Hosmer, Louisa Tatem Fallon, Anna Mary Wilson, Allen G. Oliver and Lewis Lowry Allen of the other part."

The subject-matter of the controversy which arose on distribution of the estate of Francis F. Lowry was whether the domicil of the decedent was Philadelphia or Paris. Sophia Warden, the appellee, contending that the domicil of the decedent was at Philadelphia, and that the distribution should be made, per capita, in accordance with the laws of Pennsylvania, while Mary E. Lapp et al. appellants here contended that the domicil was Paris, and that distribution should be made in accordance with the law of the domicil per stirpes, according to the French code.

The auditing judge, PENROSE, J., found as a fact that the domicil of the decedent was at Philadelphia, and made distribution per capita in accordance with Pennsylvania laws, as will more fully appear from his adjudication, which was as follows:

By the adjudication of the account filed July 8, 1896, it was ordered that distribution of the balance shown by the account as modified should be made in accordance with the agreement entered into by all the distributees except to the extent of $2,803.46 which should remain with accountant "to answer the contest between Sophia L. Warden of the one part and Mary E. Lapp, Lewis C. Lowry, Agnes Hosmer, Louisa Tatem Fallon,

Anna Mary Wilson, Allen G. Oliver, and Lewis Lowry Allen of the other part,"—Sophia L. Warden not having been a party to the agreement under which such partial distribution was made.

Instead of making application to the auditing judge, by petition or otherwise, to decide the question as to the disposition to be made of the portion of the balance thus retained, the accountant has filed the present account, debiting itself simply with the sum mentioned, $2,803.46, as if it were not already before the court. The effect of this is to subject the amount to unnecessary costs, to increase the labors of the court, and to lead to confusion; but as no objection has been made by counsel for the parties interested, and the account has come for adjudication before the same judge who has the original account, the irregularity may be overlooked, so far at least, as no one is prejudiced by it.

The matter is however not one purely of form. An application has been made by Mr. Divine to strike from the record the deposition of going witnesses, taken September 3, 1895, under a rule entered for the purpose by counsel for the widow of the decedent, filed in the clerk's office October 22, 1895. There were two questions to be determined: marriage of the decedent and his domicil, and the purpose of the depositions was to establish the facts as to both. When they were taken, Mrs. Lowry was represented before the examiner by Mr. Gerhard, and Mr. Maxwell, Mr. Divine, and Mr. Fallon attended on behalf of the distributees, respectively, for whom they are counsel. The fact of marriage seems now to be admitted by all the parties, but the question of domicil is still an open one; and Mrs. Sophia L. Warden, whose rights are not affected, by the agreement of compromise entered into by the others, has, unquestionably, the right to use the depositions so taken, though not at her instance, for the purpose of establishing the question of domicil so far as concerned the fund embraced in the account then before the court. Depositions taken under a rule may be used by either party to the controversy, even if not filed (Bennett v. Williams, 57 Pa. 404), a fortiori when they have been filed.

The result would probably have been the same even if the question had arisen as to a new fund—the witnesses being be-

yond the reach of the court and the testimony having been reduced to writing after full opportunity to all persons interested to cross-examine: Evans v. Reed, 78 Pa. 415; Speyerer v. Bennett, 79 Pa. 445; Walbridge v. Knipper, 96 Pa. 48, but here it is the very fund itself or a portion of it, and the deposition is offered on one of the points which it was taken to establish. Under the authorities referred to, it may be used by any of the parties, and, of course, the right cannot be taken away by striking the depositions from the record. The distinction between the present case and Pepper's Est., 34 W. N. 65, cited by Mr. Divine, is very manifest.

The decedent, as appears by the adjudication referred to, died January 24, 1894, intestate, without issue, father, mother, brother or sister, leaving a widow, Rebecca L. Lowry, and nephews and nieces and great nephews and nieces, viz: (1) Mary E. Lapp, the only child of Charles Lowry, a deceased brother; (2) Lewis C. Lowry, the only child of Lewis Lowry, a deceased brother; (3) Sophia D. Warden; (4) Caroline L. Hutchins; (5) Mildred T. Herring; (6) Henrietta Herring; (7) Howard M. Herring; (8) T. W. Fletcher and J. Fletcher; (9) Mrs. A. S. Burch, Malcolm L. Herring and T. R. Herring; (10) Agnes Hosmer; (11) Louisa Tatem Fallon; (12) Anna M. Wilson; (13) Lewis Lowry Allen; and (14) Allen G. Oliver. Nos. 3, 4, 5 and 6 being children, and Nos. 8 and 9 grandchildren of Louisa L. Herring, a deceased sister—the parents of the grandchildren being respectively, Mary E. Fletcher and Malcolm L. Herring, a daughter and son who had died in her lifetime; Nos. 10 and 11 children of Mary L. Tatem, a deceased sister; and Nos. 12, 13 and 14, children and child of a deceased daughter (Amanda Allen) of Elizabeth L. Allen, a deceased sister.

He died in Paris, where he had spent many years in the latter part of his life—the question to be determined is whether he was domiciled in France or in Pennsylvania. Under the law of France, if that be the place of domicil, the widow, it is said, is entitled to more than one half of the estate, and the nephews and nieces, instead of each taking a fourteenth of the other half, as in Pennsylvania, take per stirpes, that is, Mrs. Lapp and Lewis C. Lowry each take one fifth of the portion not going to the widow, Mrs. Hosmer and Mrs. Fallon one

fifth, Anna M. Wilson, Lewis L. Allen and Allen G. Oliver one fifth, and Sophia D. Warden, Caroline L. Hutchins, Mildred T. Herring, Henrietta Herring, Howard M. Herring, T. W. Fletcher and J. Fletcher and A. S. Burch, Malcolm L. Herring and T. R. Herring one fifth of the share of Mrs. Warden, being in that case but one thirty-fifth (one seventh of one fifth) instead of one fourteenth. It was said, indeed, by Messrs. Divine and Fallon, that even in Pennsylvania, as the persons entitled are nephews and great nephews and nieces and great nieces the distribution would be made in the same manner; but this is clearly not the law. Prior to the act of 1855, nephews and nieces took to the exclusion of great nephews and nieces, and where there were no living brothers or sisters, the distribution, by express provisions of the original act (April 8, 1833, sec. 14, P. L. 315), was to be made to them in equal shares. The act of 1855 extended the representation among collaterals one degree further, so as to include grandchildren of brothers and sisters, and give to them "such shares as their parent would have taken if living." There is no suggestion of change as to the shares, and the operation of the new law is not to be extended beyond the purpose manifestly intended. If no nephew or niece had died, the distribution would be made per capita; the act of 1855 merely brings in the children of such as may have died, who previously would have been altogether excluded —and gives to them, by representation of their parent, "such share" as he would have taken but for his death, viz: a share equal to what each of the living nephews and nieces received.

The decedent was born in Philadelphia, where for many years he carried on business. He was a butcher, having a stall in the Farmers' Market, and after reaching the age of fifty, he was able to retire with an estate sufficient in size to permit him to live comfortably on its income. So far as appears he owned no real estate and his securities were placed in The Fidelity Insurance, Trust and Safe Deposit Company for safe keeping—remaining there till his death. He was childless, and sometime between 1872 and 1876 he and his then wife went to Paris, powers of attorney by which to collect his income being left with the Fidelity Company. His stay in Paris was not continuous. He was in Philadelphia during periods of greater or less duration, the longest time from about July, 1889, to August,

1890, and the last, so far as the evidence shows, in 1893. His wife died in 1890 in Paris, and he then returned with her body. She was buried in his lot in Laurel Hill.

In 1893 he married the lady who survived him as his widow. She is a French woman and the marriage took place in France. After the remarriage he again came to this country, returning to France in June, 1893. He died, as already stated, in the following January.

A change of domicil works such important consequences, both as to the status of the person and the distribution of his personal estate, that the burden of proving a change is upon the party alleging it, and this is not only under settled principles of public law, but under the fundamental rule of evidence that an established condition is presumed to continue. The presumption stands until overcome by proof and the proof must be clear and free from reasonable doubt. Mere residence in a foreign country is not, standing by itself, enough. It must appear that the residence was animo manendi, and with the intention of abandoning the former domicil. An established domicil adheres until an intention to adopt, with an actual adoption of a new one is made manifest, and this is emphatically the case where the domicil alleged to have been given up is the domicil of origin. In the leading case of Somerville v. Somerville, 5 Vesey, 750, the master of the rolls (Sir Richard Pepper Arden), said: "The third rule I shall extract is, that the original domicile, or as it is called, the forum originalis, or the domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile." In Aikman v. Aikman, 3 Macq. 854, it is said by Lord Westbury: "Everyone's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be animo et facto, and the burden of proof unquestionably lies on the party who asserts the change." And in the same case (page 863) it was said by Lord Cranworth: "It is a clear principle of law, that the domicile of origin continues until another domicile has been acquired, i. e. till the person whose domicile is in question has made a new home for himself in lieu of the home of his birth."

A domicil of choice, as distinguished from a domicil of origin may be abandoned by simply ceasing to reside in it with the intention of so doing, but a domicil of origin is retained until the actual acquisition animo manendi, of a new domicil. Hence in Bell v. Kennedy, L. R. 1. Sc. App. 307, it was held that a person whose domicil of origin was Jamaica, who died in Scotland, after having resided there for a year, retained his original domicil, though he had sold his estates there and left Jamaica, as he had declared, "for good,"—it not being shown that he had at the time of his death or previously, any fixed or settled purpose to make Scotland his future home.

These principles are perfectly well settled, and they have been applied in countless cases decided in this country. See Price v. Price, 156 Pa. 617. Their application to the case now under consideration leads to a conclusion adverse to the claim that the estate of the decedent is to be distributed according to the law of France. There was nothing to show that he had abandoned his Philadelphia domicil or that he had acquired a permanent residence in France. He did not engage in business in the latter country. So far as appears he never even became a householder there, and his remittances were made, not to him, at any fixed place or abode, but to his bankers, Drexel, Harjes & Company. Undoubtedly, Parisian life had great attractions for him; this was shown by the testimony offered before the auditing judge by Messrs. Divine and Fallon; but this was the utmost extent that was shown, and there was not a syllable of evidence to show an intention to renounce Philadelphia as his place of domicil, though he was in constant communication with the Fidelity Company and its officers, both while abroad and in this country.

The absence of all evidence, written or oral, of any expression of an intention to abandon, or that he had abandoned Philadelphia as his permanent home, is especially significant in view of the established facts that during the whole of his absence in France, his entire estate was permitted to remain in Philadelphia; that when his wife died, he caused her to be buried, not in France where she was at the time, but in his family lot in Laurel Hill, and that his last dying wish, as shown by a paper written at his instance, was that he too should be buried in the same place. It is true that in Hood's Estate, 21 Pa. 106, the

desire of the decedent to be buried at the place of his domicil of origin and the fact that some of his securities were there, as well as the fact that he had an interest in business carried on there, were not regarded as important in view of the further facts that he had removed from such domicil during his minority, had engaged in business and established a permanent residence in Cuba, had changed his religion in order to become domiciled there, and always considered himself as domiciled and resident on the Island of Cuba where his fortune lay. There, there was the strongest evidence of abandonment of original domicil, and acquisition of permanent residence in Cuba, while here, evidence of similar character is wholly wanting.

But the case does not rest on the mere absence of proof of intention to abandon Philadelphia as the domicil of the decedent: there is positive uncontradicted evidence of declarations by him, shortly before his death, that he did not have such intention. Arthur E. Valois, whose testimony was taken by deposition (already referred to), was consulted in his official character (counsel for the United States Consulate General at Paris) by the decedent with reference to his contemplated marriage in 1893, the question of domicil being one of importance as affecting marital rights, etc., etc. He then stated that his domicil was Philadelphia, and after his marriage his intention was to return, after some time. This was said on various occasions to Mr. Valois. Testimony to the same effect was given by Mrs. Rosa Fernand, a sister of the widow of the decedent, to whom he said "many times" that "he never had a real residence in France, never learned to speak French; and that his residence was Philadelphia, he loved America very much." The testimony of Mr. Valois was objected to by Mr. Divine, but so far as the auditing judge can perceive, upon no substantial grounds. That he would have no direct pecuniary interest in the question before the court, is apparent; and the fact, if it be a fact, that a professional relation existed between him and the decedent, or between him and Mrs. Lowry, the widow, is not available as an objection on the part of any third person: Dowie's Estate, 135 Pa. 210.

The estate of the decedent is distributable in accordance with the laws of Pennsylvania, except so far as the parties in inter-

est have agreed to the contrary. Mrs. Sophia D. Warden is not affected by any agreement.

A supplemental account, debiting the accountant with moneys recently remitted by Drexel, Harjes & Company to close the French account ($432.39) was presented and is hereto annexed. The costs of filing the present account will be charged against the moneys so received.

Exceptions were filed to adjudication, both upon the findings of fact and of law, which exceptions were subsequently dismissed and the adjudication confirmed by the court in banc in an opinion by HANNA, P. J., reported 5 District Reports, 729, whereupon this appeal was taken.

Errors assigned were in dismissing the exceptions to the adjudication of the auditing judge, which exceptions principally turned on the findings of fact by the auditing judge that the domicil of the decedent was in Philadelphia at the time of his death.

William S. Divine, with him *Christopher Fallon*, for appellants.—Ordinarily, attacking the findings of fact of an auditing judge are attended with great difficulty, but the case at bar is not such a case as gives the usual weight to such findings of fact, the domicil being an inference drawn from other facts: Sweatman's Appeal, 150 Pa. 369.

The law, it is admitted, casts the burden of proof upon the party asserting the change of domicil. But the appellants in this case did not allege a change of domicil and the law is well settled that prima facie a man is domiciled at the place of his residence at the time of his death, and it is incumbent upon those who deny it to repel the presumption of law: Guier v. O'Daniel, 1 Binney, 349, 1 American Leading Cases, 755; Ennis v. Smith (Kosciusko's Estate), 14 How. U. S. 400.

Prima facie the place of residence is the domicil until other facts established the contrary: Carey's Appeal, 75 Pa. 301; Ennis v. Smith (Kosciusko's Estate), supra.

And this rule applies not only in interstate habitation, but also where a citizen removes to a foreign country.

Where a person removes to a foreign country and settles there, the presumption in favor of domicil of origin no longer

exists and the burden of disproving the domicil of choice falls upon him who denies it: Hood's Estate, 21 Pa. 106.

Robert D. Maxwell, with him *Victor Guillou*, for appellee.—When a deposition is taken it ought to be and is equally the property of both parties and may be given in evidence by either: Gordon v. Little, 8 S. & R. 533; Nussear v. Arnold, 13 S. & R. 323.

OPINION BY SMITH, J., December 13, 1897:

The principal question in this case was one of fact, namely, the domicil of Francis F. Lowry at the time of his death. He was born in Philadelphia and lived to an advanced age, and during nearly all of the last twenty-five years of his life he resided in Paris, France, where he died intestate. So far as appears he never engaged in business there, and his property and business remained in charge of a trust company in Philadelphia, where he had placed it before going to Europe. Testimony touching the inquiry was submitted to the learned auditing judge, from which he found that Lowry had not lost his domicil of origin, and that, therefore, his estate should be distributed according to the laws of Pennsylvania. This finding was approved by the orphans' court and exceptions to the action of the auditing judge were dismissed. Nothing short of manifest error would warrant us in disturbing this conclusion: Galloway's Appeal, 5 Pa. Superior Ct. 272. Whether the prolonged residence of Lowry in Paris would be sufficient in itself to establish a domicil of choice in France, it is unnecessary to decide, because there was affirmative testimony plainly indicating an intention on his part to retain his citizenship and domicil here. Even if, as contended, the burden of proof was cast upon the appellees, the evidence is sufficient to sustain the finding and decree of the court below. The depositions seem to have been regularly taken under a rule, and were filed by order of the court. Thereupon they became proper evidence for either party: Bennett v. Williams, 57 Pa. 404. There is nothing further in the case calling for special notice. The specifications are dismissed and the decree is affirmed.

Cornelius Loose, Appellant, v. Willoughby Scharff.

Landlord and tenant—Way-going crop—Sale under fi. fa. and vend. ex. of landlord's interest.

Where a crop of winter grain sown by the way-going tenant is, by virtue of a local custom, the property of the landlord, a sale under a fi. fa. of the landlord's interest in the growing grain before actual severance does not of itself work such an implied severance as will pass the landlord's title to the purchaser under the fi. fa., as against a subsequent purchaser of the land, at sheriff's sale, who obtains a deed before the tenant's lease expires.

Argued Nov. 9, 1897. Appeal, No. 96, Oct. T., 1897, by plaintiff, from judgment of C. P. Berks Co., Oct. T., 1895, No. 83, on special verdict in favor of defendant. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Amicable action in assumpsit. Before ENDLICH, J.

On the trial of the case the jury found the following special verdict:

1. Plaintiff became the purchaser in December, 1894, on an execution issued at his instance and levied upon the winter crops in the ground of the farm of Hibschman (defendant in said execution) in the possession of J. L. Loose, as tenant for a term beginning April 1, 1894, and ending April 1, 1895.

2. Prior to the levy of said execution said Hibschman had not rented said farm to said J. L. Loose for another year beginning April 1, 1895.

3. Defendant on February 16, 1895, became the purchaser of said farm under execution on a judgment entered to No. 83, December term, 1894, J. D. in a sci. fa. sur mortgage upon said property.

4. The tenancy of said J. L. Loose, under the lease, beginning April 1, 1894, was under and subject to the custom prevailing in this county, that the incoming tenant has the benefit of the winter crops in the ground at the time, and is bound, when going, to leave a crop of winter grain in the ground in place of that which he found.

5. The value of the crops levied upon by plaintiff was, when

harvested in the summer of 1895, after deduction of the expense of harvesting, $207, and said crops were retained by defendant. If upon the whole matter thus found the court should be of opinion that the plaintiff has a good cause of action, then we find for the plaintiff and assess his damages at $227.34. If otherwise, we then find for defendant, as per special verdict filed.

A motion for judgment on a special verdict made by the plaintiff was overruled and judgment was directed to be entered for the defendant in the following opinion by ENDLICH, J.:

Counsel for plaintiff contends that the long line of decisions and dicta on the question of the landlord's interest in grain in the ground, where the latter has been rented upon shares, and the liability of that interest to seizure for his debts (Carson v. Blazer, 2 Binney, 475; Stultz v. Dickey, 5 Binn. 285; Biggs v. Brown, 2 S. & R. 14; Myers v. White, 1 R. 353; Stambaugh v. Yeates, 2 R. 161; Demi v. Bossler, 1 P. & W. 224; Forsythe v. Price, 8 W. 282; Rinehart v. Olwine, 5 W. & S. 157; Bittinger v. Baker, 29 Pa. 66; Burns v. Cooper, 31 Pa. 426; Ream v. Harnish, 45 Pa. 376; Helme v. Ins. Co., 61 Pa. 107; Narewood v. Wilhelm, 69 Pa. 64; Hershey v. Metzgar, 90 Pa. 217; Shaw v. Bowman, 91 Pa. 414; Long v. Seavers, 103 Pa. 517; Baker v. Lewis, 150 Pa. 251), is inapplicable to a case governed by the custom found to exist in this county. Be it so. Yet notwithstanding this custom, which simply requires the tenant to leave a growing crop when he goes, where he found one when he came, it is quite clear that, unless there had been a previous severance, actual or implied, of the growing grain from the soil, the sale of the realty was bound to carry with it the title to the grain: Wilkins v. Vashbinder, 7 W. 378; Bear v. Bitzer, 16 Pa. 175; Backentoss v. Stahler's Adm'r, 33 Pa. 251; Heysham v. Dettre, 89 Pa. 506; Hershey v. Metzgar, supra, p. 219; Long v. Seavers, supra, pp. 521, 522. The controlling inquiry, therefore, in this case must be whether the execution of the landlord's creditor, levied, while the farm was in the possession of the lessee, upon the winter grain put out by him and in the ground, as personalty, constituted a severance of the grain from the realty, by reason of which severance the former passed to the purchaser under said execution and not to the purchaser at

the subsequent sale of the land under proceedings upon the mortgage thereon. Manifestly, if the interest of the landlord in the growing grain, at the time when it was levied upon, was not liable to seizure as personalty, no such effect can be attributed to the execution. Now, it is said by Mr. Justice GREEN, in Long v. Seavers, supra, p. 519, that the proposition, that grain growing in the ground is personal property and may be seized and sold upon execution, relates, in its generality, only to the interest in the grain of the person in possession. The reason of this limitation is obvious and demonstrates its applicability without regard to the matter of differing customs as affecting the rights and duties of the tenant. Where a man has himself sown his own land with his own grain, he owns the latter both as grain, which is personalty, and as part of the land into which he has put it, which is realty. While he remains in absolute control, i. e., in possession of the land, with the grain in it, he is, of course, competent to treat the grain as part of the land or as something separate from it, i. e., either in connection with the land, as realty, or apart from it, as personalty. Consequently his creditors have the same right. An execution and levy upon the grain as personalty, being, therefore, lawful, will effect a legal severance of the grain from the soil, and a sale of the former under such execution will invest the purchaser with the title to the grain. But where grain has been put out by a tenant, while in possession of the land under his lease, the landlord, during the continuance of the term and the tenant's possession, is the owner of the grain in the soil by virtue only of his ownership of the land. That is, he owns it as part of his land, which is realty, and as such only, therefore, can it be reached by his creditors in connection with, as appurtenant to the land. Hence an execution and levy upon it as personalty, apart from the land, is an impossible thing. Such an execution and levy consequently cannot work a severance of the grain from the soil and a purchaser under it takes no title as against a subsequent execution purchaser of the land with the grain in it. It follows that, in this case, the defendant is entitled to judgment upon the verdict.

And now, June 21, 1897, plaintiff's motion for judgment upon the special verdict is overruled, and it is ordered that, upon payment of the verdict fee, judgment be entered for defendant.

Judgment for defendant. Plaintiff appealed.

Error assigned was in directing judgment to be entered in favor of the defendant on special verdict.

H. R. Green, with him *B. Y. Shearer* and *A. G. Green*, for appellant.

Morris H. Schaffer and *Adam B. Rieser*, for appellee.

PER CURIAM, December 13, 1897:

This dispute arose over the title to a growing crop of grain. The plaintiff claimed as purchaser at sheriff's sale of the crop as personalty; the defendant as purchaser at a subsequent sheriff's sale of the land.

It was decided in Long v. Seavers, 103 Pa. 517, that where land is let upon shares a sale upon a fi. fa. of the landlord's share of the growing grain before actual severance does not of itself work such an implied severance as will pass the landlord's title to the purchaser under the fi. fa. as against a subsequent purchaser of the land at sheriff's sale who obtains his deed before the rent falls due. The case was precisely like the present except in this particular. There the subject-matter of the dispute was the landlord's share, reserved as rent to be delivered to him when the crop was harvested and divided; here it was the whole crop of winter grain sown by the tenant whose tenancy was under and subject to the local custom prevailing in Berks county which required him, when going, to leave a crop of winter grain in the place of that which he found. Notwithstanding this distinction the similarity of the two cases in respect of the possession at the time of the sale of the crop upon fi. fa. remains. The relation of landlord and tenant existed, and the possession of the tenant was exclusive. The landlord had not the actual or constructive possession of the land or the crop; nor had he a right to the immediate possession. He had no right to enter upon the land demised to take the crop or do any other act inconsistent with the tenant's right of possession, until the expiration of the term, and before that took place the land was sold at sheriff's sale. Under the act of 1836, the purchaser of the landlord's title to the land under execution against him is entitled to the rent falling due after acknowledgment of the sheriff's deed, whether it be payable in money or grain.

But conceding for the purpose of the case that the crop had not all the characteristics of rent, strictly speaking, still the facts as to the possession seem to bring the case within the limitation of the general rule as it was stated by Mr. Justice GREEN in Long v. Seavers. "It is true that grain growing in the ground is personal property and may be seized and sold upon execution: Hershey v. Metzgar, 90 Pa. 217. But that proposition in its generality relates to the interest in the grain of the person in possession." For the reasons suggested, which are more fully elaborated in the opinion of the learned judge of the court below, the judgment is affirmed.

Margaret Philips v. The Baltimore Mutual Aid Society, Appellant.

Insurance—Mutual aid society—Construction of policy—Delay in payment—Province of court.

Where members of a mutual aid society are classed as nonbeneficial if in arrears for dues for more than three weeks and, even when reinstated, remain nonbeneficial for five weeks thereafter, the beneficiary of a member so in default cannot recover death benefits. The fact that the receipt book of decedent shows acceptance of dues by the company at irregular times is no evidence of an intent of waiver by the company of any rights secured to it by the policy or to change its terms. The facts being undisputed, the question was for the court, and it should have directed a verdict for the defendant.

Argued Oct. 20, 1897. Appeal, No. 122, Oct. T., 1897, by defendant, from judgment of C. P. No. 2, Phila. Co., June T., 1895, No. 860, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Appeal from magistrate. Before PENNYPACKER, P. J.

It appears from the evidence that suit was brought in assumpsit to recover for death benefits which were admitted to be $50.00, and the sum of $5.00 per week sick benefits, for which the plaintiff is the beneficiary.

As to the claim for benefits the defense set up was a provision of the policy to this effect:

"Any member in arrears for more than three weeks' dues shall not be entitled to benefits, but such members can be reinstated by paying such arrears, and passing an examination, though they will not be entitled to benefits should sickness, accident or death occur within five weeks from date of reinstatement."

By a receipt book offered in evidence by the plaintiff it appeared that during the time covered by the book, payments were accepted from Hannah Philips in periods of three or four weeks, and that on the 15th of October, decedent was three or more weeks in arrears. She died on the 22d of October, 1894.

Defendant's points, which were refused by the court, were as follows:

1. If the jury find from the evidence that the decedent had become nonbeneficial by being more than three weeks in arrears prior to her death and had not paid up those arrears more than at least five weeks prior to her death so as to become beneficial under the terms of the policy, then their verdict should be for the defendant. *Answer:* I decline that point.

2. The verdict of the jury should be for the defendant. *Answer:* I decline that point.

Verdict and judgment for plaintiff for $61.91. Defendant appealed.

Errors assigned were refusal of defendant's points.

Edward A. Anderson, with him *John H. Fow*, for appellant.—The form of this policy has been passed upon by the court of common pleas in Dauphin county, and held to be valid and binding: Simms v. Ins. Co., 15 C. C. R. 642.

This case is governed by the rulings in Lantz v. Ins. Co., 139 Pa. 546.

Although the amount involved in this matter is small, the principle is important.

Joseph W. Hunsicker, with him *Charles Hunsicker* and *George Thorn Hunsicker*, for appellee.—Forfeitures are odious in law and are enforced only where there is the clearest evidence that that was what was meant by the stipulation of the parties: Helme v. Ins. Co., 61 Pa. 107.

The case of Simms v. Ins. Co., cited by the appellant, does not apply to this case. The other case cited by the appellant of Lantz v. Ins. Co., only decides that the company was not bound to accept the premium after the death of the insured.

OPINION BY PORTER, J., December 13, 1897:

In the policy of insurance sued on was the provision: "Any member in arrears for more than three weeks' dues, shall not be entitled to benefits, but such members can be reinstated by paying such arrears and passing an examination, though they will not be entitled to benefits should sickness, accident or death occur within five weeks from date of reinstatement." The plaintiff, the mother of the insured, submitted testimony to prove the identity of the insured and the death on October 22, 1894. She offered in evidence the policy and a so-called receipt book showing payments of dues or premiums. The defendant offered no evidence, claiming that the entries in the receipt book showed that the insured was in default at the time of her death. The policy was dated December 20, 1889. The insured had been paying dues for nearly five years. The policy and receipt book were found in her trunk after her death. There was no evidence indicating with what regularity she paid her dues preceding April, 1894. The receipt book included only payments made from April 9, 1894, to the time of the death of the insured, but recited "old book paid up to date." There was no testimony to explain the entries in the receipt book, which consisted merely of dates and initials. In the absence of such explanation they would seem to indicate that the insured had made payment of her dues not on the days contemplated by the policy, but at irregular periods,—most of them when she was more than three weeks in arrear. This however was not evidence of an intention to waive any rights under the policy or to vary any of its terms. It was a course permissible by the stipulation above quoted. The purpose of that clause was to give the insured an opportunity to avert, in part, the effect of failure to pay the premiums when due. It gave a right of reinstatement but attached the condition that she should not be entitled to benefits for five weeks subsequent to such reinstatement. By the receipt book it appears that on October 8, 1894, being then more than three weeks in arrears, she made a payment reinstating

herself. She died October 22, 1894, within the five weeks following the reinstatement. The insured being thus in default by the terms of the policy the beneficiary was entitled to no benefit thereunder.

We are therefore of opinion that the learned trial judge erred in not directing a verdict for the defendant. The second assignment of error is sustained and the judgment is reversed.

P. A. Althouse v. Mrs. James B. Hunsberger, Catherine M. Hunsperger, Appellant.

Judgment—When application to set aside maintained.

An application to vacate and set aside a judgment can be maintained only on the ground of defects apparent on the face of the record.

Judgment—Mistaken name—Service of process.

If a party is sued by a wrong or fictitious name, or by some designation which includes a part only of his name, and is personally served with process, and fails to urge the misnomer in any way, a judgment entered against him by such mistaken, fictitious or imperfect name, is valid and enforceable.

Catharine M. Hunsberger was sued as Mrs. James B. Hunsperger, was served with process and allowed judgment to be entered against her by default under that name. *Held*, that Catharine M. Hunsperger is not in position to urge this misnomer, or use of a fictitious name as constituting a defect vitiating the judgment as between herself and the holder of it.

Judgment—Motion to strike off—Laches—Equity.

Where the record shows that defendant, being served with process in a suit before an alderman, failed to defend the same but suffered judgment by default, and neglected to take an appeal or certiorari, by one or the other of which every right she subsequently alleged in a petition to strike off the judgment, might have been adequately protected, the court will not exercise its equitable power to stay execution or interfere with the judgment.

Argued Nov. 9, 1897. Appeal, No. 92, Oct. T., 1897, by defendant, from order of C. P. Berks Co., May T., 1897, No. 48, discharging rule to vacate judgment. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to vacate or set aside judgment. Before ENDLICH, J.

Judgment was entered by a magistrate against Mrs. James B. Hunsberger for $28.00. Transcript was filed in the common pleas. A rule subsequently was taken to vacate, which upon hearing was dismissed in an opinion by ENDLICH, J. (in which further facts sufficiently appear), as follows:

Judgment having been entered against Mrs. James B. Hunsberger by an alderman, a transcript thereof was in due course filed in this court to No. 48, May term, 1892, J. D. An application by defendant to open this transcripted judgment was refused for reasons given in an opinion filed June 20, 1896. A pluries writ of vend. ex. was thereupon issued by plaintiff to No. 1, June term, 1897, E. D., and the court is now asked by Catharine M. Hunsberger (or Hunsperger) to stay the execution thereof upon her property and to vacate and set aside the judgment.

1. An application to vacate and set aside, i. e., to strike off, a judgment can be maintained only on the ground of defects apparent on the face of the record: O'Hara v. Baum, 82 Pa. 416; Allen v. Krips, 119 Pa. 1; France v. Ruddiman, 126 Pa. 257: Adams v. Grey, 154 Pa. 258; Brewing Co. v. Booth, 162 Pa. 100; North & Co. v. Yorke, 174 Pa. 349; Hall v. Pub. Co., 180 Pa. 561—which may include such undenied averments in the applicant's petition as go to complete the record: Hiller v. Niedzielska, 176 Pa. 409. The supposed defect of this judgment, relied on by counsel, is the fact that the name of the defendant therein is given as "Mrs. James B. Hunsberger." Conceding that "Mrs." is not a legal name, State v. Gibbs, 44 N. J. L. 169—but merely an indication of the sex of a person named, Elberson v. Richards, 42 N. J. L. 69—it is, nevertheless, true that the remainder of the description of defendant in this judgment, containing what may be a baptismal and a surname, is not, as a matter of law, so indescriptive as to render the judgment necessarily void under the doctrine of the above and similar cases. The worst that can be said of it is that it is to be treated as a wrong or fictitious name. Now, the rule seems to be that if a party "was sued by a wrong or fictitious name, or by some designation which included a part only of his name, and was personally served with process, and, failing to urge the misnomer in any way, judgment was entered . . . . against him . . . . by such mistaken, fictitious or imperfect name, it is valid

and enforceable;" 1 Freeman, Judgments, sec. 50*a*, 154. The averments of Catharine M. Hunsperger's petition show that she is the person sued as "Mrs. James B. Hunsberger," and the transcript discloses the fact that the person so sued was personally served with process and that she allowed judgment to be given against her by default under that name, which judgment, transcripted into this court, is the one now in question. It would appear, therefore, that Catharine M. Hunsperger is not in a situation to urge this misnomer or use of a fictitious name, as constituting a defect vitiating the judgment as between herself and the holder of it.

As concerns the petitioner's allegations of fraud, res adjudicata, etc., though they appear undenied by answer, these are matters necessarily dehors the record and therefore not available in this application. Indeed they come clearly within that class of matters which ought to have been raised by appeal or certiorari, and on the ground of which, for that reason, a judgment entered on a transcript from a magistrate can be neither opened nor set aside: McKinney v. Brown, 130 Pa. 365.

2. The equitable power of the court to stay, in a proper case, even indefinitely, execution process issued upon a judgment therein, is not to be questioned, Harrison v. Soles, 6 Pa. 393; Feagley v. Norbeck, 127 Pa. 238, and doubtless may be exercised though the judgment be one entered upon a transcript from a magistrate: see Engard v. O'Brien, 9 Phila. 559. But being an equitable power, it is exercised upon principles of equity. These (where there has been no agreement or forbearance or the like) forbid its exercise except upon a clear showing that the defendant has used due diligence and exhausted every legal means of defense or redress, or has been prevented, without fault of his own, from doing so. It is not necessary to discuss a proposition so fundamental. See 1 Black, Judgments, secs. 365, 374, 378, 387. The record here shows that the defendant, being served with process in a suit before an alderman, failed to defend the same, but suffered judgment to go against her by default, and that without presence of ignorance of the fact that she neglected to take an appeal or certiorari, by one or the other of which every right she now alleges to have had might have been adequately protected. In

these circumstances it seems very manifest that the redress she asks cannot be granted without violating well settled rules.

The rule to show cause is discharged.

Error assigned among others was refusal to make absolute the rule to show cause why the judgment should not be vacated or set aside.

D. E. Schroeder, for appellant.

John F. Smith, for appellee.

PER CURIAM, December 18, 1897:

The very earnest argument of the defendant's counsel has failed to convince us that the court committed error in discharging the rule entered in the present case or in entering judgment in the succeeding case. Its action in both cases is so thoroughly vindicated in the opinions filed as to render further discussion unnecessary and unprofitable.

Order affirmed and appeal dismissed at the cost of the appellant.

P. A. Althouse *v.* Mrs. Jas. B. Hunsberger, with notice to terre-tenant, if any. Catharine M. Hunsperger, Appellant.

Judgment—Revival—Defense on original merits.

In an action to revive a judgment, it appearing that defendant had been duly served with process in the original proceedings which had been prosecuted to judgment, which had never been appealed from, defendant must be understood to have waived her right to question its validity.

Argued Nov. 9, 1897. Appeal, No. 149, Oct. T., 1897, by defendant, from judgment of C. P. Berks Co., May T., 1897, No. 23, reviving and continuing lien of judgment et quare executionem non. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Sci. fa. to revive judgment. Before ENDLICH, J.

The facts sufficiently appear from a portion of the opinion of the court below, which is as follows:

This is a sci. fa. to revive the lien of a judgment entered to No. 48, May term, 1892, J. D., on a transcript from an alderman's docket, et quare executionem non. The writ was issued against "Mrs. James B. Hunsberger with notice to terre-tenants, if any," and returned served on Mrs. James B. Hunsberger, defendant, and George M. Christ, terre-tenant. Affidavits of defense have been filed by the latter and by Catharine M. Hunsberger.

The affidavit of Catharine M. Hunsperger starts out with an admission that the affiant is the party sued as "Mrs. James B. Hunsberger." It then recites the history of the litigation out of which the judgment sought to be revived arises, again averring the identity of "Mrs. James B. Hunsberger," "Kate Hunsberger" and the affiant, and declares that the judgment of the alderman against her was given fraudulently, in pursuance of a conspiracy between the alderman and the plaintiff, the former having knowledge that a previous suit before another magistrate, between the same parties and for the same cause of action, had been decided in her favor, which decision was not appealed from, and having assured her that he would not enter judgment against her. There is no allegation that she was ignorant of the entry of the judgment by the alderman. What is not averred in an affidavit of defense is taken not to exist: Lord v. Ocean Bank, 20 Pa. 384. If defendant was cognizant of the decision against her, it was her right and duty to appeal or certiorari the proceeding before the alderman. Not having chosen to do so, she must be understood as having waived her right to question its validity. The matters alleged in her affidavit, therefore, would not avail her as a defense before a jury, and are for that reason (Wanner v. Eman. Church, 174 Pa. 466), insufficient to prevent judgment against her.

Judgment of revival in favor of plaintiff for $36.40. Defendant appealed.

Error assigned was in making the rule for judgment absolute against Mrs. James B. Hunsberger.

D. E. Schroeder, for appellant.

John F. Smith, for appellee.

PER CURIAM, December 13, 1897:
The judgment is affirmed. (See preceding case.)

Benjamin Irwin, Assignee, Appellant, v. James F. Hanthorn and Ellen Hanthorn.

Practice, Superior Court—Appeals—Sufficiency of bail.

Under the act of 1895 an appeal to the Superior Court was not effectual unless bail for the costs of the appeal be given, and an appeal was dismissed where the judge of the court below, on exception taken to the sufficiency of the bail bond, made the following order: "After hearing I decline to approve within bond, because not signed by the plaintiff, and the insufficiency of the security offered."

Appeal—Practice, C. P.—Execution for costs.

An appeal will not be sustained assigning error in an execution for costs based on the assumption that they had not been taxed by the prothonotary where the record of the proceedings prior to the execution has neither been printed nor brought up, and where there is no allegation that the appellant filed exceptions or made any effort to have the legality of the costs adjudicated in the regular way.

Costs—Taxation—Practice, C. P.

Conceding that the court has the inherent power to determine in a summary way the legality of costs, the orderly and usual method of invoking the exercise of the power is by filing exception, entering a rule to have the costs taxed or retaxed before the prothonotary, and appealing from his decision to the court of common pleas.

Argued Nov. 19, 1897. Appeal, No. 170, Nov. T., 1896, by plaintiff, from order of C. P. Chester Co., Aug. T., 1896, No. 102, to set aside execution issued for costs. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to set aside execution for costs. Before HEMPHILL, J.

It appears from the record that a judgment of compulsory nonsuit was entered against the plaintiff in this case in 1895, and was subsequently affirmed by the Superior Court in 1896 (see Irwin v. Hanthorn, 1 Pa. Superior Ct. 149). An execu-

tion was subsequently issued for sheriff's and prothonotary's fees and costs. This rule was discharged in an opinion by HEMPHILL, J., as follows:

This is a rule to show cause why the above execution issued for costs, shall not be set aside, because the same have never been taxed by the prothonotary. An inspection of the record shows that the execution was issued, not strictly speaking, for costs but for fees, the amount being made up of officers' fees and verdict and judgment fees.

"Costs," says Mr. Justice GIBSON, in Musser v. Good, 11 S. & R. 248, "are an allowance to a party for expenses incurred in conducting his suit; fees are a compensation to an officer for services rendered in the progress of the cause."

See also Howard Asso. v. Phila. & Reading R. R. Co., 102 Pa. 220. The former are party costs and require taxation; but the latter being officers' fees or record costs, do not. That party costs alone require taxation is apparent from our rule of court, relative to taxation of costs, which provides that "the affidavit of the party or other person to the correctness of the bill and the attendance and materiality of the witnesses, shall be annexed and shall be good prima facie evidence to the taxing officer." There being no party bill of costs filed in this case there was nothing for the prothonotary to tax, and the rule is therefore dismissed.

ORDER OF COURT ON BACK OF BOND.

October 21, 1896, after hearing, I decline to approve within bond because not signed by plaintiff, and the insufficiency of the surety offered.

Errors assigned were (1) In awarding the executions in this case. (2) In refusing to set aside the execution of No. 102, August term, 1896, issued for costs. (3) In its opinion filed in deciding that it was not necessary to tax officers' fees in a suit in court. (4) In its order of October 21, 1896, made on the back of the bond on appeal, said order being as follows: "After hearing I decline to approve within bond because not signed by plaintiff, and the insufficiency of the surety offered." (5) In not allowing the appellant a reasonable time in which to either have the surety justify or procure additional sureties.

W. S. Harris, for appellant.

J. Frank E. Hause, for appellee.

PER CURIAM, December 13, 1897:

A scire facias sur mortgage was issued by the plaintiff against the defendants and upon the trial of the issue a verdict was rendered for the defendants. The plaintiff appealed to this court from the judgment entered thereon, and the judgment of the court below was affirmed (1 Pa. Superior Ct. 149). A fi. fa. was afterwards issued to collect the costs. Upon the plaintiff's petition alleging "that the costs in said case have never been taxed or the amount due ascertained by any process of law whatever" the court granted a rule to show cause why the execution should not be set aside. From the order discharging this rule the present appeal was taken on October 16, 1896.

The defendants excepted to the sufficiency of the bail on the appeal bond, and on October 21, 1896, a judge of the court below made the following order: "After hearing, I decline to approve within bond because not signed by the plaintiff, and the insufficiency of the surety offered." The effect of this order was to leave the appeal in the same condition as if no bail had been entered; and under the Act of June 24, 1895, P. L. 212, an appeal to this court was not effectual for any purpose unless bail for costs of the appeal was given: Marks v. Baker, 2 Pa. Superior Ct. 167; Page v. McNaughton, 2 Pa. Superior Ct. 519. Doubtless the court might, and perhaps ought to have permitted the plaintiff to enter new bail within a reasonable time after the original bail was adjudged insufficient, if proper application had been made; but the record brought up to us fails to show that such application was made, or that a new bond was filed or tendered; and, of course we must be guided by the record.

Even if the motion to quash were not to prevail we would be unable to sustain the assignments of error. The complaint is, that the execution for costs was improvidently issued, because, as we are asked to assume, they had not been taxed by the prothonotary. But whether or not there was such taxation of them, as, in the absence of exception and appeal from the

prothonotary's action, would be sufficient to support the execution, and whether or not the costs taxed were specifically such as the law allows are questions which a court of error cannot decide without having before it the record of the proceedings prior to the issuing of execution. This has neither been printed nor brought up; all that we have before us are the execution docket entries, the executions and what follows. These are not sufficient to show the error complained of. Furthermore the plaintiff does not allege in his affidavit that he filed any exceptions to the fees charged by the sheriff and prothonotary (for the collection of which the execution issued) or that they were illegal, or that he had made any effort to have their legality adjudicated in the regular way. Conceding that the court possesses the inherent power to determine in a summary way the legality of such charges, as well as the party's bill of costs, the orderly and usual mode of invoking the exercise of the power is by filing exceptions, entering a rule to have the costs taxed or retaxed before the prothonotary, and appealing from his decision to the court of common pleas. The plaintiff does not claim that he attempted to pursue this course; and in the absence of specific exceptions to the fees charged or averment in his affidavit that they were illegal or excessive, the court committed no error in refusing to set aside the execution.

Appeal dismissed at the cost of the appellant.

Samuel Goodman, Wm. E. Goodman and Joseph E. Goodman, trading as Harrington & Goodman, Appellants, v. The Merchants' Despatch Transportation Company.

Contract—Shipping receipt—Bill of lading.

When a shipping receipt provides that: "The acceptance of this receipt for goods made subject to the provisions of the bill of lading of this company makes this an agreement between the M. D. T. Co. and carriers engaged in transporting said goods and all parties interested in the property," such provision in the receipt requires the shipping receipt and the bill of lading to be read together as constituting the agreement.

Common carrier—Misdelivery of goods—Evidence—Question for jury.

A suit was brought by plaintiff against a transportation company for alleged misdelivery of goods, consigned to R. of Tyler, Texas, by deliv-

ering same to M. at Dallas, Texas. *Held*, that the question was for the jury under the terms of the contract as entered into between the transportation company and the consignor, as evidenced by the shipping receipt and bill of lading, whether the company had shown a good excuse other than negligence, for not having delivered the goods to R. the consignee; whether it did all that a prudent, reasonable, commonsense business man would have done to insure a proper delivery to the proper person; and whether the transportation company had shown that it was not negligent.

Common carrier—Negligence in delivery of goods—Question for jury.

In a question of negligence arising from alleged misdelivery of goods by a transportation company, *held*, that the jury may take into consideration the conduct of consignor toward the person to whom the goods were delivered after receipt by him and any delay which may have occurred in notifying the transportation company of such alleged misdelivery and the relation of the recipient of the goods toward the consignee.

Argued Oct. 7, 1897. Appeal, No. 67, Oct. T., 1897, by plaintiffs, from judgment of C. P. No. 4, Phila. Co., March T., 1895, No. 1052, on verdict for defendant. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit for the recovery of the value of certain goods amounting to $430.69 alleged to have been misdelivered by defendant company. Before AUDENREID, J.

The facts sufficiently appear in the charge of the court below, which is as follows:

As I understand the undisputed facts in this case, they are briefly these: On the 18th of February, 1890, the firm of Harrington & Goodman in this city packed up and shipped to a man named W. B. Robinson, at Tyler, Texas, a case of dry goods, of the value of $430.69. These goods were forwarded to Robinson by the hands of the Merchants' Despatch Transportation Company, to which they were delivered on the date before mentioned. That company gave to the shippers, Harrington & Goodman, a shipping receipt, in which the package containing the goods is described and specified by reference to the marks upon it, W. B. Robinson, Tyler, Texas, via St. Louis. [The goods seemed to have reached St. Louis in good order, and to have been passed on from that point to Tyler, Texas, by the Pacific Express Company. On their arrival

at Tyler a party named A. J. Michell, who for a long time prior to that date had been conducting business at Tyler as a sort of general agent for the consignee named in the receipt, went to the agent of the express company, and directed the reshipment of the goods to Dallas, Texas, to the firm of Michell & Co. The Pacific Express Company forwarded the goods to Dallas per his request.] [9] They were received by Michell & Co., who have since failed to pay for them, except to the extent of $50.00. [It does not seem to be disputed that A. J. Michell had been W. B. Robinson's agent at Tyler, an agent charged with various general and extensive powers. It appears from his own testimony that he was in the habit of receiving all goods consigned by express or freight to Robinson, of keeping a bank account in Robinson's name and of honoring drafts drawn on Robinson at that point. His powers, as you see, were very, very extensive. He was practically, as I recall the testimony which was read from his deposition, Robinson's alter ego at that point, with authority to do pretty much all that Robinson could himself if he were there.] [10] The firm of Harrington & Goodman failing to collect from Robinson or from Michell & Co. the full value of the goods embraced in this shipment, have sued the Merchants' Despatch Transportation Company for the value of the consignment, charging it as carrier with the value of the goods committed to it, but which it has since failed to deliver or to return to the consignors. The defense, I take it, is of the following character: It is asserted, in the first place, on behalf of the defendant, that it is not a common carrier of goods, but that its position is that of a forwarder. It claims to be a corporation which receives and forwards goods, taking upon itself the expense of transportation, for which it receives a compensation from the owners of the goods, but it has no concern in the vessels or wagons or cars by which the goods are transported, and no interest in the freight as freight. [It claims, therefore, that it not to be regarded as a common carrier, but as a mere bailee for hire. It stands on the doctrine of law that a bailee for hire, of the character of forwarder, is not bound, as is a common carrier, to deliver the goods committed to its care for transportation safely, at all events, except in a case where such safe delivery has been made impossible by the act of God or of the public enemy, but is bound only to perform its duty of

transportation with care and fidelity, and show that any loss of the goods which may have arisen, has arisen not through its default or through the default of its servants. On that proposition of law the defendant claims to be excused from any liability to the plaintiffs in this case, because, it is said, it has used due care and diligence in the handling and delivery of the plaintiffs' goods.] [11]

Another point of its defense is that it has complied with the contract made between it and the firm of Harrington & Goodman, in this, that since the intention of the firm of Harrington & Goodman was that the goods should be delivered to A. J. Michell, although the consignment was made to Robinson, Michell was the real party to whom it was intended the goods should be delivered, and that as he did get the goods, it is discharged. Failing that, it stands upon the point that Michell was Robinson's agent to receive these goods, and that the course of Robinson's dealings through Michell at Tyler, had been such as to justify it and its agents (not only as to Robinson, but as to all parties dealing with Robinson through them) in the belief that Michell had the authority to receive the goods, or to cause them to be forwarded to some other party at some other point. That I understand to be the defense outlined by the counsel for the Merchants' Despatch Transportation Company. [Besides this, it claims, and I think the claim is one to which you must pay great attention, that Harrington & Goodman have ratified the delivery of these goods to Michell & Co. by accepting a payment on account of their price from Michell, and by failing to complain of that misdelivery until nearly twenty months had elapsed after the date of the consignment of the goods.] [12]

[It is my opinion, and I charge you as matter of law, that under the terms of the contract entered into between the consignors and the transportation company, as evidenced by the shipping receipt and the bill of lading, it was the duty of the transportation company to deliver that case of dry goods to Mr. Robinson at Tyler, Texas, or show a good excuse for not having done so, that excuse being something other than negligence on their part or on the part of their employees or agents in the delivery of the goods. It lies on the transportation company to show that it was not negligent, and that under the circumstances

of the case, its employees did all that prudent, reasonable, commonsense business men would have done to insure a proper delivery to the proper person of the goods which it received from these plaintiffs. It is for you to determine whether they have done that, whether they have performed their full duty in delivering these goods.] [13]

[If you believe that the goods in question were delivered to a person especially authorized by the consignee or by the consignee's general course of dealing with him, to receive these goods, and that the reshipment of the goods to Dallas, Texas, was within the powers of Michell, as evidenced by the course of dealing, to which he has testified, between himself and Robinson, then you must find a verdict for the defendant.] [14]

[In determining whether or not these parties were negligent, you have a right to take into consideration the fact that Harrington & Goodman, after the delivery of these goods, corresponded with Michell & Co., and received money from them, and treated them just as if they had been the parties to whom the consignment had originally been made.] [15]

[If, on the other hand, you are of the opinion that the Merchants' Despatch Transportation Company was negligent in making the delivery in Tyler, Texas, and in reshipping the goods to the new consignees named by Michell, viz., Michell & Co., at Dallas, Texas, if you believe that there was nothing in the course of dealings between Robinson and the express agents at Tyler to warrant the belief that Michell had authority to give the order for the reshipment which he then gave, your verdict must be for the plaintiff,] [16] and the verdict in their favor must be for the amount of the bill of goods, $430.60, with interest from April, 1890, less the $50.00 which have since been paid by Michell & Co., and which counsel for the plaintiffs have agreed shall be credited upon this claim.

I have been requested by the plaintiffs' counsel to charge you as follows:

1. Under the receipt offered in evidence, the defendant is responsible, as a common carrier, for the through carriage of the case of dry goods from Philadelphia to Tyler, Texas. *Answer:* That point I refuse. [17]

2. Under the bill of lading offered in evidence, the defendant is responsible, as a common carrier, for the through car-

riage of the case of dry goods from Philadelphia to Tyler, Texas. *Answer:* That point I refuse. [18]

3. If the jury believe, under the evidence, that the defendant agreed to carry said case of dry goods from Philadelphia to Tyler, Texas, the defendant is responsible for the through carriage of said goods and the delivery thereof to W. B. Robinson. *Answer:* That point I affirm.

4. The defendant had no right, without plaintiffs' authority, to deliver to any other person than W. B. Robinson. *Answer:* That point I affirm, with this qualification: It was their right to deliver the goods either to W. B. Robinson, or W. B. Robinson's duly authorized agent, and, if you find that Michell was Robinson's duly authorized agent to receive the goods or to order their reconsignment and reshipment to another point, your verdict must be for the defendant. [19]

5. The misdelivery of the case of dry goods, or the delivery to the wrong person, is not a "loss, detriment or damage," within the meaning of the words in the following provision of the receipt, to wit: "It is further stipulated and agreed that in case of any loss, detriment or damage, done to or sustained by any of the property herein receipted for, during such transportation, whereby any liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening thereof," and said provision in the receipt is no answer to plaintiff's claim in this case. *Answer:* That point I affirm.

6. The misdelivery of the said case of dry goods, or the delivery to persons not entitled to receive it, is not a "loss" or "damage" within the meaning of the words in the third condition of the bill of lading, to wit: "No carriers shall be liable for loss or damage not incurred on its own road. . . . Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event." And said condition is no answer to plaintiff's claim in this case. *Answer:* That point I affirm.

7. The third condition of the bill of lading which provided that "Claims for loss or damage must be made in writing to the agent at point of delivery promptly after the arrival of the prop-

erty, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," is binding, if at all, upon the consignee only and not upon the shipper. *Answer:* That point I affirm.

8. The third condition of the bill of lading quoted in the seventh point, if it does apply to the shipper, is an unreasonable condition. *Answer:* That point I affirm.

9. The defendant must deliver the bill of lading at or near about the time the goods were received for transportation in order to claim the benefit of the provisions of the third condition in the bill of lading. *Answer:* That point I refuse. It was the right of the plaintiffs in this case to ask for a bill of lading, and if they did not do it, it was their own fault. [20]

10. As the goods shipped to W. B. Robinson, February, 1890, were delivered to Michell in April, 1890, and no bill of lading or copy thereof was delivered or handed to plaintiffs until September, 1891, the defendant cannot claim the benefit of the provisions of the third condition of the bill of lading. *Answer:* That point I affirm.

11. If the defendant relies upon the third condition of the bill of lading, quoted in the seventh point, it thereby affirms that the bill of lading is the contract between the parties to this suit. *Answer:* That point I affirm.

12. The acceptance of any payment on account by the plaintiffs, from the person or persons, to whom the goods were wrongfully delivered, is no bar to this suit against the carrying company, but the amount so received goes in reduction of damages. *Answer:* That point I affirm. Although I will add this qualification, that it seems to me that the receipt of money on account of the price of these goods from the parties in whose hands the goods came after their reconsignment from Tyler, Texas, is evidence to show a ratification and approval of the delivery which was made by the defendant to Michell & Co. [21]

13. Under all the evidence in this case, the verdict must be for the plaintiffs. *Answer:* That point I refuse. [22]

I have been requested by the defendant to charge you as follows:

1. The defendant's contract in respect of the goods in question required it only to carry said goods promptly and properly

to East St. Louis, and there promptly to deliver them in good order and condition to the next carrier on their route to destination, exercising reasonable care and prudence in the selection of the next succeeding carrier. If defendant has done this, it cannot be held responsible for damage to or loss of the said goods happening beyond East St. Louis, or for the failure on the part of the carrier or carriers beyond East St. Louis to fulfil their obligations in respect of the said goods. *Answer:* That point I refuse. I regard the duty of the defendant in this case to be that it should deliver the goods not to East St. Louis only, but to Tyler, Texas. That was the destination fixed by their contract.

2. Plaintiffs having accepted without question the benefits of what they claim to be an unauthorized delivery of the goods in question, knowing at the time that the goods were delivered to other than the consignee, are estopped from disputing the propriety of such delivery. *Answer:* That point I refuse. I do not regard their collection of the sum, which it is admitted they received from Michell & Co., to amount to an estoppel, but I regard the receipt of that money, and the attempt to collect more from Michell & Co. as extremely strong evidence that the delivery made, as has been described by the Merchants' Despatch Transportation Company, or their subagents at Tyler, was ratified and approved by the plaintiffs in this case. [23]

3. Plaintiffs having failed to notify the defendant until a year and a half after the delivery of the goods in question at the terminus to other than the consignee, and having known all that time that such delivery was made to other than the consignee, if defendant, owing to such failure to so notify, was misled to its injury to believe the said delivery was proper, plaintiffs are estopped from asserting that such delivery was erroneous. *Answer:* That point I will refuse, but I regard their failure for a year and a half after the delivery of the goods to a person other than the consignee named in the shipping receipt, to notify the transportation company of such misdelivery extremely strong evidence that the plaintiffs concurred in that delivery and ratified the act of the defendant in giving the goods to Michell & Co. [24]

4. Plaintiffs having recognized, as the party to whom the goods ought to have been delivered, the party who actually did

receive them, by writing him for payment and accepting from him part payment therefor, are estopped from claiming that said goods were delivered to the wrong party. *Answer:* That point I refuse. I do not regard such acts as an estoppel; but, as I have already said, in my opinion, that is very strong evidence of an acquiescence in the delivery which was made by this defendant to Michell & Co., and a ratification of what the transportation company did in fulfilling its contract, or an acceptance of the act of the defendant company as a complete fulfilment and discharge of their contract of transportation. [25]

5. By the terms of the contract of shipment as claimed by plaintiffs herein, it is provided that "claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event;" and, as this provision is binding upon plaintiffs and they have failed to show a compliance therewith, they are not entitled to recover any damages for alleged loss of, or damages to, the goods in question. *Answer:* That point I refuse.

6. Under the provisions of the contract of shipment in question, the plaintiffs are not entitled to recover, and your verdict should be for the defendant. *Answer:* That point I refuse. I think I have charged you as fully as the case warrants, and I shall leave the matter in your hands. It is your duty to render a fair verdict. Let not the fact that the defendant is a corporation influence you in this matter. You are sworn to try the case on the law and the evidence. [If you believe that the defendant company performed its contract to transship these goods to Robinson, at Tyler, Texas, negligently, that a reshipment to Dallas, under a reconsignment to Michell & Co., was a thing, which, under the circumstances, no reasonable, sensible, ordinary, everyday, commonsense man would have done, then your verdict must be for the plaintiffs for the amount which they have claimed; but, if you believe that, the defendant company, or its agent, the Pacific Express Company, did just what any reasonable, commonsense, everyday business man would have done under the circumstances, and that they were not guilty of negligence, then your verdict must be for the defendant.] [26] And so, if you believe that the plaintiffs have acqui-

essed in the delivery made and have accepted what the defendant did as a fulfilment and discharge of its contract.

Verdict and judgment for defendant. Plaintiffs appealed.

Errors assigned among others, were (9–16) To portions of the judge's charge, reciting same. (17–25) In answers to the points, reciting said points and answers. (26) To a portion of the judge's charge, reciting same. (27) In presenting the case to the jury in the general charge and answers to points as set forth in the foregoing assignments of error in an inadequate, partial, unfair and misleading manner. (28) In not presenting to the jury a full, fair and impartial view of the plaintiffs' case under the evidence and the law.

Wm. H. Burnett, with him *Sheldon Potter* and *John Sparhawk, Jr.*, for appellants.—The court erred in refusing plaintiffs' thirteenth point, which was as follows: "Under all the evidence in this case the verdict must be for the plaintiffs."

The bill of lading is the contract between the parties: Clyde v. Hubbard, 88 Pa. 358.

The defendant company falls within the class of companies which have been decided to be common carriers: Bank v. Express Co., 93 U. S. 174; Buckland v. Express Co., 97 Mass. 124; 2 Am. & Eng. Ency. of Law, 783, and notes.

The shipping receipt was delivered up to the defendant and accepted by it when the bill of lading was issued. The mere lapse of time between the giving of the shipping receipt and the bill of lading was not important: Goodman v. Transportation Co., 3 Pa. Superior Ct. 282.

The word "forward" of itself is not sufficient to convert a contract of carriage into one to "forward" merely: Clyde v. Hubbard, 88 Pa. 358; Porter on Bills of Lading, Ch. 23, secs. 325, 333, 337; Buckland v. Express Co., 97 Mass. 124.

There is nothing in the contract itself which is any defense to plaintiffs' claim.

The claim in this case is for damages for a wrongful delivery.

Condition 3 of the bill of lading provides: "No carrier shall be liable for loss or damage," etc., and in this respect the bill of lading and the shipping receipt agree, except that the latter adds the word "detriment."

This condition affords no defense, because a wrongful delivery is not a "loss, damage or detriment:" Clyde v. Hubbard, 88 Pa. 358; Porter v. Ex. Co., 4 So. Car. (Richardson), 135.

This provision does not apply to the shipper but only to the consignee. As to the former, it would be entirely unreasonable.

There is no evidence that the consignor had any knowledge of the misdelivery until six months after it had occurred.

There was no evidence offered which would support any defense to the plaintiff's claim under the contract.

The contract was to deliver to W. B. Robinson at Tyler, Texas.

Proper delivery is as much a part of this contract as safe transportation: Pa. R. R. Co. v. Stern, 119 Pa. 24; Wernwag v. R. R. Co., 117 Pa. 46.

The defendant was bound to know whether Michell & Co. were the agents of Robinson, or had any authority to receive these goods: Wernwag v. Railroad Co., 117 Pa. 46.

There was no sufficient evidence of the ratification of defendants' wrongful delivery by the plaintiffs, to deprive plaintiffs of the right of action against defendants: 14 Am. and Eng. Ency. of Law, 826.

The acceptance of payment on account from the party who obtained possession by the wrongful delivery, is no ratification by the principal, and does not discharge the defendant from the consequences of his wrongful act: 2 Am. & Eng. Ency of Law, 903; Railroad Co. v. Pumphrey, 59 Md. 390; Forbes v. Railroad Co., 133 Mass. 154; Jellett v. R. R. Co, 30 Minn. 265, Rosenfield v. Express Co., 1 Woods, 131; 2 Sedgwick on Damages, sec. 853, p. 622.

The judge's instruction to the jury was throughout erroneous, because he charged the jury: That the question in the case was one of negligence.

Even if the judge was right in leaving the case to the jury, his charge was unfair and partial, upon the subject of ratification, and did not fairly present the plaintiffs' case.

This part of the charge is particularly set forth in assignments 12, 15, 23, 24 and 25. And the error consists in presenting to the jury one view only of the evidence, and that the view

which defendants relied upon to prove ratification and in neglecting entirely to present the plaintiffs' view; and in throwing the weight of the judicial opinion entirely in favor of defendant. This is error: Larzelere v. Tiel, 3 Pa. Superior Ct. 109; Minick v. Gring, 1 Pa. Superior Ct. 484.

The judge referred to the acceptance of payment on account as evidence only of ratification, and strongly intimated to the jury that, in his opinion, that was all it was.

He did not notice the plaintiffs' position that they had a right to accept money for their goods from any person who wrongfully came into possession of them, and they were not bound to rely for payment in full from a person who might be without responsibility, and who resided several hundred miles away.

Nor did he call attention to the fact that the carrier had never notified plaintiffs of the delivery; nor that the carrier had received all he was entitled to receive by having the amount paid on account deducted from the damages he would otherwise have been obliged to pay.

Chas. Heebner, with him *J. Claude Bedford*, for appellee.—It is submitted that the appellants have no just ground for complaint as to the trial of this cause in the court below. What the Superior Court (see 3 Pa. Superior Ct. 282) indicated as errors in the former trial were remedied in this latest trial; the so-called bill of lading was admitted in evidence, and the facts in the case were submitted to the jury and submitted fairly for the plaintiffs.

It is admitted that these goods were carried "safely, promptly, and properly" to destination, and there was no attempt to show that defendant had a "line" or "route" extending to destination, Tyler, Tex., and, in point of fact, it did not have such "line" or "route." The defendant is distinctly a forwarding company, holding itself out as such, and known as such, not having any road or owning or controlling any motive power, but having special facilities for accomplishing the expeditious movement of freight. The engagement in this receipt is by express words to forward. The word "forward" has a distinct, well-recognized meaning in contracts for the transportation of goods, and all the terms of this shipping receipt show plainly that

the word "forward" in it was used there in its well-known and legal sense. See Mullarkey v. R. R. Co., 9 Phila. 114, and Express Co. v. Bank, 69 Pa. 394. See also plaintiff's argument in report of the former hearing, 3 Pa. Superior Ct. 384.

OPINION BY BEAVER, J., December 13, 1897:

When this case was before us nearly a year ago, we sent it back, in order to allow the bill of lading furnished by the defendant to the plaintiffs to be received in evidence, and also that the facts relating to the delivery of the goods by the defendant to the consignee might be submitted to the jury. Both of our directions were observed in the trial of the cause. A verdict was found by the jury for the defendants, upon which judgment was entered and from which the plaintiffs appeal.

The record shows twenty-eight assignments of error, but the first eight of these were practically withdrawn at the argument as not having been made in accordance with our rules. The material questions in the case related to the delivery of the goods shipped by the plaintiffs to the consignee at the place of destination, and the effect of the receipt of a portion of the value of the goods by the plaintiffs from a person other than the consignee. The consideration of these questions involves others which are, for the most part, collateral and incidental. The main point in the case was the delivery to Michell, as the agent of the consignee, and the reshipment of the goods by his direction to a point other than the place of destination. The facts in regard to this delivery were in the main fairly submitted to the jury.

The plaintiffs make their principal argument on the twenty-second assignment of error which involves the refusal of the court to affirm the point that "under all the evidence in this case, the verdict must be for the plaintiffs." It is difficult to see how the court could have affirmed this point, in view of our directions in Goodman v. Transportation Company, 3 Pa. Superior Ct. 282, in which we say that "the facts should have been submitted to the jury," referring to the facts in relation to the delivery.

The only question in the case is as to the manner in which those facts were so submitted. All of the plaintiffs' points, except the first, second, ninth and thirteenth, were affirmed

absolutely or with proper qualifications. How the plaintiffs could consistently ask the court to say that "under the receipt offered in evidence, the defendant is responsible as a common carrier for the through carriage of the case of dry goods from Philadelphia to Tyler, Texas," we cannot understand, their whole contention being that the receipt was merged in the bill of lading, nor can we see how the court could have affirmed a like proposition in regard to the bill of lading, when the receipt itself provides that "the acceptance of this receipt for goods, made subject to the provisions of the bill of lading of this company, makes this an agreement between the Merchants' Despatch Transportation Company and carriers engaged in transporting said goods and all parties interested in the property."

The receipt and bill of lading, taken together, constituted the contract between the parties. No request was made of the court to determine as a matter of law whether the contract between the parties made the defendants common carriers or merely forwarders, and indeed, under the facts of the case, the question was of little practical importance. There is no denial of the fact that the goods were safely transported and delivered at Tyler, Texas. The real question, as we have already intimated, was, were they properly delivered? The trial judge in the court below, however, evidently treated the contract of the defendant as that of a common carrier, and charged the jury that "it was the duty of the transportation company to deliver that case of dry goods to Mr. Robinson at Tyler, Texas, or show a good excuse for not having done so, that excuse being something other than negligence on their part or on the part of their employees or agents in the delivery of the goods." The court below did not impose any duty upon the plaintiffs of showing negligence on the part of the defendant; but, on the other hand, made it incumbent upon the defendant to show that it was not negligent.

Taking the charge as a whole, in connection with the answers to the points of both plaintiffs and defendant, we can see no substantial error. The plaintiffs' side of the case was presented to the jury quite as favorably for them as they had a right to ask or expect.

The judgment is affirmed.

Daniel Dreibilbis *v.* Peter B. Esbenshade, Appellant.

Charge of the court—Biased and extravagant charge.

It is reversible error for the court to import into its charge reference to matters which have no bearing on the case and to use extravagant expressions which tend unduly to inflame the minds of the jury.

Charge of court—Erroneous construction of evidence.

It is error for a trial judge to instruct the jury that alleged slander is proven by defendant's own admission when the testimony of the defendant denied the slander as laid and where his admissions were of a radically different statement.

It is error for a judge to assume more than is warranted by the testimony.

Evidence—Slander—Hearsay—Irrelevant testimony.

In an action for slander it is error to admit proof by plaintiff of what one of his witnesses had told him that defendant had said the same evening the alleged slanderous words had been uttered.

Argued Nov. 11, 1897. Appeal, No. 54, Oct. T., 1897, by defendant, from judgment of C. P. Lancaster Co., Jan. T., 1890, No. 67, on verdict for plaintiff. Before RICE, P. J., BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Trespass for slander. Before LIVINGSTON, P. J.

It appears from the record that plaintiff's statement alleges the defamatory words to be in brief, "Daniel Dreibilbis is a thief; he stole; he is not honest." And the amended statement filed alleges the defamatory words to be, "I believe my turkeys are over there. I believe the tenant man took them. I believe I'll get a search warrant. I think I know where they are. I think they are in Hinardier's tenant house. I think I'll get a search warrant."

The court admitted, under objection, the plaintiff in the suit to be asked and to answer the following questions: ["Q. Mr. Hinardier says he repeated to you at the time exactly what Mr. Esbenshade said? A. That same evening. Q. What did he tell you Mr. Esbenshade said?" Objected to by defendant. Admitted. Exception sealed. "Q. What did Mr. Hinardier say to you Mr. Esbenshade had said? A. When I came home Hinardier told me that Esbenshade was here hunting his turkeys.

Q. What did he tell you Esbenshade had said to him? A. He said he believes I got his turkeys, and he is going in to get a search warrant and search my house; he is pretty sure I got these turkeys."] [1]

The court charged the jury as follows:

This is what is termed in law an action of slander. The words here charged are such words as the law requires to make an action actionable in itself; they charge larceny, an infamous crime with a severe punishment. [These words as laid are in themselves actionable, therefore. Now are they proven? I need scarcely say to you that if you believe the testimony of the defendant himself you cannot say they are not proven, because he tells you he did say about what is there; and, further than that, he went to a magistrate's office and signed a paper in which he charged this man, the defendant, with the larceny; had a search warrant prepared for him; searched his house (I think you will find from the evidence in his absence, the presence of his wife and child) found nothing and left. He was arrested himself, came here and had a hearing, and was discharged for want of evidence to sustain the charge made against him. So that in this case, according to the statements of the defendant himself, your verdict will have to be for the plaintiff for some amount; and the main question you will have to decide is what that amount shall be.] [2]

It is true that he has not produced any evidence to show that he has been driven out of society by this charge; that he has suffered any pecuniary loss for want of labor or want of a house to live in, or anything of that kind. If he had he would be entitled to exemplary or vindictive damages. As it is he is not. He is entitled to such damages as will dispossess his mind of this charge in this community; such damages as you or either of you (for there is no direct measure of fixing them) would ask a jury to give under circumstances such as he now labors under.

[This is a record made against him which will not down. The record is here, remains in this office, and always will show what the defendant here, Mr. Esbenshade, charged him with. And you will have to render such verdict as in your judgment will compensate him for the injury he had received in his reputation

by this charge.] [3] I cannot give you anything by which you can measure the damages otherwise than I have stated to you. There is no direct measure when there are no direct or independent damages proven. Where these are general, as in this case, the judge must judge from those, and their own better judgment, if they were in his place, what they would ask a jury to give. By doing so they will have complied with the requirements of the law and discharged their duty.

I don't know that I need say anything further to you in regard to the matter. You will have to take the papers and dispose of the case under the law as I have stated it to you and in the manner I have stated to you.

Verdict and judgment for plaintiff for $250. Defendant appealed.

Errors assigned were (1) In allowing certain questions and answers from Samuel Dreibilbis, the plaintiff in this suit, to be asked and answered under exception, reciting same. (2, 3) To portions of the judge's charge, reciting same.

J. C. Arnold, for appellant.

J. Hay Brown and *W. U. Hensel*, for appellee.

OPINION by BEAVER, J., December 13, 1897:

The action is slander. The plaintiff, being upon the witness stand and under examination, was asked, under objection and exception, what his own witness Hinardier, previously examined, had told him the defendant said the same evening the alleged slanderous words had been uttered. The purpose of this offer was not stated. We are at a loss to determine in what view of the case the evidence received under this offer was competent. It differed somewhat from the testimony of Hinardier himself but it could not have been offered for the purpose of contradicting him nor yet of corroborating him. Was it intended to be substantive proof of the slanderous words uttered by the defendant, as laid in the plaintiff's statement? If so, it was clearly incompetent. The mere fact that what the defendant said to Hinardier had been communicated to the plaintiff had been testified to both by Hinardier himself and by the plaintiff, without objection. That was as far as it was

proper to go. The objection should have been sustained and the offer rejected.

The alleged slanderous words, as laid in the plaintiff's amended statement, are as follows: "I believe my turkeys are over there; I believe the tenant man took them; I believe I will get a search warrant; I think I know where they are; I think they are in Hinardier's tenant house; I think I will get a search warrant." The testimony of the defendant, who was called by the plaintiff, as if under cross-examination, in regard to what he said as to the loss of his turkeys was as follows: "Q. Did you say to him (Jacob Kohr) talking about Dreibilbis, 'I believe my turkeys are over there?' A. I didn't mention no names. Q. Did you say 'I believe my turkeys are over there?' A. I did, yes. Q. Did you say 'I believe the tenant man took them?' A. Oh no, no, sir. Q. Did you say 'I believe I will get a search warrant?' A. I did that. Q. 'I think I know where they are,' did you say that? A. No, I didn't say that. Q. Did you say 'I think they are in Hinardier's tenant house?' A. No."

It will be readily seen that the words as laid in the plaintiff's statement and those as testified to by the defendant are essentially and materially different, and yet in regard to them the court said: "These words as laid are in themselves actionable, therefore, now are they proven? I need scarcely say to you that, if you believe the testimony of the defendant himself, you cannot say they are not proven, because he tells you he did say about what is there. And further than that, he went to a magistrate's office and signed a paper in which he charged this man, the defendant, with the larceny, had a search warrant prepared for him, searched his house (I think you will find from the evidence in his absence, the presence of his wife and child) found nothing and left. He was arrested himself, came here and had a hearing and was discharged for want of evidence to sustain the charge made against him, so that in this case, according to the statements of the defendant himself, your verdict will have to be for the plaintiff for some amount, and the main question you will have to decide is what that amount shall be."

In this there was substantial error. The defendant emphatically denied having said "I believe the tenant man took them." "I think I know where they are." "I think they are in Hin-

ardier's tenant house." If there is anything in the words laid in the plaintiff's statement which will support the innuendo, it is in the language above quoted. Certainly the testimony of the defendant did not prove them. What followed in regard to the search warrant and the subsequent proceedings thereon threw no light whatever upon the utterance of the slanderous words alleged to have been uttered and, therefore, the statements of the defendant did not warrant binding instructions as to the finding of a verdict for the plaintiff.

The trial judge in the court below charged the jury: "This is a record made against him and will not down. The record is here, remains in this office, and always will show what the defendant here, Mr. Esbenshade, charged him with, and you will have to render such a verdict as in your judgment will compensate him for the injury he has received in his reputation by this charge." What is the record referred to? Was it the proceedings before the alderman upon which the search warrant was obtained? Technically this was not a record, was not in the court and shows on its face that the charge had been dismissed and the defendant discharged. Was it the record of the action of slander then being tried? The defendant was in no way responsible for that. That was a record for which the plaintiff alone was responsible and we fail to see, in any view of the case, why the language complained of should have been used as substantial ground upon which a verdict could be based.

The three assignments of error, upon which the defendant (the appellant here) relies, are all sustained, and the judgment is reversed and a new venire awarded.

Josiah S. Koch *v.* Henry Kuhns, Appellant.

Building contract—Submission to architect—Rule of mason's workmanship—Evidence.

A building contract provided that all the mason work shall be measured by the architect according to rule of mason's workmanship. *Held*, in a controversy as to the amount due the mason, that the contract properly interpreted imposed upon the architect the duty to observe the rule of mason's workmanship in his measurement, and offers of evidence tending to show that the measurements certified by the architect had failed to apply

the rule, are admissible. In order to oust the jurisdiction of the courts it must clearly appear that the subject-matter of the controversy is within the prospective submission. The right of trial by jury is not to be taken away by implication.

Argued Nov. 9, 1897. Appeal, No. 18, Oct. T., 1897, by defendant, from judgment of C. P. Berks Co., Dec. T., 1894, No. 72, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit to recover over payment to the stone mason under a building contract. Before ENDLICH, J.

It appears from the record and evidence that this is an action brought by the contractor to recover from the defendant, a stone mason and subcontractor, an overpayment for stone masonry required in the erection of the said building. The contract provided for the payment of a certain sum per perch for each and every perch so laid, as measured by the architect, and also provided that all work be measured according to the rules of mason's workmanship. The question turned on the correctness of the architect's measurements.

During the course of the trial the following offers of testimony were made, with objections by plaintiff. [Charles F. Smith sworn: Mr. Stevens: Counsel for defendant further offers to prove by the witness on the stand that he made actual measurements of the mason work done by Mr. Henry Kuhns at the Memorial Church and compared them with the measurements made by the architect Lonsdale and that he finds that the architect failed to apply the mason's rule of measurement and in many instances calculated the actual cubic contents of the mason work done, whereby the claim of the plaintiff would be decreased, and with the bills for extras admitted would be entirely wiped out; these measurements were made the same time, November 16, 1895.] [4]

[Mr. Stevens: Counsel for the defendant renew the same offer and add to it: the testimony showing that there was no change in the character of the work, and the witness was able accurately to measure the mason work as done by Kuhns; the defendant offers to show by the witness on the stand that he made actual measurements on the ground of the mason work that was exposed to view and took the measurements and cal-

culations made by the architect of those parts which were concealed, and he finds by comparison that the architect failed to apply the mason's rule of measurement, but took the cubic contents of the walls, whereby the defendant failed to receive credit for a large amount of work done, equal to the amount of plaintiff's claim.] [5]

[Adam H. Leader sworn: By Mr. Stevens: "Q. You are a civil engineer? A. Yes, sir. Q. How many years' experience? A. About 10. Q. You are accustomed to measuring buildings? A. Yes, sir. Q. You made a measurement of the Memorial Church of the stone work done by Henry Kuhns. A. Yes, sir. Q. From the work actually done and by an actual measurement of the masonry and examination of the plans? A. Measured the masonry by lengths of walls, and assumed the heights taken by the architect, which we couldn't get, and make up our calculation."

Mr. Stevens: We offer to show by the witness that from an actual measurement of the mason work in the Methodist Church, made on November 16, 1895, by the rule of mason's measurement, he found 1232 perches in the foundations, 1580½ perches in the superstructure, not including the cloister and the tower, and 590 perches in the cloister and tower.] [6]

The court, ENDLICH, J., charged in part as follows:

[Now, gentlemen, you understand in building contracts of this kind where the parties agree to refer the matter of measurements and computations to a certain person, that person's measurements and computations are binding upon both parties, except where the measurements themselves indicate on the face of them palpable miscalculations—faulty arithmetic. So you start out with this proposition in the present case, that in so far as the rights of the parties are to be measured by their agreement (and they are to be measured by the agreement unless you find for the defendant upon one of the questions which has been raised in this case, and that I will discuss to you later) the measurements of the work done as made by the architect are binding upon both parties and so are his calculations, except in those instances where a palpable mistake has been shown by the evidence. There have been certain mistakes shown by the evidence, which, as I understand, are conceded

by the plaintiff, and those mistakes in the claim which he now makes against the defendant have been corrected.] [1]

Verdict and judgment for plaintiff for $854.39. Defendant appealed.

Errors assigned, inter alia, were, (1) To portion of the judge's charge, reciting same. (4-6) Rejection of certain offers of evidence made by the defendant, reciting same.

Wm. Kerper Stevens, of *Stevens & Stevens*, for appellant.—The contract between the parties not having made the measurements of the architect conclusive, the defendant has a right to prove that the measurements were inaccurate: Trust Co. v. Railway Co., 70 Fed. Rep. 282; Railroad Co. v. Wilcox, 48 Pa. 161.

The contract between the parties required all work to be measured according to the rule of mason's measurement, and the architect had not the power to adopt a different rule: McCollough v. Ashbridge, 155 Pa. 166.

The question raised by these assignments of error has been very recently considered by this court in the case of Fisher v. South Williamsport, 1 Pa. Superior Ct. 386; Drhew v. Altoona, 121 Pa. 401; Railroad Co. v. Dilley, 25 Am. & Eng. R. R. Cases, 265; Morse on Arbitration, 38, cited and approved in Railroad Company v. Mills, 22 S. E. Rep. 556.

Philip S. Zieber, with him *Baer & Snyder*, for appellee.—The provision in the contract that the work was to be done to the satisfaction of the architect, and payments to be made for it as measured by said architect at such times and in such amounts as said architect shall certify to be rightly due, rendered the architect's measurements conclusive upon the parties: Kennedy v. Poor, 151 Pa. 472.

The agreement of Mr. Koch, therefore, was to pay only for the work done as measured by the architect. The case differs in that respect from Railroad Co. v. Wilcox, 48 Pa. 161, and Trust Company v. Railway Company, 70 Fed. Rep. 282, cited in appellant's argument: Kihlberg v. U. S., 97 U. S. 400.

Our contention is also supported by the case of McCauley v. Keller, 130 Pa. 53.

OPINION BY PORTER, J., December 13, 1897:

The contract between the parties in this cause was in writing and required the defendant "to do all the stone masonry required for the new Methodist Episcopal Church and Sunday School buildings, to be erected on North Fifth street" in the city of Reading. After setting forth the rate per perch, the contract provides, "all the work to be measured according to rule of mason's workmanship.

"All to be done in the best, most substantial and workmanlike manner to the satisfaction of Thomas P. Lonsdale, the supervising architect, as described and set forth in the plans and specifications as furnished by said architect." The plaintiff was required by the contract to pay the defendant "the before named sums per perch for each and every perch so laid as measured by said architect, at such times and in such amounts as the said architect shall certify to be rightly due said party of the first part upon his application and statement of work done."

As the work progressed, payments were made to the mason without the architect's certificate, upon an account kept by the defendant based upon measurements made when the work was in progress. The architect seems to have made no measurements until the work was practically completed, and then issued a certificate for the whole of the work done. When the certificate was issued the plaintiff had already paid the defendant in full for mason work the sum of $6,357.07. The architect's measurements and calculations showed that the plaintiff had overpaid the defendant the sum of $905.88. For this the plaintiff sued.

The difference between the measurement of the architect and that of the defendant is claimed to be, at least in part, due to the difference in the method of measuring the work done.

The learned trial judge of the court below seems, in this connection, to have fallen into error. Under the terms of the contract the architect may have been the arbiter as to the character and quality of the work done, but his measurements were to be made according to a certain rule. Nowhere in the contract is found a specific stipulation that the architect is to have the power to determine the measurement arbitrarily.

"In order to oust the jurisdiction of the courts it must clearly

appear that the subject-matter of the controversy was within the prospective submission. The right of trial by jury is not to be taken away by implication:" Drhew v. Altoona, 121 Pa. 401, 420.

The court below was apparently of opinion that the architect's measurements were binding unless shown to have been based on palpable mistake or fraud; whereas, where the contract contemplated a measurement by a particular rule, he should have shown his knowledge of the rule and his application of it to the particular case. His testimony is not satisfactory on this point, and indicates his own opinion to have been that the rule was subject to his power to vary it in the particular case. True, he says that he measured by what he knew to be the mason's rule, and says that he measured the whole surface of the wall and gave it to the mason, but his cross-examination runs in part as follows: "Q. There are a number of openings there, now you included them all. Under the mason's rule of measurement those openings are included? A. Not by my mason's rule as I understand it, no sir. Q. There is a general rule adopted in the measuring of mason's work, is there not? A. No sir. Q. There is not? A. No sir. Q. The contract calls for the mason's rule of measurement? A. Yes sir, but measured by me. Q. That is a uniform rule of measurement, is it not? A. No sir. Q. Did you adopt a different mason's rule? A. I had to do it. I was the arbiter and had to do it in my way. I couldn't do it in any other party's way or I would have had to learn their method. The contract required me to do it." And again he says: "Q. But now the mason's rule of measurement in a general way is uniform in all parts of the state as to the work measured? A. No sir, I couldn't say that." And again: "Q. Now you have also said and given us an illustration that the mason's rule of measurement may differ in different localities? A. No sir, you asked me if I was to do it in a specific way and I said I was, and the mason's measurement set out for me to do is my way. I was fixed in the contract to do the work in a specific way, otherwise I had to learn some other way of measuring. I only know my rule of mason's measurement." And again: "Q. Did you at any time make any effort to apply the rules of mason's measurement? A. I just explained I did the work by what I understood to be the rules of mason's measurement."

From this it will be seen that there was doubt cast on the proposition that the measurements had in fact been made according to the rule of mason's measurement as required by the contract. Under these circumstances, the offers of the defendant to prove by competent witnesses that the measurements certified by the architect were not in accordance with the rule aforesaid, and that the architect had failed to apply the rule, ought to have been admitted.

The fact that the offer of proof was on the basis of measurements made a considerable time after the construction was completed, does not furnish a ground to reject the evidence. From the evidence it appeared that the mason work in large part was still visible and that the architect's own figures were accepted as to the parts of the masonry not visible.

We think the offers of proof set forth in the 4th, 5th and 6th assignments of error should not have been rejected, and these assignments are therefore sustained.

The first assignment is also sustained, as the part of the charge complained of is in conflict with the views herein expressed. The remaining assignments are not sustained.

The judgment is reversed and a venire facias de novo awarded.

Estate of Mary Fell. Appeal of Wm. King, Agent for the Heirs of Jacob Fell and Francis Fell, deceased, Heirs-at-law of Mary Fell, deceased.

Will—Bequest of interest a bequest of the fund—Life estate.

A bequest of the interest of a fund, without limitation as to time, is a bequest of the fund itself, unless there is something to show a different intention.

In cases of doubt or indefiniteness the fact that there is no bequest or limitation over is usually held decisive in favor of the view that the first taker is entitled to an absolute estate in the fund.

The bequest was of interest on a certain bond to Leah and Rachel during their lives, and in case of death of either of them the survivor to have all it draws for life. *Held*, on the death of the survivor the principal was payable to her administrators and not to the next of kin of the decedent.

Argued Nov. 10, 1897. Appeal, No. 177, Nov. T., 1896, by Wm. King, agent for the heirs of Jacob Fell and Francis Fell,

deceased, from decree of O. C. Lancaster Co., dismissing exceptions to and confirming absolutely report of the auditor in the estate of Mary Fell, deceased. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Exceptions to auditor's report. Before LIVINGSTON, P. J.

The exceptions to the auditor's report were as follows:

1. The auditor erred in awarding the net balance of the estate—$288.19—to the administrator of Rachel Fell, deceased.

2. The auditor erred in not awarding the net balance of the estate—$288.19—per stirpes to the heirs of Jacob Fell, Francis Fell and Rachel Fell.

Other facts sufficiently appear in the opinion of the court.

Errors assigned were (1, 2) In dismissing the exceptions to the auditor's report.

Thos. Whitson, for appellant.—The mistake that the learned auditor made in interpreting the will is that he has tried to bring it under the rule that "a gift of the produce of the fund is a gift of the principal." The rule only takes hold where the gift of the interest is unqualified, in perpetuity, forever, and so indeed it is held by every authority that the learned auditor has cited.

An heir is not to be disinherited without an express devise or necessary implication; such implication importing not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed: 3 Jarman on Wills, 704 (5 Am. ed.)

The failure to name a residuary legatee raises no intent to disinherit any person who would take under the intestate laws: Hoffner v. Wynkoop, 97 Pa. 130; Fitzwater's Appeal, 94 Pa. 141.

All the tendency of the law in cases of the slightest doubt or ambiguity is to follow the intestate laws: Joyce's Estate, 13 W. N. C. 520.

D. F. Magee, for appellee.

OPINION BY WICKHAM, J., December 13, 1897:

The portions of the will of Mary Fell, deceased, necessary to be here considered, are as follows: "I, Mary Fell, do make this my will, that is, I will to Leah F. Moore and Rachel Fell all the interest on a bond that I hold against Charles Fell, except so much as will pay one half of the interest on some notes I signed with Charles, and if Charles Fell will give those persons notes in his own name, then one-half of the principal which I should pay may be entered on the bond as the amount paid, and Leah F. Moore and Rachel Fell, shall have all the interest on the remainder of the bond. They shall have all the interest it draws during their lives and in case of the decease of either of them, the survivor shall have all it draws, during her life, &c."

"I appoint Marshall Wright and William King my executors, and I appoint them to be a committee in conjunction with Charles Fell during the lifetime of Leah F. Moore and Rachel Fell."

The first clause of the first paragraph above quoted, standing alone, would undoubtedly give the two legatees the corpus of the fund absolutely. A bequest of the interest of a fund, without limitation as to time, is a bequest of the fund itself, unless there is something in the will to show a different intention: Garret v. Rex, 6 W. 14; Campbell v. Gilbert, 6 Wh. 72; Robert's Appeal, 59 Pa. 70; Keene's Appeal, 64 Pa. 268. The second clause of the paragraph provides that the legatees shall have all the interest during their lives, and that it shall all go to the survivor, in case of the death of either before the other.

We thus have presented to us the question, whether the absolute bequest of the fund shall be cut down to a life estate therein by a later expression in the will. To accomplish this, all the authorities agree that the testator's intent to reduce the estate must be unambiguous. It will be noticed that the testatrix does not expressly say that the estate of the legatees shall cease with their lives, or the lives of the survivor, and it is especially significant that there is no bequest or limitation over. The latter circumstance is very important. In case of doubt or indefiniteness it is usually held decisive in favor of the view that the first taker is entitled to an absolute estate in the fund. It is scarcely necessary to refer to the many authorities sustaining the epigrammatic summary of Justice LOWRIE, in Smith's Appeal, 23 Pa. 9, that "In cases of doubtful construction, the law

leans in favor of an absolute rather than a defeasible estate, of a vested rather than a contingent one, of the primary rather than the secondary intent, of the first rather than the second taker, as the principal object of the testator's bounty." Equally well settled is the rule that a will must be so construed as to avoid partial intestacy, unless the contrary is unavoidable: Appeal of Boards of Mission, 91 Pa. 507; Boies' Estate, 177 Pa. 190.

The appointment of a "committee" for the legatees, whatever was meant thereby, certainly did not create any trust as to the bequests. There is not a word in the will giving the committee the right to handle, invest, or interfere with the legatees' estates. But, even if the bequests had been placed in the hands of the committee, without more, the trust would have been dry, the trustees having assigned to them no active duties, and hence could have no effect on the construction we feel bound to give the will: McCune v. Baker, 155 Pa. 503.

Decree affirmed at cost of appellant.

Wm. P. Gray, now to the use of Thomas H. Gray, *v.* Henry F. Hartman, Appellant.

Evidence—Cross-examination of unwilling witness by party calling him.

It is proper for the trial judge, in the exercise of a sound discretion, to permit a cross-examination of an unwilling witness by the party calling him to show that his previous statements and conduct were at variance with his testimony, where such statements made at a preliminary examination induced the calling of the witness and were material to the issue.

Charge of court—Instructions as to scrutiny of evidence.

In a case where there is conflicting or contradictory oral testimony, it is proper for the trial judge to instruct the jury as to their duty of carefully scrutinizing and dispassionately weighing the evidence.

Argued Nov. 10, 1897. Appeal, No. 178, Nov. T., 1896, by defendant, from judgment of C. P. Lancaster Co., Feb. T., 1894, No. 51, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit for breach of alleged oral contract. Before BRUBAKER, J.

It appears from the evidence that during the progress of the trial plaintiff called as a witness one William Bachman, and against defendant's objections was permitted to cross-examine the witness as to alleged declarations or admissions he had made previous to the trial in the office of the counsel for plaintiff, for the purpose of showing that plaintiff had been misled and deceived by the witness.

The court, BRUBAKER, J., charged the jury, inter alia, as follows:

There is another principle of law which I deem it my duty to give to you, with reference to the weight and preponderance of the testimony. It is your duty, gentlemen of the jury, to carefully scrutinize and dispassionately weigh the evidence of all the witnesses in the case, and to give proper credit to the evidence of each and all of the witnesses, and if possible to reconcile all the evidence in the case with the presumption that each witness has intended to speak the truth, unless by their manner of testifying on the witness stand, or inconsistent statements sworn to, or by testimony inconsistent with other credible witnesses in the case, you are led to believe from a manifestation of interest, bias or prejudice, that such witness or witnesses have been inclined to color, distort, or suppress the truth, or unless they have been impeached. It is your duty to carefully scrutinize the testimony as it has been given upon the stand, in order to arrive at the truth of the matters in dispute, at issue between the parties.

Verdict and judgment for plaintiff for $174.34. Defendant appealed.

Errors assigned, among others were (1) In overruling objections. (2) In permitting the cross-examination of William Bachman, a witness called by the plaintiff, for the purpose of showing that plaintiff had been misled and deceived by the witness. (17) To portions of the judge's charge, reciting same.

B. F. Davis, for appellant.—A party may not impeach his own witness by cross-examination: Fisher v. Hart, 149 Pa.

232; Stearns v. Bank, 53 Pa. 490; Smith v. Price, 8 Watts, 447.

The vice of the charge was in allowing the testimony of plaintiff in impeaching his own witness to go to the jury as substantive testimony: Bank v. Davis, 6 W. & S. 285.

Edw. P. Brinton, with him *Wm. R. Brinton*, for appellee.—The court rightly permitted plaintiff's counsel to specially call the attention of witness, Bachman, to his contrary statements made in his preliminary examination and when he denied them in toto, the court properly permitted plaintiff to contradict the witness: Cowden v. Reynolds, 12 S. & R. 281; Com. v. Lamberton, 2 Brewster, 565; Stearns v. Bank, 53 Pa. 490; Bank v. Davis, 6 W. & S. 285; McNerney v. Reading, 150 Pa. 611.

OPINION BY BEAVER, J., December 13, 1897:

Sixteen of the assignments of error in this case relate to exceptions taken to the examination of one Bachman, a witness called by the plaintiff, or to the testimony of witnesses called to contradict him. They raise but a single question: Can a party who has called a witness lay the ground for contradicting him by a cross-examination and subsequently contradict him by other witnesses, when he has been misled as to what the witness will testify by a preliminary examination?

The general rule upon the subject is thus stated in Greenleaf on Evidence, vol. 1, sec. 442: "When a party offers a witness in proof of his cause, he thereby in general represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and, having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth or to impugn their credibility by general evidence tending to show them to be unworthy of belief." "Whether it be competent for a party to prove that a witness whom he has called and whose testimony is unfavorable to his cause had previously stated the facts in a different manner, is a question upon which there exists some diversity of opinion. . . . But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise and is contrary to the examination of the witness preparatory to the trial or to what the party had reason to believe

he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him."

The allegation in this case is that the testimony of the witness was not only contrary to his examination preparatory to the trial but that he had been brought under the influence of the opposite party.

The authorities in Pennsylvania very clearly sustain the right of the party calling a witness under such circumstances to cross-examine him, for the purpose of showing that he had made statements different from those to which he testifies on the stand on a previous occasion, not, it is true, for the purpose of making his previous statements substantive evidence of the facts therein stated, but in order to neutralize the evidence given by the witness.

This rule is clearly recognized in McNerney v. Reading, 150 Pa. 611, in which Mr. Justice McCollum, delivering the opinion of the court, says: "It is apparent that Boyer was an unwilling witness and that his evidence was a surprise to the appellee who called him to the stand. It was proper, therefore, for the learned trial judge, in the exercise of the sound discretion which the law allows him in such cases, to permit a cross-examination of the witness by the party calling him, to show that his previous statements and conduct were at variance with his testimony."

The present Chief Justice, in Fisher v. Hart, 149 Pa. 232, distinctly recognizes the rule and the exceptions thereto which he says "were fully considered by Mr. Justice Thompson in Stearns v. Merchants' Bank, 53 Pa. 490," in which latter case the authorities upon the subject are very fully commented upon, and the reasons for the exceptions to the general rule fairly and as we believe soundly laid down.

The facts of the present case warranted the court below, in the exercise of the sound discretion which the law allows in such cases, in permitting the cross-examination of the witness Bachman by the party calling him, and also in showing that his previous statements were at variance with his testimony.

This is not the case of Fisher v. Hart, supra, where the witness testified to nothing prejudicial to the plaintiff, and where it did not appear that he manifested any bias. His answers were

"I don't remember." In this case, the witness Bachman was important. His testimony was directly contradictory to that of the plaintiff; and, if the plaintiff's witnesses were to be believed, the very opposite of what he had stated in the preliminary examination, when the case was being prepared for trial. The parts of his testimony to which exception was taken and which constitute the first three assignments of error, are not fairly representative of its vital character and its far-reaching influence in determining the plaintiff's case.

The seventeenth assignment relates to the following portion of the charge of the trial judge in the court below: "There is another principle of law, which I deem it my duty to give to you, with reference to the weight and preponderance of the testimony. It is your duty, gentlemen of the jury, to carefully scrutinize and dispassionately weigh the evidence of all the witnesses in the case, and to give proper credit to the evidence of each and all of the witnesses and, if possible, to reconcile all the evidence in the case with the presumption that each witness has intended to speak the truth, unless, by their manner of testifying on the witness stand or inconsistent statements sworn to, or by testimony inconsistent with other credible witnesses in the case, you are led to believe, from a manifestation of influence, bias or prejudice, that such witness or witnesses have been inclined to cover, distort or suppress the truth, or unless they have been impeached. It is your duty to carefully scrutinize the testimony, as it has been given upon the stand, in order to arrive at the truth of the matters in dispute at issue between the parties." This is a general statement proper to be made in every case where there is conflicting or contradictory oral testimony.

The case seems to have been carefully and fairly tried and we see no reason to disturb the judgment. It is, therefore, affirmed.

John Cooper, Jr., and Abram Gordon, Administrators of Isaac W. Graham, deceased, *v.* James R. Eyrich and Calvin R. Eyrich, trading as James R. Eyrich & Brother, Appellants.

Contract of decedent—Mispayment to widow—Set-off—Quasi administration.

An executory contract was made by decedent to deliver pork to defendants. After his death, pork, belonging to the estate, was delivered by the widow and payment made to her and not to the administrator. *Held*, in a suit by the administrator to recover the price of the pork, that a verdict for the plaintiff would have been properly directed had allowance been made for a set-off of so much of the money received by the widow as was applied in quasi administration by her for the payment of debts due by the decedent, and which payments, if properly made, were in relief of the estate.

Argued Nov. 18, 1897. Appeal, No. 130, Oct. T., 1897, by defendants, from judgment of C. P. Chester Co., April T., 1896, No. 42, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit for goods sold and delivered. Before WADDELL, P. J.

Graham, the decedent, made a contract for the sale of pork, which was executed by the widow and payment made to her and not to the administrators, the plaintiffs in this suit.

The widow subsequently claimed and was allowed her exemption, and the auditor surcharged the administrators with the price of the pork received by the widow and not accounted for by her to the administrators.

There was evidence tending to show that the widow had expended a portion of the money received by her for the pork in liquidation of certain debts of the decedent. The court directed a verdict for the plaintiffs.

Verdict and judgment for plaintiffs for $170.23. Defendants appealed.

Errors assigned among others were, (1) to the action of the court in directing a verdict for the plaintiffs. (6) Refusal of

defendants' seventh point, which point was as follows: "If from the money received from Eyrich & Brother, the widow of Isaac W. Graham, paid the funeral expenses or any other debts properly due by the administrators, thereby relieving the estate from such payments, the defendants should have credit for that amount in this action, and be relieved to that extent from the claim of the plaintiffs."

H. H. Gilkyson, for appellants.

J. Frank E. Hause, for appellees.

OPINION BY BEAVER, J., December 13, 1897:

Graham, the decedent, made a verbal contract with the defendants for the sale of pork, to be delivered at sundry times. One delivery was made during his lifetime, for which a check was given, payable to his order. After his death, of which the defendants had knowledge, the check so given was surrendered and, in its stead, another check, payable to the order of the person returning it, was given. Subsequent deliveries of pork were made by sundry persons and paid for at the time by checks made payable to the order of the persons delivering it. Three deliveries, aggregating in value $170.23, were made, the checks for which, as appears in the testimony, were all paid and the money received thereon delivered to the widow of the decedent who was in possession of his personal property from the time of his death until letters of administration were issued, subsequently to the delivery of the pork. The money so received by the widow was used, in part at least, in the payment of the funeral expenses of the decedent, which, as appears by the testimony of one of the administrators, exceeded $100.

Upon this state of facts, the court below directed the jury to find a verdict for the plaintiffs, the administrators of the decedent, for the amount of their claim, $170.23, adding: "This may be wrong. It depends altogether upon the law involved in the case. My impression of the law, as it now exists, is in favor of the plaintiffs; but, upon a review of the matters, we may become convinced that it is a mistake and, if so, we can correct this error, without a great deal of trouble."

The contract between the decedent and the defendants is a purely personal one which was dissolved by the death of the de-

cedent and did not bind his legal representatives. The change of the check, therefore, given the decedent in his lifetime and the payment for subsequent deliveries to the parties delivering the pork were made by the defendants at their peril, and if there were nothing else in the case, would justify the direction of the court to find a verdict for the plaintiffs: Dickinson v. Calahan's Admrs., 19 Pa. 227; White's Exrs. v. Comth., 39 Pa. 167.

Letters of administration were issued subsequently to the delivery of the pork and, upon the filing of their account, the administrators were surcharged with the amount of the value thereof, as claimed in the present suit; and, in order to make themselves whole, they instituted this suit, so as to recover from the defendants the value of the pork already paid for by them, on the ground that the payment had been wrongfully made, or at least not rightly made, and that they are, therefore, liable to pay the amount a second time to the present plaintiffs.

It does not clearly appear that either of the administrators had knowledge, at the time, of the delivery of the pork by the widow to the defendants and the payment of the same by them to her, through the parties who delivered it. It would seem, therefore, that the question of neglect on their part, either to compel the widow to account for the money so received or to charge her with it at the time, when she claimed the benefit of the act of 1851, has little significance. The plaintiffs were certainly not guilty of laches in delaying their suit against the defendants until after the hearing before the auditor to whom their account was referred, and the surcharge by him against them of the value of the pork deliverd to the defendants.

We are of the opinion, however, that the defendants' seventh point, namely: "If, from the money received from Eyrich & Brother, the widow of Isaac W. Graham paid the funeral expenses or any other debts properly due by the administrators, thereby relieving the estate from such payments, the defendants should have credit for that amount in this action and be relieved to that extent from the claim of the plaintiffs," should have been affirmed, with the possible qualification "if the estate were solvent or if there were assets of the estate to pay the preferred debts which were paid by the widow."

The widow was in possession of the personal property of the decedent between the time of his death and the granting of letters of administration. As to the disposition of the pork sold

to the defendants she was undoubtedly acting as an administratrix de son tort and, inasmuch as the estate received the benefit of at least a portion of the money paid by the defendants, they should be relieved from the repayment, at least to that extent.

From the dicta contained in Roumfort v. McAlarney, 82 Pa. 193, and Gilfillen's Appeal, 170 Pa. 185, as well as from reason and the general principles of equity, the rule, that executors de son tort are entitled to have credit for valid debts of the decedent actually paid by them out of assets upon which they have intruded, would seem to be plainly deducible; and, if this be so, it follows inevitably that those whose money afforded the relief which the decedent's estate secured by such payment should have the benefit thereof; for, as was said by Mr. Justice GORDON in 82 Pa. 193, supra, "Under such circumstances, the property would have passed into a quasi administration which it would be inequitable to disturb."

There is no injustice to the administrators in this, for, if they had shown before the auditor that the money paid by the defendants and received by the widow had been actually used by her in relief of the decedent's estate, it is safe to say that they would not have been surcharged with the amount. On the other hand, the injustice to the defendants, if there be a balance in the hands of the administrators for distribution, is plainly apparent, when it is considered that of that balance the widow would receive the one third of the amount which she had already wrongfully received from the defendants, although in a sense rightly appropriated to the payment of debts of the decedent.

The amount of the debts of the decedent paid by the widow does not clearly appear, nor does it affirmatively appear by the record that the estate was solvent or that there were sufficient assets to pay even the preferred debts. If the estate were solvent and it affirmatively appeared that the whole of the amount paid by the defendants to the widow had been expended in the payment of the debts of the decedent, it would not be necessary to retry this case; but, inasmuch as we are not definitely informed in regard to these questions, we must send the case back for a retrial. The assignments of error are numerous. We have not discussed them specifically or in detail, but what we have said disposes of the case as fully as seems necessary.

Judgment reversed and a new venire awarded.

North Broad Safe Deposit and Storage Co. *v.* The Chester, Darby and Philadelphia Railway Co. et al., Appellants.

Street railways—Negligence—"Stop, look and listen"—Question for jury.

In an action for damages resulting from an accident at a railway crossing, the case is for the jury where the evidence submitted by the parties is contradictory in most important particulars.

Plaintiff's evidence tended to show that he stopped, looked and listened and could see no car approaching, and that his horses were struck by a car approaching over an undulating track at the rate of thirty-five miles an hour. Defendant's testimony tended to show that the wagon was visible for a long distance from the car, and was going in the same direction and turned suddenly to cross the tracks without any effective attempt to "stop, look and listen," which must have disclosed the approaching car clearly visible from the crossing; that the motorman had the current off and brake on and had sounded his bell. *Held*, that for the court to determine which of these statements is true, would be an usurpation of the power lodged in the jury.

Argued November 16, 1897. Appeal, No. 33, Oct. T., 1897, by defendants, from judgment of C. P. Delaware Co., June T., 1896, No. 30, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass for damages resulting from a collision. Before CLAYTON, P. J.

It appears from the evidence that defendants own and operate an electric trolley railway on the Darby and Chester Turnpike Road running in an eastwardly and westwardly direction. The road is about fifty feet in width. The telford construction occupies about eighteen feet in the middle of the road. The defendants' railway is constructed on the north side of the road between the telford construction and the north limit line of the road. The place where the accident occurred is in the borough of Glenolden where Ashland avenue crosses the turnpike road at right angles.

On the morning of July 4, 1895, a wagon with four horses belonging to the plaintiff and in charge of their driver, was proceeding westwardly on the turnpike road, approaching the Ash-

land avenue crossing conveying a party of about twenty young people on a picnic excursion. The driver knowing that the place of destination was somewhere on Ashland avenue, either stopped or slowed up a short distance before reaching Ashland avenue and inquired whether he should turn to the right or the left. The conductor of the party directed him to turn to the right. According to his statement, in order to make a long turn, he started pulling the horses first to the left to get the wagon on the left hand side of the road, and then turned to the right to go along Ashland avenue. When the lead horses had gotten upon the track and the pole horses had their front feet about on the south rail, the defendant's trolley car came along going westwardly and struck the lead horses, injuring them. The evidence was conflicting.

Plaintiff introduced evidence tending to show that the driver before attempting to make the turn, stopped, looked up and down the track, listened for approaching cars and saw none; that the car was running at a dangerous and unusual rate of speed, some of the witnesses testifying that it was running from forty to sixty miles an hour; that immediately after the accident the motorman admitted that he had not rung the bell and that his car was not under control.

Defendants introduced testimony tending to show that the car had only left a switch at a distance of thirteen hundred feet from the place of the accident and that it was a physical impossibility for the car to attain a speed of more than twelve miles an hour in that distance from the starting point; that the wagon was visible from the track for some distance; that the motorman had his brakes on and had been sounding his gong; that the wagon made the turn into the track without stopping.

The court left the question of defendants' negligence and plaintiff's contributory negligence to the jury, with proper instructions as to the law and with fair and impartial comments on the evidence.

Verdict and judgment for plaintiff for $800. Defendants appealed.

Error assigned was refusal to affirm plaintiff's first point as follows: "Under all the evidence in the case the verdict of the jury should be in favor of the defendants."

W. B. Broomall, for appellants.—It is the legal duty of the person about to cross the tracks of a street railway, when he reaches it, to look in both directions for an approaching car. This duty is as peremptory as the rule with reference to steam railroads to "stop, look and listen." His neglect to look at that point and listen is negligence per se: Ehrisman v. Railway Co., 150 Pa. 180; Myers v. R. R., 150 Pa. 386; Omslaer v. Traction Co., 168 Pa. 519; Davidson v. Railroad Co., 171 Pa. 522; Seamans v. Railroad Co., 174 Pa. 421; Sullivan v. Railroad Co., 175 Pa. 361; Hartman v. Railroad Co., 182 Pa. 172.

The foregoing is a fair epitome of the plaintiff's evidence relating to the accident. A fair construction of it is that if the wagon was stopped at all it was at such a distance short of Ashland avenue, that if the driver looked in the direction of the approaching car the car at that time was not in sight. Then having made a long turn first to the left and then to the right this involved such a length of time as that it was his duty to look again before crossing. If he had done so the plaintiff's case shows plainly that the car was then in sight. Under these circumstances we maintain that the plaintiff is convicted by its own showing of contributory negligence.

The road being level for a distance of four hundred feet before reaching Ashland avenue it is obvious that the description of the accident given by the defendant's witnesses is the correct one, to wit: that the driver of the wagon when he came to Ashland avenue suddenly pulled his horses in front of the approaching car, and that no prior indication was given of his intention to turn into Ashland avenue.

Our cases uniformly hold that it is idle for a man to say that he did not see an approaching train, when if he had looked it would be impossible for him to avoid seeing it.

Joseph W. Kenworthy, with him *Joseph H. Hinkson*, for appellee.

OPINION BY PORTER, J., December 13, 1897:

The only error complained of in this case is the refusal of the court below to affirm the defendants' point that "under all the evidence in the case the verdict of the jury should be in favor of the defendants." We have given the testimony in the case

the examination which this assignment requires, and find that the court below committed no error in refusing the request of the defendants.

On the morning of July 4, 1895, a wagon with four horses, belonging to the plaintiff, and in charge of a careful driver, was proceeding westwardly on the Darby & Chester Turnpike through the borough of Glenolden, in Delaware county. In the wagon were a party of about twenty young people, on a picnic excursion. Their destination was a grove north of the turnpike on Ashland avenue in the said borough. The driver, knowing that the place of destination was somewhere on Ashland avenue, stopped before reaching the avenue and inquired of the conductor of the party whether he should turn to the right or to the left. He was directed to turn to the right, which required him to cross the tracks of the defendant company. According to the testimony for the plaintiff, in order to make a wide turn, he pulled his horses first to the left and then to the right across the tracks, to proceed along Ashland avenue. When the lead horses had gotten upon the track and the pole horses had their front feet about on the south rail, the defendants' trolley-car struck the lead horses, doing them serious injury. For these injuries and some damage to the harness and wagon, the suit was brought.

It was testified by the plaintiff's witnesses, including the driver and a number of the occupants of the wagon, that before attempting to cross the tracks of the defendants, the wagon was stopped, and that the driver looked to the right and to the left more than once, and listened for the approach of a car; that several of the occupants of the wagon also looked and listened, and that none of them saw or heard a car approaching. The stop was made within a short distance of the place of crossing, where the occupants of the wagon had an unobstructed view. The roadway upon which the car approached was an undulating descending grade. The car was proven to be invisible at something over 1,300 feet, some of the plaintiff's witnesses saying at about 650 feet. The course of the wagon had been in the same direction as that of the car until the attempt to turn into Ashland avenue was made.

It was testified by a number of witnesses for the plaintiff that the car approached at a rate of from thirty-five to forty-five

miles an hour on the down grade; that no bell was rung and that the motorman admitted at the time of the accident that he had not rung the bell and that he had lost control of the car.

On behalf of the defendants it was testified that the wagon was in sight of the occupants of the car an appreciable time before the attempt to cross the tracks was made; that the motorman had the current off and the brake on, and had sounded his bell as a warning. The motorman denied the alleged admissions that he had failed to ring his bell and had lost control of the car.

No attempt is made by the defendants to argue in this court that negligence on their part was not sufficiently proven to support the verdict. Their argument is directed to a contention that such contributory negligence was shown on the part of the plaintiff that there should have been no recovery. To this we cannot assent. It was, in our opinion, a case that must inevitably have gone to a jury on the evidence submitted. Under the testimony on behalf of the plaintiff, the rule to look and listen and if necessary stop at a point from which proper observation might be had, was complied with. Apart from this rule the degree of care to be exercised must vary in every case with the circumstances, and no unbending rule in this regard can be laid down. It was for the jury to say not only whether the facts were as alleged by the plaintiff's witnesses, but also whether under the circumstances the plaintiff's driver failed to exercise the care that would be expected of an ordinarily prudent man: Davidson v. Traction Co., 4 Pa. Superior Ct. 86.

The language of Mr. Justice MITCHELL in Ely v. Railway, 158 Pa. 236, may be adopted as applicable to the present case:

"The evidence in the present case shows that the plaintiff stopped, looked and listened before driving on the track. He was, therefore, not proceeding recklessly but with some degree of attention to the situation and his duty in regard to it. The mere act of stopping does not, it is true, of itself show that he stopped at a proper place, or that there was not another and better place where he should have stopped again, or that his duty of looking and listening was performed with the proper care and attention; but stopping is opposed to the idea of negligence, and unless notwithstanding the stop, the whole evidence shows negligence so clearly that no other inference can

properly be drawn from it, the court cannot draw that inference as a conclusion of law, but must send the case to the jury. . . . But in cases like the present, the plaintiff is not required to disprove contributory negligence, but only to make out a case clear of it. Unless, therefore, his negligence appears affirmatively, he is entitled to go to the jury on the general presumption against it, and so, likewise, where the evidence is conflicting as it was here." It is true that the case from which the quotation is taken was a grade crossing of a steam road, but the propositions stated have clear and direct application to the case in hand.

The evidence submitted by the parties is contradictory in most important particulars. The plaintiff's witnesses say that they looked and could not see the car approaching. The defendant's witnesses upon the car say that they saw the wagon as they were approaching, for some distance. For the court to determine which of these statements is true, would be an usurpation of the power lodged in the jury. We have no doubt that the refusal of the point was a correct ruling and therefore, the judgment of the court below is affirmed.

Lancaster Trust Co.'s use *v.* John E. Gouchenauer, Appellant.

Execution—Debtor's exemption—Laches.

The claim for the debtor's exemption must not be unnecessarily delayed until costs have been incurred which otherwise readily might have been avoided. Moore v. McMorrow, 5 Pa. Superior Ct. 559, followed.

A claim on the proceeds of land sold under a vend. ex., made after the sheriff's sale, is too late when the land had been levied on and condemned under the fi. fa. the year previous and when the sale took place two years after an assignment for the benefit of creditors, the assignor in the meantime having taken no steps to have his exemption set aside out of the real estate by the assignee.

Argued Nov. 10, 1897. Appeal, No. 17, Oct. T., 1897, by defendant, from decree of C. P. Lancaster Co., May T., 1895, No. 11, refusing exemption in execution on judgment. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to show cause why the sheriff should not pay to John E. Gouchenauer $300, which he claimed to be due him under the exemption act of April 9, 1849. Before BRUBAKER, J.

It appears from the record that John E. Gouchenauer made an assignment for the benefit of creditors. At the time the assignee made his appraisement, Gouchenauer said to him that he wanted none of the personal property and he then made no claim to have any real estate appraised to him under the deed of assignment, but he subsequently said to the assignee that he wanted $300 out of the real estate.

The appraisement of the assignor's property amounted to $779.25 of which $537.50 was real estate, and $241.75 personal property. The assignee made public sale of the personal property, and sold the same for $207.67, of which amount John E. Gouchenauer became purchaser to the amount of $68.60, with the understanding that when the assignor received his $300 exemption he would pay the assignee for the goods purchased by him, the assignor, at the public sale. No other or further claim was ever made by the assignor from the assignee. The real estate was subsequently sold by plaintiff under a judgment antedating the assignment, and the proceeds amounted to about $278. After the vend. ex. had issued, and some two years from the time of the assignment, the defendant claimed from the sheriff the $300 debtor's exemption.

The court discharged the rule. Defendant appealed.

Error assigned was discharging rule.

Charles I. Landis, for appellant.

W. U. Hensel, with him *J. Hay Brown*, for appellee.—It has been expressly decided that, where an assignor who reserves the $300 worth of property does not promptly make his election and have his appraisement, he loses the benefit of it: Weaver's Appeal, 18 Pa. 307; Bowyer's Appeal, 21 Pa. 210; Neff's Appeal, 21 Pa. 243; Davis' Appeal, 34 Pa. 256; Shaeffer's Appeal, 101 Pa. 49.

PER CURIAM, December 13, 1897:

The appellant's contention is, that the real estate having passed out of the hands of the assignee into the control and

custody of the sheriff, and the sheriff having sold it, the position of the parties was as if no assignment had been made, and the failure of the defendant to claim the $300 exemption at the time of the appraisement of the assigned estate was not a factor in the case. It seems unnecessary to discuss this proposition; for, even if it were to be conceded, the defendant would be left in no better position. The fi. fa. issued on December 12, 1895, and the land was condemned. It was not until after the vend. ex. had issued, a year later, that the claim was made. These facts bring the case within the well settled rule that the claim must not be unnecessarily delayed until costs have been incurred which otherwise might have been readily avoided. The case cannot be distinguished from Moore v. McMorrow, 5 Pa. Superior Ct. 559.

Order affirmed and appeal dismissed at the cost of the appellant.

Commonwealth ex rel. L. A. Hillegass, Appellant, v. Josiah Huffman, Jonas Imler and Joseph W. Boor, Commissioners of Bedford County.

Taxation—Statutes—General and local laws construed and sustained.

The local law of April 13, 1868, P. L. 1017, providing for the collection of taxes in the county of Bedford recognized and retained by the Act of June 24, 1885, P. L. 187, is not repealed by the Act of June 6, 1893, P. L. 333, entitled "An act to authorize the election of tax collectors for the term of three years in the several boroughs of this commonwealth."

There is no inconsistency between these local and general acts which can be enforced at the same time without in any material way interfering with each other.

Argued Nov. 8, 1897. Appeal, No. 41, March T., 1898, by plaintiff, from order of C. P. Bedford Co., Sept. T., 1897, No. 31, for overruling demurrer to the return, etc., in an application for mandamus. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Mandamus to the commissioners of Bedford county requiring them to deliver to plaintiff for purpose of collection duplicates of state and county taxes for the township of Juniata. Before LONGENECKER, P. J.

The facts sufficiently appear from the opinion of the court below, as follows:

L. A. Hillegass was elected tax collector for Juniata township at the February election 1897, and on the 19th of April presented his bond to the court when the same was approved. On the same day and at the same time he filed his petition reciting the above facts and alleging that under the Acts of June 25, 1885, P. L. 187, and June 6, 1893, P. L. 333, he was entitled to have for collection the duplicate of state and county taxes levied and assessed in said township for the current year; that the county commissioners, on demand made upon them for said duplicate, had refused his request, stating they proposed to deliver it, with their warrant for collection, to Charles Reily the county treasurer. He therefore asked for a writ of mandamus commanding them to deliver to him said duplicate. It was thereupon ordered that an alternative writ issue.

Charles Reily, the county treasurer, after alleging his interest in the subject-matter in controversy, asked leave to become a defendant and to frame his return and conduct the subsequent proceedings at his own expense, upon which leave was granted him accordingly. He afterwards filed his return as did also the county commissioners. The return of Reily raised no issue of fact but denied the plaintiff's right to receive the duplicate on the ground that the local Act of Assembly approved April 13, 1868, P. L. 1017, entitled "An act to provide for the collection of state, county, poor and military taxes in the county of Bedford," makes it the duty of the county commissioners in each and every year, immediately after the assessment of taxes for state, county, poor and military purposes have been completed, to cause duplicates to be made and to deliver the same to the county treasurer, and that the act further provides for the collection of the same by him; that said act of 1868 was not altered, amended or repealed by any subsequent law, but is still in force, and that the plaintiff is not entitled to said duplicate, but that he, the said county treasurer, is entitled to have and collect the same. The return of the commissioners is in substance of the same import and therefore raises the same question of law. To these returns the relator demurred.

The single question presented for determination is the effect of the act of June 6, 1893, on that of April 13, 1868. Does the

act of 1893 repeal that of 1868? The act of June 25, 1885, left in full force the Bedford county system for collecting the taxes in question: Malloy v. Reinhard, 115 Pa. 30; Evans v. Phillipi, 117 Pa. 226.

The act of 1893 is entitled "An act to authorize the election of tax collectors for the term of three years in the several boroughs and townships of this commonwealth," and provides "that the qualified voters of every borough and township in the commonwealth of Pennsylvania shall, on the third Tuesday of February after the passage of this act and triennially thereafter, vote for and elect one properly qualified person for tax collector in each of said districts, who shall serve for the term of three years, and shall give a bond annually to be approved by the court;" and in a second section it says "all acts or parts of acts inconsistent herewith are hereby repealed."

The act of 1885 had already provided for the election of a collector of taxes in each borough and township in the commonwealth, and the only changes made by the act of 1893 are with reference to the length of the official term, extending it from one to three years, and the giving of a bond annually, as in the former act, "to be approved by the court," instead of "by the court or a judge thereof in vacation," as by the act of 1885.

The 13th section of the act of 1885, after declaring so much of all general acts as was inconsistent with it repealed, further provided, "but this act shall not apply to any taxes, the collection of which is regulated by a local law," thus showing explicitly the legislative intent of preserving in force local statutes like that of 1868 prescribing a method for the collection of certain taxes, as above stated, though the same result would no doubt have been produced had no such clause been inserted.

When the act of 1893 was passed, its second section repealed not only the repugnant provisions of the act of 1885, but all other general or local acts inconsistent with the act of 1893. But is the act of 1868 inconsistent with it? The act of 1893 deals alone with the election and qualification of the officer and his official term, while that of 1868 relates only to the manner of gathering the particular taxes therein mentioned by an officer whose election and the right to whose office are in no way affected by the act of 1893. The question for our determination is not whether a tax collector in Juniata township shall be elected

under the terms of the act of 1893 or shall be designated in some other way, but whether the county treasurer, whose title to his office is not and cannot be challenged, and is conceded, shall collect certain taxes as heretofore, in accordance with the act of 1868, or whether the township collector shall gather those taxes also, along with all others, notwithstanding the local statute and the saving clause in the 13th section of the act of 1885, which clause refers merely to the taxes affected by local laws and not to the election of the collector.

In all the decided cases construing the act of 1893 which we have seen, the issue presented involved the right or title to the office of borough or township collector. In Com. v. Middletown Borough, 3 Dist. R. 639, the question for decision was whether, since the passage of the act of 1893, that officer could be appointed under the local act. In Com. v. Wunch, 167 Pa. 186, the collector of the township who had been duly elected and qualified under the act of 1893, applied for the duplicates but was refused because a local statute provided for the selection of a person as collector who should be the lowest bidder, a method of designating a township collector clearly inconsistent with that provided by the act of 1893. In the case of Com. v. Lindenmoyer, 5 Northampton R. 165, the contest was likewise as to which of the parties was rightfully the township collector. Koehler was made so under the provisions of the act of 1893, and Lindenmoyer claimed title to the position by virtue of an appointment after competitive bidding for it under a local act.

Whatever might have been the views of the several courts determining those cases upon the question now before us, it was not necessarily involved in the cases they decided and is not, as we think, ruled by them. They were ruled as they were for other reasons which are quite apparent, which were in fact irresistible, and which have been already noticed. The act of 1893 meant to provide the only way of selecting the officials known as tax collectors in the several boroughs and townships, namely, by election, and of course the office could no longer be filled by competitive bidding and appointment or on the mere preference of the municipal officers. A uniform method of filling the office was clearly effected by the repealing section of the act of 1893, which strikes down all local statutes supplying contrary methods of choice.

But neither the title nor the act itself seems to us to indicate an intention to repeal local laws pertaining only to the manner of gathering taxes.

If it had been intended to repeal all such acts as well as those relating to the election of the officers it would have been readily accomplished in a single line by saying so in express terms. On the contrary the last clear expression of the legislature on this branch of the subject is contained in the saving clause of the act of 1885 and it leaves for collection taxes thus provided for to the systems contained in the local acts.

The argument is that the court should go beyond the clearly declared purpose of the legislature and impress upon the act of 1893 an intention which its words do not seem to imply. It is proposed that by judicial interpretation we shall read into the act what the law making power omitted to insert. True, as stated in Com. v. Wunch, supra, the Supreme Court has "felt constrained to interpret statutes relating to these subjects in the light of the constitutional requirements," and a purpose is there expressed of adhering to the rules laid down in Com. v. Macferron, 152 Pa. 244 and Quinn v. Cumberland County, 162 Pa. 55; but we do not understand these remarks to indicate an intention to effect uniformity in all matters pertaining to taxation by judicial construction unless such a purpose fairly appears on the face of a statute under consideration. In Com. v. Macferron, cited in that case, it was said, the rule "that a previous local statute is not repealed by a subsequent general statute inconsistent with it, unless words of repeal are employed for that purpose," was not questioned, but was held inapplicable because in classification acts, like that under consideration, the legislative intent is fully expressed. And so was the intent most clearly expressed in the act of 1893 as applied to the case of Com. v. Wunch. In Quinn v. Cumberland County, it was said by Mr. Justice GREEN, "it is evident the two acts cannot be executed together, and the act of 1893, in its 8th section, expressly repeals all acts or parts of acts inconsistent with or contrary to the provisions of this act." That was also true of the act in Longswamp township, Berks county, for the selection of a township tax collector, to which the principle was applied.

But is there any reason why the acts which we are considering may not be executed together in Juniata township, where

the relator will collect all the taxes except those for state and county purposes? If they can stand and be executed together we do not understand the courts to mean that we should depart from the well settled rules of interpretation and strike down the local act for the sole object of effecting that uniformity to which the constitutional provision points. The constitutional demand for uniformity was as imperative when Malloy v. Reinhard was decided as it is now, and yet it was there said, "rarely, if ever, does a case arise where it can justly be held that a general statute repeals a local statute, by mere implication. The constitution of 1874, upon many subjects, prohibits local or special legislation, but it changes no rule relative to the repeal, by legislation, of local laws existing when it was adopted. Had section 13 of the act of 1885 been omitted, there would have been no repeal of the local statutes for the borough of Verona."

While, therefore, it is very clear that another collector of taxes in Juniata township could not be appointed in the face of the act of 1893, it is not equally apparent that it entitles the relator to the right of collecting all taxes assessed in that township. In no event could he collect taxes on unseated lands, for the 12th section of the act of 1885 expressly forbids it, and we do not understand that any one alleges that section is repealed. If it remains in force it destroys the argument of a legislative intent to commit all the taxes in Juniata township to a single individual for collection.

The system furnished by the act of 1868 has operated most satisfactorily for nearly thirty years in Bedford county, and as we learn in a number of other counties in which taxes are to-day being collected under it, and a number of reasons might be advanced why it is preferable to that embodied in the act of 1885, but we are quite well aware that such considerations would not warrant us in sustaining the local act, and yet we would for that reason feel less inclined to strain a point in order to arrive at the relator's interpretation of the repealing clause of the act of 1893.

Now, May 13, 1897, the demurrer of the relator, L. A. Hillegass, to the answers filed in this case is hereby overruled, and it is ordered, adjudged and decreed that the duplicate of state and county taxes levied and assessed in the township of Juniata for

the current year be delivered by the county commissioners, for the purpose of the collection thereof, in accordance with the provisions of the act of April 13, 1868, to Charles Reily, the county treasurer.

Errors assigned were (1) overruling demurrer. (2) In ordering that the duplicates of state and county taxes levied and assessed in the township of Juniata for the current year, be delivered by the county commissioners, for the purposes of collection thereof, in accordance with the provisions of the act of April 13, 1868, to Charles Reily the county treasurer.

Daniel S. Horn, for appellant.

John S. Weller and *Frank E. Colvin*, with them *S. R. Longenecker*, for appellee.

OPINION BY BEAVER, J., December 13, 1897:

Under the provisions of an act of assembly approved April 13, 1868, P. L. 1017, entitled "An act to provide for the collection of state, county, poor and military taxes in the county of Bedford," the treasurer of the said county has, since the passage of the act, collected the taxes therein named. An act of assembly approved the 25th day of June, A. D. 1885, P. L. 187, entitled "An act regulating the collection of taxes in the several boroughs and townships of this commonwealth," provides for the election of an officer, to be styled collector of taxes, by the qualified electors of each borough and township in the commonwealth on the third Tuesday of February of each year thereafter, and provides, in its fourth section: "The several county, borough, township, school, poor and other authorities now empowered and which may hereafter be empowered to levy taxes within the several boroughs and townships of this commonwealth shall, on or before the first day of August in each year, after the first election of collector of taxes under this act, issue their respective duplicates of taxes assessed to the collector of taxes of their respective boroughs and townships, with their warrants attached, directing him to collect the same, but road taxes may be worked out as heretofore," and in its thirteenth section provides: "So much of all general acts hereto-

fore passed as is inconsistent herewith is hereby repealed, but this act shall not apply to any taxes the collection of which is regulated by a local law."

An act of assembly, passed the 6th day of June, A. D. 1893, P. L. 333, entitled "An act to authorize the election of tax collectors for the term of three years, in the several boroughs and townships of this commonwealth," provides simply for such election and, in its second section, repeals all acts or parts of acts inconsistent therewith.

It is claimed by the appellants that the act last above mentioned repeals the act of April 13, 1868, supra, and that it, by necessary implication, repeals the 13th section of the act of June 25, 1885, supra, it being admittedly clear that, unless this latter section is repealed, the local act of 1868 is safe under its protection.

It is admitted that the precise question raised here has not been decided in Pennsylvania. Com. v. Wunch, 167 Pa. 186, in which the decision of the lower court, affirmed in a Per Curiam opinion of the Supreme Court, relies largely upon Com. v. Middletown, 3 Dist. Rep. 639, is not directly in point. In both of these cases the question involved was, whether the tax collector elected under the provisions of the act of 1893, supra, should perform the functions and discharge the duties of the office to which he had been elected by the qualified electors of the municipality, or whether these functions and duties should be performed and discharged by officers or employees who by appointment or competitive bidding had secured the rights and privileges of tax collectors under the operation of local laws. It will be observed that the act of 1893, supra, provides for the election, by the qualified voters of every borough and township in the commonwealth of Pennsylvania, on the third Tuesday of February after the passage of the act, and triennially thereafter, of one properly qualified person for tax collector in each of said districts, who shall serve for the term of three years. It is very clear that the lowest bidder for the collection of taxes in the townships of Longswamp and Bethel, in Berks county, and the collector appointed by the town council of the borough of Middletown could not collect the taxes in those districts respectively, consistently with the rights and duties of the collectors of taxes elected under the provisions of

the act of 1893, supra, if the tax collectors so elected were to assume the obligations or discharge the duties of the office to which they had been severally elected. The latter act is plainly inconsistent with the local acts for Longswamp and Bethel townships and Middletown borough above referred to. The provisions of these several acts cannot be enforced at the same time and, therefore, cannot stand together. Under the plainest principles of construction, therefore, the general repealed the local acts.

We have an entirely different question raised in the present case. The saving clause of the thirteenth section of the act of 1885, supra, is "But this act shall not apply to any taxes the collection of which is regulated by a local law." The treasurer of Bedford county can collect the state and county taxes, the latter by the Act of April 4, 1872, P. L. 929, being made to include the poor taxes, and the relator Hillegass, who was elected tax collector for Juniata township at the February election in 1897, can collect all the township taxes without in any way interfering with each other in the discharge of the duties of their respective offices and without abridging the rights or limiting the powers of the township collector, so far as they relate to the collection of township taxes. There is, therefore, no necessary conflict between the duties of these several officers, which are to be discharged under and by virtue of the provisions of the several laws under which they secure their rights and receive their authority respectively. The acts are not necessarily inconsistent with each other and, therefore, in accordance with well known principles, can and ought to be construed together, so that full force and effect may be given to the provisions of each respectively.

The titles of the acts of 1885 and 1893, supra, are significant. The first is entitled "An act regulating the collection of taxes in the several boroughs and townships of this commonwealth;" the second "An act to authorize the election of tax collectors for the term of three years in the several boroughs and townships of this commonwealth." Nothing whatever is intimated in the title of, and nothing is said in the latter act in regard to any system for the collection of taxes.

So many of the counties of the commonwealth have provisions practically similar to those of Bedford county for the col-

lection of state and county taxes, under local laws, that this mode of collection may be almost regarded as a system, one which has worked well in practice, under which public interests have not suffered, and may well have been in the mind of the legislature when the act of 1885, supra, was passed. Are the state and county taxes in these several counties included in, or do they constitute the "any taxes the collection of which is regulated by a local law" mentioned in the thirteenth section of the act of 1885, supra? If so, and there is no necessary inconsistency between the enforcement of the provisions of the general act of 1893, supra, and the several local acts, including the act of 1868, supra, their collection, as provided for in the several local acts, should not be interfered with. We think it apparent that there is no such inconsistency, and that the general and local acts involved in this controversy can be enforced at the same time, without in any material way interfering with each other.

It is not necessary to add more to the well considered opinion of the presiding judge in the court below. We are of opinion that he reached the correct conclusion in construing the various statutes involved, and the judgment is, therefore, affirmed.

Commonwealth of Pennsylvania v. G. Augustus Page, Appellant.

Criminal law—Abortion—Adequate charge—Answer to point—Question for jury.

Where the question is whether the defendant did or did not commit an abortion in manner and form as indicted it is exclusively for the jury, the issue being dependent upon the credibility of the witnesses for the commonwealth and accused respectively. The appellate court will not disturb the verdict of the jury on the ground that the charge of the court and answer to defendant's point were unfavorable to the defendant, and inadequate in the presentation of the case for the consideration of the jury, when the point in question is ingenious but argumentative and composed in part of a skilful combination of fact and inference which did not admit of an unequivocal answer; and where the charge was fair, impartial, adequate and sufficiently guarded the rights of the defendant

Argued Oct. 19, 1897. Appeal, No. 84, April T., 1898, by defendant, from judgment of Q. S. Allegheny Co., Dec. Sess., 1896, No. 446, on verdict of guilty. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Indictment for abortion. Before SLAGLE, J.

The facts sufficiently appear from the charge of the court below:

The defendant, G. Augustus Page, is charged in this indictment under four counts. These counts are drawn under an act of assembly in relation to the crime of abortion, which, at common law, was not regarded as of so very great importance, but which, in their wisdom, the legislature saw proper to specially provide for. The act of assembly is as follows:

"If any person shall unlawfully administer to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child, any drug, poison or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony."

The second section is: "If any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any poison, drug or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony."

The difference between those sections being, that in the first, in order to make out the offense, it must follow that the child or woman died; in the second, merely the administering of poisons or the use of instruments, with intent to produce abortion, makes out the offense, whether or not the child or the mother died.

In this case, as I say, there are four counts. The first count is drawn under the 88th section of the act of March, 1860, which charges the administering of poisons or other substances of that sort, merely with the intent to produce abortion. There

is no evidence in this case that medicines were administered by the defendant with any such purpose, and therefore there can be no conviction under that count.

The third count charges the administering of medicines, and alleges that in consequence of that the mother, Mrs. Martha M. Page, died. There is no evidence, as I say, of the administering of medicine, and therefore there can be no conviction under that count.

The second count alleges that an instrument was used,—"that the defendant did use a certain instrument and other means in and upon the body of one Martha M. Page, she, the said Martha M. Page, being then and there pregnant and quick with child, or supposed and believed to be pregnant or quick with child, with the intent to procure the miscarriage of the said Martha M. Page, contrary to the act of the general assembly." Now that count of the indictment is made out by the simple proof of the fact that an instrument was used, without regard to its consequences; and if you find that the defendant used an instrument upon his wife for the purpose of producing an abortion, then he would be guilty under that count of the indictment.

The fourth count of the indictment alleges that an instrument or other means was used "with the intent to procure the miscarriage of the said Martha M. Page, and in consequence of the said unlawful act the said Martha M. Page did then and there die; contrary to the form of the act of the general assembly;" so that under that count it is necessary that you should be satisfied from the evidence that Mrs. Page died in consequence of the use of this instrument.

The only two counts of the indictment which you are to consider, therefore, are the second and fourth, and as the fourth includes the second—because in the fourth count of the indictment it is necessary that you should be satisfied that the defendant used the instrument and that that resulted in the death of Mrs. Page, of course the second count is included in it—and if you find, then, that he used the instrument and that Mrs. Page died from the effects of that attempted abortion, then you should find him guilty of the fourth count and no more, because the fourth includes the second.

Now, keeping these things in mind, it is necessary for me to

instruct you as to the law bearing upon the various questions raised by the testimony. The counsel for defendant have asked me to instruct you upon certain questions of law, and before making any general remarks I will answer the points submitted to me.

Here the court read and answered the defendant's points and, inter alia, point IV.

IV. [In considering the testimony relating to the defendant's alleged admission to Dr. Pettit that he had used an instrument upon the person of his wife, Martha M. Page, the jury should bear in mind the infirmity of human recollection as to the exact words that were used, the interest, if any, which Dr. Pettit has in shielding himself from blame, the fact that on one of the two occasions of said alleged admissions Dr. Pettit himself admits that he is uncertain whether defendant said "that is what I used" or "that is what was used," the testimony of Edward A. Woods that Dr. Pettit told him he was not certain whether defendant said he or she had used the instrument, and all other facts tending to show that Dr. Pettit may be mistaken in repeating the language used by defendant more than a year ago, including the positive denial of the defendant that he ever used, or told Dr. Pettit that he used, an instrument upon his wife; and, unless upon consideration of all the facts, the jury are convinced beyond a reasonable doubt that the defendant did certainly admit that he used the instrument upon his wife, and actually did use it, or assist in its use, their verdict should be not guilty. *Answer:* This is refused. I do not recall any evidence showing any interest of Dr. Pettit in this case. It is not alleged that he produced the abortion. The defendant said that the doctor had agreed to remove the fœtus in case on examination he found it dead. As to any alleged malpractice by him, it would make no difference by whom the instrument had been used. The matters mentioned in this point should be considered in connection with the other evidence in the case, to determine whether or not the defendant did say to Dr. Pettit what he testified the defendant had said; but the guilt of the defendant does not depend on that fact alone; there is other evidence in the case which should be considered.] [1]

Now, gentlemen, as you will observe, taking the fourth count of the indictment, which includes, as I have said, the second,

there are a number of things that are necessary to constitute this offense. In the first place, the woman must be pregnant or quick with child, or supposed and believed to be pregnant or quick with child. An instrument, or other means of similar character—it does not describe any particular instrument—some mechanical means—must have been used in order to produce an abortion, that is, with the intent to procure the "miscarriage" of such woman, as it is called in this act, and that word is probably used in the act because abortion at common law had a peculiar signification relating to the time at which it was attempted, that is, in relation to the length of time that the child had been conceived, and under our law whenever conception has taken place and an attempt is made to produce a miscarriage it is an offense under this law, so that the time at which conception had commenced is not material here, provided it was well defined. And, further, you must find under this indictment that Mrs. Page died from the effects of that operation. It is not alleged in the count that the child died from that, but it is alleged that Mrs. Page died from the effects of that operation, and therefore you must find that fact, and it is not sufficient that you should find simply that the child died.

A number of these facts are undisputed. The testimony is undisputed of all the witnesses who have any knowledge of the matter that Mrs. Page was pregnant at the time this act was committed. The testimony of the defendant is that she was in the course of pregnancy for about two months and a half; the doctors testified that from the appearances it was from three to four months. The fœtus was from three to four months old; but there is no question about the fact that she was at that time pregnant. There is no dispute about the fact that an instrument was used. The defendant himself testifies to that, so that that is beyond any question or dispute, that there was an instrument used for the purpose of producing this abortion. The testimony of the physicians indicates it. The testimony of the defendant himself is that his wife had used an instrument, and that she had told him what instrument was used, and he afterwards produced it, so that there is no question as to the fact that there was an attempt to produce an abortion by the use of an instrument, and that would make an offense under the second count of the indictment—I do not

mean that it would make him guilty of the offense, but would constitute an offense under the act of assembly—but in order to convict under the fourth court of the indictment, you would have to find the further fact that this resulted in the death of Mrs. Page. I do not know whether there is, under the testimony, any great question as to that fact. The testimony of the doctors as to her condition at the time she was taken to the hospital—not only the testimony of Dr. Pettit, but that of the other doctors—would indicate a very bad condition. Dr. Pettit says that when he got there on Thursday he discovered that she had been bleeding very profusely, and there were clots of blood, and that after making an examination he concluded that to save her life it was necessary that this fœtus should be removed; that he had not been certain on the first examination on the Saturday and Monday preceding, that the child was dead; that upon this examination on Thursday he withdrew one of the limbs out far enough for him to know that the child was dead and he then proceeded to remove it, and that it was necessary to do that in order to save her life, in that condition.

Now, if you are satisfied from the testimony in the case that Mrs. Page would have died, then, if she died under an operation, which was necessary to save her life, still the death must be related back to the original injury, and if you are satisfied from all the circumstances that the original injury would have caused her death—satisfied of all these facts, of course, beyond a reasonable doubt—that the original injury produced by the use of these instruments would have caused her death, then the fact that she died under an operation or in consequence of an operation which was necessary to save her life would not change the effect of that condition.

Then that would constitute the offense; the woman was pregnant, an instrument was used, and Mrs. Page died; but in order to convict, you must further find, beyond a reasonable doubt, that the instrument was used by the defendant in this case, or, as has been suggested in the point submitted and which I have answered in the affirmative, that he assisted in doing it, because if he was present, assisting in its use by any person else—his wife or any other person—he would be equally guilty, if he was there assisting in the operation, though he didn't use the instrument himself; but under the testimony in the case,

it seems to me, if there is any doubt about the fact of his using it at all, there would be the same doubt as to his assistance, because there is no evidence as to any circumstances of that sort. The testimony on the part of the commonwealth goes to show that he did it himself, and if he did not do it himself the testimony would not justify any inference that he assisted in it, it seems to me; however, that is all for you.

[Now you have heard the testimony discussed fully by counsel and it is not necessary for me to repeat it. You have heard the testimony of Dr. Pettit as to what he said at the time the defendant first spoke to him in reference to this matter, and you have heard the positiveness with which he asserts that at that time the defendant said, "I used this instrument," and you have heard also the reason why he says he is certain of the language used at that time, because of the subsequent conversation in relation to the matter. Of course the change of one word would make a great difference, and if the circumstances were not such as to justify you in believing that Dr. Pettit remembered distinctly the language which was used that might raise a reasonable doubt in your minds; but you will take his recollection in connection with all the other testimony in the case and say whether or not you are satisfied that Dr. Pettit now testifies to what actually occurred; and, in connection with that, you have the testimony of Mr. Kress as to what was said to him, and it seems to me that that is in corroboration of what was said to Dr. Pettit, or what he alleges was said to him. Mr. Page denies that he said to either of these men what they testify that he did say to him—denies that he used the word "I," but says that he used the word "she;" but you have the testimony of those witnesses, and you will remember what they said and about all the circumstances attending the conversations, and if you are satisfied that they are telling the truth about it, then you have the admission of the defendant that he was the party who committed this offense. Against that you have his statement that he said nothing of the sort, and you will take into consideration, also, all the circumstances attending the transaction, in order to determine on which side the truth lies.

As I said, without going over all the testimony in the case upon this point, you must be satisfied after a full and fair con-

sideration of all the evidence—satisfied fully and beyond a reasonable doubt, not a mere possibility of doubt, but some reasonable difficulty in coming to and maintaining your conclusion as to his guilt. If you have such a doubt you will find him not guilty. If you are satisfied beyond such a doubt that he committed this offense, then you would find him guilty on the fourth count, if you find that the death of Mrs. Page was the consequence of this act; or, if you have any doubt about that, you will find him guilty on the second count of the indictment—of an attempt.] [2]

To which charge of the court counsel for defendant except. [3]

Verdict of guilty and sentence thereon. Defendant appealed.

Errors assigned were (1) refusing to affirm defendant's fourth point and in the answer thereto, reciting same. (2) To a portion of the judge's charge, reciting same. (3) The charge of the court as a whole is unfavorable to appellant, and inadequate in its presentation of the case to the jury. (4) In entering judgment upon the verdict founded upon the meager and uncertain evidence presented by the commonwealth in this case.

D. F. Patterson, with him *Chas. A. Woods*, for appellant.—On the whole, and as a whole, it was a charge for conviction, in a typical case for acquittal on the ground of reasonable doubt.

We contend that no judgment should have been entered upon a verdict founded, as this verdict must have been, upon the testimony of a single witness respecting the appellant's use of a single word. In Com. v. Cleary, 135 Pa. 64, PAXSON, C. J., said: "When a man's life may depend on a single word, the use of language cannot be attended with too much care." This was said in reference to the language used by the court below in its charge, and is certainly no less applicable to language alleged to have been used by party charged with crime.

The note to page *826 of the 10th edition of Starkie on Evidence furnishes a valuable illustration of the damage likely to result from the misuse of a single word.

We claim that even a stringent administration of justice does not require the punishment of a reputable citizen when the question of his guilt or innocence depends upon a witness's understanding or recollection of whether he said "I did it" or

"she did it," especially when there is so much in the case to indicate that as a matter of fact "she did it."

John C. Haymaker, district attorney, for appellee.

OPINION BY BEAVER, J., December 13, 1897:

This case affords an illustration of the necessity for the efforts which organized society has made, through the laws which it has enacted, to protect itself—a necessity never more apparent and pressing than in these latter days of modern social life, when the moral tone in regard to crimes of this character has become lamentably lax.

Were there facts fairly raised by the evidence for the consideration of the jury and was the testimony in regard to these facts presented for their consideration in such a way as to guard the legal rights of the defendant? These, under various forms, are the questions raised by the assignments of error and admit of a very simple and direct answer.

The defendant's fourth point, the answer to which is complained of, is ingenious, but it is argumentative and is composed in part of a skilful combination of fact and inference, which did not admit of a direct and unequivocal answer. The court undertook to answer it, however, and we think did so wisely and well. The charge was fair, impartial, adequate and sufficiently guarded the rights of the defendant.

The principal witness for the commonwealth, Dr. Pettit, was clear in his recollection and emphatic in his declarations as to the defendant's admissions as to his personal connection with the principal fact upon which the commonwealth relied for his conviction, his recollection being fortified by the rebuke which he had administered to the defendant at the time, which would have been entirely out of place, except upon the theory of the defendant's personal participation in the operation which finally resulted in the death of his wife. The previously expressed intention of the defendant to another witness was, of course, powerfully corroborative of the commonwealth's case. The testimony of these witnesses, whose natural bias, if they had any, would, because of their previous friendship for him, have been with the defendant was opposed by the simple though emphatic denial of the defendant.

The issue was a very simple one. It was exclusively for the jury, under proper instructions from the court. Such instructions we think they had. We are not prepared to say that the verdict of the jury was not warranted by the facts. We are of the opinion that the judgment of the court below should be, as it now is, affirmed, and the record is remitted to the court below with directions that the defendant be remanded to the Western Penitentiary to serve that portion of the sentence yet unserved at the time this appeal was perfected, to wit: the 31st day of July, 1897.

W. S. Taylor *v.* John Sattler and George P. Bickel, Appellants.

Practice, Superior Court—Appeals—Defective assignment.

An assignment of error is defective under Rule 15 of the Superior Court which assigns for error the whole charge without further specification.

The purpose of an assignment of error is to place upon the records of the appellate court the specific ground of complaint on the part of the appellant.

Appeals—Review—Theory of trial below followed.

A case will be treated in the appellate court as it was tried below. It must be regarded as the trial judge was led to view it from the pleadings, the evidence and the contentions of counsel. The appellate court ought not to consider whether it might or should have been tried on some theory that would have led to a different result; when no radical error is manifest the appellate court will adhere to the theory of the case which the parties adopted, and in view of which the court instructed the jury.

Appeals—Review—Appellant may not shift theory of the case.

Where the verdict of the jury established the liability of the defendants upon the theory of the case by which they chose to have it tested, they cannot be permitted on appeal to change their ground and allege that the case should have been treated in accordance with a view not presented on the trial.

Attachment under act of 1869*—Bond—Action—Damages.*

An action may be maintained on a bond given in an attachment proceeding under the Act of March 17, 1869, P. L. 8 as amended by the Act of May 24, 1887, P. L. 197, where there has been a failure to prosecute the action with effect or where the attachment has been quashed, but recovery in such action is limited to legal costs, fees and damages sustained by reason of the attachment.

Argued April 12, 1897. Appeal, No. 7, April T., 1897, by defendants, from judgment of C. P. No. 3, Allegheny County, February Term, 1894, No. 534, on verdict for plaintiff. Before RICE, P. J., WILLARD, WICKHAM, BEAVER, REEDER, ORLADY and SMITH, JJ. Affirmed. REEDER, J., dissents.

Assumpsit on a bond given in a writ of attachment issued pursuant to the act of 1869. Before KENNEDY, P. J.

The facts sufficiently appear in the charge of the court below:

On or about April 1, 1891, John Sattler, one of the defendants in the case, commenced an action against the plaintiff, Mr. Taylor, by an attachment and proceeding under one of our statutes, and that attachment was served or executed on or about the first of May following, attaching certain property of the plaintiff, W. S. Taylor. At the time of the issuing of the attachment, the plaintiff in that action, Mr. Sattler, as he was required to do, gave a bond, with the other defendant here, George P. Bickel, as surety, the condition of that bond being that he, Sattler, would prosecute his attachment and proceeding to success, or, failing therein, he would pay to Mr. Taylor any damage or loss accruing to him by reason of this attachment.

The attachment was issued about the first of April, 1891, and served about the first of May of the same year. That attachment remained until May of 1893, upwards of two years, when it was dissolved or quashed by an order of court; in other words, Mr. Sattler failed to sustain his attachment proceedings, and then Mr. Taylor, as he had a right to do, brought an action upon the bond that had been given by Mr. Sattler, with Bickel as surety, to recover the damages which he alleged he sustained by reason of the issuing and continuance of this attachment for something like upwards of two years, and that action you have been sworn to try in this case. It is admitted by the pleadings in this case by the defendants that this property of the plaintiff was duly attached. In their affidavit of defense they do not deny that the property was attached under the proceedings commenced by Mr. Sattler, and they do not deny that they failed to sustain that attachment proceeding. And hence Mr. Taylor is entitled to recover in this action damages, if any, which he has suffered by reason of the attachment. The property attached

consisted of tools used in the drilling of oil wells. You have heard them described; and Mr. Taylor has given to you the cost of those tools, and his estimate of their value at the time of the attachment. The most of them were second-hand tools, but he alleges they were worth at least two thirds of their original cost, and he has given you in detail the cost of the tools that were attached. He claims that they were a total loss to him; that this attachment remained in force for upwards of two years, and in the meantime the tools all went to destruction. He says that whatever was left there, if anything, was worthless, and he therefore asks at your hands a verdict for all the tools, because they were a total loss to him.

It appears in the proceeding, gentlemen, that a portion of the tools, however, at the time of the attachment, were in the well which was in process of drilling, and were fast there and were never gotten out. Of course, for those the plaintiff is not entitled to recover. He does not suffer any loss by reason of the attachment upon those articles that were at the time fast in the well. Of course, the attachment proceeding did not increase that loss, or did not cause the loss of those tools, and as to them he is not entitled to recover. The plaintiff admits that, and his counsel frankly stated that you may omit those in your consideration in making up your verdict. But he claims, as to the other tools that were on the ground, to recover their full value at the time, and his estimate of them, and the estimate of his witnesses, is something upwards of $900. He claims, in addition, for loss of time, some $18.00, and railroad fare $10.00, making $28.00 actual loss or outlay incurred by him by reason of the attachment, in having to attend it here.

In substance that is plaintiff's claim, amounting in the aggregate to something like $900 or $1,000, and for that he asks a verdict at your hands. The defendants, while admitting by their affidavit of defense that these tools were attached, and that they did remain under the attachment for upwards of two years, yet claim that a large number of the tools were in this well, and a total loss to the plaintiff irrespective of the attachment. They claim that there were other tools in the well besides those admitted to be there by the plaintiff. That is for your consideration. Any tools you find were in this well, and lost by reason of being there, of course the plaintiff is not entitled to

recover for. The plaintiff admits that; but he gives you, as he claims, a complete list of those articles, and says that those are all the articles in the well, and only for those should there be any reduction made from his claim.

The defendants claim, further, that these tools that were there, and attached—that were not in the well I mean, but that were taken under this attachment—were not of the value that the plaintiff puts upon them; that they were second-hand tools and worth much less in value. That is another question for you to determine: what the tools were actually worth that were not in the well—what they were fairly and reasonably worth in the market. For that amount you are to allow the plaintiff, if they were not left there at the time the attachment was dissolved, and in the same condition that they were at the time the attachment was issued. In other words, if the goods were either lost or destroyed, or injured, by reason of the attachment, for that loss, destruction or injury the plaintiff would be entitled to recover in this action. But if they were there in the same condition when the attachment was dissolved that they were at the time the attachment was issued, and the plaintiff could have had them by going for them, then he did not suffer any loss. But the plaintiff claims that they were a total loss by reason of this attachment; and you will bear in mind that this attachment remained there for some two years. If the property was left without proper care for that time, of course it would be liable to deteriorate in value.

Now, then, whatever loss or damage the plaintiff suffered by reason of this attachment, continuing in force for upward of two years, for that amount, if any, you will allow, by your verdict in this case, in favor of the plaintiff.

Counsel for defendants have asked us to instruct you as follows:

1. That to recover damages in this case by reason of the attachment, the same must be clearly proven. *Answer:* This point is affirmed.

2. That if it appears to the satisfaction of the jury that the loss, if any, in this case, was caused by the negligence of the plaintiff himself, in not looking after his property when the attachment was dissolved, the plaintiff cannot recover. *Answer:* This point is affirmed.

3. That it was clearly the duty of the plaintiff to look after his property in some reasonable time after the attachment was dissolved. *Answer:* This point is affirmed. You will recollect in this connection that the plaintiff maintains that the property, whatever was there, was utterly worthless to him at the time of the dissolution of the attachment, while the defendants maintain that it was as good as when the attachment was issued.

4. That the sheriff's return in this case is not in evidence properly, and, while the attachment was issued, the alleged service of the same is denied by the alleged garnishee, Fred. Opperman, and is not binding on defendants. *Answer:* This point is refused. As I have said, the defendants have not denied, in their affidavit of defense, that the attachment was issued and served; in other words, they have not denied that this property was attached, as claimed by the plaintiff.

To which charge of the court counsel for the defendants except, and, at their instance, bill sealed.

Error assigned was to the charge of the court reciting same.

A. H. Rowand and *James Fitzsimmons*, with them *H. H. Rowand*, for appellants.—The case discloses no evidence that will warrant the judge in submitting to the jury the question as to the amount of damages which were indirect and consequential. In this case the entire charge of the court, which is practically assigned for error, shows that the court mistook the law of this case and allowed the plaintiff below, and appellee here, to recover for that which was not comprehended under the terms or provisions of that statute, or of the bond to be given thereunder.

It is scarcely necessary to say anything more than to refer to the cases of the Com. v. Land and Improvement Co., 163 Pa. 99; Berwald v. Ray, 165 Pa. 192.

J. M. Stoner, with him *F. R. Stoner*, for appellee.

OPINION BY SMITH, J., October 18, 1897:

In Com. v. Swayne, 1 Pa. Superior Ct. 547, this court expressed its disapproval of the practice of assigning for error the entire charge, without further specification, for reasons thus

tersely stated by our Brother BEAVER: "Rule 15 of this court provides that each error relied on must be assigned particularly and by itself. What is the error relied upon in this assignment? Is it that the charge of the court taken as a whole was inadequate, or that it was unfair to the defendant, or that it failed to state the evidence specifically and fairly, or that the conclusions of law therein set forth were erroneous? We cannot tell. The particular error complained of should be specifically set forth, so that the attention of the court may be directed thereto. This assignment, therefore, lacking as it does the essential element of particularity, is not considered." This ruling is the logical outcome and application of the proposition laid down by the Supreme Court that: "The purpose of an assignment of error is to place upon the records of this court the specific ground of complaint on the part of the appellant:" Rosenthal v. Ehrlicher, 154 Pa. 396, WILLIAMS, J.

It is well settled that, in the absence of a request for specific instructions, mere errors of omission in the charge can be complained of in the appellate court only in exceptional cases; as, for instance, when the presentation of the question involved is so imperfect and inadequate as either to leave the jury practically without direction on important points, or tends to mislead them, as in Tietz v. Traction Co., 169 Pa. 516; Richards v. Willard, 176 Pa. 181; when some aspect of the evidence demands that the attention of the jury should be called to it as involving material questions for them to consider and determine, as in cases of which Herstine v. R. R. Co., 151 Pa. 244, is a type; when prominence is given to evidence on one side, without adequate reference to evidence in contradiction, as in Herrington v. Guernsey, 177 Pa. 175; Lerch v. Bard, 177 Pa. 197; or where, in a trial on indictment, it is the duty of the court to fully instruct the jury with respect to the ingredients of the offense and the evidence necessary to convict. As to errors of commission, there can be little difficulty in pointing them out, if not specifically, at least by description, as indicated in Com. v. Swayne, supra. Even in the rare instances in which the charge embraces but one point, or raises but one question, the practice of assigning it in lump is not to be commended. It is, in all cases, more in conformity with the spirit and purpose of the rule to present the portion alleged to be erroneous

"particularly and by itself," separated from extraneous matter. If this cannot readily be done, the specific character of the alleged error can be clearly indicated.

In the case before us, as in Voskamp v. Conner, 173 Pa. 109, the assignment is "as far from being specific as it can well be made;" and, as was said in Walls v. Campbell, 125 Pa. 346, if we are to consider it, "we must treat the case here as it was tried below." We must regard it as the trial judge was led to view it from the pleadings, the evidence, and the contentions of counsel. We are not to consider whether it might or should have been tried on some theory that would have led to a different result. When no radical error is manifest, this court will adhere to the theory of the case which the parties adopted, and in view of which the court instructed the jury: Griffith v. Knarr, 1 Pa. Superior Ct. 379. "A judge who submits a case to a jury in the manner in which it is presented by counsel, ought not to be convicted of error for not presenting it in some other way to which his attention had not been called:" Hartley v. Decker, 89 Pa. 470, PAXSON, J. To determine, therefore, whether the trial judge may be convicted of error in the charge before us, we must examine the case as it was presented on the trial, and decide, not whether the theory on which the parties chose to present it was the correct one, but whether the charge of the court, upon that theory, can justly be complained of by the appellants.

The declaration alleges, as breach of the condition of the bond, that the obligors did not prosecute the attachment with effect, or recover a judgment therein, or pay the legal costs and damages which the defendant therein—the plaintiff here—sustained by reason of the attachment; and further avers, as the direct and specific cause of damages thus sustained, "that the defendant took under said attachment and afterward converted to his own use," the property attached. The plea of nonassumpsit, by which this was met, was merely a denial of the execution of the bond and the alleged breach of condition; and as the affidavit of defense is not printed, it does not appear that anything else was in controversy. On the trial, the execution of the bond, with the failure to prosecute with effect, to recover judgment, and to pay the legal costs and damages, were not controverted; and the evidence left nothing in issue but the

nature, cause and extent of the damages, as specifically laid—that is to say, the loss to the defendant in the attachment from the alleged possession and conversion of the goods, under the writ, by the plaintiff therein. The possession taken by the plaintiff in the attachment, of the premises on which the defendant's goods had been left, included the custody of those goods, and as to the greater portion of them nothing further is shown. The plaintiff in this action contended, on the trial, that by reason of this possession they were lost to him. This was denied by the defendants. This was the only matter in controversy. The evidence on both sides was directed solely to the condition and value of the property when the attachment was issued or executed, and when it was dissolved. There is no assignment of error to the admission of evidence to maintain this issue on the part of the plaintiff, nor to the rejection of evidence offered for the like purpose by the defendants. As the sheriff's return is not printed, it does not appear that the officer took possession of the property, or even saw it. Whether he had incurred any liability in the premises is a question not raised on the trial nor presented by the record. As already said, the case is to be treated here as it was tried below; and as this question was not tried below, there is nothing to warrant its consideration here.

With the pleading and evidence before him, and having heard the counsel as to the matters which, in their view of the case, were involved, the trial judge thus stated the issue to be determined by the jury: "The plaintiff maintains that the property, whatever was there, was utterly worthless to him at the time of the dissolution of the attachment, while the defendants maintain that it was as good as when the attachment issued." Since this portion of the charge is excluded from the assignment of error, it must be accepted as an accurate statement of the issue made by the parties. The trial judge further instructed the jury that the damages recoverable were such as accrued "by reason of the attachment;" and that, "if the goods were either lost or destroyed or injured by reason of the attachment, for that loss, destruction or injury, the plaintiff would be entitled to recover in this action. But if they were there in the same condition when the attachment was dissolved that they were at the time the attachment was issued, and the plaintiff could

have had them by going for them, then he did not suffer any loss." He further limited the extent of recovery by excluding from consideration tools which had become lodged in the well and could not be withdrawn. In the view of the case in which the parties united on the trial, this was certainly as favorable to the defendants as they had a right to expect. As to the measure of damages, it is entirely consistent with the law on that subject as stated in Com. v. Improvement Co., 163 Pa. 99, and in Berwald v. Ray, 165 Pa. 192.

Thus the issue was joined, and the case submitted to the jury, on the theory of the rights and liabilities of the parties which their counsel presented; neither the admission nor the rejection of evidence is complained of; and the specific instructions respecting the duty of the plaintiff, and the conditions under which he would not be entitled to recover, were such as the appellants in their points asked the court to give. The verdict established the liability of the appellants upon the theory of the case by which they chose to have it tested. They cannot now be permitted to change their ground and allege that the case should have been treated in accordance with a view not presented on the trial: Gowan v. Glaser, 3 Cent. Rep. 109. Their responsibility for the seizure and retention of the property under the attachment having been settled by the verdict, it is too late for them to protest that they had no part in the course of action by which the plaintiff was injured, and that he should seek redress from the sheriff.

Treating the case here as it was tried below,—on the theory upon which both parties proceeded, and which was substantially followed by the trial judge,—there is no error in the charge, the verdict was justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.

REEDER, J., dissents.

The No. 2 Assistance Building and Loan Association, Appellant, v. Henry K. Wampole.

Appeals—Refusal of judgment—Practice on review.

The appellate court will not interfere, where rules for judgment have been refused, in doubtful and uncertain cases, but will do so where the case is clear and free from doubt.

Practice, C. P.—Sufficiency of affidavit—Landlord and tenant—Sheriff's sale of leased property.

The plaintiff's statement showing liability for rents accruing, subsequent to sheriff's sale, by tenant to sheriff's vendee, who was also assignee of the lease from the former owner, an affidavit is insufficient which admits notice of plaintiff's claim for rent, a payment of rent after such notice and a notice of intended discontinuance after expiration of the current year, and which attempts to limit and modify the effects of such acts by stating reasons which influenced such conduct at the time. Intentions in such cases are not the subject of inquiry. The court can only inquire into the legal effect of admitted facts.

Argued Oct. 5, 1897. Appeal, No. 29, Oct. T., 1897, by plaintiff, from order of C. P. No. 2, Phila. Co., Dec. T., 1896, No. 187, discharging rule for judgment for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Appeal from judgment of magistrate in a suit for rent under a lease.

It appears from the record that a statement of claim was filed by the plaintiff to which the defendant demurred. This demurrer was overruled by the court below, with leave, whereupon the defendant filed an affidavit of defense; upon which the plaintiff took a rule for judgment, which rule the court discharged and an exception was taken thereto by the plaintiff under the act of assembly.

From the plaintiff's statement the following allegations appear:

Henry K. Wampole, the defendant, was the lessee under a lease for a factory building from James A. Weir, landlord, for one year from February 1, 1895, at the rent of $100 per month (reduced by the parties to $75.00 per month).

The premises were sold by the sheriff as of the landlord, Weir, to the building association, a mortgagee, the plaintiff herein, and the lease was assigned by Weir to the plaintiff, after the sheriff's deed was acknowledged. After that assignment, Wampole paid the rent, $75.00 per month, to the building association for several months, and, afterwards, on August 26, 1896, gave written notice to the association that he wished the lease discontinued after the expiration of the current term (February 1, 1897), the lease containing a provision for renewal until notice should be given.

He paid the rent up to and including that due October 1, 1896, but refused to pay that falling due November 1, 1896, $75.00, and it was for that amount that this suit was brought.

To the statement, the defendant filed a special demurrer, and the court overruled it with leave, etc. He then filed an affidavit of defense which was as follows:

That he is the defendant in the above entitled cause and has a just and true defense to the whole of the plaintiff's claim, of the following nature and character, to wit:

That at the time the lease was entered into by him with James A. Weir, on February 1, 1895, there was a mortgage executed by the said James A. Weir, against the said demised premises, dated September 1, 1891.

That on March 24, 1894, a judgment was entered against the said James A. Weir, and that the said premises were sold at sheriff's sale, to the plaintiff, on the 2d day of March, 1896, and a deed therefor made by the sheriff to the said plaintiff, dated March 7, 1896.

That the said defendant occupied said premises together with his partner, Frank V. Wireman, for a few months, but the said Henry K. Wampole and Frank V. Wireman dissolved partnership, and that deponent left said premises at least three months prior to the date of said sheriff's sale, so that when the said sale was made he was no longer in possession of said premises, and the rent for said premises had been paid by Frank V. Wireman to James A. Weir, the then owner of the building, and accepted by him, and subsequent to the sale he paid it to plaintiff, who thereby accepted said Wireman as their tenant.

Your deponent did not know that said premises had been

sold at sheriff's sale to the No. 2 Assistance Building & Loan Association, or to any one, until five months subsequent to said sale, to wit: on the 20th day of August, when the agent of plaintiff called upon him and informed him of these facts, and he thereupon, being unadvised as to his rights, paid to said agent of plaintiff the sum of $25.00, and which was the only sum paid by your deponent to plaintiff.

Your deponent did not pay this under the lease, or because he was bound by the lease, but because at that time he thought he might have been responsible for the occupancy of the premises by his previous partner.

That thereupon, or a few days thereafter, to wit: on the 26th of August, he notified the plaintiff that he was not responsible under said lease and wished it discontinued. Such notice was not intended as, nor did it convey, any agreement or undertaking to be responsible under said lease or any engagement that he was so responsible, but that, on the contrary, your deponent neither made any agreement to become responsible under said lease, and never occupied said premises or paid any rent to the plaintiff under said lease. He has always repudiated any obligation to be bound by said lease and still does. There was never any agreement between him and the plaintiff either by any communication or contract, verbal or written, whereby he agreed to be or become the tenant of said plaintiff, or be bound by the provisions of the said lease.

All of which your deponent believes to be true, and therefore avers and expects to be able to prove upon the trial of the cause.

Error assigned was refusal to enter judgment against the defendant for want of a sufficient affidavit of defense.

J. H. Sloan, for appellant.—It is submitted that, even if there had not been an assignment of the lease to the plaintiff, it had a right as sheriff's vendee to affirm the lease under the Act of June 16, 1836, sec. 119, P. L. 755, which gives the same remedies to recover rent as the defendant in the execution had. See 1 Pepper & Lewis' Dig. title "Execution," page 1993, sec. 164, and authorities cited. It is unnecessary, however, to consider this aspect of the question in view of the assignment of the lease by the defendant in the execution to this plaintiff.

J. Campbell Lancaster, for appellee.—There is but a narrow question of law raised by the facts in this case, and that is whether the Act of June 16, 1836, P. L. 755, par. 119 (1 P. & L. Dig. pp. 1993–4, par. 164), has altered the rule of the common law as to the effect upon a tenant under a lease, by reason of the sale of the leased premises under an incumbrance antedating said lease. See on this point Funk v. Voneida, 11 S. & R. 109, particularly the opinion of Mr. Justice DUNCAN, on page 112, citing the cases of Levett v. Withrington, 1 Lutw. 97; Maule v. Ashmeade, 20 Pa. 482; Jackson & Gross on Landlord and Tenant, par. 1015.

While there are no cases on this doctrine precisely, the theory is borne out in Duff v. Wilson, 69 Pa. 316, in which it was held that there could be no recovery against the surety of a lessee, where the demised premises had been sold at a sheriff's sale under a mortgage antedating the lease.

OPINION BY BEAVER, J., December 13, 1897:

The error complained of by the appellant is the refusal of the court below "to enter judgment against the defendant for want of a sufficient affidavit of defense." The grounds upon which this refusal was based are not given and we are left, therefore, to seek them in the plaintiff's statement and the defendant's affidavit of defense.

Appeals under the provisions of the act of April 18, 1874, P. L. 64, have not been favored by the Supreme Court. From Griffith v. Sitgreaves, 81* Pa. 378, one of the earlier cases, to Paine v. Kindred, 163 Pa. 638, the decisions have been practically uniform. We may say, in the language of the latter case: "We do not mean to interfere where rules for judgment have been discharged in the lower courts in doubtful and uncertain cases, but only in such as are very clear and free of doubt." But where there is a case clear and free of doubt our duty is not doubtful.

The plaintiff's statement shows it clearly entitled to the rents, accruing subsequent to the sheriff's sale, under the lease from Wier to Wampole, in accordance with the provisions of the 119th section of the Act of June 16, 1836, P. L. 755. Does the affidavit of defense, giving the fullest effect to its statements,

raise any issue of fact between the plaintiff and the defendant? We think not.

The plaintiff, as is admitted by the defendant, gave notice subsequently to the sale of its claim for rent, which was in effect an exercise of its option to make him its tenant. The defendant practically admitted the claim by paying part of the rent. He endeavored to limit or modify the effect of this payment by stating the reasons which influenced him to make it. These, however, were based entirely upon mental states and processes which could not, in the nature of the case, be given in evidence on the trial of the cause.

His acknowledgment of the lease and of his obligation thereunder are further shown by the notice given by him to the plaintiff, in accordance with the terms of the lease, of his desire to have it discontinued after the expiration of the then current year. What his intention may have been in giving this notice is not the subject of inquiry. We can only inquire as to the legal effect of the admitted fact.

There can be no question as to the plaintiff's right to recover: Menough's Appeal, 5 W. & S. 432. It was not only the purchaser at sheriff's sale but was the assignee of the lease. The defendant admitted its right to the rent by a payment in part and by doing such acts under the lease as were inconsistent with the claim of non-liability thereunder.

Under the statement and affidavit of defense, there are no facts for a jury and, as we view the law of the case, the plaintiff is entitled to judgment.

The decree of the court below is, therefore, reversed and judgment is now directed to be entered for the plaintiff and against the defendant for such sum as to right and justice may belong, unless other legal or equitable cause be shown to the court below why such judgment should not be so entered.

A motion for reargument was made which was refused.

PER CURIAM, January 18, 1898:

"The effect on the lease of the sale under a prior incumbrance" was not overlooked in the consideration of the case nor in the opinion filed therein. It is expressly stated that "The plaintiff's statement shows it clearly entitled to the rents accruing

subsequent to the sheriff's sale under the lease from Weir to Wampole in accordance with the provisions of the 119th section of the Act of June 16, 1836, P. L. 755." It is further considered in the latter part of the opinion, in which it is stated: "There can be no question as to the plaintiff's right to recover: Menough's Appeal, 5 W. & S. 432 (1843). It was not only the purchaser at the sheriff's sale but was the assignee of the lease. The defendant admitted its right to the rent by a payment in part and by doing such acts under the lease as were inconsistent with the claim of nonliability thereunder."

Duff v. Wilson, 69 Pa. 316, has no possible application here. In that case the sheriff's vendee elected to disaffirm the lease and took possession of the premises, thereby evicting the tenant, but Mr. Justice SHARSWOOD distinctly says that "The purchaser at the sheriff's sale might have affirmed the lease and required the rent to be paid to him, as assignee of the reversion." The purchaser at sheriff's sale under an incumbrance prior to the lease can affirm or disaffirm the lease at his pleasure. In this case the building association chose to affirm it and hold the defendant as its tenant and, in effect, exercised its option by demanding the rent.

The whole case was fully considered and all the points raised in the original hearing sufficiently met in the opinion already filed. The motion for the reargument is therefore denied.

William Y. Leader, to the use of Henry A. Ingram, v. Wilson W. Dunlap, John D. Dunlap and Anna S. Pettit, Appellants.

Appeals—Practice, S. C.—Discretion of court—Opening judgment.

An application to open judgment is addressed to the discretion of the court which has not been taken away by the Act of May 20, 1891, P. L. 101.

It is not an abuse of discretion for the court to refuse to open a judgment entered on a verdict after a regular trial, where defendant's counsel did not notify him of the time of the trial, and where the defendant had actual notice that the case would likely be placed on the trial list at the term it was tried, but gave no personal attention to the matter.

Argued Oct. 14, 1897. Appeal, No. 102, Oct. T., 1897, by defendants, from order of C. P. No. 1, Phila. Co., March T., 1894, No. 528, discharging rule to open judgment, set aside verdict and permit motion for a new trial to be filed nunc pro tunc. Before RICE, P. J., WICKHAM, BEAVER, SMITH and PORTER, JJ. Affirmed.

Rule to open judgment and set aside verdict.

It appears from the record that plaintiff brought an action for alleged malicious conspiracy against defendants which was called for trial on February 2, 1897. The case was tried in the absence of defendants and their counsel, and verdict and judgment entered for the plaintiff for $500. Defendants entered a rule to open the judgment which was discharged.

Other facts sufficiently appear in the opinion of the court.

Error assigned was discharging rule to show cause why judgment entered against defendants should not be opened, etc.

Wendell P. Bowman, for appellants.

John McDonald, for appellee.

OPINION BY RICE, P. J., January 18, 1898:

This is an appeal from an order discharging a rule to show cause why judgment upon verdict should not be opened, the verdict set aside and the defendants given leave to file a motion and reasons for a new trial nunc pro tunc. The petition or affidavit upon which the rule was granted is not printed in the defendants' paper-book, but the grounds of the application, as disclosed in the depositions, were, that the defendants were not present at, and had no actual notice of, the trial, until after judgment had been entered on the verdict. The reason alleged for their failure to appear at the trial is, that their attorney neglected to notify them of the time when it would take place. The allegation that illness was the cause of his failure to notify them is not sustained by any direct testimony or, indeed, by any competent and satisfactory evidence of any kind. There is also an intimation that he was in trouble on account of some criminal charge and absconded, but the testimony of the con-

stable, who had the warrant for his arrest, shows, that, if he did abscond, it was not until after the date of the trial of the present case. Moreover, there is testimony, that, at a meeting between the plaintiff and one of the defendants in December, 1896, it was agreed, that both parties should endeavor to have the case ended at that term of court. Therefore, the defendants not only had the constructive notice which the trial list gives, but also had actual notice that an effort would be made to have the case tried at the term it was tried. It was their duty to give some personal attention to the matter, but, as far as appears, they neither examined the trial list for themselves, nor consulted their attorney.

To sum up the whole case, judgment was regularly entered upon a verdict after a trial in due course of law. If the defendants were not present they and their attorney were alone to blame. To have opened the judgment and granted a new trial would seem to have been little less than a pure matter of grace. But granting to the court the most liberal discretionary power to relieve parties from defaults due to the negligence of their attorneys that has ever been claimed, it must be remembered also, that the vigilant party, who has obtained a verdict and judgment, has rights, and that there can be no prompt dispatch of the business in the courts if they are to be ignored, and verdicts and judgments set aside in a mere spirit of benevolence towards the defaulting party. Certainly it would not be safe to lay it down as a rule (as we must if we reverse) that it is an abuse of discretion for the court to refuse to open a judgment entered on a verdict after a regular trial, where the defendants' counsel did not notify him of the time of the trial, even though the defendant had actual notice that the case would likely be placed on the list at the term it was tried, and gave no personal attention to the matter. The application was addressed to the discretion of the court, which has not been taken away by the Act of May 20, 1891, P. L. 101: Kelber v. Plow Co., 146 Pa. 485; Pfaff v. Thomas, 3 Pa. Superior Ct. 419, and cases there cited. An examination of the case fails to show that the discretion was improperly exercised; therefore it is unnecessary to discuss any other question.

The order is affirmed and the appeal dismissed at the cost of the appellants.

Estate of Herman Heller, deceased. Appeal of Carter & Company.

Contract—Time is of essence of a contract to deliver chattels.

In mercantile transactions, such as the sale of goods, time is generally held to be of the essence of the contract; and where one of the terms of the contract provides a date for the shipment or delivery, shipment or delivery at the time fixed will usually be regarded as a condition precedent, on the failure to observe such date the other party may repudiate the entire contract.

Contract—Construction—Written and printed parts.

When the written and printed parts of a contract cannot be reconciled, the former is presumed to have been separately and particularly considered by the parties, and to express their exact agreement on the subject.

Argued Oct. 21, 1897. Appeal, No. 24, Oct. T., 1897, by Carter & Co., from decree of O. C. Phila. Co., Oct. Sess., 1890, No. 99, dismissing appellant's claim in distribution. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, and PORTER, JJ. Affirmed. PORTER, J., dissents.

Exceptions to adjudication of PENROSE, auditing judge.

At the adjudication of the estate of Herman Heller, deceased, a claim was presented by Carter & Company for goods sold and delivered to decedent which was dismissed by PENROSE, auditing judge, in an adjudication, which was, inter alia, as follows:

The claim of Carter & Company, at whose instance the account was so filed, was for goods sold, $113.49, with interest from April 23, 1889, under a contract with the decedent, of which the following is a copy:

"No. 101. PHILA., March 16th, 1888.

"Carter & Co., Counter Check Book Makers, Niagara Falls, N. Y., will please ship me on or about one-half at once, one half within one year, via Freight on (25th March) 88, Ten thousand "B" Counter Check Books, for which I agree to pay the sum of 2¼ cents each. Total, $225, at their office.

"Payable as delivered. (Signed) H. HELLER,

"Cash and Charge index. RYAN.

"Send proof."

The contract is written on a printed blank; the first two lines, except the word "me" and the last two, except the words "I" "2½" and "$225" being printed, and all of the rest, except the word "via" being in manuscript.

The proof requested at the foot of the paper was sent, and across it was written: "O. K., make 5000 yellow paper, 5000 white, for use on alternate days. (Signed) H. Heller, Ryan."

The first delivery in pursuance of this contract was made April 9, 1888. It was duly accepted and paid for (5,075 checks, $114.20).

The decedent was a manufacturer of ladies' wear and white goods, wholesale and retail. The checks are slips used by salesmen for the purpose of having proper entries of sales made upon the books of the merchant. In the present case, the name of the decedent, his address and nature of business, were printed at the top of the paper or slip, and after this a blank for the name of the salesman, the amount of sale, and amount received; and at the foot, the words: "In case of error, return this bill." It will be seen, therefore, that unless taken by the person for whom prepared, they were absolutely useless to the shipper, and incapable of being sold or disposed of to any other person.

On April 23, 1889, the balance of the order, viz: 5,044 checks, amounting to $113.49, were shipped from Niagara Falls to the decedent at Philadelphia, and upon their arrival were duly tendered at his store, 730 Arch street; but he had died previously, viz: January 22, 1889, and his executors, who were then engaged in winding up the business, declined to receive them. In a letter dated April 25, 1889, they wrote to the claimants: "We were much surprised to receive the enclosed bill, as we never ordered the goods and know nothing about them. You have evidently made a mistake in the name." In reply to this the claimants wrote, April 27, 1889, (apparently in ignorance of the death of the decedent as the letter was addressed to him):

"We hold your signed contract, dated March 16, 1888, for 10,000 check books, half of which were to be shipped March 25th and the balance within one year. This contract is signed 'H. Heller, per Ryan.' The first part of this contract was duly sent and the goods invoiced; the enclosed invoice is for the balance of the contract. We enclose herewith copy of the original contract so that you can investigate the matter."

To this the executors replied, April 29, 1889, returning the bill and saying: "We . . . . must positively decline to accept the goods, for the following reasons: The contract calls for the balance to be shipped within one year from March 16, 1888. That time has now expired, and besides, owing to the death of Mr. Herman Heller, the executors have assumed charge and are liquidating the business, and having no use for the books, must decline to accept them. We know nothing of any such contract, and had you notified us beforehand we would have advised you in time."

On May 1, 1889, the claimants wrote to the executors, denying their right to refuse the goods, and asserting that both the letter and spirit of the contract had been complied with on their part—the first shipment of the books having been made April 9, 1888, and the second April 23, 1889. They added that the fact that the executors "did not know that we were holding these books for Mr. Heller does not alter the facts of the case, nor does it relieve the estate of Mr. Heller from the responsibility of accepting and paying for the goods."

In reply to this the executors wrote, May 2, 1889, referring the claimants to their solicitor, Mayer Sulzberger, Esq.

It must, of course, be conceded that the death of the purchaser did not put an end to the right of the other party to the contract to insist upon payment; but this right was dependent upon performance by them in accordance with the terms of the agreement. When the case was presented to the auditing judge he was inclined to the opinion that such performance had been shown, and that the stipulation as to time, in view of the words "on or about," was not material; but further reflection had led to a different conclusion. The words "on or about" are printed in the form given to the decedent to fill up, but it is clear they are no part of his contract and are to be regarded as if erased. They must give way to the terms as written, and they are express that the half not presently delivered must be shipped "within one year." Whether the period of one year is to be computed from the date of the contract or of the first delivery is immaterial; more than a year from either having expired before the shipment was made.

It is true that in general, time is not regarded as of the essence of a contract for the sale of lands, but this is because the con-

tract itself vests the equitable estate in the vendee, and the completion of the transaction by transfer of the mere legal title is, in equity, not of sufficient importance to interfere with the right to demand specific performance because of delay, more or less prolonged, in asking for it. But the reason does not apply to contracts with regard to personalty, as to which it appears to be well settled that, in the absence of waiver, strict performance in every particular—quantity, quality, place and time is essential; and this irrespective of actual loss to the opposite party: Addison on Contracts, 233; Hare on Contracts, 570; Pollock on Contracts, 464; Cleveland v. Sterrett, 70 Pa. 204.

In the present case not only was there a failure on the part of the claimants to deliver at the stipulated time, but according to the testimony (Dr. Edwin A. Heller) there was actual inconvenience and loss to the estate of the decedent in consequence.

The auditing judge is forced to the conclusion that the executors of the decedent were not bound to receive the articles contracted for at the time they were tendered, and the claim must, therefore, be disallowed.

The balance of principal in the hands of the accountants, as set forth above, $ will be held for the purposes mentioned in the will of the testator.

Two commissions for the examination of witnesses were taken out on behalf of Carter & Company, the cost of execution of one of which, as stated by Mr. Cooper, was $15.00 and of the other $10.00. As the claim has not been sustained, these costs cannot, of course, be charged against the decedent's estate.

It is ordered and adjudged that the account be confirmed nisi on payment of clerk's fees.

Exceptions to the adjudication disallowing the claim of Carter & Company were dismissed by the court in banc in the following opinion by HANNA, P. J.

The single question in this case is whether claimants were bound by their contract with testator to deliver to him the remaining half part of the printed "counter check books" within one year from March 16, 1888.

The evidence is the shipment was not made until April 23, 1889. In the interval, testator died; and upon the arrival of the goods in this city, his executors refused to receive them,

upon the ground that claimants had not complied with the terms of the order given by testator or the contract entered into with them. The death of testator does not affect the right of the claimants to recover. The balance due is still a debt payable by his estate, provided the claimants performed their part of the contract.

It will be observed, the contract in this case is with respect to personalty, and the rule as to the performance of which differs from that applied to the specific performance of contracts with regard to the sale and conveyance of real estate. In such cases it seems that, in equity, time is not of the essence of the contract, except when controlled by other equities, as shown in Bispham's Equity (5th ed.), secs. 391, 392. But when a contract is made for the manufacture and delivery of articles of merchandise or other personal property on or before a certain day, or at a specified date, in the absence of proof of consent of the other party or waiver by him, strict performance of the terms and conditions of and compliance with the contract are required before recovery of the price agreed upon can be had.

The "counter check books" were to be delivered "within one year," and this, by the terms of the contract, was a condition precedent to the demand for payment. This being the case, no suit can be brought upon the contract, "until the condition has been fulfilled or its nonfulfillment excused." Again, "from the very nature of a condition precedent, it results that it must be strictly performed before the party on whom its performance is incumbent can call on the other party to fulfill his promise:" Tiffany on Sales, 153; Anson on Contracts, 380.

Upon a fair consideration of the language of the contract in this case, the intention of the parties seems very clear, that each was to be bound by the stipulation that the "counter check books" were to be printed and delivered "one-half at once, one-half within one year." The claimants had the right to deliver at any time within one year, and the testator was bound to pay upon the delivery. The "check books" were to be used in testator's retail business, and having his name and his own peculiar trade blanks, symbols, etc., printed thereon, were absolutely valueless and unsalable to any other tradesman or in any other business. This the claimants must be presumed to know.

The time thus fixed upon would appear to be considered by the parties as a material factor of the contract, and made by them an essential part thereof. Thus, "of the essence of the contract," and consequently a condition precedent: Tiffany on Sales, 154. See also Addison on Contracts, 233, Hare on Contracts, 570, Pollock on Contracts, 464, and Blackburn on Contracts of Sale, 225–227.

"In mercantile transactions, however, such as the sale of goods time is generally held to be the essence of the contract; and where one of the terms of the contract provides for the shipment or delivery, shipment or delivery at the time fixed will usually be regarded as a condition precedent, on the failure of which the other party may repudiate the entire contract:" Tiffany on Sales, 155 and cases cited in note. An "impossibility arising after the formation of the contract is not an excuse from performance, unless the impossibility results either (*a*) from the destruction of the specific goods which are the subject of the sale, or (*b*) from a change in the law:" Tiffany on Sales, 158, 160; Anson on Contracts, *321, and cases in note.

Furthermore, the contract was executory in its character. The "check books" were not printed and sold and delivered to the purchaser so that the title passed to him, as in the sale of wool in Kitchen v. Stokes, 9 W. N. 48, and the removal and payment therefor within thirty days were held not to be of the essence of the contract; but they were to be manufactured and delivered at a future date fixed upon by the contract, thus showing that time was in the contemplation of the parties.

In Cleveland v. Sterrett, 70 Pa. 204, the defendants agreed to deliver to plaintiff 240 barrels of oil of quality named, etc., "any time between July 1 and Dec. 1," and it was held the defendants were to be the actors, as the claimants in the present case must be held, and were bound to be ready to deliver the oil on December 1st. AGNEW, J., said: "It is plain the contract fixed the time of delivery as Dec. 1, for beyond this date Cleveland & Co. had reserved no day of grace." They "were not ready then to deliver, and their failure gave Sterrett the right to rescind;" and "not being ready to deliver the oil and comply with their contract, could not demand the money of the plaintiff, nor recover damage from the plaintiff for his refusal to receive the oil after Dec. 1."

In Depuy v. Arnold, 1 W. N. 157, carpets were bought on the express condition they should be delivered and put down by a certain day. The carpets were not delivered nor put down on that day, nor on a subsequent day promised by the plaintiff. The defendant accordingly refused to accept the carpets, and in an action brought to recover the price, plaintiff was refused judgment for want of a sufficient affidavit of defense.

In the case before us there is no hardship to the claimants, except that arising from their own laches and oversight of the express conditions of the contract. They performed part of the contract, as did the testator by payment for half of the "check books" ordered, and they had full notice they could not demand payment for the remainder, unless they delivered them to him "within one year."

We cannot reach any other conclusion than that the parties intended time to be "of the essence of the contract," and as claimants failed in performance within the time agreed upon by them, their claim is properly disallowed.

The exceptions are dismissed and the adjudication confirmed.

Errors assigned were (1) In dismissing appellant's first exception to the adjudication of the auditing judge, which was as follows: "Because the learned judge erred in law in finding regarding the written contract of claimants, Carter & Company, Limited, with decedent, the words 'on or about' are printed in the form given to the decedent to fill up, but it is clear they are no part of his contract, and are to be regarded as if erased." (2) In dismissing appellant's second exception to the adjudication of the auditing judge, which was as follows: "Because the learned judge erred in law in finding that the written contract, under the circumstances of this case, was to be construed exactly according to its terms, with the erasure of the words 'on or about,' while it is apparent, both from the contract and the admitted evidence, that the agreement was for the future delivery of printed matter, the order for which had to be sent to Niagara Falls, New York, a proof made and returned, the goods manufactured and shipped, and under which it is admitted that the first shipment, which was received and paid for, did not take place until twenty-four days after the contract was signed, and the words in the contract 'on or about' thus adopted and rati-

fied by the decedent as a very part of the same. (3) In dismissing appellant's third exception to the adjudication of the auditing judge, which was as follows: "Because the learned judge erred in law in finding as to the contract in this case, that 'strict performance, in every particular—quantity, quality, place and time is essential' when it was clearly in evidence without contradiction, that the decedent gave an order for twice as many goods as he needed in order to get the advantage of a reduced price, and that the goods were manufactured according to the order by the claimants, one half of them shipped to the decedent, as agreed, while the other half was held for his convenience, and subject to his order at any time, and no evidence was produced to show that they had ever been called upon to make any shipment." (4) In dismissing appellant's fourth exception to the adjudication of the auditing judge, which was as follows: "Because the learned judge erred in finding from the testimony, that 'there was actual inconvenience and loss to the estate of the decedent in consequence' of the nondelivery of the balance of the goods, when the testimony does not bear that evidence, and the letter written by the executors, when the balance of the goods was tendered stated: 'The executors have assumed charge and are liquidating the business, and having no use for the books, we must decline to receive them'; showing conclusively that the reason they did not want them was because the decedent's business had passed into their hands, and the books were no longer appropriate for use in the store, and this is further shown by the testimony of Dr. Heller that the retail business was carried on until Christmas following the tender of the goods." (5) In dismissing appellant's fifth exception to the adjudication of the auditing judge, which was as follows: "Because the learned judge disallowed the claim of Carter & Company, Limited, as presented, and did not allow to them the full amount of their claim with costs of the commissions."

Samuel W. Cooper, for appellant.—The principles governing the point whether time is the essence of the contract in cases like this are so well settled and accepted by the mercantile community that it does not appear that any case exactly in point has been brought into court.

If no demand is made until after the time stipulated, the sell-

er is entitled to a reasonable time after such demand within which to deliver: Holt v. Brown, 63 Iowa, 319.

Where it is the buyer's duty to designate the time of delivery the seller is not bound to act until he has been notified of the place chosen: Shaw v. Grandy, 5 Jones (No. Car.), 56.

In fact the vendor, under the conditions of the agreement in this case, is a bailor: Oakley v. State, 40 Ala. 372.

Ephraim Lederer, for appellee.

OPINION BY RICE, P. J., January, 18, 1898:

The appellants argue, that the point of this case is whether time is of the essence of the contract, when the vendee of goods has them specially manufactured for his use and leaves them in the possession of the vendor subject to order. But we do not so understand the question raised. The contract, as evidenced by the decedent's written order which was accepted by the appellants, contains nothing which indicates that the second instalment was to be held subject to order. Nor do we find any competent parol evidence that such was the understanding of the parties. The appellants were the actors and were bound to ship the goods within the time specified in the contract without further order unless performance within that time was excused or waived.

The authorities cited in the opinions of the auditing judge and of the court upon exceptions, as well as others that might be cited, show that a stipulation as to the time of delivery in an executory contract for the sale of goods is an essential and not a collateral term. A distinction has been drawn in favor of contracts for work or skill, and the materials upon which it is to be bestowed, and as to such it has been said that "a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay will not justify the aggrieved party in repudiating the entire contract but will simply give him his action for damages for the breach of the stipulation:" Beach on Contracts, sec. 619. We doubt whether this distinction would hold good in ordinary mercantile contracts although the goods were to be manufactured. Merchants are not in the habit of placing upon their

contracts stipulations to which they do not attach some value and importance, and that alone might be sufficient answer to the question why time of shipment should be deemed an essential term: Bowes v. Shand, L. R. 2 App. Cases, 455; Burdick on Sales, 142. The contract under consideration was not a mercantile contract, it is true; that is to say, the goods were not ordered with a view to sell them. They were however of a special pattern and were ordered for a special purpose. They were valueless to any one but the purchaser, and would be of no value to him if he did not continue in the mercantile business he was then conducting. Ample time was allowed for the performance of the contract, and from all the circumstances it is reasonable to suppose that the parties actually intended that performance within that time should be a condition precedent to a right to recover the price.

It is probable that the appellants agreed to furnish the books at a less price, because they could make them all at one time but we fail to see how this fact affects in any way the question of their duty to deliver them within the time specified. If it has any bearing it tends to show that the failure to deliver was without even plausible excuse. As the learned president of the court below well says: "In the case before us there is no hardship, to the claimants, except that arising from their own laches and oversight of the express conditions of the contract."

When the written and printed parts of a contract cannot be reconciled the former is presumed to have been separately and particularly considered by the parties and to express their exact agreement on the subject. See Grandin v. Ins. Co., 107 Pa. 26; Haws v. Fire Assn., 114 Pa. 431; Duffield v. Hue, 129 Pa. 94; Dick v. Ireland, 130 Pa. 299; Lane v. Nelson, 167 Pa. 602. This rule was properly applied in the present case. When the parties came to fix the time for delivery, instead of naming a specific date "on or about" which the second instalment should be shipped by the appellants and accepted by the purchaser, they designated a period within which it was to be shipped, leaving the precise date of shipment within that period to the option of the appellants. Whether the year was to be computed from the date of the contract (which is the more reasonable construction) or from the date of the first shipment, is immaterial; because, in either case, the goods were not shipped within the time specified in the contract.

For these reasons, in connection with those set forth in the able opinions of the auditing judge and of the court below the decree is affirmed and the appeal is dismissed at the cost of the appellants.

PORTER, J., dissents.

Commonwealth *v.* A. L. Spencer and Thomas Aubrey, Appellants.

Criminal law—Conspiracy—Jurisdiction.

Conspiracy is a matter of inference deducible from the acts of the parties accused, done in pursuance of an apparent criminal purpose, in common between them, and which rarely are confined to one place and if the parties are linked in one community of design and of interest there can be no good reason why both may not be tried where any distinct overt act is committed; for he who procures another to commit a misdemeanor is guilty of the fact, in whatever place it is committed by the procuree.

Conspiracy—Evidence of general motives.

In order properly to comprehend the nature and circumstances of a particular conspiracy, charged in an indictment, evidence as to the motives and conduct of the alleged conspirators in promoting a conspiracy of the same kind to defraud the public generally, is properly admissible.

Practice, Superior Court—Evidence admitted without objection.

Where evidence is offered and admitted without objection in the court below it is improper to assign such admission for error.

Practice, Superior Court—Defective assignment of error.

An assignment of error as to admission of evidence is defective under Rule 17 which neither quotes the full substance of the bill of exceptions nor copies the bill in immediate connection with the assignment.

Practice, Superior Court—Review—Refusal to grant new trial—Lack of exceptions.

Errors to the refusal of the court below to grant a new trial will not be considered when no exception was taken to this action of the court.

A new trial is properly refused where on the motion therefor the evidence adduced upon the trial is not shown to be incorrect in any material matter by anything subsequently made to appear.

Argued Oct. 11, 1897. Appeal, No. 23, Jan. T., 1898, by defendants, from judgment of Q. S. Luzerne Co., Nov. Sess., 1896, No. 39, on verdict of guilty. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Indictment for conspiracy. Before BENNETT, J.

It appears from the record that the indictment charged the defendants, Spencer and Aubrey, with having conspired wilfully and maliciously to cheat the firm of Koons & Company out of certain spikes, pipes, etc.

The facts sufficiently appear in the opinion of the court.

Verdict of guilty and sentence thereon that each defendant pay $100, costs of prosecution and be imprisoned in the Luzerne county jail for one year. Defendants appealed.

Errors assigned were (1) In admitting under objection evidence offered by the commonwealth as follows: "Commonwealth proposes to prove by the witness on the stand, both by oral conversations and by letters to be subsequently offered, that he entered into an arrangement with the defendants, in the early part of 1896 and latter part of 1895, to organize a corporation under the laws of the state of New Jersey to be known as the Phœnix Contract Company, with power to buy and sell materials, buy and sell stock, bonds and other paper; with power to construct railroads, bridges, docks, etc., with a paid up capital of $1,000 and an authorized capital of $100,000. That after procuring said charter they would obtain a rating from a commercial agency which would give them credit in the business world, and that one office of the company should be in the city of New York, and another in the city of Scranton, Lackawanna county, Pa.; the latter to be the main office. Thomas Aubrey, one of the defendants, the confidential clerk and employee of A. L. Spencer, the other defendant, was to be the secretary and treasurer of the company. That they would then proceed to buy materials, such as nails, pipe and the like in large quantities, wherever credit could be obtained on the faith of the incorporation and rating aforesaid." (2) In admitting under objection certificate of organization of the Phœnix Contract Company issued by the state of New Jersey to be followed by evidence that there was not a dollar paid in to commence business with, the charter stating that the total amount of capitol stock of said company is $100,000, number of shares one thousand, to be followed by evidence that no moneys of this amount of $100,000 was ever paid in. Defendants' counsel object to this certificate, first, because it appears that the incorporators

were persons other than the defendants and that neither of the defendants is in any way referred to or mentioned in the certificate. (3) In charging the jury as follows: "Indeed it may be necessary and proper to prove a conspiracy of such general character in order to establish the particular conspiracy charged in the indictment, as the offspring of the more general one. But, as we have also in a general way hitherto instructed you, if, as the offspring or succession of such a general conspiracy, these defendants entered into a distinct conspiracy to cheat and defraud Koons & Co., according to the second position taken by the commonwealth, then they may be convicted under this indictment, if overt acts have been committed in this county by either of them or their innocent agent, as claimed by the commonwealth. Again, it is argued in behalf of the defendants that the evidence on the part of the commonwealth which may tend to show the original or general conspiracy claimed by it, is irrelevant and immaterial on the real issue which you are trying, and that it should be disregarded by you in determining whether there was a conspiracy to cheat and defraud Koons & Co. In answer to this we say to you that while such evidence of the general conspiracy claimed is not sufficient to establish the special one in issue, even though it should prove the existence of the former to your satisfaction; yet, that such evidence is nevertheless proper for your consideration as bearing upon the relations existing between the defendants and Milair, through this Phœnix Contract Company, upon the nature and character of the business methods they were pursuing, their purposes and motives at the time, and such evidence may be considered by you in connection with the testimony showing the transactions which led to the opening and conduct of business with Koons & Co., and as bearing upon the question whether there was an independent conspiracy upon the same general plan of execution as the original, yet having for its specific purpose the cheating and defrauding of Koons & Co. The defendant Spencer held no official relation to the company, yet was to act with the other parties in its behalf. These and his testimony, and in fact all of the evidence bearing on the subject of the purposes of this Phœnix Contract Company, are for you, and you are to determine what is the truth in this matter." (4) The entire charge of the court to the jury was prejudicial, misleading and unfair to de-

fendants, charged as they were with a crime. The court committed error in admitting as evidence upon the trial under the indictment, the following letter, together with a very large number of others of a like character, to be found in commonwealth's exhibits in appendix. Many of them having been written long before the defendants, or either of them, ever knew George W. Koons & Co., or heard of the Phœnix Contract Co., and even before the inception of said company, and having no reference or relation to either of them.

"SCRANTON, PA., Nov. 18, 1895.

"G. A. J. MILAIR, Esq.

"Room 472, 32 Liberty St., New York.

"Dear Sir: I know now where I can get $20,000 worth of materials for good paper if you can get it here at once. Can't some Boston firm help you out? Wire me, as I must let them know. Here is a rare chance. Hope to see you Tuesday at farthest.

"Yours truly,

(Signed) "A. L. SPENCER."

(5, 6) Refusing a new trial. (7) In continuing to take jurisdiction of the case after the close of the evidence upon the trial. (8) The refusal of a new trial was an abuse of the discretionary power of the court.

E. H. Shurtleff and *I. H. Burns*, for appellants.—The accused defendants cannot be convicted of one offense by evidence of a former offense which had been completed before the inception of the second and which is not charged in the indictment: Hartmann v. Com., 5 Pa. 60; Com. v. Harley, 48 Mass. 506; Com. v. Judd, 2 Mass. 329; Com. v. Kellogg, 61 Mass. 473; Rex v. Roberts, 1 Camp. 399.

So far as our research has extended we do not find that the precise point has been raised in this state, but in Collins v. Com., 3 S. & R. 220, the indictment was drawn in the precise form suggested in the Harley case and is at least persuasive evidence that our courts consider it correct. The court erred in refusing a new trial.

In at least one case the Supreme Court has examined the trial evidence in order to determine the question of a retrial: Pilger v. Com., 112 Pa. 220.

Whatever may have been said in some of the older decisions in regard to granting new trials by appellate courts we take it that it is now the settled law that a refusal to set aside a verdict in the court below may be alleged for error: Smith v. Times Pub. Co., 178 Pa. 481.

It is confidently asserted that there is no proper and legal evidence to prove the charge as laid in the indictment or to sustain the jurisdiction of the court of Luzerne county. Not only this, but the great change in the facts, as they would be presented on another trial, is amply sufficient to justify this court in granting us a rehearing.

John T. Lenahan and *Henry A. Fuller*, with them *Daniel A. Fell*, district attorney, for appellee.—Authorities are legion establishing the competency of distinct but connected offenses to prove guilty knowledge or criminal intent, some of which are considered by the court below, and others may be cited here: Kramer v. Com., 87 Pa. 299; Goersen v. Com., 99 Pa. 388; s. c. 106 Pa. 477; Com. v. Johnson, 133 Pa. 293; Com. v. Place, 153 Pa. 314.

The court below have found that:

"The evidence adduced upon the trial has not been shown to be incorrect in any material matter by anything subsequently made to appear. Nor do the manner and circumstances under which at a very late period after the verdict the so-called correction or retraction came about, serve to impress us with its importance or merit as a reason for a new trial."

Jurisdiction in conspiracy is obtained by any overt acts done within the jurisdiction.

OPINION BY WICKHAM, J., January 18, 1898:

The defendants in this case were indicted and convicted for conspiring to cheat and defraud George W. Koons & Co. of valuable personal property. The evidence consisting of about four hundred and fifty-three pages of printed testimony, and one hundred and twenty letters and other documentary exhibits, reveals the philosophy and methods of one of the dangerous forms of dishonesty peculiar to modern business life.

A. L. Spencer, living in Scranton, Pa., had been engaged, prior to 1895, in business dealings with one E. T. Day, of New

York City, and as he alleges, obtained through Day, as security for some indebtedness owing to him from the latter, certain notes issued by a corporation called the Southwestern Pacific Company. This was a speculative, insolvent concern of shadowy outline, whereof G. A. J. Milair, also of New York, was president. How long it eked out an existence we do not know, but it is quite sure that it was defunct for some time before the Phœnix Contract Company was formed. Just what the precise nature of the relations between Spencer and Milair were before October of the year 1895, is hard to tell; their testimony in regard to this matter is not as clear as it might be, and much is left for surmise, but from their letters appearing in evidence, it seems that they were on terms of close business intimacy, that Milair was procuring and trying to procure iron, lumber, and other materials for Spencer, to reduce Day's indebtedness to the latter and probably to help himself at the same time. For these purposes the Southwestern Pacific Company was used to some extent, and if Milair is to be believed, would have been fraudulently employed in an extensive way, at Spencer's suggestion, had not its credit utterly failed. When things had reached this pass, and it became evident to Spencer that the old company could no longer be made available for either honest or dishonest uses, we find him writing to Milair, under date of October 8, 1895, complaining that the latter had not sent lumber, iron and spikes as he had promised, and suggesting as follows: "I tell you the thing to do is to start a new Co. The old one, no matter what you may do, is hammered out of existence and is carrying a bigger black eye than you will ever be able to heal. If you will pitch in, I will turn material into cash for you. I would like to handle the money end of it myself. What do you say?"

Before this letter was written, Spencer, Day and Milair had at least one conference in New York about organizing the new company, the real purpose whereof, as Milair, in effect admits, being to buy materials, to wit: iron, nails, spikes, lumber, etc., sell the same and divide the proceeds, Spencer to receive fifty per centum thereof. Whether he was to get more in the aggregate than would pay his debt, then alleged to be $8,500, is not quite clear, nor is it very material. The other fifty per cent was to go to the New York end of the concern. Aubrey was to get

$1,500 a year for his services, seemingly to be paid out of the gross receipts.

On October 14, 1895, Spencer again writes Milair, saying: "Viewing your situation in the back ground and from past experience, I realize fully how difficult it is to buy with the credit of S. W. P. Co., and each report through the agencies reflects stronger and stronger on you and that Co.; hence the necessity of forming a new one under a wholly new name that you can sit quietly back and manage. We are all discouraged at this end." On October 22, 1895, he writes Milair concerning a note, and says: "Your name and that of the S. W. P. Co. must not appear." In a letter to Milair, dated December 2, 1895, he suggests that the title of the new company, the formation of which was then under consideration, shall be "New York Construction & Fire Proofing Co." and adds, "As I am to use the material or dispose of it, it would seem that I should be out of the list. . . . . Get up the new company under this head, and Aubrey as secretary or treasurer as you wish. Will look for your letter and small notes to-morrow. I am worried as the time to take care of the old ones is short. Do not forget that now is the time I need your aid." Aubrey was Spencer's bookkeeper and business confidant.

Milair, recognizing the fitness of things, preferred the name, "The Phœnix Contract Company," and so wrote Spencer, and the latter name was chosen. When asked by the defendants' counsel: "I suppose you suggested that because it was rising out of the ashes of your former enterprise?" He replied, "That was my idea, yes; that is the reason I thought it was an appropriate name."

In a letter to Milair, dated December 13, 1895, Spencer states: "My attorney says I cannot be a director in any company without being liable for its debts, and I can't afford to do that." On December 28, he says in another letter: "A new company with Pelletreau and Hoffmire and several others with us, would make the thing go at once. This is the quickest way to get easy, and if they would authorize Aubrey to buy, we could begin now," etc. It may be remarked here, that throughout the voluminous correspondence, only brief extracts from which can be presented, Spencer appears anxious to get every one, that

might be made useful, into the new company, while determined to have no visible connection with it himself.

In a letter of January 15, 1896, he complains to Milair that the latter is "too slow about the new company" and concludes as follows: "You cannot afford to neglect this new company for something less reliable. When you get H. and P. to join, I will send $25.00 for charter. Now act quickly. Aubrey has become discouraged at your slow pace." The next letter, dated February 8, 1896, and referring to certain notes that he wanted Milair to send him for speculative purposes, contains the following: "It would be as well that the notes should bear no indorsement that would suggest the South Western Pacific Company. This deal has progressed so satisfactorily so far that I would not on any account have it imperiled now." Two days later, he writes Milair: "Both myself and Aubrey are ready to take off our coats to make the new company a success, if we can only get it started, and I accordingly enclose a check as promised, payable to the secretary of state of New Jersey, amount $26.00, and shall be glad to know that the organization will be completed at an early date." It seems that Milair did not have the small sum of money needed to pay the fees on the issuing of the charter. On February 26, Spencer says in another letter to Milair: "I wired you this morning to send me the name of the new company, and the position assigned to Aubrey in it, as I want to work some of the matters I have on hand through the medium of the new organization." The telegram referred to is as follows: "Wire name new company, Aubrey's position in it so can make purchases." In a letter, dated March 2, 1896, he says: "I want Thomas Aubrey made secretary and treasurer of the Phœnix Contract Co., as he will do the buying and trading at this end." On March 7, 1896, he writes: "I hope you will now lay aside every other scheme until this is perfected, and once in working order, I am sure it will be highly renumerative for you and me." The charter for the Phœnix Contract Company was obtained under the laws of New Jersey, on March 7, 1896, and the capital stock was fixed at $100,000. Milair, Joseph P. Wiswall, and Charles R. Braine were the incorporators, all so far as we can see, being financially irresponsible, nor does it appear that James Kennedy, who was brought in later, concededly as a figure head, was in much better condition. The $26.00 check

was used in paying for the charter. Braine was made president, Kennedy vice-president, Aubrey secretary and treasurer with an office at Scranton, and Milair general manager, with an office in New York. Braine, as Milair says in his testimony, was the "Mr. B." referred to in the following extract from Spencer's letter to Milair dated October 14, 1895, "We are all discouraged at this end. Mr. B. has given up the idea of getting spruce lumber. I fear we shall not be able to bring him into use again." On March 17, 1896, Spencer says in a communication to Milair: "I enclose herewith check, $50.00, to cover rent of new offices at 156 Broadway, and hope to hear at once that you have closed arrangements for same. This must be done at once that we may proceed to get our stationery printed here and that you may arrange for a rating as suggested to Aubrey yesterday. Please lose no time in these matters. I am specially anxious if possible to get some money this month to take up some of the old papers, and I see no other way to accomplish it but through the medium of the new Co. Nothing can be done until these details are definitely fixed, and we must all act at once while trade remains dull." On the next day, he again writes, saying "I cannot too greatly emphasize the necessity for promptly obtaining for the new Co. a good rating. Nothing can be done without it, and if it is delayed we can do no business here." Again on March 24th, he says: "I am very anxious on the question of rating for the new Co., of which you make no mention in recent letters. Please rush this matter as Aubrey and I are very desirous of getting down to business. Material is daily offered to me, which the Phœnix Co. could easily buy, given a good rating. We cannot make a move without it however, and I don't want to run the risk of making a mistake." Three days later, he writes Milair: "Now we have lots of business in the air. The delay on the rating hurts. The secretary sent out specifications (at a risk I think) for $22,000 worth of nails. . . . If you can get in new office do so at once, as inquiries may come there concerning the nails purchased."

Before this time Aubrey had also been writing Milair hurrying him up. In a letter under date of March 21, 1896, he says: "We are all in shape here to proceed to business, but awaiting your advice as to rating. Please say when you can secure this, as it will certainly be the first question put to us in response to

inquiries for material. . . . It will be advisable for each of us to keep the other informed of every move made, so that there may be no surprises sprung on either." On the 26th of the same month, he writes: "Seeing that Mr. S. will ultimately handle a large proportion of the material we shall buy, it will be inadvisable to use his name as reference whenever it is asked for." On the 30th of the same month, he again writes Milair, saying: "Mr. Spencer wired you this A. M. to be here on Wednesday morning without fail. We have agreed to meet Dun's agent at 3 o'clock on Wednesday afternoon to make a statement relative to the position of this Co. This must be done at once inasmuch as we have a big nail deal practically consummated, and if we can only nobble Dun's local man, we are safe to carry it through. Please do not fail to be here and bring along whatever you can that will establish us with Dun's. A rating can be more easily procured here than in N. Y. From what Mr. Spencer said in his letter to you on Friday, I concluded you would be on the lookout for nail men. I wrote to every nail mill in Penna., and have one quotation today that looks like positive business. Hence the necessity for your certain appearance on Wednesday. Anything in the shape of bonds, notes, or securities of any kind that you can get hold of, it would be very essential to bring along with you."

It is significant that the "big nail deal" referred to was the one consummated with Koons later, as Aubrey admits in his cross-examination. This matter has a most important bearing on the alleged particular conspiracy of Spencer and Aubrey to defraud Koons. Among the definitions of "nobble" a word little used here, but common in England, Aubrey's native country, the Century Dictionary gives the following, "Circumvent," "get the better of," "get hold of dishonestly," and a nobbler is "a thimblerigger's confederate."

In response to the call from Spencer and Aubrey, Milair went from New York to Scranton, and met them at the company's office in the latter city. The three men, in order to get a good business rating through R. G. Dun & Co.'s agency, for the Phœnix Contract Company, prepared the following statement:

"The authorized capital stock of the Company is $100,000, of which $50,000 has been subscribed and paid for. The assets of the company is:

Cash in bank	$ 3,000.00
Bills receivable	10,000.00
Merchandise, about	17,000.00
Stocks, Bonds, etc.	20,000.00
Total	$50,000.00
Liabilities	None.

"The banking of the company is done with the Traders' National Bank, Scranton, Pa.

"The business of the company is that of general contractors for the construction of railroads, bridges, etc. etc., and has several large contracts pending."

Not a dollar of the stock was at any time paid for, nor was it intended that it should be paid for, even in part. In what proportions it was held by the incorporators does not appear. Indeed, Aubrey, the secretary and treasurer, admits in his testimony that he did not know himself. But this was a matter of small moment, seeing that the division of the gross receipts in the manner agreed on, rather than of legitimate profits, was the chief aim and object of the confederacy. The company was organized mainly to get goods on credit, or for securities of little or no value, that Milair might pick up in New York and elsewhere by the questionable methods revealed by the evidence. That there was no intention to expend more money than was absolutely necessary to bait the traps from time to time is very apparent. The company had nothing in the way of assets or capital save $3,000 temporarily deposited by Spencer in the Traders' National Bank of Scranton to aid in making a false show and securing a fraudulent rating. This deposit, as is shown by the correspondence, had "a string to it," and was all withdrawn inside of thirty days. A statement more boldly and nakedly false was, perhaps, never before sought to be imposed on a mercantile agency.

It failed to accomplish its intended purpose with R. G. Dun & Co., but misled Bradstreet's agency, which latter concern gave the company the desired rating. Everything was now ready for the "big nail deal" with Koons, who lived in Audenreid, a town on the edge of Luzerne county, and was representing himself and his partner George John. To bring about this deal speedily was evidently the main reason for the anxiety of Spen-

cer and Aubrey to get Milair to Scranton and secure a rating, as the evidence shows that on the very day Aubrey wrote his letter last quoted from, he had negotiated with Koons for a large lot of nails. Thereafter the two Scranton conspirators followed Koons as the skillful hunter pursues his quarry. Aubrey's letters to his victim, wherein he assumes the tone of a strict and careful business man, who will not stand any remissness, his complaints of delay, his intimations that only the greatest promptness on the part of Koons will save the latter from losing a valuable customer, are models of cunning and effrontery.

By June 10, 1895, goods to the value of $10,050.27 had been obtained from Koons and his partner. They were secured through about a dozen shipments, all save two made to points in Luzerne county. Of the total price, $1,000 was paid in cash and about $950 by turning over to Koons storage receipts for some goods in New York, the title to which he testified at the trial, was still in dispute. Beyond these amounts nothing was paid. On June 8, 1896, when only $15.00 stood to the credit of the company in the bank wherewith all its business was done, the other moneys collected from the sales of Koons's goods having been divided between Spencer and Aubrey, the latter negotiated with Koons for material to cost $12,000 more. In a letter of that date to Milair he says: "It was the best policy to give Koons money, as I have now got his entire confidence, and yesterday closed a deal with him for $12,000 worth of material for prompt delivery." Before Koons shipped the goods last ordered, he suspected that he was being cheated and refused to go any farther. In an earlier letter written May 23, 1896, to Milair, Aubrey says, speaking of Koons, "I think you had better leave him to me, and if you reply to his letter give him to understand that you will not interfere between the Scranton office and his good self, inasmuch as his treatment of our orders has been so unbusinesslike and annoying to us. We can work him well enough from this end, and his zeal for prompt cash settlements will soon cool off. . . . Mr. Spencer has written a good letter to Lehigh Lumber Co." Spencer's letter to the Lehigh Lumber Company was one recommending the Phœnix Contract Company as entitled to credit, and falsely representing its business and assets.

What became of the material purchased from Koons? This inquiry is fully answered by the evidence. No sooner were shipments commenced than a manufacturer's agent, or broker, Fred E. Turner, of Wilkes-Barre, a debtor of Spencer, was sent for and an arrangement made with him to sell the property. Spencer, Aubrey and Turner met, not at the office of the Phœnix Contract Company, but at Spencer's own office at Green Ridge Iron Works, Scranton. Turner says, "They there informed me that the Phœnix Contract Company had been organized, and that they had excess material that would be turned into cash, at a price below the market rate, in order to assist Mr. Spencer on some notes that he had indorsed for gentlemen in New York." They farther explained that the excess was from a large contract that the company had in the west, and that Spencer had put Aubrey into the company as secretary and treasurer, to look after Spencer's interests. Turner immediately started for New York, to which city the first shipments had been made, where he sold one thousand kegs of nails at ten per cent below the then market rate, and the price agreed to be paid Koons only a few days before, his commissions, part of which were to be applied to his indebtedness to Spencer, to come out of the sums realized.

After the material in New York had been disposed of, he went into Luzerne county, pursuant to his authority, and from time to time, during the spring and summer of 1896, there sold the goods shipped by Koons into that county, at figures (sometimes as much as fifteen per cent) below the ruling market prices. Most, perhaps all, of these goods were consigned by G.W. Koons & Co. to themselves, at Wilkes-Barre and Plymouth. The facts just recited are important in considering what overt acts were committed in Luzerne county by Spencer and Aubrey, or either of them, acting by authority express or implied of both, or by their agent Turner, in furtherance of the common design. The offenders may be indicted in any county where even a single overt act has been committed. Our Supreme Court, announcing the general rule on the subject, has said in Commonwealth v. Gillespie, 7 S. & R. 469, and the language is applicable to more than one branch of this case: "It must be recollected that conspiracy is a matter of inference, deducible from the acts of the parties accused, done in pursu-

ance of an apparent criminal purpose, in common between them, and which rarely are confined to one place, and if the parties are linked in one community of design and of interest, there can be no good reason why both may not be tried where one distinct overt act is committed, for he who procures another to commit a misdemeanor is guilty of the fact, in whatever place it is committed by the procuree."

Turner usually made the Luzerne county sales while the goods were yet in the carriers' hands, consigned to G. W. Koons & Co., and therefore liable to stoppage in transitu: Hayes & Black v. Mouille & Co., 14 Pa. 48; Penna. R. Co. v. Amer. Oil Works, 126 Pa. 485; Tiffany on Sales, 216–217. In such cases he reported the sales to the Scranton office, and orders of G. W. Koons & Co. to deliver were sent from there to the carriers. Sometimes he had deliveries made directly to himself. It cannot be denied that these transactions constituted overt acts, in furtherance of the scheme to defraud. It is urged, however, for the defense, that while Spencer may have been in the conspiracy to defraud the public generally, there is no sufficient proof that he conspired against G. W. Koons & Co., or that he authorized any overt act in Luzerne county, and that therefore the defendant could not be brought within the jurisdiction of the court of quarter sessions of that county. But Turner testifies that he talked and communicated with both defendants regarding the business, that "he," Spencer, "advised with me on the sale of material that was under way. If I needed any instructions or advice I got it from either one of them, from either Mr. Spencer or Mr. Aubrey." It must be remembered that practically the only victim, or at least the only one worth mentioning that came into the net, was Koons, and that about the only business done, so far as the evidence shows, was getting hold of the goods of Koons and his partner, promptly selling them at less than cost and market prices, and dividing the proceeds between Spencer and Aubrey, the former getting most of the money. Everything that was realized went substantially to these two men. Their confederates were completely ignored in the division of the spoils. Milair testifies, and his testimony in the main is borne out by other evidence, "They got in I understand some eight or ten thousand dollars. They told me all the time they had not

received it, but it seems they did receive it during June, July, and August. They told me the goods had not been delivered and had not received any money, could not even send money for the rent of the office in New York. In the meantime had taken thousands of dollars as it appears out of the treasury of the company." He also says, and there is no denial, "I asked the secretary and treasurer for a statement repeatedly and repeatedly; never furnished it to me. I don't know how much money was paid in or what paid out, they would not allow me to see the books, or allow me, ———, to give me any information of any kind. They simply took the money and left me in New York."

Koons testifies that after he had made a shipment or two, he met Spencer, at Aubrey's request, and that the former assured him that Aubrey and the Phœnix Contract Company were all right and that "he would not hesitate to give them a line of credit himself." It will be observed, from the evidence, that he did not do this, although the company was anxious to buy the very things he was manufacturing and selling.

On one occasion Aubrey went to Wilkes-Barre, and told Spencer that Turner needed money the next day, and that they must go together and collect some of the bills for the goods sold by Turner. This they did and Aubrey went back to Scranton with the funds. It would be easy to refer to other evidence, in the case, tending still further to show the intimate connection and understanding between Spencer and Aubrey in regard to the transactions with Koons, and that from beginning to end Spencer's was the master mind.

A motion for a new trial was made in the court below, one of the main reasons relied on being an affidavit made by Turner after the trial, that he did not mean to say in his testimony that Spencer had directed him to sell the material furnished by the Koons' firm. This was not in accordance with his story told the counsel for the commonwealth, or his testimony before the grand jury and the traverse jury, which was undenied by the defendants at the trial. His deposition was taken to be used at the argument of the motion, and it appears from it that, a month after the trial, Spencer had Turner go to Scranton, and, after talking to him, secured the affidavit. Unfortunately for the defense, Turner, on cross-examination, was compelled in his deposition

to explain the affidavit, and his explanation when analyzed simply means, to use his own language, that Spencer did not "actually and solely" employ him to make the sales. But even if we accept the affidavit as true, and meaning all that it says, there is still enough left in the circumstances, the unassailed and unretracted part of the testimony of Turner, and the other evidence, to amply justify the conviction. Turner's agreement to receive $500 for furnishing information, which aided Koons in following the conspirators in their secret windings, throws no doubt on those portions of his testimony impliedly admitted to be true, and to which he still adheres.

It is urged by the defense that the commonwealth should not have been permitted to go into the history of the formation and purposes of the Phœnix Contract Company, as by so doing a separate and indictable conspiracy to defraud the public at large was uncovered. For the same reason it might be objected, in behalf of one indicted for killing or wounding another with a deadly weapon, that the commonwealth should be debarred from proving that the prisoner, for weeks before the commission of the crime, had, contrary to our statute, carried the weapon, concealed on his person, with the deliberate intention of using it against any one whom he might select from a class of persons. In order to properly comprehend the nature and circumstances of the particular conspiracy charged in the indictment, and the motives and conduct of the two defendants, it was absolutely necessary to admit the evidence whereof complaint is made. Never in the history of English or American jurisprudence was there a time when an intelligent judge would have excluded it. The bogus company was part of the juggling machinery created by the defendants to delude their victims, and was deliberately, skillfully and successfully employed as a means or instrument in deceiving Koons. Had it not been so used, by both defendants, there would be reason in their objection. The case of Carroll v. Commonwealth, 84 Pa. 107, and kindred authorities fully sustain the admissibility of the evidence, but, even before these cases were decided, its relevancy could not have been fairly questioned.

Coming now to a direct consideration of the assignments of error, we find that the first fails to comply with Rule 17 of this

court, as it neither quotes the full substance of the bill of exceptions, nor copies the bill in immediate connection with the assignment. The offer of evidence and the ruling thereon are given, but the evidence itself is neither set forth nor incorporated by reference. The second assignment, at least so far as it relates to the evidence outside of the certificate therein mentioned, is open to the same objection, and the further one that it fails even to show the ruling of the court on the offer. The letters referred to in the fourth assignment only one of which is set forth or otherwise individuated were, so far as we can see, offered and admitted without objection; hence it is unfair to the court below, as well as improper, to assign their admission as error. The fifth, sixth, and eighth assignments complain of the refusal of the court below to grant a new trial. No exception was taken to this action of the court. The other assignments, relating to the jurisdiction of the court, and alleged errors in the charge, cannot be sustained. The statement quoted from the charge, in the third assignment of error, is fully warranted by Spencer's own undenied and unexplained letters.

The peculiar character of the case has led us, as will be observed, to consider it more fully and broadly on its merits than a strict adherence to our rules, relating to assignments of error, demands. In doing so we have reached the conclusion, that the defendants were treated with the greatest fairness during the trial, every doubtful question raised by their counsel having been resolved in their favor, that the verdict was the only one the evidence would warrant, that a new trial was justly refused for the reasons set forth by the learned trial judge in his opinion, and that the sentences are very merciful.

All the specifications of error are overruled, the judgments are affirmed, and the record remitted to the court below, to the end that the sentences imposed may be duly enforced. And it is ordered that the defendants surrender themselves forthwith tc the custody of the keeper of the jail of Luzerne county, and serve out so much of the periods of imprisonment, prescribed by the said sentences, as had not expired on June 30, 1897, the day the supersedeas allowed on this appeal took effect.

Commonwealth of Pennsylvania ex rel. John T. Baldwin & Co. v. George Yeisley, Constable, and John R. Jeffries, Surety on his Official Bond, Appellants.

Public officers—Constable's bonds—Cause of action for neglect.

In an action of assumpsit on a constable's official bond a sufficient cause of action is disclosed where the breach alleged was that an execution was placed in the constable's hands by virtue of which he had made levy upon goods of the debtor which would have sold for more than enough to satisfy the execution but that he neglected and refused to sell them but made return "no goods found subject to levy and sale."

Practice, C. P.—Amended statement and second rule for judgment.

It is not error to permit a plaintiff to withdraw his original statement and to file another, averring the elements of damage with greater particularity and verified by affidavit as required by rules of court. No new cause of action being introduced such action is a proper exercise of the power to permit amendments. Nor is there error in granting a second rule for judgment after the defects in the original statement have been cured by amendment.

Practice, C. P.—Suit on constable's bond demands affidavit of defense.

An action on a constable's official bond conditioned for the performance of collateral acts or official duties is within the affidavit of defense act.

Constables—When demand requisite under act of 1772.

The written notice or demand required to be made by the Act of March 21, 1772, 1 Sm. L. 365, only applies where the constable acts in obedience to his warrant or writ; it has no application where the cause of action is based on his open contempt of and disobedience to his writ.

Constable's bond—Proper entry of judgment—Power of court to control.

While there may be force in the contention that in strict practice two judgments should be entered in a suit on a constable's bond, one in favor of the commonwealth for the amount of the bond and one in favor of the plaintiff for his damages, it does not appear that the constable has reason to complain that judgment was not entered for the penalty, and in any event the court would have power to correct the judgment so as to make it conform to the statute had the question been raised by the assignments of error.

Argued Nov. 10, 1897. Appeal, No. 156, Nov. T., 1896, by defendants, from judgment of C. P. Lancaster Co., Feb. T., 1896, No. 47, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit on constable's bond. Before BRUBAKER, J.

It appears from the record that this suit was brought on bond of Yeisley, one of the defendants, to recover for losses incident to his failure to execute a writ. The record does not show that notice was given and demand made by plaintiffs in this case on the constable before suit was brought. Plaintiffs moved for judgment for want of a sufficient affidavit of defense which was refused. The court subsequently permitted plaintiffs to withdraw the statement and file an amended statement to conform to the rules of court. After the amended statement was filed a second rule for judgment for want of an affidavit of defense was taken and subsequently made absolute and judgment entered for $151.60. Defendants appealed.

Errors assigned were (1) In entering judgment, viz: "We now direct judgment to be entered for the plaintiffs for the sum of one hundred and fifty-one dollars and sixty cents ($151.60)." (2) In allowing plaintiffs to withdraw their statement filed April 18, 1896, and substitute in lieu thereof a second statement, filed June 4, 1896. (3) In allowing a new or second statement to be filed by plaintiffs in lieu of their first statement, after the court discharged the rule for judgment on the first statement. (4) In not discharging the rule for judgment granted on the second statement filed. (5) In entering judgment on the statement, No. 2, filed, as there is not sufficient cause of action disclosed therein to warrant it. (6) In holding that the defendants are required to file an affidavit of defense to prevent judgment from being entered against them under the Act of May 25, 1887, P. L. 271, for want of an affidavit of defense, the suit in this case being brought on a constable's official bond. (7) In entering judgment against the defendants for the reason that no notice was given the constable, George Yeisley, one of the appellants, before this suit was brought, as required by the Act of March 21, 1772, sec. 6, 1 Sm. L. 365.

J. W. Denlinger and *A. J. Eberly*, for appellants.—It was error to allow the plaintiffs to move for judgment after amended statement had been filed. The statement upon which the judgment was entered was deficient and did not warrant the entry of such judgment, in that judgment was asked to be entered for

the commonwealth for the use of Baldwin & Co. for the amount of their damages and not in favor of the commonwealth for the penal sum named in the bond which would accrue to all parties interested in said bond: Byrne v. Hayden, 124 Pa. 170.

An affidavit of defense is not required in actions on official bonds: Endlich on Affidavits of Defense, sec. 109; Com. v. Hoffman, 74 Pa. 105.

Judgment in this case must be reversed, because Yeisley, constable, one of the appellants, did not receive the notice he was entitled to before this suit was brought, under the act of March 21, 1772, sec. 6, 1 Sm. L. 365; Com. v. Warfel, 157 Pa. 444.

A. F. Hostetter, with him *W. F. Beyer*, for appellees.—Permitting the withdrawal of the statement and filing an amended statement was the proper exercise of the power of amendment: Waite v. Palmer, 78 Pa. 192; Lance v. Bonnell, 105 Pa. 46; Kay v. Fredrigal, 3 Pa. 221.

Nor is the fact that the court entered judgment for want of a sufficient affidavit of defense after having discharged a previous rule an abuse of discretion: Wetherill v. Stillman, 65 Pa. 105.

If an action sounds in contract its name is assumpsit and an affidavit of defense is required. The act of 1887 makes no exception as to official bonds: Bradley v. Potts, 33 W. N. C. 570.

The only seeming exception is in an action brought to recover statutory penalties: Osborn v. The Bank, 154 Pa. 134.

Our case, however, is not a penal action nor is it an action ex delicto. It is an action on the defendant's bond which is a contract and is for a breach of the covenant of that bond.

The precise objection made by the appellants that the law remains as it was before 1887 is met by the Supreme Court in Byrne v. Hayden, 124 Pa. 170.

The case at bar is not the kind of case covered by the act of 1772. It is manifest that the sixth section of that act is no protection where the warrant, if legal, would furnish no justification and this section has no place where the injury complained of arises from an act which was not commanded by the writ: Mollison v. Bowman, 3 Clarke, 183; Lantz v. Lutz, 8 Pa. 405.

OPINION BY RICE, P. J., January 18, 1898:

This was an action of assumpsit upon a constable's official bond. The breach alleged was that an execution having been placed in his hands by virtue of which he had made a levy upon goods of the debtor which would have sold for more than enough to satisfy the execution; he neglected and refused to sell them but falsely made return "no goods found subject to levy and sale." The action was in substance, as well as in form, ex contractu, and by the express terms of the act of 1887 the plaintiff's statement in such a case "shall be replied to by affidavit." There is nothing in the objection, that an action upon a bond conditioned for the performance of collateral acts or official duties, is not within the affidavit of defense law. If the statement contains all the ingredients of a complete cause of action, averred in clear and unequivocal language, and the damages are specifically set out, so that, upon a judgment by default, they may be liquidated with certainty, an affidavit must be filed to prevent judgment. See Byrne v. Hayden, 124 Pa. 170. The principle upon which Osborn v. First Nat. Bank, 154 Pa. 134 was decided has no application to a case like the present, and the other cases cited by the defendant's counsel were decided prior to the act of 1887, which, as was said in Byrne v. Hayden, was intended to have a wider scope than the old affidavit of defense law.

It was not error to permit the plaintiff to withdraw his original statement and to file another, averring the elements of his damages with greater particularity, and verified by affidavit as the rules of court required. No new cause of action was introduced. It was, in effect, a proper exercise of the power to permit amendments: Kay v. Fredrigal, 3 Pa. 221. Nor was there error in granting a second rule for judgment after the defects in the original statement had been cured by amendment: Wetherill v. Stillman, 65 Pa. 105.

The act of March 21, 1772, 1 Sm. L. 365, declares: "No action shall be brought against any constable . . . . for anything done in obedience to any warrant under the hand and seal of any justice of the peace, until demand hath been made, ... in writing, signed by the party demanding the same, of the perusal and copy of such warrant duly certified under his hand, and the same hath been neglected for the space of six days after such

demand." The purpose of this provision becomes plain when we look at the context. It was to protect constables in acts done in obedience to writs placed in their hands, notwithstanding a defect of jurisdiction in the justice or justices issuing them, and to inform the party aggrieved by such acts where to place the responsibility. The design of the section was to make the justice exclusively answerable for his own defaults. Where a constable has pursued his warrant, he can be affected with want of jurisdiction in the magistrate, only where he is sued alone, having, after a proper demand, refused for the space of six days to furnish a copy of the warrant: Jones v. Hughes, 5 S. & R. 299, 303; Barr v. Boyles, 96 Pa. 31, and cases there cited. If, however, the constable acted not in obedience to his warrant but in open contempt of it, of course he could not plead the warrant as a justification, and such a case is not within the letter or the spirit of the statute. This was expressly decided in Lantz v. Lutz, 8 Pa. 405, where the action was for an escape; and although it has been held since, that the action cannot be maintained by the prosecutrix in a criminal case and to that extent the case has been overruled (Downing v. Com., 21 Pa. 215) the principle for which we cite the case as authority has not been questioned in any later decision which has come to our notice. It is supported by the English decisions upon a precisely similar statute collected by Judge LEWIS in Mollison v. Bowman, 3 Clark, 281. The case of Com. v. Warfel, 157 Pa. 444, is not an authority to the contrary. There the constable had in his hands an execution issued by competent authority commanding him to do just what was done. If proper demand had been made and complied with, the plaintiff would have seen that no action could be maintained against the constable, because he was protected by his writ in levying upon and selling the debtor's goods. Here the constable refused to obey the command of his writ, and for that he was exclusively liable. Undoubtedly, as the Chief Justice says, the demand must be made in all cases within the purview of the act; but this case was not within its purview.

The 29th section of the act of March 20, 1810, 5 Sm. L. 173, provided that constables' bonds should be "for the like purposes and uses for which sheriffs' bonds are usually given." Substantially the same provision was incorporated in the 112th section

of the Act of April 15, 1834, P. L. 557, and was interpreted to mean that the remedy should be the same as that upon sheriffs' bonds, which was regulated by the act of March 28, 1803, 4 Sm. L. 45. It was held upon a construction of these statutes that judgment was not to be entered for the penalty for the use of those interested but for the damages sustained by the party suing: Campbell v. The Commonwealth, 8 S. & R. 414. But the act of June 14, 1836, P. L. 637, applies in express terms to "every bond and obligation which shall be given to the commonwealth by any public officer," and it was said in McMicken v. Commonwealth, 58 Pa. 213, that "so much of the act of 1803 as relates to proceedings upon the official bond of the sheriff is no doubt supplied and therefore repealed by this act," but it was held not to be so as to the recognizance. There is therefore much force in the defendants' contention that in strict practice two judgments should have been entered, one in favor of the commonwealth for the amount of the bond, and the other in favor of the plaintiffs for their damages. It is not clear, however, what reason the defendants have to complain that judgment was not entered for the penalty, and upon a critical examination it will be seen that the assignments of error do not distinctly and unequivocally raise the objection. Even if they did, it would not be necessary to reverse the judgment; for we would have power to correct it so as to make it conform to the statute: Carman v. Noble, 9 Pa. 366, 372; Scarborough v. Thornton, 9 Pa. 451, 456; McMicken v. Commonwealth, 58 Pa. 213, 219; Act of June 24, 1895, sec. 8, P. L. 212.

Judgment affirmed.

Frank Skinner, to use, Appellant, v. George Chase.

Judgments as set off.

Judgments are set off against each other by the inherent powers of the court immemorially exercised.

Judgment—Set-off—Assignment of judgment—Discretion as to conflicting equities.

The equity of a defendant to set off a judgment purchased by him against a judgment acquired by the plaintiff against him is equal to the secret equity of an assignee of plaintiff's judgment prior in time to defendant's acquisition of judgment sought to be set off where said assignee has neglected the precaution of having the judgment marked to use. The appellate court therefore will not disturb the exercise of the discretion of the court below in making absolute a rule to permit defendant to set off the judgment against the plaintiff acquired by him after suit brought.

Assignment of chose—Subject to defense—Notice.

An assignee of a chose in action not negotiable takes it subject to all the defenses to which it was subject in the hands of an assignor including the right of the debtor to set off any claim against the assignee before notice of the assignment.

Practice, C. P.—Discretion of court—Duty of filing opinion.

In cases appealing largely to the discretion of the court below where oral testimony of witnesses is frequently heard and passed upon, an opinion should always be filed by the court setting forth at least briefly, its findings of fact and the grounds of its decision: Gump v. Goodwin, 172 Pa. 276.

Argued Oct. 22, 1897. Appeal, No. 123, Oct. T., 1897, by plaintiff, from order of C. P. No. 2, Phila. Co., June T., 1895, No. 52, making absolute rule to set off judgment held by defendant against plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, and PORTER, JJ. Affirmed.

Rule to set off judgment held by defendant against plaintiff against a judgment held by plaintiff against defendant. The rule was made absolute by the court below. Plaintiff appealed.

The facts sufficiently appear in the opinion of the court.

Error assigned was making absolute the rule of defendant permitting him to set off judgment which he obtained by purchase seven months after the plaintiff had assigned his interest in suit against defendant.

J. M. Moyer, for appellant.—If the assignments are good, then the purchase by Chase of the Kennedy judgment for the purpose of set-off comes like the doctor at the funeral, too late.

As against Skinner, had he not previously assigned his interest in the Chase suit, the judgment not presented by way of set-off would be one thing, but as against Skinner's assignees it can only avail subject to their equities and rights: Weidner v. Schweigart, 9 S. & R. 387.

Charles A. Chase, for appellee.—The judgment was assigned to defendant who set it off against the judgment subsequently obtained against himself. He certainly had as much right to obtain redress as the original legal plaintiff who could have attached him as garnishee. The rule to set off one judgment against another had exactly the same effect as an attachment, was more expeditious, less expensive and placed the plaintiff under no disadvantage whatever: Hazelhurst v. Bayard, 3 Yeates, 152; Russell v. Spear, 4 W. N. C. 476; Rider v. Johnson, 20 Pa. 190.

If, however, the security offered as a set-off has been merely borrowed for the purpose, it will not be allowed: McGowan v. Budlong, 79 Pa. 472.

The power to set off judgments has been exercised immemorially, and arises from the court's equitable powers over its suitors: Garner v. Price, 4 Kulp, 10. See also discussion of the subject by RICE, P. J., in Shoemaker v. Flosser, 5 Kulp, 437.

It has been decided in the following cases that a judgment can be set off against a judgment notwithstanding equities in third parties: Stout v. Moore, 7 W. N. C. 456; Hazelhurst v. Bayard, 3 Yeates, 152; Waln v. Hews, 5 S. & R. 468; Cornwell's Appeal, 7 W. & S. 305.

OPINION BY RICE, P. J., January 18, 1898:

On May 9, 1895, Frank Skinner sued George Chase, and on December 6, 1895, obtained judgment for want of an appearance.

On December 9, 1895, Chase applied to have the judgment opened. His application was granted, and on April 8, 1897, the plaintiff obtained a verdict for $223.97, upon which judgment was entered on April 13th.

On the following day (April 14th) Chase was granted a rule to show cause why a judgment entered in common pleas No. 1 in favor of Thomas Kennedy against Frank Skinner, and assigned by Kennedy to Chase on December 11th, should not be set off against the judgment against him. Depositions were taken, by which the following facts were established:

On December 16, 1895, Skinner borrowed of William P. Elder $200, and as collateral security for the loan (which was renewed in June, 1895), pledged his wife's diamond earrings, and assigned the above-mentioned claim against Chase. On January 6, 1896, this claim was marked of record to Elder's use; and so the record stood at the time of the trial and at the time the rule under consideration was granted. It appears, however, that on June 1, 1896, the loan was repaid by the check of Skinner's wife drawn upon her personal bank account, and the diamonds were returned to her. At the same time Elder executed the following receipt and assignment: "Received from Mrs. Sallie P. Skinner her check for two hundred dollars in full payment for a loan for that amount made by me to Frank Skinner on June 17, 1895. I hereby assign and transfer unto her all my interest in the claim of Frank Skinner against George Chase in common pleas No. 2, June term, 1895, No. 52, previously assigned and marked to my use as collateral security by Frank Skinner, the plaintiff, and all benefit to be derived therefrom and I direct that said claim be marked to the use of Sallie P. Skinner."

It is said that this transaction was a fraud concocted by Skinner for the purpose of hindering and delaying his creditors by the use of his wife's name; but this position is not sustained by any competent and satisfactory proof. On the contrary, the uncontradicted testimony is, that the diamonds were given to Mrs. Skinner by her father; that she had a separate estate which she inherited from him; that the money which she advanced to pay the Elder loan did not come from her husband, and that he has not repaid her.

It is urged, in the second place, that as she bought the judgment with notice that Chase owned the Kennedy judgment against her husband she took subject to the right of Chase to set off the latter judgment against the former. If she were a mere purchaser this would be true: Filbert v. Hawk, 8 W. 443;

Clement v. Philadelphia, 137 Pa. 328. But the equity of Mrs. Skinner antedates the formal assignment to her. It had its inception when she permitted her diamonds to be pledged as security for her husband's debt, which was before Chase bought the judgment that he asks to use a set-off. When she advanced the money to pay the debt she became entitled to be put in the place of the creditor, upon the established principle of equity that a surety, or one who stands in the situation of a surety for one whose debt he pays, is entitled to have the benefit of the collateral securities which the creditor has taken as an additional pledge for his debt. The assignment was but the formal recognition of that equity by the parties concerned.

Here, however, another difficulty is encountered. Chase bought the Kennedy judgment without any notice whatever that there was an outstanding equity in any one which would prevent him from setting it off against the judgment that was entered against him. Indeed, it was not until after this rule was made absolute that Mrs. Skinner filed her assignment or attempted to have the judgment marked to her use.

In view of these facts was Mrs. Skinner's equity superior to that of Chase, and was the court bound to recognize it in the present proceeding?

An assignee of a chose in action not negotiable takes it subject to all the defenses to which it was subject in the hands of the assignor, including the right of the debtor to set off any claim against the assignor before notice of the assignment: Rider v. Johnson, 20 Pa. 190; Smith v. Ewer, 22 Pa. 116; Keagy v. Com., 43 Pa. 70, 73. Proof of no notice of the assignment is not necessary to establish the right of set-off, but proof of notice is necessary to defeat the right: Burford v. Fergus, 165 Pa. 310. But a cross demand to be set off must belong to the defendant before suit brought: Pennell v. Grubb, 13 Pa. 552; Speers v. Sterrett, 29 Pa. 192; Gilmore v. Reed, 76 Pa. 462. For this reason alone Chase could not have offered the Kennedy judgment as a set-off on the trial of the issue. He nevertheless had a right to purchase it with a view to use it as a set-off against the judgment that had been entered against him or that might be entered after the trial of the issue. It was as available for that purpose as if he, personally, had obtained a judgment against Skinner on December 11, 1895, the date of

its assignment to him. Judgments are set off against each other, not by force of the defalcation act, but, as was said by Chief Justice GIBSON, "by the inherent powers of the courts immemorially exercised, being almost the only equitable jurisdiction originally appertaining to them as courts of law remaining:" Ramsey's Appeal, 2 W. 228; Jacoby v. Guier, 6 S. & R. 448; Filbert v. Hawk, 8 W. 443; Horton v. Miller, 44 Pa. 256; Hazelhurst v. Bayard, 3 Y. 152; Burns v. Thornburgh, 3 W. 78; Wellock v. Cowan, 16 S. & R. 318. The exercise of this power is not a mere matter of grace but is governed by equitable principles. The right of the defendant, although not secured by the statute, cannot be arbitrarily denied. Being so, one, not a party to the record, who sets up a prior equity to defeat it, may justly be required to show that he has omitted no duty. In discussing the right of defalcation under the statute, LEWIS, J., said: "If a debtor, in the lawful pursuit of his business, parts with his money or property in consideration of the transfer of a cross demand against his creditor, with a view to a set-off, it would be unjust to deprive him of this right by a previous assignment of which he had no notice at the time he parted with the consideration. He has as good a right to purchase a cross demand to extinguish the claim against himself by set-off, as he had to accomplish the same object by direct payment. In the latter case it is not pretended that he could be compelled to pay the debt a second time. The principle is precisely the same in each case. . . . The maxim, prior in tempore, potior in jure holds, it is true, whenever it has not been inverted by enactment, or where the benefit has not been lost by misconduct or imprudence; but it must not be allowed to protect a party who has neglected a requisite precaution to save others from imposition:" Rider v. Johnson, supra. These general principles are applicable here. The assignment to Chase antedated the assignment to Mrs. Skinner. He appears, therefore, to be prior in time. She sets up a prior secret equity, but of this he had no notice whatever. It would seem, therefore, that his equity is equal to hers, and as she had not filed her assignment, or attempted to make herself a party to the record, we are not prepared to say that the court improperly exercised its discretion in making the rule absolute.

"In cases such as this—appealing largely to the discretion of

the court below—where oral testimony of witnesses is frequently heard and passed upon, an opinion should always be filed by the court, setting forth, at least briefly, its findings of fact and the grounds of its decision:" Gump v. Goodwin, 172 Pa. 276.

Order affirmed and appeal dismissed at the cost of the appellant.

Commonwealth of Pennsylvania to use of Mary F. Chapman v. Annie C. Rodgers et al., Appellants.

Partition—Distribution of proceeds—Lien creditors of heir—Trustee's responsibility.

Where the orphans' court in distribution of the proceeds of the sale of land by a trustee in partition proceedings, awards to an heir only what would remain of her share of the fund after payment of the record liens against her interest the trustee having given bond to appropriate the proceeds of such real estate according to the trust and decree of the court, the trustee cannot ignore a lien creditor of the heir and settle with the latter who has no authority to release the trustee from his duty to pay such creditor under the decree of the court.

Partition—Judicial sale—Divestiture of liens.

Where proceedings in partition result in a judicial sale of the land, the lien which had been created by one of the tenants is divested from the land but continues on the money raised by the sale.

Partition—Sale by trustee—Duty of trustee to take searches before distribution.

A trustee who sold real estate under a decree in partition, and settled with one of the heirs without taking out searches for liens of record, is liable to a mortgagee whose mortgage was discharged by the sale.

Argued Oct. 13, 1897. Appeal, No. 97, Oct. T., 1897, by defendants, from judgment of C. P. No. 4, Phila. Co., March T., 1897, No. 1030, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit upon the trustee's bond to recover for mortgage given by one of the heirs on the undivided interest in the estate of her father, the defendant being the administratrix of the

trustee and the sureties on the bond in proceeding in partition in the estate of Francis Rodgers, deceased.

Other facts appear in the opinion of the court.

The rule for judgment for want of a sufficient affidavit of defense was made absolute in an opinion by ARNOLD, P. J., reported in 6 Dist. Rep. 453.

Judgment for plaintiff for $509.10. Defendants appealed.

Error assigned was making absolute the rule for judgment for want of a sufficient affidavit of defense.

Edward A. Anderson, with him *John H. Fow*, for appellants. —Upon a distribution of a fund in partition, a confirmation of the audit is conclusive upon a judgment creditor of one of the heirs who failed to present his claim: Sutton's Est., 4 Kulp, 297; Kennedy v. Borie, 166 Pa. 360.

It is the well-settled doctrine in this state that where the land is divided the lien of the judgment against the heirs attaches to their respective purparts: Diermond v. Robinson, 2 Yeates, 324, and that the purpose of partition is division and not conversion: Wright v. Vickers, 81 Pa. 122, and that upon a sale in partition the proceeds pass to a person entitled thereto as real estate: Wentz's App., 126 Pa. 541; Stoner's Est., 8 York, 27; and so it has been decided in a sister state, that an agreement between heirs that one buy at a partition sale for a certain price is legitimate and binding: Ventress v. Brown, 34 La. Ann. 448; 17 Am. & Eng. Ency. of Law, 793.

Charles A. Chase, for appellee.—Where a proceeding in partition results in a judicial sale of the land, the lien which had been created by one of the tenants is divested from the land, but continues on the money raised by the sale: Reed v. Fidelity Ins. Co., 113 Pa. 574; Wright v. Vickers, 81 Pa. 122; Steel's Appeal, 86 Pa. 222; Stewart v. Bank, 101 Pa. 342.

When the lien of a mortgage is divested by a judicial sale it is not revived by a reacquisition of the title by the mortgagor: Rauch v. Dech, 116 Pa. 157.

The orphans' court, therefore, had full authority to make the decree that it did. This case is similar to the case of Reed v. Ins. Co., 113 Pa. 574, and for these reasons and for those given by the president judge of the court below this judgment should be affirmed.

OPINION BY RICE, P. J., January 18, 1898:

Real estate was sold by a trustee in partition proceedings to three of five heirs, one of the three having previously mortgaged her interest to the present plaintiff. The sale was confirmed upon the trustee giving bond with sureties conditioned "faithfully to execute the trust and properly to appropriate the proceeds of such real estate according to the trust and decree of the court, and according to law." On the adjudication of the account of the trustee the share of the heir who had given the mortgage was ascertained to be $3,057.70, which sum was awarded to her subject to the liens of record against her interest. In defense to this action brought by the mortgagee on the trustee's bond it was alleged, that, pursuant to an agreement made between the trustee and this heir before the sale, he settled with her, receiving from her on account of her bid only so much money as was necessary to pay her share of the costs and the amount due the other heirs, and she, in turn, discharging him from payment of the sum awarded to her in the adjudication of his account. In an opinion filed, to which little can be added, the court below held that the affidavit was insufficient to prevent judgment, and in that conclusion we concur. If the heir were suing for her share this might be a good defense, but we fail to see how the rights of her lien creditor can be prejudiced by an agreement to which he was not a party and of which he had no notice. No secret agreement between the heir and the trustee could compel him to resort to the land for the collection of his debt if under the decree he was entitled to take it out of the fund. The general rule is, that where a proceeding in partition results in a judicial sale of the land, the lien which had been created by one of the tenants is divested from the land, but continues on the money raised by the sale: Wright v. Vickers, Adm'r, 81 Pa. 122; Reed v. Fidelity Ins. Co., 113 Pa. 574. In making distribution the orphans' court recognized and applied this general rule, and awarded to the heir only what would remain of her share of the fund after payment of the record liens against her interest. By the decree, fairly construed, these were continued against, and were first payable out of the fund into which her interest in the land had been converted, and she had no authority to release the trustee from his duty to pay them.

But it is argued that a decree of distribution directing the trustee to pay to an heir his share of the proceeds of sale in partition proceedings after deducting therefrom the record liens against his interest, without ascertaining and specifying what the liens are, their amount, and to whom payable, is not such a decree as is contemplated by the Act of March 27, 1832, sec. 49, P. L. 206. It is argued with much force, that that form of decree casts on the trustee a responsibility from which he is entitled to be relieved; that it compels him, not only to ascertain what the liens are, but to take the risk of deciding all disputes between the heir and the creditor; whereas, if the creditors were required to come before the auditor or the auditing judge and prove their claims (as undoubtedly they may) a final adjudication could be made which would protect everybody. Let it be granted that the court might have pursued this course, still the trustee is not in a position to complain because it did not do so. The plaintiffs' lien was on record. Its validity and amount are not questioned. The trustee might have procured searches to be made and thus furnished the court the means to make a specific distribution. It is not alleged that he did so, and, presumably he did not. And, even if he did, the place to complain was in the orphans' court; but he neither excepted to the adjudication nor appealed. Nothing remained for him to do but to appropriate the money in accordance with it. If the lien creditor had been ignored in the distribution and the whole sum awarded unconditionally to the heir (as was done in Sutton's Estate (4 Kulp, 297), a different question would be presented. Having acquiesced in the decree which clearly recognized the rights of the lien creditor the trustee could not ignore him, and settle with the heir and then claim to be discharged from further liability.

Judgment affirmed.

Western Massachusetts Mutual Fire Insurance Company, Appellant, v. Girard Point Storage Co.

Contract—Lex loci—Conflict of laws—Constitutional law.

If a citizen of Pennsylvania, by a contract validly made outside of its boundaries, incurs a liability, no law of this state, can under the constitution of the United States, prevent his fulfilling that obligation, even by an act done within the state.

Insurance—Foreign companies—Lex loci—Prohibitive Pennsylvania statutes.

The issuance and delivery of insurance policies in Massachusetts makes the contract a Massachusetts contract to be governed by the laws of that state free from the taint of illegality by reason of the existence of penal or prohibitive legislation in Pennsylvania. Com. v. Biddle, 139 Pa. 605, followed.

Policies for property in Pennsylvania were issued in Massachusetts. These policies were canceled and the insured received a return premium. *Held*, in a suit to recover assessments imposed for losses, etc., incurred by plaintiff company while the policies were in force, that an affidavit was insufficient which set up as a defense that "the plaintiff being a foreign company had not prior to placing the insurance complied with the acts of assembly of Pennsylvania regulating the way in which foreign insurance companies should undertake the insurance of property in Pennsylvania."

Argued Oct. 12, 1897. Appeal, No. 79, Oct. T., 1897, by plaintiff, from order of C. P. No. 1, Phila. Co., Mar. T., 1896, No. 189, refusing judgment for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Rule for judgment for want of a sufficient affidavit of defense in an action of assumpsit upon two policies of insurance to recover assessments levied upon the insured for losses and expenses incurred by the company during the life of the policies. Before BEITLER, J.

The facts sufficiently appear in the opinion of the court.

The court below discharged the rule for judgment. Plaintiff appealed.

Error assigned was discharging the rule for judgment.

Francis S. Laws, with him *Sharp & Alleman*, for appellant.—A contract as to its validity, nature, obligation and interpretation is to be governed by the laws of the place of performance: Story on Conflict of Laws, sec. 280; Bank v. Hall, 150 Pa. 466; Perlman v. Sartorius, 162 Pa. 320; Shattuck v. Ins. Co., 4 Caff. (Mass.) 599; Todd v. Ins. Co., 11 Phila. 355.

The mere fact that the subject-matter of the contract (the property insured) was located in Pennsylvania is not sufficient to change what is otherwise a Massachusetts contract into a Pennsylvania contract: Lamb v. Bowser, 7 Bissell, 315.

John Hampton Barnes, for appellee.—A corporation being a creature of law, has no existence outside of the jurisdiction which created it. One state may therefore prescribe the terms and conditions upon which business may be conducted in that state by corporations of another state: Paul v. Virginia, 8 Wall. 168; List v. Com., 118 Pa. 322.

Making such a contract or policy of insurance as the present is a carrying on of the business of insurance in the state of Pennsylvania, even though the negotiations, circulars, etc., may have been carried on through the mails and the policy delivered by mail: Com. v. Long, 1 C. C. 190; 6 Thompson on Corps. par. 7968; Heebner v. Ins. Co., 76 Mass. 131; Thwing v. Ins. Co., 111 Mass. 93.

All foreign corporations are prohibited from going into operation in Pennsylvania without having first complied with the Act of June 7, 1879, P. L. 112, sec. 1, and Act of April 4, 1873, P. L. 20.

Every policy, contract, or guaranty of a foreign fire insurance company which shall not have complied with the above and other laws of Pennsylvania in regard to foreign insurance companies, is illegal and absolutely void. See Act of February 4, 1870, sec. 1, P. L. 14, Pur. 105.

This act is constitutional and such contracts are void: Arrott v. Walker, 118 Pa. 249; Com. v. Vrooman, 164 Pa. 306: Act of May 1, 1876, sec. 47, P. L. 66, Pur. 1057, which is a supplement to act of April 4, 1873, supra.

No foreign insurance company which has not complied with the laws of Pennsylvania with regard to foreign insurance companies can recover in the courts of Pennsylvania on a contract

made in violation thereof: Ins. Co. v. Bales, 92 Pa. 352; Thorne v. Ins. Co., 80 Pa. 15; Ins. Co. v. Heath, 95 Pa. 333; Lasher v. Stimson, 145 Pa. 30.

OPINION BY PORTER, J., January 18, 1898:

This is an appeal from the court below, discharging the rule for judgment for want of a sufficient affidavit of defense.

The plaintiff is a corporation organized under the laws of the state of Massachusetts. The defendant is a Pennsylvania corporation, to whom two policies of fire insurance were issued by the plaintiff, covering property in Philadelphia. These policies were alleged by the statement of claim and admitted by the affidavit of defense, to have been "issued and delivered to the defendant at Springfield, Massachusetts." The insurance was to cover the period from June 25, 1894, to June 25, 1895. On April 25, 1895, the policies were canceled and the defendant received a return premium. On May 25, 1895, an assessment was sought to be imposed upon the defendant for losses and expenses incurred by the plaintiff company while the policies were in force. The affidavit of defense denies liability on the ground that: "the said plaintiff being a foreign insurance company, had not prior to the placing of the said insurance complied with the acts of assembly of the state of Pennsylvania regulating and directing the way and manner in which foreign insurance companies should undertake the insurance of property in the State of Pennsylvania." And "that the placing of the said insurance and the issuing of the said policies by the plaintiff on the property of the defendant situated in the State of Pennsylvania as aforesaid was contrary to the provisions of the said statute" and "avers that under such circumstances the plaintiff is not entitled to recover from the defendant the assessments," etc.

It is not necessary to a decision of this case to quote the numerous provisions of the several acts of assembly. The purpose of the system of legislation in Pennsylvania respecting fire insurance has been, to limit the business to corporations created under the laws of the commonwealth and to foreign corporations which have complied with certain expressed regulations.

The objects of the legislation have been for revenue and to protect the citizens of the commonwealth from irresponsible and

unsupervised insurers. The methods of enforcing the legislative provisions are by the imposition of punishment upon the persons (principals or agents) who fail to regard the prohibitions; by imposing personal liability on agents atttempting to represent foreign insurance companies not complying with the law, and by declaring void, contracts made in violation of the several acts.

In the case now before us there is nothing to indicate that the plaintiffs were doing an insurance business in Pennsylvania. They had neither office nor agent within the commonwealth. The policies in the present case are admitted to have been "issued and delivered in Massachusetts."

True, the property insured was located in Pennsylvania. This, however, does not in our opinion bring the contract of insurance within the prohibitions of the statutes. The illustration used in Story on Conflict of Laws, sec. 278*a*, is applicable. He says: "So a policy of insurance executed in England on a French steamship for the French owner on a voyage from one French port to another, would be treated as an English contract, and in cases of loss the debt would be treated as an English debt. Indeed all the rights and duties and obligations growing out of such a policy would be governed by the law of England and not by the law of France, if the laws respecting insurance were different in the two countries."

The issuance and delivery of the policies in Massachusetts made the contract a Massachusetts contract to be governed by the law of Massachusetts, free from taint of illegality by reason of the existence of penal or prohibitive legislation in Pennsylvania. To hold otherwise would be to give to these acts extraterritorial effect, and to deprive the citizen of his constitutional right to make such contracts as he may desire beyond the boundaries of Pennsylvania: Allgeyer v. Louisiana, 165 U. S. 578.

In reaching the conclusion herein expressed we are guided by the opinion of the Supreme Court in the case of Commonwealth v. Biddle, 139 Pa. 605. It is true that there the case required only a construction of the penal acts. The expressions used, however, have direct application to the present case: "It may be readily conceded that an act which should attempt to prevent a non-resident owner of property in this state or a resident

owner not at the time within its territory, from insuring his property in any manner lawful in the place of contract, would be void as extra-territorial. So, also, it may be conceded that if a citizen of Pennsylvania has, by a contract validly made outside of its boundaries, incurred a liability, no law of this state can, under the constitution of the United States, prevent his fulfilling that obligation, even by an act done within the state. But, beyond the limitation imposed by the constitution, the power of the legislature to declare any acts done within the territory of the state unlawful or criminal cannot be questioned, and all considerations of wisdom or policy, of hardship, of difficulty or even impossibility of general enforcement, must be addressed to the law-making branch of the government."

The case of McBride v. Rinard, 172 Pa. 548, has been cited, as expressing a conclusion adverse to that reached by us in the present cause. That, however, was an action brought to hold a local agent of a foreign corporation personally liable as principal, and the remark contained in the opinion palpably refers to companies having an agency within the state. It cannot apply, in our opinion, to companies who have never come within the boundaries of the commonwealth, who have neither office nor agent here and who have but issued and delivered policies in another state in a particular instance to a citizen of Pennsylvania.

Neither precedent nor authority can be found in the cases cited by the defendant for holding that the transaction in this case comes within the statutes forbidding the doing of business in Pennsylvania.

The assignments of error are sustained; the judgment of the court below is reversed, and the record is remitted with direction to the court below to enter judgment against the defendants for such sum as to right and justice may belong unless other legal or equitable cause be shown to the said court why such judgment should not be so entered.

Benner R. Myton v. Jas. A. Wilson et al., Appellants.

Easement—Way—Reservation of moiety of spring—Access thereto.

A reservation in a conveyance of one half a spring and a moiety of the spot of ground whereupon it arises implies access to the spring in some manner for the purpose of taking water; but with an existing channel natural or artificial conducting the water, the parties must, in the absence of any provision for a different mode of conveyance, be understood as contemplating the use of such channel for that purpose. No implication arises that will warrant the grantor or his successors in title, in laying a pipe over grantee's lands.

Argued October 19, 1897. Appeal, No. 11, March T., 1897, by defendants, from judgment of C. P. Huntingdon Co., Dec. T., 1895, No. 20, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass. Before BAILEY, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict for plaintiff for $5.00. A certificate having been filed that the value of the right or interest involved was less than $1,000, defendant appealed.

Errors assigned were (1) In its answer to defendants' second point, as follows: "2. The deed of the executor of William Johnston, Esquire, to George Rung in 1824 for the adjoining and remaining portion of his farm under a power in his will to sell real estate vested in George Rung the title to one undivided half of the spring and spot of ground on which it rises as an appurtenance and constituent part of the tract of land therein described. *Answer:* Refused." (2) In its answer to defendants' fifth point, as follows: "5. If the jury believe that Thomas F. Stewart and James Myton, predecessors in the title of Benner R. Myton, claimed only one fourth each of the spring as testified by Bilger Shipton and John B. Frazier, Benner Myton is estopped and cannot claim that James A. Wilson is a trespasser in entering upon the other undivided half, under a claim of right. *Answer:* This point is refused as not material." (3) In charg-

ing the jury as follows, to wit: "There is no physical connection of the spring with the land conveyed to Rung; there is no evidence that William Johnston used the spring as an incident or appurtenance to this land; or that he in any manner connected the one with the other in their use." (4) In instructing the jury as follows: "An appurtenance is defined to be 'a thing belonging to another thing as principal and which passes as incident to the particular thing.' It must be necessary to the full enjoyment of the thing granted, and in use at the time of the grant as incident thereto. In this state it is held that what is necessary to the enjoyment of the thing granted passes with it as an appurtenance, without express words; but what is merely convenient to its enjoyment does not." (5) In instructing the jury as follows: "The property now owned by Wilson had been occupied by William Johnston and the several intermediate owners without any connection whatever between it and the use of the spring as an attachment to it. For eighty-five years each successive owner enjoyed the use of the water flowing from this spring by reason of his right thereto as riparian owner. Therefore, it could not at the time of the original grant, have been actually necessary to the enjoyment of the land now owned by the defendant Wilson. There was no act of William Johnston, no express words in the deed of his executors to Rung conveying the interest of Johnston in the spring, or the water flowing from it, and we are of opinion that the general words conveying the 'appurtenances thereto belonging' do not include the spring; and therefore the interest of Johnston in it is not now owned by Wilson, and it is our opinion that he had no right to enter the land of the plaintiff, intervening between his land and the spring for the purpose of laying pipe to conduct water therefrom. It is not material that Johnston must have intended to use the water from the spring or convey it to his land as argued by the learned counsel for the defendant. The fact remains that he did not so use it, and that there was no connection whatever between the use of the spring and the use of the land until the defendant laid these pipes in 1895, except the use he was entitled to of the water flowing from the spring down its natural channel by virtue of his being the owner of lands abutting on that channel. We feel bound to instruct you that the defendant had no right to lay down the pipes on the land of the plain-

tiff, and that the plaintiff may recover in this action, whatever damage he has sustained by reason of the defendant's entry on his land. If we are in error in our view of the law we feel gratified to know that such error may be corrected by a higher court on appeal." (6) In instructing the jury as follows: "The only question that remains for you to determine is the amount of damage the plaintiff is entitled to under the evidence." (7) In charging the jury as follows: "You will determine the amount of damage to compensate him for the injury done and render your verdict accordingly." (8) In charging the jury as follows: "The only question that remains for you to determine is the amount of damage the plaintiff is entitled to under the evidence."

Charles G. Brown and *H. H. Waite*, for appellants.—A right reserved in a deed and spread on record is in the chain of title to the lands upon which the right is reserved, and is constructive notice to the persons who subsequently purchase the said lands: Bombaugh v. Miller, 82 Pa. 203; Hayes v. R. R. Co., 51 N. J. Eq. 345.

To the same effect is the case of Whitney v. R. R. Co., 77 Mass. 359; 71 Am. Dec. 715.

An easement is not presumed to be a mere personal right or in gross, when it may be fairly regarded as appurtenant to some other estate: Gould on Waters, sec. 301; Dennis v. Wilson, 107 Mass. 591.

Mere nonuser for any length of time of an easement created by express grant, will not destroy or extinguish it. There must be some conduct on the part of the owner of the servient tenement, adverse to and in defiance of the easement, and the nonuser must be the result of it and must continue for twenty-one years: Dill on Board of Education, N. J. 10, L. Rep. Ann. 276; Hall v. McCaughey, 51 Pa. 43; Lathrop v. Elsner, 93 Mich. 599.

W. H. Woods and *A. O. Furst*, with them *J. S. Woods*, *W. McK. Williamson* and *T. W. Myton*, for appellee.—But aside from this, an adverse user and possession of the servient estate coupled with nonuser by the dominant, when continued for the time of the statute of limitations, will destroy an easement or,

to speak more accurately, will raise a presumption of a release: Jennison v. Walker, 77 Mass. 423; 4 Leading Cases Am. Law on Real Property, 156.

It is confidently submitted:

1. That the estate left in William Johnston, Sr., the grantor, under the deed of August 17, 1810, did not create an easement of any description. It is to be regarded as an estate remaining in him precisely as if he had never made the conveyance of the eighty-one acre tract.

2. That William Johnston, retained such interest in the spring, and the water flowing therefrom, did not make the tract of land conveyed by him, a tenement servient to any other tenement or tract of land.

3. That there was no connection or annexation of his estate in the spring to the tract of land, the title to a portion of which became vested in appellant.

4. That there was no grant made by William Johnston, or any successor in title, by which his estate in the spring was conveyed or annexed to appellant's land.

5. That there never has been any prescriptive use of the said spring for the advantage or benefit of appellant's lands.

6. That appellant, in entering forcibly into the close of the plaintiff, breaking the soil, digging a trench, laying a pipe therein, and taking the water from the spring in the interior of plaintiff's tract, was guilty of a trespass, and was liable to the plaintiff as a trespasser.

OPINION BY SMITH, J., January 18, 1898:

The trespass of which the plaintiff complains was the laying of a pipe through his land, by the defendant, for the conveyance of water from a spring thereon to the defendant's land adjacent. The defendant contends that the right to do this is an easement appurtenant to his land.

William Johnston, in 1810, conveyed part of a tract of land to his sons, William and John, and by his will, executed later, authorized his executors to sell the residue. The plaintiff holds under the deed and the defendant under the will. The deed contains the following stipulation: "Provided always, nevertheless, and it is hereby declared to be the express intent and meaning of the parties to these presents, that the right to one

moiety or half part of a certain spring which rises on the above described land, opposite to and about ten perches east south east of a red oak, corner of the line, south eight degrees west twenty-four perches, and which crosses the said line, south eight degrees west twenty-four perches passing in a northwesterly course between the lines, south thirty-four degrees east twenty-four perches to a still house and south thirty degrees west eighty-six perches to a white oak, and the free use, liberty and privilege of the same shall still subsist in and continue and remain unto the said William Johnston, esquire, his heirs and assigns. To have and to hold the said above described land hereby granted, or mentioned, and intended so to be with the appurtenances unto the said William Johnston, Junior, and the said John Johnston, their heirs and assigns, as tenants in common, and not as joint tenants, to the only proper use, benefit and behoof of them the said William and John and their respective heirs and assigns forever. Excepting, nevertheless, the right to one half part of said spring and one moiety of the spot of ground whereupon it arises, which the said William Johnston, esquire, expressly reserves, as aforesaid, to himself, his heirs and assigns forever."

The defendant contends that the water right thus described became appurtenant to the land retained by the grantor, and passed to his successors in title. As the case is presented, however, a determination of this point is unnecessary. First, there is a question as to the identity of the spring described with that reached by the defendant's pipe. Next, it appears that a natural outlet or channel existed, by which the water of the latter spring was conveyed to the defendant's land, and there is no allegation of interference therewith by the plaintiff. If the spring to which the defendant laid his pipe was not the one mentioned in the stipulation, it is clear that the pipe was laid without right. If it was that spring, the first question to be considered is whether the stipulation, if creating a right appurtenant to the defendant's land, authorized him to lay the pipe. Access to the spring in some manner, for the purpose of taking water, it undoubtedly implied. But with an existing channel, natural or artificial, conducting the water, the parties must, in the absence of any provision for a different mode of conveyance, be understood as contemplating the use of such channel for that

purpose. There is no express provision for a departure from this channel, or for the laying of a pipe through the land conveyed; while the description, beginning with the spring, follows with courses and distances that apparently refer to its outlet, as if for the purpose of including it. Under the terms of the stipulation, therefore, the grantor had a right to so maintain the existing channel as to keep it adequate for the purposes of the stipulation. He had no right to construct a channel elsewhere. If such a right can be implied, it is without limit, and the grantor might change the channel as often as he desired. Such a construction would give him an unreasonable dominion in the premises; one beyond evident need and beyond the apparent intention of the parties. To say that he had a riparian right to the flow through the natural channel, independent of the stipulation, does not meet the case. This right was limited to the natural flow from the spring, which might have been less than the quantum stipulated for. The stipulation gave the right to a fixed proportion of the spring water, and must be construed as contemplating its conveyance by the existing channel, with a right to make such improvement or enlargement as might be found necessary to its sufficiency. This was the extent of the defendant's right, and the substitution of another mode of conducting the water through the plaintiff's land without his consent was unwarranted. Since this change in the manner of its enjoyment was without authority, the question whether the water right was appurtenant to the defendant's land becomes immaterial.

Judgment affirmed.

Commercial Ice Company, Appellant, v. City of Philadelphia.

Public officers—Necessary furnishing of public office.

The furnishing of ice is not one of the "things necessary for the proper furnishing of the offices of the register of wills and orphans' court."

Argued Dec. 15, 1897. Appeal, No. 170, Oct. T., 1897, by plaintiff, from judgment of C. P. No. 4, Phila. Co., June T., 1897, No. 1325, in favor of defendant on case stated. Before WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Case stated. Before ARNOLD, P. J.

1. The plaintiff, a corporation duly organized under the laws of the state of Pennsylvania, engaged in the business of selling ice, wholesale and retail, in the city of Philadelphia and vicinity, at the special instance and request of the register of wills for the county of Philadelphia, furnished ice for use in the offices of the register of wills and in the rooms of the orphans' court for said county from January 1, 1895, to June 30, 1897.

2. The said register of wills is a county officer of the county of Philadelphia, and it was and is his duty, under an act of assembly of the state of Pennsylvania, to provide all things necessary for the proper furnishing of the offices of the register of wills and the rooms of the orphans' court of said county.

3. The value of the ice so furnished by plaintiff for this purpose during this period was $573.36.

4. Said ice so furnished and services rendered by the said plaintiff were in all respects satisfactory to the said register of wills, and bills for the same were approved but were not paid by him as presented from time to time because no specific appropriation had been made for the same by the councils of the city of Philadelphia, and the general appropriation made by the said council to defray the incidental expenses of the offices of the register of wills had been exhausted.

5. It is agreed between the plaintiff and the defendant that if the court be of opinion, upon the above statement of facts,

that the plaintiff is entitled to judgment against the defendant, judgment shall be entered in its favor for $573.36, with interest thereon from June 30, 1897.

Either party reserving the right of appeal.

Judgment was entered on case stated in favor of defendant in the following opinion by ARNOLD, P. J.

Payment of this claim by judgment of court is forbidden by the Act of April 21, 1858, sec. 5, P. L. 385, which provides that no debt or contract shall be binding on the city of Philadelphia, unless authorized by law or ordinance and an appropriation sufficient to pay the same has been previously made by councils.

In this case an appropriation was made to defray incidental expenses, but it has been exhausted without paying the plaintiff. The claim is now made for the years 1895 and 1896 and half of 1897. While ice may be considered a necessity, yet we do not consider it among the "things necessary for the proper furnishing" of a public office, such as may be paid for by mandamus. It has always been paid for out of an appropriation for incidental expenses made by the city councils, who may if they see fit, ratify the plaintiff's claim and order the payment thereof. Judgment for defendant.

Error assigned was entering judgment in favor of the defendant and in not entering judgment in favor of plaintiff on case stated.

Howard W. Page, of *Page, Allinson & Penrose*, for appellant. —The Act of April 21, 1858, P. L. 385, does not apply to county officers.

The distinction between contracts made by city and county officers is recognized: Bladen v. Phila., 60 Pa. 464; Wright v. Phila., 8 W. N. C. 141; Smith v. Phila., 5 Phila. 1.

A careful examination of the case in which recovery was refused upon the ground that case fell within the provision of the act of April 21, 1858, will show that they are instances in which contracts were made by a city as distinguished from a county officer.

Even admitting that the fifth section of the act of 1858 applied, the act was not violated, as it appears from case stated

that general appropriations were made from time to time by councils to defray the incidental expenses of the office of the register of wills, and that the only reason that plaintiff's bills were not paid as presented, was that said appropriations had been otherwise exhausted. The case, therefore, would seem to be analogous to McGlue v. Phila., 10 Phila. 348, and such diversion could hardly bar his claim under the principle laid down in Parker v. Phila., 92 Pa. 401.

The case stated contains an express averment that it was the duty of the register of wills under an act of assembly, to provide all things necessary for the proper furnishing of the offices of the register of wills and the rooms of the orphans' court.

The word "proper" has been defined as synonymous with "fit, suitable, appropriate:" Century Dictionary, title "proper," par. 3.

The word "furnish" means to supply, or provide, or equip with anything necessary or useful: Webster's Dictionary.

"To furnish" means "to provide with what is proper or suitable, supply with anything; fit up or fit out, equip, as to furnish a house, a library or an expedition:" Century Dictionary, title, "furnish," par. 3.

"Furniture in general includes that with which anything is furnished or supplied to fit it for operation or use. That which fits or equips for use or action; outfit, equipment, as the furniture of a war horse, of a microscope, table furniture:" Century Dictionary, par. 3.

The phrase "furniture of ship" ex vi termini, includes everything with which a ship requires to be furnished to make her seaworthy: Winfield's Adjudged Words and Phrases, 279, citing Weaver v. Owens, 1 Wallace, Jr., U. S. C. C. 359, 369.

Provisions for the use of the crew are covered by a policy on the "ship and furniture:" Stroud's Judicial Dictionary, 316, citing Brough v. Whitmore, 4 T. R. 206; Hill v. Patton, 8 East, 373.

"The word furniture relates ordinarily to movable personal chattels, but is very general in meaning and application, and the meaning changes so as to take the color or to accord with the subject to which it is applied:" Anderson's Law Dictionary, 483, citing Fore v. Hibbard, 63 Ala. 412.

It may not be amiss to remark that the words of the case

stated are not that the register of wills is authorized to purchase office furniture but to provide "all things necessary for the proper furnishing," a phrase general in its character and equivalent to all things necessary for the proper equipment of the offices for the use intended. If ice water is a necessity, as admitted in the opinion of the court below, it is difficult to see how rooms intended for use by a great multitude of people at all times and under all conditions, could be properly equipped without it. It is just as much one of the necessary expenses of the administration of justice within the language of Judge SHARSWOOD in Bladen v. Phila., supra, as telephone service, stationery, fuel or janitor service, and the plaintiff's claim is as much entitled to the protection of the court.

E. Spencer Miller, with him *John L. Kinsey*, for appellee.—It may be reasonable to infer that the ice in question was purchased to cool drinking water. This is a form of refreshment which may be a grateful relief in either winter or summer. It can hardly be regarded as indispensable, however.

No authorities appear to exist upon the questions raised, where the commodity purchased was thus one of refreshment rather than necessity. The absence of authority in support of such a claim would seem to be a sufficiently strong negative assurance to equal an authority for the defense.

OPINION BY PORTER, J., January 18, 1898:

The plaintiff at the request of the register of wills for the county of Philadelphia furnished ice for use in the offices of the register of wills and in the rooms of the orphans' court for said county from January 1, 1895, to June 30, 1897, and now sues the city of Philadelphia for $573.36, the amount of the bill.

The register of wills is a county officer and under legislative enactment, is required to provide "all things necessary for the proper furnishing of the offices of the register of wills and the rooms of the orphans' court of said county," as set forth in the case stated.

We do not think it necessary here to determine whether the plaintiff, in order to a recovery against the city of Philadelphia, should be required to exhibit an ordinance and appropriation by the city councils giving authority to contract the debt.

The real question is whether the furnishing of ice is one of the "things necessary for the proper furnishing of the offices of the register of wills and the rooms of the orphans' court."

To reverse the action of the court below would require us to determine judicially that the providing of ice is necessary for such furnishing. This we are not prepared to do. We construe the language of the act to cover only those things which, if absent, would obstruct or prevent the proper conduct of the business of the offices of the register of wills and of the said courts. While the use of ice may have come to be so prevalent as to make it to many people more than a luxury, we cannot hold that it is necessary to a proper furnishing of a public office or court room.

The city of Philadelphia has in the past periodically appropriated a sum to incidental expenses, as appears by the case stated, out of which such claims as the present have been paid. The appropriation for the period during which the plaintiff's claim was accruing, was exhausted before the presentation of the claim. Such a fund may with propriety be applied in part to the maintenance of the court rooms and register's offices with a due regard to personal convenience as well as to necessity. In the present case we are compelled to construe the language of an act of assembly which is too narrow in its terms to sustain the plaintiff's contention.

The judgment of the court below is therefore affirmed.

M. Zineman & Bro. *v.* William Harris, Appellant.

Contract—Rescission for fraud—Evidence—Province of the court.

The trial judge is justified in excluding from the jury the question of alleged fraud when the testimony of the witness called to corroborate the defendant was vague and uncertain and where all the testimony taken together failed to answer the test of being clear, precise and indubitable.

Contract—Rescission for fraud—Requisite proof.

In order to rescind a contract on the ground of fraudulent representations by the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew that it was not true; that he made it in order to have it acted on by the other party to his damage and in ignorance of its falsity and with a reasonable belief that it was true.

Province of court and jury—Question of reasonable time.

The question of what is reasonable time or undue delay, when the facts are undisputed, is a question of law to be determined by the court.

Argued Dec. 14, 1897. Appeal, No. 111, Oct. T., 1897, by defendant, from judgment of C. P. No. 4, Phila. Co., June T., 1894, No. 1552, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit for goods sold and delivered. Before THAYER, P. J.

It appears from the evidence that plaintiffs are manufacturers of spectacles, and had devised an outfit consisting of an instrument to determine the proper spectacles, and spectacles numbered to correspond with marks on the instrument. The defendant a druggist without experience in dealing in spectacles alleged that he had ordered goods of the plaintiffs on their representation that they had sold such outfits to another druggist in a similar neighborhood to the defendant's and that that druggist had sold large quantities of them.

The court, THAYER, P. J., charged the jury as follows:

[This is a suit brought to recover the price of certain goods sold and delivered. The defendant relies upon an alleged rescission of the contract on his part, which he attempts to justify by proof that he was induced to buy them by misrepresentation made to him by the plaintiffs, who sold them. The alleged misrepresentation consisted, according to the defendant's statement, in the plaintiff's representing that he had sold similar goods to Mr. Ogden. The evidence is that although the plaintiff had not sold precisely these goods to Mr. Ogden, he had sold him somewhat similar goods—smoked eyeglasses it turned out to be.] [1] [At any rate, after receiving the goods and keeping them, as the defendant did, from the 17th of March to the 28th of June, it was too late for him then to rescind the contract upon such an allegation as that. If he intended to rescind the contract he ought to have acted sooner. If he had returned them immediately, or within a reasonable time, after receiving the goods, there might have been at least some color for such a defense. But as matter of law, I instruct you that his offer to return the goods was entirely too late, and therefore he is responsible to the plaintiffs.] [2]

Verdict and judgment for plaintiff for $38.25. Defendant appealed.

Errors assigned were (1, 2) portions of the judge's charge, reciting same.

W. S. Roney, for appellant.—There being a mistake of fact material to the contract it is void: 2 Kent's Com. (13th ed.), 477; Pollock on Contracts, 441; Fink v. Smith, 170 Pa. 124.

These misrepresentations constituted a fraud. They come fully up to the standard laid down in Brown v. Eccles, 2 Pa. Superior Ct. 192.

There was no assent of two minds meeting on common ground: Harding v. Lloyd, 3 Pa. Superior Ct. 293.

An effort was made to return the goods as soon as the fraud was discovered: Hollingsworth on Contracts, 183; Lawson on Contracts, sec. 249.

Irving E. Zeigler, for appellees.—The right to rescind a contract must be exercised within a reasonable time after the breach. What is such a reasonable time is for the court: Morgan v. McKee, 77 Pa. 228.

The act of the defendant in opening the package and selling therefrom, was such that rescission could not be made.

OPINION BY BEAVER, J., January 18, 1898:

The contract in this case was in writing. It was an order to the plaintiffs signed by the defendant for certain goods which were actually delivered, which the defendant accepted and part of which he sold. He undertook to rescind the contract, on the ground that it was induced by representations which he alleges were false and fraudulent. When this action was brought by the plaintiffs to recover the value of the goods sold, the fraud so alleged was set up as a defense to its payment.

Two assignments of error cover the entire charge of the court to the jury, in which the court instructed the jury that the defendant's offer "to return the goods was entirely too late and, therefore, he is responsible to the plaintiffs." The charge is very brief. No reasons are given for the conclusions reached by the trial judge and we are, therefore, left to gather them from the testimony as it was developed in the trial.

If no fraud was practiced upon the defendant by the plaintiffs, the conclusion reached by the trial judge is undoubtedly correct. The goods were sold on the 15th day of March, 1894, and were returned or offered to be returned on the 28th of June following, the defendant having in the meantime sold some of the goods and, in order to restore the status quo, having purchased from other persons what was sufficient, in his opinion, to make good the amount sold.

The question of "what is a reasonable time or undue delay, when the facts are not disputed, is, as is well settled, a question of law to be determined by the court:" Leaming v. Wise, 73 Pa. 173; Morgan v. McKee, 77 Pa. 228.

If the contract, however, were based upon a fraud practiced upon the defendant, he could rescind it within a reasonable time, after the discovery of the fraud; and, if his testimony is to be believed, he rescinded the contract and offered to return the goods immediately after the discovery of what he alleged to be the fraud practiced upon him by the plaintiffs. It is manifestly certain, therefore, that the trial judge in the court below eliminated the question of fraud entirely from the case. Was he justified in so doing? It has been very often held by the Supreme Court and this court that "when the execution of an instrument has been obtained by means of a fraud or where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed, parol evidence could be given to prove the fraud, though it contradict the instrument;" but in such a case "the evidence must be clear, precise and indubitable—not indubitable in the sense that there must be no opposing testimony but in the sense that it must carry a clear conviction of its truth:" Honesdale Glass Co. v. Storms, 125 Pa. 268, and numerous cases therein cited.

Admitting that the representations complained of amounted to a fraud of which the law will take cognizance, was the evidence of it sufficient to be submitted to the jury? We think not. It was sufficient in quantity, having the two witnesses necessary to establish the fraud; but, after a careful reading of all the testimony upon the subject, we are clearly of the opinion that the witness who was called to corroborate the defendant

was vague and uncertain in his testimony; and, taking all of the testimony upon the subject together, it fails to meet the requirements herein set forth. Whether these considerations influenced the trial judge in failing to submit to the jury the question of fraud, we cannot, of course, determine. It may be that other considerations moved him.

In Southern Development Co. v. Silva, 125 U. S. 247, it was held that "In order to rescind a contract for the purchase of real estate on the ground of fraudulent representation by the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew that it was not true; that he made it in order to have it acted on by the other party and that it was so acted on by the other party to his damage and in ignorance of its falsity and with a reasonable belief that it was true." The rule is not essentially different as to personal property. Were the representations as to the sale to Ogden of a material fact? Admitting that the defendant acted upon those representations, did he do so to his detriment or damage? These are questions which naturally suggest themselves as legitimately raised by the evidence but which need not be definitely answered, in view of the reasons heretofore given which may have influenced the court below in withholding the question of fraud from the jury and which, in our opinion, was a sufficient justification for so doing.

The judgment is affirmed.

Samuel P. Ferree, trading as Street Railway Advertising Company, Appellant, v. Samuel Young.

Practice, Superior Court—Refusal of judgment on affidavit.

The appellate courts will not review the action of the courts below in discharging a rule for want of a sufficient affidavit of defense unless it be a very plain case of error of law.

Practice, C. P.—Sufficiency of affidavit alleging fraud.

An affidavit is sufficient which alleges representations which were in effect fraudulent, made by plaintiff for the purpose of inducing the defendant to execute a contract and a rescission of alleged contract upon discovery of the alleged fraud. Such affidavit raises questions of fact which cannot be determined by an appellate court.

Argued Dec. 15, 1897. Appeal, No. 156, Oct. T., 1897, by plaintiff, from order of C. P. No. 2, Phila. Co., June T., 1897, No. 686, discharging rule for judgment for want of a sufficient affidavit of defense. Before WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule for judgment for want of a sufficient affidavit of defense.

The plaintiff claimed on a contract for advertising in street cars the sum of $112.50. The court below discharged the rule for judgment for want of a sufficient affidavit of defense, filing no opinion. Defendant appealed.

Error assigned was to the order of the court discharging the rule.

C. F. Gummey, Jr., for appellant.—The principle involved in this case has already been decided by this court in Hand v. Russell, 1 Pa. Superior Ct. 165. A case almost identical with the one under discussion is Hallowell v. Lierz, 171 Pa. 577.

Wm. H. Wood, for appellee.—Where the positive averments, considered with reference to the written contract, show that the oral agreement induced the signing of the written one, the affidavit is sufficient: Keough v. Leslie, 92 Pa. 424.

Plaintiff could not repudiate the fraud and yet retain the benefit of the contract: Jones v. Bldg. Assn., 94 Pa. 215; Meyerhoff v. Daniels, 173 Pa. 555.

An order refusing judgment for want of a sufficient affidavit of defense, will only be reversed in a very plain case of error in law: Radcliffe v. Herbst, 135 Pa. 568; Ins. Co. v. Confer, 158 Pa. 598; Paine v. Kindred, 163 Pa. 638.

OPINION BY SMITH J., January 18, 1898:

The plaintiff appeals from the decree of the court below discharging a rule for judgment for want of a sufficient affidavit of defense. This court has followed the rule of the Supreme Court in this class of appeals: "It must be a very plain case of error in law, if we sustain appeals in such cases as this, from the decree of the common pleas discharging the rule:" Ætna Ins. Co. v. Confer, 158 Pa. 598. The affidavit of defense avers,

that the plaintiff's agent procured the defendant to advertise, on the representation that the plaintiff had room in the street cars for just one coal advertisement, and only one, and that if the defendant would place an advertisement with the plaintiff no other coal advertisement would be placed in the cars during the defendant's contract. The affidavit further avers that the defendant relied upon this assurance and was induced thereby to sign the contract; that the plaintiff, notwithstanding the representation and promise, put the defendant's advertisement with those of other coal dealers in the same cars; and that the defendant notified the plaintiff, as soon as he could do so, to remove his advertisement, as it was obtained through fraud and misrepresentation, and he would not pay for it. The affidavit is expanded with the elaborate phraseology frequently employed in those instruments, but we give the substance. The learned court refused to declare the affidavit insufficient, and we are therefore asked to hold that this ruling presents "a very plain case of error in law," which calls for correction. This we cannot do. The affidavit alleges representations which were in effect fraudulent, made by the plaintiff's agent for the purpose of inducing the defendant to execute the contract, and a rescission of the alleged contract upon discovery of the alleged fraud. This raises questions of fact which cannot be determined by an appellate court.

The decree discharging the rule for want of a sufficient affidavit of defense is affirmed.

Hannah T. Omensetter *v.* Henry Kemper, Appellant.

Evidence—Trespass—Res gestæ—Measure of damages.

The question being one of trespass in illegally closing plaintiff's window overlooking property belonging to wife of defendant, evidence is properly admissible as to conduct and declarations of the defendant in regard to consenting to the erection of the windows as bearing on a license from the wife as well as to alleged bad faith, recklessness or oppression of the defendant; the evidence being pertinent in any event, irrespective of the wife's title and defendant's inability to bind her, if it appeared that plaintiff's property was built within her own line, tending as it did to furnish some guidance as to the measure of damage.

Evidence—Witness cannot be made the arbiter.

Where the issue turned on the proper division line between two properties a question is properly excluded when, to have allowed the witness to have answered it, would have made him the arbiter of the whole question of title, including the application of the statute of limitation.

Practice, Superior Court—Unfair assignment—Excerpt from charge.

An assignment of error is unfair and defective which complains of an excerpt from the charge, wrested from its context, when, if all that was said in the instruction complained of had been quoted, it would appear that the matter in dispute had been left entirely to the jury.

Practice—Review—Charge of court—Comment on evidence.

The question turning on the accuracy of certain measurements made, on the one hand by trained surveyors and on the other, by unskilled persons, it was not error for the court to call the attention of the jury to the fact that defendant's measurements were made by "a baker attended by a tinsmith under the supervision of a lawyer." This is not such departure from judicial gravity as to call for a reversal.

Trespass—Title by possession—Burden of proof on defendant.

Mere possession is in itself a form of title, and he who interferes therewith must be prepared to show a better title. Plaintiff having been in possession of her house and defendant having invaded her possession, by obstructing her windows, the burden devolved upon him to explain or justify his acts.

Division fence—Consentable line—Statute of limitations—Burden of proof.

The mere calling a fence a division fence does not make it one. It is the duty of a party, relying on a fence as a division one, to supply the jury with the requisite facts. A consentable line is not established merely by an existing fence when its character is only accounted for during ten or twelve years.

Argued Oct. 5, 1897. Appeal, No. 38, Oct. T., 1897, by defendant, from judgment of C. P. No. 4, Phila. Co., June T., 1896, No. 565, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass quare clausum fregit to recover damages for obstruction to plaintiff's light and air by nailing up her windows. Before AUDENREID, J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $183.33. Plaintiff appealed.

Errors assigned were (1–3) In admitting questions propounded to plaintiff's witnesses as to conversations which had taken place between them and the defendant. (4) In overruling the following question propounded to Joseph Thorp: "Q. Assuming that the fence line as you have put it on the plan was the fence as it has been in existence as testified to by Mr. Kemper, and running that fence out upon the straight line as Mr. Kemper testified that the fence did run to Leverington avenue, state to the court and jury whether or not that would show that the plaintiff's property was built over Mrs. Kemper's property." (5–8) In charging the jury as follows: "As Mrs. Omensetter was, undoubtedly, in possession of that house and every part of it, including not only its interior, but also the wall in which these windows were opened, it would appear that her possession has been invaded, and that she is therefore entitled to recover damages at your hands in this action, unless the defendant can explain and justify his acts. . . . As the plaintiff is in the possession of the property No. 518 Leverington avenue you are bound to start out with the presumption that she is lawfully in possession of it, and that her title is co-extensive with her possession. It lies on the defendant to show that that house is not within the plaintiff's own lot, and that the division line is not to the northeast of the wall in which the windows and doors open. . . . . The only question of doubt in Mr. Thorp's determination of the location of the southwest line of the Kemper lot is as to whether he carefully measured the distance of one hundred and ninety-six feet one inch from the corner of Ridge avenue. I do not think that there is chance for a mistake in this calculation at any other point. . . . The measurements made for the defendant were made by a baker, attended by a tinsmith, under the supervision of a lawyer. It does not appear that any of these gentlemen ever made a land measurement before." (9) In affirming plaintiff's second point, which point is as follows: "If the jury believe from the evidence that the defendant gave a license to the plaintiff to erect the windows in question and in consequence of which license plaintiff went to an expense by building her house upon a different plan from that which she would have adopted if such license had not been given, then the license was irrevocable, and in no aspect has the defendant a right to nail the obstructions to plaintiff's window." (10) In

refusing to charge the jury as requested for the defendant as follows: "It is the uncontradicted testimony of the defendant that the division line between the property of plaintiff and Catharine Kemper for upwards of twenty-one years next preceding the erection of plaintiff's house was marked by a straight fence as shown on the plan of survey which you have in evidence. I instruct you if you find the said fence to have existed as testified to, and that the plaintiff's house is upon or over the line as so established, then your verdict must be for the defendant." (11) The damages found by the jury were excessive.

W. Horace Hepburn, for appellant.—The only question before the court below on the trial of this case was as to the location of the division line between the defendant's lot and the plaintiff's property. The evidence admitted under the first three assignments of error were irrelevant and prejudicial and should have been excluded: Bank v. Gillespie, 115 Pa. 564.

The affirmance of the plaintiff's second point as set out in the 9th assignment of error, did not tend in the least possible way to enlighten and help the jury, but did tend to convey the impression that the defendant had committed a wrongful act.

The burden of proof should be upon the plaintiff, and not, as stated by the court, upon the defendant: Wolf v. Wolf, 158 Pa. 621.

The line fence had been recognized for a period beyond the statute of limitations and should not have been disturbed: McCormick v. Barnum, 10 Wend. 104.

Long acquiescence by one in a line assumed by the other is evidence of an agreement: Kip v. Norton, 12 Wend. 127; Hunt v. Johnson, 19 N. Y. 279.

A great number of cases confirming the doctrine as stated above may be found in Tyler's Law of Boundaries, Fences and Window Lights, at pages 288 to 294.

The description of the persons testifying as to the measurements for defendant was couched in language by the trial judge tending to produce a mirthful effect upon the jury, and it had that effect as it brought forth a laugh from them.

Francis S. Cantrell and *Francis S. Cantrell, Jr.*, for appellee.—There was no evidence in this case of a consentable line recog

nized for a period long enough to invoke the statute of limitations. The evidence sufficiently established the proposition that plaintiff had built her house within her own line, and that the act of the defendant was an unwarrantable trespass.

The comments of the court complained of in the assignments of error were mere proper expressions of opinion by the court: Com. v. Orr, 138 Pa. 276.

OPINION BY WICKHAM, J., January 18, 1898:

The plaintiff sued in trespass, for the alleged unlawful acts of the defendant in closing up two windows in the east wall of her house, which is situate on East Leverington Avenue, in the city of Philadelphia. The defendant tried to justify his acts by averring, and attempting to prove, that the wall extended over on the property of his wife, by whose authority he obstructed the windows. The only question, therefore, outside of the matter of damages, was whether or not the wall was built on the land of the defendant's wife. To make this question of fact still more definite and easy of solution, the defendant in his first point, which was affirmed, asked the court to charge that his wife was entitled to a lot fifty feet wide west of the western boundary line of another lot, adjoining and east of hers, known as the Shinkle or Morton lot. This boundary line was marked by an ancient fence which both parties agreed was the true eastern boundary of the Kemper lot.

Under the instruction requested by the defendant and given by the court, it is apparent that if, measuring westwardly from the Morton fence to the Omensetter wall, Mrs. Kemper had a lot fifty feet in width, all she claimed under her deed, then the defendant was guilty of the trespass charged, unless through a consentable line, or under the statute of limitations, the wife could justly claim more land. Such was the necessary effect of the way in which the defendant had the case submitted to the jury. The jury, looking at all the evidence bearing on this point, found in effect, that Mrs. Kemper had the fifty feet referred to east of plaintiff's house and west of the Morton fence, and therefore rendered a verdict against the defendant. The evidence shows, that the defendant intruded west of the eastern surface of the wall, the obstructions having been nailed to the wooden frames set back in the window openings.

The court had in its charge ruled, that there was not sufficient evidence to establish a consentable line, or to give title under the statute of limitations, to the land occupied by the wall or any part thereof. The defendant therefore had to stand on his wife's deed and the measurements made westwardly from the Morton fence, and the jury found that she had fifty feet east of the plaintiff's building.

Let us now look at the assignments of error. The first, second, and third relate to the admission of testimony showing that the plaintiff's husband, before she erected her house in 1889, consulted with the defendant, who encouraged the putting in of the windows. He talked and acted at that time in such a way as to lead one, not knowing that his wife held the title, to assume that he was the owner of the lot adjoining the plaintiff's. He alone was sued, and, at the time when the testimony objected to was offered, his defense was not developed. The testimony was therefore properly admitted as part of the history of the matter in controversy and as bearing on the question of license, as well as the alleged bad faith and recklessness, or oppression of the defendant. Even after the defense had been opened, and it appeared by the wife's deeds that she was the real owner of the property occupied by herself and husband, and that he therefore had no authority to bind her, the evidence was still pertinent, in case the jury found that the plaintiff's house was built in on her own lot. It tended to furnish some guidance as to the measure of damages. Omensetter, in the conversation detailed in the first assignment of error, asked Kemper, after showing him the plan of the house if he had any objection to it. Kemper replied, "No, John, I would rather have those windows there than a dead wall." Omensetter says farther, in giving his version of the conversation, "I told him I intended to keep within my own line which I am doing." The remark "which I am doing" was volunteered by the witness, was not called out by any question, and in strictness was inadmissible. A motion was made by the defendant's counsel to strike it out, but as there is no assignment of error, based on the court's refusal to do so, the matter need not be further considered.

To another witness Kemper said, "I gave him" (Omensetter) "permission to put two windows in the gable end of this wall," and made a like statement to still another person.

The learned trial judge told the jury, in language not to be misunderstood, that Kemper had no authority to represent his wife, and that no license had been proved. The jury found in effect that the plaintiff's building was inside her line. In view of this finding we fail to see why, in assessing the damages, they had not a right to consider the defendant's conduct from beginning to end so far as it related to the windows. He encouraged the putting of them in. He was told by Omensetter that the house would be built west of the Kemper line, and as a matter of fact, it was so built and maintained. And yet, notwithstanding these things, the defendant, without a word of notice or warning, disfigured the plaintiff's habitation and closed up her handsome and costly leaded and plate glass windows by nailing over one an old pine batten door, and over the other "bagging covered with manure, horse manure," thus causing crowds of six to a dozen people to frequently gather, as the evidence shows, to view the odd decorations.

We think that all the testimony of the three witnesses mentioned in the assignments we have been considering, so far as it was responsive to the questions or suggestions of the plaintiff's counsel, was admissible. Anything objectionable and volunteered should have been met, at the time, by a motion to strike out, and if such motion were overruled, the refusal, if excepted to, could have been assigned for error here. This has not been done, and at any rate, the irresponsive matter is so harmless as to be scarcely worth the trouble.

The fourth assignment complains that the court overruled the following question, put for the defense to one of the surveyors on cross-examination: "Assuming that the fence line as you have put it on the plan was the fence as it has been in existence, as testified to by Mr. Kemper, and running that fence out upon the straight line as Mr. Kemper testified that the fence did run to Leverington avenue, state to the court and jury whether or not that would show that the plaintiff's property was built over Mrs. Kemper's property." This question was very properly disallowed for two reasons: first, it does not appear that the witness heard what Kemper had testified, about the fence and the length of time it had existed; and second, to have allowed the witness to answer would have made him the arbiter of the whole question of title including the applicabil-

ity of the statute of limitations. It was the province of the jury to determine whether the Omensetter wall was built on the Kemper property. The witness should have been asked as to the position of the fence with reference to the wall, or the Morton line, or as to like matters within his art.

The fifth and sixth assignments are based on the instructions given the jury to the effect that the plaintiff, being in possession of her house, including of course the wall and windows, and the defendant having admittedly invaded her possession, it devolved on him to explain or justify his acts. As this is horn-book law, part of the very alphabet of the law of trespass, no authorities need be cited to sustain it. Mere possession, fortunately for the good order of society, is in itself a form of title, and he who interferes therewith must be prepared to show a better one.

The seventh assignment is not quite fair to the court below. The instruction complained of is an excerpt, wrested from its context. Had all that was said, on the subject referred to in this instruction, been quoted, it would appear that the matter of the correctness of the conflicting measurements was left entirely to the jury. Even the expression of opinion, contained in the excerpt, was practically withdrawn near the close of the next paragraph of the charge.

In the eighth assignment the appellant complains, that the court said to the jury that the defendant's measurements "were made by a baker attended by a tinsmith under the supervision of a lawyer." That the measurements were made by three persons of the respective callings mentioned, instead of by a surveyor, and that the lawyer superintended, is indubitable, but a careful examination of the testimony does not make it quite clear whether the baker, who was the defendant himself, was attended by the tinsmith, or the tinsmith by the baker. However, a slight mistake in stating the order of rank would be harmless error, as it is quite certain that the baker was at one end of the tape line and the tinsmith at the other. The plaintiff's evidence as to the disputed line came from professional surveyors. The defendant first called in a surveyor, but being dissatisfied with the result, he rejected the artist's work. Then, instead of employing another surveyor, he undertook, with the aid of his counsel and a neighbor, to make his own measurements, this

being the first experience either of the three had in measuring land or finding boundaries. It was, therefore, not out of place for the court to call the attention of the jury to their vocations, and although it may have been done in a manner calculated to provoke a smile, there was not such a wide departure from judicial gravity as to demand a reversal. It may be mentioned here, that the testimony of Mr. Thorp, one of the surveyors, explains how easily these three gentlemen, ignorant of the courses of the lot lines and the angles at which they intersect the avenue, might make mistakes, although actuated by the most honest motives.

It would have been better for the court to have simply refused the plaintiff's second point, set forth in the ninth assignment of error. The answer, however, taken as a whole, is equivalent to saying, "It is true that if a license has been proved, then it is irrevocable, but there is no evidence that either Kemper or his wife gave any license." In the general charge, the jury were emphatically instructed that no license had been shown, the learned trial judge closing his remarks on this head with the words "Therefore as I say, the question of license is out of the case, and you need not consider it." In view of all this, the appellant, in our opinion, suffered no harm from the manner in which the court disposed of the plaintiff's second point. The jury must have understood that, in effect, the point was refused.

The tenth assignment rests on the refusal of the court to charge as follows: "It is the uncontradicted testimony of the defendant that the division line between the property of plaintiff and Catharine Kemper for upwards of twenty-one years next preceding the erection of plaintiff's house was marked by a straight fence, as shown on the plan of survey which you have in evidence. I instruct you, if you find the said fence to have existed as testified to, and that the plaintiff's house is upon or over the line as so established, then your verdict must be for the defendant." To have affirmed this point would have been serious error. It is true the defense offered evidence as to the existence of a straight fence, running back from Leverington avenue, along or near the disputed line, and a part whereof was taken down by the plaintiff when she built her house. It was testified by the defendant and his wife, that the fence had been there some thirty-five years before the trial. Mrs. Kemper

bought in 1877, the Omensetter house was built in 1889. Kemper testified that the plaintiff's husband, between the two years just mentioned, helped to maintain the fence. Under the proof, we have only a period of twelve years, at the most, during which the defendant's wife can be said to have claimed up to the fence. We are left utterly in the dark as to the history of the fence prior to 1877. It does not appear who built or maintained it; whether it was intended to mark the true line or a consentable line; whether it was recognized by former owners as indicating the boundary, or whether Mrs. Kemper's predecessors in title had claimed and held up to it. The merely calling it a division or line fence by the defendant and his wife, in their testimony, does not make it one. It was their duty to supply the jury with facts. The measure of proof is indicated in Brown v. McKinney, 9 W. 565, and Reiter v. McJunkin, 173 Pa. 82, the strongest cases that can be found in our reports in favor of the appellant's position.

We may add, that where this fence stood with reference to the wall is, to say the least, left very conjectural. The only witness who testified directly in regard to the matter was the carpenter, who built the plaintiff's kitchen back of the main building, and who was called for the defense. He stated that he took down about twelve feet of the fence, but added that he built, inside the line, on the plaintiff's own lot.

As to the eleventh and last assignment, we cannot say, looking at all the facts, that the amount of the verdict should lead us to interfere.

Judgment affirmed.

Andrew Karahuta v. The Schuylkill Traction Company, Appellant.

Question for jury—Negligence—Street railways—Duty of motorman.

Where there is evidence of the failure to ring the bell and of failure to perceive the approach of the child who was killed by a trolley car, and that the motorman was engaged in conversation with one of the passengers just before the accident and that his face was at one time turned away from the track, the case is for the jury on the question of the defendant's negligence.

Negligence—Contributory negligence of parent—Question for jury.

A father left his little child of two and one half years of age on the front steps of his house facing a public street where electric cars and wagons were passing, while he took a still smaller child in to its mother. There was a hand organ playing upon the opposite side of the street and the child was enjoined not to leave the step. While the father was absent the child had wandered upon the track and had been killed. The parents were people in humble circumstances and had no one else to take care of the children but themselves. *Held*, That the action of the parent was not such as compelled the court to pronounce it to be such contributory negligence on his part as to require the withdrawal of the case from the jury.

Argued Dec. 9, 1897. Appeal, No. 160, Oct. T., 1897, by defendant, from judgment of C. P. Schuylkill Co., Jan. T., 1895, No. 207, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass by parent to recover damages for the death of his son, who was struck by car of the defendant company. Before SAVIDGE, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $565.50. Defendant appealed.

Error assigned was refusal of binding instructions for defendant.

MacHenry Wilhelm, for appellant.—The fact that a child is injured on a public street does not of itself impose liability on

the part of a driver or other person who has the vehicle in charge: Moss v. Traction Co., 180 Pa. 389; Johnson v. Railway Co., 160 Pa. 647.

The fact that a child is found in the streets affords a strong presumption of negligence on the part of the plaintiff: P. & R. R. R. Co. v. Long, 75 Pa. 257; Cauley v. Railway Co., 95 Pa. 398; Glassey v. Ry. Co., 57 Pa. 152.

Chas. N. Brumm, with him *George Dyson*, for appellee.—The principles of law that apply perfectly to this case are laid down in Henne v. Ry. Co., 1 Pa. Superior Ct. 311.

The refusal of binding instructions is justified by Dunseath v. Traction Co., 161 Pa. 124.

OPINION BY PORTER, J., January 18, 1898:

The only specification of error in this case is the refusal of the court below to give binding instructions to the jury to find for the defendants. This request is based upon the propositions first that the defendants were not guilty of negligence; and second, that the plaintiff, (the father of the child who was killed) was guilty of contributory negligence.

A decision of this case requires a consideration of the testimony. The plaintiff is a foreigner, having lived at the time of the accident, but seven years in this country. His residence was on Centre street in the borough of Mahanoy City. His family consisted of himself, his wife, his son Joseph, (who was killed) of the age of two years and a half, and a younger child about one year old. Centre street is about eighty feet wide from curb line to curb line and is traversed by the tracks of the defendant company, which operates an electrical street railway. The tracks are laid in the middle of the street. One of the termini of the line is in Mahanoy City east of the house occupied by the plaintiff. The car which killed the child, Joseph Karahuta, had passed eastward to the terminus and was on its return trip.

On August 7, 1894, the plaintiff left his house and proceeded directly across Centre street taking his two children, the younger in his arms and the older by the hand, to Hogan's store to be nearer an Italian who was there playing a hand organ. Having remained for a time listening to the music with a number of

other persons, adults and children, the plaintiff returned to his house with his two children. Having to go to the yard of the house for a necessary purpose for a few minutes, he allowed the older boy to remain on the front doorstep and took the younger child into the house, placing the latter in the care of its mother. On his return to the house, in a few minutes, he found the older child dead in the arms of its mother, having been killed during his absence by a car of the defendant company.

The allegations in respect to the negligence of defendants were that the car was moving at an extraordinary speed, that the motorman failed to ring his alarm bell, and that his attention was not being properly given to the management of his car.

The evidence does not satisfy us that there was any undue speed. The car seems to have been moving at a rate of not more than four to six miles an hour at the time of the accident. The power was not on and the car was drifting on a slight down grade.

As to the failure to give warning of approach it was shown that the accident occurred in the middle of the block and that the motorman had not rung his bell since leaving the street crossing to the east. While it is true that there is no necessity for a motorman to continually ring his bell, it is also true that when approaching a point where he could see that a number of children and others had congregated upon the street it may well have been his duty to give notice with his gong of the approach of his car, and had he done so in the present case it might have been that the warning would have prevented the little child from crossing the track.

In addition, however, there was evidence showing that the motorman was engaged in conversation with one of the passengers just before the accident, and that his face at one time was turned away from the track. This turning away was sought to be explained by the fact that a number of persons called out to him in warning to prevent the injury to the child. This is not a satisfactory explanation. If bystanders were able to see the impending accident and give warning, the motorman should have been able to see it himself, and if he had, the warning from others could not have diverted his attention nor would such warning have been necessary. There was in our opinion

sufficient evidence of the failure to ring the bell and of the failure to perceive the approach of the child, to require the case to go to the jury, on the question of the defendants' negligence.

The plaintiff allowed his little child of two and one half years of age to remain on the front step of the house facing on the public street where electric cars and wagons were passing. He allowed him to remain there for a few minutes with an injunction not to go away. The smaller child was left with the mother, who was in the front or back room of the house. The family were in moderate circumstances. The child had no caretaker but the parents. It is true that the attraction of a hand organ was within sight and hearing of the child. He had however, been permitted to see the organ at a nearer view. It is true that its presence may have been a temptation to the child to leave the doorstep in defiance of the father's injunction. We are, however, not prepared to say that the action of the parent in this case was such as to require a court to pronounce it to be such negligence on his part as to require the withdrawal of the case from the jury. The absence of the testimony of the mother upon this branch of the case is to be regretted, but it was explained by the statement at bar that she was dead at the time of the trial.

This case differs from Johnson v. Passenger Railway Co., 160 Pa. 647. There the mother stood at the open door of the house in conversation with relatives and permitted her child to pass her and escape into the street and be killed by a passing car. The facts in that case are tersely put by Mr. Justice DEAN, "a child twenty months old, an open door, a dangerous railway track, within a few feet of the open door, the mother standing in full view of the door and the track, and the further fact that it would probably take the little child as long to toddle from the door to the track before the eyes of its mother as it took the approaching car to come a square. Was this such care as was due from the mother to her child according to the circumstances?" The burden of that case fell upon the fact that the accident happened under the eyes of the parent under circumstances where she might have intervened after the child had started on its path to danger. This case comes rather within the ruling in Dunseath v. Pittsburg, etc., Traction Co., 161 Pa. 124, where it is said: "We cannot assent to the proposition that the court

should have taken the case from the jury on the ground that the presence of the boy on the street under the circumstances shown, constitute negligence on the part of the plaintiffs which contributed to his death." Mr. Justice McCollum quotes with approval in the same opinion the language of the Supreme Court in P. & R. R. Co. v. Long, 75 Pa. 257, as follows: "To suffer a child to wander on the street has the sense of *permit*. If such permission or sufferance exist, it is negligence. This is the assertion of a principle. But whether the mother did suffer the child to wander is a matter of fact and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be reasonable care, dependent on the circumstances. This is a fact for the jury." The opinion in the recent case of Woeckner v. Erie Electric, etc., Co., 182 Pa. 182, applies this view of the law to facts similar in many respects to those presented here.

The learned trial judge was thus compelled to send the case to the jury. This he did in a clear and able charge, quite as favorable to the defendants as they could have expected.

The judgment of the court below is therefore affirmed.

License of Lorenz Wacker. Appeal of D. C. Gibboney.

Liquor law—Statutory period for acceptance of license cannot be extended.

An applicant for a liquor license has, under the statute, fifteen days within which to accept or refuse his license when allowed. This time being definitely fixed by the statute cannot be extended by the court.

Liquor law—Appeals—Standing of remonstrant to appeal.

The right of appeal belongs to every person in a legal sense aggrieved and whoever stands in a cause as the legal representative of interests which may be injuriously affected by the decree made in a license case is, within the meaning of the law, aggrieved. One who is properly before the lower court as a remonstrant and who is heard by that tribunal, is a proper appellant.

Argued Oct. 20, 1897. Appeal, No. 117, Oct. T., 1897, by D. C. Gibboney, and as secretary of the Law and Order Society from the decree of Q. S. Phila. Co., granting a bottler's license to Lorenz Wacker. Before Rice, P. J., Wickham, Beaver, Reeder, Orlady, Smith and Porter, JJ. Reversed.

It appears from the record that Lorenz Wacker filed an application for a bottler's license at 801 N. Forty-eighth street, Philadelphia. A remonstrance was filed of the Law and Order Society. On May 14, 1897, a bottler's license was granted. On May 30, 1897, in obedience to the Act of June 9, 1891, P. L. 257, the grant was revoked for nonpayment of license fee within fifteen days. On July 8, 1897, petitioner Wacker presented petition dated June 17, 1897, to extend time of payment, which was granted the same day. On July 9, 1897, a receipt of the city treasurer for the license fee received fifty-six days after the legal grant, was filed.

An appeal was taken to the Superior Court by D. C. Gibboney and as secretary of the Law and Order Society, remonstrants.

Errors assigned were (1) Granting the petition of Lorenz Wacker on July 8, 1897. (2) In granting an extension of time. (3) In making the order indorsed on the application "and now July 8, 1897, license granted." (4) In rehearing and regranting in July term, 1897, a bottler's license on an application made to March term, 1897, heard March 31, 1897, wherein a final decree was made on May 14, 1897. (5) In rehearing and regranting to Lorenz Wacker an application for a bottler's license for the license year commencing June 1, 1897, the said application previously granted May 14, 1897, to the same person, for the same business, at the same place, for the same time, having been revoked May 30, 1897, by the express provisions of the act of assembly approved June 9, 1891, sec. 7, P. L. 257, no new application having been filed.

Lewis D. Vail, for appellant.—The court of quarter sessions cannot repeal the express provisions of an act of assembly. The action of the court below was not an amendment of the order of May 14, 1897: Riddle's Estate, 19 Pa. 431.

John Dolman for appellee.—There is no case in which a taxpayer or citizen is allowed an appeal from the decision of the quarter sessions on a question affecting the police government of the city. The act of June 9, 1891, gives the court of quarter sessions authority to grant liquor licenses, the only restric-

tion being that they shall be for one year from a date fixed by rule or standing order. The action of the quarter sessions is clearly within its powers under the act. The sincerity of the applicant is unquestioned. He owns sufficient money to pay his license fee, but failed to have it in his immediate possession at the proper time through a mere accident. Although he failed to pay it in time, he neither "neglected" nor "refused" to pay it as the act provides.

OPINION BY OBLADY, J., January 18, 1898:

The application for license in this case was resisted by the Law and Order Society of Philadelphia. A remonstrance was filed by the society in which legal and material objections were specifically averred, and these were attested by an affidavit. The record shows that the petition and the remonstrance were considered by the court on a hearing held March 31, 1897, and on May 14th the prayer of the petitioner was granted.

The applicant did not comply with the provisions of sec. 7 of the Act of June 9, 1891, P. L. 257. "If any person or persons shall neglect or refuse to pay to the city or county treasurer the sum of money directed in sections one and three, within fifteen days after his, her or their application for license has been granted by said court, then and in that case the said grant shall be deemed and held revoked and no license issued. It shall be the duty of the person or persons whose application has been granted by the said court, to pay the said sum of money to the said treasurer within the said fifteen days and forthwith produce to, and file with the clerk of court, the receipt of said treasurer thereof, and upon any default the said clerk shall forthwith mark the said application and grant 'revoked.'" The clerk of quarter sessions noted of record the default of the applicant as follows: "And now, to wit: May 30, 1897 the application and grant to Lorenz Wacker for bottler's liquor license at 810 North Forty-eight street, thirty-fourth ward is hereby revoked for nonpayment of license fee within fifteen days."

On July 8th fifty-six days after the license had been granted, Wacker presented his petition to the court in which he gave reasons for the default, and said that "he had been disappointed in securing the necessary money to pay the license fee from an

expected source and had made a number of efforts to get the money elsewhere but was unsuccessful." On this petition the court extended the time within which to pay the license fee and indorsed it "license granted."

July 9th, Wacker paid to the county treasurer the license fee, filed in the office of the clerk of quarter sessions a proper receipt therefor, and received from that official a bottler's license for one year from June 1, 1891.

After the grant of the license the proceeding was ex parte, no rule was granted, nor notice given to the remonstrants. No objection is or could be taken to the action of the court in granting the original license. The applicant had, under the statute, fifteen days within which to decide whether he would accept or refuse. That time is definitely fixed by the statute and cannot be extended by the court. The subsequent action of the court was without statutory authority. The whole proceeding is founded upon the statute, and the right to this license ceased when the applicant made default in not paying within the prescribed time. It is nowhere suggested that the decree of July 8th, was an amendment, or was made to correct an error of record in the knowledge of the court, and it cannot be construed otherwise than that the intention was to extend the statutory time for making payment of the license fee. The license was properly revoked by the clerk. The remonstrants were regularly on record and were heard without objection by the court at the time the license was originally granted. The right of appeal belongs to every person in a legal sense aggrieved. Not only are those persons aggrieved in a legal sense, whose individual, peculiar rights are invaded, but also those whose representative claims are assailed. Whoever stands in a cause as the legal representative of interests which may be injuriously affected by the decree made is, within the meaning of the law, aggrieved: Green v. Blackwell, 32 N. J. Eq. 768. This is the law of the civil courts, and we feel that the same generous rule should apply in license cases. One who is properly before the lower court as a remonstrant, and who is heard by that tribunal, is a proper appellant to this court. The remonstrance is signed by the "Law and Order Society of Philadelphia, D. C. Gibboney, Secretary," and the truth of the facts

stated therein is vouched for under oath by C. B. Jones. The same parties appear here as appellants.

The decree of the court dated July 8, 1897, granting the license to Lorenz Wacker is reversed, the costs to be paid by the appellee.

Hugh Kelly v. Frederick Baun, Appellant.

Contract—Statute of frauds—Original undertaking.

Where the paramount purpose moving a promisor in making a promise was to subserve his own interests, it becomes an original undertaking and is not within the statute of frauds, although the promise incidentally includes the payment of the debt of another.

Where plaintiff and defendant were creditors of B., and plaintiff bid in certain goods at a sheriff's sale of B.'s business which was purchased by defendant, a promise by defendant that in consideration of a transfer of plaintiff's bid that he, the defendant, would pay B.'s debt to plaintiff, because he could not run the place without the goods purchased by plaintiff, such promise although in form an assumption of B.'s debt is what is termed an original undertaking and is not within the statute.

Argued Dec. 14, 1897. Appeal, No. 65, Oct. T., 1897, by defendant, from judgment of C. P. No. 3, Phila. Co., March T., 1895, No. 345, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit. Before MCMICHAEL, J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $550. Defendant appealed.

Error assigned was refusal of binding instructions for defendant.

Thomas Leaming, for appellant. The alleged promise in this case is within the 1st section of the Act of April 26, 1855, P. L. 308, the familiar statute of frauds.

In order to convert a promise to pay a debt of another into an original undertaking so as to take it out of the statute of frauds,

evidence must be clear and satisfactory, and this is a question for the court: Eshleman v. Harnish, 76 Pa. 97; Haverly v. Mercur, 78 Pa. 257; Gable v. Graybill, 1 Pa. Superior Ct. 29.

The test that this verbal promise was a guaranteeing of another's debt is the continued existence of the original debt: Maule v. Bucknell, 50 Pa. 39, 52; Dougherty v. Bash, 167 Pa. 429; Branson v. Kitchenman, 148 Pa. 541; Machine Co. v. Cann, 173 Pa. 392; Burr v. Mazer, 2 Pa. Superior Ct. 426.

Thomas A. Fahy, for appellee.

OPINION BY SMITH, J., January 18, 1898:

The whole complaint in this case is based on the refusal of the court below to direct a verdict for the defendant. The appellant contends that the testimony showed, indisputably, that the plaintiff's cause of action was upon the note of a third person to which the defendant was not a party and for which he was not liable; and that this suit is an attempt to hold the defendant responsible for the debt of another, under an oral promise, in contravention of the statute of frauds.

It is admitted that both plaintiff and defendant were creditors of one Karl Hiller, who conducted a butchering establishment, and was a brother-in-law of the defendant. At a sheriff's sale of Hiller's property the greater part of it was bid in for the defendant. The plaintiff attended the sale and "hoping to save his claim of $500," bid in the shafting and machinery used in Hiller's business. After the sale the defendant and the plaintiff met and arrived at an understanding whereby the plaintiff surrendered his right to the property he had purchased, to the defendant, the latter paying the bid.

The question submitted to the jury arose from the circumstances under which the plaintiff transferred his right to the property. The plaintiff alleged that the defendant promised, in consideration of the surrender, to pay the $500 which Hiller owed him. The only testimony on the subject was that of the parties. The plaintiff testified in chief that the defendant said to him: "Look here, Mr. Kelly, you had better let the machinery and shafting you bought stay here. We cannot run the thing without that shafting, and I will pay you myself that $500 of Hiller's;" and on cross-examination, that the defend-

ant said to him: "I will pay that money to you myself, for that machinery, if you will leave it here," and that "he said that afterward, he said it twice over, and he said that to me." The defendant testified that he knew nothing about the note, and that nothing was said about paying it. The jury were instructed that if they believed the plaintiff's version the plaintiff was entitled to recover; otherwise not. The verdict was for the plaintiff.

The machinery bid in by the plaintiff was turned over to and accepted by the defendant. He became the purchaser of all the property sold by the sheriff and continued the business in his own name. The sheriff's sale was made on executions in which he was the plaintiff. But it is contended that the promise to pay the plaintiff $500, in addition to the bid, for the portion bid in by the latter, is within the statute of frauds, because the agreement was to pay the amount Hiller owed the plaintiff, and because the latter held a note that was not surrendered, and upon which Hiller paid one year's interest, after the sheriff's sale. We cannot assent to this view. The statute was passed to prevent fraud, and courts must not permit it to be made an instrument for the perpetration of fraud. Assuming as we must that the facts have been correctly found by the jury, the provisions of the statute are invoked to relieve the defendant from payment of part of the sum which he promised to pay for the property.

The substantial question for our decision is whether the paramount purpose of the defendant, in making the promise was to subserve his own interest, or to secure the debt of another person. If the former, it is what is termed "an original undertaking," although in form an assumption of the debt of another, and is not within the statute. The machinery transferred to the defendant was necessary, with that which he had already purchased, for the operation of the business there conducted. According to his own statement he "could not run the thing" without the shafting, and in order that this might be done he bought the plaintiff's right thereto for $500. True, he promised to pay the debt of his brother-in-law; but it was to secure this that the plaintiff attended the sale and bid in the property, and the fact that he was willing to release his claim on Hiller cannot operate to discharge the defendant from his promises, made

manifestly for his own interest and purposes. Substantially Hiller's debt to the plaintiff was merely the measure of the sum which the defendant was willing to pay the plaintiff for the property bid in by him. It is clear that the plaintiff bid off and held the machinery because he sought thus to secure the debt Hiller owed him, and it therefore requires no stretch of the principle that "it (the promise) may be unaffected by the statute, though the original debt remains, if the promisor has received a fund pledged, set apart, or held for the payment of the debt," (Maule v. Bucknell, 50 Pa. 39), to hold that it covers the transaction under consideration.

Judgment affirmed.

Ross C. Collins v. The Morning News Company, Appellant.

Libel—Evidence—When record of a crime charged inadmissible

Where the libel charged plaintiff as indicted for a criminal offense, evidence tending to show that plaintiff was on the bail of the real offender is properly excluded, it not being pretended that the publication was based upon knowledge of the facts as shown by the rejected testimony. The excluded record would have shown conclusively that every material fact stated in the publication was untrue.

Libel—Measure of damages.

Where there is no evidence that defendant in a libel suit had actual malice in publishing the article complained of by the plaintiff, compensation for the injury done to the plaintiff's character is the only legal measure of damages for which a recovery can be had.

Libel—Privileged communication—Burden of proof.

A communication to be privileged, must be made on a proper occasion, from a proper motive, and be based upon reasonable or probable cause. The immunity of a privileged communication is an exception, and he who relies upon an exception must prove all the facts necessary to bring himself within it.

It is not a privileged communication when a newspaper publishes that plaintiff "was arrested on a bailpiece," when an examination of the record would have disclosed that it was plaintiff who, as bail, had surrendered the real offender.

Libel—Probable cause—Failure to examine record.

Probable cause is not shown where a newspaper publishes a libelous

charge against a citizen on information from the attorney in a criminal case, where such information made further information necessary to warrant a cautious man in believing that the plaintiff was guilty of any offense.

A cursory and insufficient examination of the record will not exempt from the charge of carelessness when a more particular investigation would have elicited the whole truth; still more is defendant responsible if he neglects to examine an available record choosing rather to remain in ignorance when he might have obtained full information.

Argued Nov. 11, 1897. Appeal, No. 35, Oct. T., 1897, by defendant, from judgment of C. P. Lancaster Co., Sept. T., 1893, No. 3, on verdict for plaintiff. Before RICE, P. J., BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass sur libel. Before LIVINGSTON, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict for plaintiff for $650. Defendant appealed.

Errors assigned were, inter alia (1, 2) In admitting, under objection, the following questions to witness for plaintiff, for the purpose of showing the amount of damages involved: "Q. What was the circulation of the Morning News at that time—15th of August, 1893? A. About 3,500. Q. Did it or not circulate generally in this city and county? A. It did." (3) In overruling the following question by defendant in cross-examination of the plaintiff: "Defendant offers to ask the witness if there was not a prosecution against Howard Lehman for malicious mischief and cruelty to animals, and whether Mr. Collins, John Cassidy and Behny Ross were not his bail for his appearance, and whether or not they hadn't taken out a bailpiece for him by Mr. Collins." (5–10) The substance of these assignments were errors assigned in disallowing, upon objection by the plaintiff, offers of defendant to prove by the records of the quarter sessions that one Lehman was charged with malicious mischief and cruelty to animals, and that plaintiff and others were sureties on the recognizance given by him before the magistrate to appear at quarter sessions. That a bailpiece was taken out in this case by plaintiff for the body of said Lehman; to be followed by evidence that the reporter of the News had understood from information received from B. F. Davis, counsel for

plaintiff, that this bailpiece had been taken out for the arrest of said Collins and in pursuance of that information so obtained, the reporter caused a local item, which is the subject of this suit, to be published in the Morning News. (12) In answer to plaintiff's second point, as follows: "2. The uncontradicted evidence in this case is that the publication made was untrue. It is not privileged. It is libelous per se. It is actionable, and, therefore, it is presumed to be malicious. *Answer:* That is, malice in law. It is not shown. It is denied there was any actual malice on the part of the defendant here in this publication, and no proof." (14) In answer to plaintiff's fourth point: "4. Where the words published are in themselves actionable, libelous and untrue, evidence need not be given of malice. The publication is presumed to be malicious. *Answer:* That is what I have stated to you in the general charge." (15) In answer to plaintiff's fifth point: "5. The publisher of a newspaper and his reporters are bound to use extreme diligence to ascertain whether or not libelous matter which they publish is true, and when the publication and untruth of such matter are shown, they are required to prove extreme diligence to ascertain its truth before they are exempted from damages for such publication. *Answer:* We say that the publisher of a newspaper and his reporters are bound to use due care, reasonable care and diligence to ascertain whether the matter is libelous or not, libelous or true. And when the publication and untruth of such matter are shown, they are required to prove reasonable diligence and care to ascertain its truthfulness before they can be exempted from damages for such publication." (16) In answer to plaintiff's sixth point: "6. Under the law and the evidence the verdict must be for the plaintiff for such amount as will compensate him for the damages he has suffered; and for malice or reckless negligence if proved, punitive damages may be awarded. *Answer:* That may be affirmed. That would be the correct method of getting at it, provided he has not used proper care and diligence." (18) In charging the jury as follows: "And where there are several charges, it is said in Murr v. Book, several distinct charges, some privileged and some not privileged, those that are not privileged are not justified by the charges which are privileged. Where an article is libelous in itself, is not privileged in its character, pub-

lishers failing to establish its truthfulness are liable for damages, and if the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the case must be given to the jury. Wherever one publishes words which injure the reputation of another he must be taken to have intended the consequence naturally resulting therefrom. Malice is an essential element, but whenever a wilful, unprivileged publication is made embodying the other qualities of libel, legal malice may be inferred. Falsehoods are never privileged, and reasonable cause to believe the libelous charge to be true is no defense for its publication. The defendant in this case admits the publication was untrue, and states the fact that the next morning, as was read to you from their next morning's paper, they attempted to correct the error they had made the day previous without any request on the part of Mr. Collins. This is not in any sense a privileged communication. It is not a report of a judicial proceeding. There were no proceedings against Mr. Collins in this court, and none shown to be. There was no suit in court against him. He had not been held to answer to the crimes stated, malicious mischief and cruelty to animals. He had not given bail for his appearance to answer such charges. He had not been arrested on a bail-piece, and was not then put to jail, was not in jail. So that none of the charges against him in this paper were true. That is admitted by the attempt to correct the next day after they saw they were not true."

George Nauman and *H. M. North*, with them *T. B. Holahan* and *Eugene G. Smith*, for appellant.—The article in question was a privileged communication: Briggs v. Garrett, 111 Pa. 404; Jackson v. Pittsburg Times, 152 Pa. 406.

A reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man to believe that the party was guilty of the offense, is the basis for a privileged communication: Coates v. Wallace, 4 Pa. Superior Ct. 253.

The defendant had undoubted right to prove the circumstances upon which probable cause of belief was based, with the source of its information, as the latter bore on the good faith of its inquiry: Conroy v. Times, 139 Pa. 334.

J. Hay Brown and *W. U. Hensel*, for appellee.—The fact that

one man is arraigned in court for a criminal offense certainly gives a newspaper no right to say that some other man had been so arraigned: Odgers on Slander and Libel, 187, *248; Shelly v. Dampman, 1 Pa. Superior Ct. 115; Ingram v. Reed, 41 W. N. C. 123.

The case at bar does not respond to the criterion of privilege as laid down by THAYER, P. J., in McKay v. McClure, 3 W. N. C. 58. See also Godshalk v. Metzgar, 23 W. N. C. 541; Press Co. v. Stewart, 119 Pa. 584; Collins v. Publishing Co., 152 Pa. 187; Seip v. Deshler, 170 Pa. 234; O'Toole v. Pittsburg Post, 179 Pa. 271.

OPINION BY ORLADY, J., January 18, 1898:

The defendant published in its newspaper, the following: "Arrested on a Bail Piece. There are suits pending against R. C. Collins, John Cassidy and Behny Ross for malicious mischief and cruelty to animals, which will be tried at next week court. It was feared last evening that R. C. Collins would leave this locality and not turn up for trial. In consequence a bail piece was issued and he was committed to jail to await trial, unless he secures other bail." On the day after this publication, the following appeared in the same newspaper: "A provoking Error. 'Through a mix of names The Morning News yesterday stated that R. C. Collins, John Cassidy and Behny Ross had suits pending against them for cruelty to animals and malicious mischief, and that R. C. Collins had been arrested on a bail piece. Of course the public will understand that the item was a provoking error, and that such honorable and well known gentlemen are not defendants at all in any suit. The fact of the matter is that they are bondsmen for one Howard Lehman, who stands charged with the above offenses, and they surrendered their bail, taking out a bail piece, upon which he was arrested."

This action was instituted the same day that the alleged libel was published, and resulted in a verdict in favor of the plaintiff.

It was not contended on the trial that the article was maliciously published, and the defendant's second point was affirmed. "As there is no evidence that the defendant in this case had actual malice in publishing the article complained of by the plaintiff, compensation for the injury done to the plaintiff's character is the only legal measure of damages for which a recovery could be had in any event."

The evidence represented by the third, fourth, fifth, sixth, seventh, eighth, ninth and tenth assignments of error was properly excluded, as it was not pretended that the publication was based upon the knowledge of the facts as shown by the rejected testimony. A proper examination of the record suggested in the several offers, or knowledge by the defendant of the facts as stated, previous to the publication, would have made it designedly malicious. The excluded record would have shown conclusively that every material fact stated in the publication was untrue. The published retraction declares the plaintiff to be "an honorable and well known gentleman," and "of course the public will understand that the item was a provoking error." It is only when grave mistakes are made that newspapers so frankly declare that their news items are to be disbelieved. The only substantive question in the case was one of fact; was the publication of this admittedly erroneous statement made after a proper inquiry into the facts as therein detailed by the newspaper reporter?

The reporter was a member of the bar, and by reason of his professional learning had special knowledge of the place in which to make search for the truth or falsity of the facts given. The investigation of the case could have been as easily made, prior to the publication as after, and if made, would have disclosed the facts to be as stated in the retraction and as found on the trial. There was no pending proceeding against the plaintiff; he had not been held to answer; he had not given bail for his appearance; he had not been arrested on a bail piece; he was not put to jail; and no one feared or said he feared that "he would leave the locality and not turn up for trial;" all of which was discovered within a few hours after the publication, and the defendants admit each and every one of the prejudicial facts to be untrue.

The reporter relied upon a brief and hurried interview with an attorney, which, from his testimony was incomplete and confusing as to the true relation of the plaintiff to the case about which the inquiry was made. The conversation with the attorney, under the facts of the case, instead of furnishing a reasonable and probable cause for the publication rather made a further examination necessary to warrant a cautious man in believing that the plaintiff was guilty of any offense.

It was not a privileged communication. The authorities on which the appellant relies to sustain the argument that it was such, are considered in Coates v. Wallace, 4 Pa. Superior Ct. 253, and cannot relieve the defendant in this case. It is not sufficient that the defendant believed the facts to be true at the time of publication; the belief must have rested on reasonable and probable cause: Winebiddle v. Porterfield, 9 Pa. 137; Chapman v. Calder, 14 Pa. 365; Smith v. Ege, 52 Pa. 419.

In Godshalk v. Metzgar, 23 W. N. C. 541, an offer was made of a record of a suit, not in justification, but to show probable cause, and rejected; the court saying: "The reporter may have written this paragraph for the purpose of giving spice to his paper, or from other motives. It is true no offense is named, but it is idle to say that a statement that a man has been arrested and committed to the county prison in default of bail does not mean anything, it means a great deal, and is the more damaging from what it leaves unsaid." In Ingram v. Reed, 5 Pa. Superior Ct. 550, this court held, under facts more favorable to the defendant than in the present case, that even a cursory and superficial examination of a record, will not relieve or exempt from the charge of carelessness, when a more particular investigation of the record or case would have elicited the whole truth. The zeal of the reporter for sensational news must be curbed by a careful investigation of the accessible facts which would throw light upon the subject-matter before the reading public is furnished with that which may be proper.

This is the requirement of the law, and has been so recognized in all the cases in which the question has been raised. If indeed there were means at hand for ascertaining the truth of the matter of which the defendant neglects to avail himself and chooses rather to remain in ignorance when he might have obtained full information, there will be no pretense of any claim of privilege: Shelly v. Dampman, 1 Pa. Superior Ct. 115; Conroy v. Times, 139 Pa. 334.

In the light of the facts in this case, the numerous decisions of the Supreme and Superior Courts stamp the article "Arrested on a Bail Piece" as entirely outside the pale of privileged communications, and that it was published without reasonable or probable cause of the truth of its facts. The assignments of error are overruled and the judgment is affirmed.

James W. M. Newlin, Appellant, v. J. Edward Ackley.

Appeals—Weight to be given to referee's findings of fact.

The appellate court cannot go behind the findings of fact by a referee, except where the assignment of error is such as could be heard and determined if the trial had been according to the course of the common law,—before a jury. If the evidence is relevant and proper and the findings of fact are reasonably inferable therefrom, the court must, in the absence of fraud, accept the report as correct.

Argued Nov. 18, 1897. Appeal, No. 121, Oct. T., 1897, by plaintiff, from judgment of C. P. Bucks Co., Feb. T., 1893, No. 18, in favor of plaintiff as to a portion of his claim but dismissing plaintiff's exceptions to the report of the referee rejecting a portion of plaintiff's claim. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Foreign attachment. Before YERKES, P. J.

It appears from the record that this was an action brought by the plaintiff to recover from defendant for professional services two separate sums, to wit: one of $250 and one of $750. The case was referred to J. Percy Keating, who found for the plaintiff as to the former sum and no exception having been filed judgment became final as to the $250. As to the claim for $750 the referee reported that the services had been rendered and that they were reasonably worth $750, but that the conditions under which this contingent fee was to become payable had not been fulfilled, hence he rejected the plaintiff's claim for the $750.

Other facts appear in the opinion of the court.

Judgment for plaintiff for $250 with interest and costs. Plaintiff appealed.

Errors assigned among others were (6) In dismissing plaintiff's sixth exception to the referee's supplemental report, which was as follows: "That plaintiff excepts to that portion of the referee's second conclusion of law, which reads as follows: 'The burden of proving that such lack of ownership was through defendant's fault, and that the suit was definitely determined

in consequence, likewise rests with the plaintiff and this he has not established.' Because this finding is a mixed one of law and fact and is erroneous in law, and is not supported by the evidence in the cause." (11) In making the order confirming the referee's report.

The other specifications of error related either wholly or partially to findings of fact, and in view of the opinion of the Superior Court it is not necessary to set out same.

Alex. Simpson, Jr., with him *Henry Lear*, for appellant.—Where the means of proving the negative are not within the power of the party alleging it, but all the proof on the subject is within the control of the opposite party, who, if the negative is not true, can disprove it at once, then the law presumes the truth of the negative averment from the fact that such opposite party withholds or does not produce the proof which is in his hands, if it exists, that the negative is not true: Railroad Co. v. Bacon, 30 Ill. 347; Ins. Co. v. Kearney, 16 Q. B. 925; State v. Lipscomb, 52 Mo. 32; Sheldon v. Clark, 1 Johns. (N. Y.) 513.

J. Edward Ackley, with him *Ross & Long*, for appellee.—The contract was an entire one and until complete performance on his part the attorney cannot sue: Tenney v. Berger, 93 N. Y. 524; Whitehead v. Lord, 7 W. H. & G. 691; Weeks on Attorneys, secs. 255, 316; Cordery's Law of Solicitors, 62.

OPINION BY SMITH, J., January 18, 1898:

The plaintiff, an attorney at law, brought this action to recover for professional services performed for the defendant in certain legal proceedings instituted in the United States circuit court, and another suit in the court of common pleas of Philadelphia. Upon a reference under the act of May 14, 1874, the plaintiff's claim for services in the latter case was allowed, and his claim for services in the suit in the federal court was wholly disallowed. Exceptions to the report of the referee, filed on behalf of the plaintiff, were dismissed by the court below; whereupon this appeal was taken.

The proceeding in the federal court was by bill in equity, and the claim in dispute here is for services therein. The

ground of action is too indefinitely stated in the declaration, but is given more specifically in the plaintiff's "history of the case," as follows: "The proceedings on Mr. Ackley's bill in equity were to be conducted for said Ackley until final determination was had on the merits. That if the cause failed on the merits defendant was to be charged no further fee, but that if it was decided in his favor then he was to pay plaintiff (appellant) a liberal contingent fee, the amount of which was not agreed upon, but which should be based upon the increased value of said Ackley's stock." The plaintiff alleged that it became necessary to abandon the equity suit in the federal court, because the defendant failed to acquire, prior to its commencement, the personal ownership of the street railway stock which he held as administrator, and upon which the suit was based, as he had been instructed to do, and that this failure precluded a determination of the suit on its merits. "Wherefore he now sues for $750 as a quantum meruit fee, because Ackley's default prevented the original agreement being carried out." The claim before the referee was supported mainly by the plaintiff's testimony. The defendant, testifying in his own behalf, denied the agreement set up by the plaintiff, and also denied that the equity case was abandoned by reason of any fault or neglect on his part, and he further asserted that the equity suit has not been discontinued, but is still pending in the circuit court. Defendant further alleged that proceedings in the equity suit were voluntarily suspended by the plaintiff here, who entered into an agreement whereby its final disposition was made to depend upon the result of another action by other parties against the railway company, in another court, and that this action also remains undetermined.

The material questions in controversy would seem to be covered by the report of the referee. On the principal point he found that it was not shown that the equity suit in the federal court, upon which the plaintiff's claim is based, was defeated, or had to be abandoned, by reason of any default of the defendant, and that as a fact it is still pending, and may be proceeded with. He further reports that the plaintiff "was himself responsible for the circumstance which he relies on here as an obstacle to his earning his fee. He has accordingly failed to substantiate his claim." The plaintiff's claim is not based

on his fulfillment of the alleged contract with the defendant, but on the allegation that he could not fulfil it because of the defendant's default. He seeks, therefore, to recover for his services in its prosecution, without reference to the alleged agreement. He admits that this contract called for a trial of the equity case on its merits and a final determination by due course of procedure, to entitle him to further compensation; but he contends that this termination was defeated by the defendant, and therefore he was entitled to compensation for what he had done. But the referee found, on adequate evidence, that this contention, essential to plaintiff's recovery, was unwarranted by the facts. If the facts left the main question in doubt, it might be worth while to inquire whether the agreement entered into by the plaintiff, whereby proceedings were suspended in the equity suit until the final determination of another suit by other parties, and to abide the decision thereof, could be considered a final determination on the merits of the defendant's equity suit in the federal court, within the meaning of the alleged agreement, or, if without the concurrence of Ackley, it was within the scope of professional services at all. This agreement of the plaintiff postponing the equity case, was properly admitted in evidence by the referee. It tended to refute the gist of the plaintiff's claim under the issue raised by the evidence.

The controversy here involves questions of fact, and the paper-books of both parties would indicate that the referee heard a large amount of testimony and based his conclusions of fact and of law thereon. These conclusions would seem to be warranted by the evidence, and are therefore binding upon us. The power of the appellate court to deal with the facts has often been passed upon, and is clearly defined by the decisions. Thus, in Bradlee v. Whitney, 108 Pa. 362, it was said by CLARK, J.: "It has been frequently held in this court that a writ of error, in such case, brings up only questions of law. The court cannot go behind the findings of fact by the referee, except where the assignment of error is such as could be heard and determined if the trial had been according to the course of the common law —before a jury: Jamison v. Collins, 83 Pa. 359; Lee v. Keys, 88 Pa. 175; Brown v. Dempsey, 95 Pa. 243. If the evidence is relevant and proper, and the findings of fact are reasonably

inferable therefrom, we must, in the absence of fraud, accept the report as correct. We cannot consider the weight or the conflict of the evidence, or the veracity of the witnesses; this is the proper office of the referee, who performs the double function of court and jury. Such of the assignments of error as are directed solely to the facts must therefore be dismissed." Again, in Bidwell v. Railway Company, 114 Pa. 535, the same learned justice said: "The findings of fact by the referee are of course conclusive here; we cannot review them, they are as binding upon us as if they had been found by a jury in the form of a special verdict; the case must therefore be considered upon the assumption of the facts stated." This view, supported by all the authorities touching the point, but enunciates the distinction of the statutes regulating the procedure in referred cases. All the specifications of error relate, either wholly or partially, to findings of fact, except the sixth and eleventh. Even were we permitted to re-examine and refind the facts we could not do so because the evidence has not been printed. There is no error in the sixth or eleventh specifications.

The assignment of errors is overruled and the judgment affirmed.

Albert Snyder v. Steinmetz & Zearfoss, Appellants.

Province of court as to whether there is a question for the jury.

It is true that there is in all cases at law a preliminary question for the court whether there is any evidence of the facts sought to be established that ought reasonably to satisfy the jury. If there is evidence from which the jury can properly find the question for the party on whom rests the burden of proof, it should be submitted. If not it should be withheld from the jury.

Contract—Presumption of payment—Question for jury.

Where there is more than a scintilla of evidence in the case, from which a contract reasonably might be inferred, and a presumption of payment is not conclusive, and where if the testimony of the plaintiff is believed such contract is established and such presumption of payment is rebutted, the question of credibility is for the jury.

Contract—Implied contract—Extra wages—Rebuttable presumption of payment.

A contract to do extra work may be implied from a request to do such work, and the subsequent performance thereof and the presumption of payment arising from a delay in presentation of a claim for extra compensation, coupled with a regular receipting for regulation wages may be rebutted by evidence which is, if believed, clear, complete and convincing.

Argued Dec. 9, 1897. Appeal, No. 161, Oct. T., 1897, by defendants, from judgment of C. P. Northampton Co., May T., 1897, No. 71, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Appeal from magistrate. Before SCHUYLER, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $68.00. Defendants appealed.

Errors assigned were, (1) The charge of the court below is misleading when he says to the jury that "it is an undisputed fact that the plaintiff rendered the services for which he seeks to recover." The part of the charge where the court misleads the jury is as follows: "It is undisputed that beginning with the year 1895, on the 10th of December, and ending on the 29th day of March, 1897, the plaintiff cared for the horses of the defendants on Sunday. If this service was rendered to the defendants at their request, or at the request of either of them, or if it were rendered to the defendants without any request having been made upon the subject, if they knew that the services were being rendered, then, if there were nothing further in the case, the plaintiff would be entitled to a verdict at your hands for the value of these services. But these facts do not stand alone. It is contended on the part of the defendants that the plaintiff is not entitled to recover notwithstanding he rendered these services. The defendants deny that they requested the plaintiff or that either of them requested the plaintiff to render these services. They deny, at least impliedly, that these services were rendered for them, my recollection of the testimony being that they presumed the services were being rendered for the other drivers in their employ. If that be so then the plaintiff would

not be entitled to recover for the services, if there were nothing further in the case than that fact. If the plaintiff rendered these services without being requested to do so, and if he rendered them for the other employees of the defendants, and they got the benefit of the services, and the defendants did not get the benefit of the services, then the plaintiff would not be entitled to recover. . . . Now, I have said to you that if these services were rendered to the defendants at their request, or with their knowledge, that that standing alone would entitle the plaintiff to recover the amount which would compensate him for what those services were really worth. I leave all the facts with you. There are two facts and very important facts in the case that are wholly undisputed. The one is that these services were actually rendered." (2) In that part of their charge where they say: "The law upon this subject is this, that where settlements are made with employees from time to time, and the employee receives payment from time to time for the services which he has rendered, and does not complain that the amounts that he received were too small, but accepts them without objection and without any remonstrance on his part, I say the law applicable to that condition of things is that it is very strong evidence that the claim of the plaintiff is not well founded. I have been asked to take the case away from you upon that point. I do not think that the law goes that far, but the law goes this far, that, as I have said to you, the fact of the receipt of so many payments without any hint at all of any omission, is strong evidence that a superadded claim is not well founded." (3) In their answer to the defendants' point. The point and answer thereto are as follows: "1. The court is asked to say to the jury that the plaintiff's claim being for wages, and he having worked for the defendants from December 10, 1895, to March 29, 1897, and the defendants having paid him every Saturday night, and he never having demanded extra pay for Sundays, the presumption is that the wages paid him on Saturday night was in full of all moneys due him up to the time of such payments. *Answer:* If you find the facts as stated in this point, these facts furnish strong evidence against the claim set up by the plaintiff." (4) In their answer to the plaintiff's third point. The point and answer thereto are as follows: "3. If there be substantial change in the nature or amount of the labor

and service performed by the plaintiff, the law presumes that the plaintiff is entitled to extra compensation, proportioned to the increased labor and services. *Answer:* That point I affirm with the same qualification."

William Fackenthall, for appellants.—The payment to the plaintiff every Saturday was a payment in full for the week, was so considered and accepted by the plaintiff and the court should have said so to the jury: Webb v. Lees, 149 Pa. 13; 153 Pa. 436; McConnell's Appeal, 97 Pa. 31.

A. B. Howell, for appellee.—If the contract was not done by request, but the appellants knew that it was being done and received the benefits of it, the law implies an obligation on their part to pay for it: Swires v. Parsons, 5 W. & S. 357; Curry v. Curry, 114 Pa. 367.

The presumption of payment in this case is but a presumption of fact and may be rebutted: McConnell's Appeal, 97 Pa. 31.

If there be more than a mere scintilla of evidence in support of the appellee's case, even though it be weak, it is an error for the court not to submit it to the jury: Patterson v. Dushane, 115 Pa. 334; Express Co. v. Wile, 64 Pa. 201; Bank v. Wireback, 106 Pa. 37.

OPINION BY BEAVER, J., January 18, 1898:

The plaintiff, a driver of a horse which he attended only during working days, being in the employ of the defendants at a stipulated rate of wages, which were paid at the end of each week, alleged that one of his employers had handed him the keys of the stable in which the four horses belonging to the defendants were kept, saying "You take care of the horses and feed them and I will make arrangements with you in a day or two." This was immediately after another employé in the service of the defendants, who had general charge of the horses and their exclusive care on Sunday, left that employment.

As was said by the court below, it was "undisputed that beginning with the year 1895 on the 10th of December and ending on the 29th day of March, 1897, the plaintiff cared for the horses of the defendants on Sunday." This was testified to by

the plaintiff, by one or more of his co-employees and by others who had knowledge of the facts. It was not disputed. One of the defendants admitted his knowledge of the fact that the plaintiff was doing the work for which he claimed but added, by way of explanation, that he supposed he was doing it for and under some arrangement with the other drivers. There was no denial and no attempt at denial of the fact that the plaintiff actually did the work.

The defense was twofold: First, that the work was not done for the defendants under any contract, either express or implied, and that, therefore, they were not liable to pay for the same; and, second, that the weekly payments made by the defendants and accepted by the plaintiff raised the presumption "that the wages paid on Saturday night was in full of all moneys due him up to the time of such payments."

It is not claimed by the plaintiff that there was any express contract between him and the defendants for the extra work for which he claims in the present suit. The contract must be inferred from the alleged request made by one of the defendants, when the keys were delivered to the plaintiff, to take charge of the horses and that he would make an arrangement in reference thereto in a day or two, and from the fact that plaintiff entered upon and continued to perform the extra work which the alleged employment contemplated and imposed. It is not alleged that such an arrangement ever was actually made. The plaintiff could recover, therefore, if entitled to anything, only what the services rendered in pursuance of this alleged request were reasonably worth. As to their value there was ample evidence for the consideration of the jury.

The presumption of payment, raised by the facts in evidence, was twofold: First, that arising from the delay in making demand for payment for the alleged extra services, until the plaintiff's discharge; and second, from the acceptance every week of the regular weekly wages which were paid subsequent as well as prior to the alleged employment for extra work, for which the plaintiff claimed.

In McConnell's Appeal, 97 Pa. 31, where a domestic servant made no demand for the payment of wages, until after the death of her employer and several years after the services were rendered, it was held that this delay raised a presumption of pay-

ment, but it was said by Mr. Justice PAXSON who delivered the opinion of the court, "It is, however, a presumption of fact merely and liable to be rebutted." In Webb v. Lees et al., 149 Pa. 13, relied upon by the appellants, it was held that "When an employee is shown to have accepted wages from week to week for a period of months, at a rate in accordance with his own returns of time, it is convincing evidence that he was to be paid according to time, and not only should it be so set before the jury but the jury should not be permitted to disregard it in the absence of an explanation equally clear, complete and convincing and made out by evidence that does and ought to carry conviction." The facts in both of these cases were, however, different and easily distinguished from those which we are considering. The evidence in the present case was such as was necessarily submitted to the jury. If believed by them, as it evidently was, it rebutted the presumption of fact raised by the delay in making the demand and was sufficiently convincing to satisfy the jury that the weekly envelope payments had not contained the wages earned by the plaintiff in the extra work alleged by him to have been done on Sunday in the stables of the defendants for their benefit. The testimony of the plaintiff as to the employment by one of the defendants was specific, the fact that he did the work was clearly proved and seems to have been known by both the defendants, Steinmetz testifying on cross-examination that the fact was communicated to him by his partner, and the plaintiff's explicit statement was evasively met by Steinmetz in his cross-examination. There was, therefore, much more than a scintilla of evidence which could not be withheld from the jury: Patterson v. Dushane, 115 Pa. 334. It is true that "there is in all cases at law a preliminary question for the court whether there is any evidence of the facts sought to be established that ought reasonably to satisfy the jury. If there is evidence from which the jury can properly find the question for the party on whom rests the burden of proof, it should be submitted. If not, it should be withheld from the jury:" McKnight v. Bell, 135 Pa. 358; but there was evidence in this case from which a contract might be reasonably inferred and the presumption of payment was not conclusive: Weaver v. Craighead, 104 Pa. 288; Cover v. Manaway, 115 Pa. 338. If the testimony of the plaintiff was

to be believed, the jury could well find in his favor and the question of his credibility was entirely for them.

The instructions of the trial judge in the court below as to the implied contract under which the plaintiff sought to recover and as to the effect of the receipt of his weekly wages were not unfavorable to the appellants; and, taking the charge and answers to points together, fully and fairly covered the case.

The judgment is, therefore, affirmed.

The R. Rothschilds Sons' Company, a corporation incorporated and doing business under the laws of the state of Ohio, Appellant, v. E. F. McLaughlin.

Province of court as to whether there is question for jury.

There is in all cases at law a preliminary question for the court whether there is any evidence of the facts sought to be established that ought reasonably to satisfy the jury; if there is evidence from which the jury can properly find the question for the party on whom rests the burden of proof, it should be submitted. If not, it should be withheld from the jury.

Evidence — Parol evidence to reform written contract — Quantity and quality.

To reform or contradict a written contract the evidence of fraud or mistake must be sufficient to move the conscience of a chancellor to reform the instrument; that is as to quantity, there must be the testimony of two witnesses or one witness with corroborating circumstances equivalent to a second, and as to quality, the evidence must be clear, precise and indubitable.

Province of court and jury—Inadequate charge as ground for reversal.

Where the trial judge fails to give the jury proper instructions as to the vital question in the case and either entirely overlooks or disregards the same, it is ground for reversal.

Argued Nov. 18, 1897. Appeal, No. 120, Oct. T., 1897, by plaintiff, from judgment of C. P. Delaware Co., June T., 1896, No. 141, on verdict for defendant. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Replevin. Before CLAYTON, P. J.

The facts sufficiently appear in the charge of the court below, as follows:

"This is an action of replevin in which the plaintiff, when he issued his writ, claimed to be the owner of certain barroom fixtures which he says he leased to Mr. McLaughlin. The real transaction between the parties was in the nature of a conditional sale. The plaintiffs were willing to sell the fixtures, the title to remain in them until they should be paid for; that is the transaction between the parties, and it was a lawful transaction; the law permits agreements of that kind. It is in the nature of a conditional sale between the parties; that is to say, the plaintiff agreed to lease these articles for what they call a rent, and after a certain amount of rent shall be paid equal to the value of the articles, then the title was to pass to Mr. McLaughlin and not before. So, you see, the whole question for you is, Has the article been paid for? If it has, then the title at the time of the issuing of this writ was in Mr. McLaughlin, and he is entitled to your verdict. If the articles have not been paid for then the title was in the plaintiff, Rothschilds. Now, whether the full price has been paid or not, will depend upon all the circumstances of the cause.

The defendant alleges that they did not send him the article he purchased; that they sent him an inferior article, worth much less, and, as he had paid $100 down, and had paid $50.00 on the freight, or at the time it was delivered, he kept the articles with the understanding that they should make good to him what they represented the articles to be, or with the intention upon his part to set off the difference in value between the article he received and the article he was to receive. I say to you that under the operation of this peculiar action he has the right to do it. The action of replevin in Pennsylvania is an equitable action. It will lie in every case to test the title to personal property. The operation of the action of replevin is to settle the title to personal property, and the title to this property is in Mr. McLaughlin if Mr. McLaughlin has paid for it. If he has not paid for it the title is in the plaintiff, Rothschilds, and Rothschilds will be entitled to your verdict, and his verdict will be the value of the property. As a rule, all other circumstances

being equal, what the party agrees to pay for a certain article is its value; but if the article contracted for was not sent, if an inferior article was sent, then there is an implied agreement only to pay the value of the inferior if the man accepts it and within a reasonable time makes his claim. If, therefore, you shall find, and the first question will be for you, did Rothschilds send Mr. McLaughlin an inferior article? Did he send the article that Mr. McLaughlin bought from him? If he did not, what is the difference in the price? That is the whole question. Now you will have no difficulty in regard to that. You will consider first whether the article that was received by Mr. McLaughlin was the article that he contracted for. If you find that it was, then the contract price is what your verdict should be, less what has been paid; and, in that event, your verdict would be for the plaintiff for $301.20. If you come to the conclusion that the Rothschilds did not send the article that was bargained for, if you find that he sent an inferior article which was worth less money, then the implied contract would be that the title should vest in Mr. McLaughlin as soon as he paid what the article was reasonably worth; and, if you find that it was reasonably worth less than the article that he agreed to purchase, then just what that is worth is what your verdict should be, deducting what has been paid. As I understand—what amount has been paid?

Mr. Baker: $330.

The Court: $330 has been paid, and Mr. Gray and Mr. McLaughlin say that the article received was not worth more than $330. If that is so and the bar received was not the one agreed to be leased, then the defendant is entitled to a verdict. If you find that the article sent was not the article bargained for, and that it was worth only $320 or $330 instead of $600, then, as the $330 has been paid the title is in Mr. McLaughlin; he has paid for what he got. But if you find that they sent on to him the article he contracted for, if they kept their contract with him, then the price of the article purchased is the $600 agreed upon between the parties, and as $330 has been paid there will be $270 due. Now the plaintiff was entitled to have that money at the time that his action was brought, at least; and therefore he should have damages for the detention, which, in this case, should not be more than six per cent, which would

amount in this case to $301.30. Their claim, I say, is for $301.30, including the damages for the detention under the allegation they have sent what they agreed to furnish, and for that that is what they are entitled to, and if they have not, then you will deduct from the $301.30 whatever you think the difference is between the article contracted for and the article that was sent.

Now, gentlemen, that is all the light that I can give you upon this case. The question is reduced to a simple point. Consider these two questions that I have laid before you, and if you come to the conclusion that the plaintiffs here have carried out their contract and have furnished Mr. McLaughlin with the fixtures he contracted for, then there would be due to the plaintiff the sum of $301.30. If, on the other hand, you find that they did not send him the article he bought, and that under the circumstances the best that he could do was to keep what they did send him, then he is only to pay what the article was reasonably worth, and it will be for you to say what deduction should be made if you should so find.

The contract and letters offered in evidence are sent to the jury.

Verdict and judgment for defendant. Plaintiff appealed.

Error assigned among others was (22) the charge as a whole failed to give the jury instructions as to their duty in the case, and left them in ignorance of the law applicable thereto.

A. B. Geary, for appellant.—Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement: Thorne, McFarlane & Co. v. Waflein, 100 Pa. 519; Baer's Appeal, 127 Pa. 360; Irvin v. Irvin, 142 Pa. 271; Wodock v. Robinson, 148 Pa. 503; Hoffman v. Railroad Co., 157 Pa. 174.

The only ground upon which the court could submit to the jury the power to find that the plaintiff did not send the article contracted for would be that there was sufficient evidence of alteration of the contract or evidence of fraud clear, precise and indubitable and so direct and clear that a chancellor would reform the agreement, anything short of this ought not to be submitted to the jury: McGinity v. McGinity, 63 Pa. 38; Rowand

v. Finney, 96 Pa. 192; Murray v. R. R. Co., 103 Pa. 37; Sylvius v. Kosek, 117 Pa. 67; McClain v. Smith, 158 Pa. 49.

If the charge is inadequate in its treatment of the question submitted, such defect will be ground for reversal: Young v. Merkel, 163 Pa. 513; Fineburg v. Railway Co., 182 Pa. 97. If no particular instructions be asked, the court is responsible for the general effect only of the charge; and in considering the charge the whole of it must be taken together. If, when so considered, it has a tendency to mislead, though no particular portion of it be erroneous, it is cause for reversal: Insurance Co. v. Rosenberger, 3 W. N. C. 16; Iron Co. v. Diller, 17 W. N. C. 6.

We respectfully submit that the charge was inadequate and misleading to the jury, and failed to present to them the real question for their consideration.

No argument or paper-book for appellee.

Opinion by Beaver, J., January 18, 1898:

Whilst it is always more satisfactory to us to have both appellant and appellee represented by counsel and to have, in most cases, written and oral arguments presented for our consideration, we are, nevertheless, enabled to reach a fairly satisfactory understanding of the position of the defendant in this case from the colloquies which occurred between his counsel and the court in the course of the trial below. The first impressions of the trial judge, as the case unfolded in the trial were correct and, if they had been adhered to and embodied in the charge to the jury, it is probable that this case would not have been presented for our consideration.

The plaintiff company and the defendant, on the 14th of January, 1895, in the city of New York, entered into a written agreement in and by which the plaintiff leased to the defendant certain bar fixtures, therein fully described, upon the terms and conditions set forth in the lease. This agreement undoubtedly constitutes a bailment and was so recognized by the court below. It is true that the trial judge speaks of it in his charge as being "in the nature of a conditional sale between the parties" but he clearly recognized the true character of the transaction in what follows: "that is to say, the plaintiff agreed to

lease these articles for what they called a rent and, after a certain amount of rent shall be paid, equal to the value of the articles, then the title was to pass to Mr. McLaughlin and not before." If there were nothing else in the case, the appellant would have little to complain of.

Twenty-two assignments of error are presented for our consideration. The twenty-second is as follows: "The charge, as a whole, failed to give the jury instructions as to their duty in the case and left them in ignorance of the law applicable thereto." The discussion of this assignment will practically cover all that need be said in regard to the case. As we remarked in Snyder v. Steinmetz, ante, p. 341, in which an opinion has been this day filed, quoting McKnight v. Bell, 135 Pa. 358: "There is in all cases at law a preliminary question for the court whether there is any evidence of the facts sought to be established that ought reasonably to satisfy the jury; if there is evidence from which the jury can properly find the question for the party on whom rests the burden of proof, it should be submitted. If not, it should be withheld from the jury."

Was there any evidence in this case which should have been submitted to the jury, from the consideration of which, under any circumstances, they could find for the defendant? The agreement of the parties was in writing, the defendant's testimony showing that, when executed in the office of the plaintiff in New York, the only persons present were the defendant himself and the agent of the plaintiff who is the subscribing witness thereto. It would seem also as if the defendant were the only person present, when the memoranda in the agreement, which constitute the description of the fixtures, were made. The effort was made to discredit and set aside the written agreement upon the theory and allegation that the fixtures shipped by the plaintiff to the defendant were not those which he purchased or leased. There was no effort to show that they did not correspond with the description contained in the written agreement. It was, therefore, incumbent upon the defendant at the outset to discredit the agreement which was in writing. This could only be done, under the circumstances, by proof of fraud or mistake. As has been held in very many cases, so familiar to the profession that they need not be recited here, the evidence of fraud or mistake must be sufficient to move the con-

science of a chancellor to reform the instrument; that is, as to quantity there must be the testimony of two witnesses or one witness with corroborating circumstances equivalent to a second, and as to quality the evidence must be clear, precise and indubitable. A number of cases relating to this subject are collected in Honesdale Glass Co. v. Storms, 125 Pa. 268. It is scarcely necessary to say, in view of what we have already said on this subject, that it is at least doubtful whether either in quantity or quality the proof in this case came up to the requirements of the law in reference to the contradiction of a written instrument by parol evidence on the ground of fraud or mistake. This goes to the root of the case and should have been distinctly passed upon by the court below, but there is not a word said in the charge in regard to a written agreement nor as to the rules under which it is allowable to contradict it. Nothing is said to the jury as to the measure and quantum of proof required for that purpose. Indeed the case was left to the jury as if the purchase had been made by a parol agreement, and the witnesses were permitted to testify, without reference to the written agreement, that the article shipped by the plaintiff and received by the defendant was not the article purchased.

Even if this had been so, what was the duty of the defendant, when the fixtures were received and the discovery made that they were not what he purchased? It was clearly his duty, either to refuse to receive the goods; or, having opened them before the mistake or fraud was discovered, to return them or offer to return them immediately. Instead of doing this, the defendant unpacked the fixtures, set them up in his place of business and used them continuously paying numerous instalments under the lease, apparently without objection, until the writ of replevin, which is the foundation of this suit, was issued by the plaintiff. The defendant seeks to avoid the discharge of this plain, legal duty by saying that he gave notice to the plaintiff's agent, his friend and witness, Gray; but there is nothing in the case, except the defendant's own allegation, that Gray was in any sense the agent of the plaintiff, and his testimony on the subject is very unsatisfactory and indefinite.

The court below failed to give the jury proper instructions as to the duty of the plaintiff in regard to the return or offer to return of the fixtures, when received by him, and did not allude

in any way to the measure of proof necessary to establish the agency of Gray. The vital questions in the case were, therefore, entirely overlooked or disregarded by the court in its charge to the jury and the twenty-second assignment of error, which we have quoted, must be sustained.

It is scarcely necessary to discuss in detail the various assignments of error. Enough has been said to indicate the general principles which should govern in submitting the case to the jury. These principles are fundamental, and if properly observed will doubtless govern in the admission of evidence as well as in the instructions to the jury.

The judgment is reversed and a new venire awarded.

F. A. North & Co., Appellants, v. Mrs. E. M. Yorke.

Practice, C. P.—Sufficiency of affidavit of defense—Conditional sale.

Under a contract, in form a bailment, but, as between the parties at least, a conditional sale, an affidavit is sufficient which, admitting a default in the payment of instalments of purchase money due under the contract, averred a surrender of the chattel in controversy, that it was at the time of such return worth more than the balance due by defendant thereon, and finally that the vendor plaintiff accepted the organ in full settlement and satisfaction of any claims against the affiant.

Argued Dec. 7, 1897. Appeal, No. 55, Oct. T., 1897, by plaintiffs, from judgment of C. P. Montgomery Co., Dec. T., 1894, No. 102, refusing judgment for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit for goods sold and delivered. Before SWARTZ, P. J.

The plaintiffs, by a written agreement in the form of a lease, sold to defendant a symphony organ and from time to time sold to the defendant certain rolls of music for use in said organ. The defendant having become in arrears and the terms of the alleged lease having fully expired, plaintiffs demanded a settlement of the arrearages of the alleged rental, which defendant could not make. During the pendency of negotiations the or-

gan and music were returned, and the plaintiffs brought suit to recover the alleged arrearages of rental.

Defendant filed an affidavit of defense as follows:

E. M. Yorke, defendant above named, being duly sworn according to law, deposes and saith:

That she has a full and complete defense against the whole of the claim on which suit has been brought against her in the above case, of the following nature, to wit:

That on or about March 31, 1891, said plaintiffs sold to her the certain organ referred to in plaintiffs' claim, conditionally upon her payment therefor of the sum of four hundred and seventy-five dollars ($475), in monthly instalments on said organ.

That said defendant paid between the 1st day of May, and the 28th day of January, 1893, on account of said monthly instalments the sum of one hundred and seventy-five dollars ($175) on said organ, and finding herself unable to pay the balance of said purchase money, surrendered and delivered said organ to said plaintiffs on or about July 31, 1893, and plaintiffs accepted the same; and the said defendant is advised that by said acceptance she was forthwith released from further liability on said contract of purchase.

And the said defendant further saith that at the time of the return to the said plaintiffs of said organ, the same was worth more money than the balance of the contract price for the purchase of the same after deducting therefrom the payments made by her, and that she verily believes and expects to be able to prove that said plaintiffs accepted said organ in full settlement and satisfaction of any claim they might have against her, by reason of her contract of purchase with them.

All of which facts defendant believes to be true and expects to be able to prove on trial of above case.

A former branch of this case was reported in 174 Pa. 349.

The court below discharged the rule for judgment for want of a sufficient affidavit of defense. Plaintiffs appealed.

Errors assigned among others were (1, 2) In discharging plaintiffs' rule for judgment for want of a sufficient affidavit of defense, and not making the same absolute. (3) In holding as follows: "The contract was in reality a conditional sale, but

the law allows these contracts to be clothed in the dress of bailments, and sustains them as such in the interest of both the vendor and vendee." (4) In holding that "the penalty for nonpayment is a redelivery of the organ to the vendor, and the repossession is a discharge of the penalty. The vendor could have proceeded against the defendant for the overdue instalments; he saw fit, however, to take the other remedy; either was complete in itself, and the plaintiffs in default could collect the money or retake the organ. The two remedies were not cumulative; they could not adopt both unless it was plainly expressed in the contract, or a necessary implication from its terms." (5) In holding that "at the end of the term, if the payments were made, the organ was the property of the defendant, without the further payment of a penny." (6) In holding that "taking back the organ in default of payments was a rescission of the contract, and an end of any personal obligation on the part of the lessee." (7) In holding that "the defendant says she returned the organ because she was unable to make the payments. This was a privilege as well as a duty under her contract. In default of any monthly payment the said lessee agrees to redeliver said organ to the party of the first part. Even if this provision was made for the protection of the lessors, and they alone could take advantage of it, still, as they accepted the organ, as alleged in the affidavit, it was a redelivery under the terms of the lease, because of default in payments."

Chapman & Chapman, with them *Joseph Fornance*, for appellants.—This affidavit does not set out any agreement between plaintiffs and defendant, either to accept said organ as a partial or a total satisfaction. It can be presumed that there was no such agreement, otherwise it would have been set out, and it is therefore the more necessary for affiant to set out the facts on which she bases her statement, that she "verily believes" the plaintiffs accepted said surrender in full satisfaction. Her averment of acceptance by plaintiffs, without anything to show how, when, or in what manner, is a statement of a legal conclusion, and insufficient: Bank v. Stadelman, 153 Pa. 634.

In holding that the contract is in reality a conditional sale, masquerading under the guise of a bailment, the learned court below has committed a serious error: Edwards' Appeal, 105 Pa.

103; Jones v. Wands, 1 Pa. Superior Ct. 269; Rieker v. Koechling, 4 Pa. Superior Ct. 286.

The contract contained the essential feature of a lease or contract of hiring, to wit: The provision for the return of the goods: Farquhar v. McAlevy, 142 Pa. 234.

Henry Pleasants, with him *Montgomery Evans* and *George W. Reed*, for appellee.—Either remedy was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative; they could not adopt both unless it was plainly expressed in the contract, or a necessary implication from its terms.

Similar rulings were previously made by the Supreme Court in Campbell v. Hickock, 140 Pa. 290, Scott v. Hough, 151 Pa. 630, and Durr v. Replogle, 167 Pa. 347.

OPINION BY PORTER, J., January 18, 1898:

Agreements of the kind disclosed in this case usually come before the courts for interpretation in controversies between the vendor of chattels and creditors of the vendee. Here we are required to construe the agreement as between the original parties to it.

The form of the contract is one of hiring or bailment, but the parties evidently intended that the event should be an absolute purchase: Seanor v. McLaughlin, 165 Pa. 154. In construing this contract and in determining the rights and liabilities under it, we must look not so much to form as to substance and intention. The plaintiff under the form of a lease, in effect, sold to the defendant an organ on certain expressed conditions. Payment was to be made in periodic instalments covering a specified period. These instalments were called rent, but as between the original parties they were in fact payments on account of the purchase money. On the failure to pay any instalment the defendant agreed to redeliver the chattel to the plaintiff. On a failure so to deliver the plaintiff had the right to reposses himself of the chattel, should he so desire. In this case the defendant fell into default and did not immediately redeliver to the plaintiff. The plaintiff did not exercise his right to take possession but allowed subsequent defaults to occur, and did not at any time during the running of the con-

tract repossess himself of the chattel. The only construction that can reasonably be placed upon this course of action is that the plaintiff extended the time for the payment of the instalments.

At the expiration of the time when all the instalments should have been paid, the plaintiff was entitled to recover the total amount stipulated by the contract to be paid with interest. Failing to immediately demand this, the organ seems to have remained with the defendant for a considerable time. Being unable to discharge the balance of her indebtedness she avers "That she surrendered and delivered said organ to said plaintiffs on or about July 31, 1893." This was a right as well as an obligation under the conditions of the contract.

The affidavit contains the further averment: "That at the time of the return to said plaintiffs of said organ the same was worth more money than the balance of the contract price." She further avers that "She believes and expects to be able to prove that said plaintiffs accepted said organ in full settlement and satisfaction of any claims they might have against her."

While the affidavit might have been more specific in detail, yet we are satisfied that the averments are sufficiently set forth to prevent the entry of judgment, and we do not regard it as necessary at this stage of the cause to do more than indicate our views of the contract as above expressed.

The order of the court below discharging the rule for judgment is affirmed.

City of Chester v. Mary McGeoghegan et al., Appellants.

Jurisdiction, J. P.—Reduction of municipal claim by remission of the penalty.

A municipality having cause of action to recover a municipal assessment and penalty thereon, may throw off the penalty and thus bring the claim within the jurisdiction of an alderman.

Municipal law—Power to compromise claims.

Municipal officers may compromise claims or remit them in whole or in part when delay and expense may be saved by so doing; they are responsible at the proper time and place for so doing, but a debtor being sued as such is not in position to call them to an account.

Argued Nov. 16, 1897. Appeal, No. 20, Oct. T., 1897, by defendants, from judgment of C. P. Delaware Co., Sept. T., 1895, No. 226, in favor of plaintiff for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit on a claim for paving. Before CLAYTON, P. J.

The facts sufficiently appear in the opinion of the court.

The court entered judgment for want of a sufficient affidavit of defense for $298.74, plaintiff having omitted that part of its claim for penalty prescribed by the act of assembly. Defendants appealed.

Error assigned was in making absolute plaintiff's rule for judgment for want of a sufficient affidavit of defense.

J. V. McGeoghegan, with him *Charles A. Lagen*, for appellants.—The remedy given is not only specific, but it is the only remedy designated in the act for the adjudication of such claims: Campbell v. Grooms, 101 Pa. 481.

In all cases where a remedy is provided the directions of the act of assembly must be strictly pursued: Beltzhoover v. Gollings, 101 Pa. 293.

The plaintiff cannot reduce part of his claim and thereby give the justice jurisdiction: Collins v. Collins, 37 Pa. 387; McFarland v. O'Neil, 155 Pa. 265.

A. A. Cochran, for appellee.—Interest is simply an incident of debt overdue which a person may claim or not at his pleasure. It follows that he may remit a penalty for the same purpose: Quigley v. Quigley, 10 W. N. C. 388; Evans v. Hall, 45 Pa. 235.

OPINION BY WICKHAM, J., January 18, 1898:

The city of Chester had the right, under the Act of May 23, 1889, P. L. 272, and an ordinance passed in accordance therewith, to sue for, and recover from the appellants, a municipal assessment of $220.55, together with interest and a penalty of five per centum, amounting in all to $308.76.

Instead of suing for the latter sum, the city threw off the

penalty, amounting to $11.02, and brought suit before an alderman for the debt and interest only, the aggregate of both being less than $300. The only question before us is whether the plaintiff could give the alderman jurisdiction by waiving its right to the penalty, and thus bringing the claim below $300, the maximum amount for which an action could be brought before the magistrate.

We have no hesitation in holding that this could legally be done. In Evans v. Hall, 45 Pa. 235, it was decided, that while one cannot by relinquishing a part of his debt give a justice of the peace jurisdiction, he may accomplish that result by refraining from claiming interest, the reason assigned being that the interest is no portion of the debt proper, but merely an incident thereof. There is much stronger reason for saying that the penalty, in the present case, is no more than an incident of the indebtedness. Interest, where it can be claimed as of right, is now popularly regarded as an outgrowth of the debt and therefore practically a part of it, whereas a penalty is something collateral and foreign tacked on to the principal thing.

The appellants argue, however, that the city, because it is a municipality having its powers and duties defined by statute, cannot legally sue for less than the principal, with the interest and penalty attached. To this we cannot assent. The proper municipal officers may compromise claims, or remit them in whole or in part, when delay and expense may be saved by so doing, being responsible at the proper time and place for any breach of duty. The appellants are not in court as citizens defending the rights of the city, but as mere debtors refusing to pay a just debt, on the sole ground that the plaintiff might have sued for more. They cannot be heard to object, in this proceeding, that the city authorities have done what any private suitor might lawfully do, to secure a standing in the alderman's court.

Judgment affirmed.

M. Y. Belber *v.* M. Belber. Appeal of Mayer Alsberg et al.

Execution—Standing of judgment creditor to contest prior execution.

A judgment creditor whose execution has been issued on a transcript from the judgment of a magistrate, has no standing to resist the right of a prior execution creditor to take the fund out of court when an appeal has been regularly taken in due time from the judgment of the magistrate.

Judgment—Transcript filed pending time of appeal—Practice, C. P.

An appeal from the judgment of a magistrate regularly taken, ipso facto, destroys a judgment obtained by filing a transcript in the common pleas. A plaintiff cannot prevent this result, by hurriedly taking a transcript to the prothonotary's office, provided the defendant, within the time allowed by law, take and enter his appeal.

Argued Oct. 21, 1897. Appeal, No. 3, Oct. T., 1897, by Mayer Alsberg, from decree of C. P. No. 3, Phila. Co., Sept. T., 1896, No. 747, discharging rule to show cause why the sheriff should not pay the funds into court and for an issue. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, and PORTER, JJ. Affirmed.

Rule to pay the fund arising from the sheriff's sale on sundry executions into court, and for an issue to determine the material facts in dispute relating to the distribution of said fund.

The facts sufficiently appear in the opinion of the court.

The court below discharged the rule. Junior execution creditors appealed.

Error assigned was in discharging the rule for the payment of the fund arising from the sheriff's sale into court, and in refusing to frame issues to determine the material facts in dispute relating to the distribution of the fund.

Charles Hoffman, for appellants.—Upon the affidavit of a subsequent lien creditor that prior judgments are without consideration and for the purpose of hindering, delaying and defrauding creditors, the court, under the Acts of June 16, 1836, P. L. 755, and April 20, 1846, has no discretion but to award an appeal: Schwartz's Appeal, 21 W. N. C. 246.

John Monaghan, with him *David Phillips*, for appellee.—A transcript of the judgment of a justice of the peace filed in the common pleas, creates no lien upon the defendant's real estate, if an appeal be entered before the justice within the time limited by law: Hastings v. Lolough, 7 Watts, 540; Rubinsky v. Patrick, 2 Dist. Rep. 695.

OPINION BY WICKHAM, J., January 18, 1898:

The appellants obtained judgment before a magistrate against Mary Belber, on November 16, 1896, and three days later filed a transcript thereof in the court of common pleas No. 4, of Philadelphia county, having first issued an execution in the magistrate's court, to which there was a return of nulla bona.

The Act of June 24, 1885, P. L. 160, provides, "That in all cases where a judgment has been obtained before a justice of the peace, city recorder, magistrate or alderman, of this commonwealth, and no appeal or certiorari has been taken to said judgment, and a transcript of said judgment has been filed in the office of the prothonotary of the county where said judgment is obtained, such judgment shall thereafter be and have all the force and effect of a judgment originally obtained in the court of common pleas of said county." On the day the transcript was filed a fieri facias issued on the judgment thereby created, and a levy was made on personal property of the defendant, subject to the lien of a prior fieri facias for $812.35, issued from common pleas No. 3, in favor of M. Y. Belber. The sheriff, a day later, sold this property on both writs and another issued contemporaneously with that of the appellants in favor of a third creditor, realizing $440. The appellants, before the return day of any of the writs, presented a petition in common pleas No. 3, alleging inter alia, that the judgment in favor of M. Y. Belber was given without consideration, to hinder, delay, and defraud the petitioners and other creditors of M. Belber, and praying that the proceeds of sale should be ordered into court and an issue granted. On this petition the court granted a rule on the sheriff and M. Y. Belber to show cause.

An appeal, from the judgment of the magistrate in favor of the appellants, was taken by the defendant, M. Belber, on November 27, 1896, and filed the same day in common pleas No. 1. On November 28, 1896, the rule to show cause issued in com-

mon pleas No. 3, was discharged. On December 3, 1896, the defendant took a rule, in common pleas No. 4, to strike off the appellants' judgment entered on the transcript, which rule, after hearing, was discharged, for what reasons we know not, nor need we here inquire.

It will hardly be seriously contended that the taking and filing the appeal did not ipso facto annul the judgment. The proceedings on the appeal are de novo: Hastings v. Lolough, 7 W. 540; Felton v. Weyman, 10 Pa. 70. A plaintiff cannot prevent this result by hurriedly taking a transcript to the prothonotary's office, provided the defendant, within the time allowed him by law, take and enter his appeal.

If, by record evidence, the plaintiff in the first execution against Mary Belber was able to show that the appellants' judgment had ceased to exist, and this it seems was done, the appellants had no right to an issue, for they had lost their standing to claim, as against the first execution creditor, any part of the fund which was still in the grasp of the law. As Justice SHARSWOOD says, in Sheetz v. Hanbest's Executors, 81 Pa. 100, an execution creditor engaged in a contest regarding the distribution of the proceeds of a sheriff's sale may displace another creditor's lien by establishing "any matter of defense, arising subsequent to the judgment, which the defendant himself could do in an action of debt or scire facias upon it." A scire facias to revive may be defeated by proof of a collateral agreement that on the occurring of a certain event, to take place after the entry of the judgment and which has so taken place, the judgment shall have no farther efficacy: Hartzell v. Reiss, 1 Binn. 289; Bown v. Morange, 108 Pa. 69; or a discharge in bankruptcy, where the judgment was a provable debt, at the time of the adjudication, may be shown with like effect: Spring Run Coal Co. v. Tosier, 102 Pa. 342. So also release, accord and satisfaction, or payment may be successfully set up.

In the present case the appellants' judgment died on November 27, 1896, and their right to take out of court any part of the proceeds, realized from the sale of the defendant's goods, could be legally denied by any other creditor having a lien on the fund, the latter being insufficient to pay all the claims.

Decisions to the effect that property, sold on execution under a voidable judgment, or on a judgment appealed from, cannot

be reclaimed from the purchaser, rest on a well known principle not applicable here. Patterson v. Peironnet, 7 W. 337, cited for appellants, when analyzed, does not conflict with the views on which we decide the case in hand. All that was actually decided there was that the buyer of goods regularly sold on execution by the constable before appeal taken, was entitled to retain them. No question as to the disposition of the proceeds of sale between parties claiming as lien creditors arose or was considered. The case also differs from the present one in other respects.

We are of the opinion that had an issue been granted, M. Y. Belber might have successfully resisted the appellants' attempt to take any part of the fund out of court, hence there was no error in refusing the petition.

The order discharging the rule to show cause is affirmed, and appellant directed to pay the costs.

Estate of George Fitler, deceased. Appeal of David Fitler, Administrator of the Estate of Samuel Fitler, deceased.

Decedent's estate—In absence of creditors heirs may distribute among themselves.

The mere legal estate passes to the administrator of a decedent, the equitable descends upon the parties entitled to distribution. If there be no creditors, the heirs have a complete equity in the property, and if they choose, instead of taking out letters, may distribute it by arrangement made and executed amongst themselves.

Decedent's estate—Distribution by family settlement—Presumption as to nonexistence of creditors.

George, a son, the decedent, owed his father, Samuel, $2,000, represented by four bonds of $500. The son's widow as administratrix of her husband paid his four brothers $100 each on account of above debt in anticipation of distribution, and received two bonds, one in consideration of the payment, and one for services rendered by her individually to Samuel's wife. No letters were taken out on the estate of the father, until sixteen years after his death and long after the above family settlement, when one of the sons administered. The account of George's estate showed a balance of $478.51. The father's administrator recovered judgment

against the administratrix of his brother George for the $1,000, and sought to recover the full amount of the balance shown by her as administratrix of George. *Held*, that the decree against the administratrix was properly limited to the amount shown to have been in her hands, as such, less the $400 paid in distribution under the family settlement to the sons surviving the father, or in fact to $78.51, and that the lapse of sixteen years, with other circumstances, raised a presumption of the nonexistence of creditors of the father Samuel, which sustained the family settlement by way of informal distribution.

Argued Dec. 7, 1897. Appeal, No. 66, Oct. T., 1897, by David Fitler, administrator of the estate of Samuel Fitler, deceased, from decree of O. C. Schuylkill Co., Jan. T., 1897, No. 1, in distribution. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Exceptions to adjudication. Before DUNN, P. J.

It appears from the record that the question arose at the audit of the first and final account of Sarah Fitler, administratrix of the estate of George Fitler, at which audit David Fitler, as the administrator of the estate of Samuel Fitler, claimed the balance of $478.51, shown by the accountant to be in her hands. The court, DUNN, P. J., allowed the accountant credit for $400 theretofore paid to the heirs of Samuel Fitler, deceased, in pursuance of a family settlement, and awarded the balance, only $76.01, to the administrator of Samuel Fitler.

Other facts appear in the opinion of the court.

Errors assigned among others were (1) In dismissing the exception taken by the appellant to the adjudication, which was as follows: "The court erred in not regarding the judgment obtained by David Fitler against Sarah Fitler as final and conclusive between the parties." (2) In permitting accountant, under objection from appellant, to submit evidence in support of the following offer of accountant's counsel: Mr. Gerber: "I propose to prove by cross-examination of this witness, and by such other evidence as may be produced hereafter, that Sarah Fitler, the administratrix in this estate, paid to the heirs of Samuel Fitler, out of the personal funds in her hands, as administratrix of the estate of George Fitler, deceased, the sum of $400; that that sum was paid on account of the distributive shares of the four heirs of David Fitler (Samuel Fitler), and

that said sum was paid prior to the recovery of judgment in this suit, and on a bond given by George Fitler to Samuel Fitler, which said bond was surrendered to the said Sarah Fitler at the time that the said $400 was paid or else an indorsement made on it whatever it is. This for the purpose of not disputing the judgment in the court of common pleas, but for the purpose of showing partial distribution of the fund in the hands of Sarah Fitler, the administratrix and accountant, now before the court. It is also further proposed to prove by evidence to be produced hereafter, that tender of the whole amount of the money arising from the personal property of George Fitler, was made to the said heirs of Samuel Fitler, and a release requested from them, and it was refused; said tender being made either in the fall of 1890 or the fall of 1891." (7) In dismissing the seventh exception taken by the appellant to the adjudication of the court below, which was as follows: "The estate of Samuel Fitler, deceased, is not before the court and it is error to determine what the sons did or did not do at this time." (9) In deciding as a matter of law that the $400 paid by the defendant to the four sons of Samuel Fitler, deceased, should be allowed to her in full, which decision is as follows: "We find as a matter of law that the accountant is liable for the sum of $478.51, less $400 paid to David, John, William and Franklin Fitler. That the balance of the fund for which she is liable, after deducting the fees of the clerk of the orphans' court, must be paid to David Fitler, administrator of Samuel Fitler, deceased, on account of judgment March Term, 1895, No. 281." (11) In finding as a fact that there were no creditors of the estate of Samuel Fitler, which finding of fact is as follows: "Creditors of their deceased father (Samuel Fitler) could call upon them as executors, de son tort, but there are no creditors of Samuel Fitler to complain."

S. M. Enterline, for appellant.—A judgment having been obtained in the common pleas by the administrator of Samuel Fitler against the administratrix of George Fitler, the accountant's only remedy was to apply to the same court in which judgment was entered, to open or vacate it, or by writ of error or appeal: Otterson v. Middleton, 102 Pa. 78; McClain's Appeal, 180 Pa. 231.

The learned judge below was in error in deciding that there could be no creditors of the estate of Samuel Fitler. He evidently lost sight of the fact that no letters of administration were taken out on this estate until February 18, 1895, and that the statute of limitations of the creditors against the estate did not begin to run until then. In fact there are still remaining over three years' time for them to present their claim: Marsteller v. Marsteller, 93 Pa. 350; Levering v. Rittenhouse, 4 Wharton, 130; Amoles' Appeal, 115 Pa. 356; Riner v. Riner, 166 Pa. 617.

In Yorks' Appeal, 110 Pa. 69, Judge PAXSON (reversing the court below said): "The administration of estates in Pennsylvania is a legal, and not an equitable system, resting as it does upon statutes."

All assets of a decedent must come to the hands of his personal representative. A payment of money to any one else is a mispayment. Eisenbise v. Eisenbise, 4 Watts, 134, is directly in line.

G. H. Gerber, for appellee.

OPINION BY WICKHAM, J., January 18, 1898:

Samuel Fitler died in 1879. At the time of his death, his son George owed him $2,000, secured by four bonds of $500 each. George died in 1884 leaving the bonds unpaid. His widow, Sarah, took out letters of administration on his estate, and in September, 1887, filed her first and final account showing a balance nominally in her hands of $478.51.

When the usual proceedings to make formal distribution were had in the orphans' court, the administratrix proved that she had, by way of anticipation, paid to David, John, William, and Franklin Fitler, at their joint request, each $100, about the year 1890. These, her husband's brothers, were the only persons entitled as the heirs of Samuel Fitler, and as there were no creditors of his estate, they might legally divide it without administration. "No doubt the personal estate of a decedent vests in the administrator, but in trust for creditors and heirs or legatees. The mere legal estate passes to the administrator, the equitable descends upon the parties entitled to distribution. If there be no creditors, the heirs have a complete equity in the

property, and if they choose, instead of taking letters of administration, to distribute it by arrangement made and executed amongst themselves, where is the principle which forbids it?" Walworth v. Abel, 52 Pa. 370; Weaver v. Roth, 105 Pa. 408.

At the time these payments were made, the heirs surrendered to Sarah one of the bonds, because of the money paid them, and gave her another for services rendered her husband's mother during the last years of her life. The debt was thus reduced to $1,000.

In 1895, David Fitler took out letters of administration on the estate of Samuel, his father, and brought suit in the common pleas for the $1,000 against Sarah Fitler and her children, heirs of George, with a view evidently to obtain a lien on George's real estate. He succeeded only in securing judgment against Sarah as administratrix, having delayed too long in instituting proceedings to reach the land. This judgment was presented in the orphans' court by David, who claimed that Sarah should be required to pay thereon the whole amount of the balance of $478.51 shown by her account. The learned auditing judge very properly, as we think, held that the $400 advanced earlier should be regarded as a partial distribution, and that therefore only the sum of $78.51 remained actually unpaid. This amount, less the clerk's fee, was awarded to the judgment.

To have sustained David's contention would have resulted in compelling George's administratrix to pay the $400 twice to the heirs of Samuel, and made her liable for $878.41 instead of the true balance shown by her account.

But it is contended, for the appellant, that there was not sufficient evidence to justify the court in holding that there were no creditors of Samuel's estate to whom David as administrator might be liable. We think the circumstances amply warranted the learned auditing judge's conclusion. Samuel died May 29, 1879, and no letters of administration were taken out on his estate until February 18, 1895, and it does not appear that they were issued at the instance of any creditor. So far as we can see, they were secured by David merely to qualify himself to bring suit against George's estate. It is not likely that if Samuel were indebted, at the time of his decease, his creditors would have permitted his estate to go unadministered for nearly six-

teen years. The audit of Sarah's account took place on February 8, 1897, nearly eighteen years after Samuel's death. In the absence of any evidence or even intimation, at the audit, that any unpaid debts existed against Samuel's estate, the learned auditing judge, looking at all the circumstances, rightly assumed that they constituted prima facie proof that there were no such debts.

The appellant's position that Sarah purchased the two bonds from the heirs is not sustainable.

We have carefully considered all the assignments of error, in connection with the argument of the appellant's counsel, and deem none of them tenable.

Decree affirmed at the cost of appellant.

Commonwealth of Pennsylvania *v.* Dr. W. F. Mitchell, Appellant.

Criminal law—Refusal of new trial—Adequacy of charge.

The refusal to grant a new trial in a criminal case is not error where on the whole evidence, if believed, no reasonable doubt is raised as to the defendant's guilt and where the trial was conducted with great care, the attention of the jury directed to the measure of proof necessary and to the presumption of innocence, and where the evidence was submitted in a clear and impartial manner.

Criminal law—Evidence of letters, etc., indicating an expected meeting.

Where the crime of abortion is charged as incident to the meeting of two people, which is admitted to have taken place, evidence is admissible as tending to prove a step in the commonwealth's case of the fact that deceased addressed and mailed a letter to defendant, and subsequently wired him to meet her on a certain train; such evidence being admissible as tending to prove that these two persons had been in communication prior to the subsequent meeting on the train designated in the telegram.

Argued Oct. 20, 1897. Appeal, No. 85, April T., 1898, by defendant, from judgment of Q. S. Somerset Co., Feb. Sess., 1897, No. 14, on verdict of guilty. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Indictment for procuring abortion. Before LONGENECKER, P. J.

It appears from the record and evidence that the defendant, Dr. W. F. Mitchell, a practicing physician in Petersburg where he was known among the front ranks of his profession, was indicted on the above charge. The commonwealth produced evidence to show that a letter and telegram addressed to defendant had been sent by the deceased; that subsequently defendant called on the deceased at a hotel in Somerset; that deceased subsequently went to Pittsburg where she died in a hospital as the result of a criminal operation. Defendant was examined as to what took place at the interview at the hotel and the condition disclosed by his evidence appeared to be somewhat inconsistent with the testimonies of the authorities of the hospital.

Defendant denied having received either the telegram or the letter offered in evidence or that he had ever seen or heard from the deceased prior to having been called in by her in a professional capacity at the one interview at the hotel in Somerset. He further denied performing any criminal operation.

Verdict of guilty and sentence thereon. Defendant appealed.

Errors assigned were (1) In admitting evidence on the following offer and objection, Miss Lizzie Thomas, assistant in the post office at Scott Haven, Pa., being on the stand: "Mr. Ruppel: Let us have an offer. Mr. Kooser: Counsel for the commonwealth propose to prove by the witness on the stand that a few days before the 30th of December, 1896, near about Christmas, Miss Sadie E. Beal handed to the witness a letter addressed to Dr. Mitchell, Addison, Pa.; that that letter was mailed on the next mail going east, in the direction of Addison from Scott Haven. This to be followed by proof that the defendant was the only Dr. Mitchell resident at Addison in December, 1896, and to be followed by further proof that on the 30th of December, 1896, Sadie E. Beal telegraphed Dr. Mitchell to Confluence, Pa., in these words: 'Will be on 6 instead of 14, meet me,' signing instead of her own name 'S. E. B. Andrews.' Mr. Ruppel: This is objected to for the following reasons: 1. It is not shown that the Dr. Mitchell so addressed is the defendant, as there were no initials on the letter. 2. It is not proposed to be shown by proof on part of the commonwealth that Dr. Mitchell, the defendant, received such a letter. 3. The

defendant denies having received such a letter. 4. The evidence is irrelevant and immaterial. The Court: With regard to the testimony embraced in the offer tending to make out a step in the commonwealth's case, the evidence is proper for that purpose. We admit it and note an exception to the defense. The witness then testified as follows: 'Q. Did you know Sadie E. Beal? A. Yes, sir. Q. Who was with Mr. Madore in December last? A. Yes, sir. Q. Do you have any distinct recollection of her handing you a letter in the latter part of December, and if so, state about when it was and to whom addressed and to what point addressed. A. Well, I remember she came there one morning and handed me two letters, one addressed to Dr. Mitchell, and it was Somerset county; I don't remember the address, but think it was Addison, and I sent it on the 2 o'clock mail." (2) In admitting evidence on the following offer and objection: "Mr. Kooser: We offer in evidence all the exhibits identified . . . . the telegraphic message as written, signed S. E. B. Andrews, at McKeesport and sent to Confluence, and the message received at Confluence, and the entries on the registers of the Hotel Vannear in Somerset and of the Hotel Federal in Allegheny. Mr. Ruppel: We object to the telegram at McKeesport written by S. E. B. Andrews, as we got no such telegram. The Court: These exhibits are admitted. The exhibit marked 'F' which is objected to, is also admitted upon the testimony of the two operators, the one at McKeesport and the one at Confluence; the testimony of the one being that she sent the message, the substance of the message, and that of the other being that she received it, and the two messages being the same in substance and differing merely in the initials of the name attached, both being signed 'Andrews.' We think they are sufficiently identified as the same message. Note an exception to the defendant as to the McKeesport telegram." (3) In charging the jury as follows: "It is charged that the defendant met Sadie E. Beal on the 30th of December, by pre-arrangement, for the purpose of a criminal operation, the theory being that he had been previously advised by letter and understood the purpose of the meeting; that the message of the morning merely apprised him of her coming by a particular train, and that the operation was in fact performed in the few moments he is shown to have been in

her room at the hotel. The only evidence produced of any communication prior to the message received by him at Confluence on that morning, related to a letter which the young lady acting as assistant postmistress at Scott Haven testified Miss Beal had mailed at her office the latter part of December, and which was addressed to Dr. Mitchell, as she thought, at Addison, in this county. That letter she said she sent on the 2 o'clock east bound train that afternoon. With regard to a letter thus mailed and not shown to have been received, the law raises a mere presumption that the person addressed received it through the ordinary course of the mails. Against this presumption the defendant positively testifies that he never did receive it. If you believe him it takes out of the case all the significance attached to the alleged previous communication. If not, it might be a potent circumstance in construing the conduct of the parties on the meeting upon the train after the message from McKeesport. The facts connected with the message delivered to the defendant at Confluence have been very fully discussed on both sides, so I need not refer to them more at length."

(4) In charging the jury as follows: "After the girl died in the hospital and it was manifest an abortion was produced by the criminal act of some one, it seems suspicion was directed to this defendant, and he, to relieve himself of that suspicion, went to the district attorney's office and related to those present his version of the visit he had made to the unfortunate woman's room. It is around this statement that the most serious aspects of the case gather. Just what his statement of the affair then was, has become the subject of serious conflict in the testimony of those who were present. Four of them unite substantially in saying that he stated his examination of the woman's parts developed the fact that a rupture of the sack containing the fœtus had already occurred, that the waters had been draining from it and the discharge had in fact attained an offensive odor, while the os, or mouth of the womb, was already greatly dilated, as illustrated by the witnesses. These conditions, you will recall, are inconsistent with those described as found on her arrival at the hospital. It will probably puzzle you to understand how a woman with that degree of dilation of the neck of the womb, and nature struggling to expel the fœtus, could travel the many miles covered by Sadie E. Beal's journey that

day. However, it is only the statement which Dr. Mitchell is alleged to have made that day in which that condition is described, and the controversy is between the witnesses as to the manner in which he did describe it. On the part of the defense two witnesses were called who were present and they say no such dilation was exhibited as is stated by the witnesses of the commonwealth, but as they illustrated it with their hands the neck or mouth of the womb was almost closed. And the witnesses are also in conflict as to what he said about the condition of the waters coming from the woman and the nature of the discharge." (5) In refusing binding instructions for defendant. (6) In the answer to the third point of defendant, as follows: "That all evidence in this case relating to the alleged mailing of a letter by Sadie E. Beal to the defendant must be entirely ignored by the jury in the consideration and determination of the case. *Answer:* Refused." (7) In overruling motion for a new trial.

W. H. Ruppel and *W. H. Koontz*, with them *J. H. Uhl* and *John R. Scott*, for appellant.—The prima facie proof that depositing at defendant's office a properly addressed, prepaid letter, raises a presumption that it reached its destination in due course of mail, may be rebutted by showing that it was not received. In all the cases, however, that have been ruled by the Supreme Court in this state, the offer to prove the contents of the letter, accompanied the offer to prove the mailing of it: Ins. Co. v. Toy Co., 97 Pa. 424; Jansen v. McCorkell, 154 Pa. 323.

In the case now before the court, it was not proposed to show the contents of the letter, nor that it was received by the defendant, and the evidence in the case failed to show any previous acquaintance between Miss Beal and the defendant, and there was not a particle of evidence as to the contents of the letter. The evidence, however, went to the jury, from which they were led to infer that the contents of the letter were that the defendant should perform a criminal operation upon her.

No argument offered or paper-book submitted for appellee.

Opinion by Orlady, J., January 18, 1898:

The defendant was convicted on an indictment in which the crime of abortion was charged. Sadie E. Beal, an unmarried

woman whose residence was at Sand Patch, Somerset county, Penna., died in Allegheny City as the result of a premature birth which had been induced by unnatural causes. When the defendant learned through the newspapers that a criminal operation had been performed on her at a hotel in Somerset, he went to the district attorney's office and made a statement that he had gone to the room of Miss Beal in the Hotel Vannear, and there made an examination of her person after refusing to aid her in procuring an abortion.

The first and second assignments of error must be overruled. The contents of the letter were not offered, nor did the commonwealth propose anything beyond establishing the fact that a letter had been sent. That fact standing alone was harmless, but taken in connection with the telegram, and the subsequent meeting of the parties, it was an item of evidence worthy of consideration. So also was the telegram. The testimony of the sending and receiving operator proved that her message had been received by the defendant, and however slight that link in the chain was, it was yet entitled to be received in evidence with the letter for the very purpose as suggested by the learned trial judge,—"as tending to make out a step in the commonwealth's case."

The contents of the letter and the general meaning of the telegram were not material, but they tended to prove that these two persons had been in communication prior to their meeting on the train, and that this meeting was the result of design and not of accident. Proof of any system or means which would suggest a previous acquaintance would be subject to a like objection. It was not so much what was written as the fact that the defendant did not meet Miss Beal on the train as an unexpected stranger. In the authorities cited by appellant, the contents of the letter in each case was the important matter, and they do not apply under these facts.

The trial was conducted with great care, and the attention of the jury was fairly directed to the measure of proof necessary, and to the presumption of innocence to which the defendant was entitled, to wit: "Are there such circumstances proved beyond a reasonable doubt in each instance, as to make out the separate elements necessary to prove that the defendant was guilty of the crime charged?"

The evidence was submitted in a clear and impartial manner. The high character of the defendant and misstatements of the dead girl were of great weight, and whatever of doubt there was when the commonwealth rested, it was removed by the damaging admissions of the defendant. On the whole evidence there was not such doubt of guilt as to warrant a new trial and it was properly refused.

The judgment of the court below is affirmed, and it is now ordered that W. L. Mitchell be remanded to the custody of the keeper of the county jail of Somerset county, there to be confined according to law for the residue of the term for which he was sentenced, and which had not expired on the 5th day of August, 1897, and that the record be remitted to the said court, that this order may be effectual.

Albert P. Reger, Appellant, v. Manhattan Brass Company and William Wiler.

Measure of damages—Claim property bond in sheriff's interpleader.

The true measure of damages in a proceeding on a forthcoming claim property bond, given under sheriff's interpleader proceedings, where, on determination of the issue against the claimant, the goods have not been returned and the bond has thereby become forfeited, is the value of the goods, with interest, from the time the goods were to be forthcoming according to the tenor of the bond, and not from the date of the bond.

Argued Oct. 5, 1897. Appeal, No. 12, Oct. T., 1897, by plaintiff, from judgment of C. P. No. 2, Phila. Co., June T., 1891, No. 903, for want of a sufficient affidavit of defense against William Wiler. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Sci. fa. sur recognizance. Before PENNYPACKER, J.

This action is a scire facias sur recognizance given in sheriff's interpleader proceedings, in which the claimant had failed to sustain its title to the goods claimed. To the above scire facias the defendants, principal and surety, filed separate affidavits of defense. Plaintiff thereupon took rules for judgment for want

of sufficient affidavits of defense, and the court, by special order, entered judgment for the plaintiff for the full value of the goods claimed and costs, with interest from the return day of the vend. ex., to wit: October 7, 1895. The plaintiffs claimed judgment, however, for the value of the goods, with interest from the date of their taking, October 23, 1891, and for defendants' costs in the interpleader proceedings, which was refused, and from the entry of this judgment the plaintiff has taken this appeal.

The court below entered judgment in favor of the plaintiff for $1,634.24 with interest from October 7, 1895. Plaintiff appealed, alleging that judgment should have been entered in the penal sum of $3,200 to be released on payment of $1,611.74, together with interest thereon from October 23, 1891, and $22.50 defendants' costs in the interpleader proceedings and costs of suit.

Errors assigned were (1) In making the following order for judgment, to wit: "And now, July 8, 1896, it is ordered that judgment be entered in favor of the plaintiff against the Manhattan Brass Company in the sum of $1,634.23, with interest from October 7, 1895; that the plaintiff have leave to serve a copy of the amended scire facias upon William Wiler, the other defendant, and that the said Wiler have leave to file a supplemental affidavit of defense within one week from the time of such service of the copy of the sci. fa." (2) In making the following order for judgment, viz: "And now, October 7, 1896, it is ordered that judgment be entered in favor of the plaintiff against William Wiler in the sum or $1,634.24, with interest from October 7, 1895." (3) In not entering judgment in favor of the plaintiff, and against the defendants, the Manhattan Brass Company and William Wiler, for the sum of $3,200, to be released on payment of $1,611.74, together with interest thereon from October 23, 1891, and $22.50, defendants' costs in the interpleader proceedings, and costs of suit.

M. Hampton Todd, for appellant.—The plaintiffs are entitled to compensation, and the only means by which they can obtain compensation is to give them the value of the goods of which they were deprived, with interest from the date of the unlawful claiming: O'Neill v. Wilt, 75 Pa. 266.

The measure of damages contended for here is sustained by the somewhat analogous proceedings in replevin: McCabe v. Morehead, 1 W. & S. 513.

In McInroy v. Dyer, 47 Pa. 118, in an action of trespass the rule was laid down to be "what will make the plaintiff whole is the same in one form of action as in another. No distinction is recognized by the courts." To the same effect is Hill v. Canfield, 56 Pa. 454.

John Weaver, with him *John Sparhawk, Jr.*, for appellees.—Is the amount to be recovered upon the bond the value of the goods, with interest, from the date of the bond, or the value of the goods, with interest, from the time the goods were to be forthcoming, according to the tenor of the bond? Bain v. Lyle, 68 Pa. 60; Byrne v. Hayden, 124 Pa. 170; Sedgwick's Appeal, 7 W. & S. 260; Passavant v. Gummy, 32 W. N. C. 217; Whitesides v. Bordman, 39 Leg. Int. 347.

OPINION BY ORLADY, J., January 18, 1898:

The sole question in controversy in this case is concisely stated by appellant's counsel. What is the true measure of damage in a proceeding on a forthcoming claim property bond, given under sheriff's interpleader proceedings, where, on the determination of the issue against the claimant, the goods have not been returned and the bond thereby becomes forfeited? The plaintiff claimed to recover the value of the goods as appraised, $1,611.74, with interest from the date they were taken from under his execution, namely October 23, 1891, and the defendant's costs, $22.50 in the interpleader proceedings. Judgment was entered for want of a sufficient affidavit of defense, as contended for by the plaintiff, except that interest was allowed only from the day on which the venditioni exponas was returned, eloigned, namely, October 7, 1895.

The amount in dispute being the difference in interest on the amount of the judgment between the dates mentioned. The bond is in the penal sum of $3,200, and the condition is "that if the goods so levied upon and claimed as aforesaid, shall be forthcoming upon the determination of the issue to answer the said writ of execution, if the said issue shall be determined in favor of the said Albert P. Reger et al., or if so

many of them shall be forthcoming as shall be determined not to be the property of the said Manhattan Brass Company, then this obligation to be null and void, otherwise to remain in full force and virtue." The goods were taken from under the plaintiff's execution, and upon the filing of the claim property bond delivered into the possession of the Manhattan Brass Company, the claimants. As shown by the record, these goods were not forthcoming to answer the writ of venditioni exponas, and the sheriff made return of eloigned thereto. Compensation for being kept from what rightfully belongs to the plaintiff is not compensation for being kept out of the use of property, but for being kept out of the use of money. In cases of trover, replevin and trespass, interest on the value of property unlawfully taken or converted is allowed by way of damages for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed by the wrongful or negligent act of another may not be included in the damages: Sedgwick on Damages (8th ed.), sec. 316; McInroy v. Dyer, 47 Pa. 118. The reasons for the decisions being that in these instances there is an absolute conversion of the property, and the possession is taken from its former owner.

The judgment in this case is intended to represent the value of the property at the time it was subject to execution after the title to it had been disposed of in the interpleader proceeding.

A claim property bond is security for the damages which may be recovered. Nothing but money can be recovered on it. That part of the bond usually given by the defendant which provides for a return of the property is a nullity. The judgment, if a verdict is found for the plaintiff, can only be for damages. The bond is not simply that the goods shall be forthcoming, but in order to answer the execution of the plaintiff—the execution upon which the levy is made—not an alias execution with its necessary accompaniment of a new levy, but that identical execution or one following it up and perfecting it as a venditioni exponas: Bain v. Lyle, 68 Pa. 60.

On the giving of the bond the property is placed in the custody of the claimant. His custody is substituted for that of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant under the bond for its

delivery to the sheriff, the property is as free from the reach of other processes as it would have been in the hands of the sheriff: Hagan v. Lucas, 10 Peters, U. S. 400; Lantz v. Worthington, 4 Pa. 153; Tefft v. Sternberg, 5 L. R. A. 221 and notes; Curtis v. Ford, 10 L. R. A. 529 and notes; Parsons v. Hartman, 30 L. R. A. 98 and notes.

Had the goods in this case been held by the sheriff, the appellant's argument would not contend for interest earlier than October 7, 1895, and if the claimant's custody is a mere substitute for that of the law the conclusion reached is the same.

It has been repeatedly held that the execution and delivery of such bond does not discharge the goods from the lien of the execution or substitute the bond for the goods. It merely operates as a transfer of the goods from the custody of the sheriff to that of the claimant, pending the issue as to their ownership: Bain v. Lyle, supra.

If the condition of the bond is performed, the goods are sold by the sheriff, and the proceeds, less costs, applied to the execution creditor entitled thereto. On the other hand, if the condition is broken, the damage sustained by the creditor is the sum that would have been realized by the sale of the goods, and that presumptively is their value: Byrne v. Hayden, 124 Pa. 170. What sale is here meant? Certainly the one on the venditioni exponas which is under the levy of the original writ. The date of that sale could not have been earlier than October 7, 1895, prior to which time, under the decisions, the property was in the custody of the law. The value of the property is not questioned, and the amount of that part of the judgment is admittedly correct.

The judgment entered should have been for the penalty named therein to be released upon payment of the ascertained amount of damages occasioned by the breach of the condition, as stated in Byrne v. Hayden, supra, but it is not a reversible error as this court has full power to enter judgment for the proper sum, and in the proper form to make it conform to the statute: Carman v. Noble, 9 Pa. 366, 372; Act of June 24, 1895, P. L. 212; Commonwealth v. Yeisley, ante, p. 273, decided at this term.

It is not necessary to dispose of the first assignment of error, the second is overruled, and the judgment as modified in form is affirmed.

It is now ordered that judgment be entered in favor of the plaintiff and against the defendants, the Manhattan Brass Company and William Wiler, for the sum of $3,200 to be released upon payment of the sum of $1,611.74 with interest from October 7, 1895, and $22.50 the defendant's costs in the interpleader proceeding, costs of suit and of this appeal.

Kate Adam, wife of Abraham Adam, in the right of said Kate, *v.* Elizabeth Moll, Appellant.

Practice, C. P.—Amendment to statement, the cause of action being the same.

Plaintiff properly is allowed to amend his statement where the foundation of the action remains the same.

In the case at bar, being trespass for wrongful diversion of waters, the amendment was properly allowed; the water affected was the same; the means employed to effect the diversion are set out with more particularity in the first than in the second; the fact of the diverting and obstructing remained the same in each; the use of the supply of water is the same; and the alleged injury the same.

Waters and water courses—Obstruction and diversion—Prescription.

Where the obstruction of a water course is complained of, instructions to the jury are proper to the effect that if the natural flow of a water course had remained as alleged for twenty-one years then the plaintiff's right to the water became absolute. The testimony being contradictory as to the responsibility of defendant for the alleged diversion it was properly left to the jury, with directions to reconcile it if they could, and if not to determine on which side the truth lay.

Argued Nov. 9, 1897. Appeal, No. 162, Nov. T., 1896, by defendant, from judgment of C. P. Berks Co., Sept T., 1891, No. 54, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass for obstruction of water course. Before ERMENTROUT, P. J.

It appears from the evidence that the defendant and the plaintiff owned property on opposite sides of a public road. The defendant alleged that plaintiff diverted the water flowing

from springs located on defendant's land so as to change the point of discharge upon the land of the plaintiff. It was alleged by the plaintiff that the water was diverted from its natural course by a ditch dug by defendant's son. The testimony was conflicting as to what exactly was done by the son and also as to whether it was done with knowledge and consent of defendant herself.

Verdict and judgment for plaintiff for $1.00 and costs. Defendant appealed.

Errors assigned among others were (1) In overruling defendant's motion to strike out amended narr, as follows: "Mr. Stevens: Before the jury is sworn in this case the defendant asks the court to strike out the amended narr." Errors were assigned to the charge of the court commenting on the evidence, and especially, (5) In charging the jury as follows: "There was some testimony on the part of the plaintiff that her first experience in not having the use of this water was after Orlando dug that ditch, or, rather, five years ago. This is the language: 'Q. Was the water pretty regular there prior to five years ago? A. Always; that is the way it was up to five years ago; there was always water there. Q. How is it now? A. Now it is gone; there is none there.' She says the ditch was dug about five years ago. She says that she went to the old lady and complained about this thing, and that the old lady declined to do anything to give her relief. That evidence is submitted to the jury to find whether or not the old lady, the defendant, ratified, approved, assented to the act of Orlando in digging that trench. If the jury find from that evidence that the act of Orlando was ratified, approved and assented to by her, then she would be responsible, otherwise not." (7) In charging the jury as follows: "I have tried to make myself understood in this case. I have called the attention of the jury to the important points in the case. I will sum them up again. Did this stream flow so that water was delivered upon the land of the plaintiff? Did the defendant prevent that water from being delivered at the exact point at which it was accustomed to be delivered? If the defendant diverted it, and she failed to deliver that water back at that point, the plaintiff can recover; otherwise not. As to the damages, $1.00 and costs

will be just as effective as anything else. We always tell the jury in cases of this kind to find simply nominal damages."

Wm. Kerper Stevens, with him *Ira P. Rothermel*, for appellant.

John F. Smith, for appellee.

OPINION BY ORLADY, J., January 18, 1898:

The plaintiff and defendant are owners of adjoining properties which are separated by a public road, and so related by the natural conformation of the ground that the water rising and accumulating on the land of the defendant naturally flows across the public road onto the land owned by the plaintiff. This action was brought to recover damages alleged to be sustained by the plaintiff for the wrongful diversion of the water, which wholly deprived her of its use for necessary domestic and irrigating purposes. The original statement was amended by leave of court under objection which alleged that a new cause of action was thus introduced. An examination of the two statements satisfies us that there was no error in permitting the amendment, as the foundation of the action is the same in each; the water affected is the same; the description of the watercourse the same; the means employed to effect the diversion are set out with more particularity in the first than in the second; the fact of obstructing and diverting is unchanged; the use of the supply of water the same; and the alleged injury the same. The first assignment of error is not sustained.

The point submitted by the plaintiff embraced the material facts urged by the plaintiff, "If the jury find from the evidence that the stream of water in contention in this suit, flowed over the lands of the defendant in a defined ditch or channel along the ledge of the hill in the defendant's meadow onto the public highway and thence across the public highway and onto the plaintiff's land for a period of twenty-one years and upwards prior to March, 1891, then the plaintiff's right to have the water discharged at this point became absolute" and warranted affirmance by the court. The disputed question of fact was limited to one item,—was the defendant responsible for the diversion of the water? The jury was told "The testimony upon that point is somewhat contradictory, it is for the jury to reconcile

all the facts, it is for the court to say what the law is, not to pass upon the facts. You will look at every bit of evidence in the case and reconcile it if you can. If you cannot reconcile it, then you must make up your minds which is to be believed and act accordingly. Now, what is the alleged diversion? The alleged diversion is that a ditch was dug connecting the stream in such a manner as to change its course and take it down to a certain stone culvert through which it was discharged onto the land of the plaintiff. Who created that diversion if such was created? If the jury find from the evidence that the act of the son was ratified, approved and assented to by her then she would be responsible; otherwise not."

The facts were left entirely to the jury and the citation from the testimony of the defendant's witnesses was fairly made by the court. We fail to find anything in this record sufficient to warrant a reversal. The assignments of error are overruled and the judgment is affirmed.

Moncure Robinson, Jr., and Lydia M. B. Robinson, Appellants, *v.* The Pennsylvania Railroad Company.

Railroads—Eminent domain—Practice—Res judicata—Construction of charter.

The universal practice upon well settled law, under mode pointed out by the supplement to charter of the Pennsylvania Railroad Company, has been to assess all the damages done, or likely to be done, to the premises through which a railroad passes, including materials taken from adjoining land, and at a different time, although the bond, for appropriation of the strip for right of way, and the petition in the proceedings, set forth and are for damages for right of way only, and not for damages for materials so taken from adjoining lands.

Under said supplement, a different cause of action does not exist for materials so taken, and a petition for the appointment of a jury to assess such damages will, on motion, be stricken off, as res judicata.

Argued Nov. 15, 1897. Appeal, No. 160, Nov. T., 1896, by plaintiffs, from order of C. P. Chester Co., Miscel. No. 1905, dismissing petition for appointment of a jury of view. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Petition for jury of view to assess damages for materials alleged to be due by the Pennsylvania Railroad Company. Before WADDELL, P. J.

It appears from the record that plaintiffs' petition filed July 6, 1896, was as follows:

The petition of Moncure Robinson and Lydia M. B. Robinson respectfully represents:

"That the Pennsylvania Railroad Company, a corporation duly incorporated and existing under the laws of the Commonwealth of Pennsylvania, heretofore surveyed, laid out, and constructed a branch line of railroad through and upon the lands of your petitioners, in the township of Tredyffrin, in said county, and in so doing said company took, used and occupied a strip of land containing about $7\frac{315}{1000}$ acres, more or less, which strip of land is particularly described by metes and bounds in a certain petition filed by said company in this court on March 26, 1895, wherein said company requested the appointment of five persons as viewers to assess the damages done to the petitioners by reason of the entering upon and occupation of said strip of land.

"That said company, in the construction of said branch line, entered upon the land of the petitioners adjoining and in the neighborhood of the strip above referred to, and quarried, dug, cut, took and carried away therefrom large quantities of stone, gravel, clay, sand, earth and other suitable materials necessary and proper for the construction and maintenance of said line.

"That your petitioners and the said company have endeavored to agree, but cannot agree, upon the compensation to be paid for the damage done in consequence of the quarrying, digging, cutting, taking and carrying away of the materials aforesaid.

"Wherefore, your petitioners pray the court to appoint as viewers five disinterested persons, and fix a time not less than twenty or more than thirty days thereafter, for said viewers to meet upon said premises, and to order and direct that said viewers, having been first duly sworn or affirmed by some power competent to administer oaths, faithfully, justly and impartially to decide and true report to make concerning all the matters and things to be submitted to them, and in relation to which they are authorized to inquire, and having viewed the said premises, to estimate and determine what damages have been

sustained by the petitioners by reason of the quarrying, digging, cutting, using and carrying away of the materials aforesaid."

On July 6, 1896, on motion of defendant's counsel a rule was granted on the above-named petitioners to show cause why the petition should not be dismissed. On September 7, 1896, the railroad company, defendant, filed its answer. On October 12, 1896, the court made the above rule absolute.

Other facts appear in the opinion of the court. Plaintiffs appealed.

Error assigned was dismissing the petition filed by the appellants.

C. H. Krumbhaar, for appellants.—The decree of the learned court below amounts to the sustaining of the demurrer to the petition of the appellants. The record properly discloses no more than a petition by the appellants for the appointment of viewers and a rule to dismiss the same. If it was proper for the court below to dismiss the petition of the appellants for deficiencies appearing on the face thereof, the decree below was right. Otherwise it was clearly wrong. The answer filed by the appellee, and the testimony heard on the return of the rule, cannot be considered in this court, and should not have been in the court below. They are not, properly speaking, a part of the record. They neither add to nor take away from the sufficiency of the petition of the appellants.

The bar set up by the appellee is an alleged former recovery, an assertion that the damages claimed in this proceeding for materials were, or ought to have been, and therefore, in contemplation of law, actually were, included in the judgment rendered for original land damages. Even in an affidavit of defense where res adjudicata, or former recovery, is set up as a defense, the former judgment must be set forth in the affidavit of defense ipsissimis verbis. So has said the Supreme Court of Pennsylvania: Richards v. Bisler, 3 W. N. 485.

The right to have damages assessed for taking materials is specially provided for in the charter of the company. The first section of the company's charter (Act of April 13, 1846, P. L. 312), confers upon the company three distinct powers as follows: (*a*) To "survey, ascertain, locate, fix, mark and determine"

the route of the road. (*b*) To "lay down, erect, construct and establish a railroad" on the route determined. (*c*) To "enter upon any lands adjoining, or in the neighborhood of the said railroad so to be constructed, and to quarry, dig, cut, take and carry away therefrom any stone, gravel, sand, earth, wood, or other suitable material necessary or proper for the construction of said railroad." The fourth section of the Act of March 27, 1848, P. L. 273, which act is a supplement to the charter of the company, also clearly indicates that the taking of materials is a separate and distinct matter from the taking of the land for the right of way.

It is incumbent upon the jury to set out in their report the quantity, quality and value of both the land taken and the "materials" as separate items: Reitenbaugh v. R. R. Co., 21 Pa. 105; Pa. R. R. v. Bruner, 55 Pa. 318.

The proceeding for the assessment of these damages was begun by the company, and the jury as a matter of law had no authority to take into consideration anything except what the petition described.

The reason why the report of the jury should be specific and in the line of the requirements of the act, is stated in Zack v. Railroad Co., 25 Pa. 394, in these words: "It is important, in reviewing a cause tried out of the general course of the law, to see what matters have been inquired of, that it may be known that the cause has been fully and rightly considered."

The same reasoning is applied in the case of Phila. & Erie R. R. v. Cake, 95 Pa. 139.

But aside from this position, which goes to the merits of the case, the question raised by the company cannot be considered in this summary manner.

The answer to the present petition sets up, in substance, that damages have been paid for the injury described in the petition and the verdict in the former proceeding, its payment and satisfaction of record are stated as a bar to the right to have a jury appointed.

All this, however, is matter of defense. It does not justify the court in refusing to appoint a jury. If the company has already paid the damages now claimed, the jury of view will so determine, and the jury to try the case on appeal has like authority. This question is for them, not for the court. A pre-

cisely similar question has been passed upon in Herner v. R. R. Co., 1 Pa. C. C. 43; Updegrove v. R. R. Co., 3 Pa. C. C. 74; Fulmer v. R. R. Co., 1 Pa. C. C. 46.

John J. Pinkerton, for appellee.—In the trial of this cause before a jury of the common pleas, under the pleadings, every species of demand enters, because the measure of damages is the difference between the market value of the land before and after the taking.

In estimating the damages to a landowner, caused by the construction of a railroad, the rule as to the measure of damages declared by Judge GIBSON in 1821, has, ever since, been recognized and followed: Schuylkill Navigation Company v. Thoburn, 7 S. & R. 411; Railway Co. v. McCloskey, 110 Pa. 436.

The verdict of the jury in this case was for $24,057.67, and it is to be presumed that every form of damage entered into it: Del. & Lack. Co. v. Burson, 61 Pa. 369, 381.

The acceptance by the plaintiffs, of the amount awarded by the verdict of the jury, and satisfaction of the judgment entered thereon, is a bar to any future recovery for damages sustained by reason of the construction and maintenance of this railroad: Hoffeditz v. R. R. Co., 129 Pa. 264.

The claim for damages for materials taken in the construction of the railroad was embraced in the pleadings of the case tried in the common pleas; it might have been recovered in that suit, and, for these reasons, cannot be recovered in a second proceeding: Hess v. Heeble, 6 S. & R. 57.

The question will then be, how far have the jury in the first action tried, professed to pass on the matters put in issue by the pleadings? It is the duty of the jury to find the whole issue, and if they fail in this, their verdict is bad.

The matter I apprehend, depends not on the nature of the demand as it appeared in the evidence, but on the manner in which it was set out in the declaration.

If a verdict, finding several issues, be produced in evidence, the opposite party will not be allowed to show that no evidence was given on one of the issues, and that the finding was indorsed on the postea by mistake, the record being conclusive that the fact was as it is therein stated.

Whether the present cause of action had been inquired into, was not the question, but whether the cause of action contained in the declaration was the same as that laid in the second suit: Carvill v. Garrigues, 5 Pa. 152.

C. H. Krumbhaar in reply.— The proceedings being statutory must be strictly followed: Fehr v. Schyl. Nav. Co., 69 Pa. 161; Koch v. Williamsport W. Co., 65 Pa. 288.

The proceedings being special, do not come within the ordinary power of the judge as such, but must be exercised by him under the statute: Lewis v. St. Paul Ry. Co., 58 N. W. Rep. 580; 5 So. Da. Rep. 148.

The proceedings provided by the charter meant a trial by jury. A trial would have given appellants an opportunity to meet defense of former recovery, and not have exposed them to the danger of being cast out of court on ex parte affidavit.

The claim for materials was not embraced in the pleadings.

A plea of "not guilty" in trespass quare clausum fregit raises only the issue declared in the narr. The petition, in the present instance, takes the place of the narr; otherwise, what issue would have been presented? What close broken? The close, of course, described in the petition the right of way sixty-six feet in width. It is the statement in which the whole and only cause of action is embraced. Without it the proceedings would have been a hollow nothingness.

The agreement, in question, to put the cause at issue, was only an agreement that the said cause shall be deemed at issue with like effect as though a declaration in trespass quare clausum fregit had been filed by the plaintiffs, and a plea of not guilty filed thereto by the defendant. The cause referred to was, of course, the cause of action contained in the petition, which was the basis of the proceeding instituted by the appellees, in which they had the unobstructed right and choice to set forth only one or as many other causes of action as fully and completely as possibly could exist.

The judge cannot direct, or the jury inquire into, anything not set forth in a proper petition, consequential damages, growing out of the act set forth, of course being included; but not damages for or growing out of an act not set forth: Lewis v. St. Paul R. Co., 58 N. W. Rep. 580; 5 So. Da. Rep. 148.

Damages arising from the taking of the property described in the bond, and subsequently in the petition, the sixty-six feet wide strip was a question to be inquired into.

A close examination of the authorities cited by appellee more strongly establishes the contention of appellant:

1. That the bond fixed the date of appropriation of the right of way only.

2. That the charter establishes two separate causes of action.

3. That nothing within the view of this court shows more than one cause of action to have been declared upon.

4. That the taking of material is a separate and distinct act from the appropriation for a right of way, done at a different time, and requiring compensation or security.

5. That the plea of "not guilty" raised only the issue set forth in the petition filed March 26, 1895, i. e., right of way.

6. That the damages for taking of said material could not be included in consequential damages resulting from the taking of the strip of land for right of way.

There is no record before this court, or in fact before the lower court, in any of the proceedings heretofore had, which will show that the materials have ever been included in any issue, or paid for, or security given therefor; but, on the contrary, could they be examined, they would show that materials had been expressly excluded.

Hess v. Heeble, 6 S. & R. 57, only confirms appellants' right to offer parol testimony to explain record under the circumstances of the present case, and to disprove former recovery. It differs from the present case in that plaintiff there counted in solido, here appellants have not merged their two causes of action.

The railroad company had not done all incumbent on it under charter (i. e., entered bond or condemned the materials taken), to place it in position to invoke proceedings thereunder, —consequently could not have raised the issue. Hess v. Heeble explained; Carmony v. Hoober, 5 Pa. 307.

OPINION BY BEAVER, J., January 18, 1898:

The appellants, in July, 1896, presented to the court of common pleas of Chester county a petition setting forth that "The Pennsylvania Railroad heretofore surveyed, laid out and con-

structed a branch line of railroad through and upon the lands of your petitioners in the township of Tredyffrin, in said county, and in so doing said company took, used and occupied a strip of land containing about 7 $\frac{3}{10}\frac{1}{00}$ acres, more or less, which strip of land is particularly described by metes and bounds in a certain petition filed by said company in this court on March 26, 1895, wherein said company requested the appointment of five persons as viewers to assess the damages done to the petitioners by reason of the entering upon and occupation of said strip of land." It was further alleged in said petition: "That said company, in the construction of said branch line, entered upon the land of the petitioners adjoining and in the neighborhood of the strip above referred to, and quarried, dug, took and carried away therefrom large quantities of stone, gravel, clay, sand, earth and other suitable materials necessary and proper for the construction and maintenance of said line," and asking that the court appoint viewers "to estimate and determine what damages have been sustained by petitioners, by reason of the quarrying, digging, cutting, using and carrying away of the materials aforesaid." The reference in the petition to the former petition presented by the railroad company for viewers naturally attracted the attention of the court to which the petition was presented, an inspection of which discloses the fact that "The said railroad company, in pursuance of the authority vested in them by the act incorporating the said company and by any and all acts of the General Assembly of the Commonwealth of Pennsylvania enabling them, desired to enter upon and occupy for the purpose of constructing thereon the said branch railroad, with the necessary slopes, embankments, bridges, turnouts, sidings, depots or stations, warehouses, offices, engine and water stations or other buildings or appurtenances, which may be necessary or convenient for the same, the following described piece or parcel of land, to wit:" (after which follows a description by metes and bounds of the land to be entered upon, containing seven and $\frac{3}{10}\frac{1}{00}$ acres, more or less), and praying the court to appoint viewers "faithfully, justly and impartially to decide and true report to make concerning all the matters and things to be submitted to them, and in relation to which they are authorized to inquire and, having viewed the said premises, to estimate and determine the quantity, quality

and value of the said land so taken or occupied, and what amount of damages have been sustained or may be sustained and to whom payable."

Viewers were appointed, in pursuance of the said petition, four of whom on the 11th day of June, 1895, made a report filed in the court below September 7, 1896, in which they estimated the value of the land taken, as the same appears by the plot or draft of the route of said railroad thereto attached, at the sum of $5,133, and the damages done to the property at the sum of $9,867.

An appeal from the award of viewers thus made was taken by the appellants and, upon the trial of that appeal in the court below, in which it was agreed "that the foregoing cause shall be deemed at issue with like effect as though a declaration in trespass quare clausum fregit had been filed by the plaintiff and a plea of not guilty filed thereto by the defendant," a verdict was rendered by the jury in favor of the plaintiffs, the appellants in this case, and against the defendant, the appellee, for the sum of $24,057.67, damages, and six cents costs, which judgment was satisfied by the plaintiffs' attorney April 27, 1896. All these facts appear as matters of record in the proceedings arising under the petition filed by the defendant, as alluded to by the appellants in their petition for the appointment of viewers, and were fully set out in an answer to the petition made by the railroad company, duly sworn to, in response to a rule granted by the court upon the petitioners to show cause why the petition should not be dismissed. Testimony was also taken upon that rule, at the taking of which the appellants were represented by counsel, to show that in March, 1895 (the date at which the original petition of the railroad company had been presented), "all the dirt had been taken and materials used and everything needed in the construction of the road." The question was, therefore, fully and fairly raised as to whether or not the petitioners had a right to the appointment of viewers to assess damages for taking dirt and other materials used in the construction of the railroad passing through their property outside the limit of the right of way, after having recovered a verdict for damages under the proceedings had in pursuance of the petition presented by the railroad company in March, 1895.

It would seem, from the report of Robinson v. Railroad, 161 Pa. 561, that the railroad company had originally entered upon and taken a strip of land through the appellants' property one hundred and forty feet in width instead of the sixty-six feet expressly allowed by its charter, which is contained in the Act of 13th of April, 1846, P. L. 312, as amended by the Act of 27th of March, 1848, P. L. 273. In an ejectment brought by the plaintiffs against the railroad, they were allowed to recover all of the land outside a strip sixty-six feet wide, to which the railroad was limited for right of way. The railroad was allowed to amend its petition descriptive of the land taken by it, so as to limit it to the sixty-six feet in width, and it was after this amendment that the appeal from the award of viewers was tried and the verdict for damages rendered.

It is claimed by the appellants that the charter of the railroad company, as contained in the acts of 1846 and 1848, supra, is to be strictly construed against it, and this is undoubtedly true, and that by a strict construction of its charter, they are to be allowed separate sets of viewers to assess the value of the land taken for the purposes of the railroad and for the materials which it may enter upon, use or take away in pursuance of the authority given it by its charter. It is true, that in the fourth section of the act of 1848, supra, in which the mode in which damages are to be assessed is pointed out, authority is given to the viewers to assess the damages for lands or materials which the company may enter upon, use or take away, in pursuance of the authority given to it by the act, and the disjunctive conjunction "or" is used throughout the entire section in speaking of lands or materials, the duty of the viewers being prescribed in the following language: "And, having viewed the premises, they shall estimate and determine the quantity, quality and value of said lands so taken or occupied, or to be taken and occupied, or the materials so used or taken away, or to be used or taken away, as the case may be; and, having due regard to and making just allowance for the advantages which may have resulted or which may seem likely to result to the owner or owners of said lands or materials, in consequence of the opening or making of said railroad or the construction of works connected therewith; and, after having made a fair and just comparison of said advantages or disadvantages, they shall estimate

and determine whether any, and if any, what amount of damages have been sustained or may be sustained, and to whom payable, and make report thereof to the court."

In pursuance of the powers thus conferred upon viewers, the universal practice in Pennsylvania, so far as we know,—a practice based upon the well settled law,—has been to assess all the damages done or likely to be done to the premises through which the railroad passes, including the use and occupation of the ground occupied, the materials taken from the land adjoining the limits of the right of way, increased danger by fire, inconvenience from noise, additional burden imposed upon the land by reason of fencing, inconvenience of farming parts of lands separated from each other by the railroad, increased difficulty in reaching barns and other buildings, in the ordinary use of the property, damages likely to result from drainage and other causes arising from the construction of the road and other similar disadvantages. These and such as these have always been held as proper subjects of inquiry by viewers and, on appeal from their award, by juries, in estimating the difference between the value of the land as it was before the railroad was constructed and its value after the construction.

There has been no deviation from the general rule in regard to the measure of damages in cases of the character of that tried in the court below, in which the appellants were plaintiffs and the railroad company defendant, since the case of the Schuylkill Navigation Co. v. Thoburn, 7 S. & R. 411, which, as we have lately remarked in another connection, was a leading case, down to Struthers v. Phila. & L. R. R. Co., 174 Pa. 291, in which latter case Mr. Justice WILLIAMS lays down the rule as follows: "The true measure of damages has been held, in a long and unbroken line of cases, to be the difference in the market or selling value of the property entered, before the entry was made, and afterwards," (referring to a number of well known cases) "but the jury have no right to allow damages for distinct items, whether estimated by experts or other witnesses, and reach the amount of their verdict in that manner. Their duty is simply to ascertain the loss in the selling value of the property entered, due to the fact of the taking by eminent domain. This loss stands for the measure of damages, because it embraces the effect of all the elements of depreciation taken together."

If the railroad company went beyond the bounds of its right of way and took materials for the construction of its embankment, that was an element of depreciation which could have been, should have been and doubtless was taken into consideration, by both the viewers and the jury, in reaching a conclusion as to the amount of damages suffered by the appellants in the construction of the railroad. In no other way could the difference in the market or selling value of the property entered upon, before the entry was made and afterward, be ascertained. If the appellants had been the owners of property adjoining that of another person, through whose lands the railroad was located and built, and the railroad company had entered upon their land for the purpose of taking materials to be used in the construction of the road, they would undoubtedly have been entitled to the appointment of viewers for the purpose of assessing the damages so done to their property; but, by their own showing, as is manifest from their petition and the reference therein to the former proceedings, the damages for the ascertainment and determination of which they asked viewers to be appointed, must have been passed upon in the proceedings had in pursuance of that petition, otherwise we would be obliged to hold that counsel for plaintiff and defendant, viewers, court and jury, all failed in the discharge of a manifest duty.

It is contended by the appellants that the only question for the court below, and the only one which is legitimately before us, is the sufficiency and regularity of the petition presented by them asking for the appointment of viewers; but, as hereinbefore intimated, they have themselves introduced the record of the former proceedings by reciting the petition of the railroad company for the appointment of viewers. They were represented in the proceedings which followed the granting of the rule to show cause why the petition should not be dismissed. They participated in the cross-examination of the witness whose testimony was taken in the proceedings had under that rule. We can see no reason why the court should not determine the question as to whether or not viewers should be appointed to assess the damages, as well at the time when the petition was presented as when, after an appeal from the award of viewers, in a trial before a jury, an effort was made to show the damages resulting from the taking of the material complained of, which

could not have been allowed; or when, after the plaintiffs had given in evidence testimony relating to the damages, the fact of a former recovery had been shown, in which event the court would, of course, have instructed the jury that no recovery could be had.

Although the question was not distinctly raised in the court below, there is grave doubt as to the sufficiency of the petition presented by the appellants. It shows that the railroad company had "laid out and constructed a branch line of railroad through and upon the lands of your petitioners in the township of Tredyffrin" and that "in the construction of said branch line, entered upon the land of the petitioners adjoining and in the neighborhood of the strip above referred to and quarried, dug," etc. There is no allegation that the materials taken for the construction of the road had been taken from an adjoining tract. It must be presumed, therefore, that they were taken from the same tract upon which the road had been laid out and constructed. How could the viewers, therefore, if appointed, have complied with the provisions of the fourth section of the act of March 27, 1848, supra, in determining the damages to be awarded to the appellants, after making just allowances for the advantages which may have resulted or which may seem likely to result to the owner or owners of said lands or materials in consequence of the opening or making of said railroad or the construction of works connected therewith? The petition stops short of what is required under the facts of the case and, if viewers were to be appointed in such a case, we can see no reason why another set of viewers might not be appointed to determine what damages had been suffered by the appellants, by reason of the increased burden of fencing, or by reason of the inconvenience from noise and vibration of the plaintiff's residence, by the running of trains, and every other element which enters into the determination of the question of damages, as regulated by the well settled principles as hereinbefore referred to. How could the viewers in any such case consider the advantages accruing to the petitioner by reason of the construction of the railroad, in estimating the damages? It is not necessary for us to pass upon this question, however, inasmuch as it is not presented for our consideration.

There is nothing in the objection made by the appellants that

they were limited in the trial of the appeal from the award of the original viewers by the bond filed by the defendants in that suit. The condition of that bond was "to pay or cause to be paid unto the plaintiffs, or to their executors, administrators or assigns, such sum of money as they shall be entitled to receive for damages, in consequence of the taking and keeping of said land for the purposes aforesaid, said payment to be made after the amount of said damages shall be agreed upon by the parties or assessed in the manner prescribed by the laws in such case made and provided." If this bond had not been sufficiently broad to cover all the damages suffered or to be suffered by the plaintiffs, they could have required it to be enlarged or amended at the time by an application to the court below, but we think it was abundantly sufficient in every respect to cover all the damages which the plaintiffs suffered or were likely to suffer, in consequence of the taking of their land and the construction of the road, as provided in ordinary cases.

It is incumbent upon courts to prevent litigation as far as possible, consistently with the rights of all parties in interest. The court of common pleas in this case had complete jurisdiction of the subject of controversy. The single question in dispute was as fairly and fully raised as it could have been, at any subsequent stage of the proceedings usually incident to the ascertainment and determination of damages in a like case. We see no impropriety whatever in the disposition made of the case, at the time and under the circumstances, when disposed of.

The decree of the court below is affirmed and the appeal dismissed, at the costs of the appellant.

Mrs. E. M. Forney et al., Heirs of Henry B. Mytinger, deceased, Appellants, v. The County of Huntingdon.

Practice, C. P.—Case stated must show jurisdiction.

A case stated must show the jurisdiction of the court over the parties and that it is a real dispute, not a colorable one, to obtain an opinion from the court.

A case stated is defective where it fails to set forth the nature of the judgment to be entered in case the court should find the law to be for the plaintiffs.

Practice, Superior Court—Appeal quashed in absence of assignments of error.

Where there are no assignments of error the appeal will be quashed.

The appellate court will decline to roam at will over the whole domain of law and fact and enter such judgment at law or decree in equity as it might conclude the plaintiffs might have been entitled to.

Argued December 14, 1897. Appeal, No. 35, March Term, 1897, by plaintiffs from judgment of C. P. Huntingdon Co., May T., 1897, No. 22, in favor of defendant on case stated. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Appeal quashed.

Case stated, raising the question of validity of assessment of county taxes for $46.34. Before BAILEY, P. J.

The case stated is as follows:

That Henry B. Mytinger, of Morris township, died on or about the 21st day of November, A. D., 1884, leaving to survive him the above stated plaintiffs who are his heirs at law.

That at the time of his death the said Henry B. Mytinger was seized of a certain farm or tract of land, situate in the township of Morris and known as the "Water Street Property," containing 62 acres of improved land and 19 acres of unimproved or timber land.

That among the improvements on said farm were a brick hotel building in which three of the said heirs now reside, a gristmill and mill tenant house, brick house and five other small tenant houses. That said farm was valued in the annual assessment for the year 1896 (a copy of which is hereto attached and marked exhibit "A"), at the sum of $1,659, and a tax for county pur-

poses of $23.22, being at the rate of 14 mills levied thereon by the county commissioners. A receipt for which tax is hereto attached and marked exhibit "B." That the other above mentioned buildings and improvements located on said farm were valued and assessed in said assessment for the year 1896 as follows: Geiser house, $150; brick hotel, $760; mill and house, $1,150; minister's house, $300; house above gate, $150; gate house, $100; double frame house, $100; brick house, $600; and a county tax at the rate of 14 mills was levied on each of the said buildings as above valued, making a total additional county tax of $46.34 levied on said farm by the said county commissioners.

The following question is therefore submitted for the determination of your honorable court.

Whether the assessment of a county tax of $46.34 on the above stated buildings and improvements on said farm for the year 1896 was a legal or illegal tax and assessment.

If the court shall be of the opinion that the said additional tax of $46.34 as well as the valuation of the buildings and improvements by the assessor was illegal and should be stricken from the assessment and tax duplicate, then the court is respectfully requested to enter judgment for the plaintiffs.

If the court shall be of the opinion that valuation of the said buildings was lawfully made by the assessor and the said tax of $46.34 legally levied thereon by the county commissioners the court is respectfully requested to enter judgment in favor of defendant.

It is hereby agreed by the parties hereto that the judgment of the court in this case stated shall be as binding as if made in a regularly instituted suit in law or equity.

Each party reserves the right of appeal.

L. H. BEERS,
Atty. for plaintiffs.

SAML. I. SPYKER,
County solicitor.

Now May 21, 1897, it is hereby agreed that valuation and assessment of the real estate of H. B. Mytinger's heirs, mentioned in the foregoing "case stated," is identically the same for the year 1897 as for the year 1896, on the said farm as well for the buildings and improvements on said farm. That the county tax levied on said real estate is at the rate of 12 mills.

That an additional county tax of $39.72 was levied on the buildings and improvements on said farm in addition to the county taxes on said farm.

It is further agreed that the court shall enter judgment touching and including the said county taxes and the assessment and valuation of the said real estate for the year 1897, in all respects and with same force and effect as in the above "case stated" for the year 1896.

SAML. I. SPYKER, County solicitor.

L. H. BEERS, Atty. for plaintiffs.

The court entered judgment for defendant, BAILEY, P. J., filing the following opinion:

The plaintiff's property is returned for taxation at a valuation of $5,169. The property consists of a farm, hotel, gristmill and several tenant houses. The hotel, mill and tenant houses were erected on what was originally the farm. It is not alleged they were used in connection with the farm. It is true the assessor returns with his assessment, the manner by which he arrives at the aggregate valuation. That is, he arrives at the total valuation of the property as a whole by ascertaining the value of its several parts, and returns the separate values of these several parts to show how he reached the total valuation. Perhaps this was unnecessary; we do not think it vitiated the assessment. It is not a double assessment and there is no allegation that the valuation is excessive. If it were too high or for any reason illegal the proper remedy of the plaintiff would have been by appeal: Moore v. Taylor, 147 Pa. 481.

The triennial assessment was made in 1895. An inspection of the return of the assessor for Morris township shows that the plaintiff's property was valued in the same manner and at the same amount as in 1896 and 1897. It is presumed that the plaintiffs had notice of this assessment and of the time of the appeal. No appeal was taken, and the tax was laid on the basis of the valuation as returned. It is too late to object to the manner of the assessment when the tax collector calls for the tax. If the assessment was not satisfactory it was the right and duty of the taxpayers to appeal in the manner and within the time fixed by law. Not having done so the assessment and valuation have the effect of a judgment. We have no jurisdiction to review

the action of the assessor or the commissioners, wherein they have authority to act, except on appeal taken within the time fixed by law. We have no original but only appellate jurisdiction as to questions of excessive or illegal assessments in cases where the general power to assess exists in the assessors and commissioners: Clinton School District's Appeal, 56 Pa. 315.

Equity will enjoin against the collection of a tax assessed for an illegal purpose, and in cases where the taxing authorities had no power to lay the tax: Harpers' Appeal, 109 Pa. 9; Kemble v. Titusville, 135 Pa. 141.

In this case it is not claimed that the commissioners were without authority to lay the tax or that it was laid for an illegal purpose.

Let judgment be entered in the case stated in favor of the defendant.

Judgment for defendant on case stated. Plaintiff appealed.

There were no assignments of error set out in the paper-books.

L. H. Beers, for appellants.

Saml. I. Spyker, for appellee.

PER CURIAM, January 18, 1898:

These proceedings were irregular and defective in many essential particulars, but we need mention only two. A case stated must show the jurisdiction of the court over the parties, and that it is a real dispute, not a colorable one, to obtain an opinion from the court: Berks County v. Jones, 21 Pa. 413. Not only was there no appeal from the decision of the county commissioners or board of revision and appeals, but it would also seem that the plaintiffs had not put themselves in position to take such appeal. The suggestion that the case stated was intended as a substitute for an appeal, and was to be disposed of as if a formal appeal had been taken is not borne out by the record and was not assented to on the argument. Therefore the court was without jurisdiction to enter any order, decree or judgment with reference to the assessment or collection of the taxes in question.

In the second place the case stated fails to set forth the nature of the judgment to be entered in case the court should find the law to be with the plaintiffs.

Courts ought to encourage amicable submissions of real disputes, but the greatest liberality of practice will not justify parties in agreeing upon facts — no action or proceeding being pending or agreed to — and asking the court to enter such judgment at law or decree in equity as it may conclude the plaintiff might be entitled to.

For these reasons the court below might well have dismissed the case stated.

When the case reached this court there was the same disregard of form and orderly procedure. No assignments of error were filed and we are, in effect, asked to roam at will over the whole domain of law and fact, and enter such judgment at law or decree in equity as we may conclude the plaintiffs might have been entitled to. This we decline to do.

The appeal is quashed.

Estate of Samuel Royer, deceased. Appeal of Samuel Wolf.

Will—Issue d. v. n.—When to be awarded or not.

An issue d. v. n. is of right when the fact arising and in dispute is substantive and material to the inquiry, unless the whole evidence of the fact alleged be so doubtful and unsatisfactory that a verdict against the validity of the will should not be permitted to stand.

Will—Testamentary capacity—Degree of proof.

Vague and indefinite indications of mental weakness will not suffice to deprive a man of his dominion over his estate, or defeat his right to dispose of it by will.

Will—Testamentary incapacity—Issue d. v. n.

An issue will not be awarded where the evidence showed that while the testator was advanced in years at the time of making the will, and not exempt from the infirmities of age or the impairment of the mental faculties incident thereto, disclosed no positive mental disability or incompetence to act understandingly, and where the sole act complained of was the displacement of the appellant as executor who was then eighty-seven, and the substitution of a younger man of unquestioned fitness.

Argued Nov. 11, 1897. Appeal, No. 144, Oct. T., 1897, by Samuel Wolf, from decree of O. C. Lancaster Co., refusing an

issue d. v. n. Before RICE, P. J., BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule on executors of Samuel Royer, deceased, to show cause why an issue devisavit vel non should not be granted. Before LIVINGSTON, P. J.

The facts sufficiently appear in the opinion of the court.

The court below discharged the rule. Samuel Wolf, the would be executor appealed.

Errors assigned were (1) discharging rule for an issue d. v. n. (2) In the opinion of the court as follows: "Being of opinion that, as Samuel Wolf is neither legatee, heir, or next of kin, to Samuel Royer, deceased, but a stranger to him, and to the estate, having no interest therein whatever; a mere intruder, having no right to object to the probate of the will or to take and enter an appeal therefrom, and having no right or standing in this court to demand or be made party to an issue devisavit vel non to test the validity of the instrument in writing purporting to be the will of Samuel Royer, deceased, the rule to show cause why an issue devisavit vel non should not be granted, etc., must be discharged and appeal dismissed. The rule is therefore discharged by the court and the appeal dismissed."

John H. Fry and *B. F. Davis*, for appellant.—If from any cause he is so enfeebled in mind as to be incapable of knowing the property he possesses, he is without the required testamentary capacity: Wilson v. Mitchell, 101 Pa. 495; Shaver v. McCarthy, 110 Pa. 339; Tawney v. Long, 76 Pa. 106; Thompson v. Kyner, 65 Pa. 368; Daniel v. Daniel, 39 Pa. 191; 1 Redfield on Wills, 104, 122, 123.

Want of testamentary capacity once shown is presumed to continue until the fact of temporary capacity is established by convincing proofs: Leech v. Leech, 21 Pa. 67; Harden v. Hays, 9 Pa. 151; Titlow v. Titlow, 54 Pa. 216.

J. Hay Brown and *A. J. Eberly*, with them *W. U. Hensel*, for appellees.—An issue will not be granted, if upon the whole evidence, a verdict against the will ought not to be sustained: Boyer's Will, 13 Phila. 254; Wainwright's Appeal, 89 Pa. 220; Winpenny's Appeal, 8 W. N. C. 415.

An issue devisavit vel non will not be awarded unless sufficient evidence be furnished, which, if uncontradicted, would sustain a verdict against the will: Corson's Estate, 2 Montg. 173; s. c., 3 Montg. 103.

Evidence that the testator was old, intemperate and irascible is not sufficient to submit his mental capacity to a jury, in the absence of evidence that he was mentally unfitted to dispose intelligently of his property: Keating's Appeal, 17 Atl. 207; s. c. 36 P. L. J. 283, affirming McCullough's Will, 35 P. L. J. 169. See Napfle's Estate, 134 Pa. 492, affirming s. c. 46 L. I. 57. An issue as to testamentary capacity or undue influence will not be awarded upon mere evidence of old age, lessened mental activity or impaired memory. In such cases, the inquiry is always to be directed to the mental condition of the testator at the time of the execution of the will, and to the circumstances then surrounding him or affecting his action: Lennig's Estate, 36 W. N. C. 118; Shreiner v. Shreiner, 178 Pa. 57; Boehm v. Kress, 179 Pa. 387.

Opinion by Smith, J., January 18, 1898:

In October, 1884, Samuel Royer made his will, disposing of his entire estate, and appointed Samuel Wolf, Sr. and Adam Konigmacher executors. Subsequently, Adam Konigmacher died, and in July, 1890, his son Jacob Konigmacher was substituted by codicil. In January, 1893, the testator executed another codicil, in which he revoked the appointment of Samuel Wolf and appointed Jacob Konigmacher and W. K. Seltzer executors, and expressly ratified the will in all other respects. The testator died about two months after the execution of the last codicil, and his will was duly proved before the register of Lancaster county. From the decree admitting it to probate Samuel Wolf, Sr., appealed, alleging that he was interested in the estate by "being named in will of date of October 9, 1884, and codicil of date of July 31, 1890, as one of the executors of the will of said Samuel Royer," and assigned as reasons for his appeal that the testator was not of sound mind when he executed the codicil of January 25, 1893, and that the codicil was procured by fraud, duress, and undue influence. Evidence was submitted to the orphans' court on the question of the testator's mental capacity, with special reference to his ability to make

the codicil by which the appellant's appointment was revoked. No attempt was made to invalidate the original will or the first codicil. The court made no comment on the effect of this evidence relating to the testator's mental capacity, but disposed of the case on the ground that the appellant was a stranger to the testator,—"a mere intruder"—not a "person interested" within the meaning of the statutes allowing interested persons to institute a contest, and for this reason dismissed the appeal.

Two questions are raised by this record: (1) Was the evidence produced sufficient to warrant the granting of an issue devisavit vel non? (2) Has Samuel Wolf such an interest in the estate as entitles him to raise this issue? Vague and indefinite indications of mental weakness will not suffice to deprive a man of his dominion over his estate, or defeat his right to dispose of it by will. The testator was advanced in years at the time of making his will, and was not exempt from the infirmities of his age or the impairment of the mental faculties incident thereto; but there is nothing in the evidence that shows positive mental debility, or incompetency to act understandingly, when making the codicil of January 25th. The sole act complained of is the displacement of the appellant, who was then eighty-seven years of age, and the substitution of a younger man of unquestioned fitness for the active discharge of the duties of the position. The appellant was not connected with the testator or his wife by blood or marriage; and the heirs and legatees do not complain of the change.

From a close examination of the evidence it fails, in our opinion, to show that the testator was not in the full possession of his senses and entirely competent to dispose of his estate when he made the last codicil. In this class of cases, where an issue is asked for by one who has a right to demand it, "the issue is of right, under the 41st section of the act of March 15, 1832, when the fact arising and in dispute is substantial and material to the inquiry, unless the whole evidence of the fact alleged be so doubtful and unsatisfactory that a verdict against the validity of the will should not be permitted to stand:" Schwilke's Appeal, 100 Pa. 628. This rule, so often repeated by the Supreme Court, has long been the established test as to whether an issue should be granted; hence there is no difficulty, so far as the law is concerned, in determining the proper course to

pursue. An examination of the evidence in the present case leads unhesitatingly to the conclusion that it is "so doubtful and unsatisfactory that a verdict against the validity of the will should not be permitted to stand." The few incidents shown, and upon which the appellant relies to prove mental incapacity, are common in every day life, even in persons far younger than the testator; but such casual departures from what men regard as the rational standard are not sufficient to deprive such persons of the right to dispose of their property by will.

Holding as we do that nothing was shown which would justify the framing of an issue devisavit vel non, it is unnecessary for us to pass upon the other question presented.

The decree is affirmed.

Commonwealth v. R. Bruce Hutchinson, Appellant.

Criminal law—Solicitation to commit crime when an indictable offense.

Solicitation to commit a felony is a misdemeanor. But the classification of a crime as a felony or a misdemeanor being wholly arbitrary, and governed by no fixed or definite principles, it is not the criterion by which to determine the question whether solicitation to its commission is an offense in law. The true test is to be found in its effect on society, since all acts that injuriously affect the public police and economy are indictable at common law. Solicitation to burn a store building is such an act; incitement to incendiarism being a direct blow at security of property and even of life. It is therefore indictable as a misdemeanor.

Evidence of crime not charged but cognate when admissible.

While an independent crime having no connection with that charged cannot be shown, evidence may be given of one so connected with the offense for which the defendant is on trial as to show motive, purpose, identity or guilty knowledge.

The evidence tending to show that a defendant, charged with soliciting another to burn a building, at or about the time of such alleged solicitations, addressed similar solicitations to other persons, is properly admitted. Such testimony does not fall within the rule excluding evidence of other offenses than that laid in an indictment.

Argued Nov. 8, 1897. Appeal, No. 40, Oct. T., 1897, by defendant, from judgment of Q. S. Blair Co., Jan. Sess., 1897, No. 27, on verdict of guilty. Before RICE, P. J., WICKHAM,

BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Indictment charging solicitation to burn a building. Before BELL, P. J.

It appears from the record and evidence that there was evidence tending to show that defendant made a proposition to Robert Williams that if he would set fire to the storeroom of Pheasant & Wagner, the defendant would pay him, Williams, $25.00. An offer of evidence was made and admitted, under objection, tending to show that similar offers were made to other persons about the same time to commit the same or similar offense connected with the same building.

The opinion of BELL, P. J., refusing motion in arrest of judgment and a new trial, is reported in 6 Dist. Rep. 709.

Verdict of guilty and sentence thereon. Defendant appealed.

Errors assigned among others were (1) the indictment in the above case will not sustain a conviction in Pennsylvania, as it does not charge an offense indictable, either at common law or by statute. (4) The admission of the testimony of Frank Bowden, Frank Moore and Harry Woods, tending to show that defendant had solicited them to burn this same building after the time he had solicited Robert Williams to burn it, being distinct and separate offenses (if offenses at all), having no connection with the crime charged in the bill of indictment, and occurring weeks after the solicitation laid in said indictment, and for which an indictment is still pending, the commonwealth having elected on motion of defendant's counsel to go to trial on bill No. 27, of January sessions, 1897, in which the names of Frank Bowden, Frank Moore and Harry Woods had been stricken off by the district attorney. (8) The sentencing of the defendant to pay a fine of $20.00, costs of prosecution, and to undergo an imprisonment in the jail of Blair county for a period of six months. (9) There is no warrant in law for the sentence imposed by the court upon the defendant, as there is no act of assembly authorizing it, and it is therefore illegal and void.

A. V. Dively, with him *J. Banks Kurtz*, for appellant.—Solicitations to commit misdemeanors are not indictable in Penn-

sylvania: Smith v. Com., 54 Pa. 209; Whar. Cr. Law, sec. 179; Stabler v. Com., 95 Pa. 318.

The admission of the testimony of Bowden, Moore and Wood, tending to show that defendant had solicited them to burn this same building, after the time he had solicited Williams to burn being distinct and separate offenses, if offenses at all, having no connection with the crime charged in the bill of indictment, and occurring weeks after the solicitation laid, and for which an indictment is still pending was error: Shaffner v. Com., 72 Pa. 60; Com. v. Daniels, 2 Select Eq. Cases, 332; 2 Russ. on Crimes, 694.

Wm. S. Hammond, district attorney, with him *Thomas H. Greevy* and *R. A. Henderson*, for appellee.

OPINION BY SMITH, J., January 18, 1898:

The defendant was convicted and sentenced on the charge of soliciting one Robert Williams to burn a store building. The material parts of the indictment are as follows: "That R. Bruce Hutchinson . . . . did unlawfully, maliciously and wickedly solicit and incite Robert Williams to unlawfully, wilfully and maliciously burn, attempt to set fire to with intent to burn a certain new building . . . . owned by the firm of Pheasant & Wagner, and used, on the first floor for a storeroom and post-office, on the second floor by the Young Men's Christian Association and the Juniata Borough Council, and on the third floor by the Independent Order of Odd Fellows and the Patriotic Sons of America; and did offer the sum of $25.00 to the said Robert Williams to pay him for setting fire . . . . with intent to burn the said building."

It is contended, on the part of the defense, that solicitation to commit a misdemeanor is not indictable, and that, as the indictment charges only such solicitation, it sets forth no criminal offense.

There seems no question that solicitation to commit a felony is a misdemeanor: Rex v. Higgins, 2 East, 5; Rex v. Hickman, 1 Moody, 34; Reg. v. Quail, 4 F. & F. 1076; State v. Avery, 7 Conn. 266; People v. Bush, 4 Hill, 133; Com. v. M'Gill et al., Add. 21; State v. Bowers, 15 L. R. A. 199. This however cannot be affirmed of the broad proposition that solici-

tation to commit a misdemeanor is itself a misdemeanor. On the contrary, it seems clear that with respect to various misdemeanors, involving little or no moral turpitude or prejudice to society, solicitation to their commission is not in law an offense. It is equally clear that as to certain others, it is an offense. The cases cited in Wharton's Criminal Law, sec. 179, show that such solicitations are indictable, "when their object is interference with public justice, as when a resistance to the execution of a judicial writ is counseled, or perjury is advised, or the escape of a prisoner is encouraged, or the corruption of a public officer is sought, or is invited by the officer himself." In Rex v. Phillips, 6 East, 464, it was held that solicitation to commit a misdemeanor of an evil and vicious nature was indictable. The authorities collected in the notes to Washington v. Butler, 25 L. R. A. 434, embrace cases in which it was held indictable to solicit another to make a plate for counterfeiting bills of exchange; to commit assault and battery; to commit perjury. There is also a class of cases frequently referred to in the discussion of this question, but really without bearing on it; solicitations accompanied with the offer of a bribe, of which Rex v. Plympton, 2 Ld. Raymond, 1377, and Rex v. Vaughan, 4 Burr, 2494, are leading instances. In these the act sought was lawful; the offer of a bribe to influence its performance was the unlawful feature.

The adjudications by the highest court of our own state, on the subject of solicitation to commit crime, touch it only at two points. They decide that it is a misdemeanor to solicit the commission of murder: Stabler v. Com., 95 Pa. 318; Com. v. Randolph, 146 Pa. 83; and that solicitation to commit fornication or adultery is not indictable: Smith v. Com., 54 Pa. 209. The latter case does not, however, go to the length of declaring that solicitation to commit a misdemeanor is not a misdemeanor. No general rule on the subject was there laid down. The decision was based on the difficulty of defining the particular offense charged in the case; of determining "what expressions of the face or double entendres of the tongue, what freedom of manners, are to be adjudged solicitation;" and on the principle that "a rule of law which should make mere solicitation to fornication or adultery indictable would be an impracticable rule, one that in the present usages and manners of society would

lead to great abuses and oppressions." It may be added that the act charged was one that tended only to secret immorality by the parties immediately involved, and not directly to the public prejudice.

In the broad field lying between the extremes thus adjudicated, our guide must be found in the principles that underlie our criminal code. To reach just conclusions, we must pursue the method thus laid down by Mr. Justice PAXSON in Com. v. McHale, 97 Pa. 397, and applied in that case: "We must look beyond the cases and examine the principles upon which common law offenses rest. It is not so much a question whether such offenses have been punished as whether they might have been. . . . We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public police and economy."

The distinction, sometimes attempted, between solicitation to commit a felony and to commit a misdemeanor, is based on an artificial and not an intrinsic difference. It has received comparatively slight judicial recognition. In Reg. v. Ransford, 13 Cox C. C. 9, it was declared to be without foundation. Indeed, the statutory classification of crime, as felony or misdemeanor, is governed by no fixed or definite principle, but is purely arbitrary. Legislative whim or caprice may alone determine in which category an offense, not a felony at common law, shall be placed. There is no reason, arising from the nature of the offenses, why the burning of another's house shall be classed as a felony, and the burning of one's own house or other building, with intent to defraud insurers, as a misdemeanor; why the larceny of money shall be pronounced a felony, and its embezzlement only a misdemeanor; why it shall be deemed a felony to make counterfeit coin, and but a misdemeanor to utter it, or a felony to attempt to utter a counterfeit bank note, and only a misdemeanor to utter counterfeit coin; why the possession of ten counterfeit bank notes, with intent to utter them, shall be declared a felony, and the forgery of a deed merely a misdemeanor; or why the forgery of a bank check shall be made a felony, and the forgery of a promissory note but a misdemeanor. With respect to the public police and economy, and the general interests of society, there are misdemeanors more pernicious in

effect than some of the felonies. As to the mode and incidents of trial there is no distinction, except as between offenses triable exclusively in the oyer and terminer and those within the jurisdiction of the quarter sessions. As to punishment, trial for misdemeanor may subject the defendant to punitive consequences more serious than those to which he is exposed in trial for many of the felonies, since the penalty is often more severe, and, even if acquitted, the costs may be imposed upon him. It is obvious that, with respect to the majority of criminal offenses, the distinction between felonies and misdemeanors rests on no substantial basis, and that the classification of an offense as a felony or a misdemeanor affords no just criterion for determining whether solicitation to its commission is indictable. Under such a test, one may be punished for soliciting the theft of the most trifling chattel, or the burning of the most worthless dwelling, yet may with impunity incite to the embezzlement of millions, or to the laying in ashes of the largest manufactories, or the entire business quarter of a city. The only practical and reasonable test is that stated and applied in Com. v. McHale, supra: the manner in which the act may "affect the public police and economy;" and the only logical conclusion is that all acts which "especially affect public society," to its injury, are criminal. The act for which the defendant is here indicted, as thus affecting public society, is the solicitation described in the indictment.

Argument is scarcely needed to demonstrate that the solicitation charged in the present case is of a character to injuriously affect public society and the public police and economy. Except solicitations to murder and riot, nothing is more calculated to disorder and terrorize society than incitements to incendiarism. Such incitement is a direct blow at security of property and even of life. It must therefore be pronounced an indictable offense.

The evidence tending to show that the defendant, at or about the time of his solicitation of Williams, addressed similar solicitations to other persons, was properly admitted. The testimony on this point does not fall within the rule excluding evidence of other offenses than that laid in the indictment. While an independent crime, having no connection with that charged, cannot be shown, evidence may be given of one so connected

with the offense for which the defendant is on trial as to show motive, purpose, identity or guilty knowledge: Kramer v. Com., 87 Pa. 299; Shaffner v. Com., 72 Pa. 60; Copperman v. People, 56 N. Y. 591; State v. Watkins, 9 Conn. 47; Reg. v. Dossett, 2 Car. & Kir. 306; Rex v. Voke, 1 R. & R. 531; Rex v. Ellis, 9 Dowling & Rowland, 174. In the present case the several solicitations were connected manifestations of one purpose existing in the defendant's mind,—the purpose of burning the building described in the indictment, by the hand of another.

Nothing in the assignments of error requires further discussion.

The judgment of the court below is affirmed, and it is now ordered that R. Bruce Hutchinson, the appellant, be remanded to the custody of the keeper of the county jail of Blair county, there to be confined according to law for the residue of the term for which he was sentenced and which had not expired at the date of his admission to bail pending this appeal, and that the record be remitted that the sentence and this order be carried into effect.

Charles Clements v. George Bolster, Frederick W. Bolster and George W. Bolster, partners trading as George Bolster & Sons, Appellants.

Epistolary contracts—What amounts to, in law.

When a contract is epistolary, consisting of a series of letters, containing inquiries, propositions and answers, it is necessary that some point should be attained, at which the distinct proposition of the one party is unqualifiedly acceded to by the other, so that nothing further is wanting on either side to manifest that aggregatio mentium, which constitutes an agreement, and that junction of wills in the same identical manner, offered on one side and concurred in by the other, bringing everything to a conclusion which in contemplation of law amounts to a contract.

It is not a contract where an offer is made to buy a monument at $600 adding "we would like to have your derrick to set up monument. We will pay freight on derrick to return;" to which plaintiff replied asking that $15.00 more be allowed, and added: "I have entered your order—Now as to derrick, you would hardly want one sent from here, as that would be too expensive for you. Why not get one from Philadelphia or

Harrisburg?" This was but an acceptance in part; there could be no contract without an acceptance in full. A contract is not created by proposals and counter proposals; it arises only from the acceptance of a proposal.

An offer is not converted into a contract by a response proposing a deviation from its terms; it becomes a contract only when accepted in precise accordance with its terms.

Argued Nov. 11, 1897. Appeal, No. 114, Oct. T., 1897, by defendants, from judgment of C. P. Lancaster Co., Dec. T., 1894, No. 24, on verdict for plaintiff. Before RICE, P. J., BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit for goods sold and delivered. Before LIVINGSTON, P. J.

It appears from the record that plaintiff based his claim on an alleged epistolary contract for the purchase and sale of a monument. In his statement the plaintiff declared on two letters of the dates of January 23, 1894 and January 24, 1894, as forming the basis of this contract. These letters are set out in full in the opinion of the court.

Other letters of subsequent date passing between the parties were made the subject of offers of evidence, which offers were ruled upon by the court below, some of the letters being admitted and others rejected, and these rulings are made the subjects of assignments of error. In view of the decision of the appellate court, however, it is not material that any of the subsequent correspondence be set out in full, the plaintiff having declared only on the letters of January 23, and 24, as constituting the contract.

Verdict and judgment for plaintiff for $206.14. Defendants appealed.

Errors assigned among others were (7) in its answer to the plaintiff's first point, which point and answer are as follows: "1. By the letter of January 23, 1894, from Bolster to Clements, and the letter in reply thereto, from Clements to Bolster, dated January 24, 1894, which letters are admitted by both sides to have been written, sent and received, a complete contract for the purchase and sale of the monument was made, and this contract could not be changed nor added to by the defendants, ex-

cept with the consent of the plaintiff. *Answer:* That we have affirmed in the general charge." (9) In disallowing the following offer of testimony by the defendant: Frederick Bolster, one of the defendants, being under examination. "Witness shown letter dated April 9, 1894, and also envelope in which it was inclosed, stamped Boston, Mass., April 9, 1894, and asked if he received that letter from Clements. Objected to by plaintiff. Disallowed. Defendants except." (11) In disallowing the following offer of defendants: "Defendants offer in evidence the letter of April 9, 1894, marked 'J. B. L.;' the envelope marked 'J. B. L. No. 2,' in which the letter was inclosed, and the draft or design marked 'J. B. L. No. 1,' which was inclosed in the same envelope and carried in the same mail. Objected to by plaintiff. Disallowed. Defendants except. The letter was as follows:

"BOSTON, MASS., April 9, 1894.

"Messrs. GEO. BOLSTER & SONS,

"EPHRATA, Pa.:

"Dear Sirs: Can you make use of a Pink Westerly Granite Headstone as per enclosed, tracing No. 14,085? If so I will let you have it at the extremely low price of $35.00. This is a special offer and you must not calculate upon getting another at this price. It is an easy selling design, and I am sure you would do well with it. Can ship at once on receipt of order. Terms would be list.

"Both work and material are first-class, and I assure you you are getting a bargain if you accept this offer. If you decide to take the Monument, please send your order, at once, as it is an attractive design, and one that will sell itself.

"All Scotch Granites f.o.b cars New York City, American Granites f.o.b car quarries.

"Yours truly,

"CHARLES CLEMENTS.

"P. S. Try and sell this."

(13) In admitting the following offer of plaintiff: "Defendants object to the reading of letter of July 9, 1894, Clements to Bolster, because it is argument, made by plaintiff in his behalf. Admitted. Defendants except. The letter was as follows:

"BOSTON, MASS., July 9, 1894.

"Messrs. GEO. BOLSTER & SONS,

"EPHRATA, Pa.:

"Gentlemen: I have yours of the 6th in regard to Monument 13,257. You state that you are surprised at receiving my letter of the 5th of July. I do not see why you should be. Same was sent in your interests so that you could place your derrick and be ready to set the work as soon as received. You state that you did not order the monument. I would refer you to your letter of January 23, 1894, which is a direct order for the work. You write as follows:

"'We will give you for this monument complete, $600; there must be letter 'B' instead of 'H' on Cap. This is the best we can do. It will also take headstone which we will take it and pay extra for it. We would also like to have your derrick to set the monument. We will pay freight on derrick to return; we calculate to do more business with you in the future. We will pay for monument as soon as set up.'

"In answer to the above you have my letter of January 24, 1894. Then you wrote January 26, as follows:

"'We will give you the job provided you write and promise best Dark Quincy including all lettering, first-class job, for $600. We are held responsible for a first-class job, and therefore must hold you responsible for it. If you will answer the letter accordingly, we will send you the inscription letters; let us know by return mail; state if you can send it about the 20th or 25th of April; we will get a derrick as we have further use for it. If this job is all right, can sell several monuments on hand. On back of letter you will find sketch of headstone to be Dark Quincy, face pol., balance hammer dressed, bevel to front 1½; give us price on it.'

"In answer to the above letter you have mine of January 29, wherein I told you I would accept and furnish the work at $600 and referred to giving you price on headstone in another letter.

"Now I shall insist in your taking this work, and will expect an answer by the 14th, instructing me to ship. When I told you that I would accept the order, I accepted the conditions named in your letter of the 26th.

"Yours truly,

"CHARLES CLEMENTS."

(14) In admitting the following offer of plaintiff: "Plaintiff offers in evidence letter dated June 28, 1895. It is admitted letter was received by defendants, but defendants object to its admission in evidence. Admitted. Defendants except. Letter read to the jury by Mr. Coyle:

"BOSTON, MASS., June 28, 1895.

"Messrs. GEO. BOLSTER & SONS,

"EPHRATA, Pa.:

"Dear sirs: I have given instructions to attorneys to notify you that if you did not make settlement of my account within the next twenty days, either by secured note or cash, that the monument now ready for shipment to you, and which is subject to your order, will be sold at auction and proceeds from said sale will be credited to your account, and suit brought for the balance.

"Yours truly,

"CHARLES CLEMENTS."

B. F. Davis and *J. Hay Brown*, with them *W. U. Hensel* and *A. E. Burkholder*, for appellants.—In Slaymaker v. Irwin, 4 Whar. 369, a case not unlike this, there is a lucid discussion of the subject of epistolary contract. The case of Allen v. Kirwan, 159 Pa. 612, is more recent and even more strongly in point. The plaintiff gives further evidence in the letter of April 9, 1894, that the contract had not been closed, and the court erred in excluding this testimony and holding as a matter of law that this letter did not refer to the monument of the January correspondence, and that it could not even be proved to relate to it.

John A. Coyle, for appellee.—We have a completed contract made by the letters of January 23d and the reply of January 24th. The offer was open until it reached the plaintiff, and the contract closed the moment the plaintiff mailed his acceptance to the defendant: Ames & Co. v. Pierson, 174 Pa. 597.

OPINION BY SMITH, J., January 18, 1898:

The declaration avers, as the cause of action, a contract between the parties, embodied in a letter from the defendants to the plaintiff, dated January 23, 1894, and an answer by the

plaintiff, dated January 24, 1894. The trial judge held that these letters formed "a complete contract for the purchase and sale of the monument" to which they referred. This instruction to the jury is, inter alia, assigned for error. Unless, therefore, the letters present such a contract, the declaration discloses no ground on which the plaintiff can recover, and the instruction complained of was erroneous.

These letters, as set forth in the declaration and shown on trial, we quote in full. The defendants first wrote as follows:

"EPHRATA, PA., January 23, 1894.

"MR. CHARLES CLEMENTS:

"Dear Sir: We have sold monument No. 647, of your Design Drapery spire first size. Spire 1.5×1.5×11.6 Plinth 2.0×2.0×1.3. Cap 3.2×3.2×2.1. Die 3.2×3.2×1.4. Base 4.4×4.4×1.6. To be dark quincy granite, first class job. To be six raised letters for name on base 3 1/2 in. large deep 3/8 in. sunk letters, for inscription 60, 1 1/2 inches large. We will give you for this monument in complete order, six hundred dollars. There must be letter 'B' instead of 'H' in cap, this is the best we can do. It also takes headstone which we will take yet and pay extra for it. We would also like to have your derrick to set up the monument. We will pay freight on derrick to return. We calculate to do more business with you in the future. We will pay for monument as soon as set up."

"Yours very respectfully,

"GEORGE BOLSTER & SONS."

To this the plaintiff replied on the following day:

"BOSTON, MASS., January 24, 1894.

"MESSRS. GEORGE BOLSTER & SONS, EPHRATA, PA:

"Dear Sir: I have your favor of the 23d, giving order for No. 647 at $600, including lettering to amount you named. I have entered your order, but if you can give me $15.00 more on this I would like to have you allow it; cutting the price to $600 and not allowing anything for the lettering makes it rock bottom for good work and stock which I intend to give you in this monument.

"Now as to derrick you would hardly want one sent from here as that would be too expensive for you. Why not get one from Philadelphia or Harrisburg. This will save you money.

I think I can put you in correspondence with parties that will loan you a derrick or set the work for you.

"Yours truly,

"CHARLES CLEMENTS.

"P. S. Send on the lettering."

The principles on which the legal effect of these letters is to be determined are thus defined by Mr. Justice SERGEANT, in Slaymaker v. Irwin, 4 Wharton, 369: "It is incumbent on a party suing to recover damages for breach of contract, to make out a clear case of some matter or thing mutually assented to, and agreed upon by the parties to the alleged contract. When the agreement is in writing, signed and executed by the parties, their assent to all that is contained in it, is no longer a matter of dispute; the questions which arise in such a case are of a different character. But when it is epistolary, consisting of a series of letters, containing inquiries, propositions and answers, it is necessary that some point should be attained, at which the distinct proposition of the one party is unqualifiedly acceded to by the other, so that nothing further is wanting on either side, to manifest that aggregatio mentium, which constitutes an agreement, and that junction of wills in the same identical manner, offered on one side and concurred in by the other, bringing everything to a conclusion, which in contemplation of law amounts to a contract. If a proposition be made by one man to another, to purchase an article from him at a certain price and on certain terms, which is accepted as offered, there is then an agreement or contract. But if, instead of accepting it, the party declines so doing, and then new terms of purchase are offered, the assent is yet to be given by the other to the terms thus varied. It is not a contract—it is the suggestion or proposal of a new subject of contract, on which the first party has again a right to pause, to consider, to accept, to reject, to suggest new terms; and all is in the meantime merely negotiation. Mr. Chitty, in his General Practice, in treating of the question, when the contract may be collected from several documents or letters, extracts this rule from the authorities: 'The whole terms of the contract when in writing need not be expressed on the same paper or documents, but may be collected from several letters containing proposals and alternate agree-

ments between the parties; but then the last communication, must be a distinct and unqualified assent, to an equally clear proposal; and if the last letter suggest any new or further proposition, requiring the assent of the other party, or some communication from him to complete the transaction, then no contract or agreement is constituted:' 1 Chitty, Gen. Prac. 118."

In Joseph v. Richardson, 2 Pa. Superior Ct. 208, in an opinion by the president judge of this court, it was said on this subject: "To constitute a contract the acceptance of the offer must be absolute and identical with the terms of the offer. If one offers another to do a definite thing, and that other person accepts conditionally, or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat, or it is in effect a counter proposal. This is elementary law."

According to all the authorities, a contract is not created by proposals and counter proposals; it arises only from the acceptance of a proposal. And this acceptance must be in exact conformity with the proposal; the minds of the parties must meet on every point presented in the offer. An acceptance qualified in any manner, or accompanied by any reservation, or new proposal, is not that union of minds in which the law recognizes a contract. An offer is not converted into a contract by a response proposing a deviation from its terms; it becomes a contract only when accepted in precise accordance with its terms.

It is evident from an examination of the letters of January 23d and 24th, that the proposals of the defendants were not "unqualifiedly acceded to" by the plaintiff. On the contrary, he proposed a change in the price, and suggested a substitute for the sending of a derrick which formed part of the offer. We cannot say that this part of the offer was immaterial. The defendants regarded it as of sufficient importance to be embraced in their proposal, and on this point we are not to revise their judgment and substitute our own. The plaintiff could not hold the defendants to their offer by accepting it in part; there could be no contract without its acceptance as a whole. The variation proposed by the plaintiff was, in legal effect, a rejection of the offer, and precluded its acceptance thereafter, without the subsequent assent of the defendants. "An acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiations, ... unless renewed by the

proposer, or he assents to the modification suggested:" Railway Co. v. Rolling Mill Co., 119 U. S. 149; 1 Benjamin on Sales, page 106. The letters of the parties, in the present case, recited in the declaration as forming the contract on which the plaintiff seeks to recover, do not exhibit an offer with an acceptance in such terms as to create a contract, and the seventh assignment is sustained.

A letter from the defendants to the plaintiff, dated January 26, 1894, indicates a modification of the proposals contained in the first two letters; and in a letter to the defendants, dated July 9, 1894, the plaintiff says, "I accepted the conditions named in your letter of the 26th." Whether the letters written in January, 1894, taken together, form a contract, it is unnecessary now to decide; but if there was a sale of the monument mentioned in the first two letters on terms other than those indicated in those letters, the plaintiff has a right to recover in accordance with such terms, though it may become necessary to amend the declaration to make the final agreement admissible. In this connection the plaintiff's letter dated April 9, 1894, becomes material, and should be admitted, while in the absence of a contract between the parties its rejection did the defendants no harm. The plaintiff contends that the word "monument," as used in this letter, corresponds in meaning to the word "headstone," also used, and that both refer to the stone therein offered for sale. The defendants insist that it refers to the monument mentioned in the two letters set forth in the declaration, and tends to sustain their contention that no contract for that monument had yet been made. While the construction of a writing is, in general, for the court, yet where "words used in a contract are technical, or local, or generic or indefinite, or equivocal, on the face of the instrument, or made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case:" Brown v. Brooks, 25 Pa. 210. Where words are susceptible of two interpretations, the ambiguity growing out of the manner in which they are used in the instrument may be relieved by showing their meaning in the trade in which they are employed and to which they are peculiar: McDonough v. Jolly Bros., 165 Pa. 542. Parol evidence, which is explanatory of the subject-matter of a written contract, consistent with its terms and necessary for its interpretation, is

admissible: Church v. Clime, 116 Pa. 146. Whether, as trade terms, at the plaintiff's place of business, at the date of the letter of April 9, 1894, the words "monument" and "headstone" were regarded as so far similar in meaning that either might be applied to such a stone as that described in the letter referred to, can be shown only by parol, and the construction of this letter may depend largely upon the evidence that may be produced on this point.

Nothing in the letter embraced in the thirteenth assignment is competent evidence for the plaintiff except the first sentence of the last paragraph, relating to the delivery of the work, and this is competent only as an offer to deliver.

The letter embraced in the fourteenth assignment was properly admitted, as an offer of delivery, and notice that unless accepted the work would be sold on the defendant's account. This was the proper course for the plaintiff to pursue, unless he chose to make delivery of the work and sue for the price.

Nothing in the remaining assignments requires further notice.

Judgment reversed, and venire de novo awarded.

Commonwealth ex rel. Fred Nuber v. Keeper of Workhouse.

Criminal law—Practice, Q. S.—Suspension of sentence—Order when equivalent to final sentence.

An order of the court of quarter sessions which suspends sentence as to a part of the penalty prescribed by law for an offense, and imposes a pecuniary penalty upon the defendant, where fine and imprisonment constitute the penalty affixed to the crime, is, to all intents and purposes, a legal sentence, compliance with the terms of which renders it illegal for the court to alter or reform the sentence, after the term at which trial, conviction and the said partial sentence occurred, and any sentence subsequent thereto is illegal and void.

Argued Jan. 12, 1898. Appeal, No. 2, Miscellaneous Docket, April T., 1898, by Fred Nuber, relator, from sentence of Q. S. Erie Co., Nov. Sessions, 1896, No. 9, on verdict of guilty. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Reversed.

Indictment for receiving stolen goods. Before MILLER, P. J., of the 35th judicial district, specially presiding.

It appears from the record that Lizzie Nuber was indicted, tried and convicted at the November sessions, 1896, of the court of quarter sessions of Erie county for receiving stolen goods, and that at said term sentence of imprisonment was suspended on the following order, made by the court which was complied with by the defendant, the order being as follows: "And now, November 19, 1896, on recommendation of district attorney, the sentence of imprisonment in the case of the Commonwealth v. Lizzie Nuber is suspended for the present and during good behavior upon her paying the costs of prosecution, paying $200 to the clerk of the courts for the use of the Erie County Law Library, and paying a sum not to exceed $100 to reimburse the New York, Chicago & St. Louis R. R. Co. for damage done to goods which were stolen and received by the defendant."

On November 30, 1896, the clerk of the court receipted for $394.28 "to apply on costs, leaving the amount due the New York, Chicago & St. Louis R. R. Co. unpaid." Subsequently the committee of the Law Library receipted for the $200 directed to be paid by the order of November 19th as "two hundred dollars fine in this case."

In December, 1896, the clerk of the court receipted for $100, "being the amount of money to be paid to the New York, Chicago & St. Louis R. R. Co. to reimburse them for damage done to goods which were stolen and received by defendant, as per order of court."

On May 25, 1897, the court sentenced the defendant, Lizzie Nuber to pay a fine of $1.00 to the commonwealth for the use of the Erie County Law Library, pay the costs of prosecution, restore the property stolen if not already restored, or pay the owner the full value thereof, and undergo imprisonment in the Allegheny county workhouse for and during a period of two years, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

It appears also from the record that there are four terms of quarter sessions and oyer and terminer in the county of Erie fixed by rule of court as follows: One term commencing the first Monday of September to continue three weeks, one term commencing the second Monday in November to continue two

weeks, one term commencing the first Monday in February to continue three weeks and one term commencing the second Monday in May to continue two weeks.

A petition was subsequently filed by Fred Nuber, husband of defendant, reciting the facts as above set out and suggesting "that the sentence of imprisonment imposed May 25, 1897, is illegal and void for the reason that there being only four regular terms of quarter sessions in the said county of Erie, the said court had no jurisdiction in said matter after the ending of the November sessions, 1896, at which conviction was had and the first sentence imposed and entered upon; that the said Lizzie Nuber is unlawfully detained in the custody of the keeper of the Allegheny county workhouse, upon a sentence and commitment of a court without jurisdiction, and your petitioner therefore prays that a writ of habeas corpus may issue according to the act of assembly in such case made and provided, so that the said Lizzie Nuber may be brought before your honorable court to do, submit to, and receive what the law may require."

The petition being allowed, a writ of habeas corpus was issued and at the same time in accordance with the order of the court, a certiorari was also issued which brought up the entire record.

W. G. Crosby, of *Fish & Crosby*, for the relator.—The relator contends that if the first order or judgment of the court was a sentence to pay a fine, then after said November term the said court had no further jurisdiction in said case, and the latter order or sentence of said court was illegal and void.

The act of March 31, 1860, sec. 109, provides that one convicted of the crime of receiving stolen goods shall be sentenced to pay a fine and undergo imprisonment.

A sentence is the final determination of a criminal court. It is a conclusion of the law and not of the judge.

Fine is a pecuniary punishment imposed by the judgment of the court, a sentence to pay a penalty in money, and the terms, fine, penalty and punishment as used in that sense, have been declared to be synonymous: U. S. v. Reisinger, 128 U. S. 398; 19 Am. & Eng. Ency. of Law, 569.

Under all legal principles the orders and judgments of court should, when possible, be construed to have been exercised under full power and authority until the contrary is shown.

In the light of such a construction the order of the court of Erie county in No. 9, November sessions, 1896, made November 19, 1896, was the imposing of judgment or sentence, to the extent of a fine or pecuniary punishment, and as such was final, and any subsequent sentence of imprisonment after the term was error.

A court may suspend the judgment over a criminal, in toto, until another term, but has no power to impose two sentences for a single offense by imposing a fine and at a later term superadding imprisonment: Com. v. Ketner, 92 Pa. 372; Com. v. Perkins, 124 Pa. 36; United States v. Pile, 130 U. S. 280, Com. v. Foster, 122 Mass. 317.

No appearance or paper-book for appellee.

OPINION by BEAVER, J., February 19, 1898:

The relator presented his petition to this court, alleging that his wife, Lizzie Nuber, was illegally detained by the defendant, by reason of an alleged sentence of the court of quarter sessions of the county of Erie, passed upon her on the 25th day of May, 1897, and praying that a writ of habeas corpus might issue to bring her before this court, in order that the legality of the sentence under which she was confined might be determined. The writ was allowed and she was regarded by consent as constructively present at the argument of the case. At the same time in accordance with our order a writ of certiorari issued which brought up the entire record.

The relator's wife, who was the defendant in the case of the Commonwealth v. Lizzie Nuber, in the court of quarter sessions of Erie county, was convicted on the 18th day of November, 1896, of the crime of receiving stolen goods. The 109th section of the Act of March 31, 1860, P. L. 382, provides that "If any person shall buy or receive any goods, chattels, moneys or securities or any other matter or thing, the stealing of which is made larceny by any law of this commonwealth, knowing the same to be stolen or feloniously taken, such person shall be guilty of felony and, on conviction, suffer the like pains and penalties which are by law imposed upon the person who shall have actually stolen or feloniously carried away the same." The 103d section of the same act provides that "If any person shall

be guilty of larceny, he shall on conviction be deemed guilty of felony and be sentenced to pay a fine not exceeding five hundred dollars and to undergo an imprisonment by separate or solitary confinement at labor not exceeding three years." On the 19th day of November, 1896, the following order or judgment was entered by the court: "On recommendation of the district attorney, the sentence of imprisonment in the case of the Commonwealth v. Lizzie Nuber is suspended for the present and during good behavior upon her paying the costs of prosecution, paying two hundred dollars to the clerk of the courts for the use of the Erie County Law Library and paying a sum, not to exceed one hundred dollars, to reimburse the New York, Chicago & St. Louis Railroad Company for damage done to goods which were stolen and received by the defendant."

Under the provisions of the Acts of Assembly of April 17, 1866, P. L. 962, and of April 3, 1872, P. L. 752, all fines imposed by the courts of the county of Erie, which do not by law go to the school fund of said county, were made payable to a committee therein named for the purchase of a law library for the said county of Erie, etc. The record shows that the costs were fully paid, that "two hundred dollars fine in this case" was receipted for by the treasurer of Erie County Law Library December 3, 1896, and that the attorney of the New York, Chicago & St. Louis Railroad received "one hundred dollars, it being amount of money to be paid New York, Chicago & St. Louis Railroad Co. to reimburse them for damage done to goods which were stolen and received by defendant, as per order of court, December 19, 1896."

On the 25th day of May, 1897, the court made this record: "The court sentences the defendant, Lizzie Nuber, to pay a fine of one dollar to the commonwealth (for the use of the Erie County Law Library), pay the costs of prosecution, restore the property stolen, if not already restored, or pay the owners the full value thereof, and undergo an imprisonment in the Allegheny County Workhouse for and during the period of two years, there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with." If the order of the court of November 19, 1896, were a sentence of the defendant, then the sentence passed upon her May 25, 1897, supra, is illegal and void, inasmuch as a defendant cannot

be twice sentenced for the same offense, nor have the criminal courts of this state the power to reconsider a sentence after the term at which it was pronounced: Commonwealth v. Mayloy, 57 Pa. 291. It will be observed that the order of November 19th, supra, is not a general suspension of sentence. According to its terms "the sentence of imprisonment in the case of Commonwealth v. Lizzie Nuber is suspended for the present and during good behavior." The penalty imposed by law for the offense of which the defendant was convicted is fine and imprisonment. If the amount directed to be paid to the Erie County Law Library was a fine, the said order was at least in part the sentence which is authorized by law; if it was not a fine, the court had no legal right to impose nor had the Erie County Law Library any authority of law to receive it.

The direction to pay the costs in a criminal proceeding is not a sentence in the sense of its being a part of the penalty imposed by law. It is rather an incident of the judgment, but the sentence is nevertheless used as the means of enforcing payment. In common practice the sentence in case of a conviction of larceny or of receiving stolen goods consists of four parts: the payment of costs, the restoration of the goods or the payment of the value thereof, the payment of a fine, and imprisonment. Three of these ingredients or parts of the ordinary sentence are found in the order of the court of the 19th of November, 1896. It is to be presumed that the court, in making the said order, acted within the limits of lawful authority. If it did, the order was, to all intents and purposes, a sentence of the defendant. It matters not what the sum of money paid into court for the benefit of the Erie County Law Library may be called. It was a pecuniary penalty imposed upon the defendant, by virtue of the conviction by the jury of the crime with which she was charged, the only authority for its imposition being the right conferred by the act of assembly to impose a fine as part of the penalty incurred by the commission of the crime. It will not do to say that it was an agreement made by the court with the defendant which she could comply with or decline, as she chose. Such a proposition shocks the moral sense as well as the legal instinct. It is equivalent to saying that the court, without any authority of law, made such an agreement. This we would be slow to assume under any circumstances, and it is not necessary in

this case, for the court suspended sentence only as to imprisonment and, therefore, must have acted within and under the provisions of the law, affixing the penalty to the crime of which the defendant was convicted, so far as the fine or the payment of money as a penalty was concerned, otherwise it acted not only without lawful authority but in disregard of its own order. Moreover, the defendant was helpless. Notwithstanding all that may be said to the contrary, she would naturally feel that the order of the court must be complied with or that she would suffer in the end. The power which would and doubtless did move her to comply with the terms of the order of the court is the same which in its last analysis impels obedience to all orders, judgments and sentences of all courts—the fear of worse.

The imposition of what is called the regular sentence, on the 25th of May, 1897, was the second term after conviction and the order of the 19th of November, which immediately followed. By the terms of that sentence she was directed to pay a fine of one dollar to the commonwealth for the use of the Erie County Law Library—she had already paid $200 under the previous order; to pay the costs of prosecution—which had been overpaid, as appears by the record, under the previous order; to restore the property stolen, if not already restored, or pay the owners the full value thereof—which had been done, under the provisions of the former order, as appears by the receipt, upon the record, of the attorney of the railroad company. It is to be presumed that the court had no intention of compelling the payment of the costs which had already been paid and of making good, a second time, the value of the property stolen. But we can see no warrant in law, in view of what has been said in regard to the order of the 19th of November, for the imposition of an additional fine and the sentence to imprisonment which followed, if the said order was in law, as it undoubtedly was in fact, a sentence of the defendant.

In view of the limited or only partial suspension of sentence and of the imposition of a pecuniary penalty which has no justification in law, except as a fine provided by the act of assembly which affixes the penalty to the crime of which the defendant was found guilty, we feel bound to hold that the order of the 19th of November, 1896, was a legal sentence. But it may be urged that the court did not exhaust the penalty and that,

inasmuch as the law provides for a fine and imprisonment, the sentence was not complete and, therefore, illegal. But, as was said in Commonwealth v. Mayloy, supra: "The common law principle of the finality of judgments is at once an answer to the argument and a refutation of the idea that the power to interpose exists after the term has passed." The power of the court was exhausted; its sentence could not be amended; "it might have been during the term but not afterward:" Beale v. The Commonwealth, 25 Pa. 11.

We do not determine, nor are we called upon to determine, what might have been, if the defendant had failed to comply with the terms of the order above referred to. She did comply with them. True, not within the term at which the order was made; but, if the commonwealth had wished to take advantage of her failure to do so, the motion to reform the sentence should have been made during term time. We have been greatly aided in reaching a conclusion in this case by the reasoning of DIXON, J., in State v. Addy, 14 Vroom, 113, 39 Am. Rep. 547, and the exhaustive discussion of the general subject in Ex parte Lange, 18 Wall. 163.

We have not discussed, nor are we called upon to discuss in this connection the almost universal practice in this commonwealth of the suspension of sentence, upon the payment of costs, where considerations of public policy may and ought to induce the court to stay its hand. We say nothing in regard to this practice. On the whole, the power which it implies has been judiciously exercised, so far as our knowledge and information extend; nor is it necessary to say anything as to the practice which has been recognized and is alluded to in Commonwealth v. Mayloy, supra, in which Chief Justice THOMPSON says: "The court has power to remand and hold convicts for sentence as long as may be deemed necessary and advantageous to the ends of justice, and, in the meantime, may receive information in addition to that disclosed on the trial in regard to what should be an appropriate sentence under the circumstances, where the court has a discretion on the subject."

What we do now decide specifically is that an order of the court of quarter sessions which suspends sentence as to a part of the penalty prescribed by law for an offense and imposes a pecuniary penalty upon the defendant, where fine and imprison-

ment constitute the penalty affixed to the crime, is, to all intents and purposes, a legal sentence, compliance with the terms of which renders it illegal for the court to alter or reform the sentence, after the term at which trial, conviction and the said partial sentence occurred, and that any sentence subsequent thereto is illegal and void.

Whereupon it is now considered and adjudged that the judgment of the court of quarter sessions for the county of Erie, entered May 25, 1897, in which the court sentences "the defendant, Lizzie Nuber, to pay a fine of one dollar to the commonwealth, for the use of the Erie County Law Library, pay the costs of prosecution, restore the property stolen, if not already restored, or pay the owners the full value thereof, and undergo an imprisonment in the Allegheny county workhouse, for and during the period of two years, there to be kept, fed, clothed and treated as the law directs, and stand committed, until the sentence be complied with" be reversed and annulled; and it is further ordered that the said Lizzie Nuber be released from her confinement in the Allegheny county workhouse, and that the record be remitted to the said court of quarter sessions for further proceedings, in conformity with the opinion of this court herein expressed, and of this order; costs of the proceedings in this court to be paid by the county of Erie.

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

Evidence—Inadmissibility of post contractual representations in deceit.

In an action on a contract evidence was properly rejected which was offered in support of alleged representations made by the plaintiff's agent after the contract in controversy had been entered into; such representations even if false would not legitimately tend to establish the defense, which was deceit.

Appeals—Application for new trial—After-discovered testimony — Discretion of court.

Applications for new trial based on allegations of after-discovered testimony are addressed to the sound discretion of the trial court, and only in clear cases of abuse of discretion, if ever, is the refusal of the application assignable for error.

Charge of court—Comments on testimony—Effect of charge as a whole.

The charge of the court is not open to exception when the effect of its comments, taken as a whole, was to lead the jury to the conclusion, not that the plaintiff's version of a conversation was the more probable, but that his version did not differ, in legal effect, upon the question at issue, from that of the defendant.

It is not error for the trial judge to comment on the testimony of a witness and to call attention to its inherent probability or improbability, provided he does it fairly, and leaves the question of his credibility to the jury.

Where particular instructions are not asked for, and the complaint is that the charge was inadequate or one-sided, the court will be reviewed on the general effect of the charge and not upon sentences or paragraphs disconnected from the context which qualifies and explains them; if, as a whole, the charge was calculated to mislead, there is error in the record; if not, there is none.

Argued Dec. 14, 1897. Appeal, No. 8, Oct. T., 1897, by defendants, from judgment of C. P. No. 2, Phila. Co., Mar. T., 1893, No. 70, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Sci fa. sur mortgage. Before SULZBERGER, J.

It appears from the evidence that defendants purchased of the plaintiff certain premises in Philadelphia for the sum of $4,400, subject to certain incumbrances, and executed a bond and mortgage for a portion of the purchase money, namely, $1,400 secured on the same, $1,000 to be paid in six months, and $50.00 quarterly thereafter. The agreement of sale made in writing, on February 18, 1890, was as follows:

"Received Philadelphia February 18, 1890, of Miss Martha H. and Ella Cridland the sum of $100 on account of purchase money of premises No. 2220 N. 16th St. 28th Ward sold for the sum of $4,400 subject to a mortgage of $2,500 thereon. Taxes, interest, to be adjusted at date of settlement which is to be made on or before the 25th day of February 1890. The policy of insurance against fire to be paid for by the purchaser less 10 % discount. Terms to be $500 cash, $2,500 first mortgage at 5 3/10, $1,400 second mortgage at 6%, $1,000 to be paid in six months and $50 quarterly. Deed to be made in the name of Miss Martha H. and Ella Cridland.

"$100.

"1305 Butler St.

"F. C. Thomas 1714 S. 8th St. will attend to the conveyancing and making settlement at office of building."

At the expiration of six months it was alleged that certain material defects in the building manifested themselves, and that the defendants, upon being assured by the plaintiff that these defects would be remedied, paid the $1,000. Repairs were not made, and no portion of the balance being paid, suit was brought upon the mortgage.

At the trial offers were made to prove certain conversations between defendants and the agent of the plaintiff in which it was alleged that certain misrepresentations were made by said agent and which conversations took place on the 25th of February, 1890. This evidence, upon objection by the plaintiff, was rejected. [1, 2]

Verdict and judgment for plaintiff for $581.06. Defendants appealed.

Errors assigned among others were (1, 2) In sustaining plaintiff's objection to the offers of evidence by defendants of conversations between plaintiff and defendant subsequent to February 18, 1890, the date when the agreement of sale was signed, under which it was alleged that certain misrepresentations were made by plaintiff's agent; (3) In refusing to grant a new trial based upon an affidavit of after-discovered evidence. (4) In its charge to the jury, taken as a whole, by giving prominence to the evidence of the appellee without adequate reference to evidence in contradiction, which is especially prominent in the following abstract: "Now the evidence in this case is, on the part of the Misses Cridland, that they did make the question of solid ground such a question, and I do not understand Mr. Locker to deny it. Mr. Locker said what was perfectly natural, and what appears to bear all the evidence of truthfulness: 'I deal a great many times in a year; I have had many, many transactions since that time, perhaps hundreds. Now, would it be possible for me truthfully to say that I spoke to these people on this occasion when I sold perhaps ninety houses in that one operation alone, and a great many others in other operations?' Well, that impresses one as being a badge of truthfulness. In short, if he had said that he really remembered every word of the conversation, you might very well ask

yourselves how it is that this man has such a tremendous memory, such a huge memory that in all the lapse of time and with all that multiplicity of transactions, he can still remember every word that everybody had said, and you might doubt the truthfulness of such a story, but here he says, 'I can't say, I know this, that McNeile told me these foundations were solid. They were excellent, and if anybody asked me about them I said that.' From the whole of that I think you would be fairly justified in concluding that there was a conversation between the plaintiff and defendant concerning the solidity of the foundation." (5) In charging the jury as follows: "The concrete covering of the cellar floor serves as a platform which practically bears very little weight. The space under the cellar wall there bears very much weight, to wit: the weight of the whole house. Now, if a house comes down, they say the joint between the wall and the cellar floor must be broken, that you could not have the walls settling down without breaking the joint between walls and the cellar floor; and they say, furthermore, that if the settling were uneven so that the four walls would not come down at exactly the same rate, at the same time, there would, moreover, be a fracture of the corners, where one wall would leave the other; and they say that they examined that place with the greatest care and minuteness, used lights, and made deliberate inspection, and did not find any evidence of such a fracture in either place; and their professional opinion is, that that condition of affairs being given, it is impossible that there could have been a settling of the foundation. On this point, you know, Mr. McBride (appellant's witness) is equally positive. I do not recollect that he was able to point to a particular fracture, but when questioned by me upon that subject, it seemed to me that the emphasis of his condemnation increased, rather than diminished. He then, I think, spoke about what was the use of discussing minor points; that the whole block was going down, or something to that effect." (6) In charging the jury as follows: "If you find that this house has not settled in the foundations; that the foundation of ground upon which it is, is solid—and in that sense I use foundation and ground as identical, and that the foundation is solid and that the house has not settled by reason of any defect in the founda-

tions—then you are to find a verdict for the plaintiff for the full amount."

J. H. Brinton, for appellants.—The crucial point of the defense lies in the misrepresentations made to defendants by plaintiff, or his agent, on the faith of which the premises in question were purchased.

The alleged agreement of February 18, 1890, is at best but an ex parte statement of the plaintiff's conception of the agreement and was signed by his agent and could, therefore, be but binding upon himself and his principal. Such writings and receipts are not to be construed as definitive agreements: Baush v. Railroad, 18 Phila. 392; Horton's Appeal, 38 Pa. 294; Batdorf v. Albert, 59 Pa. 59; Wolf v. Phila., 105 Pa. 25; Grove v. Donaldson, 15 Pa. 128; Bell v. Bell, 12 Pa. 235.

The charge of the court is misleading, and his comments had the effect to minimize the weight of the testimony of defendants' witnesses and, taken as a whole, would leave the impression that the plaintiff's witnesses deserved the greater credibility.

While it is true that the practice of excepting to a charge generally and assigning it as error is not recognized save in exceptional cases, the case at bar seems to comply with the requirements of the exception: Reichenbach v. Ruddach, 127 Pa. 564; Lerch v. Bard, 177 Pa. 197; Herstine v. Railroad Co., 151 Pa. 244.

H. Gordon McCouch, for appellee.—As the gist of the defense was alleged false representations inducing the making of the contract, it is apparent that no evidence could have been received as to representations made after the contract was closed, and in such ruling of the court there was no error.

The overruling of a motion for a new trial is not a proper subject for an assignment of error. The discretion of the court is not reviewable here: Howser v. Com., 51 Pa, 332; Moock v. Conrad, 155 Pa. 586; DeGrote v. DeGrote, 175 Pa. 50.

The charge of the court, as a whole, was entirely fair; in effect, the court charged the jury that representations were made and relied on, and left it to them to decide whether they

were true or false. Their verdict settles that question in favor of the appellee, and while the appellants may feel dissatisfied with the finding they have no just cause to complain of their treatment by the court.

OPINION BY RICE, P. J., February 19, 1898:

The valid objection to the evidence referred to in the first and second assignments of error was, not that it would tend to contradict or vary the contract by parol, but that proof of representations, though false, made by the plaintiff's agent after the contract was entered into, would not legitimately tend to establish the defense, which was deceit. This is obvious; for the defendant admitted that the contract was made on February 18th, and was in writing; the receipt which contained the essentials of a valid writing for the sale of real estate was delivered on that day; and the other witness, Aaron J. Cridland, testified, that, before the alleged conversation took place, he had been told by his sisters, the defendants, that they had purchased the house. Manifestly they did not purchase it on the faith of any representations made on February 25th, and the court committed no error in rejecting testimony which had no legitimate tendency to prove the defense, and could only tend to confuse and divert the minds of the jurors from the real issue. The first and second assignments are overruled.

An application for a new trial based on an allegation of after-discovered testimony is addressed to the sound discretion of the trial court, and only in clear cases of abuse of discretion, if ever, is the refusal of the application assignable for error: DeGrote v. DeGrote, 175 Pa. 50. The witness Kohn had testified on the trial, and had undertaken to describe the cracks in the building, but omitted to mention any cracks in the foundation walls. Very naturally the court might hesitate to grant a new trial for the purpose of permitting him to supplement his testimony. But we need not speculate as to the reasons which moved the action of the court. They are not on the record; and, even if the defendants had excepted to the refusal of the application, there is nothing in the case to take it out of the rule above stated. The third assignment is dismissed.

In commenting on the testimony of the witness Locker, the learned trial judge committed no error of which the defendants

have any just reason to complain. The effect of his comments, taken as a whole, was to lead the jury to the conclusion, not that the witness's version of the conversation was the more probable, but that his version did not differ in legal effect upon the question at issue from that of the defendants. "It seems to me," said the judge, "for the purposes of this case there is no real difference" (between "solid ground," the terms used by the plaintiff, and "solid foundation," the terms used by the defense) "because the defendants, if they were told that the foundations were solid, were entitled to believe, not only that those cellar walls were well built, but that they were well built and well placed upon a proper supporting foundation of earth, and if they were not so placed, if they were placed upon a foundation that was not safe, that would not support the weight put upon it, then there was not a solid foundation." There were other instructions to the same effect; and upon a careful perusal of the whole charge it will be seen that the case was sent to the jury upon the theory, so far, at least, as the judge expressed an opinion upon the question of fact, that the defendants' version of the representations was not contradicted in essential particulars by the testimony of the witness. Further comment upon the fourth assignment of error is unnecessary; it is overruled.

We find no error in the instructions complained of in the fifth assignment, even when disconnected from the rest of the charge. The theories of both parties and the main points in the evidence supporting them were adequately and impartially presented. Nor did the court, in summarizing the testimony of the witness McBride, misapprehend its effect, as will be seen from the following extract therefrom: "I mean to say it is impossible to talk about one house that is built tied in with other houses, to say that one house would show a crack when they have all gone down together; there is nothing to crack them, they cannot crack; they can fall apart, they can fall out in the street, but there is nothing there to hold them to make them crack. You cannot talk about one house that is built in with other houses. It is impossible for that house to show a crack, when they are all going down together. The house has gone, all the walls, the side walls, and back walls, and front walls."

It is not error for a trial judge to comment on the testimony

of a witness and to call attention to its inherent probability or improbability, provided he does it fairly and leaves the question of his credibility to the jury. Where particular instructions are not asked for and the complaint is that the charge was inadequate or onesided, the court will be reviewed on the general effect of the charge, and not upon sentences or paragraphs disconnected from the context which qualifies and explains them; if, as a whole, the charge was calculated to mislead, there is error in the record; if not, there is none: Irvin v. Kutruff, 152 Pa. 609; K. of P. v. Leadbeater, 2 Pa. Superior Ct. 461; Walton v. Caldwell, 5 Pa. Superior Ct. 143. This charge, whether viewed in respect of the instructions upon the law, or the review of the facts, was clear, adequate, and impartial.

The instruction complained of in the sixth assignment, taken in connection with what followed, was a full and clear statement of the controlling questions of fact in the case and was free from error. This seems too plain to permit discussion.

Judgment affirmed.

Wile's Estate. Rump's Appeal.

Evidence—Conflicting presumptions of marriage and legitimacy—Policy of law.

A valid marriage once established is presumed to continue until the contrary is shown or until a different presumption is raised. Of necessity resort must often be had to presumptive evidence, and it is not too much to say that the burden of proof is often placed and shifted, not only because of the convenience of proving or disproving a fact in issue, but also upon grounds of public policy.

The presumption of the continuance of a valid marriage will yield after long desertion of a wife by her first husband and after a second marriage by the first husband and by the wife, in favor of the presumption of legitimacy of the wife's child by her second marriage; and the burden of proving the continuing validity of the first marriage is imposed by the policy of law upon those contesting the legitimacy of the child of the wife by the second marriage even to the extent of compelling the production of proof that the first marriage had not been terminated by divorce during the long years of desertion by the husband during which he had sojourned in many states, had married again and had declared that his marriage with the mother of the child in question was void.

Legitimacy of children—Burden and quality of proof—Policy of law.

The presumption and charity of the law are in favor of the legitimacy of a child, and those who wish to bastardize him must make out the fact by clear and irrefragable proof. The presumption of law is not lightly repelled; it is not to be lightly broken in upon nor shaken by a mere balance of probabilities; the evidence for repelling it must be strong, satisfactory and conclusive; such presumption can only be negatived by disproving every reasonable probability.

Argued Oct. 13, 1897. Appeal, No. 82, Oct. T., 1897, by Almira E. Rump, Julia McKnight and Michael Shetzline from decree of O. C. Phila. Co., Oct. T., 1881, No. 168, in the matter of the estate of George Wile, deceased. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Adjudication of trustees' account. Before FERGUSON, auditing judge.

It appears from the record and evidence that the question arose at the audit of the estate of George Wile upon the filing of the account of testamentary trustees.

The guardian of John Shetzline, Jr., the grandson of the testator, claimed as distributee under the limitations during the continuation of a trust to issue of testator's children, FERGUSON, auditing judge, finding that the minor's mother had been married to Benjamin Andrews prior to her marriage to the child's father, and that her first husband was living at the time of her second marriage, holding that the marriage was void and that the child being illegitimate could not share as issue of his father in the distribution. This finding he reaffirmed on a rehearing which had been granted "to enable the guardian to prove her claim." Exceptions on behalf of the guardian of John Shetzline, Jr., were filed alleging error, (2) In placing the burden of proof on said minor; (5) In finding that there was no evidence that Benjamin F. Andrews and Elizabeth Andrews were divorced; (7) In not finding that the said minor was entitled to all presumptions existing at the time of his birth; (10, 11) In not awarding the fund to the guardian of said minor.

The court in banc sustained the above exceptions in an opinion by PENROSE, J., in which the material facts of the case fully appear, and which is as follows:

That the parents of the child, whose right as one of the distributees is now denied, were regularly married in 1884, a year or more before his birth; that, in the relation thus established, they lived happily until the husband's death in 1891; and that during the entire period of seven years or more his father, brother and sisters were on terms of intimacy and friendship with his family, with no suggestion that his marriage was not a valid one, are facts clearly established by the evidence, and, practically, not in dispute. As grandchild he was entitled, while he lived, to one twentieth of the income of the estate of the testator; and the share which he had received was continued, for more than two years, to his child's guardian, under the limitation during the continuance of the trust to "issue."

The boy, a helpless cripple, now about ten years old, seems to have been the object of especial tenderness on the part of his father, who, on his death-bed, expressed great anxiety as to his future welfare, fearing, as he said, "lest some wrong might at any time be done to his little crippled boy." His mind was relieved by the assurance of a sister that this should never be; but it is this sister who now alleges that her brother's marriage was invalid, and seeks on this ground, not only to exclude his boy from further participation in the grandfather's estate, but to blight his entire life by stigmatizing him as illegitimate—though her share of what he would thus be deprived of, during a period of two years, is shown by the adjudication to be but $60.62. The auditing judge, in commenting on this has well said: "We have often illustrated in this court some of the best features of human nature. We have also some of the worst. This is one of the worst." Avarice, however, is apt to yield to just such temptations; and, as we know, thirty pieces of silver (just half the amount sought for here) were sufficient to induce the grossest act of perfidy recorded in the history of the human race.

It appears that in 1866 the boy's mother was married to a man who deserted her in 1872, after having treated her with great brutality and after repeatedly declaring that she was not his wife. He disappeared from the city, and she was told that he was dead; but it was not until 1884, after an interval nearly twice as long as that required to create a presumption of death, that she contracted a second marriage—never, in the mean-

while, having heard of, or had any communication with him. But he was not dead; and a year or two after the birth of the child whose legitimacy is now attacked, he appeared again in Philadelphia, thus putting an end, of course, to the presumption of death arising from his long continued absence.

If the case rested here, there could be no escape from the conclusion that the second marriage of the wife, notwithstanding the good faith with which it was contracted, was void ab initio. But it was shown that two or three years after his desertion, the supposed first husband married another woman, with whom, as his wife, he has ever since lived and cohabited; and as he would otherwise be guilty of bigamy, it is to be presumed either that he spoke truthfully when he asserted that the marriage of 1866 was, for some undisclosed reason, void, or that after his desertion and before his remarriage, he obtained a divorce. A divorce so procured, even if service were not effected upon the opposite party, would be voidable only, not void; and after the remarriage of both parties both would be bound by it (see Richardson's Estate, 132 Pa. 292; Pennoyer v. Neff, 95 U. S. 714; Bishop on Marriage and Divorce, secs. 163, 199). It is stated in Best on Evidence, sec. 346, that "it is a presumptio juris, running through the whole law of England, that no person shall, in the absence of criminative evidence, be supposed to have committed any violation of the criminal law, . . . or to have committed any act subjecting him to any species of punishment, ... and this holds in all proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally." And "so strong is this presumption," it is said by Professor Greenleaf (Evidence, sec. 35), "that even where the guilt can be established only by proving a negative, the negative must, in most cases, be proved by the party alleging the guilt; though the general rule of law devolves the burden of proof on the party holding the affirmative." Illustrations of these principles are furnished by Rex v. The Inhabitants of Twyning, 2 B. & Ald. 386; Case v. Case, 17 Cal. 598; West v. The State, 1 Wis. 186; Williams v. The East India Company, 3 East, 193, etc.

But where the question not only involves the commission of crime by third persons, but relates also to the legitimacy of one born in wedlock, and especially where the legitimacy was not

questioned until after the death of the parent through whom property is claimed, presumptions of this character are greatly strengthened. "The presumption and charity of the law," as was said by the Supreme Court of Illinois in Orthwein v. Thomas, 127 Ill. 554, are in favor of the legitimacy of the child, "and those who wish to bastardize him must make out the fact by clear and irrefragable proof. The presumption of law is not lightly repelled; it is not to be lightly broken in upon or shaken by a mere balance of probabilities; the evidence for repelling it must be strong, satisfactory and conclusive." And in Piers v. Piers, 2 H. L. Cas. 331, it is said that the presumption "can only be negatived by disproving every reasonable possibility." See also DeThoren v. The Attorney General, L. R. 1 App. Cas. 686.

The precise question has been decided by the court of last resort in at least two states of the Union (Blanchard v. Lambert, 43 Iowa, 328; Carroll v. Carroll, 20 Texas, 731); and as the decisions are fully justified by the principles to which we have referred, we have no hesitation in following them.

The second, fifth, seventh, tenth and eleventh exceptions to the readjudication are sustained, and the distribution awarded accordingly.

Counsel will prepare the necessary decree.

Errors assigned among others were (1) In sustaining appellee's exceptions; (5) In finding that there was a presumption of a divorce of the child's mother from her former husband; (6) In giving said presumption of divorce the full force of an established fact; (9) In finding that John Shetzline, Jr. was a legitimate son of John Shetzline, Sr.

Frederick J. Knaus, for appellants.—If a woman has a lawful husband alive and undivorced at the time of her second marriage, no matter how long he may be absent or unheard of, the second marriage is void: Clark's Appeal, 173 Pa. 451. Kenley v. Kenley, 2 Yeates, 207; Thomas v. Thomas, 124 Pa. 646.

It was error in the court in banc not to have sent the matter back to the auditing judge to permit the hearing to be completed by permitting the appellants to submit evidence in support

of their side of the case. The proceeding was analogous to a nonsuit in a common law action, and no one will pretend that when a nonsuit is taken off the defendant has not the right to a venire de novo, to have his side heard. This point was raised in Wharton v. Williamson, 13 Pa. 273.

Albert D. Wilson, for appellee.—The court in banc inferred an additional fact, namely, a divorce by Benjamin Andrews from his wife. "Legal presumptions lie thickly strewn in the pathway of evidence. A state of facts being proved the law makes its own inference and from it pronounces that another fact must have existed:" Kisterback's Appeal, 51 Pa. 483. When presumptions are in conflict that prevails which favors innocence. It is presumed every one has conformed to the law.

The findings of fact by the orphans' court will not be disturbed: Coulston's Estate, 161 Pa. 151; McConnell's Appeal, 97 Pa. 31.

OPINION BY RICE, P. J., February 19, 1898:

When the existence of a valid marriage relation is once established by proof it is to be presumed, ordinarily, that it continues to exist until the contrary is shown or until a different presumption is raised. Where this presumption comes in conflict with the presumption of the innocence of either of the parties in marrying a second time and of the legitimacy of the offspring of such marriage, the question arises which shall yield. If one of the parties has been absent from his or her domicil unheard of for seven years there is no difficulty. In such a case death is to be presumed: Francis v. Francis, 180 Pa. 644; but this presumption is subject to be rebutted, as it was in the present case, by proof that he was alive at the time of the second marriage: Thomas v. Thomas, 124 Pa. 646. But proof that he was alive is not positive proof that he was still the lawful husband of the woman to whom he was first married. That fact rests alone on the presumption of the continuance of a relation which might have been dissolved by divorce as well as by death. Upon that bare presumption the appellants' whole case rests. In other words, they say, that Benjamin Andrews was married to Elizabeth in 1866, and was alive when she married John Shetzline in 1884; therefore, because of the presumed

continuance of a proved relation, the latter marriage was void, the child born of it was a bastard, and was incapable of inheriting from or through his father. Possibly, if there were nothing further in the case, this presumption would neutralize the prima facie presumption in favor of the validity of the marriage directly in issue; although that has been denied in more than one case. But be that as it may, the proposition, that the former presumption must always prevail, in the absence of full proof of the dissolution of the first marriage, is not sustained by principle or the weight of authority. The circumstances of the particular case, although not in themselves amounting to full proof of the fact, may so aid the presumption in favor of innocence as to warrant the court in presuming the dissolution of the first marriage by death and even by divorce; or to put the proposition in a preferable form, in holding, that the burden of proving that it was not dissolved rests on him who asserts the illegitimacy of the offspring of the second marriage. Of the well considered cases which may be cited in support of this proposition—some of them go still further—are Blanchard v. Lambert, 43 Iowa, 228; Re Edwards, 58 Iowa, 431; Carroll v. Carroll, 20 Tex. 731; Coal Run Coal Co. v. Jones, 127 Ill. 379; Schmisseur v. Beatrie, 147 Ill. 310; Boulden v. McIntire, 119 Ind. 574; Hull v. Rawls, 27 Miss. 471; Klein v. Laudman, 29 Mo. 259; Hunter v. Hunter, 31 L. R. A. 411, and cases there cited. See also Rex v. Twyning, 2 B. & Ald. 386; Kelly v. Drew, 94 Mass. 107; Greensboro v. Underhill, 12 Vt. 604; Spears v. Burton, 31 Miss. 548; Wilkie v. Collins, 48 Miss. 496; Johnson v. Johnson, 114 Ill. 611; Orthwein v. Thomas, 127 Ill. 554; Sharp v. Johnson, 22 Ark. 79. Our own cases recognize the general principle, although none of them decides the precise question before us. In Breiden v. Paff, 12 S. & R. 430, the question was as to the validity of a deed made by A and B, his wife. It was proved that she had been married to D who was dead more than thirty years, and one of the plaintiff's witnesses stated that she had had three husbands before marrying A. It was contended that a conveyance to which her legitimate husband was not a party, would not pass her estate, but Judge GIBSON said: "I am of opinion, the court were right in leaving the jury to presume that the persons to whom she had been married previously to her marriage with

Paff were dead. In an old transaction like this, the fact of the second marriage is, of itself, some evidence of the death of the former husband. There are sometimes cases where it is unavoidably necessary to decide on the existence of facts, without a particle of evidence on either side, and if a decision in a particular way would implicate a party to the transaction in the commission of a crime, or any offense against good morals, it ought to be avoided; for the law will not gratuitously impute crime to any one, the presumption being in favor of innocence till guilt appear." In Senser v. Bower, 1 P. & W. 450, the question was as to the legitimacy of the plaintiff. There was sufficient evidence of reputation and cohabitation to show that her father and mother were married in fact. "But," said Chief Justice GIBSON, "there is said to be the same evidence of a precedent marriage of the mother with another man who was alive at her second marriage; and hence a supposed dilemma. But the proof being equal, the presumption is in favor of innocence; and so far is this carried in the case of conflicting presumptions, that the one in favor of innocence shall prevail: Starkie on Ev. 749–753. It must be admitted that this principle is not immediately applicable here, inasmuch as there is no conflicting evidence, and the facts supposed to result are consistent with each other; but it establishes that the same proof that is sufficient to raise a presumption of innocence may be inadequate to a presumption of guilt. To say the least, then, the jury were not bound to draw the same conclusion of marriage from the same evidence, without regard to consequences; and to have instructed them that they were, would have been an error. On the contrary, they were bound to make every intendment in favor of the plaintiff's legitimacy, which was not necessarily excluded by the proof." So in Pickens's Estate, Obenstein's Appeal, 163 Pa. 14, Mr. Justice FELL said, "but if conflicting presumptions arose, that in favor of innocence and legitimacy would prevail."

The declaration of Benjamin Andrews that the mother of the appellee was not his wife; his marriage to another woman with whom he lived openly as his wife, and who was so recognized by his daughter; the terms of intimacy and friendship which existed between the mother of the appellee and her second husband's family during all the period of their marriage; their

recognition of her as his lawful wife, and of the appellee as his legitimate child, emphasized by a solemn promise made by one of the appellants to the father upon his death bed; the lapse of time, during all which no question appears to have been raised by any one as to the validity of either of the second marriages, are facts which cannot be overlooked in determining such an issue as is presented here. They do not, of themselves, prove the dissolution of the first marriage, it is true, but they do show a probability of it, which, taken in connection with the presumption of innocence and legitimacy, neutralized the presumption that Benjamin Andrews was the lawful husband of Elizabeth at the time of her marriage with John Shetzline, and left the fact essential to the appellants' claim not proven.

In answer to the question, how were they to prove that he was not divorced, it may be asked how was this appellee to prove that he was? If he must prove it by the record it would be scarcely less difficult for him to ascertain the state and the court in which the decree was made, than for the appellants to prove the negative; and, it is to be borne in mind that even where guilt can be established only by proving a negative, the negative must in most cases be proved by the party alleging the guilt, unless the fact be one peculiarly within the knowledge of the other party. But the opinion of the court below is so full and satisfactory upon this point, and indeed upon all the questions, that, it seems to me, we might well have adopted it without further discussion.

Since writing the foregoing we have examined the unreported case of Van Dyke v. Barger (No. 83, May T. 1878, Middle District of Supreme Court) called to our attention by our Brother BEAVER who was of counsel. Upon a hasty examination it seemed to sustain the appellant's contention, but upon a more careful consideration of its facts we think it fairly distinguishable from the present case in a very important particular. There, the question was as to the dissolution of the marriage tie between Alexander Van Dyke and Elizabeth McCleary. The evidence showed, that shortly after their separation both married a second time, and after the death of the second woman Alexander Van Dyke married a third time. But both parties continued to reside in Pennsylvania, and their domicils were well known. If either party had obtained a divorce it would

have been an easy matter to prove it by a judicial or legislative record. It was of such a case that the Supreme Court, in distinguishing it from Senser v. Bower, *supra*, said: "It is evident no such presumption arises here — and it is very different from presuming a divorce — which should only be by some legislative or judicial proceeding easily susceptible of proof, if it had existed." The same cannot be said of the present case. For over ten years the domicil of Benjamin Andrews was unknown. The mother of the appellee supposed him to be dead, and was warranted in so presuming when she married a second time. The evidence showed that his second marriage was contracted in Kentucky, and when his daughter visited him he was domiciled in Illinois. The appellee furnished the best evidence of which the case in its nature was susceptible, taking into consideration all the circumstances. To require him to prove a divorce by the record of some court would be to compel him to trace Benjamin Andrews through all his wanderings and to search the records of all the courts of all the states where he may have been domiciled. This were to require an impossibility, as much so as to prove the death of a person who has been unheard of for seven years. The latter may be presumed, and is often presumed, in favor of innocence; why not the former? Of necessity, resort must often be had to presumptive evidence, and it is not too much to say that the burden of proof is often placed, and shifted, not only because of the convenience of proving or disproving a fact in issue, but also upon grounds of public policy. "Society rests upon marriage, the law favors it, and when a man and woman have contracted marriage in due form, the law will require clear proof to remove the presumption that the contract is legal and valid." The presumption of the continuity of an established relation, or state, or condition, whether of marriage or any other, is a convenient rule of evidence, and, it is true, most frequently accords with the actual facts. But it is not an absolute and inflexible rule, and could not be so declared without breaking down other presumptions equally regarded in the law and based on as strong natural probability. We think it was so far weakened in the present case by the proved facts and the natural probabilities that grew out of them, that the court was justified in holding, that it was incumbent on the appellants to prove that Benjamin

Andrews was the lawful husband of the appellee's mother at the time of her marriage to John Shetzline, and that they had failed to prove that fact.

There is nothing in the record of the proceedings to show that the auditing judge did not receive all the evidence that the appellants offered. After a regular marriage of the parents of the appellee was shown, the burden of proving that the parties had not legal capacity to marry, and that the issue was illegitimate, rested on the appellants. If they saw fit to go to final hearing without introducing or offering all the evidence they had upon that question, they took the risk, and having lost were not entitled to another opportunity to make out a stronger case.

The decree is affirmed at the cost of the appellants.

BEAVER, J., dissents.

Annie S. Koons, Appellant, *v.* James F. McNamee.

Easement—Prescription does not run pending unity of titles.

There can be no adverse user upon which to base a prescription of easement while the title to the properties is held by a single owner, for no man can have an easement in his own property.

Easements founded upon grant subject to permanent, visible service.

Where the owner of land subjects part of it to an open, visible, permanent and continuous service or easement in favor of another part, and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be. This is founded on the principle that a man shall not derogate from his own grant, and its enforcement is a fortiori where the vendee purchases the dominant land.

Easements whether apparent and continuous—Question for jury.

Whether an easement or servitude is apparent, continuous or the contrary, involves questions of fact resting in parol which, when the facts are in dispute, is for the jury, the court cannot reserve to itself the power to decide them.

Practice, C. P.—Reservation of point of law—Province of court.

Where a point of law is reserved, the facts out of which it arose must be stated on the record; the court cannot draw inferences of fact from the evidence. It must be a pure question of law—such as rules the case,—not a mixed question of law and fact.

Where there has been an improper reservation the case will be sent back for a new trial, in order that the facts may be found by the jury or distinctly put on the record in some other recognized way.

Argued Oct. 22, 1897. Appeal, No. 131, Oct. T., 1897, by plaintiff, from judgment of C. P. No. 4, Phila. Co., June T., 1896, No. 703, in favor of defendant, on verdict for plaintiff, subject to point of law reserved as to whether the plaintiff could recover. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Reversed.

Trespass for cutting off the water and drain pipe which flowed through defendant's property. Before AUDENREID, J.

The facts sufficiently appear in the opinion of the court.

The court below directed the jury to render a verdict for the plaintiff for $104, subject to a point of law reserved as to whether the plaintiff could recover. Judgment was subsequently entered on the point of law reserved in favor of defendant, non obstante veredicto.

Error assigned was entry of judgment for defendant on the point of law reserved non obstante veredicto.

J. H. Grater, for appellant.—It is well settled doctrine in this state that a permanent right established by the owner over his property, necessary for its convenient use, will not be destroyed by his sale or his incumbrance: Railroad Co. v. Jones, 50 Pa. 417.

Easements which are apparent and continuous are not merely those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject: Kieffer v. Imhoff, 26 Pa. 438.

The appellant was entitled to the use of the water and drain through appellee's property, as the servitude was imposed by his grantor, and was continued for upwards of twenty-one years. An easement by prescription was created by appellee's vendor.

James P. Gourley, for appellee.—The purchaser of an alleged servient estate does not take it subject to an easement not apparent nor mentioned in the deed, unless he had notice. He is not bound to make inquiries of adjoining owners, nor

make an examination of adjoining premises: McKinney v. McCollough, 42 L. I. 414.

A mere permissive occupation of land is revocable at pleasure, and cannot be made the basis of a claim of adverse user. Whatever right therefore the licensee may have under such circumstances is extinguished the instant the title is transferred to another: Stille v. Simes, 16 Phila. 110.

OPINION BY RICE, P. J., February 19, 1898:

The plaintiff is the owner of two lots of ground on Palethorp street in the city of Philadelphia, and the defendant is the owner of a lot on Second street abutting on the plaintiff's lots. Both these properties were originally owned by John McNulty. The plaintiff acquired her title in 1884 from the purchaser at sheriff's sale under a judgment on a mortgage given by John McNulty in 1879. The defendant acquired his by deed from the heirs of John McNulty in May, 1891.

In 1874 or 1875, Mr. McNulty built two houses on the Palethorp street lots, and from that time until the commission of the trespass for which this suit was brought, they were supplied with water carried by a pipe from the main on Second street through the lot now owned by the defendant. For the same period the drainage from the roofs and water closets of the Palethorp street houses was conducted into a well on the same, and thence into a larger well, separated only by a wall, on the defendant's lot, which was connected with the sewer on Second street by a terra cotta pipe. It is alleged that there is no water main or sewer on Palethorp street.

In May, 1896, the defendant shut off the flow of water to the plaintiff's premises, and also stopped the drain therefrom by filling up the well upon his own premises. Hence this suit.

At the conclusion of the testimony the trial judge instructed the jury as follows: "The only question in this case is a question of law. That question is as to whether or not, under the evidence which has been adduced, the plaintiff has established her right to the easement, for the interference with which she now claims to be damaged. I will reserve that question, and with that point reserved, I direct you to find a verdict in favor of the plaintiff for the sum of $104, the sum agreed on by the parties." Subsequently the court entered judgment for the defendant non obstante veredicto. No opinion was filed.

The contention that the plaintiff has an easement by prescription, in its strict sense, cannot be maintained, for the reason that there could be no adverse user while the title to the properties was held by a single owner; and the period of time after their severance in title, even dating from the giving of the mortgage, was not sufficiently long for the creation of an easement in that way.

"It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property, but he obtains the same object by the exercise of another right, the general right of property; but he has not the less thereby altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the land burthened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it:" Gale's Law of Easements, 52. This doctrine as to implied easements, not of strict necessity, has also been stated in this way: "Yet where an owner of property has so used one portion of it that he has impressed upon it in favor of another portion what would be, were the portions in different ownerships, a servitude, then upon a conveyance of the former portion an easement will be granted to the vendee, where the use has been of such character that an easement resulting from it would be of the class known as continuous and apparent:" 4 Sharswood and Budd's Leading Cases on Real Property, 133, 134. A distinction has been drawn in the modern English cases between an implied grant and an implied reservation, but the general principle as above stated, as far at least as it relates to the implication of a grant, is too well settled by authority to require discussion. In one of the recent decisions of our Supreme Court it is said: "The law on this subject is settled beyond question. Where an owner of land subjects part of it to an open, visible, permanent, and continuous service or easement in favor of another part, and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be. This is the general rule founded on the principle that a man shall not derogate from his own grant. The rule is stated in Gale on Easements

half a century ago, quoted with approbation by Chief Justice GIBSON in Seibert v. Levan, 8 Pa. 383; by Chief Justice LEWIS in Kieffer v. Imhoff, 26 Pa. 438; and expressly made the basis of the decision in Phillips v. Phillips, 48 Pa. 178. The cases in which the subject has most frequently come before this court, are those in which the grantor has conveyed the servient tenement, and the question has been whether the purchaser took subject to the easement remaining in the estate of the grantor: Overdeer v. Updegraff, 69 Pa. 110, and the rule has been uniformly held to be as above stated. Its enforcement would be a fortiori where the vendee purchases the dominant land, as in the present case. That is conceded even in the modern English cases which question the universality of the rule:" Grace Church v. Dobbins, 153 Pa. 294. In addition to the cases cited in the foregoing opinion, the following may be mentioned as recognizing and applying the general principle: Zell v. Universalist Society, 119 Pa. 390; Geible v. Smith, 146 Pa. 276; Ormsby v. Pinkerton, 159 Pa. 458; Sharpe v. Scheible, 162 Pa. 341; Held v. McBride, 3 Pa. Superior Ct. 155, and the cases there cited. The rule applies to purchasers at judicial, as well as private sales: Zell v. Universalist Society, supra. It will be observed that the implication of a grant in the class of cases above cited, and to which this belongs, rests not upon strict necessity but upon a different principle. How far necessity or great convenience enters into the question in cases of this class is thus stated in Phillips v. Phillips, 48 Pa. 178: "It is not to be understood by this doctrine that any temporary convenience adopted by the owner of property is within it. By all the authorities it is confined to cases of servitudes of a permanent nature, notorious or plainly visible, and from the character of which it may be presumed that the owner was desirous of their preservation as servitudes, evidently necessary to the convenient enjoyment of the property to which they belong, and not for the purpose of mere pleasure." These general principles apply to all kinds of apparent and continuous servitudes imposed by the owner upon one portion of his land for the benefit of another portion, and of course drains and water pipes are not excluded from the operation of the rule. Indeed, in the leading case of Nicholas v. Chamberlain, Cro. Jac. 121, it was held "that if one erects a house and builds a conduit thereto in

another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, or sells the land to another reserving to himself the house, the conduit and pipes pass with the house." This has been used as an illustration of the general principle in several of our own cases.

An examination of the evidence, in the light of these general principles, shows, that the question whether the plaintiff had an easement of drain and water pipe, or of either, in the defendant's premises could not be reserved and decided as a pure question of law.

Whether an easement is apparent and continuous or non-apparent and noncontinuous involves questions of fact resting in parol, which, under the evidence in the present case, were for the jury to decide under proper instructions as to the law. Where the essential facts have not been found by a jury, or agreed upon by the parties, and are in dispute, as in the present case, the court cannot reserve to itself the power to decide then. For example, there is some evidence tending to show, that, owing to the fact that there is no water drain or sewer on Palethorp street, the easement claimed was necessary, or, at least, greatly convenient to the reasonable enjoyment of the dominant tenement. If this be the fact it would have an important bearing (even if it were not conclusive) upon the intention of the owner in connecting the Palethorp street houses with the drain and sewer on Second street. See Phillips v. Phillips, supra. Again it is alleged by the plaintiff,—we do not assume to say it is the fact,—that, not only might the drainage connection between the dominant and the servient tenements have been seen by any one inspecting the latter, but also that the defendant had actual knowledge before he purchased the Second street property that the Palethorp street houses were supplied with water, and drained, in the way described. What is the fact? It has not been found by the jury, and has not been put on the record in the reserved point. We need not go further into the evidence for the purpose of pointing out other questions of fact which arose, or might arise in such a case. We have referred to these simply for illustration, and enough has been said to show, that the question, whether the plaintiff, under the "evidence adduced," (which must mean

all the evidence) has an easement in the defendant's land, was not a pure question of law.

Where a point of law is reserved the facts out of which it arose must be stated on the record; the court cannot draw inferences of fact from the evidence. It must be a pure question of law—such as rules the case—not a mixed question of law and fact. A question has been raised as to the propriety of reserving the question "whether there is any evidence in the case to be submitted to the jury upon which the plaintiff is entitled to recover" (Chandler v. Commerce Fire Ins. Co., 88 Pa. 223; Koons v. Tel. Co., 102 Pa. 164; Newhard v. R. R. Co., 153 Pa. 417; Yerkes v. Richards, 170 Pa. 346), but all the authorities, from Edmonson v. Nichols, 22 Pa. 74, to Yerkes v. Richards, supra, uniformly hold, that a verdict for a certain sum, subject to the opinion of the court whether upon the whole case the plaintiff is entitled to recover, does not authorize a judgment for the defendant non obstante veredicto; the facts must be admitted of record or found by the jury: Irwin v. Wickersham, 25 Pa. 316; Wilson v. The Tuscarora, 25 Pa. 317; Winchester v. Bennett, 54 Pa. 510; Wilde v. Trainor, 59 Pa. 439; Ferguson v. Wright, 61 Pa. 258; Campbell v. O'Neill, 64 Pa. 290—a case directly in point—Com. v. McDowell, 86 Pa. 377; Miller v. Bedford, 86 Pa. 454; Printing Co. v. Rice, 106 Pa. 623; Buckley v. Duff, 111 Pa. 223; Henry v. Heilman, 114 Pa. 499; Moore v. Copley, 165 Pa. 294; Shelly v. Dampman, 1 Pa. Superior Ct. 115; Ginther v. Yorkville, 3 Pa. Superior Ct. 403.

In any view of the case the judgment non obstante veredicto must be reversed; but whether we ought now to enter judgment for the plaintiff on the verdict or to send the case back for a retrial is a question of practice not free from difficulty. Without, however, undertaking to lay down a general rule upon the subject we are of opinion that under the special circumstances of the case it should be treated as an improper reservation and not as an absolute nullity, and that, following Bank v. Earley, 115 Pa. 359, the case should be sent back for a retrial, in order that the facts may be found by a jury, or distinctly put on the record in some other recognized way. See also Wilde v. Trainor, 59 Pa. 439.

Judgment reversed and venire facias de novo awarded.

Benjamin Lipper v. Bouvé, Crawford & Company, a corporation, Appellant.

Surrender of lease—Burden of proof as to acceptance.

A surrender of demised premises by the tenant, in order to be effectual, so as to release him from liability for the rent, must be accepted by the lessor and the burden of proof is on the lessee.

Landlord's duty as to leasing abandoned premises.

A landlord is not bound in relief of his tenant to lease abandoned premises to any one who may apply; and he clearly is not bound to consider a proposition of a third person to rent them prior to and in anticipation of, the tenant's removal. Any efforts which he may make are in the interest and for the benefit of the tenant and do not, of themselves, discharge the tenant from his covenant to pay rent.

Landlord and tenant—Exercise of option for additional term—Tenancy from year to year.

A holding over by a tenant who has an option for an additional term is notice to his landlord of his election to exercise his privilege; the actual continuance of such occupation is the best and most conclusive evidence of the intention to continue.

A lease was for a year with an option of two years' renewal, and a provision for tenancy from year to year on three months' written notice. The tenant held over the first year, and toward the end of the second year gave three months' written notice of intention to terminate the lease. *Held*, That the option having been exercised the term became certain in duration, and that a tenancy from year to year would not arise before the expiration of the term.

Argued Oct. 21, 1897. Appeal, No. 45, Oct. T., 1897, by defendant, from judgment of C. P. No. 4, Phila. Co., June T., 1895, No. 599, in favor of plaintiff for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Affirmed.

Assumpsit to recover rent.

The material facts appear from the statement and affidavits of defense. The statement declared for rent due on a lease for the term of one year with the privilege of two years additional from December 1, 1892, the essential covenants of this lease being set out in the opinion of the court. The tenant after three months' written notice, vacated on November 30.

1894, claiming the lease to be one from year to year. The landlord having rented the premises for a portion of the year ending November 30, 1895, claimed for the difference in rent collected. The affidavit set up a surrender and legal right to surrender, but did not specifically aver an acceptance by the landlord. A supplemental affidavit averred that prior to November 30, 1894, a number of persons offered to rent the store for the same sum as that reserved in tenant's lease and upon being referred to the landlord he failed or refused to rent to them, and that subsequently after alterations made he rented for a higher rent.

Judgment for plaintiff for $547.61. Defendant appealed.

Error assigned was making absolute the rule for judgment for want of a sufficient affidavit of defense.

Charles A. Chase, for appellant.—The words "for the term of one year with privilege of two years additional" mean from year to year not exceeding three years; this construction was placed upon a similar clause by the Supreme Court in the case of Gillion v. Finley, 22 W. N. C. 124. That case is identical with the present case at bar.

In Magaw v. Lambert, 3 Pa. 444, it was held that where premises were destroyed by fire and the landlord entered to repair, if he did so without the tenant's consent, it was an eviction; if with the tenant's consent, it was a rescission of the lease, and in either case the rent is suspended.

It is submitted, therefore, that both the affidavit and the supplemental affidavit set forth a good defense.

Benjamin Alexander, for appellee.—This case is not ruled by the case of Gillion v. Finley, 22 W. N. C. 124 as contended by the appellant. In that case there was no covenant to deliver up the premises at the expiration of the term, or a clause providing for a tenancy from year to year after the expiration of the term.

In the present case, in the argument of the rule for judgment for want of a sufficient affidavit of defense, counsel for the appellee cited the cases of Harding v. Seeley, 148 Pa. 20;

Cairns v. Llewellyn, 2 Pa. Superior Ct. 599; Montgomery v. Commissioners, 76 Ind. 362; Delashman v. Berry, 20 Mich. 292, and other cases, and it was upon these cases that the court granted judgment.

OPINION BY RICE, P. J., February 19, 1898:

The plaintiff leased to the defendant a certain building "for the term of one year with privilege of two years additional from the first day of December, A. D. 1892, at a rent of two thousand dollars per year to be paid in equal monthly payments . . . . in advance." The lessee covenanted that they "at the termination of said term, will deliver up said premises in as good condition, order and repair as the same now are in," etc. The lease contained this further provision: "And it is hereby mutually agreed that either party hereto may determine this lease at the end of said term, by giving the other notice thereof, at least three months prior thereto, but in default of such notice, this lease shall continue upon the same terms and conditions as are herein contained, for a further period of one year and so on from year to year unless or until terminated by either party hereto giving to the other three months' notice for removal previous to the expiration of the then current term."

If there were only the language of the granting part of the instrument to guide us the decision in Gillion v. Finley, 22 W. N. C. 124; 11 Cent. Rep. 793, might perhaps compel us to hold that the lessees holding over after the expiration of the first year created a tenancy from year to year, simply, which they might terminate at the end of the second year. But the other provisions of the lease indicate an intention to create a tenancy for a determinate period which should be one year or three years at the option of the lessees. When the option was exercised the term became certain in duration; and at the expiration of that term, but not before, a tenancy from year to year would arise if the tenant held over, unless the landlord had given three months' notice prior thereto, as provided in the lease. By this construction the rights and obligations of the lessor and the lessees in respect to the termination of the lease at the expiration of the term, after its duration had been fixed by the exercise of the lessees' option, would be mutual, and neither would have an advantage over the other in that regard. But this would not

be so if the tenant could give notice and terminate the lease at the end of the second year and the landlord could not. The plain intention was to put them on an equality after the lessees had once exercised their option, and this can only be carried out by holding that it then became a lease for three years from the beginning of the term. In Harding v. Seeley, 148 Pa. 20, it was said: "That a holding over by a tenant who has an option for an additional term is notice to his landlord of his election to exercise his privilege is generally held in this country." In Delashman v. Berry, 20 Mich. 292, it was said: "Upon principle it would certainly seem, that the actual continuance of such occupation was the best and most conclusive evidence of the intention to continue. And as it was at his option to have the term expire at one year or three years, and he had covenanted to deliver up possession at the end of the term, but one inference could legally and properly be drawn from such continuance after the year, to wit: That he intended to continue rightfully, according to the terms of his lease, rather than wrongfully to defiance of its provisions." The foregoing was quoted with approval in the opinion of our Brother WICKHAM in Cairns v. Llewellyn, 2 Pa. Superior Ct. 599, and the case was cited in the opinion of Mr. Justice HEYDRICK in Harding v. Seeley. In Rohboch v. McCargo, 6 Pa. Superior Ct. 134, the lease was "from the 26th day of January, 1891, for and during the term of one year, two months and six days, with the privilege of remaining in possession until the 1st day of April, 1896." In the opinion rendered after a reargument of the case Judge WICKHAM said: "The lessees were given the right to hold for and during the continuous period of time intervening between April 1, 1891, and April 1, 1896. This is the plain and obvious meaning of the language used. When they accepted the option, they at once took this integral term, and not a portion thereof, nor a mere tenancy from year to year." The case of Montgomery v. Commissioners, 76 Ind. 362, is also directly in point.

When the lessees in the present case held over after the end of the first year nothing more was necessary to give notice to the lessor of their intention to exercise their privilege. In the absence of anything to qualify or explain their act, it is to be deemed an election to claim their full privilege and to hold for two years additional; so that, if the lessor had attempted to

remove them at the end of the first additional year, against their consent, he must have failed, and they, on the other hand became bound to pay the stipulated rent for the full term of three years. By this construction all the provisions of the lease are harmonized and given full force, and by no other can they be.

A surrender of demised premises by the tenant, in order to be effectual, so as to release him from liability for the rent, must be accepted by the lessor, and the burden of proof is on the lessee. Acceptance is expressly denied in the plaintiff's statement and is not alleged in the affidavit of defense; nor is it necessarily to be implied from the facts. Such acts of the lessor as are shown in the statement and the affidavit are in the interest and for the benefit of the tenant, and do not, of themselves, discharge him from his covenant to pay rent: Pier v. Carr, 69 Pa. 326; Breuckmann v. Twibill, 89 Pa. 58; Auer v. Penn, 99 Pa. 370; Teller v. Boyle, 132 Pa. 56; Lane v. Nelson, 167 Pa. 602; Ashhurst v. Phonograph Co., 166 Pa. 357.

The defendants further aver that "when it became known to the public previous to the 30th day of November, 1894," that they intended to vacate the store, a number of persons applied to rent it and were sent by them to the plaintiff; that some of these persons offered to rent the store upon the same terms and conditions as those contained in the lease; and that the plaintiff "neglected and refused to rent the store to anyone." It will be observed that the affidavit is silent as to the names of these persons, their character, responsibility and business and that the time referred to was prior to the removal. The landlord is not bound, in relief of his tenant who had abandoned the premises, to rent them to any one who may apply, but may rent them and hold the tenant for the difference, unless he has accepted a surrender: Auer v. Penn, supra. But whatever may be his duty after he has retaken possession, he is clearly not bound to consider a proposition of a third person to rent them prior to, and in anticipation of, the tenant's removal.

Judgment affirmed.

Hires & Co., Limited, *v.* Albert E. Norton, Owner, James Hood, Contractor, Appellants.

Appeals—Practice, Superior Court—Assumption based on motive dehors the record.

The appellate court is not warranted in going outside of the record in search of questions of fact not fairly raised by the evidence. Where under the admitted facts a plaintiff has made out a prima facie case on a mechanic's claim, and the defendant offers in evidence a single clause of a contract between him and the contractor, the appellate court will not assume it was the contract under which the buildings were erected.

Argued December 14, 1897. Appeal, No. 141, October T., 1897, by defendants, from judgment of C. P. No. 1, Phila. Co., June T., 1892, No. 196, M. L. D. on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Sci. fa. sur mechanic's lien for glass, etc., against forty-five adjoining three- and two-story brick dwellings, etc. Before BRÉGY, J.

At the trial the following facts were agreed upon and submitted as the plaintiff's evidence:

That the amount of the lien apportioned against the property against which the sci. fa. was issued was $185.07, and that the amount due now with interest in said lien is $252.

That the said sum is due for glass, lights, putty, etc., furnished by said claimant for and about the erection and construction of said house within six months before the filing of the lien, of which building Albert E. Norton is the owner, and James Hood the contractor, at whose instance and request the materials were furnished.

By indenture dated March 29, 1890, recorded April 12, 1890, Hugh Chain, Jr., et al., conveyed to said Albert E. Norton the lot of ground against which the above amount is apportioned; the lot being on the north side of Fairmount avenue and west side of Union street, containing in front on Fairmount avenue sixteen feet, and extending of that width in length or depth northward on Union street, seventy-seven feet to a three foot wide alley, and having a brick store and dwelling built thereon. (Plaintiff closed).

Defendant offered in evidence the eleventh clause of the contract as follows:

11. The said James Hood furthermore agrees and binds himself that he will not himself file any lien for work and labor done and materials furnished towards the erection of said sixty-five houses or any of them, and that he will not suffer or permit any lien attachment or other incumbrance under any law of this state or otherwise by any person or persons whatsoever to be put or remain upon the said sixty-five buildings or upon any of them for any work or labor done or materials furnished under or in pursuance to this contract, or by reason of any other claim or demand against him that can or might in any manner or way affect, impair or take priority to the lien of the said sixty-five mortgages executed in favor of the German-American Title and Trust Company, one being upon each of the said sixty-five respective premises. (Evidence closed).

The court instructed the jury to render a verdict for the plaintiff.

Verdict and judgment for plaintiff for $252. Defendants appealed.

Error assigned was refusal of binding instructions for defendants.

Robert H. Hinckley, with him *Leon Folz*, for appellants.—The wording of this contract is entirely within the ruling of Nice v. Walker, 153 Pa. 123.

E. Cooper Shapley, for appellee submitted no paper-book.

OPINION BY RICE, P. J., February 19, 1898:

Under the admitted facts the plaintiff made out a prima facie case. In defense, the owner of the buildings offered in evidence a single clause of a contract between him and the contractor, which we are asked to assume was the contract under which the buildings were erected. Without having before us the whole contract, and without any evidence upon the record that the lien in question "can or might in any manner or way affect or take priority to the lien" of any mortgage given by the owner, we cannot say that the court committed

error in holding that no defense was made out. We do not feel warranted in going outside the record in search of questions not fairly raised by the evidence.

Finding no error in the record, the judgment is affirmed.

Bixler & Correll *v.* J. B. Lesh, Appellant.

Contracts—Construction—Province of court and jury.

If a contract is verbal, it is, of course, the exclusive province of the jury to ascertain what the parties meant; if it is in writing, its construction is for the court. The sense of words used in connection with what the parties intended to express by them is exclusively for the jury.

Promissory notes as payment of debt—Presumption—Question for jury.

If one indebted to another gives his negotiable promissory note for the amount without any new consideration, the acceptance of the note does not operate as payment or satisfaction, unless so intended by the parties, and this is a question for the jury if there be any evidence going to show such intention.

Argued Jan. 13, 1898. Appeal, No. 22, Jan. T., 1898, by defendant, from judgment of C. P. Lackawanna Co., Jan. T., 1895, No. 221, on verdict for plaintiffs. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit to recover amount due on book accounts. Before GUNSTER, J.

It appears from the record and evidence that judgment had been entered on a judgment note given as collateral security for certain goods and merchandise sold by plaintiffs to defendant. Subsequent to the sale the defendant gave to the plaintiffs certain promissory notes; it being alleged that these notes were given in payment of the book account and also of the judgment note which it was agreed should be returned to the defendant. The judgment note having been entered up a motion was filed and rule granted to show cause why judgment should not be opened. Upon consideration of this rule the court granted an order that an issue be made up by the plaintiffs declaring on

their book accounts and filing copy thereof, and the defendant making answer within ten days thereafter as to what, if any, part to said account they have any defense.

Verdict and judgment for plaintiffs for $223.82. Defendant appealed.

Errors assigned were, (1) In refusing to open judgment. (2) Refusing binding instructions for defendant; (3) In charging the jury as follows: "The plaintiffs testify that the notes were received by them in lieu of the book account, in partial satisfaction of the book account—that the notes were accepted not in payment but in partial satisfaction." (4) In charging the jury as follows: "The plaintiffs testify that the notes were received by them only in partial satisfaction, and that they received only fifty dollars on the note. If these plaintiffs accepted these notes in satisfaction of their book account, then the book account is paid, because they took the notes. If you believe that they did not accept them in satisfaction of the book account, and that they simply received them in the usual course of business, as a man would accept a note as a promise to pay the debt that is due him, then the debt would not be paid, and it is for you to say."

A. A. Vosburg of *Vosburg & Dawson*, for appellant.—The doctrine that where there is a scintilla of evidence the case must be submitted to the jury, has been exploded: Express Co. v. Wile, 64 Pa. 201.

Where a charge is misleading, the judgment will be reversed. Collins v. Leafey, 23 W. N. C. 264; Fawcett v. Fawcett, 95 Pa. 376; Canal Co. v. Harris, 101 Pa. 80.

Questions should not be submitted to the jury, without evidence: Furniture Co. v. School Dist., 122 Pa. 494; Cunningham v. Smith, 70 Pa. 450.

E. Warren, for appellees submitted no paper book.

Opinion by Rice, P. J., February 19, 1898:

The defendant gave the plaintiffs a judgment note as collateral security for goods he was about to purchase. The goods were delivered, and subsequently he gave three bank notes for

the amount of the account and the discount. Later he applied for a rule to show cause why the judgment should not be opened. After hearing upon depositions, the court discharged the rule, but awarded an issue to determine the amount due for or on account of goods sold and delivered. No dispute arose on the trial of the issue as to the amount of the account or as to the actual payments, the sole defense being that the bank notes were given and accepted in full payment of the book account, and, therefore, the plaintiffs should have sued on the notes.

It is a general rule of law that if one indebted to another gives his negotiable promissory note for the amount without any new consideration, the acceptance of the note does not operate as payment or satisfaction, unless so intended by the parties, and this is a question of fact for the jury if there be any evidence going to show such intention: Hart v. Boller, 15 S. & R. 162; Brown v. Scott, 51 Pa. 357; Seltzer v. Coleman, 32 Pa. 493; Kemmerer's Appeal, 102 Pa. 558; Walker v. Tupper, 152 Pa. 1; Dougherty v. Bash, 167 Pa. 429.

It is argued that there was nothing for the jury to decide because there was no dispute about the fact that the notes were given and accepted in payment. This depends upon the construction to be put on the plaintiffs' version of the transaction. One of them testified that they were taken "not in payment, but in partial satisfaction." The plaintiffs' witness who took the notes described the transaction thus: "Well, he said he had no money, so I told him I had come for a settlement of the bill, and the best thing I asked him if he could give notes. He said he would and he signed them right there." When asked on cross-examination what he took the notes for, he answered: "Partial payment on the bill." Assuming the correctness of this version, what did the parties intend in giving and accepting the notes in "partial" payment or "partial" satisfaction of the accounts? Evidently not that they were a complete extinguishment of the account, nor that they were a satisfaction of a particular part of it, for no part was mentioned. A probable meaning of the language is that they were taken as a conditional payment; that is to say, if or when they were paid. This, however, was a question for the jury, and the court could not have declared that they were taken as absolute payment without usurping their functions. "The sense of words used

in connection with what the parties intended to express by them is exclusively for the jury to determine:" Maynes v. Atwater, 88 Pa. 496. "If the contract is verbal, it is, of course the exclusive province of the jury to ascertain what the parties meant; if it is in writing, its construction is for the court :" Forrest v. Nelson, 108 Pa. 481. Other cases to the same effect are cited in Speers v. Knarr, 4 Pa. Superior Ct. 80. The question as to what the parties said and what they meant was left to the jury in a clear and impartial charge, of which the defendant has no reason to complain.

All the assignments of error are overruled and the judgment is affirmed.

Charles H. Clark, Appellant, v. Jacob Koplin et al.

Mechanic's lien for alterations, etc.—Notice—Statutes construed.

The Act of May 18, 1887, P. L. 118, extending the local law of May 1, 1861, P. L. 550, relative to liens for repairs, alterations and additions is a substitute for the latter act and the latter act must yield. The same interpretation applies to its effect on the Act of August 1, 1868, P. L. 1168, which permitted liens to be filed in the city of Philadelphia, but contained no requirement as to notice, and the act of 1868 must be considered as superseded, so far as the duty to give notice under the act of 1887 is concerned.

Argued Dec. 14, 1897. Appeal, No. 28, Oct. T., 1897, by plaintiff, from order of C. P. No. 4, Phila. Co., Dec. T., 1896, No. 136, M. L. D. striking off mechanic's claim. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to strike off mechanic's lien.

It appears from the record that plaintiff furnished to Jacob Singer, contractor for Jacob Koplin, the owner, or reputed owner, of a building upon which repairs were being made, certain lumber to the value of $52.94. No notice was given to the owner of the building by the plaintiff of his intention to file his claim. Defendants took a rule to strike off the claim, which rule the court below made absolute. Plaintiff appealed.

Error assigned was making absolute rule to strike off claim.

Augustus J. Rudderow, for appellant.—Contended that the Act of May 18, 1887, P. L. 118, does not supersede the Act of August 1, 1868, P. L. 1168.

Adolph Eichholz, for appellee.—This question is not a new one. The Supreme Court has repeatedly held that the act of 1887 has superseded the local acts upon the same subject: Best v. Baumgardner, 122 Pa. 17; Morrison v. Henderson, 126 Pa. 216; Groezinger v. Ostheim, 135 Pa. 604; Purvis v. Ross, 158 Pa. 20.

PER CURIAM, February 19, 1898:

The Act of May 18, 1887, P. L. 118, extended the local law of May 1, 1861, P. L. 550, relative to liens for repairs, alterations and additions, "to all the counties of this commonwealth," and provided "that, to entitle any one to the benefits of this act, he shall give notice . . . . of his intention to file a lien under the provisions of this act." The act of 1861 contained no requirement as to notice. "It is, however, perfectly plain that it was the intention of the legislature by the act of 1887, to give a lien for repairs by general law applicable over the whole commonwealth, but subject to the condition that the claimant should give notice of his intention to file a lien to the owner when the materials are furnished or work done. As this condition was not imposed by the act of 1861, it is necessarily and materially inconsistent with that act; but as the act of 1887 was clearly intended to cover the same subject-matter as the act of 1861, by way of general instead of local law, it must be regarded as a substitute for the latter, and the latter must yield:" Best v. Baumgardner, 122 Pa. 17; Groezinger v. Ostheim, 135 Pa. 604; and see Morrison v. Henderson, 126 Pa. 216. By the same reasonable interpretation the Act of August 1, 1868, P. L. 1168, which permitted liens for repairs to be filed in the city of Philadelphia but contained no requirement as to notice, must be considered as superseded, so far as the duty to give notice is concerned, by the act of 1887. As the city and county of Philadelphia are coextensive, and as the act of 1887 extended the act of 1861 to all the counties of the common-

wealth, with the added proviso as to notice, it is impossible to conclude that the legislature intended to except Philadelphia from its operation.

Order affirmed and appeal dismissed at the cost of the appellant.

Petition of J. Boyd McHenry, Sheriff, for approval of appointment of Jailer. Appeal by Commissioners of Columbia County.

Statutes—Construction—Repeal by nonuser.

An act of the legislature cannot be repealed by nonuser. A statute can be repealed only by express provision of a subsequent law or by necessary implication. To repeal by implication there must be such positive repugnancy between the new law and the old that they cannot stand together or be consistently reconciled. Only so far as the later statute is repugnant to the prior, does it operate as a repeal.

Statutes—Prison keepers—Acts of 1790 *and* 1860.

There is no such inconsistency and repugnancy between the 28th section of the Act of April 5, 1790, 2 Sm. L. 539, and the Act of March 31, 1860, P. L. 427, as requires the courts to hold that keepers of jails or prisons may not be appointed in counties, where, in the opinion of the court, suitable prisons have been erected for imprisonment of convicts at labor.

Appeals—Practice, Superior Court.

An order of court was made confirming the appointment of a keeper of a county prison, and no appeal being taken to the order within the time allowed by law, the appellate court cannot go behind the order and, upon an inquiry into the facts, treat it as a nullity. So far as the appellate court has authority to determine, the order was valid until it was rescinded, and until that time the keeper was entitled to receive compensation; he is entitled to have the appeal determined by the record proper.

Argued Jan. 12, 1898. Appeal, No. 33, Jan. T., 1898, by commissioners of Columbia Co., from order of Q. S. Columbia Co., Feb. Sess., 1897, No. 29, rescinding order appointing prison keeper, but directing payment of his services from day of appointment. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Petition to rescind confirmation of sheriff's appointment of

keeper of county prison. Before CRAIG, P. J., of the 43d judicial district, specially presiding.

It appears from the record that on March 1, 1897, on petition of the sheriff of Columbia county setting forth that he had appointed Harry H. Kline jailer and keeper of prisoners confined in the jail of Columbia county, under the act of April 5, 1790, the court approved the appointment and fixed the wages of the appointee at $25.00 a month. Afterwards, on September 20, 1897, the county commissioners filed a petition asking that so much of the order of court as required the county to pay Harry H. Kline, the sheriff's appointee, $25.00 per month be rescinded, on the ground that section 28 of the act of 1790 has been rendered obsolete. After hearing had on said petition, the court made the following decree:

"And now, October 26, 1897, after argument and due consideration, the order made by the court of quarter sessions of Columbia county on the 1st of March, 1897, is rescinded; and it is further directed that said Harry H. Kline receive pay from the county of Columbia, for his services under said order at the rate of $25.00 per month, to November 1, 1897; and that, thereafter, C. F. Deiterich, the commissioners' appointee, be given access to the jail of said county by the sheriff, for the purposes of his appointment; and that he receive compensation therefor, at the rate of $25.00 per month, from and after the first of November, 1897."

The commissioners of Columbia county appealed.

Error assigned was in the following part of the decree of the court that "it is further directed that said Harry H. Kline receive pay from the county of Columbia for his services under said order at the rate of $25.00 per month, to November 1, 1897," the order referred to being the order of March 1, 1897, confirming the sheriff's appointment, and fixing the appointee's wages at $25.00 per month.

J. B. Robinson, with him *R. R. Little*, for appellant.—The commissioners had no power to settle demands arising from torts or the wrongful acts of a public officer: Black v. Rempublicam, 1 Yeates, 140.

A public officer claiming compensation must show an act of assembly giving it: Rothrock v. School Dist., 133 Pa. 487.

He cannot claim fees for services rendered for which no compensation is provided by law: Will v. Eberly, 8 Lanc. Bar. 105.

No one but an officer de jure is entitled to the compensation provided by law: Commonwealth v. Slifer, 25 Pa. 23.

Clearly the commissioners would not have the power to use the public moneys in this case against law, and therefore the courts could not compel them to so use them. Even when the statutory compensation be clearly inadequate it cannot be varied at the discretion of the court or the agreement of the parties: Hahn v. Derr, 1 W'r'd. 178.

And if the commissioners had no right to pay a person not authorized by law the courts had no jurisdiction to compel them to do so: Black v. Rempublicam, 1 Yeates, 140.

Grant Herring, with him *G. M. Quick*, for appellee.

PER CURIAM, February 19, 1898:

The 28th section of the Act of April 5, 1790, 2 Sm. L. 539, has not been expressly repealed, and it is worthy of notice that it was omitted from the list of statutes and sections of the same act embraced in the repealing section of the Revised Penal Code of Procedure (Act of March 31, 1860, P. L. 427–451).

There was good reason for this. Imprisonment at labor in the county jail or prison for less than a year is still permitted by section 75 of the latter act when in the opinion of the court pronouncing the sentence, suitable prisons have been erected for such confinement and labor. Therefore, the reasons which actuated the legislature in providing for the appointment of keepers of such malefactors, whose duty it was to superintend and direct their labors, have not ceased to exist. As they enacted no substitute for the provision it is fairly to be presumed that they intended to leave it in force. The remark of Lord Bacon, "that, as exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated," expresses a principle which often aids, if it does not conclusively control, in determining the intention of the legislature; which, after all, is the thing to be ascertained, whether the question be one of con

struction or of implied repeal. It has even been held that a specific repeal by one statute of a particular section of another raises a clear implication that no further repeal was intended. Probably it is safer to say, that it is strong evidence that no further repeal was intended; and it is not here contended that the rule is so rigid as to prevent the consideration of other evidence of legislative intent, as, for instance, positive repugnancy or clear inconsistency between the provisions of the later law and those of the earlier. See Endlich's Interpretation of Statutes, secs. 203, 397, 398 and cases there cited. "It was long ago settled that an act of parliament cannot be repealed by non-user. That this is the rule in this state accords with reason, and the absence of authority to the contrary. The settled rule is, that a statute can be repealed only by express provision of a subsequent law, or by necessary implication. To repeal by implication there must be such a positive repugnancy between the new law and the old, that they cannot stand together, or be consistently reconciled:" Homer v. Commonwealth, 106 Pa. 221. Only so far as the later statute is repugnant to the prior, does it operate as a repeal. There is no such inconsistency or repugnancy between the act of 1860 and the 28th section of the act of 1790 as requires us to hold that keepers of jails or prisons may not be appointed in counties, where, in the opinion of the court, suitable prisons have been erected for imprisonment of convicts at labor.

There was, therefore, authority of law for the order approving the appointment of the keeper, and fixing his compensation if the county prison was suitable for the confinement of prisoners at labor. This was to be determined by the court having jurisdiction to make the order; and, as an appeal from the order would be a mere substitute for a certiorari, there could be no review of the judgment of the court upon the facts. The proceedings being regular, and the court having jurisdiction of the subject-matter, it must be presumed that it acted according to law. Furthermore, no appeal was taken from the order within the time allowed by law. We cannot now go behind it, and, upon an inquiry into the facts, treat it as nullity. So far as we have authority to determine in this proceeding, the order was valid until it was rescinded, and until that time the keeper was entitled to receive compensation. In other words, the question

whether he was an officer de jure or merely de facto does not arise on this record.

We have not overlooked what the learned judge says in his opinion relative to the facts alleged in the petition of the commissioners to have the order rescinded. Passing the question whether facts can be brought on the record by a recital of them in the opinion, it is to be observed that the record does not show that the appellee had notice of the proceeding to revoke his appointment or that he appeared; and it is not alleged anywhere, that he, or anyone who had authority to speak for him, admitted the facts alleged in the petition. Therefore, he is entitled to have the appeal determined by the record proper, which shows a regular appointment on March 1, 1897, and a qualified rescission of the order on October 26, 1897, which, in effect, left the original order in force, so far as it affected his right to compensation during the period of his actual service. There is no error in this record of which the appellants can justly or legally complain.

The order is affirmed and the appellants are directed to pay the costs.

P. S. Bogert, Appellant, *v.* John Batterton and Elizabeth Batterton.

Actions—Illegal distress—Proper remedy is replevin.

Replevin is the proper remedy to be used by a person whose goods have been improperly distrained upon by a landlord for rent due by a tenant, and where such person receives notice of the distress and the landlord postpones the sale to give him an opportunity to replevin which he refuses to do, he cannot, after sale, bring trespass against the landlord for the value of the goods, nor replevin against a purchaser of the same at the constable's sale.

Landlord and tenant—Leased sewing machines not exempt from distress.

A sewing machine leased to the tenant of a dwelling house is not exempt from distress for rent under the Act of March 4, 1870, P. L. 35.

Landlord and tenant—Property on premises liable to distress—Exemption not claimable by a stranger.

Property of a stranger found upon leased premises is liable to distress

for rent in arrears. The claim for exemption is a personal privilege and must be claimed by the person entitled thereto. It cannot be assigned to or claimed by a stranger.

Argued Jan. 12, 1898. Appeal, No. 36, Jan. T., 1898, by plaintiff, from judgment of C. P. Luzerne Co., Oct. T., 1891, No. 251, in favor of defendants, on case tried before a judge without a jury. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Replevin for sewing machine. Before GUNSTER, J., of the 45th judicial district specially presiding.

By agreement of the parties a trial by jury was dispensed with and the case was submitted to the decision of the court under the act of April 22, 1874. The following material facts were found by the court: John Essling rented on May 8, 1891, a certain house in Wilkes-Barre from D. L. O'Neill for a certain term at the rate of $12.50 a month payable in advance. He made a payment of $5.00 down on the execution of the lease, and promising to pay another $5.00 in a few days, was permitted to go into possession of the premises described in the lease. On May 15, 1891, the plaintiff rented to said Essling a sewing machine of the value of $40.00 for the term of one month, for the rent of $3.00, and delivered the same to said Essling at said premises.

Essling did not pay the remaining $5.00 due on the execution of the lease, nor the instalment of $12.50 rent which fell due June 1, 1891, and on June 2, a landlord's warrant of distress, in the usual form, issued for the sum of $17.50, under which distress was made upon some personal property, including the sewing machine rented by the plaintiff to Essling. The lease contained a waiver of exemption. At the hour fixed for the constable's sale, the plaintiff gave the constable notice in writing that the sewing machine was his property, and forbade him selling the same as the property of John Essling, as the same was only leased to him. The constable sold the other property, but not the sewing machine, and adjourned the sale of it for one week, notifying plaintiff of the fact. At the expiration of the week nothing having been done in the meantime by the plaintiff, the constable put up the machine in question for sale and sold it to Elizabeth Batterton, one of the

defendants, who took possession of the machine. The plaintiff was present and participated in the bidding on the machine.

On June 24, 1891, the plaintiff sued out a writ of replevin in this case for the machine in question, laying the value at $40.00, and delivered the same to the plaintiff and summoned both of the defendants, John Batterton pleading non cepit, and Elizabeth Batterton pleading non cepit and property.

Certain points had been presented and a formal request for instructions to the jury before a juror was withdrawn, and the decision of the case submitted to the court. These points and the answers thereto, were, inter alia, as follows:

Plaintiff's second point, that under the provisions of the act approved March 4, 1870, sewing machines used and owned by private families were exempt from levy and sale on execution or distress for rent, and the constable, John Merrick, who had the landlord's warrant against John Essling, had no authority or warrant in law to levy upon the sewing machine in dispute. *Answer:* The act of 1870 is a supplement to an act entitled "an act to exempt sewing machines belonging to seamstresses in this commonwealth from levy and sale on execution or distress for rent," approved April 17, 1869, which provides as follows: "That hereafter all sewing machines belonging to seamstresses in this commonwealth shall be exempt from levy and sale on execution or distress for rent, in addition to any articles or money now exempt by law." The act of 1870 referred to in the point is entitled "a supplement to an act entitled 'an act to exempt sewing machines belonging to seamstresses in this commonwealth from levy and sale on execution or distress for rent,' and provides as follows: "That the act entitled 'an act to exempt sewing machines belonging to seamstresses in this commonwealth from levy and sale on execution or distress for rent,' approved April 17, 1896, shall from and after the passage of this act apply to all sewing machines used and owned by private families in this commonwealth: Provided—that this act shall not apply to persons who keep sewing machines for sale or hire.'" The defendant contends that Essling waived the benefit of the exemption provided by this act by waiving "all the exemption laws of this or any other State of the United States," while the plaintiff contends that as to the property now in dispute the waiver is void. Counsel have not referred me to

any judicial construction of the acts under consideration. A careful comparison of these provisions with those of other acts of assembly exempting property from levy, and the construction which has been put upon such other statutes leads me to the conclusion that "all sewing machines belonging to seamstresses in this commonwealth shall be exempt from levy and sale," and that it would be contrary to public policy to permit seamstresses to waive this exemption. The act of 1849 already exempted property to the value of $300 exclusive of all wearing apparel of the defendant and his family, and all bibles and school books in use in the family from levy and sale on execution issued upon any judgment obtained upon contract and distress for rent. Sewing machines fall as much within this exemption as stoves and other household furniture, or a carpenter's tools. The legislature was no doubt well aware that few seamstresses have anything more than their wearing apparel and their sewing machines. Under the act of 1849 their wearing apparel, bibles and school books remained exempt, as they were before the date of said act, and I have never heard of a case where such property was sold when the owner claimed them as exempt, though the exemption of the act of 1849 had been waived. But other property, including sewing machines, to the value of $300 was exempted by that act. If sewing machines were already exempt what necessity was there for exempting them again? In 1849 they were not known. In 1869 they were in general use, had become a household necessity and afforded many deserving women the means of earning a livelihood. Unfortunately our courts have held that the exemption under the act of 1849 could be waived. That they have so held is the only argument which can be advanced that the exemption of the act of 1869 can be waived. This argument loses much of its force when considered in the light of what our Supreme Court says of the interpretation put upon the act of 1849. In Firmstone v. Mack, 49 Pa. 387, the late Chief Justice WOODWARD says: "If it were res integra, if with the experience and observation we have had we were now for the first to pass upon the question whether debtors could waive their rights under the act of 1849 or widows theirs under the act of April 14, 1851, we would be very likely to deny it altogether and stick to the statutes as they are written." This was said in 1865, only four years before the act of 1869

was framed, and in this same case it was held that an agreement by a laborer to waive the proviso of the act of 1845 which exempts wages from attachment, embodied in a promissory note, was void. Every reason which can be advanced for withholding the wages of the laborer from the grasp of his creditors can be advanced for withholding the machine with which the poor seamstress earns wages, from the grasp of her creditors. But however that may be, there are reasons why the point cannot be affirmed. There is nothing in the title of the act of 1870 to indicate that it was the intention of the legislature to enact a law relating to any other person or persons than seamstresses, and the exemption of sewing machines belonging to them. It is entirely silent on the matter of making the act of 1869 applicable to sewing machines used and owned by private families. The act itself expressly provides that it "shall not apply to persons who keep sewing machines for sale and hire." It is an undisputed fact in the case that the plaintiff was engaged in the business of selling and letting or hiring sewing machines, and that he let the machine in question to Essling for the term of one month. There is no evidence that Essling claimed the exemption of it. On the contrary, he left the premises and abandoned the property on it. There is no evidence that the plaintiff claimed that the machine was exempt. He was not in a position to claim the benefit of any exemption law. Neither the relation of landlord and tenant, nor of debtor and creditor was established between him and Mr. O'Neil. If he was not a debtor for the rent, he was not entitled to the exemption of the statute. That his property was seized was due to the accident of its being found on the demised premises. It shared the fate which the goods of any stranger might have shared: Rosenberger v. Hallowell, 35 Pa. 369. It is a well settled principle of the common law that the goods of a stranger found on the demised premises are liable to distress for rent. While there are many exceptions in fact to this general rule there are few exceptions to it in principle: Page v. Middleton, 118 Pa. 546; Karns v. McKinney, 74 Pa. 387. For these reasons I decline to affirm the plaintiff's second point. [1]

The following points of the defendant were affirmed:

1. That the property of a stranger found upon leased premises is liable to distress by the landlord for rent in arrears.

2. The claim for exemption is a personal privilege, and must be claimed by the person entitled thereto. It cannot be assigned or claimed by a stranger.

3. If the jury believe from the evidence that Elizabeth Batterton, one of the defendants, purchased the machine in question at a public sale made by a constable in the execution of a landlord's warrant, her title to the machine is not vitiated or affected by the failure or refusal of the constable to allow a claim for exemption. [3]

4. If the jury believe that the plaintiff did not replevy the machine in question before the sale as required by act of 21st March, 1872, he cannot recover in an action of replevin against the purchaser instituted after the sale. [4]

5. If the jury believe from the evidence that the tenant, John Essling, in the lease signed by him waived the benefit of all the exemption laws of the state of Pennsylvania, that waiver cannot be retracted or set up by another party. [5]

6. Under all the evidence in the case the verdict must be for the defendants. [6]

In conclusion I am of opinion that, under the facts of the case, judgment should be entered in favor of the defendants and against the plaintiff, and that the said Elizabeth Batterton have return implevisable of the said machine and fourteen dollars and fifty cents damages, and the prothonotary of said court is hereby directed to enter judgment hereon accordingly, unless exceptions are filed hereto, in his office within thirty days after service of notice of the filing of this decision by him to the said parties or their attorneys.

Errors assigned among others were (1) refusal to affirm the plaintiff's second point or request. (3–6) In affirming defendants' third, fourth, fifth and sixth points or requests.

E. F. McGovern, for appellant.

J. F. O'Neill, with him *D. L. O'Neill*, for appellees.

PER CURIAM, February 19, 1898:

The sewing machine in question was not exempt from levy and sale on execution or distress for rent under the act of

April 17, 1869, because it did not belong to a seamstress. It was not exempt under the Act of March 4, 1870, P. L. 35, as the property of the plaintiff, because that act expressly excepts from its operation "persons who keep sewing machines for sale or hire." Nor is he in a position to claim that it was exempt as the property of the lessee. The latter had left it upon the premises from which he had removed and made no claim of ownership, or demand to have it exempted, and at the date of the sale the term for which he had leased it had expired. It was not at that time a sewing machine "owned and used" by a private family within the meaning of that act. It is also to be remarked, that the plaintiff had notice of the distress and full opportunity to replevy the property before the sale; but, instead of pursuing his remedy under the act of 1772, he saw fit to let the sale go on, and, indeed, participated in the bidding. Moreover, the title of the act of 1870 gives no notice whatever of legislation exempting sewing machines owned and used by private families, and it may be well questioned whether such a provision was germane to the subject of the act of 1869 to which it was a supplement. It is not necessary, however, to go into a discussion of that question, since under the facts found by the court the plaintiff is not now in a position to deny the validity of the title acquired by the purchaser at the sale under the landlord's warrant. "That his goods were seized was due to the accident of their being found on the demised premises. A stranger's goods would have shared the same fate:" Rosenberger v. Hallowell, 35 Pa. 369. The reasons in support of the judgment are so clearly stated in the findings of the presiding judge as to render further discussion unnecessary.

Judgment affirmed.

Patrick Doyle v. Benjamin T. Longstreth, landlord, Appellant, and James McKniff.

Landlord and tenant—Apportionment of rent of land diminished by sale.

Where by the terms of a lease the landlord reserved the privilege of selling off portions of the land, the rent to be apportioned accordingly, in the absence of an agreement between the parties as to the precise amount of the reduction to be made after each sale, the tenants remain liable for the payment of such proportion of the whole rent as the rental value of the parts unsold bear to the whole.

Partnership—Partner's authority to bind his copartner—Estoppel.

A property which had been leased to copartners was reduced in extent by sales, by the landlord under agreement with the tenants, of portions of the demised farm. One of the cotenants and partners settled and paid the rent for several years upon the basis of an annual reduction of $50.00 on account of land sold. The copartnership was dissolved, the other partner continuing as tenant. *Held*, in an action of replevin by the tenant that the former partner in making the settlement or apportionment of rent acted within the apparent scope of his authority and, in the absence of fraud or collusion, the plaintiff could not be permitted to allege, as against the landlord, that the abatement claimed and allowed was too small, and therefore, that over payments were made which should be applied upon the rent for the years of his sole tenancy.

Argued Nov. 17, 1897. Appeal, No. 69, Oct. T., 1897, by defendant, from judgment of C. P. Delaware Co., June T., 1895, No. 120, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Reversed.

Replevin for goods distrained. Before CLAYTON, P. J.

The defendant, Benjamin T. Longstreth, distrained for four years' rent on certain premises amounting to $1,000, after allowing for certain credits which reduced the amount of the distress warrant to $517.48. The plaintiff, Patrick Doyle, tenant in possession, replevied. The defendant avowed and made cognizance, and the case was tried on the issue of no rent in arrear.

Other facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff. Defendant appealed.

Errors assigned among othere were (1) in saying to the jury that under the terms of the lease there should be a reduction of

$7.50 per acre for each acre of land sold, this being the construction by the court of the term "a corresponding reduction being made in the rent," for land sold, contained in the following clause in the lease: "The said William M. Longstreth and Patrick Doyle, also covenant and agree to and with the said Benjamin T. Longstreth that on the sale of any of the above property by the said Benjamin T. Longstreth that they, the said William M. Longstreth and Patrick Doyle will release the property so sold from the terms and operations of this lease, on a corresponding reduction being made in the rent, and on payment to them of the value of whatever crop may be in the ground so sold." (2) In charging the jury as follows: "As I have said, you will just consider these two questions and you can take out this lease with you, which I have already construed. You will clearly see that this is a lease for farming purposes and not for anything else; as I tell you the acreage rule is the rule for the proportionate deduction to be made, and after you have arrived at your verdict there is no objection to the prothonotary taking it, but you must see that it is properly done. There are two cases before you." (4) The rent having been voluntarily paid in full to March 1, 1891, by William M. Longstreth, one of the tenants, and the distress warrant being only for rent falling due since, the learned court erred in saying to the jury, that if they found the other tenant did not agree to this payment, he was entitled in this action to be credited at the rate of $7.50 per acre for all land sold since the beginning of the lease.

V. Gilpin Robinson, for appellant.—The acts and declarations of the parties may be fairly regarded as throwing light upon what they meant by their written agreement: Colder v. Weaver, 7 Watts, 466; Gass's Appeal, 73 Pa. 39.

In the construction of a contract where the language used by the parties is indefinite or ambiguous and of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence: Topliff v. Topliff, 122 U. S. 121.

A voluntary payment of money under a claim of right cannot in general be recovered back.

A voluntary overpayment upon a previous quarter cannot be recovered of the landlord: Warner v. Caulk, 3 Whart. 193.

Each member of a partnership is in contemplation of law the general agent of the firm, and has power to bind his copartners by acts done within the scope of the business of the partnership: Savings Fund Society v. Savings Bank, 36 Pa. 498; Edwards v. Tracy, 62 Pa. 374.

The court in instructing the jury that the landlord should be called upon to account for the payments made by Doyle's cotenant, even if Doyle did not understand that his cotenant was only getting a reduction of $50.00 a year, overlooked the fact that the issue on trial was between Doyle and his landlord and not between Doyle and his partner, and further gave no weight to the legal principle that Doyle was bound by the acts of his partner: Tyson v. Pollock, 1 P. & W. 375; Saving Fund Society v. Bank, 36 Pa. 498; Edwards v. Tracy, 62 Pa. 374, and that if his partner had misbehaved, the remedy was against him for such misbehavior. The remedy was not against the landlord to compel him to refund.

W. Roger Fronefield, for appellee.

OPINION BY RICE, P. J., February 19, 1898:

Benjamin T. Longstreth, the principal defendant, leased a tract of land to Patrick Doyle, the plaintiff, and William M. Longstreth for the term of one year from March 1, 1882, at an annual rental of $300.

At the end of the first year they remained in joint possession as tenants from year to year until March 1, 1891, after which time Doyle remained in sole possession.

In April, 1895, the landlord issued a distress warrant for the rent which he alleged had accrued between March 1, 1891, and March 1, 1895, and was unpaid. The goods of Doyle were distrained and he sued out a writ of replevin. The defendants avowed and made cognizance, and upon the trial of the issue upon a plea of no rent in arrear, and a special plea not necessary to be noticed here, it appeared, that the leased premises originally consisted of a tract of land of about forty acres, mostly arable, upon which there were a dwelling house, a spring house with a tenement overhead, and a barn with stable for six or eight cows or horses. The premises were reduced in extent by sales made by the landlord as follows: in the years beginning,

March 1, 1882, two acres; March 1, 1886, one acre; March 1, 1887, twelve acres.

Patrick Doyle paid the stipulated rent for the year 1882; and for the years 1883, 1884, 1885, 1886, 1887, William Longstreth, his cotenant, paid it. For the subsequent years up to March 1, 1891, when William M. Longstreth went out of possession, the latter paid rent at the rate of $250 a year, under an amicable arrangement, as alleged, between him and the landlord, by which the latter abated $50.00 a year on account of the land sold.

The money with which William M. Longstreth paid the rent for the years mentioned was partly his own and partly Patrick Doyle's.

It is not disputed, that, as between them, the latter was alone liable for the rent for the years 1891—1895 for which the distraint was made.

The principal legal question in the case arises upon the construction of the following clause in the lease: "The said William M. Longstreth and Patrick Doyle also covenant and agree to and with the said Benjamin T. Longstreth that on the sale of any of the above property by the said Benjamin T. Longstreth, that they the said William M. Longstreth and Patrick Doyle will release the property so sold from the terms and operations of this lease, on a corresponding reduction being made in the rent, and on payment to them of the value of whatever crop may be in the ground so sold." Very early in the trial of the case the learned judge construed this to mean, that for every acre sold one fortieth of the rent, or $7.50, was to be abated. The argument in favor of this construction is, that it furnished a convenient rule, whereby the amount of the reduction could be ascertained with certainty and disputes be avoided. The argument is not without force, but it is not convincing. If the parties had intended that reduction should be made according to this inflexible rule it seems reasonable to suppose that they would have so provided in the lease. The land was not rented at so much an acre; the parties had not agreed that the rental value of each acre was $7.50; nor was it so in fact, as a reference to the testimony embraced in the third assignment of error will show. It is unreasonable to suppose that if, for example, the landlord had sold the land upon which the house stands,

which according to the plaintiff's own admission he sublet for $50.00 a year, the parties contemplated no greater reduction of the rent than as if he had sold a piece of swamp land of equal size. It is rather to be presumed that they intended that the rent should be reduced according to the relative rental value of the land sold, rather than its relative quantity, as the law would apportion the rent if the landlord had sold part of the land without the tenant's consent. "The apportionment" (in such a case) "where the parties cannot agree, is to be made by the jury, according to the value, not the quantity of the respective parts:" Reed v. Ward, 22 Pa. 144, citing 1 Thom. Coke, 366, 369; 2 Inst. 503; Cuthbert v. Kuhn, 3 Wh. 357. The general principles upon which the rent is apportioned in such a case were very fully stated in Reed v. Ward, supra, and were thus summarized in Linton v. Hart, 25 Pa. 193: "The law will not apportion rent in favor of a wrongdoer, and therefore if the landlord wrongfully dispossesses his tenant of any portion of the demised premises, the rent is suspended for the whole. But the owner of a reversion has a right to sell the whole or any part of it. The exercise of it is not wrongful, and therefore, in the case of a sale of a part of the reversion, the law will apportion the rent; and the right of apportionment attaches the moment the sale is made." So it has been held that an eviction of a tenant, under a title paramount to that of his landlord, from a portion of the demised premises when the tenant continues in possession of the remaining part, using and enjoying it, does not work a suspension of all subsequent rent. "He remains liable to the payment of such proportion of the rent as the value of the part retained bears to the whole:" Seabrook v. Meyer, 88 Pa. 417. See also Van Rensselaer v. Gallup, 5 Den. 454; Van Rensselaer v. Bradley, 3 Den. 135. The general principle upon which rent is apportioned according to the relative value of the part sold has been applied in many analogous cases, notably in our own case of Martin's Appeal, 2 Pa. Superior Ct. 67, and in Lee v. Dean, 3 Wh. 316; Beaupland v. McKeen, 28 Pa. 124; Carpenter v. Koons, 20 Pa. 222, cited in the opinion of our Brother SMITH. There is nothing in the agreement or in the acts of the parties to indicate that they intended that the acreage rule should be applied. Therefore, the jury should have been instructed, that, in the absence of an agreement between

the parties as to the precise amount of the reduction to be made after each sale, the tenants would remain liable to the payment of such proportion of the whole rent as the rental value of the parts unsold bore to the whole.

This being the rule applicable under a proper construction of the lease, the amount of the reductions to be made as sales were made from time to time was a matter peculiarly subject to the agreement of the parties. The evidence is, that William M. Longstreth, the plaintiff's cotenant and partner, settled and paid the rent for the years 1888, 1889 and 1890 upon the basis of an annual reduction of $50.00 on account of land sold. In so doing he acted within the apparent scope of his authority, and in the absence of proof of fraud or collusion the plaintiff should not be permitted to allege, as against the landlord, that the abatement claimed and allowed was too small, and therefore, that overpayments were made which should be applied upon the rent for the years of his sole tenancy. This is upon the assumption that the payments made by William M. Longstreth out of their joint funds were not made on account of rent generally but in extinguishment of the rent for particular years, pursuant to an agreement between him, acting for himself and his partner and cotenant and their landlord, as to the amount to be abated for those years on account of land sold.

Upon a still narrower view of the authority of William M. Longstreth to settle and adjust the amount of the rent for the years covered by his payments the plaintiff was concluded. William M. Longstreth testified that the plaintiff knew of the abatement and of the amount he was paying, and expressed no dissatisfaction. We have carefully examined the plaintiff's testimony to ascertain whether he denied this statement, and cannot find that he did. It was error, therefore, to submit the question of his knowledge and assent to the jury. It was not a disputed fact. Whether or not, under any circumstances not amounting to fraud, he could go behind a settlement and adjustment, made by his cotenant and partner, of the rent for the years of their cotenancy, it is very plain that he could not do so when the amount was adjusted and paid with his knowledge and implied assent. Under the facts, as the evidence presents them, that was an end of the matter, as far as the rent accruing prior to March 1, 1891, was concerned, and neither landlord nor tenant

could reopen it upon the ground that the abatement allowed was too large or too small. See Jones's Est., 169 Pa. 392; Heffner v. Sharp, 3 Pa. Superior Ct. 249. But as to the rent for which the plaintiff's goods were distrained (March 1, 1891, to March 1, 1895,) we find nothing in the evidence to prevent him from demanding an abatement of the stipulated rent to be estimated in accordance with the rule above stated. If there was an adjustment of the rent for the preceding years upon terms which were satisfactory to the parties, it cannot now be claimed that there was an overpayment. The case of Weber v. Rorer, 151 Pa. 487, has no application to such a state of facts.

Enough has been said, without discussing the assignments of error separately, to show that the case was tried upon a wrong theory, both as to the construction of the lease and as to the plaintiff's right to claim that overpayments were made in the years prior to 1891 which he could defalk from the rent accruing subsequently thereto.

The judgment is reversed and a venire facias de novo awarded.

Edwin Griffin, Appellant, v. Bernard Davis.

Execution must follow judgment and be warranted by the record.

A writ in execution must follow the judgment and be warranted by it.

Practice, C. P.—Proceedings under act of 1810—*Record of justice.*

Where the transcript from the justice discloses only an action in assumpsit and judgment thereon, such record does not disclose such a proceeding and judgment under the Act of March 20, 1810, 5 Sm. L. 161, as will sustain a writ of ca. sa.; the record if not perfect must at least purport to be a proceeding to enforce a liability in the mode there prescribed.

Argued Jan. 13, 1898. Appeal, No. 2, Jan. T., 1898, by plaintiff, from order of C. P. Lackawanna Co., Sept. T., 1896, No. 901, quashing writ of ca. sa. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to quash writ of ca. sa. Before GUNSTER, J.

The transcript disclosed: "Summons in assumpsit issued. September 20, 1895. Returned September 24, 1895. Served

on defendant by producing to him the original summons and informing him of the contents thereof. October 3, 1895, plaintiff appeared and the defendant did not appear. Plaintiff sworn and testified that alderman Horan gave the execution to the defendant, B. Davis, constable, and that he refused to serve it and gave it to him (the plaintiff) and he then gave it to constable Cole at the request of the defendant. W. N. Cole sworn and testified to the same, as the plaintiff did. At 3:15 o'clock judgment was publicly given in favor of the plaintiff and against the defendant, for the sum of $10.00, together with interest from June 15, 1894, and cost of suit.

"This action is brought for the alleged neglect of the defendant in the discharge of his duties as a public officer, in the case of Edward Griffin v. P. Dempsey.

"Now, April 9, 1896, execution issued in the above case and given to constable W. N. Cole, of the Third ward, Scranton.

"And now, May 16, 1896, constable Cole returns above execution nulla bona.

"Now, July 8, 1896, an alias execution issued and given to any constable of Lackawanna county, Pa.

"Now, July 31, 1896, above alias execution returned 'not served.'"

The above transcript filed in C. P. Lackawanna county, as No. 901, September term, 1896, whereupon plaintiff issued a writ of capias ad satisfaciendum, August 12, 1896.

September 14, 1896, a rule was entered on application of defendant to show cause why the writ of capias ad satisfaciendum should not be quashed. Returnable sec. reg. proceedings on said capias stayed meantime, with leave to sheriff to proceed on the writ of fi. fa.

On November 9, 1896, the court below made absolute the rule to show cause why the ca. sa. should not be quashed in the following opinion by GUNSTER, J.

From the very nature of the case the summons contemplated by this act is not like the ordinary summons in actions of assumpsit or trespass, but is in the nature of a scire facias, a summons not to answer to a certain plea, but a summons to show cause. It is so considered in our books on practice: 1 McKinney's Justice (4th ed.), 759; Binns's Justice (8th ed.),

266. The summons in the present case was not a summons to show cause, but a summons in assumpsit, and whatever may have been the intention of the plaintiff and the alderman, the record does not disclose a proceeding and judgment under the act of 1810. It does not even show that the action was for the amount of an execution placed in the defendant's hands as constable, and much less does it show a judgment in a proceeding against him, commanding him to show cause why an execution should not issue against him for the amount of another execution previously delivered to him. The rule is made absolute.

Error assigned among others was making absolute the rule to show cause why the ca. sa. should not be quashed.

James Mahon, for appellant.

A. A. Vosburg of *Vosburg & Dawson*, for appellee.

PER CURIAM, February 19, 1898:

When the rule to quash the ca. sa. came up for disposition all that the court had before it from which to determine the nature of the judgment was the transcript from the docket of the justice of the peace. This showed a judgment in an action apparently begun by a summons in assumpsit, and failed to show with any degree of certainty that the proceeding was intended to enforce a statutory liability in the mode prescribed in the 12th section of the act of 1810. This being the condition of the record, the court properly held that there was no warrant of law for issuing a ca. sa. upon the judgment and quashed the writ. All that need be said in vindication of that ruling is contained in the opinion rendered by the learned judge of the court below.

Nor was the case brought within the provisions of the Act of March 29, 1824, P. L. 171, by proof subsequently furnished by affidavit or depositions that the writ actually issued by the justice was not a summons in assumpsit, as the record seemed to show, but a summons in the nature of a scire facias in the form prescribed by the act of 1810. To entitle the plaintiff to a ca. sa. under the provisions of the act of 1824 he must show a record in substantial conformity to the provisions of the 12th sec-

tion of the act of 1810, otherwise he must be content with the ordinary process to enforce the judgment. We do not say he must show a perfect record—one that could not be successfully assailed on certiorari—but it must at least purport to be a proceeding to enforce a liability in the mode there prescribed. The defendant is entitled to have the question of the plaintiff's right to issue a ca. sa. determined by the record as it was made up by the justice, for possibly he might have seen fit to appeal if it had been made up differently. But we need not seek for reasons to support the well-settled general rule that the execution must follow the judgment and be warranted by it. The writ issued by the justice was no part of the record of the common pleas. The question was to be determined by an inspection of the transcript, which could not be supplemented or changed, for the purposes of this motion, by parol evidence of the proceedings before the justice, any more than it can be for the purpose of depriving a party of an appeal. See Dawson v. Condy, 7 S. & R. 366; D. & H. Co. v. Loftus, 71 Pa. 418; Foss v. Bogan, 92 Pa. 296; Driesbach v. Morris, 94 Pa. 23.

All the assignments are overruled.

Order affirmed and appeal dismissed at the cost of the appellant.

Estate of Henry Worthington, deceased. Appeal of Charity P. Worthington.

Practice, O. C.—Equity—Pleading—Effect of replication—Hearing on bill, answer and replication.

Proceedings in the orphans' court must have the substance of equitable form if not its technical nicety. The proper mode of proceedings is by petition, answer and replication, in which the substantial requisites making out a case should appear. A replication in equity is the plaintiff's answer or reply to defendant's plea or answer. If it be a general denial of the truth thereof, matter alleged in the answer must be proved. If it confines the denial to averring that the answer was untrue in certain particulars, but omits to deny or demand proof of material facts set out in the answer, an agreement that the case be disposed of on petition, answer and replication warrants the court in treating relevant facts averred in the answer and not denied in the replication as admitted.

Argued Jan. 12, 1898. Appeal, No. 37, Jan. T., 1898, by Charity P. Worthington, from decree of O. C. Luzerne Co., No. 177, of 1880, dismissing petition praying for an accounting in the estate of Henry Worthington, deceased. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Petition for accounting by administratrix. Before DARTE, P. J.

Charity P. Worthington filed a petition as the executrix and devisee of William Worthington, deceased, who was the son and heir of Henry Worthington, deceased, who died intestate in 1880, setting out that Alice Worthington, his widow, as administratrix, had never accounted, and praying for citation. The administratrix filed an answer, admitting administration and that she had never accounted, but set up that the petitioner was estopped from asking her to account, alleging an agreement purporting to have been made and signed in 1890, wherein she alleged a full settlement was made of both real estate and personal property, which she alleged the petitioner and her husband through whom she claimed, had executed, and that this agreement estopped her from asking an accounting.

The petitioner filed a replication setting out, inter alia, that the said paper was not executed by her, and that at the time the said paper was alleged to have been executed some of the parties who signed the same were not of full age.

The paper or release referred to purported to be signed by all the heirs and the children of Henry Worthington, and among them by petitioner's husband, William Worthington, and by petitioner herself, and purported to be a full release to Alice Worthington, as administratrix of her husband, "from all dividends, shares, claims, or demands on account of their respective shares of the estate, real or personal, and from any other matter, cause or thing whatsoever from said estate or on account of the administration thereof."

The court below held that the pleadings admitted the validity of the agreement, its signature and execution, except as denied by the replication; that the signature of William Worthington, through which petitioner claimed, was not denied, and that therefore petitioner had no standing to call for an accounting. Petitioner appealed.

Errors assigned among others were (1) in holding that William Worthington, deceased, executed and delivered a paper to the administratrix which released her from accounting, that was not produced nor offered in evidence; (2) in not holding that the replication filed was sufficient to put the answer in issue, and in the absence of a rejoinder or testimony to decree an accounting by Alice Worthington, the administratrix; (3) in not finding that the only one interested in having an accounting was Charity P. Worthington, the widow and sole devisee of William Worthington, deceased, who had filed the replication, that the interests of all the others who are alleged to have signed the agreement in the personal and real estate of Henry Worthington, deceased, had been conveyed to William Worthington, deceased, the son and heir of said decedent.

Michael Cannon, for appellant.

Geo. K. Powell, with him *D. L. Rhone*, for appellee.

PER CURIAM, February 19, 1898:

The orphans' court is a court of equity within the limited sphere of its operations, and the proceedings should have the substance of equitable form, though not its technical nicety. The proper mode of proceeding in that court is by petition, answer, replication, etc., in which the substantial requisites making the case should appear: Steffy's Appeal, 76 Pa. 94. A replication in equity is the plaintiff's answer or reply to the defendant's plea or answer. If it be a general denial of the truth of the plea or answer, and an assertion of the truth and sufficiency of the bill, matter alleged in the answer in avoidance of the relief prayed for by the bill must be proved on the hearing. It is contended by the appellant that this general rule of pleading was applicable to the present proceeding; therefore the respondent should have been compelled to prove the execution of the paper set forth in her answer. In support of this contention her counsel cites Hengst's Appeal, 24 Pa. 413, which would, indeed, sustain her position if she had filed a general replication. But this she did not do, probably because she was required by the rules of the court below to swear to it. Be that as it may, she contented herself with averring

that the answer was untrue in certain particulars, not material in the proceeding, but omitted to deny or to demand proof of the execution of the release by William Worthington through whom she claims. This being the state of the pleadings, an agreement that the case should be disposed of on petition, answer and replication warranted the court in treating the relevant facts averred in the answer, and not denied in the replication, as admitted. See Russell's Appeal, 34 Pa. 258.

The case turned then upon the construction of the paper. The court below correctly construed it to mean that the parties executing it intended to release the respondent and her sureties from all liability to them for, or on account of, her administration of the estate of her husband.

The question of her rights in the partition proceeding referred to in the replication is not before us; nor was it before the orphans' court. It is sufficient for present purposes to say that the institution of that suit did not estop the respondent from pleading the release in answer to the citation to account for her administration of the personal estate.

The decree is affirmed and the appellant directed to pay the costs.

Claster Bros. Appellants, *v.* E. Katz.

Sale—Fraud—Rule of Smith v. Smith to be strictly construed.

The intention of the buyer of goods at the time of purchasing them, not to pay, together with his insolvency at the time and his knowledge of it not communicated to the seller, will not avoid the sale after the delivery of the property sold. This is the rule of Smith v. Smith, 21 Pa. 367, recently recognized and followed as authority in Pennsylvania, but it is a rule which is declared to be not in harmony with that of a majority of other states, nor with sound policy or the principles of business honesty, and the courts will construe it strictly and will not go a step beyond it. Any additional circumstance which reasonably involves a false representation will be held sufficient to take the case out of the rule.

Where, in addition to insolvency known to the buyer and undisclosed to the seller, the buyer, before the delivery of the goods confesses a judgment enforceable at once, knowing that the effect of its enforcement will be to disable him from continuing his business, and it is so used, these

additional circumstances are sufficient to take the case out of the strict rule of Smith v. Smith.

Argued Nov. 10, 1897. Appeal, No. 135, Oct. T., 1897, by plaintiffs, from judgment of C. P. Lancaster Co., Nov. T., 1896, Nos. 35 and 36, on verdict for defendant. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Sheriff's interpleader. Before BRUBAKER, J.

The value of the goods in controversy appears to have been somewhere between $82.00 and $152.27.

The facts sufficiently appear in the opinion of the court.

Verdict for defendant. Plaintiffs appealed.

Errors assigned were, (1) In charging the jury as follows: "The law in this state has been well settled since the opinion of Judge MITCHELL, which has been quoted here, who had given an opinion in a case in the Supreme Court of this state. The law in this state is entirely different from the laws in most of the states of the Union. In New York and New Jersey, and especially where they have codes, the law is, that fraudulent insolvency in itself is sufficient to rescind the contract; but the state of Pennsylvania, by an old decision rendered very many years ago, held that there must be more than fraudulent insolvency; that it must be shown that the goods were procured by a trick, artifice or deception, or conduct which reasonably involves a false representation to accomplish the purpose." (2) In its answer to plaintiff's first point, which point and answer are as follows: "1. If a purchaser about the time of the delivery of the goods confesses judgment, and disables himself from continuing business, he commits an act of legal if not actual fraud, and acquires no title to the goods. *Answer:* That point we have to affirm as a general proposition; but before you can render a verdict for the plaintiffs they must show, as I have said before, that Blankfield practiced artifice or deception, or conduct between them which reasonably involves a false representation, to accomplish the purpose before he got the goods. Unless the plaintiffs' story is a true one, your verdict must be for the defendant, if you believe Blankfield. If you believe the plaintiffs, then your verdict should be in favor of the

plaintiffs." (3) In its answer to plaintiff's second point, which point and answer are as follows: "2. If the jury believe that after the purchase of the goods in controversy from Claster Bros., and before their shipment, Blankfield confessed a judgment to E. Katz, it was such a change in the circumstances as the vendor was entitled to know, and was a most material fact in the transaction. Having concealed from Claster Bros. the knowledge that such a judgment had been confessed, no title passed from Claster Bros. to Blankfield, which could be subject to the levy of the executions issued upon the Katz judgments. *Answer:* That point we must negative as it stands. That is true, provided, as I have said so frequently, you believe that a trick, artifice or fraud, or conduct between the parties equivalent to such fraud, was practiced on the day that the goods were purchased by Blankfield. That in itself would not be held sufficient, unless this artifice, trick or deception was perpetrated by Blankfield." (4) In answer to plaintiff's third point, which point and answer are as follows: "3. If the jury believe that at the time of the sale of the goods in controversy J. Blankfield represented that he had a stock of from $2,000 to $3,000, was not indebted to any one, except a small balance of $40.00 on a note of his sister, and that he owed no borrowed money, and had no judgments outstanding, and the facts thus stated were untrue, and on the faith of such representations Clasters parted with their goods, then the sale from Claster Bros. to J. Blankfield would be void, and Claster Bros. would have a right to the property claimed in this issue, as the title to the same never passed out of them to Blankfield. *Answer:* That would be true, providing Blankfield was insolvent at the time."

Chas. I. Landis and *B. F. Davis*, for appellants.—There was error in the charge of the court in that it stated an erroneous principle as having a direct operation on the evidence, and withdrew the attention of the jury from other points: Deal v. McCormick, 3 S. & R. 343; Young's Est., 65 Pa. 101.

The tendency of the charge was to mislead the jury: Bisbing v. Nat. Bank, 93 Pa. 79; Penna. Railroad Co. v. Berry, 68 Pa. 272.

The effect of the answer of the court to the third and fourth points was instruction to the jury that the confession of the

judgment could not in any manner affect the rights of the plaintiff, and therefore, the sale was good against him. This was an incorrect statement of the law: Bughman v. Central Bank, 159 Pa. 94.

It is error not to answer directly the question proposed by counsel: Powers v. McFerran, 2 S. & R. 44; Smith v. Thompson, 2 S. & R. 49; Tenbrooke v. Jahke, 77 Pa. 392.

W. U. Hensel, with him *J. Hay Brown*, for appellee.—The errors complained of to the charge of the court and answers to points, if errors they be, are sufficiently covered and corrected by the general charge, where the court subsequently said, "You should try to reconcile the evidence if you can; but if you cannot reconcile it, you must say whose testimony you will believe. If you believe the plaintiffs and the testimony adduced by them in their behalf, that J. Blankfield at the time he purchased these goods made such representations as they say he made, then we do not hesitate to say to you in our instructions, there was a trick, artifice or deception used in the getting of these goods. That is the issue raised here."

This was a correct statement of the law of Pennsylvania as abundantly appears from the authorities: Bughman v. Bank, 159 Pa. 94; Perlman & Cooper v. Sartorius, 162 Pa. 320; Cooperage Co. v. Gaul, 170 Pa. 545; Labe v. Bremer, 167 Pa. 15; Lowrey & Co. v. Ulmer, 1 Pa. Superior Ct. 425; Wessels v. Weiss Bros., 156 Pa. 591; Ralph v. FonDersmith, 3 Pa. Superior Ct. 618.

The appellate court will not reverse by reason of a fragment, which, wrested from its context, seems to present an erroneous statement of the law: Riegel v. Wilson, 60 Pa. 388; Bartley v. Williams, 66 Pa. 329.

While a party is entitled to an explicit answer to his prayer for instruction, the court may so qualify it as to conform to the evidence: Killion v. Power, 51 Pa. 429.

If the defendant in his prayer for instruction sets up a broader right than he is entitled to, the judge should not deny it altogether, but should explain to the jury the true extent of the right: Amer v. Longstreth, 10 Pa. 145.

It is enough if the points are sufficiently answered in the charge: Scheuing v. Yard, 88 Pa. 286.

To qualify an affirmance of a point by the cautionary statement of an abstract principle of law is not error: Yardley v. Cuthbertson, 108 Pa. 395; Duncan v. Sherman, 121 Pa. 520.

If the material questions of fact are fairly submitted, as presented by the evidence, an expression of an opinion upon the weight of the plaintiff's testimony is not error: Didier v. Penna. Co., 146 Pa. 582.

OPINION BY RICE, P. J., February 19, 1898:

This was a sheriff's interpleader to try the title to certain goods levied upon as the property of J. Blankfield. The plaintiffs were in the wholesale clothing and notion business in the city of Harrisburg, and Blankfield was in the same business as a retailer in Ephrata in the county of Lancaster.

On or about September 13, 1896, Blankfield ordered goods of the plaintiffs to the amount of about $300. Later in the same day he ordered goods of E. Katz, also doing business in Harrisburg, to the amount of $292.73, and on September 15th, (pursuant to an agreement made on the 13th), gave her a judgment note dated September 14th, and payable one day after date for $619.13. It is alleged that this note was given for the goods ordered on September 13th, and money that he owed her.

On September 15th Blankfield telegraphed the plaintiffs to ship only one half the goods. Accordingly, on September 16th or 17th, the plaintiff shipped one half the goods ordered without any knowledge that, in the mean time, Blankfield had given to Mrs. Katz the judgment note above referred to.

On September 23d, Mrs. Katz entered judgment on the note and also on another note bearing date May 1, 1896, for $300, the consideration for which does not distinctly appear, and issued executions. On the following day a levy was made on the goods in Blankfield's store, including those ordered from the plaintiffs that had not been disposed of. These goods (some of which were still in the original packages) were claimed by the plaintiffs and appraised at $80.00. The remaining goods were sold at sheriff's sale for $895.

Blankfield owned no real estate, and, as far as appears, no other property except that in his store. He was indebted to other parties, but in what amount does not directly appear.

Insolvency has been defined as the state of a person who,

from any cause, is unable to pay his debts in the ordinary or usual course of trade: Levan's Appeal, 112 Pa. 294. But it is well settled in Pennsylvania that the insolvency of the vendee of goods at the time of the sale, although known to him and not disclosed to the vendor, is not alone such fraud as will enable the latter to rescind the sale and reclaim the goods after they had come fully into the possession of the vendee. Many of the late cases in which this rule has been recognized and applied are cited in the opinion of our Brother ORLADY in Ralph v. FonDersmith, 3 Pa. Superior Ct. 618, and need not be cited here. In Smith v. Smith, 21 Pa. 367, it was held that the added fact that the vendee intended not to pay would not change the rule which was thus stated in the syllabus: "The intention of the buyer of goods, at the time of purchasing them, not to pay, together with his insolvency at the time and his knowledge of it not communicated to the seller, will not avoid the sale after the delivery of the property sold."

It was said in Bughman v. Central Bank, 159 Pa. 94 that the law as thus declared in Smith v. Smith, was not in harmony with that of a majority of other states, nor with sound policy or the principles of business honesty, and, moreover, was a departure from the previous decision in Mackinley v. McGregor, 3 Wh. 369. "But," said Mr. Justice MITCHELL, "it has been expressly followed in several cases, and has remained in the books without being overruled, for forty years, and recognizing that the subject is one on which legal minds have always been apt to differ, we do not think it wise now, notwithstanding our own clear convictions on the principle, to unsettle the law by another change. We will therefore stand on the authority of Smith v. Smith and its kindred cases, but we will not go a step beyond what they require. Any additional circumstance which tends to show trick, artifice, false representation, or, in the language of Smith v. Smith itself, 'conduct which reasonably involves a false representation' will be sufficient to take the case out of the rule of those authorities."

It needs no argument to show that the instruction complained of in the first assignment goes very far beyond what the rule declared in Smith v. Smith required. Conceding that a seller must take the risk of the insolvency of the buyer and of his secret intention not to pay, must he also take the chance, that,

the buyer has committed, or between the sale and the delivery of the goods, will commit, an act of fraudulent insolvency, whereby the seller will be effectually prevented from collecting the price of his goods? Clearly not. To obtain goods in that way is to obtain them by a trick,—a "fraud acted out"—which only needs the sanction of the law to make it a most successful method of cheating. From the very nature of a transaction a fact not disclosed may be such that it is impliedly represented not to exist, and whilst under our decisions a buyer is not held to an implied representation of solvency, he may be fairly presumed to represent that he has not deliberately set a trap for the unwary seller. We need not discuss this assignment further; nor, since the case must be sent back for a retrial upon other grounds, need we consider whether the error into which the learned judge inadvertently fell in stating the rule, was rendered harmless by other portions of the charge.

The question raised by the second and third assignments of error relates to the effect of acts of the buyer, between the purchase and the delivery of goods, upon the right of the seller to rescind the sale, after the goods have come into the possession of the buyer. The legal principle, which, in their first point, the plaintiffs asked to have applied to the case was that, if the buyer about the time of the delivery of the goods confesses judgment and disables himself from continuing business, he commits an act of legal, if not actual, fraud, and acquires no title to the goods. The court affirmed the point as an abstract proposition of law, but accompanied the affirmance with instructions to the effect, that to entitle the seller to rescind the sale he must show that it was induced by some trick, artifice or deception practiced by the buyer on the day the contract was made. The practical effect of thus qualifying the point was to nullify it, and to leave the impression on the jurors' minds, that, unless such deception was practiced, the subsequent acts of the buyer were immaterial. Whereas, if the principle invoked by the plaintiffs was sound, and the facts of the case warranted its application, the plaintiffs had a right to rescind the sale, whether active misrepresentations were made by Blankfield on the day the goods were ordered or not.

The confession of judgment by a buyer of goods between the purchase and delivery of the same is not, per se, such a fraud

upon the seller as entitles the latter to rescind the sale. Other facts must be present in the case in order to warrant the application of the principle contended for; and if the evidence concerning them is conflicting, or leaves them as subjects of inference purely, the question must be submitted to the jury under proper instructions. Hence, we are unable to say, that the plaintiffs were entitled to an unqualified affirmance of their second point. The defendant's assets and liabilities at the time of the confession might have to be considered.

But where, in addition to insolvency known to the buyer and undisclosed to the seller, the buyer, before the delivery of the goods, confesses a judgment which is enforceable at once, and he knows that the effect of its enforcement will be to disable him from continuing his business and to bring it to an end, and it is so used, these additional circumstances are sufficient, in our opinion, to take the case out of the strict rule of Smith v. Smith, and kindred cases. The decision in Bughman v. Central Bank, 159 Pa. 94, is directly in point. It appeared there that Fawcett and Sons sent two barges to the plaintiff's works to be loaded with coal in accordance with their previous course of dealing on credit by notes running for four months. On the same day Fawcett and Sons confessed judgment to the defendant, and on November 21, executed and delivered to the defendant a bill of sale covering practically all their coal boats, and including the two barges with the coal contained therein purchased from the plaintiff. The evidence tended to show that the bill of sale was signed and delivered in the forenoon of the 21st, at which time only one of the barges was loaded, and that the other was not loaded until the afternoon of that day. The question was as to the right of the plaintiff to rescind the sale. It was contended there, as it is here, that, in the absence of active misrepresentations, the rule laid down in Smith v. Smith, applied, but the Supreme Court emphasized their declaration that they would not go a step beyond what that case requires, in the following ruling: "In the present case, Fawcett & Sons at about the time if not before the delivery of the coal not only committed an act of insolvency by the confession of judgment and bill of sale to the bank, but in fact disabled themselves from continuing their business, and practically brought it to an end. This was a most material fact in the transaction. It

was such a change in circumstances as the vendor was entitled to know, and it does not admit of doubt that if he had known it, he would not have delivered the coal. In the New York cases this fact makes the purchase a fraud in law, and is conclusive: Mitchell v. Worden, 20 Barb. 253. This we think is the sound and true rule. It is in accord with what we know would be the practical result in business life, and it follows the close analogy of a concealed defect in an article sold, which entitles the purchaser to rescind the sale. We hold therefore that as between the appellant and Fawcett & Sons the transaction was a legal, if not an actual fraud, and passed no title to the coal."

We do not hold that it was the duty of the court to declare that the facts of the present case required the application of this legal principle, but we are clearly of opinion that there was ample evidence to warrant the jury in finding the facts to which it would be applicable. Hence, while the plaintiff's first point required explanation, and the second qualification, the principle involved arose fairly out of the evidence, and was not subject to the qualification which was put upon it in the answers.

If the facts were as stated in the plaintiff's third point, then a gross fraud was practiced to induce the plaintiffs to part with their goods, and they had a right to rescind the sale and to recover in the issue being tried, without being compelled, in addition, to prove that the purchaser was insolvent. The point was in exact accord with instructions given in the general charge, and should have been distinctly and unequivocally affirmed. The qualification, "provided Blankfield was insolvent at the time" was inappropriate in answer to that point, and tended to mislead.

The judgment is reversed and a venire facias de novo awarded.

A. T. Taylor, Appellant, v. Mrs. Jean McLain Paul, G. W. Swan and D. W. Simpson.

Sale—Assignment for creditors—Parol evidence.

An assignment of property by an insolvent debtor, although absolute on its face, may be shown by parol evidence to have been intended to create a trust for creditors.

Practice, C. P.—Charge of court—"Clear and satisfactory evidence."

Where, even in the absence of special request for instruction, the court undertakes to instruct the jury as to the measure or quality of proof required having stated the rule by which the jury should be governed in determining the issue, error may be assigned if the true rule is not given. To instruct the jury that a fact must be established by the "weight of the evidence" is not equivalent to saying that it must be established "by clear and satisfactory evidence." The latter implies a higher degree of proof than the former.

Husband and wife—Wife claiming against creditors—Burden and quality of proof.

The property of a husband is not to be covered up or withheld from creditors upon equivocal suspicions or doubtful evidence of a wife's right to it. The family relation is such, and the probabilities of ownership so great on part of the husband, that a plain and satisfactory case should be made out before the wife can be permitted to hold property against honest creditors. The burden of proof is upon the wife claiming under such circumstances and such proof must be clear and satisfactory.

Argued May 3, 1897. Appeal, No. 81, April T., 1897, by plaintiff, from judgment of C. P. Indiana Co., Sept. T., 1893, No. 32, in favor of defendants. Before RICE, P. J., WILLARD, WICKHAM, REEDER, ORLADY and SMITH, JJ. Reversed.

Interpleader. Before WHITE, P. J.

An attachment execution was issued on a judgment obtained by A. T. Taylor against John K. Paul with a clause of sci. fa. to G. W. Swan and D. W. Simpson, partners trading as Swan & Simpson and summoned them as garnishee. The sheriff was directed to attach $250 in the hands of Swan & Simpson. Issue in the nature of an interpleader was awarded to determine the ownership of a certain chose in action.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned were (1) In charging the jury as follows: "This is a civil case, to be determined by the weight of the evidence." (2) In charging the jury as follows: "The question first to be determined is, were these notes actually assigned to Mrs. Paul prior to the service of the attachment on her; or, in other words, had she actually made an arrangement by which she in good faith had purchased these notes from T. S. McLain, who was the assignee of her husband, John L. Paul." (3) In charging the jury as follows: "If this was actually consummated, if she actually made the agreement to raise this money before the service of this attachment upon Swan & Simpson on the 9th and 10th of June, 1893, if she made the arrangement in good faith to raise the money, and actually did raise the money and execute it, although actual payments were not made until after the attachment, still it would be good." (4) In charging the jury as follows: "If it was not so, if McLain and Paul understood each other and it was an arrangement in fraud of creditors, and subsequently Mrs. Paul came in and the transaction between her and McLain was in good faith, that is, in good faith upon her part, she knew nothing about what may have been a fraud between Paul and McLain, if she had no notice of that and got these notes for value, that would be good; that would be good as between her and the plaintiff here." (5) In charging the jury as follows: "Paul testifies that the arrangement between him and McLain was that he was to raise the money to pay the insurance companies out as consideration for the transfer of these notes, so that the transfer of the agencies could be consummated to Swan & Simpson." (6) In charging the jury as follows: "But to make it valid there must have been an agreement made by McLain in good faith at that time that he would raise the money to pay it off. If that was so, then it would be a good transaction." (7) In charging the jury as follows: "Was this transaction consummated between Mr. Paul and Mr. McLain in good faith on the 5th of June, 1893? If it was, then Mr. McLain would be the owner of these notes."

D. B. Taylor, of *Jack & Taylor*, for appellant.—The issue framed by the court was to try "whether in fact Mrs. Paul holds the note by assignment," and second, "if she does, whether

such assignment is valid as against the plaintiff." Upon the appeal of this issue the court charged the jury, "this is a civil case to be determined by the weight of the evidence." This is not the established rule of evidence. Gamber v. Gamber, 18 Pa. 363, where it was held, "in the case of a purchase after marriage the burden is upon the wife to prove distinctly that she paid for it with funds which were not furnished by her husband:" Wilson v. Silkman, 97 Pa. 509; Kenney v. Good, 21 Pa. 349; Billington v. Sweeting, 172 Pa. 161; Jack v. Kintz, 177 Pa. 571.

It was the duty of the court to instruct the jury that the assignment under which Mrs. Paul claimed was an assignment for the benefit of creditors, and not having been recorded within thirty days was void as against this plaintiff: Wallace v. Wainwright, 87 Pa. 263; Johnson's Appeal, 103 Pa. 373.

John N. Banks and *Frk. Keener*, of *Watson & Keener*, for appellees.—It was incumbent on appellant setting up the fraud to establish it, at least, by the weight of the testimony: Morton v. Weaver, 99 Pa. 47; Young v. Edwards, 72 Pa. 257.

The appellant, not having requested the court to instruct the jury that the evidence of ownership must be established by clear and satisfactory testimony, cannot now complain about the charge of the court: Com. v. Goldberg, 4 Pa. Superior Ct. 142; Railroad Co. v. Getz, 113 Pa. 214.

Even if the question had been properly raised in the court below, the cases cited, to wit: Wallace v. Wainwright, 87 Pa. 263, and other kindred cases, would not support the contention of the appellant, as there is nothing on the face of the assignment from Paul to McLain to indicate that it was an assignment for the benefit of creditors, or that it was an assignment in trust for any purpose: Bank v. Carter, 38 Pa. 446; Uhler v. Maulfair, 23 Pa. 483.

OPINION BY RICE, P. J., February 19, 1898:

On June 5, 1893, John L. Paul sold his insurance business and office furniture to Swan and Simpson and received in payment their three judgment notes dated June 1, 1893, payable as follows: $500, twelve days; $277.77 four months; $277.77, six months. Paul immediately assigned these notes to T. T. Mc

Lean, and on June 6th and 8th McLean assigned the two latter notes to Mrs. Paul, subject to a payment of a small sum that in the mean time had been made.

On June 9, 1893, A. T. Taylor issued an attachment execution upon a judgment against Paul and summoned Swan and Simpson as garnishees. They filed answers to interrogatories admitting their indebtedness upon the two smaller notes, less the payment made, and averring that they had been notified by Mrs. Paul that she owned the notes by assignments made before the service of the attachment.

The record as printed shows, that John L. Paul's attorney applied for and obtained a rule on the plaintiff to show cause why the attachment should not be dissolved, and that the plaintiff filed an answer. As this is not printed we have no means of knowing the grounds upon which he attacked the assignments to Mrs. Paul. The next step in the proceedings, as shown by the record, was the following order: "June 9, 1894, it is ordered that an issue be framed wherein A. T. Taylor shall be plaintiff, and Mrs. Jean McLain Paul, G. W. Swan and D. W. Simpson, defendants; the questions to be tried are whether in fact Mrs. Paul holds the notes in controversy by assignment; second, if she does, whether such assignment is valid as against the plaintiff." The parties went to trial upon this issue, and from the judgment on the verdict in favor of the defendants the plaintiff has appealed to this court.

The case, as tried, was in fact, although not in strict technical form, an interpleader. The garnishees admitted the indebtedness, but being uncertain as to the ownership of the notes, and standing indifferent between the claimant and the attaching creditor, were entitled to protection against a double recovery. This might have been afforded by proceeding according to the practice in common law interpleader as described in Brownfield v. Canon, 25 Pa. 299, and followed in D., L. & W. R. R. Co. v. Hill, 10 W. N. C. 461. But whether or not any process was issued to bring in the claimant is immaterial; she voluntarily appeared and made no objection to the form of the issue, which was so framed as to raise the question as to her title generally. If for any reason the assignments to her were not valid as against the plaintiff, he was entitled to the fund in the garnishee's hands. The burden of proof was upon her, and she was bound to sus-

tain her title by the quality and quantity of proof required of a married woman who sets up title to property derived from her husband, as against his creditors. As was said in Earl v. Champion, 65 Pa. 191, the language of the cases as to the quality of the proof required is rather an approximation than a definition; for the reason that it is difficult to define accurately that which is merely a mental operation, and to express with precision the degree of conviction forced upon the mind by evidence. Nevertheless, it has been uniformly held whenever the question has been raised, that the wife must establish her title by a higher degree or quality of proof than is required of a stranger. "In case of a purchase after marriage the burden is upon her to prove distinctly that she paid for it with funds which were not furnished by her husband. Unless rigid proof of her title is always required, no one can calculate the amount of injustice which the act of 1848 will produce:" Gamber v. Gamber, 18 Pa. 363. "Evidence that she purchased it amounts to nothing unless it be accompanied by clear and full proof that she paid for it with her own funds. In the absence of such proof the presumption is a violent one that her husband furnished the means of payment:" Keeney v. Good, 21 Pa. 349; Rhoads v. Gordon, 38 Pa. 277; Wilson v. Silkman, 97 Pa. 509; Aurand v. Schaffer, 43 Pa. 363. She must prove her title "by clear and satisfactory evidence:" Hoar v. Axe, 22 Pa. 381. "She must make it clearly appear that the means of acquisition were her own, independently of her husband:" Auble's Admr. v. Mason, 35 Pa. 261. Mr. Justice THOMPSON, after a critical review of some of the earlier cases, held that it was going too far to charge the jury that "if you pause or doubt upon her evidence, your verdict should be given for the plaintiff," but conceded that the true rule was "that the proof by the wife must be clear and satisfactory, sufficient to repel all adverse presumptions:" Tripner v. Abrahams, 47 Pa. 220. "We have said in many cases that the evidence must be clear and satisfactory—clear and full proof—clear and unequivocal—it must exclude reasonable suspicion that the property was the husband's. These are but forms of expression to denote that the property of a husband is not to be covered up or withheld from creditors upon equivocal, suspicious or doubtful evidence of a wife's right to it. The family relation is such, and the probabilities of owner-

ship so great on part of the husband, that a plain and satisfactory case should be made out before the wife can be permitted to hold property against honest creditors:" Earl v. Champion, 65 Pa. 191. "The proof for this purpose" (to show the wife's title as against her husband's creditors) "must be clear and satisfactory:" Duncan v. Sherman, 121 Pa. 520. "A man who is solvent may make a valid gift to his wife: Appeal of Hart, Lee & Co., 157 Pa. 200, but the fact of the gift, and every element necessary to sustain the claim of a married woman as against her husband's creditors, must be established by clear and satisfactory evidence:" Billington v. Sweeting, 172 Pa. 161. "These acts (1887 and 1893) enlarge the capacity of a married woman to contract, and to acquire and dispose of property, but they do not remove the burden which rests on her of proving title to the property she claims against her husband's creditors:" Jack v. Kintz, 177 Pa. 571. Nor, we may add, have they changed the rule as to the measure of proof: Shober v. Harrison Bros. & Co., 3 Pa. Superior Ct. 188–192.

But, it is argued that the plaintiff, not having requested the court to charge that the wife must establish her title by clear and satisfactory proof, cannot now complain. There would be force in this suggestion if the court had not undertaken to instruct the jury as to the measure or quality of proof required. But having stated the rule by which the jury were to be governed in determining the issue, error may be assigned if the true rule was not given. To instruct the jury that a fact must be established by "the weight of the evidence" is not equivalent to saying that it must be established "by clear and satisfactory evidence. The latter implies a higher degree of proof than the former: Coyle v. Commonwealth, 100 Pa. 573; Commonwealth v. Gerade, 145 Pa. 289.

Again, it is urged that "the evidence being clear and satisfactory the ownership of the notes would be determined by the weight of the evidence." But was the evidence of the facts essential to the claim of Mrs. Paul clear and satisfactory? Did she buy the notes out and out, or did she take them upon the same trusts as T. S. McLain? Assuming that she might have acquired a good title by the purchase of them upon her personal credit, was there such a purchase? In other words, were the notes transferred to her in consideration of a distinct and bind-

ing promise on her part made at the time of the assignments (or at least prior to the attachment), to pay her husband's indebtedness to the insurance companies? Is her own version of the transaction so clear upon this point as to admit of but one construction? The bare suggestion of these and other questions that fairly arose out of the evidence adduced by the defendants themselves shows the importance of having the jury distinctly and unequivocally instructed, that the facts essential to her claim of title must be established by clear and satisfactory evidence. After a very careful examination of the evidence, we feel warranted in saying that this is not a case where an erroneous statement of the rule as to the degree of proof can be treated as harmless error. Nor can we find that the error into which the court fell was cured in other portions of the charge. Therefore we are compelled to sustain the first assignment.

We shall not incumber this opinion with a recital of the testimony. Under no view of it can T. S. McLain be regarded as a purchaser for value. If however Mrs. Paul bought the notes in good faith, agreeing in consideration of the assignment to her to pay the indebtedness due to the insurance companies, the fact that part of the consideration was not paid until after the service of the attachment would not invalidate her title. If however they were transferred to her to be employed, converted or collected for the benefit of certain creditors of her husband, he being insolvent at the time, it is questionable whether she could set up title to them as against an attaching creditor. "None of the acts of assembly relating to assignments for the benefit of creditors have required that they should be drawn in any specific form. Such instruments were well known and in common use when the act of March 24, 1818, was passed, and neither before nor after its passage was any particular collocation of words held necessary to give to a writing the effect of an assignment. Since 1818 property transferred to one person to be employed, paid over or converted for the benefit of others has been regarded as property held in trust within the operation of the statutes:" Wallace v. Wainwright, 87 Pa. 263. It is due to the learned trial judge to say, that the point that the transaction was an assignment for the benefit of creditors and was void because not recorded within thirty days was not

raised or suggested on the trial of the case. Therefore we should not feel inclined to reverse the judgment because of his omission to instruct the jury as to the law upon that subject if the case were free from error upon the theory upon which the parties tried it. However, as the case must be retried, and as the point is now distinctly raised, it is proper to say that an assignment of property by an insolvent debtor, although absolute on its face, may be shown by parol evidence to have been intended to create a trust for creditors: York Co. Bank v. Carter, 38 Pa. 446–456. Whether this transaction was intended to create a trust, or was a bona fide purchase by Mrs. Paul was a question to be submitted to the jury under proper instructions, not only as to her good faith, but also as to the facts essential to a finding that she became the absolute owner of the notes and not a mere trustee for creditors. Any arrangement between her and McLain and her husband, whereby she did not become personally bound to pay the claims, but was only to use the notes for the purpose of raising money to pay them was ineffectual of itself to vest in her a title which would be good as against an attaching creditor, although such arrangement may have been entered into in entire good faith; and nothing that she might voluntarily do after the service of the attachment would perfect her title.

In view of the point now raised, the instructions complained of in the third, fourth, fifth, sixth and seventh assignments of error were scarcely adequate to compel a distinct finding by the jury as to whether the transfer to Mrs. Paul was a present sale for a sufficient consideration, or was an assignment in trust for creditors. Doubtless more precise and definite instructions would have been given if the point had been raised on the trial. This is all that we are called upon to say upon this feature of the case at this time.

The judgment is reversed and a venire facias de novo awarded.

Frank Heyer v. The Cunningham Piano Company, Appellant.

Bills of exception—Practice, C. P.—Exceptions—Testimony—Charge of court.

Exceptions to evidence are required only when the question of its admissibility is presented, when there is no objection there is no ground for an exception. Instead of authentication by bill of exceptions, both evidence and charge are placed on the record as directed by the act of 1887. The procedure in this respect has been repeatedly stated by the Supreme Court. It may be thus summarized:

1. It is the duty of the stenographer to take complete and accurate notes of the proceedings, evidence and charge, and to transcribe, for filing, a longhand or typewritten copy; but this transcription may be omitted in the discretion of the court, with the consent of counsel.

2. Exceptions noted by the stenographer, by direction of the judge, are equivalent to the formal sealing of a bill of exceptions.

3. The stenographer has no authority to note an exception except by direction of the judge.

4. To become part of the record, the copy of the stenographer's notes must be certified to by the stenographer, and approved by the judge and filed by his direction.

5. The stenographer's certificate must set forth, in substance, that the proceedings, evidence and charge are contained, fully and accurately, in the notes taken by him on the trial, and that the copy filed is a correct transcript of the same. It must be signed by the stenographer, and not in a firm name or by deputy.

6. The judge's certificate must show, in substance, his belief that the transcript is correct, and that it is filed by his direction.

7. Transcripts of the proceedings and evidence, and of the charge, with the requisite certificates, may be filed together or separately.

Charge of court—Comments on evidence—Entire charge to be weighed.

The charge of the court does not disclose reversible error when, if the assignments of error to the charge are weighed in connection with the entire context, it appears that all controverted questions resting in parol were submitted to the jury, and when the charge, in its reference to the evidence, is, as a whole, entirely fair.

Contracts—Assent to written contract evidenced otherwise than by signing.

If both parties assent to the terms of a contract, embodied in writing, their assent creates a valid contract without reference to signature, except where signing is expressly required by law.

Master and servant—Illegal discharge—Measure of damages.

When an employee is discharged, without sufficient cause, before the

end of his term of employment, he is prima facie entitled to recover his wages for the full term. He may hold himself in constant readiness to perform and recover as for performance. Even if bound to make reasonable effort to obtain other employment, the burden of proof is on the employer to show that he obtained or might have obtained it.

Argued Oct. 14, 1897. Appeal, No. 101, Oct. T., 1897, by defendant, from judgment of C. P. No. 1, Phila. Co., Sept. T., 1896, No. 730, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, SMITH and PORTER, JJ. Affirmed.

Assumpsit for wages. Before BIDDLE, J.

The plaintiff alleged a contract of employment by defendant as foreman of defendant's factory for the period of one year, on and after May 4, 1896, at a yearly salary of $1,500 payable in weekly instalments. He offered on May 4, 1896, to perform the duties under the alleged agreement, but defendant refused to permit him to enter its employment.

Other facts appear in the opinion of the court.

Verdict and judgment for plaintiff for $991.11. Defendant appealed.

Errors assigned were (1) In charging, after reciting part of the testimony of the plaintiff: "That is the allegation of the plaintiff as to what occurred on this occasion, and if you believe that is what occurred it would be a perfectly valid contract, if Mr. Cunningham had the right to make such a contract." (2) In charging: "It is not always necessary that a contract should be signed by both parties. It is a question for the jury to consider, if there is a question whether a contract was made, why it was not signed by both parties. If a man presents a contract to another and he tells him it is all right and he directs him to begin work in the morning, it is a perfectly valid contract." (3) In charging: "In regard to Mr. Cunningham's right to make this contract, that of course must be shown. His relation to the company has been shown as that of general manager, who employed all the hands, although there was no evidence that he employed any one whose term of service extended to a year." (4) In charging: "As I understand Mr. Cunningham's evidence, he practically admits that he would have the right to make this employment if he chose to do so without

presenting it to the company." (5) In charging: "No by-law has been offered to show that it was obligatory, therefore I think that if he did make the contract the company would be bound by it, but the denial comes as to the fact of the contract having been made." (6) In charging: "It therefore reduces itself down in this case to the question whether Mr. Cunningham did or did not make this contract." (7) In charging: "Assuming he had the right to make it, and if what Mr. Heyer says is true he did make it, he is bound by it; but if Mr. Cunningham's contention is true, that it was a question to be afterwards acted upon, of course he would not be bound by it." (8) In charging: "The rule of damages in cases of this character is, if a man makes a contract and the other side refuses to carry it out, the workman has no right to sit down and do nothing, and at the end of the year require the party with whom he made the contract to pay the full amount he should receive under its terms. It is his duty to lessen the damage as much as possible by seeking other employment, and if he succeeds, the amount he received from such employment should be deducted from the amount of his claim. Mr. Heyer has told you what he has earned during the time, and if you should consider that he is entitled to any damage you should deduct that from it." (9) In charging: "I think I have answered all the points here and I do not think it is worth while to go over them individually."

Samuel Gustine Thompson, with him *John A. Toomey* and *Patrick F. Dever*, for appellant.—A contract of this nature, where there are mutual and depending covenants, can only be established by proving that it has been signed by the parties. Assuming for the purpose of argument that Mr. Cunningham had in fact made a contract on the part of the corporation, plaintiff was bound to show authority to make the same: Bank v. McKee, 2 Pa. 318; Millward Cliff Cracker Co.'s Est., 161 Pa. 157; Curry v. Cemetery Assn., 5 Pa. Superior Ct. 289.

The defendant was entitled to show employment by the plaintiff in mitigation of damages: Chamberlin v. Morgan, 68 Pa. 168.

Oscar Leser, for appellee.—The testimony is not upon the record. There is no bill of exceptions, nor was a single excep-

tion asked for or allowed to any portion of the testimony or to any portion of the charge.

The charge itself is not of record, because it does not appear that it was filed "by the judge's direction at the express request of a party made before verdict, and only when such direction affirmatively appears, the charge becomes part of the record, and is assignable for error:" Connell v. O'Neil, 154 Pa. 582; Tasker v. Sheldon, 115 Pa. 107.

From the testimony, it is clear that Mr. Cunningham expressly assented to the contract, called his bookkeeper to whom he dictated its terms, and by whom the name of the company in the presence of Cunningham, the secretary, treasurer and general manager, was affixed.

A corporation may, by the instrumentality of its agents, contract within the sphere of its functions, pretty much as a natural person may. The corporate seal is not a necessity: Hamilton v. Ins. Co., 5 Pa. 339; Imperial Co. v. Dunham, 117 Pa. 460; McCullough v. Ins. Co., 2 Pa. Superior Ct. 233.

Where the agreement is wholly executory, the engagement of one party may be in writing and the other in parol: Grove v. Hodges, 55 Pa. 504.

The assent of the nonsigning party may be inferred from the circumstances: Flannery v. Dechert, 13 Pa. 505; Pratt v. Harding, 30 Pa. 525; Swisshelm v. Laundry Co., 95 Pa. 370.

OPINION BY SMITH, J., February 19, 1898:

It is objected by the appellee that neither the charge nor the evidence is on the record before us; since it does not appear that the charge was filed by the judge's direction, at the request of a party, before verdict, and there is no bill of exceptions to any of the evidence, or to any portion of the charge.

This objection is based on a phase of practice which has, within the last twenty years, been in large measure superseded. All the cases holding that the charge becomes part of the record only when filed at the request of a party, before verdict, were decided under the act of 1806, and prior to the Acts of March 24, 1877, P. L. 38 and May 24, 1887, P. L. 199. In the practice under the latter acts, such request has not been required. And under the act of 1806, an exception to the charge has never been held necessary: Wheeler v. Winn, 53 Pa. 122. Excep-

tions to evidence are required only when the question of its admissibility is presented; when there is no objection there is no ground for an exception. Instead of authentication by a bill of exceptions, both evidence and charge are placed on the record as directed by the act of 1887. The procedure in this respect has been repeatedly stated by the Supreme Court; notably in the cases of Rosenthal v. Ehrlicher, 154 Pa. 396; Connell v. O'Neill, 154 Pa. 582; Com. v. Arnold, 161 Pa. 320; Woodward v. Heist, 180 Pa. 161; Harris v. Traction Co., 180 Pa. 184. It may be thus summarized:

1. It is the duty of the stenographer to take complete and accurate notes of the proceedings, evidence and charge, and to transcribe, for filing, a longhand or typewritten copy; but this transcription may be omitted in the discretion of the court, with the consent of counsel.

2. Exceptions noted by the stenographer, by direction of the judge, are equivalent to the formal sealing of a bill of exceptions.

3. The stenographer has no authority to note an exception except by direction of the judge.

4. To become part of the record, the copy of the stenographer's notes must be certified to by the stenographer, and approved by the judge and filed by his direction.

5. The stenographer's certificate must set forth, in substance, that the proceedings, evidence and charge are contained, fully and accurately, in the notes taken by him on the trial, and that the copy filed is a correct transcript of the same. It must be signed by the stenographer, and not in a firm name or by deputy.

6. The judge's certificate must show, in substance, his belief that the transcript is correct, and that it is filed by his direction.

7. Transcripts of the proceedings and evidence, and of the charge, with the requisite certificates, may be filed together or separately.

In the present case, the certificates contain, in substance, the matters required to place the proceedings, evidence and charge before us, and properly present them for review.

The plaintiff alleges, as the ground of action, a contract for his employment, made by P. J. Cunningham as representative

of "The Cunningham Piano Company," named as defendant. The defendant denies that such contract was made. As to the contract in question, the trial judge instructed the jury, in substance, that if Mr. Cunningham had authority to make it, and they believed the allegation of the plaintiff in relation to it, it was a valid contract, but that if there was no more than a proposal to be afterward acted on, the defendant would not be bound without such subsequent action; also, that it is not necessary for both parties to sign a contract, but that if one signs, and the other assents to it, and directs performance by the party signing, it is a valid contract. As to the measure of damages, he instructed the jury that it was the plaintiff's duty to seek other employment, and that his earnings in such employment, during the period embraced in the contract, should be deducted from the compensation contracted for. These instructions are assigned for error.

As to the authority of Mr. Cunningham to make the contract, the assignments are apparently based on the theory that the defendant is a corporation. It is not entirely clear, however, that such is the fact. In the names of the parties, as presented in the paper-books, the defendant is not described as a corporation; and as the declaration is not printed, we cannot say that the defendant is therein so described. The defendant's name indicates nothing on this question. In the business nomenclature of the day, a designation of corporate form is frequently adopted by a partnership, general or limited, and sometimes by an individual. In a case before us at the present term, the plaintiff was an individual named, trading as the "Street Railway Advertising Company." Neither a charter nor other direct evidence of incorporation was offered. From occasional passages of the testimony, however, it is apparent that the parties regarded the defendant as a corporation, and from these the jury might find what the parties assumed as a fact. At the same time, the evidence of Mr. Cunningham's authority to make the contract in question is quite equal in probative force to that of the defendant's corporate existence. In his own testimony on the subject, Mr. Cunningham leaves it to be inferred that he did not possess this authority, but he does not directly and expressly deny his possession of it. There was evidence that he employed others without reference to the board of

directors; and in not referring to the board the question of the plaintiff's employment he exercised the power of deciding it independently of that body. The extent of his authority is material only if the defendant is a corporation, and the evidence, positive and negative, respecting both questions, was sufficient to justify their submission to the jury. The question of Mr. Cunningham's authority is not to be decided on his own testimony alone; it must be determined from all the evidence on that subject. The assignment of errors to the charge must also be weighed in connection with the entire context. When so considered it appears that the learned trial judge submitted all controverted questions, resting in parol, to the jury. The charge, in its references to the evidence, is, as a whole, entirely fair, and the passages assigned for error do not seem to us of a character to mislead the jury.

The instructions complained of are fully warranted by both the law and the evidence. If both parties assent to the terms of a contract, embodied in writing, their assent creates a valid contract without reference to signature, except where signing is expressly required by law. Assent is most readily shown by signature, but it may also be shown by the acts of the parties with reference to the matter in hand. If, in the present case, the jury believed that the parties agreed to the stipulations noted by the defendant's bookkeeper, as testified to by the plaintiff, those stipulations formed a contract binding on both. If, however, the matters thus noted were not finally assented to, but left for further action, there would not be the union of wills on the subject essential to a contract. The question was submitted to the jury, with adequate instructions; and the evidence on the part of the plaintiff, believed as it was by the jury, furnished adequate ground for the verdict.

The instruction as to the measure of damages was certainly as favorable as the defendant was entitled to. When an employee is discharged, without sufficient cause, before the end of his term of employment, he is prima facie entitled to recover his wages for the full term. He may hold himself in constant readiness to perform, and recover as for performance. Even if bound to make reasonable effort to obtain other employment, the burden of proof is on the employer to show that he obtained or might have obtained it: King v. Steiren, 44 Pa. 99; Wolf v.

Studebaker, 65 Pa. 459; Emery v. Steckel, 126 Pa. 171. There is no evidence that the plaintiff in this case neglected any opportunity of employment, and full allowance was evidently made for his actual earnings. The difference between these and the stipulated salary he was entitled to recover from the defendant.

Judgment affirmed.

William R. Newbold, trading as Hoopes & Newbold, Appellant, v. Jacob Boon and Bethel M. Custer.

Banks and Banking—Promissory note—Rights of indorsers.

Where a bank holds the funds of a maker at the maturity of the note, it is bound to consider the interests of the indorsers as sureties; and if it allows the maker to withdraw his funds, after protest, and the indorsers are losers thereby, the bank is liable to them.

Promissory note—Accommodation paper—Equities after maturity.

The holder of a promissory note, discounted after maturity and protest with full knowledge of its history, can only use it subject to the equities arising out of the transaction and connected with the note itself; he has no higher right to recover against the defendant's indorsers than had the maker of the paper with whom he acted.

The defendants were liable as indorsers on a note made by B. and discounted by the plaintiff. B. offered as a renewal another note with the same indorsers; this plaintiff refused to accept as a renewal, but in point of fact retained it in his possession without any consideration, as a mere memorandum of a rejected offer, but after its maturity and protest, discounted the second note and credited the proceeds to B.'s account in settlement of the prior note and other accounts with B. *Held*, In a suit against the indorsers on the second note, that plaintiff could not recover.

Argued Nov. 16, 1897. Appeal, No. 17, Oct. T., 1897, by plaintiff, from judgment of C. P. Delaware Co., Dec. T., 1894, No. 12, on verdict for defendants. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit on promissory note for $800. Before BRÉGY, of the first judicial district, specially presiding.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for defendants. Plaintiff appealed.

Error assigned was directing the jury to find a verdict for defendants.

E. H. Hall, for appellant.—Any one in possession of negotiable paper may protest it for non acceptance and give notice of such protest, although he is not the lawful holder, and could not demand payment or protest the paper for nonpayment: 3 Randolph on Commercial Paper, sec. 1139, page 136.

A creditor who holds a bill as collateral security is bound to present and give notice of dishonor, and is liable for the consequences if he omit to do so: Peacock v. Pursell, 78 E. C. L. 728 (Am. reprint).

A note being in the nature of collateral security, cannot be considered as accommodation paper: Lord v. Ocean Bank, 20 Pa. 384; Van Brunt v. Potter & Co., 2 Pa. Superior Ct. 591; Cozens v. Middleton, 118 Pa. 622; Snyder v. Riley, 6 Pa. 164; Long v. Rhawn, 75 Pa. 128; Philler v. Patterson, 168 Pa. 468.

O. B. Dickinson, for appellees.—The indorsee of overdue paper takes it subject to all the equities which arise out of it as between the original parties: Clay v. Cattrell, 18 Pa. 413; Bower v. Hastings, 36 Pa. 285; Wilson v. Savings Bank, 45 Pa. 488; Peale v. Addicks, 174 Pa. 549.

One who takes accommodation paper after maturity, takes only the title of him from whom he gets the paper: Peale v. Addicks, 174 Pa. 549.

Opinion by Orlady, J., February 19, 1898:

The defendants were liable as accommodation indorsers on a note of $900, which was made by Harry H. Black, and held by the plaintiff, a banker. This note became due on January 31, 1893, and the indorsers continued their liability by waiving protest of the paper on the day on which it matured. On the same day, Black offered to the plaintiff, his note for $800, which was marked (to renew the $900) at two months, and with the same persons as accommodation indorsers, but, by reason of the nonpayment of the difference between the two notes, the $800 note was refused by the banker, although it was left in his possession. No credit was given to Black for the new note, and on the date of its maturity (April 3, 1893) the plain-

tiff presented it for payment at the bank at which it was made payable, and had it protested. On April 20, 1893, Black paid to the plaintiff $200, and was then charged with the interest on the $900 note from the day it fell due; credit was given for the proceeds of the $800 note, and upon a balance being then ascertained between the plaintiff and Black, the latter drew a check for $902.33, by which the $900 note was discharged, as stated in appellant's history of this case. This suit was instituted to recover upon the $800 note, and on the trial the learned trial judge gave instructions to the jury to return a verdict for the defendants.

Other transactions between the plaintiff and Black seem to have complicated the settlement of their dealings, but, as to this note in suit, the plaintiff's testimony is clear and positive that he knew the defendants were accommodation indorsers; that the note in suit was intended as a renewal of the $900 one; that he positively refused to receive it as offered; that he retained the $800 note, without any consideration, as a mere memorandum of a rejected offer; that on April 3, 1893, he had it protested; that on April 20, 1893, sixteen days after its maturity, and in an adjustment of accounts between the plaintiff and Black, the $800 note was treated by them as living paper, by then discounting it and using the proceeds to discharge the larger one of $900.

If the plaintiff has title to the eight hundred dollar note, and whatever its value may have been of that date, (April 20, 1893) he acted with full knowledge of its history. In settlement with the principal debtor, he sought to give it vitality, as against the accommodation indorsers, in the face of his refusal to receive or discount it when it was offered before maturity. With this knowledge he can only use it subject to the equities arising out of the transaction or connected with the note itself: Hughes v. Large, 2 Pa. 103; Downey v. Tharp, 63 Pa. 322; Long v. Rhawn, 75 Pa. 128. He has no higher right to recover against these defendants than had the maker of the paper with whom he acted, and each had equal knowledge of all the facts: Bower v. Hastings, 36 Pa. 285; Hart v. Trust Company, 118 Pa. 565; Peale v. Addicks, 174 Pa. 549.

It further appears, from the testimony of the plaintiff, that after the dishonor of the note on which suit is brought, other

notes made by Black were included in a settlement in which the proceeds of this note figured, by which other claims were paid, and resulted in continuing the liability of these accommodation indorsers. When a bank holds funds of the maker, at the maturity of the note, it is bound to consider the interests of the indorsers as sureties, and if it allows the maker to withdraw his funds, after protest, and the indorsers are losers thereby, the bank is liable to them: Mechanic's Bank v. Seitz Bros., 150 Pa. 632, and under the facts as developed by the plaintiff the same rule must apply in this case.

The case was properly disposed of in the court below, the assignment of error is overruled and the judgment is affirmed.

Gattle Brothers *v.* Joseph P. Kremp, Appellant.

Sale—Consignment for sale—Fraud.

It has been the policy of the law and the aim and trend of all the decisions to prevent fraudulent imposition on creditors by a misleading possession; but open, notorious and exclusive possession being destructive of all sales under consignment is not the test where there has been a bona fide and honest consignment of goods to be sold as the property of the consignor. The honesty of the transaction and the intention of the parties while not the sole tests, are important and constituent parts of it in determining whether a transaction is a sale or consignment, with a view to determining the liability of the goods to execution creditors of the consignee or vendee.

Consignment for sale—Fraudulent possession—Question for jury.

A jeweler of Reading, Pa., indebted to a New York creditor, whose claim was being pressed, met him by appointment at a place in Reading other than the debtor's store; at this meeting the claim was adjusted by the return of a portion of the goods originally bought from the creditor and the delivery of certain other goods belonging to the debtor merchant. These goods were actually delivered to the creditor by the debtor, and the indebtedness of the latter canceled. At the same time and place and almost immediately after the adjustment of the accounts the creditor delivered the goods so received by him in satisfaction of his debt to his former debtor to be by him sold as a consignment for the account of the New York merchant, the former creditor. Subsequently another creditor obtained judgment on a debt which had accrued prior to this transaction, and issued execution. *Held*, on an issue arising under a sheriff's interpleader that the

question of fraudulent possession by the debtor in possession, or bona fide consignment, was for the jury.

Argued Nov. 9, 1897. Appeal, No. 118, Oct. T., 1897, by defendant, from judgment of C. P. Berks Co., Dec. T., 1896, No. 91, on verdict for plaintiffs. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Feigned issue. Before ENDLICH, J.

Joseph P. Kremp, the defendant, issued execution on a judgment against James M. Burkhart, and levied on the stock of goods in his store; Gattle Bros., the plaintiffs, thereupon made claim to certain diamonds valued at $610.20, as their property.

Other material facts appear in the opinion of the court.

Verdict and judgment for plaintiffs. Defendant appealed.

Errors assigned were (1) In not affirming defendant's point, which is as follows: "That under all the evidence the verdict must be in favor of the defendant except as to the single combination ring, $9.50, which the defendant admits was consigned originally. *Answer*: Negatived, not read to the jury." (2) In charging the jury as follows: "Those questions, gentlemen, are these: In the first place, did Burkhart deliver to Gattle the actual possession of the goods in question on October 15, 1896? He brought them to Gattle's room, there is no dispute about that; he laid them on the table, there is no dispute about that; but did he mean in so doing to hand them over to Gattle as the property thereafter of Gattle Brothers, did he mean to put them into the possession of Moses Gattle as part payment of the debt which he, Burkhart, owed to Gattle Brothers, and did Gattle so receive them and actually possess them? The law cannot undertake to fix any particular time during which a man must have held actual possession of goods in order to constitute a transfer which will be valid, but it requires that that transfer shall have been an actual one with the right in the transferee of continued possession." (3) In charging the jury as follows: "In other words, in order to constitute a transfer of possession, you must find by the fair preponderance of the evidence that when Burkhart brought these goods into Gattle's room and put them on the table, what he said and did gave Gattle the right to retain those goods then and there, and send

Burkhart away without them. Otherwise the transaction would not amount to a legal delivery." (4) In charging the jury as follows: "If, on the other hand, there was a transfer, a legal, valid transfer, as I have explained that to you, at the time, then the next question arises, What was the nature of the retransfer of these goods to Burkhart? There is no dispute about the fact that whilst Burkhart went to Gattle's room with the goods in his possession, he also left Gattle's room with the goods in his possession and they continued thereafter to be in his store. If my recollection of the testimony is right, there was no distinction made, nor was there any understanding at the time there should be any distinction made, between these goods and others so far as their handling by Burkhart in his store was concerned. It is for you to say whether this transfer, this retransfer of the goods—supposing there was a transfer in the first place by Burkhart to Gattle—by Gattle to Burkhart, was a bona fide transfer to him, for inspection of the goods, or on consignment, to be sold by him on Gattle Brothers' account, as the property of Gattle Brothers, or was it a mere renewal of Burkhart's former possession, a resale to him of the goods, with the addition, however, of a stipulation between these people that in order to secure payment by Burkhart to Gattle Brothers the title to the property should remain in Gattle Brothers until paid. If it was a bona fide and honest consignment, the goods to be sold as the property of Gattle Brothers, then they remained the property of Gattle Brothers, and this execution could not be lawfully levied upon this property, because Burkhart being indebted to Gattle Brothers, as well as to Kremp, had, of course, the right to prefer one creditor over another, and if he did prefer, in such a way as to make the preference a legally valid one, the Gattle Brothers, then their possession, their title to the property would be superior to that of other creditors who might come in afterwards."

Stevens & Stevens, for appellant.—The retention of possession of personal property by the vendor is a fraud in law whenever the subject of the transfer is capable of delivery, and no honest and fair reason can be assigned for the vendor not giving up and the vendee taking possession: Clow v. Woods, 5 S. & R. 275; Weller v. Meeder, 2 Pa. Superior Ct. 488.

The rules of law applicable to this case were applied by the Supreme Court to a similar state of facts in the case of Young v. McClure, 2 W. & S. 147.

Change of possession must be bona fide, not colorable; clear, unequivocal and exclusive. This rule is intended to prevent frauds and avoid the danger to creditors, by giving a man a false and delusive credit: McBride v. McClelland, 6 W. & S. 94; Streeper v. Eckert, 3 Wharton, 302; Garman v. Cooper, 72 Pa. 32; Milne, Brown & Co. v. Henry, 40 Pa. 352.

An attempt to secure payment of a debt very like the one presented in the case at bar is shown in Wagner v. Commonwealth, 16 W. N. C. 75.

The transaction of October 15, 1896, between Gattle Brothers and James M. Burkhart being a fraud in law, without regard to the intention of the parties, it became a question for the court and not for the jury to decide, and therefore the court erred in not affirming the defendant's point: Weller v. Meeder, 2 Pa. Superior Ct. 488; Dornick v. Reichenback, 10 S. & R. 84.

Rourke & Heinly, for appellees.—There being evidence of an actual, visible, manual delivery, the question of change of possession was properly submitted to the jury; and having found that there was such a change of possession, it was for them further to find whether the same was bona fide, absolute, and unconditional: Renninger v. Spatz, 128 Pa. 524; Goddard v. Weil, 165 Pa. 419.

By intent is meant not the secret understanding of the parties, but their intention as indicated by their language and conduct: Waters v. Wolf, 2 Pa. Superior Ct. 200.

The bona fides of the transaction in the case at bar is admitted by the appellant. There was a valid consideration, namely, the payment of a debt: Blakey's Appeal, 7 Pa. 449.

Under the charge of the court, the verdict shows that the transaction was an actual, visible, physical transfer, bona fide, unconditional and absolute, and for a valid and adequate consideration.

There are many cases where the vendor, after the transfer, remained upon the same premises, using the same goods, as the servant or agent of the vendee, and the transaction was not regarded as legal fraud. These cases have been so fully reviewed

in the late case of Weller v. Meeder, 2 Pa. Superior Ct. 488, that it is necessary to cite but a few: Garretson v. Hackenberg, 144 Pa. 107; Bell v. McCloskey, 155 Pa. 319.

OPINION BY ORLADY, J., February 19, 1898:

Joseph P. Kremp, of Reading, Pa., and Gattle Brothers, of New York City, were creditors of James M. Burkhart, who was doing business as a jeweler in Reading. After the indebtedness of Burkhart to Kremp had been created, the former became indebted to Gattle Brothers for diamonds, jewelry, etc., which were purchased from them, for sale in his store. Kremp was unable to pay the claim of Gattle Brothers upon their demand, and a correspondence ensued between the parties which resulted in an offer by Burkhart to deliver to Gattle Brothers some of the goods purchased from them, and goods purchased from other dealers, in payment of their claim. Pursuant to this offer on October 15, 1896, the parties met in a room of a hotel in Reading, to which place the goods were brought by Burkhart, and were then examined, scheduled, marked with their then value, and in payment of his debt were delivered by Burkhart to Moses Gattle for the plaintiff. Subsequent to this, but at the same meeting, the goods were delivered by Moses Gattle, upon a memorandum bill, to Burkhart, as a consignee, to be by him sold as the property of Gattle Brothers, and upon their account. The goods were placed on sale in the store of Burkhart without any special mark of identification.

On December 5, 1896, Kremp issued an execution and levied upon the stock of goods in Burkhart's store, including the goods now in dispute, which were then claimed by Gattle Brothers, in consequence of which a feigned issue was framed to determine the title thereto.

On the trial, the defendant requested the court to say "That under all the evidence the verdict must be in favor of the defendant except as to the single combination ring, ($9.50) which the defendant admits was consigned originally."

The learned trial judge refused this point, and the evidence was submitted the jury in a well guarded charge.

While the facts were not controverted, the evidence was of such a character as might admit of opposite inferences, and it was proper to refer it to the jury. The defendant contended

in the court below, and as earnestly urges in this court, that he was entitled to binding instructions under authority of a line of cases beginning with Clow v. Woods, 5 S. & R. 275.

The court said "The law cannot undertake to fix any particular time during which a man must have held actual possession of goods in order to constitute a transfer which will be valid, but it requires that the transfer shall have been an actual one, with the right in the transferee of continued possession. If there was a transfer, a legal, valid transfer at the time, then the next question arises, what was the nature of the retransfer of these goods to Burkhart. It is for you to say whether this retransfer was a bona fide transfer to him for inspection of the goods, or on consignment to be sold by him on Gattle Brothers' account, as the property of Gattle Brothers, or was it a mere renewal of Burkhart's former possession, a resale to him of the goods, with the addition however as a stipulation between these people, that in order to secure payment by Burkhart to Gattle Brothers the title should remain in Gattle Brothers until paid. If it was a bona fide and honest consignment, the goods to be sold as the property of Gattle Brothers, then they remained the property of Gattle Brothers, and this execution could not be lawfully levied upon this property."

The point submitted by the defendant assumes the validity of a consignment to preserve the title in the consignor in excepting from his claim the single combination ring ($9.50), which the defendant admits was consigned originally—and he could not have objected to the conclusiveness of the transaction if the goods in dispute had been taken by Moses Gattle from Reading to the New York store, and, with the single combination ring, honestly consigned from that point, all of which could have been done within twenty-four hours.

The fairness of the consideration in accepting the goods in payment of a preëxisting debt is not questioned.

In the cases on which appellant relies there was no evidence, or there was a conflict of evidence, as to a change of possession of the property, but in this case, under the charge of the court, the verdict means that the first transaction was honest, the consideration a valuable one, accompanied by an actual physical delivery of the property, free from any pretense, collusion or condition, resulting in a consummated sale, and the exclusive

right in Gattle Brothers to a continued possession. These facts being found, what difference did it make to this creditor of Burkhart as to whether the goods were consigned to his debtor from Reading or New York? If the right to a continuous possession, with an absolute title, became fixed in Gattle Brothers, this creditor was not injured by their consignment of these goods to him. His debt had been long overdue, and no false or delusive credit was created, and under the facts as determined by the verdict the possession of Burkhart at the time of the levy was entirely unrelated to his former possession.

The stock of goods kept for sale in a store is continually changing, and a lender does not extend general credit to an owner on the faith of a particular item of property in his store. There is no evidence in the case intimating that Kremp knew, or did not know, that this debtor kept or sold goods on consignment. The aim and trend of all the decisions has been to prevent fraudulent imposition on creditors by a misleading possession, but the open, notorious and exclusive possession as urged by appellant would be destructive of all sales under consignment. Admitting that there was no collusive or actual fraud, the appellant contends that the transaction was fraudulent in law because of the insufficiency of Burkhart's possession as consignee of Gattle Brothers; and that the honesty of the transaction or the intention of the parties are not to be considered.

We cannot go that far. The honesty of the transaction and the intention of the parties were not the sole tests by which its legality was to be determined, but they were very important, constituent parts of it, and when a jury finds that they are accompanied by an unconditional, physical delivery of possession as could reasonably be expected, taking into view the character and situation of the property, and the relation of the parties, based on an honest consideration, they became decisive of the question: Hugus v. Robinson, 24 Pa. 9; Billingsley v. White, 59 Pa. 464; McKibben v. Martin, 64 Pa. 352; Evans v. Scott, 89 Pa. 136; Crawford v. Davis, 99 Pa. 576; Ziegler v. Handrick, 106 Pa. 87; Buckley v. Duff, 114 Pa. 596; Renninger v. Spatz, 128 Pa. 524; Stephens v. Gifford, 137 Pa. 219; McGuire v. James, 143 Pa. 521; Garrettson v. Hackenburg, 144 Pa. 107; Bell v. McCloskey, 155 Pa. 319; Goddard v.

Weil, 165 Pa. 419; Goss P. Co. v. Jordan, 171 Pa. 474; Post v. Berwind-White Co., 176 Pa. 297. The distinctions noted in Clow v. Woods, 5 S. & R. 275, and in many later cases fully warranted the submission of this case to the jury. If the proof warranted the finding of the fact that the last transaction, called the retransfer, was a constituent part of the first, or if the two taken together were a mere device or expedient to pledge the property as a security for money, the result would be different, but the contention of the plaintiff was supported by evidence which convinced the jury that the consignment was a separate and entirely independent undertaking, and as such it must be considered: Murray v. McCarthy, 5 Cent. Rep. 169.

The assignments of error are overruled and the judgment is affirmed.

J. E. Smucker, Executor of Frank Hefright, deceased, and Ann Esther Cunningham, Appellants, v. The Pennsylvania Railroad Company.

Riparian rights—Effect of survey—Land bounded by stream.

A survey returned as bounded by a navigable river vests in the owner the right of soil to ordinary low watermark of the stream subject to the public right of passage, etc., between ordinary high and low watermark and where there is nothing more in the case, the successors in the title hold coextensively.

Eminent domain—Evidence—Ex parte drafts made by commonwealth.

In order to fix the location of land appropriated by the state to public uses, a draft attached to the report of the inquisition appointed to assess the damages, together with all the explanatory memoranda attached thereto is admissible in evidence to show the location of the canal because it forms part of the record: Pennsylvania Canal Co. v. Dunkel, 101 Pa. 103; but an ex parte draft, offered to show the location of a canal which was not used in and which did not pertain to, either an amicable or adverse proceeding between the state and the landowner, made after the canal was finished, without knowledge or consent of the owners and long subsequent to the settlement had with a number of the owners of distinct parts of the locus in quo, is inadmissible.

Actions—Trespass for trying title.

The right exists to bring trespass for an original tort for the purpose of

trying title, and the judgment in such an action has the same effect on the question of title as a judgment in ejectment.

Trespass for trying title—What constitutes possession.

A mere discontinuance of actual occupancy of town lots, without an intention to abandon, does not put the true owner out of legal possession. To hold possession of a town lot once occupied, it is not necessarily required that the owner should build on it or even fence it. When there is no actual possession in another, the owner is to be deemed in actual possession, and trespass will lie against a wrongdoer, it is the close of him who has the right.

Evidence—Credibility of witness—Question for jury.

It does not follow because a witness is not directly contradicted by another witness, that his testimony is undisputed. His manner on the stand, his lapses of memory, the improbability of his story, its self-contradiction, the evidence afforded by circumstances, all these or some of them may rightly lead the jury to reject his testimony. The credibility of a witness, whether it is directly or indirectly involved, is for the jury.

Question for jury—Eminent domain.

The question whether or not a particular strip of land was or was not taken by the state for the location of a canal is for the jury, there being more than a scintilla of evidence that the state left some land above low watermark, unappropriated, the land between high and low watermarks being the land in question.

Charge of court—Right and propriety of comment on evidence.

It is always the right and often the duty of the court freely to discuss the evidence. Comments kept within bounds are entirely legitimate they aid the jury, frequently prevent unjust and absurd verdicts, and thus help to preserve the respect of the people for the jury system.

Argued March 15, 1897. Appeal, No. 26, March T., 1897, by plaintiffs, from judgment of C. P. Huntingdon Co., Sept. T., 1891, No. 43, on verdict for defendant. Before RICE, P. J., WILLARD, WICKHAM, BEAVER, REEDER and SMITH, JJ. Reversed.

Trespass for occupation of plaintiffs' lands. Before BELL, P. J., of the 24th judicial district, specially presiding.

This action was brought to recover damages for injuries done by defendant to the plaintiffs by casting a large quantity of stone and dirt and by laying railroad tracks upon a strip of ground lying between the abandoned Pennsylvania canal and the Juniata river, and forming the southern parts of lots numbered from 109 to 116, inclusive, in the recorded plan of the

borough of Huntingdon. Damages were laid in the sum of $1,000.

Other facts sufficiently appear in the opinion of the court.

Verdict and judgment for defendant. Plaintiffs appealed.

Errors assigned among others were (3) The answer to plaintiffs' third point, which point and answer are as follows: "3. Trespass will lie for injury to the qualified title between high and low watermark. *Answer:* As applicable to the facts in the case this point is denied." (11) In giving binding instructions for defendant.

W. B. Simpson and *H. H. Waite*, with them *J. R. Simpson*, for appellants.

John D. Dorris, with him *William Dorris*, for appellee.

OPINION BY WICKHAM, J., February 19, 1898:

On November 21, 1787, the commonwealth of Pennsylvania granted to William Smith, his heirs and assigns, a tract of land called The Standing Stone, and bounded and described as follows: "Situate on the northeast side of Frankstown branch of Juniata, in Huntingdon county, beginning at a hickory on the bank of said branch, thence by a vacant hill north 63° east 118 perches to a post; thence by land of Ashur Clayton and vacant Piney hill south 20° east 262 perches to a hickory; thence by Piney hill south 42° east 152 perches to a corner white oak of William Smith's land; thence by the same south 27° east 94 perches to a white oak; thence by a vacant hill south 17° east 109 perches to a pine; and south 44° west 12 perches to a hickory on the bank of said branch; thence up the same 696 perches to the place of beginning; containing 428 acres and ⅛ and allowance of 6% for roads, etc., with the appurtenances. [Which said tract was surveyed in pursuance of a warrant granted to the said George Croghan, dated December 10, 1764, who by deed duly recorded at Carlisle, in the county of Cumberland, conveyed the same to the said William Smith in fee.]"

On November 14, 1795, Smith plotted and laid out the town of Huntingdon, afterwards incorporated as a borough, on the

tract of land above described. The external boundaries of the town, as set forth in words and figures on the plan thereof, are as follows: "Beginning at a large stone corner placed on the banks of the river Juniata down by entrance of a fording place and at the distance of 200 feet on a creek south 66° east from the east side of St. Clair street; then running from said stone or place of beginning north 24° east 109 perches and $\frac{7}{10}$ of a perch to a stone; thence north 66° west 157 perches to a stone; thence south 24° west, including Charles street, 110 perches or thereabouts to the river Juniata, thence down the same on the northerly bank or side to the place of beginning."

The subject-matter of the present controversy is a strip of land extending along the Juniata river between Fourth and Fifth streets, in the said borough, the same consisting of the southern ends of lots Nos. 109, 110, 111, 112, 113, 114, 115 and 116 in the aforesaid plan. This strip is only a few yards wide, lies mostly, perhaps altogether, between high and low water-mark of the stream, and was unimproved, uninclosed, and uncultivated when the defendant took possession thereof.

Between the years 1828 and 1830 the Pennsylvania canal was constructed by the state over and through the lots, the numbers whereof have just been given, and compensation was duly made to the owners for the taking and injury. The Pennsylvania Railroad Company in 1857 succeeded the state in the ownership of the canal property. In 1867 it conveyed all its rights therein to the Pennsylvania Canal Company. The canal company reconveyed to the railroad company in 1889.

In 1891, the railroad company, claiming that the state in constructing the canal had appropriated the disputed land, and that, therefore, it was part of the canal property, decided to use it in connection with its adjoining lands for railroad purposes. To this end, the company took possession of the strip, made fills, built embankments, and laid tracks thereon. At the time the plaintiff's action was brought, on August 8, 1891, the land was occupied by the defendant, and improvements were still going on.

Naturally the first question presenting itself for solution is, whether Smith under his patent from the commonwealth took merely to the bank of the river, or to ordinary low watermark. The stream, it is proper to say, was made navigable by act of

March, 1771. In view of the decision in Wood v. Appal, 63 Pa. 210, and the many earlier Pennsylvania cases therein cited and discussed by MR. JUSTICE AGNEW, we cannot hesitate in holding, as was there held, that the grant extended to ordinary low watermark, subject only to the rights of the public as to navigation, fishing, etc. The description in Wood v. Appal, so far as we are concerned with it, is so similar to the one under consideration here that we reproduce it: "Beginning at corner hickory, at Pittsburg Manor, standing on the bank of the Ohio river; thence, by said Manor, south 14° west . . . . north 37° degrees east 60 perches to a corner iron wood tree standing on the bank of said Ohio river; thence up the river 233 perches to the first mentioned hickory, the place of beginning." See also Palmer v. Farrell, 129 Pa. 162.

The next question for consideration is, whether Smith intended that the southern boundaries of the lots above mentioned, or of any of them, should run to the ordinary low watermark line. Applying the law as settled by the above decisions to the description and plot of the town, we are satisfied that such was his intention, and that each and all the lots extended to low watermark. The description carries the town lines on the south to that point, and the plot shows no street or strip of land reserved for the founder, or the public, along the stream.

We are therefore constrained to hold, as a matter of law, on the uncontradicted evidence before us, that the grantees of these lots took title to ordinary low watermark, and that were there nothing more in the case, their successors in title, whoever they may be, would hold coextensively. It devolved on the plaintiffs to show title to the premises in dispute, or some part thereof, in order to recover in whole or in part. This they sought to do by offering conveyances for the ends of the lots lying south of what they allege to be the canal appropriation. As to most of the strip, their paper title seemed, prima facie, good, unless the state in making the canal appropriated the land out to low watermark. The court below was of the opinion that the state left no part of the strip, south of the canal, unappropriated; that the lots as laid out by Smith extended only to the bank of the river, and further held that, even if the plaintiffs had shown an undoubted title, they could not sustain an action of trespass, because they were not in actual occupancy

when the company entered on the land. For these reasons, a verdict was directed for the defendant.

As to the second ground for so ruling, we have already sufficiently expressed an opinion. The first reason was for the jury to pass on, there being more than a scintilla of evidence that the state left some land, above low watermark, unappropriated, and that as late as 1871, the ends of lot No. 110 or 111, or both, were occupied by a building held by persons claiming under and through the parties, who owned at the time the canal was constructed. There was also other evidence proper to submit to the jury on this point. In adopting the view he did regarding this matter, the learned trial judge was no doubt strongly influenced by certain words and figures, appearing on a draft of that part of the canal lying within the limits of the borough, which draft was and is on file in the proper office in Harrisburg. It appears, however, from the defendant's own statement, made when the draft was admitted in evidence against the plaintiff's objection, that it was not drawn until December 29, 1832, (see page 33 of Appendix to appellant's paper book,) and both sides agree, as will be seen by reference to their respective histories of the case, that the appropriation, by the state, must have been made between 1828 and 1830. It is also shown, by releases offered in evidence by the defendant, that as to several of the lots at least, the damage for the taking had been agreed on, and paid to the owners as early as 1829 and 1830.

In Pennsylvania Canal Co. v. Dunkel, 101 Pa. 103, decided in 1882, it was held that a draft attached to the report of the viewers appointed to assess damages, together with all the explanatory memoranda thereon, was admissible to show the location of the canal, because it was part of the record of the proceedings, and as Mr. Justice Trunkey says: "It was made after the beginning of the canal and before its completion. It must have been known to the parties interested. It is consistent with the place where the canal was constructed." In the present case, so far as we can see, the draft was ex parte, was not used in, and did not pertain to, either an amicable or adverse proceeding between the State and the land owners, was made after the canal was finished, without the knowledge or consent of the owners, and long subsequent to the settlement had with a number of the owners of distinct parts of the locus in quo.

If it be contended that the draft was admissible, as part of an official book or register, its competency, unless offered in support of an actual possession, and to explain the extent of the possession and claim, which was not and could not be the purpose of the offer here, is denied by the just rule laid down in 1 Greenleaf on Evidence (13th ed.), section 485, as follows: "It is deemed essential to the official character of these books that the entries in them be made promptly, or at least without such long delay as to impair their credibility." It will hardly be contended that even the state, notwithstanding its great powers, can make title for itself, at the expense of the rights of its citizens, by maps or drafts prepared in secret, years after the event to which they relate, the entering of which in the official records persons to be affected knew nothing of, and, if they did, might be powerless to prevent.

How far these remarks regarding the draft will be applicable at the next trial will depend on the evidence then adduced. If it shall be made to appear that the taking, in the case of any of the lots, was in accordance with the draft, or that it served as a basis for fixing the compensation, to that extent, in the absence of countervailing evidence, it should be held conclusive against the plaintiff's right. By the draft, we mean not merely the lines drawn thereon, but the whole instrument, including the explanatory words and figures. Standing alone and taken as a whole, it sufficiently shows an intended appropriation by the state of all of the lots lying south of the bed of the canal. This is clearly indicated by the figures in the column showing how much of each lot was left to the original owner, and by the entire absence of lot lines south of the canal bed.

We are compelled to differ in part with the view of the learned trial judge as to the right of the plaintiffs to maintain trespass. They may, if they show good title, recover for the original trespass, that is, the disseisin, but not for anything done later. To obtain a status to recover for injuries caused to the land, or for mesne profits, while the defendants have been and are in possession, the plaintiffs must first regain possession by an action of ejectment: 2 Greenleaf on Evidence (13th ed.), section 619; 2 Waterman on Tres. 371; Bigelow v. Jones, 27 Mass. 161; Graham v. Houston, 4 Dev. (N. C.) 232;

Rowland v. Rowland, 8 Ohio, 40. The right to bring trespass in this state for the original tort, for the purpose of trying title, is impliedly recognized in our Act of April, 6, 1869, P. L. 16, which provides that the judgment in such an action shall have the same effect on the question of title as a judgment in ejectment. It appears, from the pleadings and evidence, that the acts complained of by the plaintiffs were done pursuant to a plan to hold the land permanently, and under claim of right, which claim in Pennsylvania when acted upon, as in this case, gives color of title: Green v. Kellum, 23 Pa. 254; Fisher v. Philadelphia, 75 Pa. 392. The defendant entered upon the premises, made extensive and necessarily expensive improvements, and at the time suit was brought was holding and using the ground in the manner in which a railroad company usually possesses and enjoys such property, that is, by means of its tracks and their substructure. As said before, there can be no recovery in trespass for anything done by the company while it retains such possession.

But it is seemingly urged, that actual physical occupation of the land, or at least inclosure by the plaintiffs, at the very time of the commission of the trespass, must be shown to sustain the suit. We do not so understand the law. The locus in quo consists of parts of town lots which had been occupied by the owners for a long period before the canal was constructed, and if the evidence offered for the plaintiffs were correct, were in the possession of their predecessors in title, claiming under and through such owners, long after the canal was made. A mere discontinuance of actual occupancy, under the circumstances, without an intention to abandon, would not put the true owner out of legal possession. To hold possession of a town lot once occupied, it is not necessarily required that the owner should build on, or even fence it. "When there is no actual possession in another, the owner of course is to be deemed in actual possession:" Clark v. Smith, 25 Pa. 137. "Where possession is vacant, trespass will lie against a wrongdoer, it is the close of him who has the right:" Mather v. Ministers et al., 3 S. & R. 508, 512, and cases there cited. Even if we are to regard the locus in quo as having lapsed into the condition of wild land, the rule laid down in the above decisions, and also in Porter v. McGinnis, 1 Pa. 413, Baker v.

King, 18 Pa. 138, Miller v. Zufall, 113 Pa. 317, and a number of other authorities, is equally applicable. We may add that the failure of the evidence to show any formal entry by the plaintiffs, under their title, is not material, since entry is unnecessary in Pennsylvania: Carlisle v. Stitler, 1 P. & W. 6.

In view of the above discussion of the salient points of the case, it is not necessary to pass on each assignment of error. One matter, however, not already considered, may be properly touched on. It does not follow, because a witness is not directly contradicted by another witness, that his testimony is undisputed. His manner on the stand, his lapses of memory, the improbability of his story, its self-contradiction, the evidence afforded by circumstances, all these things, or some of them, may rightly lead the jury to reject his testimony. The jurors should be left free to draw their own conclusions, unless the absolute verity of the witness's statements are either expressly, or by the clearest implication, admitted. The credibility of the witness, where it is directly or indirectly involved, is for the jury: Grambs v. Lynch, 4 Penny. 243.

But while this is true, it is always the right and often the duty of the court to freely discuss the evidence. Comments, kept within proper bounds, are entirely legitimate, they aid the jury, frequently prevent unjust or absurd verdicts, and thus help to preserve the respect of the people for the jury system.

Judgment reversed and venire facias de novo awarded.

J. L. McKay v. G. W. Pearson, Appellant.

Actions—Trover and Conversion—Way going crop.

The absolute and unqualified denial of goods to him that hath the right to demand them, is an actual conversion and not merely the evidence thereof, and trover will lie immediately upon such denial.

An out going tenant has the right to the way going crop, and the refusal by the new tenant to permit him to enter upon the land and harvest it is a conversion of the crop. A subsequent permission given by the tenant in possession to the owner of the crop to harvest the same after the prior refusal, does not destroy the right of action the crop in the meantime having become injured by the delay in harvesting the same.

Argued May 12, 1897. Appeal, No. 77, April T., 1897, by defendant, from judgment of C. P. Mercer Co., Sept. T., 1894, No. 101, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Appeal from judgment of justice. Before MILLER, P. J.

This was an action of trespass to recover the value of a crop of growing grain alleged to be the property of the way going tenant.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $46.66. Defendant appealed.

Errors assigned among others were (1) To portions of the judge's charge as follows: "It is a question of fact for you to find whether or not there was a conversion; but it is likely you will find there was a conversion in case you find that the plaintiff went to the premises on the 4th day of July to cut and harvest the wheat, and the defendant refused to permit him to go on to the premises to do so. He could not cut the wheat without going to the field; he had no right to go there without permission of the defendant. When the defendant forbade him to enter upon his premises, if he did so, plaintiff was not bound to fight his way in; and you will likely, if you find those facts, find there was a conversion. There can be no recovery unless there was a conversion under any circumstances; but if there was a conversion, as we have explained it to you, on July 4th, or about that date; if there was an offer on the part of the defendant to permit the plaintiff to cut this crop on the 13th; if the crop had deteriorated between the dates of July 4th and July 13th, then the plaintiff was not bound to cut it on the 13th, or any time thereafter, and he is entitled to recover." (8) In answer to plaintiff's sixth point, which point and answer are as follows: "6. That if plaintiff was there with his men and machinery ready and prepared to do this work of harvesting his crop, and was prevented from so doing by the wrongful act of the defendant, then plaintiff cannot be charged with the cost of harvesting the same, but would be entitled to the full value of his crop. *Answer:* If there was a conversion of the crop on

or about July 4, 1894, and if there was an offer on the part of the defendant to the plaintiff to permit him to harvest this wheat crop on or about July 13, 1894, if the crop had been damaged by the unlawful act of the defendant between July 4th and 13th, the plaintiff would be entitled to recover the value of his crop of wheat on July 4, 1894. Thus explained this point is affirmed." (9) In answer to defendant's second point, which point and answer are as follows: "2. If the jury believe from the evidence that the defendant offered to buy the field of wheat from the plaintiff on July 13th, and the plaintiff refused to sell it to him, and at the same time notified the defendant that he, defendant, dare not cut it, and that the defendant never did cut the wheat nor convert it to his own use, then the plaintiff cannot recover in this action. *Answer:* If there was no conversion by the defendant there can be no recovery by the plaintiff. If you find there was a conversion by defendant, then this point is refused."

S. R. Mason and *B. Magoffin*, for appellant.

W. H. Cochran, for appellee.—It is held that trover and conversion is a proper remedy for the tenant to recover the value of the way-going crop where the same is denied him: Shaw v. Bowman, 91 Pa. 414.

This suit was begun before a justice of the peace, under the provisions of the Act of Assembly of 1879, P. L. 194, which expressly confers jurisdiction upon justices to try suits in trover and conversion, where the sum in controversy does not exceed $300.

A wrongful intent is not an essential element of the conversion. It is enough in this action that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it: Boyce v. Brockway, 31 N. Y. 493. See also Whitaker v. Houghton, 86 Pa. 51.

OPINION BY WICKHAM, J., February 19, 1898:

J. S. McKay, the plaintiff, in the fall of 1893, sowed five acres of wheat on a farm that he had leased from William Turner. At the expiration of his term, in the spring of 1894, he removed from the farm. On July 4, 1894, the wheat was

ripe and ready for cutting, and the plaintiff, with a man and the necessary machinery, went to the premises to harvest it, as it is now admitted he had a legal right to do.

He was there met by G. W. Pearson, the defendant, who had succeeded him as Turner's tenant, and who warned him to keep off the land. The next morning the plaintiff again sought to gain an entry, for the same purpose, and was again driven away. At the first visit, the defendant, as he admits, refused to allow the plaintiff to cut the wheat, because, to quote his own language, "Bill Turner told me when I rented from him that he" the plaintiff, "had no right to put the wheat in and had no right to the wheat." Turner denied that he had told the defendant this, but the matter is more interesting than important, as he could not, by anything he might say, destroy the plaintiff's rights. The plaintiff says that the defendant gave as a reason for excluding him, that Turner had not reserved the wheat in the lease, and that therefore it belonged to him, the defendant. On the second visit, the defendant told the plaintiff that he had not, the evening before, claimed ownership of the wheat, but he adhered to his positive refusal to not permit the plaintiff to enter and harvest it. The plaintiff then, perforce accepting the situation, took his machinery and man and went away, evidently hopeless, as he had a right to be, of being ever able to get his property.

Looking at all the evidence, it is plain that the defendant, unqualifiedly and absolutely, denied the plaintiff's title, and did and said that which must have led the latter to conclude, that his wheat was lost to him. He could draw no other inference from what had happened. If one locks my money in his safe or my horse in his stable and coolly tells me "I don't claim to own your property but I will never let you have it," he is guilty of a conversion. By what magic could the plaintiff gather his crop without going on the land? In the very early case of Baldwin v. Cole, 6 Mod. 212, Lord HOLT, speaking of an absolute and unexplained denial, said: "The very denial of goods to him that hath the right to demand them is an actual conversion, not only evidence of it, for what is a conversion but the assuming upon one's self the property and right of disposing of another's goods." "Where the refusal is absolute and unexplained, it is plenary evidence of a conversion:" 26

Eng. & Am. Ency. of Law, 731. "Every conversion consists of, first, a dealing with the goods in a manner inconsistent with the right of the person entitled to the immediate possession; second, an intention in so doing to deny his right or assert a dominion which is inconsistent with such right:" Ibid. 735. One who purchased land whereon was felled timber that had been sold to another, of which sale he, the purchaser of the land had notice, refused to permit the purchaser of the timber to remove it. He was held liable for conversion: Sherman v. Way, 56 Barb. 188.

It is not, and never was, claimed that the defendant was holding the wheat for Turner. He certainly was not keeping it for the plaintiff. The inevitable conclusion therefore is, that he was retaining it solely for some purpose of his own, and whether that purpose was malicious or mercenary is of no importance. The test is, not what the defendant has or has not acquired, but what has been the effect of his act with respect to the plaintiff, and whether it amounts to an absolute denial and repudiation of the plaintiff's right. Had the defendant informed the plaintiff that he intended to exclude him only temporarily, or long enough to get time to investigate his title, there would be reason for saying that the evidence of conversion was doubtful. But, according to the tenor of the defendant's own testimony, he had already inquired concerning the matter of title, and made up his mind that the plaintiff had no right to the wheat. It is too clear that he thought he had a technical advantage, over the plaintiff, and meant to hold it. There was nothing equivocal or uncertain in his conduct. He intended to prevent the plaintiff from getting the wheat.

Several days later, alarmed perhaps by the plaintiff's positive assertion of his right to the crop, the defendant concluded to see a lawyer. He did so and found out that he was wrong, but, not until July 13, did he inform the plaintiff, that the latter might cut the wheat. His excuse for the delay is, that the plaintiff seemed to avoid him on a couple of occasions on the highway. If it be true that the plaintiff showed a want of desire to meet him, it is hardly to be wondered at, in view of what had already occurred between them. Had the defendant however been sufficiently anxious to right the wrong he had committed, and to restore to the plaintiff dominion over the crop, he doubtless could easily have found the latter at his habitation,

or sent him word by mail or messenger. Nor is it surprising if, on July 13th (although this is denied), the plaintiff, a man unlearned in the law and smarting under a sense of injury, told the defendant that the latter dare not cut the wheat.

The essential questions involved in this case may be thus summarized and answered: First, did the plaintiff own the wheat, and have the right to enter on the land and harvest it? These rights were secured to him by his lease, as well as by the custom of the country, which is part of our common law, Shaw v. Bowman, 91 Pa. 414, and indeed they are now conceded.

Second, was there a conversion of the crop by the defendant, and, if so, when? There being, in effect, an absolute and unqualified denial of the plaintiff's right, as well as a positive and final refusal to allow him to cut the wheat on July 4th and 5th, these things would, under the authorities already cited, be plenary evidence of the conversion, provided that a growing crop can be converted without severance, a matter to be presently considered.

Third, if a right of action accrued, when was it complete? Undoubtedly the plaintiff could have legally brought suit on July 4th, or on July 5th at the latest.

Fourth, did the permission given by the defendant to the plaintiff, on July 13th, to enter and cut the grain take away the right of action already accrued? The learned trial judge, going even further than some of the decided cases warrant, told the jury that if the wheat were worth as much on July 13th as it was at the time of the alleged conversion, there could be no recovery, otherwise, if there had been deterioration in value. This was stating the law most favorably for the defendant: Whitaker v. Houghton, 86 Pa. 48; Hart v. Skinner, 16 Vt. 138; Green v. Sperry, 16 Vt. 390. The jury found that the grain had been damaged and lessened in value, during the interval. The plaintiff, therefore, was not bound to secure help and machinery, a second time, and harvest the overripe and injured crop.

Fifth, did the plaintiff in any way agree to accept the defendant's offer of July 13th? If he did, of course, at the most, he could only recover the difference in value between the wheat as it was at the date last mentioned and the time of the conversion. The evidence, however, shows that he refused to make any arrangement whatever with the defendant. His statement to the latter, if made, that he, the defendant, dare

not cut the wheat, taken in connection with all the circumstances, was merely an angry expression of opinion as to the defendant's legal rights, and did not amount to an agreement to condone the conversion or to resume dominion over the crop, nor does it seem to have been so understood by either party. Had the defendant consulted his lawyer a second time, he would have been instructed to save what he could of the wheat, and thereby make the best of the situation, in which he had deliberately placed himself.

Lastly, will the action of trover lie under the circumstances detailed? In Pennsylvania, growing crops, unlike trees and other spontaneous productions of the earth, are personal property, and it cannot be doubted that in the present case the wheat was as fully personalty, while attached to the soil, as though actually severed therefrom: Backenstoss v. Stahler's Admrs., 33 Pa. 251. It might therefore be converted, by cutting and carrying it away, by applying the torch to it in the field, or by excluding the owner, when the crop was ready for harvesting, in such a manner as to clearly indicate to him an unequivocal and absolute denial of his right to the grain, and a fixed intent to permanently deprive him of all control over it. In the latter instance the conversion would be complete at once, although the wrongdoer neither then nor thereafter made nor expected to make any profit out of the transaction. Had he retained the plaintiff's wagon in his field until the weather had destroyed it, just as the elements destroyed the wheat crop, in the present case, who will say that he would not have been liable in trover? Nor would the plaintiff have been obliged to await the physical destruction before bringing suit. In Stafford v. Ames, 9 Pa. 343, a case much like the one in hand, the ground of the decision was that the plaintiff's agent "was prevented from cutting and threshing the wheat; he was illegally kept out of possession and had a right to immediate possession."

We see no error in the charge or answer to the points. The question, as to whether or not there was a conversion, was fairly left to the jury. The expression of opinion as to this matter, made by the learned trial judge, was fully justified by the facts, and the rule as to the measure of the damages was correctly given. It would answer no good purpose to discuss, in detail, the many assignments of error. They are all overruled.

Judgment affirmed.

Peck, Phillips & Wallace Company, Limited, for use of John Fullerton & Son, *v.* M. H. Stevenson, Appellant.

Debtor and creditor—Sale for payment of particular debts—Fraud.

A sale by a debtor at a full price, intended by both buyer and seller for the payment of particular debts of the vendor is a lawful sale and none the less so because other creditors may be prevented or hindered by it from obtaining payment.

Fraud—Misrepresentation—Expression of opinion.

The essential element of fraud arising out of a misrepresentation is, that it must be of a fact, and not the mere expression of opinion.

Argued April 27, 1897. Appeal, No. 120, April T., 1897, by defendant, from judgment of C. P. No. 2, Allegheny Co., April T., 1895, No. 364, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit. Before WHITE, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $163.17. Defendant appealed.

Errors assigned among others were (2) In charging the jury as follows: "The agreement between them, as evidenced by the typewritten copy which is in evidence here, undoubtedly required defendant to pay all the debts of that firm; the language clearly conveys that idea, and it would not be an honest sale, really, for the firm to sell all its property and all its accounts to a party, unless they intended to provide for all their debts." (3) In charging the jury as follows: "An insolvent firm may make an assignment—what we call a voluntary assignment—and if that is duly recorded, then all the creditors come in and get their share; but our law prohibits an assignment so as to give a preference to certain creditors. If a man or a firm is not able to pay all his or its debts, he has no right to transfer that property over for a part of his debts, and leave part unprovided for. Making an assignment in that way is virtually a voluntary assignment and would be a violation of our assign-

ment law. It is true that an insolvent firm or man may make an honest, bona fide sale of a part of its property, and if the purchaser pays an honest price for it, not knowing of any intention to cheat the creditors, he would take a good title; but when a man takes all the property that another has, not only all the property, but all his accounts and business, the fair presumption would be that he would pay the debts; because that would be the honest way of doing business; and, I say, on that basis, this agreement was evidently drawn." (4) In charging the jury as follows: "Now, it is very clear and manifest from that language that Stevenson was to take all the property and interest in that firm, and to pay all their debts. . . . There was a claim of $800, and under the printed language here the defendant would be bound to pay the whole of it, as every other debt." (5) In charging the jury as follows: "I would say, gentlemen, that it is very awkwardly worded; it is a very awkwardly worded sentence, and while I would give that interpretation to it, yet it is very awkwardly worded. If it had referred alone to that Whitesell account, it ought to have said, 'the balance of that account,' or 'the Whitesell account to be paid out of the accounts collected.' It does not say that; it says, 'balance from accounts.' It is indefinite and uncertain, and the contention on the part of the defendant is that that was put there to qualify the previous clause, which made him liable for all the debts of the firm, as shown by their books of account." (6) In charging the jury as follows: "Well, now, to transfer that clause to the other seems a very harsh construction, and a very awkward way of expressing it. . . . Suppose that clause, 'balance from accounts,' to be added; how would it read? 'Defendant assuming to pay,' etc., and 'the indebtedness of said firm, as shown by their books of account, balance from accounts.' Does that make good sense?" (7) In charging the jury as follows: "If you find, gentlemen, from the evidence, that the clause, 'balance from accounts,' was intended to change and modify that part of the agreement which made him liable for all the debts . . . . then you find for the defendant; otherwise your verdict ought to be for the plaintiff." (9) In not affirming defendant's second point, which said point and the answer thereto are as follows: "2. As it is not shown by Fullerton & Son that their claim is an indebtedness of the said firm as shown

by their books of account, there can be no recovery. *Answer:* That is refused. According to the testimony, even of the defendant himself, he admitted that this account of Fullerton & Son was a claim, and a valid claim against the firm of Peck, Phillips & Wallace Company, Ltd." (10) In not affirming, unqualifiedly, defendant's third point; which said point and the answer thereto are as follows: "3. If the jury believe from the evidence, that defendant was to pay the indebtedness of said firm only out of the collections he made, the plaintiff cannot recover without showing that the defendant has collected in more money than he paid out. *Answer:* I would affirm the first part of that point, but refuse the latter part, because the burden would be on the defendant to show that he had not collected enough to pay the accounts; and you have his testimony that he did not." (13) The undisputed testimony being that just before the agreement in suit was signed, the balance due on the Whitesell judgment had been paid and satisfied of record, the court erred in not instructing the jury that the words, "balance from accounts," could not, therefore, apply to the Whitesell judgment, but must apply to the indebtedness of said firm, as shown by their books of account, except $380, which was to be paid by the warrant of the Supreme Commandery.

M. H. Stevenson, with him *J. R. Braddock*, for appellant.

J. G. White, for appellee.

OPINION BY BEAVER, J., February 19, 1898:

The legal plaintiffs, being considerably involved and having numerous executions against them in the hands of the sheriff, made a sale of their entire business property, including accounts, to the defendant for a price not alleged to be inadequate, so as to pay the claims of the execution creditors and certain others named in the articles of agreement, under and in pursuance of the terms of which the sale was made. There was no allegation or intimation of fraud. The defendant took possession of the property, paid the claims of the execution creditors and, as he alleges, paid in addition more than he was bound to do under the terms of the agreement. The use plaintiffs brought suit in the name of the legal plaintiffs for the recov-

ery of a claim against them which they allege in their statement the defendant agreed to pay, alleging that the defendant had "agreed (inter alia) to pay the debts of the said limited partnership with such exceptions as said agreement will show." The agreement was produced by the defendant and given in evidence by the plaintiffs.

That portion of the agreement, the construction of which is in controversy, reads as follows: "Now, therefore, this agreement witnesseth, that, in consideration of the sum of two hundred dollars, to be paid in cash, and the assuming of such fees as may be due to R. H. Jackson, Esq., their attorney, and the indebtedness of said firm, as shown by their books of account, except three hundred and eighty dollars due on note of eight hundred dollars due to Whitesell & Sons, same to be paid by warrant of Sup. Commandery, balance from accounts, the said Peck, Phillips & Wallace Company, Limited, hereby agrees to sell, assign, transfer and set over unto the said M. H. Stevenson all its right, title and interest in the lease, stock, machinery, type, fixtures, good-will, business and everything belonging thereto, together with all the accounts outstanding, it being the intent to sell and assign to the said M. H. Stevenson the entire plant and business as owned and conducted by said firm at Nos. 43 and 45 Shiloh St., Pittsburg."

In reference to this agreement, the trial judge in the court below, as complained of in the second assignment of error, said: "The agreement between them, as evidenced by the typewritten copy which is in evidence here, will undoubtedly require defendant to pay all the debts of that firm. The language clearly conveys that idea, and it would not be an honest sale really for the firm to sell all its property and all its accounts to a party, unless they intended to provide for all their debts." In this there was double error. The agreement does not require the defendant to pay "all the debts of the firm," but only such as were contained in their books of accounts, nor is it true that "it would not be an honest sale for the firm to sell all its property and all its accounts to a party, unless they intended to provide for all their debts." It was held in the York County Bank v. Carter, 38 Pa. 446, that "A sale by a debtor at a full price, intended by both buyer and seller for the payment of particular debts of the vendor, is a lawful sale and none the less so, be-

cause other creditors may be prevented or hindered by it from obtaining payment. Such is the doctrine of Uhler v. Maulfair, 23 Pa. 481, and such is everywhere the doctrine of the common law, except where a bankrupt law exists." This has been followed in very many cases since that time. This practically disposes of the second, third and fourth assignments of error, which must be sustained.

The court practically left it to the jury to say what the construction of the phrase "balance from accounts," taken in connection with the sentence in which it occurs, should be, giving their own views in regard to the matter in the language which is complained of in the fifth and sixth assignments of error. It was the duty of the court to construe this agreement which, under the undisputed evidence, does not seem to be doubtful. Jackson, the attorney of the legal plaintiffs at the time the agreement was signed, and Stevenson both testified that the balance of the Whitesell & Sons judgment, save the $380 mentioned in the agreement, had been actually paid by the defendant to the sheriff, before the agreement was signed, and as to this there is practically no denial. If that were so, there was no balance of the Whitesell & Sons' judgment or claim to be provided for, after the $380 mentioned in the agreement, and the words "balance from accounts" must and could only be held to apply to the balance of other claims against the legal plaintiffs which were to be paid out of the proceeds of the accounts against their debtors. The testimony of the defendant that he had not collected enough from the accounts to pay the claims against the legal plaintiffs found upon their books, and that he had actually paid out more money than had been or could be collected, was practically undisputed. The fifth, sixth, seventh, tenth and thirteenth assignments of error are, therefore, sustained.

The eleventh and twelfth assignments are not sustained. There is no evidence of any fraud upon the part of the legal plaintiffs in representing the condition of their accounts, and it would seem, from the defendant's own testimony, that he had discovered, before the agreement was signed, that many of the accounts were worthless and uncollectible and, that for that reason, at his instance, the phrase "balance from accounts" was inserted for his protection. At the most, Peck's representations, according to Stevenson's testimony, amounted to no more

than the expression of an opinion: "He remarked to me, 'Mr. Stevenson, I think those accounts are all collectible, except perhaps $25.00.' Mr. Wallace told me about the same thing, and I did, on that assurance, undertake to collect in the accounts and pay the indebtedness." One of the essential elements of fraud arising out of a misrepresentation is, that it must be of a fact, and not the mere expression of opinion: Brown v. Eccles, 2 Pa. Superior Ct. 192; Southern Development Co. v. Silva, 125 U. S. 247.

The interests as well as the obligations of the legal plaintiffs and those of Charles F. Peck in the agreement are easily severable and, in view of that fact, we think the suit was properly brought.

As to the first assignment of error the testimony as to conversations between the legal and equitable plaintiffs on the one side and the defendant on the other was, when received, competent and relevant. There is no evidence upon the record of any exception to the refusal of the motion to strike it out, nor is there any exception to the admission of the evidence itself. It is, therefore, not sustained.

The equitable plaintiffs failed to show that their account was included in "the indebtedness of said firm, as shown by their books of account" and the testimony of the defendant that it was not so shown was undenied. The defendant's second point should, therefore, have been affirmed, and the ninth assignment of error is sustained.

The equitable plaintiffs, having elected to take advantage of the written agreement entered into between the legal plaintiffs and the defendant, and having declared thereupon, are bound by its terms. It was their duty to show that they were included within the debts of the legal plaintiffs to be paid by the defendant. Having failed to do this they are not entitled to recover, and the jury should have been so instructed.

The judgment is reversed.

Samuel C. Grier v. The Borough of Homestead, Appellant.

Municipal law—Evidence—Proof of ordinance—Burden of proof.

It is not necessary to prove the preliminary steps taken in passing and publishing a municipal ordinance, the ordinance book is prima facie evidence of the validity of the ordinance, and if anything essential to its validity has been omitted in passing or publishing it, it devolves upon the party resisting it to show such invalidity.

Practice, Superior Court—Defective assignment of error—Rule XVII.

Defective assignments of error which are in direct violation of Rule XVII of the Superior Court will not be considered.

Evidence—Road law—Measure of damages.

A witness in a land damage case must give his estimate of the money value of the injury, by contrasting the market value of the property, as it was before the injury was inflicted, with its value immediately after the injury; and the jury should be instructed that the difference in these values is the measure of damage.

Land damage cases—Evidence—Competency of witness.

In land damage cases the positive requirements for a competent witness are: personal knowledge of the property and of its market value at the time it was taken. In order that a witness may be competent to testify intelligently as to the market value of the land he should have some special opportunity for observation; he should in a general way and to a reasonable extent have in his mind the data from which a proper estimate of the value could be made.

Appeals—Evidence—Effect of admission of incompetent testimony.

The fact that sufficient competent testimony was admitted on the trial to sustain the verdict, is no antidote for the error of admitting incompetent testimony, since an appellate court cannot determine either the effect given by the jury to that which should not have been before them, or whether the verdict was not due wholly to the incompetent testimony.

Argued April 13, 1897. Appeal, No. 32, April T., 1897, by defendant, from judgment of C. P. No. 3, Allegheny Co., Aug. T., 1895, No. 129, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Appeal from report of road viewers.

On January 19, 1891, the borough of Homestead by ordinance established the grade of Dickson street. Shortly after

that time Levi Myers then the owner of the lots in question, erected thereon six tenement houses forming one building. December 31, 1891, the property was conveyed to Samuel C. Grier, plaintiff in this case.

In pursuance of a subsequent ordinance Dickson street in front of the property in question, was brought to a grade established by ordinance of January 19, 1891. On petition of plaintiff viewers were appointed to assess the damages and benefits on abutting properties.

On the trial of the case counsel for the borough of Homestead offered in evidence the ordinance of the borough of January 19, 1891, to show a formal change of grade prior to the erection of plaintiff's improvements on the lot in question. This was objected to because the ordinance included more than one street, and because the offer did not include proof of publication by handbills or newspapers as required by law. The objection was sustained.

The court admitted under objection and exception the testimony of several witnesses as to values, whose preliminary examination showed that they had no special knowledge on the subject.

Verdict and judgment for plaintiff for $1,000. Defendant appealed.

Errors assigned were (1) Sustaining plaintiff's objection to defendant's offer to prove that the grade was established on Dickson street on January 19, 1891, and that that was prior to the time the houses were erected, the offer, objection and ruling being as follows: "H. J. O'Donnell, a witness for defendant, being the borough clerk, and having identified the borough ordinance book was interrogated as follows: Mr. Silveus: I wish to prove that the grade was established on Dickson street on January 19, 1891. I will prove by other witnesses that that was prior to the time that these houses were erected and that, therefore, the plaintiff is not entitled to recover for the change of grade any damages caused to the improvements that were on the lot. Mr. Dahlinger: I object to the offer of this ordinance, because it is an ordinance establishing the grade of Second, Third, Fourth and Fifth avenues extension city farm line, and Dickson street extension and Plummer street; it is not an ordi-

nance fixing the grade of Dickson street. I object further, because it includes the proceedings of eight streets in one ordinance, and further, that the offer does not include the proof of publication by handbill and in the newspapers as required by law. Objection sustained. To which ruling of the court counsel for defendant requests an exception. Exception allowed and bill sealed." (2) The court erred in overruling the objection to the testimony of Samuel C. Grier, a witness for plaintiff, the offer and ruling being as follows: "Mr. Dahlinger: I propose to call Mr. Grier to corroborate the evidence that we have put in as to the damage sustained by these houses. I offer to prove by Mr. Grier the actual amount of loss sustained by the grading of this street to this property. The Court: Although he does not know the market value either before or after? Mr. Dahlinger: Although he does not know the market value of property in the neighborhood at that time. The Court: He has not even testified that he knows the market value of this property either before or after? Mr. Dahlinger: He knows what he paid for it. The Court: The witness admitting that he does not know the market value of property in the neighborhood including the property about which the controversy arises, it is proposed to ask him what extent it was damaged. He has already been permitted to testify that in his opinion it is damaged; this on the authority of Dawson's Appeal. We are not certain whether the ruling as to Mawhinney's testimony on Dawson's Appeal goes to the extent in a case of this sort of permitting the witness to fix figures when he admits that he does not know the market value either before or after; but we will err, if at all, on the side of liberality in admitting the testimony, and on the authority of the ruling with respect to Mawhinney in Dawson's Appeal overrule the objection and seal a bill for the defendant. Mr. Dahlinger: Now, Mr. Grier, state in your opinion the difference before and after the grading of this street as to this property." (3) In admitting the testimony of Robert J. Coyle, a witness for plaintiff, the questions, objections and ruling being as follows: "The Court: Q. Do you know anything about the value of property in that neighborhood? A. I don't know the value per foot of the ground. Q. You persist in not answering the question that is asked? A. I can't answer it because I don't know the value of the ground right

there. Mr. Dahlinger: Q. Do you know the value of property in that immediate neighborhood in a general way? A. In a general way I could, but if you would ask me point blank what those two lots are worth I could not tell you. Q. Well, just answer that question. A. Well, in a general way, I would know the value, yes, sir. Mr. Silveus: Q. How do you get that knowledge? A. Why from the general knowledge of the real estate business. Defendant renews the objection that the witness is not qualified to testify as an expert in a case of this kind. Q. I will ask you now Mr. Coyle if in your opinion that property is benefited or damaged by the grading of Dickson street? A. I think it was damaged. Q. To what extent? Objected to. Q. I will change the form of the question, what is the difference, in your opinion, between the value of the property before and after the grading? Objected to. Objection overruled. To which ruling of the court counsel for defendant requests an exception. Exception allowed and bill sealed." (4) In admitting the testimony of John G. Hastings, a witness for plaintiff, the questions, objections and ruling being as follows: "Q. What in your opinion was the difference between the market value before and after the grading? Objected to. Cross-examined by defendant: Q. Did you ever deal in real estate at all? A. No, sir. Q. Do you know anything at all about the value of real estate in Homestead? A. No, sir. Q. And the only thing you do know is by observing on this street since the grading was done, how much it is cut down in front? A. In regard to these houses, yes, sir, I went up for that purpose. Defendant renews the objection to the witness answering the question that was asked him. The Court: I make the same ruling as in the case of the last witness. The ruling as to the Mawhinney testimony may have broad enough meaning to cover this. The objection is overruled and a bill sealed for the defendant." (5) In overruling defendant's objection to the testimony of John G. Hastings, a witness for plaintiff, the questions, objection and ruling being as follows: "Do you mean it was worth less or more? A. It was worth $1,500 less. Q. Now, how do you arrive at that? A. Why I went up there and estimated, looked over the buildings and received a bid for the lowering of the house. Objected to as heresay. Q. Did you make an estimate yourself? A. I gave Mr. Grier an estimate

of what would put that property in the same condition it was before lowering it down to the grade of the street, the same as it was before the street was graded. I gave Mr. Grier an estimate of between $1,500 and $1,600. Q. Well, have you that estimate? A. I have a memorandum of it, I just figured it up at the time. Q. State what the items are? A. 12 cellar frames sash $48.00. That would necessitate putting in new cellar frame there. We would have to tear the whole wall out. Objected to. Objection overruled. To which ruling of the court counsel for defendant requested an exception. Exception allowed and bill sealed."

John F. Cox, with him *J. G. Silveus*, for appellant.—The manner of proving records of boroughs in this state is regulated by statute. See Act of April 1, 1834, P. L. 163.

A municipal corporation is not required to prove every antecedent act requisite to the legal passage of an ordinance: Becker v. Washington, 7 S. W. Rep. 291. To like effect see Town of Tipton v. Norman, 72 Mo. 380; Lindsay v. Chicago, 115 Ill. 120.

In order that a witness may be competent to testify intelligently to the market value of land he should have some special opportunity for observation; he should in a general way have in his mind data from which a proper estimate of value ought to be made: Railway Co. v. Vance, 115 Pa. 325. See also Chambers v. South Chester Borough, 140 Pa. 510; Phila. & Del. County R. R. Co., 174 Pa. 291.

The testimony given by Coyle was a mere opinion, and the same rule would apply as already laid down by Mr. Justice CLARK in Railway Co. v. McCloskey, 110 Pa. 436.

These questions seem, however, to have been settled by the decision of this court in Orr v. Gas Co., 2 Pa. Superior Ct. 401.

Chas. W. Dahlinger, for appellee.—The text books and decisions are unanimous in holding that "when ordinances are required to be published before they go into effect, this requirement is essential, and the publication must be in the designated mode:" Dillon on Municipal Corporations, sec. 331; 17 Am. & Eng. Ency. of Law, 262; 4 Wait's Actions and Defenses, page 610. See also Taylor Avenue, 146 Pa. 638.

There is no presumption in favor of the legality of municipal ordinances: Altoona v. Bowman, 171 Pa. 307.

The other four assignments of error relating to the admission of evidence of Samuel C. Grier and others are not properly assigned in that they do not show the testimony adduced. These errors are evidently intended to be assigned under Rule XVII. of the Superior Court, and in no case is the answer of the witness given to whose testimony objection was made. This point is no longer in doubt, and the assignments cannot be regarded: Com. v. Smith, 2 Pa. Superior Ct. 474; Battles v. Sliney, 126 Pa. 460.

OPINION BY ORLADY, J., February 19, 1898:

Under proceedings instituted by the borough, the plaintiff recovered a verdict of $1,000, as damages sustained in changing the grade of Dickson street. On the trial below it was urged in defense to the claim for damages, that the grade had been established by an ordinance at a time prior to the erection of the buildings on the lots of the plaintiff, and in support of this contention, the borough clerk was called by the defendant and produced the ordinance book of the borough. The ordinance of January 19, 1891, on which the defendant relied was offered in evidence, and to this the plaintiff objected. "I object to the offer of this ordinance, because it is an ordinance establishing the grade of second, third, fourth and fifth avenues extension city farm line, and Dixon street extension and Plummer street; it is not an ordinance fixing the grade of Dixon street. I object further, because it includes the proceedings of eight streets in one ordinance; and further, that the offer does not include the proof of publication by hand bill and in newspapers as required by law." The objection was sustained, (1st assignment) but as the ordinance is not on the record sent to this court we only dispose of that part of the assignment which suggests the necessity of proof of publication of the ordinance, by handbills and in the newspapers, before receiving it in evidence.

By the Act of April 3, 1851, P. L. 320, sec. 3, par. IV., it is made a corporate duty "to publish in at least one newspaper if such be printed in the proper county, and by not less than twelve advertisements to be put up in the most public places in

the borough, every enactment, regulation, ordinance or other general law at least ten days before the same shall take effect;" and by the preceding paragraph "to make full records of their proceedings and to provide for the preservation thereof."

By the eighth section of the act the secretary is required "to attend all the meetings of the corporation, keep full minutes of their proceedings, transcribe the by-laws, rules, regulations and ordinances adopted into a book kept for the purpose; and when signed by the presiding officer shall attest the same, preserve the records and documents of the corporation . . . . record the publication of all enactments and attest the same by his signature thereto." The offer as made, was unaccompanied by proof of publication, and though the ordinance was not operative until the terms of the act of assembly had been complied with, the only question raised by this assignment is, can the ordinance be received in evidence without the fact of publication being first affirmatively shown?

By the Act of April 15, 1834, P. L. 537, it is made the duty of the town clerk "to provide a suitable book or books, for the purpose of entering therein all matters of which he shall by law be required to keep a record" and by section 9 of the act of 1851 these duties devolve upon the secretary of the borough council. When ordinances are required to be published before they go into effect, this requirement is essential, and the publication must be in the designated mode: Dillon on Mun. Corp. sec. 331.

The posting by advertisements and publications in a newspaper are as essential to the validity of an ordinance as are the other statutory requisites: Sower v. Phila., 35 Pa. 231; Kepner v. Com., 40 Pa. 124; Marshall v. Mayor, 59 Pa. 455; Fuller v. Scranton, 2 Cent. Repr. 788.

The ordinance book is required to be kept, by the express direction of the statute, and the memorial made in compliance with the statute is a public record, and when the proper person presents the proper record in which the ordinance is identified and attested, it is prima facie correct and entitled to be read in evidence: Wharton on Evidence, sec. 644; Thompson v. Chase, 2 Grant Cases, 367.

The records of a school board though not required by law to be kept are admissible, and when defective are explainable by parol evidence: Gearhart v. Dixon, 1 Pa. 224.

It was not necessary to prove the preliminary steps taken in passing and publishing the ordinance, as it is well held that the ordinance book is prima facie evidence of the validity of the ordinance, and if anything essential to its validity has been omitted in passing or publishing it, it devolves upon the party resisting it to show such invalidity: Prell v. McDonald, 7 Kan. 426, s. c. 12 Am. Reps. 423; City of Atchison v. King, 9 Kan. 550.

To hold otherwise, would make it necessary to prove that the advertisements were of the statutory number, or that the posting places were the most public in the borough; but while admissible as an ordinance, it is subject to attack, and proof may be adduced to show that it was not legally published and posted, and hence was inoperative.

The first assignment of error is sustained. The second and third assignments are not considered, as they are in direct violation of Rule 17 of this court; the answer of the witness not being given, we repeat what was said in Commonwealth v. Smith, 2 Pa. Superior Ct., 474, "The reasons for this rule and the importance of it are so clearly shown in Battles v. Sliney, 126 Pa. 460, that we need only to refer to that case." The fourth and fifth assignments are considered together. A witness, John G. Hastings, a contractor, when questioned as to the amount of damages to which the plaintiff was entitled, testified as follows: "Q. Do you know anything at all about the value of this real estate in Homestead? A. No, sir. Q. And the only thing you do know is by observing on this street since the grading was done how much it was cut down? A. In regard to the house, I went up for that purpose."

From his evidence, it appears that he had no knowledge of the condition of the property before the grade of the street was changed, nor did he have any knowledge of the value of real estate in the borough; but as a contractor, he simply visited the premises after the changes had been made and estimated the cost necessary to lower the house and make it conform to the new grade. He was not called as an expert, and if his testimony had been confined to the facts of which he had knowledge, it would have been competent, but he knew nothing of the conditions existing before the grade was changed, and could not testify as to the damage resulting from a change of which he admitted he did not have any knowledge.

The testimony was received under authority of Dawson v. Pittsburgh, 159 Pa. 317, but we do not think the evidence competent under that case.

Experience has constantly demonstrated the correctness of the old rule established in the case of Schuylkill Nav. Co. v. Thoburn, 7 S. & R. 411, to wit, the jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could be first demanded; they are to value the property, without reference to the person of the owner, or the actual state of his business, and in doing that, the only safe rule is to inquire: What would the property, unaffected by the obstruction, have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is "the true measure of compensation" is the language of the Supreme Court in Chambers v. South Chester Borough, 140 Pa. 510, and in determining the duty of the jury. The same case is as definite authority for the measure of proof and qualification of a witness, in the following concise direction: "More and more closely, in recent years, we have held parties to the rule that, after all things are considered which may affect the mind of the witness he must give his estimate of the money value of the injury, by contrasting the market value of the property, as it was before the injury was inflicted, with its value immediately after the injury; and the jury is instructed that the difference of these values is the measure of damage."

This plain and just rule is the result of many preceding cases noted in that decision, and it has been followed without modification. In P. V. & C. Ry. Co. v. Vance, 115 Pa. 325, it is said: "In order, therefore, that a witness may be competent to testify intelligently as to the market value of land, he should have some special opportunity for observation; he should, in a general way, and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made; if interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in a condition to know what he proposes to state, and to enable the jury to judge of the probable proximate accuracy of his conclusions;" which test of competency is held to be vital in Michael v. Crescent Pipe Line Co., 159 Pa. 99. He cannot intelligently tes-

tify without such knowledge; its possession is a necessary element in the value of such testimony, but cannot be assumed; the court cannot pass on the question of competency until it is made to appear. Hence the possession and sufficiency of such knowledge should be made to appear and be passed upon by the court before the witness should be permitted to express any opinion. The basic requirements are personal knowledge of the property and of its value at the time it is taken: Orr v. Gas Co., 2 Pa. Superior Ct. 401. While these rules have been varied in instances of limited or special knowledge of particular property, the Supreme Court has held that it is safest rigidly to adhere to the principles announced in the cases cited, this being the only fair and safe way to ascertain the actual damage sustained.

The witness, Hastings, did not pretend to have any knowledge of the property; any idea of its market value; the uses to which it was put; its extent or character; its surroundings or advantages before the change was made; and he could not aid the jury in the least by his estimate of the damages the plaintiff sustained, by giving his opinion "of the difference between the market value before and after the grade."

A stranger from a distant state, who saw the property, for the first time on the day of trial, could testify to the same facts. A verdict to be respected must have a firmer foundation.

The fact that sufficient competent testimony was admitted on the trial to sustain the verdict, is no antidote for the error of admitting incompetent testimony, since an appellate court cannot determine either the effect given by the jury to that which should not have been before them, or whether the verdict was not due wholly to the incompetent testimony.

The first, fourth and fifth assignments of error are sustained, the judgment is reversed, and a venire facias de novo awarded.

John W. Ross *v.* Thompson Hudson, Appellant.

Illegal arrest—Liability of justice of peace—Act of March 21, 1772.

A justice of the peace who illegally orders or causes the arrest of a citizen may be made liable in an action for damages; but to be so held liable the statute requires the preliminary notice to be given, so that proper amends may be made and expensive litigation avoided.

Wherever a magistrate has acted honestly, although mistakenly, where he supposed he was in the execution of his duty, although he had no authority to act, he is entitled to the protection of the Act of March 21, 1772, 1 Smith's Laws, 364.

Argued Nov. 17, 1897. Appeal, No. 63, Oct. T., 1897, by defendant, from judgment of C. P. Chester Co., Aug. T., 1896, No. 79, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Reversed.

Trespass for the unlawful issuing by the defendant, a justice of the peace, of a warrant for the arrest of the plaintiff and procuring his arrest and retention for nonpayment of tax. Before WADDELL, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $100. Defendant appealed.

Error assigned among others was in the answer to and disaffirmance of defendant's first point, which point and answer are as follows: "The plaintiff having failed to show thirty days' notice of plaintiff's intention to sue, given to the defendant (who is a justice of the peace) by said plaintiff, pursuant to the provisions of the act of assembly of March 21, 1772, the plaintiff cannot recover in this action, and your verdict must be for the defendant. *Answer:* I must refuse to affirm that point. I recognize that the act of assembly makes provision that a justice of the peace shall have thirty days' notice of an intention to bring an action against him for violation of his duties in office, and if the plaintiff does not do so, that he cannot sustain his action. But that depends upon the character of the action. If the justice was acting within his jurisdiction, within the powers

of his office, then he is entitled to have thirty days' notice, so that he may make any amends which he may think the case warrants. But when he is acting without any jurisdiction, simply under color of his office because he is a justice, then he is not entitled to any such notice. In my judgment the case depends upon that question, and I cannot therefore affirm that point. I must refuse it."

Chas. H. Pennypacker, for appellant.—It may be laid down as a general rule, that wherever an officer has acted honestly, although mistakenly, where he supposed he was in the execution of his duty, although he had no authority to act, he is entitled to the protection of the act of assembly: Booth v. Clive, 10 C. B. 827; Jones v. Hughes, 5 S. & R. 299; Hubert v. Mitchell, Dist. Ct. of Phila. March 19, 1849.

George B. Johnson, with him *J. Frank E. Hause*, for appellee.—Where the act committed by the justice is entirely foreign to his jurisdiction, nothing can give it official color: Jones v. Hughes, 5 S. & R. 299.

Before a justice is entitled to the notice provided by the act of 1772, he must be clothed with official power to do the act officially, so that he is authorized to judge and decide whether the offense charged has been committed, or whether the thing done is punishable or within his cognizance: Johnson v. Thompkins, 1 Baldwin, 571, 602.

If a court acts without jurisdiction its judgments are nullities; they are not voidable but void, and not one of the essentials to jurisdiction existed in the case at bar: Wise v. Wills, 2 R. 208; Grohmann v. Kirschman, 36 W. N. C. 389.

Opinion by Orlady, J., February 19, 1898:

The defendant, a duly commissioned and acting justice of the peace, on complaint in writing of a collector of taxes, issued a warrant authorizing a constable named therein to levy the amount of a tax assessed against the plaintiff the language of the writ being as follows: "in case goods and chattels sufficient to satisfy the said tax with costs cannot be found, you are hereby authorized to take the body of the said J. W. Ross and convey him to the jail of the proper county, there to remain until the

amount of said tax with costs shall be paid or secured to be paid, or until he be otherwise discharged by due course of law." The plaintiff neglected or refused to make payment of the tax, and under the authority of the warrant issued by the defendant the plaintiff was taken into custody, but before being committed to prison he was discharged under habeas corpus proceedings. This action is brought to recover damages for the wrongful arrest.

It was clearly proved that the taxes claimed were due by the plaintiff as school taxes, and it is admitted that the proceeding to enforce the payment by the arrest of the delinquent was unauthorized by any statute providing for the collection of school taxes.

The defendant's first point raised the principal question in the case. "The plaintiff having failed to show thirty days' notice of plaintiff's intention to sue given to the defendant (who is a justice of the peace) by said plaintiff, pursuant to the provisions of the act of assembly of March 21, 1772, the plaintiff cannot recover in this action, and your verdict must be for the defendant."

The learned trial judge refused to affirm the point, and held that "If the justice was acting within his jurisdiction, within the powers of his office, then he is entitled to have thirty days' notice so that he may make any amends which he may think the case warrants; but when he is acting without any jurisdiction, simply under color of his office because he is a justice, then he is not entitled to any such notice."

This statute has received practically the same construction here as similar ones in England, and as held in Jones v. Hughes, 5 S. & R. 299. "It may be laid down as a general rule, that wherever the officer has acted honestly, although mistakenly; where he supposed he was in the execution of his duty, although he had no authority to act, he is entitled to the protection of the act of assembly.

"The having of jurisdiction is not the criterion; for if one magistrate were to act in a case in which jurisdiction is expressly committed to two, he would still be entitled to notice." And in Prior v. Craig, 5 S. & R. 44: "The act of 1772 is a remedial law, general in its provisions; it is beneficial, and therefore, not to be restrained, but by express words or strong and necessary implication. It was intended for all cases where a justice of

the peace acting within his jurisdiction rendered himself amen able for the wrong; and although the policy of the act may have been to secure in some measure the officer bound to act, and therefore in danger of doing wrong, from the legal consequences of unintentional error; yet as it is in many instances, impossible to distinguish errors of the head from those of the heart, its provisions must of necessity be extended to every case of official misconduct made the subject of an action."

The complicated system of securing the payment of taxes, and the distinctions in the means employed to enforce payment of township and school taxes, though the territory, person and property may be identical for each object, furnishes ample room for a mistake by a person unlearned in the law.

The conflicting arguments as to jurisdiction, and want of jurisdiction in the justice's court are much too complicated to hold the officer individually responsible for a bona fide mistake of legal judgment.

The words "in the execution of his office" cannot be held to mean absolute certainty of jurisdiction, as that would preclude possibility of error, and the officer would not then require protection. The words must be qualified by the decisions; and then the meaning will be, that a party to be entitled to the protection of a notice must bona fide and reasonably believe himself to be authorized by the act.

The evidence clearly shows the justice to have acted in the mistaken belief that he was following the strict letter of a statute, and to have erred only because he failed to legally distinguish between the means to be employed in the collection of township or school taxes. If the defendant acted in honest ignorance, or in an honest belief that he was acting by reason of his office as justice of the peace in putting the law in motion, he was entitled to the notice required by the act of 1772. The answer of the learned trial judge to the defendant's third point imposed a higher standard of duty on the justice of the peace than is required by the law.

The English cases are uniform on this subject: Booth v. Clive, 10 C. B. R. 827; Arnold v. Hamel, 9 Exch. 404; Heath v. Brewer, 15 C. B. R. (N. S.) 803; and the decisions of our courts are in accord with them: Jones v. Hughes, supra; Wise v. Wills, 2 Rawle, 208. A justice of the peace who ille-

gally orders or causes the arrest of a citizen may be made liable in an action for damages: McCarthy v. DeArmit, 99 Pa. 63; Neall v. Hart, 115 Pa. 347; but to be so held liable the statute requires the preliminary notice to be given so that proper amends may be made and expensive litigation avoided.

The first assignment of error is sustained, the judgment is reversed.

Levi M. Pollock, Agent of R. H. Pollock, v. Joseph K. Ingram, Appellant.

Public officers—Constable's liability for false return—Act of 1772.

Where a constable, after he had a sufficient levy and had accepted a sufficient bond of indemnity, abandons his levy and returns his writ, he is neither justified by his writ nor protected by the Act of March 21, 1772, 1 Sm. L. 364. The object of the sixth section of the act of 1772 was to protect constables and inferior officers from suffering injury for acts done strictly in obedience to their warrants, by reason of irregularity or for want of jurisdiction in the magistrate.

Argued Nov. 18, 1897. Appeal, No. 76, Oct. T., 1897, by defendant, from judgment of C. P. Chester Co., Aug. T., 1896, No. 46, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Appeal from judgment of a justice of the peace. Before HEMPHILL, J.

It appears from the record that this was an action in assumpsit against Joseph K. Ingram, a constable under the Act of March 20, 1810, 5 Sm. L. 161, to recover for a false return to an execution placed in his hands.

Verdict and judgment for plaintiff for $85.53. Defendant appealed.

Errors assigned were (1) In admitting in evidence the execution issued by the justice, together with the parol statements of the justice as to the proceedings before him and by him, and refusing to require the production of the justice's docket. (2) In

admitting the original execution issued by the justice in favor of Levi Pollock, Agent, v. William Ross Cameron on the $78.72 judgment, together with the several indorsements on the paper, because it was not a record or any part of the record of the justice's court. (3) In refusing to admit evidence to show that the defendant constable was not the nearest constable to the justice, nor the one most convenient to the justice, nor the constable of the township in which the justice exercised his official functions. (4) In refusing to permit the defendant constable to testify concerning the declaration of Justice CAMPBELL when he gave him the execution. (5) In refusing to permit the defendant constable to testify as to any parol instructions given to him by the justice when he handed him the execution. (6) In refusing to permit the defendant constable to testify concerning the directions given him by the plaintiff about the removal of defendant's personal property from the farm occupied by defendant. (7) In rejecting evidence of the assessed valuation of the real estate of Samuel A. Grayson, one of the sureties upon the bond tendered to the defendant constable. (8) In rejecting evidence to show that W. Ross Cameron, the defendant in the Pollock execution, was not possessed of any property and at no time could the defendant constable have made the money on the execution. (9) In refusing to admit in evidence, the affidavits claiming ownership of the personal property which had been filed with the defendant constable. (10) In its disaffirmance and answer to defendant's first point: "A constable is not liable to a suit under the act of March 20, 1810, for failure to make return of an execution on or before the return day where he is not the constable of the ward, district or township in which defendant in the execution resided, nor the next constable most convenient to the defendant, and upon the evidence in this case your verdict must be for the defendant." (11) In disaffirming defendant's third point: "It was the duty of the plaintiff to have furnished to the constable a bond duly dated, filled up, signed and witnessed, and if the bond tendered failed in any of these particulars, it was not a sufficient bond of indemnity, and the constable was justified in declining it, and your verdict should be for the defendant." (12) In disaffirming defendant's fourth point: "If the jury believe that no demand was made upon the defendant by the plaintiff prior to suit brought or

notice or demand given or made by the plaintiff to the defendant prior to suit brought, pursuant to the provisions of the act of assembly, the plaintiff cannot recover, and your verdict must be for the defendant." (13) In disaffirming defendant's first (additional) point: "If the jury believe that the defendant was advised by Theodore K. Stubbs, his counsel, that the bond offered by Pollock was not a legal bond and would not protect him against loss, and that his rejection of such bond was pursuant to advice of his counsel, and his return of the execution was made pursuant to the advice of his counsel, the defendant is not liable in this action, and your verdict must be for the defendant." (14) In disaffirming defendant's fourth (additional) point: "The defendant was justified in declining the bond tendered to him in the condition in which it was, and your verdict must be for the defendant."

Chas. H. Pennypacker, for appellant.—A penal statute is the foundation of this suit. The act fixes both the liability and the measure of it. So that all its terms must be strictly complied with and strictly construed, and should not be extended by implication. The very point raised at the inception of this case has been decided by Judge SCHUYLER in Bachman & Co. v. Fenstermacher, 2 C. C. R. 499; s. c., 112 Pa. 331.

Penal statutes must be strictly construed and never extended by implication: Com. v. Wells, 1 Cent. Rep. 232; Com. v. Lentz, 106 Pa. 643.

The docket of the justice is the best proof of the procedure. The entries therein show what has been done: Climenson v. Climenson, 163 Pa. 451.

The court below was in error in refusing to admit the declarations of the justice made to constable Ingram when he gave him the execution. Declarations accompanying the act are evidence of the part of the res gestæ: Woodwell v. Brown, 44 Pa. 121.

This action was brought without any demand or notice, as required by the act of March 21, 1772. Such an action was within the purview of the act: Com. v. Warfel, 157 Pa. 444.

The evidence shows that the bond was not signed on the day it bears date; that the names of the sureties do not appear in the body of the bond and it was not, therefore, a sufficient bond: Keener v. Crago, 81* Pa. 166.

Thomas W. Pierce, with him *S. D. Ramsey*, for appellee.—The courts have also held that when process has been executed, the power of the magistrate to select the officer cannot be attacked collaterally, for that is a matter in which he has a right to consult his judgment and convenience: Com. v. Lentz, 106 Pa. 643.

Upon being indemnified a constable must proceed with an execution on penalty of being liable for a false return: Corson v. Hunt, 14 Pa. 510; Meeker v. Sutton, 2 Phila. 288.

A voluntary acceptance by a constable of an execution and acting thereunder, places him in the same position and renders him liable in like manner, as if there was an obligation imposed upon him to receive the writ: Com. v. Lentz, 106 Pa. 643.

A penal statute is not to be so strictly construed as to entirely defeat its object: Bartolett v. Achey, 38 Pa. 273.

The case was not within the intendment of the act of 1772. The act of 1810 under which this suit was brought directs the method of procedure under it, and makes no provision for notice except by the summons. The matter covered by the sixth, eighth and ninth assignments of error was properly ruled upon by the court as irrelevant: Bachman v. Fenstermacher, 112 Pa. 331.

OPINION BY ORLADY, J., February 19, 1898:

The plaintiff secured a judgment for $78.72, before a justice of the peace, against one Cameron, and caused an execution to be issued thereon, which was directed to the defendant, as a constable, who levied upon and took into his possession certain personal property. A claim of ownership was made to the property levied upon by persons not named in the writ, and the constable demanded a bond of indemnity, which was furnished by the plaintiff. A few days afterward a controversy arose as to its sufficiency, and four days after the writ was issued the constable made return of it into the office of the justice, indorsed, "Levied upon and not sold for want of sufficient indemnity, goods levied upon being claimed by Geo. W. Campbell and M. Ella Cameron who have filed affidavits in proof of their claims."

This suit was then instituted before a justice of the peace, under the 12th section of the Act of Assembly March 20, 1810,

5 Sm. L. 161, to show cause why execution should not issue against the constable "for the amount of the debt, interest and costs of an execution in his hands to which he made a false and insufficient return" and a recovery was had against him.

On the trial of an appeal to the common pleas, a verdict was had against the constable, and the record is brought into this court for review.

The writ of execution was received in evidence under objection to show the amount of the plaintiff's claim. This did the defendant no harm, and the grade of proof was as high as the docket of the justice. The act of 1810 directs that "in the delivery of the execution to any constable, an account shall be stated in the docket of the justice, and also on the back of the execution, of the debt, interest and costs, from which the constable shall not be discharged, but by producing to the justice, on or before the return day of the execution, the receipt of the plaintiff or other return as may be sufficient in law."

In making the levy, the constable undertook the execution of the writ, and on it he made his return. This action against him was for his alleged default after he had accepted the writ, and the amount of the penalty was as certainly fixed by the indorsement on the execution made by the justice as by the one in his docket. The statute required the statement of debt, interest and costs to be on each and both. The officer may not have been strictly the "next" constable, but it does not appear that he was not the most convenient: Commonwealth v. Lentz, 106 Pa. 643. He was within the jurisdiction of the justice, he voluntarily accepted the writ without objection, which made him responsible for a default or neglect in its proper execution. The first, second, third and tenth assignments are overruled.

The instructions or directions given by the justice at the time the execution was accepted by the constable could not in any way affect his liability, as the performance of his duty was measured by the law and not by the oral instructions of the justice. The rights of the plaintiff in an execution are not to be increased or lessened by the uncertain interpretations of a justice of the peace. His control over the writ, as far as its service is concerned, ends with its delivery to the constable.

Whether the defendant in the execution was the legal owner of the property, or what was its assessed value were not mate-

rial as here presented. The act of 1810 is not merely declaratory of the common law; it goes further and fixes a penalty for a failure to perform a duty; and the penalty is the amount of the execution and costs; neither more, neither less. It is his failure to make a return, or making a false return, not his inability to make the money in the execution, which is the subject of inquiry. Hence it is entirely immaterial to show that the defendant had no goods upon which to levy: Bachman v. Fenstermacher, 112 Pa. 331. The fourth, fifth, sixth, seventh, eighth and ninth assignments are overruled.

The evidence shows that the constable accepted the bond of indemnity and expressed satisfaction as to its form and the sureties at the time it was given. He cannot afterward set up the alleged defect which is now urged as an excuse for his failure to proceed. The fact of his accepting or refusing the bond was fairly left to the jury, to wit: "If he was satisfied that the security was sufficient, he cannot use his power arbitrarily and as a mere subterfuge to avoid the acceptance of a bond by saying it was insufficient, when in reality he knew and believed that it was sufficient." The eleventh, thirteenth and fourteenth assignments are overruled.

The plaintiff's fourth point was "If the jury believe that no demand was made upon the defendant by the plaintiff prior to suit brought, or notice, or demand given or made by the plaintiff to the defendant prior to suit brought, pursuant to the provisions of the act of assembly, the plaintiff cannot recover and your verdict must be for the defendant."

If the act complained of could not have been done in obedience to the commands of the writ, but was necessarily in contempt of it, the production of the writ would not protect the constable, and the case is not within the letter or the spirit of the statute, was held in Lantz v. Lutz, 8 Pa. 405.

In the case before us the process was regular, and such as the justice was authorized to issue. No action could be sustained against that officer. But the plaintiff complains that the constable, after he had a sufficient levy and had accepted a sufficient bond of indemnity, abandoned his levy and returned his writ. If these facts be as alleged and the verdict so determined them, the constable is neither justified by his writ, nor protected by the act of assembly of March 21, 1772.

The injury complained of was that it was not "done in obedience to his warrant" but in defiance of its mandate, and therefore no demand of a copy was required. The object of the sixth section of the act of 1772 was to protect constables and inferior officers from suffering injury for acts done strictly in obedience to their warrants, by reason of irregularity, for want of jurisdiction in the magistrates.

The authorities collated by Judge LEWIS in Mollison v. Bowman, 3 Clark Cases, 281 are convincing, and have been adopted by this court in Commonwealth v. Yeisley, 6 Pa. Superior Ct. 273.

In Commonwealth v. Warfel, 157 Pa. 444, the officer acted in obedience to the warrant, but in this the clear direction of the warrant was disregarded and disobeyed.

The judgment is affirmed.

Benjamin Davis, Appellant, v. James Hamilton and the Borough of Downingtown.

Grant—Restrictive application of the grant not favored.

A construction of a grant which would restrict the grantee to the specific use for which the grant is first applied is not favored, and will not be adopted unless the language of the grant unmistakably indicates an intention to restrict the use.

Waters and watercourse—Grant not restricted to primary uses.

A grant gave the grantee and his heirs and assigns "the free use and privilege of a certain stream of water that now runs through other lands" of the grantor, "and the unobstructed right of conveying the said water in an open race or watercourse to the saw, plaster and feed mill as it is now running, with the right of entering upon said premises at any and all times to cleanse, scour and repair the said race and watercourse." *Held*, That the successors in title of the grantor have no right of action against the grantee or his successor in title for changing the use to which the water is put after he receives it, nor for trespass on grantor's land to maintain and repair the watercourse to supply water for such changed use.

Argued Nov. 19, 1897. Appeal, No. 182, Oct. T., 1897, by plaintiff, from judgment of C. P. Chester Co., Oct. T., 1896, No. 22, on verdict for defendants. Before RICE, P. J., WICK-

HAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Trespass. Before WADDELL, P. J.

It appears from the record that this was an action of trespass, and the complaint alleged not only trespass upon plaintiff's land and digging it, but for virtually diverting a stream of water that passed through it.

The amount of damages as alleged does not appear in the paper-books, but security was entered in the sum of $200.

Other essential facts appear in the opinion of the court.

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned among others were (1, 2) In rejecting plaintiff's offers of evidence as to whether it was a special benefit to the plaintiff's property to have the feed, saw and plaster mill in operation near it; and whether it was a benefit to the neighborhood to have a feed, saw and plaster mill in operation there. (3) In the charge of the court as follows: "My impressions at this time are that the grant contained in these papers does give the Borough of Downingtown the right which they here claim." (4) In the charge of the court as follows: "For the purposes of this trial, we say to you that in our judgment the justification here is complete, and the borough had a right to do just what it has done, and that would seem naturally and necessarily to result in a verdict in favor of the defendants." (7) In substantially taking the case away from the jury and directing a verdict for the defendants.

William M. Hayes, with him *J. Carroll Hayes*, for appellant.—The Borough of Downingtown here attempts to sustain a most flagrant misuse of the grant, and to evade its manifest intention.

They buy of the Ringwait heirs an insignificant lot of 1.06 acres, barely enough to carry with it this water right, whatever it may be. They now set up that they are the rightful successors of Wilson Young in all the rights that he possessed, and in many he did not possess, and never thought of possessing.

The right was reserved in the deeds to "the owner of the adjoining mill property," to convey the water "to the saw, plaster and feed mill as it is now running." And now this bor-

ough claims to be "the owner of the adjoining mill property," in the sense expressed in the grant, and to have the right to divert the water to this alien and uncontemplated use.

However general the terms may be in which an agreement is conceived, it only comprehends those things in respect to which it appears that the contracting parties proposed to contract, and not others they never thought of: Doster v. Zinc Co., 140 Pa. 147; Codding v. Wood, 112 Pa. 371, 378.

Having a construction put upon his contract plaintiff undoubtedly has the right to show all the surrounding facts and circumstances as they existed at the time the contract was entered into: Penna. R. R.'s Appeal, 125 Pa. 189; Erwin's Appeal, 20 W. N. C. 278; Sergeant v. Ingersoll, 7 Pa. 340; Stevenson v. Stewart, 7 Phila. 295.

Where an easement is granted for a specified use, the grant must be strictly construed, and the use cannot be extended or enlarged beyond that specifically granted: Lewis v. Carstairs, 6 Wh. 193; Crosland v. Borough, 126 Pa. 511.

Alfred P. Reid, with him *Butler & Windle*, for appellees.—A construction of a grant which would restrict the grantee to the specific use for which it is first applied is not favored, and will not be adopted, unless the language of the grant unmistakably indicate an intention to restrict the use: 4 Leading Cases in the Law of Real Property, 334; Johnston v. Hyde, 33 N. J. Eq. 632; Iszard v. Water Power Co., 31 N. J. Eq. 511.

The grant to Wilson Young, his heirs and assigns, is unlimited in character because no restriction or condition is suggested, and it is declared that it is the "free" use. "Free" means, not subject to restraint or control, individual, exclusive, independent, opposed to common: Anderson's Law Dictionary, 478.

"By them freely to be possessed and enjoyed," show a strong intent to give a fee, and have been adjudged sufficient to convey it: Burkhart v. Bucher, 2 Binney, 455.

By a devise of the "free use of lands" the lands themselves will pass: Cook v. Gerrard, 1 Saunders, 181.

Where an easement is of a certain quantity of water the owner is not bound to use it in any particular manner, though the purpose for which it is used is mentioned in the grant. He may use the water in a different manner or at a different place,

or increase the capacity of the machinery which is propelled by it, without affecting his right: Iron Co. v. Iron Co., 107 Mass. 290; Gould on Waters, sec. 320; Johnston v. Hyde, 33 N. J. Eq. 632; Groat v. Moak, 94 N. Y. 115; Frey v. Witman, 7 Pa. 440.

Under a grant of the privilege of sufficient water to propel certain specified machinery, the grantee is entitled to the use of the water for any purpose not requiring a greater power than is reserved: Iszard v. Water Power Company, 31 N. J. Eq. 511; Angell on Water-Courses (5th ed.), sec. 149; Luttrel's Case, 4 Coke, 86.

OPINION BY ORLADY, J., February, 19, 1898:

This action of trespass was brought to recover damages for the unlawful entry by the defendant—by its workmen—upon the land of the plaintiff, and "digging and removing the soil, grass and herbage" from the same. The defense was that the defendant had a legal right to enter, and dig, by virtue of a grant conferred by the plaintiff's predecessors in title.

In 1870, Thomas C. Hoopes, the then owner of certain real estate in Chester county, conveyed a part thereof, viz: one hundred and five acres and one hundred and twenty-four perches to the plaintiff in fee, with a reservation as follows: "and subject also to the right of the owner of the adjoining mill property, his heirs and assigns, of the free use and privilege of a certain stream of water which now runs through to the property hereinbefore conveyed, and the unobstructed right of conveying said water in an open race or watercourse to the saw, plaster and feed mill as it is now running, with the right of entering on said premises at any and all times to clean, scour or repair said race or watercourse." The same day the foregoing conveyance was executed, Thomas C. Hoopes conveyed to Wilson Young twenty acres and forty-one perches adjoining the land sold to Davis. After the general description of the acreage is added, "Further grant and convey unto the above named Wilson Young, his heirs and assigns, the free use and privilege of a certain stream of water that now runs runs through other lands of the said Thomas C. Hoopes, and the unobstructed right of conveying said water in an open race or watercourse to the saw, plaster and feed mill as it is now running, with the

right of entering upon said premises at any and all times to cleanse, scour and repair the said race or watercourse."

When Hoopes sold the two parcels of real estate to the plaintiff and Young, there was in operation on the part sold to Young, about one hundred feet from plaintiff's line a saw, feed and plaster mill, which was propelled by power secured from the water flowing in an artificial race or watercourse, of about twelve hundred feet in length, from a dam on the plaintiff's property to the mill.

About twelve years before this suit was brought, the mill was abandoned by its owner, and the dam, which diverted the water from a creek into the race, was no longer kept in repair, so that at the time of defendant's entry on plaintiff's land they were both in a useless condition.

After the abandonment of the mill and dam, the water, which would have flowed in the race under the conditions existing in 1870, ran in the bed of the parent stream, and the avowed purpose of the entry on the plaintiff's land was to reconstruct the discarded dam, and clean, scour and repair the open race so as to again bring the water into its bed, by which a stream of water would be again brought to the old mill site, where the defendant had erected a pumping station for forcing the water from the stream to the borough of Downingtown.

On the trial, the plaintiff offered evidence to show that it was a special benefit to the then owner of plaintiff's property, and a general benefit to the neighborhood to have a feed, saw and plaster mill in operation on the site as occupied at the time of creating the grants and reservations described, to which offer, objection was made and sustained by the court. However general the terms may be in which an agreement is conceived, it comprehends only those things in respect to which it appears that the contracting parties professed to contract, and not others they never thought of: Doster v. Zinc Co., 140 Pa. 147. The fact that a mill was in operation within a short distance from his property may have been an element in determining the price the plaintiff paid for his property in 1870, but there was no provision that the water in the race, as it then ran, should be limited to the use to which it was at that time applied, or that it should be so continued, and the purchaser must be presumed to have known that such a business enterprise depends for its

permanency upon many matters which no one but the mill owner has the right to decide. Whether the business would be profitable or desirable; whether the property would be rebuilt after being burned down; whether the mill would run or stand idle, would be decided by the mill owner, and would be contingencies over which this plaintiff had no right to compel nor control.

The condition of the property and the circumstances of the parties are to be considered, for the purpose of ascertaining what they really meant by the reservation. Angell on Watercourses (7th ed.), sec. 185, applies only when the intention of the parties is not clearly expressed in the language used.

The proof offered was, at most, the mere opinion of the witness, and we do not think it was competent in this action of trespass for digging and removing the soil, grass and herbage.

The primal benefit under the grant and reservation mentioned, was for the owner of the adjoining mill property, and the plaintiff was entitled to enjoy all riparian rights incident to his ownership of the land through which the race flowed. From all that appears in the evidence, all of the water which came to the defendant's property, by way of the race, passed through the open race in the same way it did when the mill was in operation.

The grant was of the free use and privilege of the stream of water conveyed in an open race, as it then ran to the mill, and the right to make the necessary repairs to the race. "As it is now running," referred to the volume of water conducted by the open race of the course, width and depth as then visible to the parties, and not to the perishable structure at which the water was then used. As a further aid to interpret the grant to Davis, we have in the same deed a reservation of a specific volume of water "in a half inch pipe in the head of the race to the barnyard," and all the water that remained was for the adjoining mill owner.

A construction of a grant which would restrict the grantee to the specific use for which it is first applied is not favored, and will not be adopted, unless the language of the grant unmistakably indicates an intention to restrict the use: 4 Leading Cases of Law on Real Property, 334; Cress v. Varney, 17 Pa. 496.

The deeds are to be construed in the light of the state of the property at the date of their execution: Connery v. Brooke, 73 Pa. 80; 3 Washburn on Real Property, 384.

Until the water left the upper owner's land the lower owner had no right to any of it, and after it passed the line of the upper owner, it not only belonged to the lower owner but the upper owner had no right either to the water, or to direct how it should be used. His right to it was exhausted, and he had no interest in it: Washburn on Easements (4th ed.), 55, 437; 28 Am. & Eng. Ency. of Law, 1030 and notes.

If the plaintiff has a right of action against the first lower owner for changing the use to which the water is put after he receives it, why should he not as well have a similar right against an owner further down the stream? If the present owner of the mill site had erected a saw, plaster and feed mill instead of a pumping station, it would not be contended that he would not have had a right to do all that the defendant has done in bringing the water to the property.

In Penna. R. Co.'s Appeal, 125 Pa. 189, the facts are very different from this case. The examiner and master there found that "during certain portions of every year, the greater portion of the stream is thus led away from the complainant's property, and he has been deprived of its use for agricultural property," and the question was, "does this grant and reservation give the railroad company the right and privilege of taking and conveying the stream in question away from both these tracts of land for the distance of about one mile, and then use the water for railroad purposes." The grant was subject to the limitation that it was to be for the use of the Parke tract, and it was "to be conducted where it formerly was." The Supreme Court says of it, "we do not see how so limited a grant can now be used to divert the water of the stream entirely away from both tracts a distance of a mile or more by means of iron pipes, and the water used, not at all for the purposes of the Parke tract, but for supplying the engines of a railroad company, or the inhabitants of a town." In the case being considered there was no diminution in volume of the water, no diversion of any part of it on the plaintiff's land, no deprivation of the owner of any benefit to his land, no change in the course of the stream

in its width or depth. As far as the open race in his land is concerned, all benefits and advantages that he had at the time of his purchase in 1870 he has now.

We think the case was properly tried, the assignments of error are overruled and the judgment is affirmed.

Thomas McKeone v. John W. Christman, Appellant.

Appeals—Discretion of court—Refusal to open judgment.

There is no abuse of discretion in a refusal to open judgment when it appears from the depositions that the entry of a final judgment in favor of the defendant would be more than doubtful.

Argued Dec. 15, 1897. Appeal, No. 157, Oct. T., 1897, by defendant, from judgment of C. P. No. 4, Phila. Co., March T., 1897, No. 1049, for want of an affidavit of defense. Before WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to open judgment and let defendant into a defense.

Plaintiff brought suit on a contract in writing to do certain plumbing work according to the rules of the board of health. Statement was filed May 8, 1897. September 23, 1897, judgment was entered for want of an affidavit of defense. On September 29, 1897, rule was taken to open judgment and let defendant into a defense, proceedings to stay. On September 30, 1897, an affidavit of defense was filed. On October 23, 1897, depositions taken in support of the rule were filed. Rule discharged.

Errors assigned were in discharging defendant's rule to open judgment.

W. H. Peace and *A. E. Stockwell*, for appellant.

Horace Pettit, for appellee.

OPINION BY ORLADY, J., February 19, 1898:

A careful examination of the depositions taken in support of the rule to open the judgment, which was entered for want of

an affidavit of defense, shows that the defense to the action was more ingenious than real.

There was ample time within which to place the defense in proper form, and counsel frankly assumes the responsibility for the omission to file an affidavit to prevent judgment, but, unless there is more in the case than is shown in the depositions, the entry of a final judgment in favor of the defendant would be very doubtful.

There was no abuse of discretion in the refusal of the court below to open the judgment, and, under the facts presented, its action was entirely proper.

The judgment is affirmed.

John L. Moore v. William E. Phillips, Appellant.

Evidence—Parol evidence to explain purpose of a note admissible—Accommodation paper—Burden of proof.

Parol evidence is admissible to explain a receipt or entry in a bank book or account book, or to show the purpose for which a note is given.

Plaintiff sued to recover the amount paid by him to take up a note alleged to have been given as accommodation for defendant. Defendant claimed the note to have been given as payment for a horse sold by him to plaintiff. The court having charged the jury: "The plaintiff must convince you of the truth of his statement by the weight of the evidence, and his unsupported oath is not sufficient," defendant cannot complain.

Argued Dec. 9, 1897. Appeal, No. 153, Oct. T., 1897, by defendant, from judgment of C. P. Montgomery Co., March T., 1896, No. 132, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit. Before WEAND, J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $328.53. Defendant appealed.

Errors assigned among others were (1) In refusing binding instructions for defendant. (2) In charging the jury as follows:

"Now I charge you that if that was the understanding and agreement between these parties at the time, that is, that no consideration passed from the defendant to the plaintiff and that the defendant agreed to take it up when it came due, then it would be one of the cases in which the plaintiff can explain the transaction; but in order to do so, he must convince you of the truth of his statement by the weight of the evidence, and his unsupported oath is not sufficient. But if the facts and circumstances surrounding the transaction add weight to the plaintiff's testimony, and corroborate him, then it will be sufficient for him to maintain his action." (3) In charging the jury as follows: "If you believe the plaintiff's testimony, that this was purely an accommodation note, and that Mr. Phillips promised to take it up when it became due, then he is entitled to recover; if on the contrary you believe Mr. Phillips' testimony, that the note was given in payment of the horses, then your verdict will be in favor of the defendant." (5) In overruling the objection of the defendant to the plaintiff's offer as follows: To prove by Robert J. Fox, a witness, as follows: "Plaintiff offers to prove by the witness that he was called in to Mr. Moore's place the day after the horses were delivered at Mr. Moore's; that one horse was suffering with lameness and the other had a very severe cold—horse grippe, for the purpose of showing at the time the horses were delivered they were unsound."

M. M. Gibson, with him *N. H. Larzelere*, for appellant.—The rule is that a chancellor invariably refuses to decree on the uncorroborated testimony of a single witness: Bank v. Thompson, 144 Pa. 393; Van Voorhis v. Rea Bros. & Co., 153 Pa. 19; Braithwait v. Renshaw, 13 Atl. Rep. 319.

Henry M. Brownback, for appellee.

OPINION BY ORLADY, J., February 19, 1898:

This suit was brought to recover a sum of money which the plaintiff alleged he had been obliged to pay for the defendant, by reason of being an accommodation maker for him on a note which the defendant refused to pay at maturity. The proceeds of the note had been received by the defendant, and its pay-

ment was refused by the maker on the ground that the note was given as a consideration for two horses, which the defendant had sold to the plaintiff about the date of the note.

The controlling fact in the case was whether the note had been given for the two horses, or, as an accommodation to Phillips by Moore.

The testimony was spiced with a horse deal between the parties, and, true to the record of such transactions, these litigants had very conflicting impressions as to the condition and quality of the animals.

The jury adopted the theory of the plaintiff in finding that he was an accommodation maker, and that he had not bought the horses.

The plaintiff did not contradict the note, which stood for what it was worth, but, the effect to be given it, the use to which it was to be put, and the purpose of its form were proper items of proof which do not in any way contradict or reform it. The suit was not on the note, it was used only as an item of evidence to fix the amount the plaintiff had paid: Tasker's App., 182 Pa. 122.

Parol evidence is admissible to explain a receipt, an entry in a bank book or account book, or to show the purpose for which a note is given: Sheaffer v. Sensenig, 182 Pa. 634. The defendant offered evidence to show a consideration for the note by a sale of the two horses, which proof was rebutted by the evidence of Moore as to the condition of the horses and the reason for giving the note.

The defendant should not complain of the standard of proof exacted by the charge of the court, as all that was required under the whole evidence was to place the burden on the plaintiff. Whereas, the court said, "he (the plaintiff) must convince you of the truth of his statement by the weight of the evidence, and his unsupported oath is not sufficient. But if the facts and circumstances surrounding the transaction add weight to the plaintiff's testimony, and corroborate him, then it will be sufficient for him to maintain his action:" Conmey v. Macfarlane, 97 Pa. 361; Holohan v. Mix, 134 Pa. 88.

The evidence complained of in the fifth, sixth, seventh and eighth assignments was properly received as contradictory of the testimony of the defendant, and the credence to be given it

by the jury would depend entirely on the manner of the witnesses and subject-matter of their testimony.

The assignments of error are overruled and the judgment is affirmed.

Henry G. Schultz v. Eula Weir Burlock, Appellant.

Landlord and tenant—Lease signed by tenant only—Statute of frauds—Opening judgment.

A lease signed only by the lessee is not in contravention of the statute of frauds, one of the purposes of which was for the protection of land owners and was intended to guard them against prejudice in the proof of parol contracts; hence the requirements of the statute are answered by a memorandum in writing signed by the party to be charged therewith.

A lease signed and executed by the tenant and accepted by the landlord sustains a judgment in an amicable action in ejectment entered under the agreements of the lease, and there is no abuse of discretion in the refusal of the court below to open the judgment.

Argued Dec. 15, 1897. Appeal, No. 155, Oct. T., 1897, by defendant, from order of C. P. No. 4, Phila. Co., Sept. T., 1897, No. 208, refusing to set aside execution, open judgment and let defendant into a defense. Before WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to set aside execution, open judgment, and let defendant into a defense.

This was an amicable action in ejectment under an alleged lease under which proceedings the defendant was ejected. It appears from the record and the evidence that the judgment and proceedings were upon a lease which was executed by the defendant as lessee but not executed by the lessor, plaintiff, and for the defendant's alleged violation of the covenant to pay rent.

Error assigned was refusal to make absolute rule to set aside the execution issued in pursuance to a confessed judgment in ejectment, to open the judgment and let defendant into a defense.

A. E. Stockwell, for appellant.—It is submitted that the lessee is not liable upon the covenants, and the covenant to pay rent

is not obligatory: Jennings v. McComb, 112 Pa. 518; Pitman v. Woodbury, 3 Exch. Rep. 11; Wood's Land and Ten. sec. 214.

M. J. O'Callaghan, for appellee.

OPINION BY ORLADY, J., February 19, 1898:

The judgment which the court below refused to open was entered against the lessee who had signed and sealed it, and who was charged with the performance of the covenants in the lease for the premises which she occupied. The lease supporting the judgment provided for a tenancy from month to month, and possession of the premises was taken at the beginning of the term.

The landlord accepted the lease as made by the tenant, and, in affirmance of it, he made several demands for rent which proved futile in producing the money. He then entered the judgment in ejectment for recovery of possession of the property.

The case of Jennings v. McComb, 112 Pa. 518, is not a parallel one. The lease in this case is not in contravention of the statute of frauds one of the purposes of which was for the protection of landowners, and was intended to guard them against prejudice in the proof of parol contracts; hence the requirements of the statute are answered by a memorandum in writing signed by the party to be charged therewith. If therefore it is signed by the vendor alone and delivered to the vendee, who accepts and acts under it, it is all that the statute requires: Lowry v. Mehaffy, 10 Watts, 387; Cadwalader v. App, 81 Pa. 194.

The judgment was self-sustaining on the record: Stewart v. Lawson, 181 Pa. 549.

The assignments of error are overruled, and the judgment is affirmed.

C. C. Matten, Receiver, Appellant, v. A. C. F. Lichtenwalner, now Butz.

Mutual insurance—Cancelation of agreement—Assessments—Premium note.

A policy of insurance and the premium note given therefor constitute a contract which the parties may rescind by mutual agreement, and when such agreement is made in good faith the parties are as much bound as if the policy had been marked canceled and the premium note given up.

If a policy be in fact canceled, there can be no recovery of assessments on a premium note given by the insured unless a liability existed for losses sustained by the company prior to such cancelation.

Mutual insurance—Effect of cancelation—Question for jury.

In a suit by a receiver to recover on a premium note, an assessment authorized by the court, where the defense is that the policy had been canceled by agreement, and there is evidence which if believed would justify the jury in finding that such agreement had been made, the court properly left the case to the jury to be controlled by their finding of two facts, namely, cancelation of the policy and nonliability at the time of such cancelation by reason of the fact that the company had collected assessments with which, or had the means, to pay losses for which insured was liable as a member of the company at the time.

Argued Dec. 7, 1897. Appeal, No. 41, Oct. T., 1897, by plaintiff, from judgment of C. P. Lehigh Co., April T., 1889, No. 77, on verdict for defendant. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit. Before ALBRIGHT, P. J.

It appears from the record that this was an action to recover the amount due on an assessment directed by the court of common pleas of Schuylkill county, the affairs of the North Schuylkill Mutual Fire Insurance Company of Pennsylvania having gone into the hands of a receiver. The defense was, that the defendant, a policy holder, having paid all assessments due up to the time, surrendered a policy, which surrender was accepted by agreement of the company and promises given for the return of the premium note. The court below left the question to the jury as to whether such an agreement or surrender or cancelation was made, and whether all assessments for which the insured

was liable at the time of such cancelation had been paid by her to the company. The amount of the assessments sued for was $137.50.

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned among others were, (2) In refusing binding instructions for plaintiff. (3) In the general charge in submitting to the jury the question of the cancelation of defendant's policy, and the payment of all losses that had occurred down to date of cancelation, there being no evidence to warrant a finding in favor of defendant on these points, or the submission of this question. (4) In admitting testimony on behalf of the defendant purporting to show a surrender of the policy to the company, and that the company canceled the policy and relieved insured from all liability thereafter. (5) In admitting evidence on behalf of defendant tending to show that the policy was sent to the company and that the defendant received a notice from the company saying that the policy would be canceled as soon as the assessments were paid, and that the assessments were paid. (6) In admitting evidence, under objection, on the part of the defendant, to show that defendant had received a letter from the officers of the company, dated June 7, 1876, signed by the secretary; the purpose of the offer being to show that on June 7, 1876, assessment No. 2 was made by the company; to be followed by a notice from the company showing that the policy would be canceled on the payment of the assessments up to that date. This evidence to be followed by the resolutions of the board of directors directing this policy to be canceled.

Geo. J. Wadlinger and *James L. Schaadt*, for appellant.—The evidence failed to show that defendant either paid her pro rata share of all losses and expenses, or that her policy was canceled as provided by the by-laws, or by any one having authority to cancel the same and relieve the defendant from liability on her premium note. There not being more than a scintilla of evidence of a material fact, the question should not be submitted to the jury: Bank v. Wirebach, 106 Pa. 37; McCarthy v. Scanlon, 176 Pa. 262.

Failure to collect one assessment is not a waiver of the right to collect a subsequent one: Ins. Co. v. Cochran, 88 Pa. 230.

The question of the effect of a surrender of a policy to an agent has been ruled by the Supreme Court against the contention of the appellee, in the case of Ins. Co. v. Swank, 102 Pa. 17; Buckley v. Ins. Co., 83 Pa. 298.

In the case of Eichman v. Hersker, 170 Pa. 402, one of the defenses set up is very much like that of the defendant in this case.

John Rupp, with him *A. G. De Walt*, for appellee.—A reasonable statement of the rule is, that where there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury, no matter how strong or persuasive may be the countervailing proof: Raby v. Cell, 85 Pa. 80.

The liability of the defendant was limited to paying her proportionate share of the expenses incurred, which happened during the period of her membership: Ins. Co. v. Hartshorn, 90 Pa. 465; Akers v. Hite, 94 Pa. 394.

OPINION BY BEAVER, J., February 19, 1898:

"A policy of insurance and the premium note given therefor constitute a contract between the company and the insured and the parties usually have the same power to rescind it by mutual agreement as they had to make it." "A good faith agreement between the parties in a contract of insurance to annul it is valid." "The parties are as much bound by such an agreement as if the policies had been marked canceled and the premium note given up." "From thence the defendant had no insurance, she was not a member, nor was she liable on the notes." "The plaintiff has no more right to collect an assessment on such notes than on those which had been actually returned on like terms:" Akers v. Hite, 94 Pa. 394. The secretary of an insurance company is the proper organ of communication between the company and the assured. It was clearly within the scope of his authority to inform the assured of the cancelation of her policy, either upon failure of the assured to comply with the condition upon which it was issued and for the nonperformance of which the company had reserved the right to cancel it, or by agreement between the company and the assured. If the policy was in fact canceled, there can be no recovery of the assessments on the premium note given by the

defendant, unless she were liable for losses sustained by the company prior to such cancelation: Columbia Insurance Co. v. Masonheimer, 76 Pa. 138.

The defendant became a member of a Mutual Fire Insurance Co., and, upon notice of an assessment upon her premium note to pay losses, she surrendered her policy to the agent from whom she had received it and requested it to be canceled. It was sent by the agent to the company for cancelation. The secretary acknowledged its receipt for cancelation, and the defendant was informed by the agent that it had been canceled. She subsequently received notice of two assessments, in one of which there was a statement of assets and liabilities, showing abundance of assets for the payment of liabilities, with the assurance that, upon the payment of these assessments, the premium note would be returned, and she released from all further claims. These assessments were paid by her to the attorney designated by the company to receive them. Upon this state of facts, the court below was asked to say that the plaintiff was entitled to a verdict for the full amount of an assessment authorized by the court of common pleas of Schuylkill county, to be laid, nearly ten years after the payment of the assessments last mentioned by the defendant. It is not surprising that the court refused to do so.

The charge of the court, in submitting the case to the jury, is clear, full and fair. The only part of it with which the appellants find fault, is that in which the only question in the case which was submitted to the jury is stated by the court as follows: "The only question submitted to you and the only grounds upon which you could find for the defendant is this: Did the directors of the company cancel her policy? If they did not so act, then she continued to be a member and was liable to assessment. If you find that the proper authorities of the company did cancel her policy, then you will say that she is relieved from liability under its terms, provided it is proved by the defendant that all the losses that had occurred down to the date of that cancelation had been paid, i. e., realized by the company. When I say 'paid,' I do not mean that the company had actually passed the money over to the person or persons who had the loss, but that the company had realized from its members, including Mrs. Lichtenwalner, what they were bound

to pay to satisfy all those losses. If the defendant has not shown that she, Mrs. Lichtenwalner, had paid to the company her share of all the losses that were incurred down to the period when the policy was canceled, if it was canceled, then you will say that she still remained liable, notwithstanding the action of the directors in attempting to give her free and cancel her policy." In this there was no error. The jury was allowed to deal with but two facts, namely, the cancelation of the defendant's policy and her nonliability at the time of such cancelation, by reason of the fact that the company had collected assessments with which, or had the means, to pay losses for which she was liable as a member of the company at the time. As to these questions we cannot say that there was no evidence to go to the jury. If the issue had rested upon the surrender of the policy and the acknowledgment of its receipt for cancelation, there might have been some question in regard to it, but the acceptance by the defendant of the proposition contained in the notice of January 11, 1877, and the payment by her of assessments Nos. 2 and 3, which notice contained a statement of the assets and liabilities of the company justified the jury in reaching a conclusion not only that an agreement was thereby made for the cancelation of the policy but that the defendant also discharged the obligation to her co-members by such payments. There can be no doubt that, under this state of facts, if her property had burned down, she would not have been entitled to recover for its loss from the company.

The failure of the company to return the premium note and the fact that the receiver found it among its assets, when he took charge of them, amounts to nothing, if the agreement of cancelation was made, as found by the jury. As was said by Mr. Justice TRUNKEY in Akers v. Hite, supra, "The plaintiff has no more right to collect an assessment on this note than on those which had actually been returned on like terms." The first, second and third assignments of error are overruled.

In the fourth, fifth and sixth assignments, which relate to the admission of evidence, we can see no error. The testimony was relevant and entirely competent. It went to the root of the case, namely, the cancelation of the defendant's policy, and, under the authorities which we have cited herein was, we think, properly received.

The judgment is affirmed.

William M. Myers, Appellant, *v.* P. A. Fritchman, I. J. Bachman, and others, associated in an unincorporated association as Cradle of Liberty Council, No. 124, O. U. A. M., Freemansburg, Pa.

Sick benefit association—Claims of members—Proper tribunal—Jurisdiction, C. P.

The constitution and by-laws of an unincorporated sick benefit association derive their force from assent either actual or constructive, and are binding on its members. Courts are without jurisdiction to inquire into the merits of questions which have been passed upon by the organization in the regular course of business, provided those questions are within the scope of its powers.

A member of a sick benefit association cannot recover in the courts a sum alleged to be due him when the regular tribunal constituted by the constitution to pass on such claims has reported adversely after regular proceedings and opportunity for a full hearing.

Argued Dec. 8, 1897. Appeal, No. 81, Oct. T., 1897, by plaintiff, from judgment of C. P. Northampton Co., Sept. T., 1896, No. 69, on verdict for defendant. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Appeal from judgment of a justice of the peace in favor of plaintiff for $223. Before SCHUYLER, P. J.

It appears from the record and evidence that plaintiff claimed sick benefits from an unincorporated sick benefit association, the defendant, of which he was a member. It appears that the plaintiff's claim had been submitted in accordance with the provisions of the constitution to the tribunal of the association constituted thereby for the determination of such matters, by which tribunal it had been rejected.

The court charged the jury as follows:

The facts admitted by the pleadings are as follows: The plaintiff submitted the claim in suit to the decision of the local council defendant, who rejected the claim, whereupon the plaintiff appealed to the state council, which dismissed the appeal.

[By section 5, article 2, of the constitution, it is provided that the decision of the local council upon claims of this kind is final, subject to an appeal to the state council.

In the opinion of the court this constitutes the claim, an adjudicated claim, and there can be no appeal from the decision of the local council under any circumstances to the court of common pleas for the purpose of having the claim readjudicated.] [1]

Verdict and judgment for defendant. Plaintiff appealed.

Errors assigned were (1) To portions of the judge's charge, reciting same. (2) In directing the jury to find a verdict for the defendant.

William C. Loos, for appellant.—A by-law imposing forfeiture is void in the absence of a statute expressly conferring power: Phillips v. Allen, 41 Pa. 481.

Where a forfeiture is set up in defense, the burden is upon the association to prove the regularity of the proceedings: Crumpton v. Pittsburg Council, 1 Pa. Superior Ct. 613.

Conflicting circumstances or allegations should be submitted to the jury for determination: Moore v. Miller, 8 Pa. 272.

There is no error in the constitution or prohibition against a member's right to have the justice of his claim adjudicated by the courts. A similar defense was introduced and rejected in Dobson v. Hall, 1 Dist. Rep. 401.

A by-law that attempts to oust the jurisdiction of the court is void: Sweeney v. Beneficial Soc., 14 W. N. C. 466.

The court has jurisdiction to examine into the proceedings of beneficial associations: Manning v. Kline, 1 Pa. Superior Ct. 210.

O. H. Meyers, for appellees.—The courts entertain a jurisdiction to preserve these tribunals in the line of order and to correct abuses; but they do not inquire into the merits of what has passed in rem judicatum in a regular course of proceeding: Porter v. Boone, 8 W. & S. 251; Toram v. Beneficial Assn., 4 Pa. 519.

The constitution and articles of a voluntary association are law as to its members: Moxey's Appeal, 9 W. N. C. 441; Sperry's Appeal, 116 Pa. 391; Com. v. Union League, 135 Pa. 301.

OPINION BY SMITH, J., February 19, 1898:

The plaintiff, a member of Cradle of Liberty Council, O. U. A. M., No. 134, Freemansburg, Pa., an unincorporated society, sues the society for sick benefits to which he alleges he is entitled under its constitution and by-laws. The defense is that this constitution provides for the adjudication of all claims by tribunals of the order, and that the plaintiff has been heard by these and determined against him.

One section of the constitution referred to provides for the reference of certain cases to a physician, "whose report, if approved by the council, shall be final, subject to an appeal to the State Council;" and another section provides for an appeal from the state to the national council. The plaintiff's case is one that falls within these provisions.

There is no controversy as to the facts on which the defense rests. They are set forth in an affidavit of defense, the averments of which, not being negatived by the declaration or denied by replication, are, under a rule of the court below, to be taken as admitted. An adverse report of a physician on the plaintiff's claim, supplemented by a like report by the relief committee, and a further investigation made at the plaintiff's request, with the same result, was duly approved by the local council, and on an appeal by the plaintiff was approved by the state council. Thereupon the plaintiff, instead of appealing to the national council, brought this action.

It has long been settled that when one becomes a member of such an organization as this he accepts and is bound by the rules adopted for its government. His rights and liabilities are regulated by those rules, whether they be called a constitution, or by-laws, or both, provided they are not in contravention of the laws of the commonwealth: Com. v. Society, 8 W. & S. 247; Com. v. Union League, 135 Pa. 301. This doctrine has been recognized in many other cases, and is in conflict with none. While perhaps most of the reported cases were begun by mandamus, the principle applies to all proceedings in which rights arising from membership are involved. The question was raised in an action on the case to recover benefits, in Society v. Vandyke, 2 Wharton, 309, and the doctrine was there laid down that the by-laws of a body like the present, derive their force from assent, either actual or constructive, and are binding

on its members. This principle has been adhered to ever since. In Com. v. Benef. Society, 8 W. & S. 247, supra, it was said by SERGEANT, J. "The charter to the defendants below, provides for the offense, directs the mode of proceeding, and authorizes the society, on conviction of the member, to expel him. This has been done, after a hearing and trial, according to the mode prescribed; at least, there is no allegation of the irregularity of the proceeding. Under these circumstances the sentence is conclusive on the merits, and cannot be inquired into collaterally either by mandamus or action, or in any other mode." Courts are without jurisdiction to inquire into the merits of questions which have been passed upon by the organization in the regular course of the business, provided those questions are within the scope of its powers. When the organization acts in a judicial capacity with reference to matters of which it has undoubted jurisdiction under its laws, its decisions are conclusive on members and all those who claim under its laws; hence they cannot resort to the courts with alleged grievances which have thus been passed upon. By uniting in membership they designate the organization as the forum of their choice relative to all membership questions, and its rules determine their rights and duties. Courts may judge of the cause so far as to ascertain whether it be within the jurisdiction of the organization, and whether the prescribed forms have been observed in dealing with the question, but cannot review the case on the merits: Com. v. Union League, supra. In McAlees v. Order Iron Hall, 12 Cent. Rep. 415, it was said, per curiam: "We have often held that a member of a beneficial society must resort for the correction of an alleged wrong, to the tribunals of his order, and that the judgment of such tribunals, when resulting fairly from the application of the rules of the society, is final and conclusive." This case bears some features similar to those of the case in hand, notably the provisions with reference to the adjustment of differences and the finality of the judgment pronounced. The policy of the law is to encourage the amicable settlement of differences arising in those societies, in accordance with their rules, when within the scope of their objects, and thus avoid the annoyance and expense of public legal controversies over private matters, in violation of charter obligations. It was said by Chief Justice GIBSON in Society. v Vandyke, supra, "Even

were there not a sentence in the way, payment of his stipendary allowance could not be enforced by action. The society never consented to expose itself to the costs and vexation of an action for every weekly pittance that might be in arrear."

As has been said by our highest court, "a member must resort to the tribunal of his order, and the judgment of such tribunal is final and conclusive." In seeking rights arising under the constitution of the order, he must pursue the methods provided by this constitution. In the present case, the order to which the plaintiff belonged has, by its constitution, provided tribunals for the settlement of his claim. He was bound to resort to these, and is concluded by their adjudication. He does not deny that their proceedings in relation to his claim were regular, nor that he had full opportunity of being heard. Their jurisdiction is not to be transferred to the courts of law because of an adverse decision, or his failure to employ or to exhaust the methods provided for its exercise. The court below, therefore, properly directed a verdict for the defendants.

Acetylene Light, Heat & Power Company v. Charles Beck, Appellant.

Practice, C. P.—Insufficient affidavit—Subscription to stock—Alleged inducing promises.

An affidavit is insufficient which sets up alleged unfulfilled promises and unrealized expectations as a defense to clearly expressed obligations of a written contract.

In a suit on a sealed contract to recover a subscription to stock, in terms an unqualified agreement to pay fifty per centum of the price down and the balance as called for by the corporation, the affidavit of defense held insufficient which rested the defense on certain alleged parol promises upon which the subscription was induced and which had not been fulfilled. *Held*, insufficient also in that it did not allege that the promises were omitted from the written contract by fraud, accident or mistake, that part of the written contract itself had been violated, that it did not specify wherein the alleged promises were false or fraudulent, or state any specific loss.

Argued Dec. 15, 1897. Appeal, No. 140, Oct. T., 1897, by

defendant, from judgment of C. P. No. 1, Phila. Co., March T., 1897, No. 237, for want of a sufficient affidavit of defense. Before WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit to recover unpaid subscription to stock.

Plaintiff's statement set out an agreement under seal whereby the defendant subscribed to eighty shares of the capital stock of the plaintiff company, agreeing to pay fifty per centum at the time of signing the agreement and to pay the additional fifty per centum when and as the same shall be called by the board of directors of the corporation.

Subsequent to the payment of the original fifty per centum an assessment of ten per cent on the stock had been called and paid for by the defendant, and subsequently the assessment, which is the subject of the suit in controversy, was made on April 20, 1896, which the defendant refused to pay.

Defendant in his affidavit of defense alleged that the subscription was obtained by reason of false and fraudulent statements made by the officers of the company at the time said subscription was solicited and obtained. That the company agreed to supply deponent with gas and failed to do so, that access to the books of the company is denied the stockholders; that the officers control a large majority of the stock which they voted to themselves, and have passed a by-law whereby said officers continue to elect themselves to office; that after the defendant subscribed, the officers of the company issued another million dollars' worth of stock which they claimed was used to pay for the right to use said gas within a circuit of ten miles of the city hall in Philadelphia, which is not as great a territory as is covered by the county of Philadelphia, in which it was alleged the right of territory had been secured; that the company had squandered large sums of money in experimental work and that up to the present time had failed to manufacture and introduce a marketable gas, and that defendant believed the company to be absolutely insolvent and unable to carry out any of the representations made by it to induce subscriptions to its stock.

Judgment for plaintiff for $400, with interest from October, 1, 1896. Defendant appealed.

Error assigned was entry of judgment for want of a sufficient affidavit of defense.

Edwin O. Michener, for appellant.—It is well recognized in Pennsylvania that any false or fraudulent statements made by officers of the company, to induce subscriptions to its stock, are a good defense in a suit brought by the company, although they would not be a good defense in a suit brought by a receiver. Among the later cases upon this subject are Ins. Co. v. Humble, 100 Pa. 495; Dettra v. Kestner, 147 Pa. 566.

Harry B. Gill, with him *Read & Pettit*, for appellee.

OPINION BY SMITH, J., February 19, 1898:

In this action, brought on a contract of subscription to stock, a judgment was entered for the plaintiff for want of a sufficient affidavit of defense. The subscription of the defendant was in writing, under his hand and seal, and in law is an ordinary contract: Railroad v. Graham, 36 Pa. 77. And with reference to other subscribers, it is a trilateral contract: Railroad v. Conway, 177 Pa. 364. In terms, it is an unqualified agreement to purchase eighty shares of stock, fifty per centum of the price to be paid down, and the balance as called for by the corporation. It contains no other condition or limitation. More than one year after its execution, the defendant paid an additional ten per centum of his subscription, upon call by the directors; but a few months thereafter, when duly called upon for another instalment of ten per cent, he refused to pay on the ground, substantially, that certain alleged parol promises, set out in the affidavit of defense, and upon the faith of which he now says he subscribed, have not been fulfilled. It is not alleged that the parol agreement, now set up in defense, was omitted from the writing by fraud, accident, or mistake; nor is it averred that any part of the written contract itself has been violated by the plaintiff. The affidavit alleges that the subscription of the defendant was obtained by reason of false and fraudulent representations, but does not specify wherein the alleged parol statements were false or fraudulent. The most that can be said of the affidavit is that it recites alleged, unfulfilled promises, and unrealized expectations. Nothing definite is given, showing or

alleging the existence of fraud when the contract was made, and upon the strength of which the subscription was procured. No specific loss is stated upon which even a defense of set-off could be based. The defendant has evidently lost faith in the enterprise, and therefore seeks to avoid further liability. The main features of the affidavit allege unperformed promises, and misappropriation and waste of the company's assets. But these allegations are not sufficient to bar judgment: Iron & Steel Co. v. Selliez, 175 Pa. 18. If, as the defendant seems to believe, the affairs of the corporation have been mismanaged, and it has become insolvent, the law affords a remedy for those ills. But they cannot be cured or lessened by withholding from the company a legitimate part of its assets, the use of which might enable the officers to successfully carry on its corporate business.

Conceding the truth of the affidavit, and giving full force to all proper inferences therefrom, enough has not been shown to entitle the defendant to go to a jury.

Judgment affirmed.

Phillip Yedinskey *v.* Felix Strouse, Appellant.

Real estate broker—Commissions—Action without license—Burden of proof.

Where a person claims for services rendered about the sale of real estate under a contract and not as a real estate broker, it devolves on the employer, if he relies on the fact that plaintiff was a real estate broker, to show that fact, and the question when properly raised is for the jury.

Real estate—Right to recover for sale under contract—Broker.

Any person may lawfully employ one, who is not a real estate broker, to buy or sell real estate, and when such employment takes place and labor is done under the employment, it must be paid for.

Argued Dec. 10, 1897. Appeal, No. 169, Oct. T., 1897, by defendant, from judgment of C. P. Schuylkill Co., May T., 1896, No. 492, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit to recover for services in selling real estate. Before BECHTEL, J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $325.80. Defendant appealed.

Errors assigned were (1) In not affirming the defendant's first point, to wit: "That the testimony of the plaintiff and his witnesses shows that the plaintiff was in the business of buying and selling real estate, and that he had no license, and therefore under all the evidence the plaintiff cannot recover," and in making the following answer to said point: "This we decline to say to you, and have already indicated to you that we leave the matter to you as a question of fact." (2) In not affirming the defendant's third point: "That under all the evidence the plaintiff cannot recover," and in making the following answer: "This we refuse to say to you, and leave you to decide what your verdict shall be."

Wm. Wilhelm, for appellant.

D. C. Henning, with him *W. J. Whitehouse*, for appellee.

OPINION BY WICKHAM, J., February 19, 1898:

The defendant, desiring to sell certain real estate in Pottsville, at the price of $20,000, offered the plaintiff who was the court interpreter of Schuylkill county $300 to find him a purchaser. The plaintiff secured a buyer, who bought at the price fixed. The employment of the plaintiff, although denied by the defendant, was found by the jury on ample evidence, to have taken place. When the plaintiff demanded his compensation, it was refused, hence this suit.

The agreement between the parties was made in 1895 or earlier, the sale took place in the fall of 1895, about the month of November, and this case was tried in the court below on September 25 and 26, 1897. These dates are quite important, in view of the main defense set up, and the nature of the evidence relied on to sustain it.

At the trial the defendant, in addition to denying the contract, alleged that the plaintiff was a real estate broker and was

not entitled to recover, because he had not the license required by Act of April 10, 1849, sec. 18, P. L. 573. This is the only matter of defense urged here.

The evidence that the plaintiff was a real estate broker when he made his contract with the defendant, or found the purchaser, was not so clear as to justify the court in saying, as a matter of law, that he was one at that time. This question was, therefore, properly referred to the jury who found in the plaintiff's favor.

The plaintiff does not speak English with ease or correctness, and in testifying regarding the matter, nearly always spoke in the present tense. Whether he meant, by any of his answers, to convey the idea that he had been buying and selling real estate for others as a business, as far back as the year in which the defendant's property was sold, was so uncertain, as to make it the duty of the court to leave the question to the jury, as one of fact. Outside of the plaintiff's own testimony, there is not much to show that he was a real estate broker at any time. It is true, that another witness stated that the plaintiff had "bought or sold several properties" before he had acted for the defendant, but an occasional or casual sale does not necessarily make the negotiator thereof a broker, within the meaning of the act: Chadwick v. Collins, 26 Pa. 138.

We quote from the decision just cited: "Any person may lawfully employ one, who is not a real estate broker, to buy or sell real estate, and when such employment takes place, and labor is done under the employment, it must be paid for; at all events, the law will not lend its aid to the employer, to defraud the employee out of his just reward.

"Practically there is no difficulty in ascertaining who are engaged in the business or occupation of real estate brokers. It is those who hold themselves out to the public as such, generally having offices or places of business, the character of which is indicated by clear and unmistakable evidence."

As the plaintiff in the present case did not declare as a professional real estate broker, but rested his claim on a special contract, made as an ordinary individual with the defendant, it devolved on the latter if he chose to defend on the ground that the plaintiff was a broker, to show that fact, in some way. This, he contends, was done through the plaintiff's own admissions in his testimony. Had the inquiry related to the fact of the

plaintiff having been engaged in the business or occupation of a real estate broker at or about the time of the trial, or within a few months before, instead of at an earlier period, the statements he made in testifying might have warranted the court in holding, that he was subject to the act and, therefore, bound to have a license, although he denied that he was a broker and it did not appear that he advertised or had an office. But, the important question was, whether he was a broker as early as 1895, and this under the doubtful evidence was for the jury to decide.

The case of Johnson v. Hulings, 103 Pa. 498, relied on by the defendant, does not govern the one in hand. There the plaintiff admitted and the jury, in a special verdict, found that at the very time the contract sued on was made, he was engaged in buying and selling real estate for others, on commission, as a business, and had no license.

In view of the finding of the jury, in the present case, that the plaintiff, at the time of his dealings with the defendant, was not a real estate broker, it is unnecessary to consider the evidence relating to the matter of the license.

Judgment affirmed.

The Philadelphia Bourse *v.* William C. Downing and Robert W. Downing, Jr., Copartners, trading as Downing Brothers, Appellants.

Contract—Rescission of—Stock subscription—Misrepresentation.

Benefits to be derived from the founding of an institution to the stock of which the defendant was invited to subscribe, may or may not result as alleged, but disappointment as to the result cannot be set up in defense to a suit to recover a subscription to stock when the subscriber had quite as good opportunities of judging as the person who solicited and secured the subscription.

Practice, C. P.—Insufficient affidavit—Contract—Misrepresentation.

An affidavit is insufficient, which, setting up two distinct representations as inducing a subscription to stock of a corporation, is indefinite in its allegations as to which is false; it is insufficient moreover, when alleging mere expressions of opinion, it fails to aver a distinct statement of material

fact known to the solicitor and unknown to the subscriber, which if false would justify a rescission of the contract.

Argued Dec. 15, 1897. Appeal, No. 138, Oct. T., 1897, by defendant, from judgment of C. P. No. 3, Phila. Co., Sept. T., 1893, No. 726, for want of a sufficient affidavit of defense. Before WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit to recover subscription to the capital stock of the Philadelphia Bourse amounting to $500 with interest from respective dates of calls thereon.

The statement alleged that defendant subscribed for ten shares par value $50.00 of the capital stock of the Philadelphia Bourse, to which the terms of the subscription were fully complied with, and which became due on the first days of the months of April, May and June. That demands for said payments were duly made upon the days and payment refused. Defendants filed the following affidavit and supplemental affidavit of defense.

The affidavit of defense was as follows:

Deponent avers that on or about December 10, 1891, the agent of the said plaintiff, specially authorized for that purpose, did solicit the subscription of the said defendants to the capital stock of the said plaintiff, and acting within the scope of the said authority, did represent to the said defendants, that all of the largest retail coal dealers in the city of Philadelphia had or were about to subscribe to the said stock, and that the enterprise was intended to foster and encourage the trade of the retail coal dealers in the city of Philadelphia, and who, if thus interested as stockholders, would be of service to each other.

Deponent avers that the said representations so made were false and were made with the intention of deceiving and misleading the said defendants; wherefore and whereby the said defendants do elect to rescind the said contract for said subscription to the stock of the plaintiff, and repudiate all liability thereunder.

The supplemental affidavit of defense was as follows:

That the representations referred to in the affidavit of defense heretofore filed, made to defendants by said agent of plaintiff, were false, and at the time they were so made they were known

by said agent to be false. That said false and fraudulent misrepresentations were the inducing cause to obtain the said subscription of these defendants, and said subscription was made solely and entirely by reason of the said misrepresentations being made to these defendants, and believed and relied upon by them, and that said subscription would not have been made except that the defendants relied and believed that the statements and representations made by the agent of the said plaintiff at the time of obtaining the said subscription were true. That these defendants did elect to rescind the said contract to subscribe to the stock of the said plaintiff as soon as the fraud practiced upon them, as above referred to and set forth in the original affidavit of defense, was discovered by them.

Judgment for plaintiff for $500 with interest. Defendant appealed.

Error assigned was making the rule absolute for judgment for want of a sufficient affidavit of defense.

F. R. Shattuck, for appellants.—There is no distinction to be drawn between the facts in this case and those in the case of Lare v. Westmoreland Specialty Company, 155 Pa. 33. To the same effect, also, is the case of Howard, Receiver, v. Turner, 155 Pa. 349.

Charles A. Chase, with him *Charles C. Lister*, for appellee.—A subscription to a joint stock company is not only an undertaking to the company, but with all other subscribers, and even if fraudulent as between the parties is to be enforced for the benefit of the others in interest: Graeff v. R. R., 31 Pa. 489.

In Guarantee Co. v. Mayer, 141 Pa. 511, an allegation that a stock subscription was obtained upon the representation that branch offices would be established, which were not, was held to be insufficient to prevent summary judgment.

Opinion by Beaver, J., February 19, 1898:

The affidavit of defense in this case was clearly insufficient. It was indefinite. There are at least two distinct representations set out in the affidavit. Which of them is alleged to be false? Upon which of them did the defendants rely? We

cannot tell. It is important, from every point of view, that the affidavit should set forth whether they relied upon the representation "that all of the largest retail coal dealers in the city of Philadelphia had or were about to subscribe to the said stock" or upon that which alleged "that the enterprise was intended to foster and encourage the trade of the retail coal dealers in the city of Philadelphia and who, if thus interested as stockholders, would be of service to each other."

Independently of this, however, were the representations such as would justify the rescission of the contract set forth in the plaintiff's statement? We think not. At the most they constituted the expression of an opinion as to what would be done by the largest retail coal dealers in the city of Philadelphia, and as to the effect which such subscription would have in bringing these traders together for their mutual benefit. There was no distinct statement of a material fact known to the person alleged to have been the agent of the plaintiff, and unknown to the defendants, which would justify the rescission of the contract. The benefits to be derived from the founding of the institution, to the stock of which the defendants were invited to subscribe, may or may not result as alleged, but as to this they had quite as good opportunities of judging as the person who secured their subscription.

There is no allegation that they made inquiry as to who the largest retail coal dealers, whose subscriptions were expected, were. Indeed the answer to such a question would necessarily have been a matter of conjecture. Equally difficult would it have been to determine who the largest retail coal dealers were. Opinions as to that question would doubtless differ. The representations lack all the essential elements necessary to establish fraud, which will justify the rescission of a written contract: Southern Development Co. v. Silva, 125 U. S. 247; Brown v. Eccles, 2 Pa. Superior Ct. 192.

The judgment is affirmed.

Mary B. Kleinert v. Catharine A. Rees and P. Ashman Rees, trading as Delaware Ice & Coal Co., Appellants.

Negligence—Duty of driver approaching crossing—Question for jury.

It is the duty of drivers of wagons to approach street crossings, recognizing the fact that people may attempt to cross at that street, and it therefore becomes a duty to have the team in such condition as to be able to stop it.

A driver of an ice wagon turned so suddenly from Arch to Juniper street that the near horse struck a woman just stepping from the curb upon the crossing. The evidence of negligence was clear and abundant, although to some extent denied. *Held*, that the question of negligence was properly left to the jury.

Argued Oct. 21, 1897. Appeal, No. 53, Oct. T., 1897, by defendants from judgment of C. P. No. 1, Phila. Co., June T., 1894, No. 450, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY and PORTER, JJ. Affirmed.

Trespass for personal injuries. Before BRÉGY, J.

It appears from the evidence that plaintiff was walking on Juniper street in the city of Philadelphia which runs north and south, east of Broad street, and is twenty-eight feet in width, having seven feet wide sidewalks on each side and a road bed fourteen feet in width. Arch street runs east and west at right angles with Juniper street, and is of the width of seventy-two feet, having sidewalks on each side of eighteen feet and a road-bed of thirty-six feet. On Arch street there are constructed two passenger railway tracks occupying thirteen feet ten and a half inches in the center of the street. The plaintiff was on the east side of Juniper street between Arch and Filbert streets, intending to take a car on Arch street going west on the north track. Defendants' ice wagon with two horses attached was on the south track on Arch street going east from Broad, and was turned into Juniper street, and the plaintiff, as she stepped off the sidewalk of Juniper street, was struck by one of the horses and was knocked down and trodden upon.

There was evidence tending to show that plaintiff saw the wagon coming down Arch street but supposed, from its speed,

that it intended to go east past Juniper street. The court left the question of contributory negligence and defendants' negligence to the jury.

Mary Kleinert and her husband, George J. Kleinert, brought separate suits, but these two actions were consolidated under the act of May 18, 1895, and tried as one, and two verdicts rendered.

Verdict and judgment for Mary B. Kleinert for $1,000.

Verdict and judgment for George J. Kleinert for $300. Defendants appealed.

Error assigned was in declining defendants' sixth and last point, which point and answer thereto are as follows: "There is no such evidence of negligence in this case as ought reasonably to satisfy you thereof, and therefore I instruct you on the whole case—your verdict should be for the defendants. *Answer:* The last point I decline."

James Alcorn, for appellants.—The circumstances of this case indicate contributory negligence on the part of the plaintiff. The case is very similar to Houser v. Railroad Co., 147 Pa. 440. See also Carson v. Railroad, 147 Pa. 219; Holden v. Railroad, 169 Pa. 1; Funk v. Traction Co., 175 Pa. 559; Waters v. Wing, 59 Pa. 211; Marland v. Railroad, 123 Pa. 487.

Charles A. Chase, for appellee.—Relied upon Christian v. Ice Co., 3 Pa. Superior Ct. 320; Bodge v. City, 167 Pa. 492.

Opinion by Beaver, J., February 19, 1898:

No fault is found with the manner in which the facts of this case were submitted to the jury, if there were any facts to be submitted. The court below was asked to say in a point submitted by the appellants: "There is no such evidence of neglect in this case as ought reasonably to satisfy you thereof and, therefore, I instruct you, on the whole case, your verdict should be for the defendants," which was declined.

The wagon of the defendants was being driven rapidly; so rapidly that the witness, Mrs. Young, says: "I knew it was a heavy wagon coming down the street and judged it was a runaway." As to this the testimony of the plaintiff and the only

other living eye-witness of the accident who was called is clear. The turn into Juniper street was made unexpectedly and sharply; the plaintiff supposed the wagon was to continue its course down Arch street. The accident occurred at the curb either just as she stepped down from the pavement on to the street or was attempting to step back from the street to the pavement. It is immaterial which. The significant fact is that she was struck by the near horse, that is the horse on the left side, at the curb, which would clearly indicate that the turn from Arch street was made so hurriedly that the driver was unable to bring his horse in to the middle of Juniper street at the crossing.

No effort was made to stop the wagon. The driver says: "I hollered and she seen the peril she was in and backed back and fell as the horse hit her—the horse on the near side." It is evident that the driver saw the peril as soon as the plaintiff. He made no effort to stop the horses before the accident, and yet he did stop them as soon as it happened.

As we said in Christian v. Commercial Ice Co., 3 Pa. Superior Ct. 320, "It was the duty of the driver to approach the street crossing recognizing the fact that people might attempt to cross at that street and, therefore, it was his duty to have his team in such a condition that, if the occasion required, he would be able to stop it." If his team was in such a condition as would enable him to stop it, it was his duty to do so. If it was not, it was a plain violation of his duty to pedestrians. In either case it was negligence. The evidence of negligence was clear and abundant, although to some extent denied. It was for the jury to say whose testimony was the more worthy of credence. It would have been manifest error for the court to have affirmed the defendants' point.

The judgment is affirmed.

Frank N. Coble *v.* Joseph S. Zook, Appellant.

Practice, C. P.—Effect of failure to demur.

If a statement is defective defendant should demur; having joined issue and gone to trial he is bound by the evidence as shown in the testimony at the trial, especially when the same is received without objection on his part; it is then too late to set up want of consideration in the agreement sued upon.

Question for jury—Credibility of witnesses.

There being evidence, though conflicting, sufficient to sustain a verdict either way on the issue raised according as credibility is accorded to the testimony of one side or the other, the question is properly for the jury.

Argued Nov. 10, 1897. Appeal No. 26, Oct. T., 1897, by defendant, from judgment of C. P. Lancaster Co., April T., 1896, No. 110, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Appeal from judgment of justice. Before LIVINGSTON, P. J.

It appears from the record that this is an action to recover the sum of $250 with interest alleged to be due and owing to plaintiff from defendant under and by virtue of a verbal agreement.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $266.25. Defendant appealed.

Errors assigned were (1) In refusing defendant's second point: "2. No consideration to the defendant for his alleged agreement with plaintiff is set forth in the statement, and the verdict must be in favor of the defendant." (2) In affirming plaintiff's point which point is as follows: "The plaintiff having submitted testimony in the above case which is uncontradicted, the court is respectfully asked to charge the jury that the verdict must be in favor of the plaintiff and against the defendant for the sum of $250, with interest from January 1, 1896." (3) In not leaving the credibility of the witnesses to the jury.

J. Hay Brown and *A. J. Eberly*, with them *W. U. Hensel*, for appellant.—Under a current of decisions, the sufficiency of the

testimony and the credibility of the witnesses are always to be left to the jury. It is their peculiar province to pass upon the same; and absolute binding instructions, without leaving the credibility of the witnesses to the jury, is error: Fullam v. Rose, 160 Pa. 47.

The credibility of a witness—though contradicted—is always for the jury: Grambs v. Lynch, 20 W. N. C. 376; Heister v. Lynch, 1 Yeates, 108; Waters v. Burgess, 14 Atlan. 398.

E. M. Gilbert, for appellee.—On the question of consideration cited McClymonds v. Stewart, 2 Pa. Superior Ct. 310; Dutton's Estate, 181 Pa. 426; Greeves v. McAllister, 2 Binn. 591.

It is true that the plaintiff did offer in evidence defendant's affidavit of defense for the purpose of showing everything therein that defendant admitted, and so stated the purpose of the offer: Bowen v. DeLattre, 6 Wharton, 430.

Where, upon the whole case, a trial judge conceives it to be his duty to give the jury binding instructions the answers to points become mere dissertations of law. The correctness of the direction to the jury to find in one way or another depends on the facts admitted or established, and if the conclusion is right on the facts, no error is committed. The same principle has been held in Maynard v. Lumberman, 20 W. N. C. 272; Cougle v. McKee, 151 Pa. 602; Holland v. Kindregan, 155 Pa. 156.

OPINION BY BEAVER, J., February 19, 1898:

If the statement was demurrable, defendant should have demurred to it: Newbold v. Pennock, 154 Pa. 591. Having filed his affidavit of defense, joined issue and gone to trial, he is bound by the evidence of consideration for the agreement, as shown in the testimony at the trial, the same having been received, without objection on his part. The first assignment of error is, therefore, overruled.

The second and third assignments relate to the same question. The record shows that the plaintiff offered in evidence the statement and the affidavit of defense. The object of the offer is not stated; but, having offered them, he is, of course, bound by the issue which they raised. The affidavit of defense

contains a distinct denial of the plaintiff's claim and sets forth that "he (defendant) never made any agreement to pay plaintiff two hundred and fifty dollars, as is alleged and set forth in the statement filed, but it is true that he did agree that, in the event of his being able to resell the premises referred to in the statement as having been purchased by him at sheriff's sale and upon his being able to reimburse himself for all moneys that he had therein, he would then, upon the resale of the said premises by him, at a price sufficient to reimburse himself for all moneys that he had therein and to enable him to pay the said sum of two hundred and fifty dollars as aforesaid, pay to the plaintiff the said sum of two hundred and fifty dollars, and this agreement on his part is the only one he ever entered into with plaintiff to pay him two hundred and fifty dollars; that he is still the owner of said premises, never having been able to sell them; that, whenever he is able to sell them and reimburse himself as aforesaid for all moneys that he has therein invested, he will be ready and willing to pay plaintiff the sum of two hundred and fifty dollars." In the absence of any evidence of the sale of the premises and of the reimbursement to the defendant of the money which he had invested therein, this affidavit raised a question of fact concerning which it was the province of the jury to pass. If they had believed its contents, the plaintiff was not entitled to recover. The credibility of the witnesses of the plaintiff and of the defendant, the latter becoming a witness by the introduction of his affidavit of defense by the plaintiff, was for the jury and should have been submitted for their consideration by the court. There was, therefore, error in affirming the plaintiff's point, and directing the jury to find for the plaintiff.

The second and third assignments of error are sustained, and the judgment is reversed and a new venire awarded.

The Wilkes-Barre Record, Appellant, *v.* The County of Luzerne.

Public Officers—Sheriff—Advertisement of Elections—"General Election" Defined—Statutes.

The sheriff is not authorized or required to give notice by advertisement of the annual spring municipal election as provided in sec. 10 of the Act of June 26, 1895, P. L. 392, for, in cases of general elections, such municipal elections are not general elections within the meaning of said section.

Submitted Jan. 12, 1898. Appeal, No. 29, Jan. T., 1898, by plaintiff, from judgment of C. P. Luzerne Co., Oct. T., 1897, No. 525, on verdict for defendant. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Case stated. Before BENNETT, J.

The following facts were agreed upon in the case stated as if the same had been found by special verdict for the opinion of the court. The plaintiffs were proprietors of a daily newspaper published at Wilkes-Barre. On February 6, 1897, the sheriff gave notice of the election required by law to be held on the third Tuesday of February of that year in the cities of Luzerne county, by advertisement in certain newspapers, including plaintiff's paper, without a special contract as to rate or amount of compensation therefor, and without advertisement by the county controller for bids, nor direction by the county commissioners to the controller to so advertise. That the requirements of law have been observed by the sheriff as to the contents of said proclamation, assuming the same to be authorized by law with respect to the February election; as to the number and political character of the papers in which, and the period during which the same was published, assuming as aforesaid; that the sum charged by the plaintiff as the price thereof, to wit, $177.66, is reasonable and just, assuming as aforesaid.

The court below entered judgment in favor of defendant. Plaintiff appealed.

Error assigned was entry of judgment for defendant.

George S. Ferris, for appellant.

G. L. Halsey, for appellee.

OPINION BY BEAVER, J., February 19, 1898:

The tenth section of the Act of June 26, 1895, P. L. 392, devolves a duty upon the sheriff of every county, for the discharge of which he alone is responsible, and in the making of the contracts for the discharge of which he has sole authority. The tenth section of the Act of June 27, 1895, P. L. 403, relates exclusively to contracts made by the commissioners and has nothing whatever to do with the contracts for advertising provided for in the previous act. From the decision of the court below upon this point there is no appeal. Both parties to the case stated assent to it.

We have, therefore, to do only with the one question remaining: Is it the duty of the sheriff of every county, in which there are cities of the first, second or third classes, to give notice of the annual municipal or February or Spring election, by advertisement in at least three newspapers, as provided in section ten of the act of June 26, supra? In other words, is the said February election a general election within the meaning of the said section? Section 2 of article 8 of the constitution of the commonwealth provides that: "The general election shall be held annually on the Tuesday next following the first Monday of November" and the third section of the same article that "All elections for city, ward, borough and township officers for regular terms of service shall be held on the third Tuesday of February." The distinction is here clearly made between what is known, in common parlance, as the fall and the spring elections, and it is to be presumed that in all laws relating to the subject the legislature, in legislating upon the general subject observes the distinction so clearly preserved in the constitution, unless the contrary clearly appears. This constitutional distinction is in ordinary, popular use, and our elections are known as general, municipal or local and special.

It is argued, however, that the legislature intended, by said act, to apply the term general elections to municipal elections, and to require advertisement for such elections, as provided in the tenth section of the act of June 26th, supra, so far as cities

are concerned. The argument is based upon the peculiar phraseology of the first sentence of said section, which provides that "It shall be the duty of the sheriff of every county, at least ten days before any general election to be held therein, except borough and township elections, to give notice of the same," etc., and it is urged that the lawmakers did not intend to except from a class what would not in their view otherwise belong to it; but this, in our opinion, draws too nice a distinction and gives a more critical meaning to the word "except" than was in the mind of the legislature. The evident intention was to exclude municipal elections, and the phrase was used out of superabundant caution.

The effect of the construction claimed would be to require the counties at large to pay for advertising the municipal election for the cities which were contained within the limits of such counties, although no such advertisements were required for the boroughs and townships thereof. We cannot believe that such was the intention of the legislature and, inasmuch as the construction which is claimed for this section by the appellants would require us to give an interpretation to the term "general election" different from that which is contained in and recognized by the constitution, and is in general use among the people, we feel constrained to hold, with the court below, "that the sheriff not being authorized or required to give notice by advertisements, as it is set forth he did in the case stated, the plaintiff is not entitled to recover from the defendant for the printing in question."

Judgment affirmed.

Gilmore & Duffy *v.* Margaret Dunleavy, Appellant.

Appeals—Certiorari—Review of order striking off judgment.

There is no statutory appeal from an order of the common pleas striking from the record an entry of satisfaction of a judgment. The effect of an appeal therefore is equivalent to a common law writ of certiorari which brings up the record only; the errors to be corrected must appear upon the face of the record, the merits cannot be inquired into; they are left to the judgment of the court below. Neither the evidence nor the opinion of the court forms any part of the record proper, and for that reason cannot be examined into.

Argued Jan. 13, 1898. Appeal, No. 18, Jan. T., 1898, by defendant, from order of C. P. Lackawanna Co., Nov. T., 1896, No. 653, making absolute rule to strike off satisfaction of judgment. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Rule to strike off satisfaction of judgment. Before EDWARDS, J.

It appears from the record that judgment was entered on May 18, 1897, for want of a sufficient affidavit of defense for $814.80 and interest. On June 2, 1897, the following entry was made on the record: "Satisfied in full, debt, interest and costs. Gilmore & Duffy, per A. F. Duffy." On June 2, 1897, a rule was granted on defendant to show cause why satisfaction should not be struck off, which rule was made absolute and the satisfaction entered in the case struck off. Defendant appealed.

Error assigned was striking off the satisfaction of the judgment entered in this case.

M. E. McDonald, with him *J. C. Vaughan*, for appellant.

James H. Torrey, for appellee.

OPINION BY BEAVER, J., February 19, 1898:

"The power to entertain and decide upon motions for summary relief is a necessary incident of jurisdiction. If an entry

of satisfaction be made upon the record by mistake, by fraud or by falsely personating the plaintiff, the court where the record is has an undoubted right, upon proof of the facts, on notice to the parties, to strike off such improper entry, and its decision upon such facts is the decision of a matter of fact which is not the subject of review on writ of error:" Murphy v. Flood, 2 Gr. Pa. Ca. 411.

"Undoubtedly the court of common pleas has power to inquire into the entry of satisfaction upon its record and, if the facts show that it was improperly done or without authority, to order the entry to be vacated. This is but the exercise of a power necessary to prevent injustice. The presumption is, the court exercised the power rightfully and on good cause shown. The facts are not before us and, therefore, cannot be reviewed:" McKinney v. Fritz, 2 W. N. C. 173.

There is no statutory right of appeal from an order of the court of common pleas, striking from the record an entry of satisfaction of a judgment. The only effect of the present appeal, therefore, is that of the common law writ of certiorari. This writ, as is well known, brings up the record in any given case for review and correction, but it brings the record only: Holland v. White, 120 Pa. 228; Rand v. King, 134 Pa. 641. The errors to be corrected must appear on the face of the record, and the merits cannot be inquired into upon this writ, but are left to the judgment of the court below. Neither the opinion of the court nor the evidence forms any part of the record proper, and, for that reason, they will not be examined on certiorari: Rand v. King, supra.

In the case under consideration the court below had jurisdiction. The record shows that a rule was granted on defendant to show cause why satisfaction should not be stricken off. Answers were filed, and, on the 16th of August, 1897, the entry is made, "Rule absolute, and the satisfaction entered in this case stricken off." The opinion of the court and the testimony upon which the decree was founded are not before us. We are confined in our inquiry simply to the regularity of the proceedings, as shown by the record. They appear to be regular. If we were to travel beyond the record, it would seem as if the court had acted upon grounds which justified its action.

Appeal dismissed at the costs of the appellants.

Gill & Fisher, Limited, *v.* John T. O'Rourke, trading as John T. O'Rourke & Co., Appellant.

Evidence—Construction of writings—Province of court.

Where a printed rule of the commercial exchange and a written notice purporting to be given thereunder are in the case, it is the duty of the court to construe them and determine the rights and duties arising therefrom.

Contract—Default under rules of the exchange—Notice construed.

Where a rule of the exchange, of which the parties to the suit are members, required a vendor, on receiving written notice that a default on a contract was intended, to sell on or before the first open board thereafter, a letter from the vendee to the vendor, which states, "So far as we are concerned deal is off," is a notice under this rule irrespective of the reasons given for such default. The vendee was not bound to give any reasons, hence the reasons, when given, do not enter into the case for either consideration by the jury or construction by the court.

Argued Oct. 6, 1897. Appeal, No. 40, Oct. T., 1897, by defendant, from judgment of C. P. No. 2, Phila. Co., Mar. T., 1893, No. 281, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit. Before SULZBERGER, J.

Plaintiffs and defendant were members of the commercial exchange in Philadelphia. On September 21, 1892, plaintiffs sold to defendant twelve thousand bushels No. 2 mixed corn to be delivered in lots to suit the buyer between the date of sale and the 10th of October ensuing. The sale took place on the floor of the exchange. On the 27th of September the appellant ordered from the plaintiffs two thousand bushels of this corn, whereupon plaintiffs required payment in money or bank due bill. As a consequence of this, a controversy ensued between the plaintiffs and defendant, and on the 28th, defendant wrote the plaintiffs the following letter:

"9/28, 1892.

"MESSRS. GILL & FISHER CO., LTD.:

"Gentlemen:—After due consideration we have arrived at the following conclusion, as you refuse to take our check and

deliver us the corn as we want it between now and the 10th of October, 1892, we would say you can keep the corn, as we do not care to deal with parties who treat us that way, we do not take this stand because the market is somewhat lower to-day than when we bought the corn. As we have never faltered in any of our contracts we did not propose to do so in this. But when a firm is afraid to take our check the best way to do is to keep your goods, and not deal with us. So far as we are concerned deal is off.

"Yours respectfully,
"J. T. O'ROURKE & Co."

It appears from the evidence that there exists a rule of the exchange regarding defaults in contracts, which is as follows:

"Sec. 3. When one party to a contract shall give notice in writing to the other party that default on said contract is intended, it shall be the duty of the party receiving such notice (unless it should be mutually arranged otherwise) to buy or sell, as the case may be, on or before the first open board thereafter, the amount of grain necessary to cover such contract, and immediately to advise the party in writing of such transaction."

Other material facts appear in the opinion of the court.

Verdict and judgment for plaintiffs for $548.10. Defendant appealed.

Errors assigned were (1) in charging the jury as follows: "Then I charge you that a default under this rule means that a person who gives the notice of default acknowledged in some way, it need not be by express words, that the valid subsisting contract upon which he is liable, is proposed to be ended by him without the consent of the other party to the contract, namely, that he intends to break the contract. I also charge you that to impose upon the other the blame of his having broken the contract is not notice of a default within the meaning of this rule, and I further charge you that that writing, which is a letter, and therefore capable of being construed by the court that the writing of Mr. O'Rourke is not notice of default within the rule, because instead of giving notice of his default it is a charge that the plaintiffs have made default. With this notice out of the way as it is by my instructions on this point, of course the plaintiff was not bound to sell on that day." (2) In declining

the defendant's first point as follows: "1. That if the jury find that the defendant (John T. O'Rourke) notified the plaintiffs (Gill & Fisher) in writing on September 28, 1892, that the deal or contract for the purchase of twelve thousand bushels of corn was off, or that he did not intend to comply with same, the plaintiffs were bound to sell the twelve thousand bushels of corn on or before the first open board thereafter at the commercial exchange, in conformity with section 3 of the rules governing defaults of said exchange." (3) In charging the jury as follows: "The defendant says he accepted, and he has a witness who does not prove anything about it. Mr. Sexton swears that he accepted it, but that evidence you are bound not to consider. No man has a right to swear to a conclusion of law. The acceptance of a contract is a legal conclusion from certain words and acts theretofore done, and Mr. Sexton being pressed gave the whole of the discussion and he always ended with the offer of the plaintiff to pay $90.00, and he never said a word that the plaintiff had said in reply. Therefore you are remitted entirely to the uncorroborated evidence of the defendant for the $90.00 settlement."

W. Horace Hepburn, for appellant.

Silas W. Pettit, with him *John R. Read*, for appellee.

OPINION BY SMITH, J., February 19, 1898:

The plaintiffs, by a contract made September 21, 1892, sold the defendant twelve thousand bushels of corn, "to be delivered in quantities to suit, up to Oct. 10th." On September 27, the defendant called for one thousand five hundred to two thousand bushels, but the plaintiffs declined to receive the defendant's check in payment and none was delivered. No further call was made; and the plaintiffs, having tendered the corn October 10, resold it October 11, for less than the contract price. This action is brought to recover the difference. The defense is directed both to the right of action and the measure of damages. As to the former, the defendant asserts that the refusal to receive his check was a violation of an agreement to take it which gave him a right to rescind the contract. As to the measure of damages in the event of his liability, he alleges

that on September 28, he gave the plaintiffs written notice that he would default on the contract, and that, under a rule of the commercial exchange to which the sale was subject, it thereupon became the duty of the plaintiffs to sell the corn on or before the first open board thereafter, which was on the day following; and further alleges that before giving this notice it was agreed that he should pay the plaintiffs $90.00 in settlement of the matter, though payment has not been made. The only questions raised by the assignment of errors, however, relate to the construction and effect of the rule and notice referred to, and a portion of the evidence respecting the alleged settlement.

The first point submitted by the defendant, though correctly stating a conclusion of law, was, as a whole, properly refused. The rule of the exchange being a printed one, and the notice to the plaintiffs being in writing, there was nothing for the jury to find as to their effect. It was for the court to construe them, and determine the rights and duties arising from them.

The portion of the charge embraced in the first specification was erroneous. The rule of the exchange required the plaintiffs, on receiving notice that default on the contract was intended, to sell on or before the first open board thereafter. The defendant's letter of September 28 was clearly notice of his intention to default. If he chose to incur the consequences of a default, he was not bound to give a reason therefor; hence it is not material whether the reason assigned was sufficient to justify a rescission of the contract. With or without such reason, his letter was unmistakable notice of an intention not to comply with his contract; and it cannot be contended that noncompliance is not default. Throughout this letter, with its comment on the action of the plaintiffs, the defendant's purpose not to take the corn which he had contracted for is evident. Its concluding sentence: "So far as we are concerned deal is off," is unequivocal; it can be understood only as a final declaration of the defendant's intention to default on his contract. It is apparent, also, that the plaintiffs so understood it; for in their answer of September 30 they describe it as "repudiating for alleged reasons" the contract for the corn. Again, in the declaration, they aver that the defendant, "on Sept. 28th, 1892, repudiated said contract." Assuredly they cannot com-

plain if their averment of record be taken as correct; and repudiation is certainly default. A default on September 28 being laid as the ground of action, the measure of damages must be determined by the rule of the exchange as to such default; on this point, the date is material. Viewing the defendant's letter as notice of his intention to default, it was undeniably the duty of the plaintiffs, on receiving it, to resell the corn on or before the first open board thereafter, which appears to have been on the day following; and it was their right to hold the defendant for any loss on such resale. If, indeed, as appears from some of the evidence, the price at that time was above the contract price, they would have sustained no loss on such resale, and the measure of damages indicated would yield them nothing.

The alleged agreement for payment of $90.00 as a settlement would, if made, fix the measure of damages independently of the notice and rule. The finding of the jury against it may have been due to the inaccurate reference by the trial judge to the testimony of one witness in relation to it, which is made the subject of the third specification of error. This witness testified: "Finally, Mr. Barker, as I understood it, he said it plain enough, said that he would accept three quarters of a cent. Mr. O'Rourke had not yet agreed to pay it, but in a few moments he said: 'Well, in order to avoid a controversy, I will pay you the $90.00, and that will end our transactions.'" The language of the learned trial judge with reference to the testimony of this witness was calculated to mislead the jury. Should the parties proceed to another trial the evidence on this point can receive closer attention, and it may then present a different aspect.

Judgment reversed and venire de novo awarded.

Commonwealth of Pennsylvania v. Michael Lewis, Appellant.

Criminal law—Fraudulent removal of goods—Pleading—Act of 1885.

The substantive offense aimed at by the Act of June 23, 1885, P. L. 136, is the fraudulent removal of a debtor's goods by placing them beyond the reach of creditors. The reference in the act to methods of removal which might more particularly affect debts of a certain status was not designed to exclude the claims of other creditors from its provisions. The act was intended to embrace all fraudulent methods of removal of property beyond the reach of creditors. The inclusion of several methods or phases of removal in one count is not forbidden by the principles of criminal pleading, although the removal might have been accomplished by one or more of these, to the exclusion of others.

Argued Jan. 17, 1898. Appeal, No. 16, Jan. T., 1898, by defendant, from judgment of Q. S. Carbon Co., April Sess., 1897, No. 12, on verdict of guilty. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Indictment sur charge of removing property out of the county with intent to prevent same from being levied on by execution, and for secreting, assigning and conveying property with intent to defraud creditors and to prevent such property from being levied upon by execution. Before CRAIG, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict of guilty and sentence thereon. Defendant appealed.

Errors assigned were (1) refusal of binding instructions for defendant. (2) In charging the jury as follows: "If, on the contrary, there was a removal, or a secreting with the intent to defraud Moses Miller, who was a creditor; and with the intent to prevent the same from being levied upon by any execution; if it was done for that purpose, and you believe that beyond a reasonable doubt, then you may find this defendant guilty." (2) In the following sentence: "And now, June 21, the defendant, Michael Lewis, is sentenced to pay to the commonwealth for the use of the parties entitled thereto, the sum of $10.00 and costs of prosecution; and further, that he undergo imprisonment in the jail of the county of Carbon for the term

of three months, to be computed from this date, and he stands committed until the sentence is complied with."

Fred. Bertolette and *H. Y. Kaufman*, of *Kaufman & Schrader*, for appellant.—The bill of indictment is therefore a jumble, and an indiscriminate mixing up of two separate and distinct charges, intended to be covered by the act under which the indictment is drawn. It follows that the indictment is bad for duplicity: Com. v. Symonds, 2 Mass. 163.

Nor does it fall within the ruling in Com. v. Miller, 107 Pa. 276; Com. v. Mentzer, 162 Pa. 646.

Again, the bill sets forth no value of the goods so removed. This is fatal. A formal defect may be amended before issue joined, and in certain cases it may be amended afterwards.

Penal statutes must be construed strictly: Warner v. Com., 1 Pa. 154.

Nor can they be extended by implication to cases not strictly within their terms: Hall v. State of Ohio, 20 Ohio, 8; Andrews v. U. S., 2 Story, 202.

Nor can it be made to embrace a doubtful case: Case of Pierce, 16 Maine, 255.

Nor will they be allowed to inflict penalties by implication: Com. v. Standard Oil Co., 101 Pa. 119, 144.

Horace Heydt and *E. O. Nothstein*, district attorney, with them *William G. Freyman*, for appellee.—It is sufficient if the indictment state the charge with so much certainty that the defendant may know what he is called upon to answer, and that the court may know how to render the proper judgment thereon; over nice exceptions are not to be encouraged, especially in cases which do not touch the life of the defendant: Sherban v. Commonwealth, 8 Watts, 212; Com. v. Keenan, 67 Pa. 203; Com. v. Stacey, 28 Leg. Int. 20.

It was not necessary for the commonwealth to prove the five acts and the intents set forth in the indictment. If the commonwealth has proved one act with one intent that is sufficient to sustain a conviction, and the sentence of the court: Clark's Criminal Procedure, 326.

An indictment drawn in the words of an act of assembly is sufficient under the criminal procedure act of 1860: Com. v. Havens, 6 C. C. R. 545.

OPINION BY SMITH, J., February 19, 1898:

The defendant was indicted and convicted of the offense of removing and secreting property with intent to defraud creditors. The indictment contains one count, which avers the fraudulent secreting and removing of property out of the county. The plea of not guilty was duly entered by the defendant, without any previous motion, and the case was tried on the merits. The defendant was sentenced to pay a fine of ten dollars and undergo imprisonment in the county jail for the term of three months.

The evil aimed at by the act of June 23, 1885, under which the indictment is framed, is the defrauding of creditors by placing the debtor's property beyond their reach. While the statute enumerates some of the methods by which this might be done and prohibits them under a penalty, it also contemplates all fraudulent means of secreting, removing or disposing of property, with like intent, by the words "or otherwise dispose of any . . . . property . . . . with intent to defraud any creditor."

The fraudulent removal of property to evade liability for debts is forbidden by the statute, and this is its principal subject. The purpose is to protect creditors from being fraudulently deprived of recourse to the property of debtors, and it includes all creditors who may be thus defrauded, without regard to the nature or status of their claims. The reference in the act to methods of removal which might more particularly affect debts of a certain status was not designed to exclude the claims of other creditors from its provisions. The act was intended to embrace all fraudulent methods of placing property beyond the reach of creditors. And all creditors who may thus be defrauded are included in its scope and purpose. The substantive offense is the fraudulent removal; and the inclusion of several methods or phases of the removal in one count is not forbidden by the principles of criminal pleading, although the removal might have been accomplished by one or more of these, to the exclusion of others. Conviction of a fraudulent removal by proof of one phase or method would be a bar to a subsequent prosecution for the removal of the same property through other methods, when all relate to the same transaction: Com. v. Mentzer, 162 Pa. 646.

The evidence was abundant to warrant the verdict. The testimony shows that the defendant was a partner in the clothing business at Lansford, Carbon county; that the firm was indebted to Moses Miller and others; that the defendant and his brother (an alleged creditor) removed a large quantity of goods from the store of the firm, in the nighttime after business hours; that some of the goods were afterward discovered in the defendant's house in Reading, Berks county, and were identified by the other partner. The circumstances under which the goods were removed and afterward secreted, when creditors were pressing, clearly warranted the inference of fraud; and it is difficult to reconcile them with honesty of purpose. The sentence was pursuant to the statute, but not to its maximum extent. The fine authorized by the statute is "a sum not exceeding the value of the property secreted." It is not pretended that the fine imposed exceeded or was equal to that value. From the testimony, the property would appear to have been worth about one thousand dollars. The other questions raised on the argument require no discussion by this court.

The assignment of error is overruled, and the judgment is affirmed; and it is now ordered that Michael Lewis, the defendant, be remanded to the keeper of the county jail of Carbon county there to be confined according to law for the residue of the term for which he was sentenced, and which had not expired on the 26th day of June, 1897, and that the record be remitted to the court of quarter sessions of said county with instructions to carry this order into effect.

D. G. Yuengling & Son, now assigned to C. Stegmaier & Son, *v.* Peter P. Jennings and Ann Jennings and the Quaker City Mutual Fire Insurance Company, Garnishee, Appellant.

Insurance—Defective proof of loss—Notice—Duty of the company—Waiver by estoppel.

If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel.

Argued Jan 11, 1898. Appeal, No. 12, Jan. T., 1898, by insurance company, garnishee, from judgment of C. P. Luzerne Co., May T., 1894, No. 672, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Assumpsit on policy of insurance. Before WOODWARD, P. J.

The facts sufficiently appear in the opinion of the court.

Verdict and judgment for plaintiff for $705.60. Garnishee appealed.

Errors assigned among others were refusal to affirm defendant's first, second, third, fourth and eleventh points, which points were as follows: "1. The evidence offered by the plaintiff in this case fails to establish that J. W. Miller had any greater authority than that of a local solicitor, and is insufficient to show that he had the authority of a general agent of garnishee company, consequently any acts performed by him or service of notice, or proofs of loss upon him cannot bind the garnishee company. 2. The authority of J. W. Miller, as general agent of garnishee company not having been shown by a certificate of authority, and it appearing that he did not countersign the policy claimed on in this case, any acts of his aside from the delivery of the policy and receipt of premium would not bind the garnishee company, and it must be excluded by

the jury from their consideration. 3. The plaintiff's account of his loss in this paper dated April 5, 1894, is not such a particular account of his loss or damage as the terms of the policy require of him, and no particular account of his loss or damage having been delivered to the garnishee company or its general agent within sixty days next after the fire, he or his assigns cannot recover. 4. There is no evidence to be submitted to the jury of the waiver of the requirements of the policy claimed on to give a particular account of the plaintiffs' loss or damage, within sixty days next after the fire, and the plaintiff or his assigns cannot recover. 11. Under all the evidence in this case the verdict must be for the defendant."

James R. Scouton, with him *W. R. Gibbons*, for appellant.—The alleged proof of loss said to have been furnished in this case was utterly defective, and no waiver can be implied from its transmission to the company: Beatty v. Ins. Co., 66 Pa. 9.

That the rule as laid down by Justice MITCHELL in Gould v. Insurance Company, is not as broad as it would appear upon first reading, we refer to the same justice in another part of the same opinion, in which he says: "In establishing this rule in regard to the conduct of insurance companies, as to objections to proof of loss, it is not intended to encroach at all on the doctrine of waiver by estoppel, as laid down in the well considered and authoritative cases of Trask v. Fire Insurance Company, 29 Pa. 198, and Beatty v. Insurance Company, 66 Pa. 9."

We, therefore, respectfully contend that our assignments of error, numbers three and four, should be sustained, because (1) the paper offered as a proof of loss was not such as required notice from the garnishee of its defects, and (2) the garnishee by neither act nor deed, did anything prior to the expiration of the sixty days, which constitutes in law acceptance of the paper as a proof of loss, or a waiver of the formal proof, and for a further reason, that the attachment execution having been issued on April 23, 1894, and interrogatories served on or about May 10, 1894, long before the expiration of the sixty days, the parties were dealing at arms' length, and the garnishee was under no obligation to notify the insured of defects in the alleged proof of loss, which would inure to the benefit of the attaching creditor: Hocking v. Howard Insurance Co., 130 Pa. 170.

E. F. McGovern, with him *John McGahren*, for appellee, relied on Gould v. Ins. Co., 134 Pa. 570, 588; Moyer v. Ins. Co., 176 Pa. 579.

OPINION BY SMITH, J., February 19, 1898:

The broad question here is whether upon all the evidence the defendant company is liable under the policy for the loss by fire of the property insured. The assignment of errors contains twenty specifications, several of which repeat, in varying phrase, the substance of others. The eleventh is that the court erred in declining to affirm the point that "Under all the evidence in the case the verdict must be for the defendant." This brings up the whole case for review. Upon examination, however, it appears that the controverted points are quite few. Testimony sufficient for submission to the jury, was introduced tending to show: (1) That the insurance was effected through J. W. Miller, an insurance agent, who received the premium, forwarded it to the company, and delivered the policy to the insured. (2) That on March 31, 1894, while the policy was in force, the property insured was destroyed by fire, without fraud or fault on the part of the insured. (3) That what the insured described as "A proof of loss . . . . according to the terms of the policy," verified by affidavit, and accompanied with the justice's certificate, was on April 5, 1894, delivered by the insured to the agent, Miller, and by him mailed to the company, and was produced by the company on trial. (4) That no objection or answer of any kind was made to this by the company. (5) That receiving no answer to this notice of loss or to his letters, the insured, on June 27, 1894, made out, swore to, and mailed to the company, a more formal proof of loss, in accordance with the detailed requirements of the policy. (6) That the insured received no answer from the company to any of his communications until January 21, 1895, when a letter came by mail calling on him to appear at the company's office in Philadelphia, and submit to an examination under oath.

The specifications of error relate to questions of fact, mainly, which were properly submitted to the jury. The objection to the sufficiency of the proofs of loss was the principal matter discussed on the argument. This matter we think comes fairly within the rule laid down in Gould v. Insurance Co., 134 Pa.

588, and Moyer v. Insurance Co., 176 Pa. 579, as held by the learned judge of the court below. The rule is as follows: "If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel." It is idle now to question the validity of this rule, or to argue that it is stated too broadly. It is the logical deduction from all the authorities, including those here cited in opposition to it. The opinion of Mr. Justice MITCHELL indicates a full examination of the cases on the question of waiver and of estoppel, in their relation to insurance contracts, and the rule referred to was evidently well considered before its adoption. It is a just and safe guide for both insurers and insured, sound in principle and salutary in its operation.

In the present case it is not denied that "the insured, in good faith, and within the stipulated time, did what he plainly intended as a compliance with the requirements of his policy," and for that purpose called to his aid the assistance of a justice of the peace whose certificate was required. His communication was unanswered by the company. His subsequent efforts to obtain an answer were similarly disregarded. Not until about ten months after the loss could the insured elicit an answer from the company, and this consisted of a peremptory demand that he go to Philadelphia and submit to an examination. Such unexplained silence or indifference, in the face of contractual obligations, will be neither encouraged nor excused by this court. We therefore hold that the defendant company is now estopped from making a denial of the sufficiency of the proofs submitted, which would turn the plaintiff out of court because of formal inadequacy. This is not a case in which the insured made no effort to comply with the requirements of his policy. On the contrary, it is evident that he endeavored to do so promptly and according to his understanding of his duties. His efforts in that direction were apparently spurned with contemptuous silence by the officers of the company. He is not now to be impaled on the horn of technicality, in aid of such treatment.

The question of the authority of Mr. Miller, as general or special agent, is not involved in this case. No objection is made to what he did in procuring the insurance or in receiving the premium, and, while the first proofs of loss were handed to him, it is not denied that he promptly mailed them to the company. It is not contended that the proofs were "served" on him or that he had authority to accept such service. It was unnecessary to show this when it was not alleged that the company did not receive them by due course of mail within the period fixed by the policy. It would appear from the testimony that the proofs were executed before the justice by the insured and received by the company within ten days of the loss by fire. Whether the company has since become insolvent, or proceedings are pending to have a receiver appointed, is not material here.

The assignment of errors is overruled and the judgment is affirmed.

William T. Auer, Appellant, *v.* Jacob B. Mauser and Abraham Smoyer.

Malicious prosecution—Essential grounds.

The grounds on which an action for malicious prosecution must rest are well settled; it must appear to have been commenced maliciously and without probable cause; these essentials must coexist.

Province of court and jury—What constitutes for the court—Existence for the jury.

What circumstances constitute probable cause is for the court; whether they have been shown in a particular case is for the jury.

Evidence—Probable cause and malice—When implied—Presumption from acquittal—Question for jury.

Malice may be implied from want of probable cause and may be rebutted by evidence showing its absence; but want of probable cause cannot be implied from malice, and may exist without it. The inquiry as to both must relate to the commencement of the prosecution and the circumstances leading to it. It is permitted to show how the prosecution terminated as bearing on the existence or nonexistence of cause and malice. An acquittal or lawful discharge of the defendant is prima facie evidence of want of probable cause, and therefore sufficient to carry the case to the jury.

1898.] Syllabus—Assignment of Errors.

In an action for malicious prosecution the case is for the jury where it appears that the plaintiff in the action as defendant in the prosecution, was lawfully discharged, although there was evidence tending to establish probable cause and to rebut presumption of malice.

Evidence—Malicious prosecution—Conversations between prosecutor and justice.

Evidence of conversations between the prosecutor and the justice after the prosecution had been instituted, in the absence of the defendant in the prosecution, are inadmissible to rebut the presumption of malice.

Argued Dec. 9, 1897. Appeal, No. 142, Oct. T., 1897, by plaintiff, from judgment of C. P. Northampton Co., April T., 1895, No. 24, on verdict for defendants. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Trespass for malicious prosecution. Before SCHUYLER, P. J.

The action was based on alleged malicious prosecution of the plaintiff by the defendants in causing him to be arrested for larceny.

The facts sufficiently appear in the opinion of the court.

The court below directed a verdict for the defendants in the following charge:

[It is indispensable to a recovery in an action for malicious prosecution that the prosecution claimed to be malicious was fully ended when the action was brought. This the plaintiff has failed to show. On the contrary, the undisputed evidence shows that the prosecution was not fully ended.] [1] [You will therefore return a verdict in favor of the defendants.] [2]

Verdict and judgment for defendants. Plaintiff appealed.

Errors assigned were (1, 2) To portions of the judge's charge, reciting same. (3, 4) In overruling plaintiff's objection to the testimony of Jacob B. Mauser as to what occurred between him and the justice of the peace after the latter had issued the warrant in suit. (5) In overruling plaintiff's objection to the testimony of Jacob M. Mauser as to conversation between him and the district attorney after the bill had been ignored by the grand jury. (6) In overruling the plaintiff's objection to the testimony of A. C. LaBarre, district attorney, as to conversations

between him and Jacob B. Mauser, after the bill had been ignored by the grand jury.

Russell C. Stewart and *M. Kirkpatrick*, with them *W. S. Kirkpatrick*, for appellant.—In this state not only is an acquittal by a jury of the criminal charge prima facie evidence of want of probable cause, but a discharge by a committing magistrate, a return of not a true bill, and a discharge by a judge upon habeas corpus, all have the same effect: Orr v. Seiler, 1 Penny. 445 Bernar v. Dunlap, 94 Pa. 329; Zebley v. Storey, 117 Pa. 478 Mentel v. Hippely, 165 Pa. 559.

In our judgment there is a case in Pennsylvania that rules our case. It is Murphy v. Moore, 10 Cent. 92, not reported in official reports.

We desire also to refer to a late case upon the general subject as to the effect of what takes place in the quarter sessions as bearing on the question of probable cause: Grohmann v. Krischman, 168 Pa. 189.

Declarations made by a defendant in his own favor in the absence of the plaintiff and not under oath are never to be received, either in mitigation of damages or as substantive matter of defense. The whole subject is clearly reviewed Mr. Justice GREEN in Clever v. Hilberry, 116 Pa. 431.

Our objections to this testimony were: 1, immaterial, irrelevant and incompetent; 2, that the record of the court of quarter sessions was the best evidence and the only competent evidence; that it could not be contradicted by the testimony offered; 3, that the matters offered are res inter alios acta: Gordon v. Com., 92 Pa. 216; Com. v. Green, 126 Pa. 531.

H. J. Steele, with him *George W. Geiser*, for appellees.—To sustain the action the failure of the proceedings against the plaintiff must be averred and proved: Stewart v. Sonneborn, 98 U. S. 187; Murson v. Austin, 2 Phila. 116.

In Knott v. Sargent, 125 Mass. 95, the grand jury made a return of "no bill," but by parol evidence it was shown that it was on account of the absence of a material witness and that the case was continued; held that an action for malicious prosecution will not lie.

These assignments apparently overlook the fact that the foundation of the action is a charge of malice. It has repeat-

edly been held that it is competent as in this case for a defendant to testify to his intent or motive where that is involved in the case: Heap v. Parrish, 104 Ind. 86; Spalding v. Lowe, 56 Mich. 366.

And upon this it is even competent to show that he sought the advice of counsel, and what was then stated: Walter v. Sample, 25 Pa. 275.

What the prosecutor stated to the grand jury has ever been held proper on the question of malice: Dietz v. Langfit, 63 Pa. 234.

Here the declarations were part of the res gestæ, accompanied the acts in issue and characterized them at the time: Elmer v. Fessenden, 151 Mass. 358.

These assignments relate to the competency of the district attorney to explain the circumstances under which the indictment was ignored. Appellant assumes that the purpose was to impeach the record. This is a mistake. Its sole purpose was to show the circumstances. We do not deny that the bill was returned ignored, but we do say that this was accomplished in an illegal manner. In Knott v. Sargent, 125 Mass. 95, the district attorney was held competent, after the grand jury had ignored a bill, to testify that a witness had been absent, and that the case was actually continued. Mauser was clearly competent to testify that he was not called before the grand jury: 1 Greenleaf on Evidence, 252.

Probable cause does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting. It has been variously defined as such a suspicion as would induce a reasonable man to commence a prosecution: Smith v. Ege, 52 Pa. 419; Gilliford v. Windel, 108 Pa. 142.

OPINION BY SMITH, J., February 19, 1898:

This action is based on an alleged malicious prosecution of the plaintiff by the defendants. The grounds on which such an action must rest are well settled; it must appear that the prosecution upon which it is founded was commenced maliciously and without probable cause. These are essential and must coexist. What circumstances constitute probable cause, are for the court; whether they have been shown in a particu-

lar case is for the jury to decide. Malice may be implied from want of probable cause, and may be rebutted by evidence showing its absence. But want of probable cause cannot be implied from malice, and may exist without it. The inquiry as to both probable cause and malice must relate to the commencement of the prosecution and the circumstances leading to it. As in other cases, all relevant matters, whether arising before or after the prosecution was begun, which properly tend to show the cause and the motive, are admissible in evidence. Hence it has always been permitted, in these actions, to show how the prosecution terminated, as bearing on the existence or nonexistence of cause and of malice. When the prosecution has been terminated by the conviction of the defendant, that fact is ordinarily accepted as sufficient proof of cause to defeat an action for damages. On the other hand an acquittal or lawful discharge of the defendants, is prima facie evidence of want of probable cause, and, therefore, sufficient to carry the case to the jury. Both conviction and acquittal may be shown, but neither is conclusive of the question; the former, however, has the greater probative force. In the determination of the questions arising in these cases, the ordinary rules of evidence are to be applied, and the functions of the trial court and of the jury are to be exercised as in other cases. These general principles have been recognized and applied so often that citation of authorities in their support is unnecessary.

In the case before us, it appears that the plaintiff was arrested for larceny at the instance of the defendants, and bound over for his appearance at the next court of quarter sessions. The grand jury to whom the bill of indictment was submitted ignored it, and the defendants were discharged. A month later this suit was brought. No further action was taken on the return upon which the indictment was founded, and no other prosecution for the alleged larceny has since been commenced. The criminal proceedings seem to have been finally dropped, and the statute of limitations as to larceny had fully run before this case was called for trial. On the trial the plaintiff offered, inter alia, the record of the criminal proceedings which showed that the grand jury returned the indictment "Not a true bill." To meet the effect of this finding, the defendants called the district attorney, who testified, under objection, that the indict-

ment was laid before the grand jury earlier than the day on which the witnesses for the commonwealth had been subpœnaed to attend, and therefore but one witness, the defendants' father, was examined; that rather than hold the jury over, he concluded to let the bill be ignored, especially because of the statement to him, by the prosecutors' counsel, that the defendants had taken the property under a claim of right. The bill was accordingly ignored. Other testimony would also indicate that the bill was disposed of before the day fixed for the commonwealth's witnesses to appear. That they were not sworn before the grand jury seems to be conceded, and it does not appear that their failure to testify was due to any act of the defendants in the present case.

At the close of the testimony, the trial judge directed a verdict for the defendants in the following brief charge: "It is indispensable to a recovery in an action for malicious prosecution that the prosecution claimed to be malicious was fully ended when the action was brought. This the plaintiff has failed to show. On the contrary, the undisputed evidence shows that the prosecution was not fully ended. You will therefore return a verdict in favor of the defendants." It was erroneous thus to declare that "the undisputed evidence shows that the prosecution was not fully ended," and to direct a verdict for the defendants for that reason, contrary to the legal effect of the record. True, the district attorney was called by the defendants and testified, under objection, that after the bill was ignored he had told Mr. Mauser, one of the prosecutors, it was a mistake, and that he would lay another indictment before the next grand jury. But when Mr. Mauser was questioned about his conversation, he said he had agreed that it was wrong thus to dispose of the prosecution; but he did not admit that he had concurred in the proposition to send another bill before a subsequent grand jury. Whether the circumstances under which the bill was ignored rebutted the presumption of want of probable cause raised by the record, was for the jury to determine under the evidence. The record, and the manner in which the finding of the jury was brought about, were evidence on this question. But the record of the court of quarter sessions, like that of other courts, imports verity, and cannot be impeached or contradicted by parol evidence except for fraud, or, perhaps, plain mistake:

County v. Boyd, 113 Pa. 52. But the testimony did not contradict the record; it was designed to rebut a presumption ordinarily deduced therefrom in these cases, and it was admissible for that purpose: Thorne v. Insurance Co., 80 Pa. 15; McClafferty v. Philp, 151 Pa. 86; Dietz v. Langfitt, 63 Pa. 234. A discharge or an acquittal casts upon the defendant, in an action for malicious prosecution, the burden of showing probable cause, unless that appears from the plaintiff's testimony: Ritter v. Ewing, 174 Pa. 342; Ruffner v. Hooks, 2 Pa. Superior Ct. 278.

The defendant in the indictment was in no default in the prosecution upon which this action is grounded. The finding of the grand jury and his discharge were all he could ask. Whether the proceedings should be continued by a new bill, or renewed by another prosecution, were matters beyond his control; and in the absence of fraud on his part he had a right to rely upon the record. That a return of "ignoramus" or "not a true bill" by the grand jury, approved by the court, is a sufficient ending of the prosecution, and such an "acquittal" of the defendant, as will support an action for malicious prosecution based thereon, is elementary law, not now to be questioned: Savil v. Roberts, 1 Salk. 13; Lowe v. Wartman, 1 Cent. Rep. (N. J.) 437; Shock v. McChesney, 2 Yeates, 473; Stewart v. Thompson, 51 Pa. 158; Murphy v. Moore, 10 Cent. Rep. 92; Charles v. Abell, Brightly Rep. 131. In this last case the principal question was the right to maintain an action for malicious prosecution upon the discharge of the defendant on a writ of habeas corpus, and it was there said by Mr. Justice BELL, at nisi prius, "It seems to be now agreed that if a grand jury ignore the bill, it is sufficient to maintain the action;" and the entire opinion embracing this sentence was quoted approvingly by Mr. Justice PAXSON in delivering the opinion of the court in Zebley v. Storey, 117 Pa. 478. In the case of Stewart v. Thompson, supra, the prosecution for which damages were claimed had terminated, as to the plaintiff, by the grand jury ignoring the indictment; and while the chief contention in the Supreme Court was whether trespass or case was the proper form of action, Mr. Justice READ said: "But the prosecution did not stop here: he [the prosecutor] procured a bill of indictment, valid in form, ... to be presented to the grand jury, which

was ignored as to the plaintiff; and the prosecution was wholly ended and determined, and the plaintiff discharged. It is clear, therefore, that there was a prosecution for a criminal offense which was at an end, and therefore case for a malicious prosecution was the proper form of action." Judgment for the plaintiff in that case was affirmed. The case of Hill v. Egan, 160 Pa. 119, is relied upon by the appellees here to sustain their contention that the prosecution was not legally terminated and that the present action was prematurely brought. That case is authority for the proposition that where a prosecution was so proceeded in that the defendant was held to bail, the magistrate could not afterward lawfully discharge the defendant without notice to the prosecutor, and that such a termination of the prosecution would not make the prosecutor liable to an action for malicious prosecution. It does not uphold the broad proposition that a trial judge may declare a judicial record of no legal effect when opposed by parol testimony alleging that it was made up partially under a mistake of fact. If the termination of the prosecution referred to here was falsely or fraudulently procured by or on behalf of the defendant, he could not ground a suit for malicious prosecution on it; but this also would be a question of fact for the jury. The first and second specifications of error are sustained.

Complaint is made, under the third and fourth specifications, of the admission of a conversation between the justice who issued the warrant and Mauser, one of the defendants, in the absence of the plaintiff, after the warrant was issued and before its return by the constable. This was offered for the purpose of showing the absence of malice, and was admitted on that ground. We think its admission was erroneous. It was a mere declaration by the defendant, made several hours after the warrant was issued, unaccompanied by any act or request to discontinue the prosecution. Mr. Mauser then told the justice, substantially, that he did not want to have Auer arrested for stealing; but he said nothing about recalling the warrant or revoking the written instructions he had sent to the justice in the morning by his tenant, Mr. Smoyer: "Mr. Snyder, go for this man Auer criminally to have hay and straw returned," in pursuance of which the complaint was made and the warrant issued. Though disclaiming a desire for the arrest, he still al-

lowed it to be made. While it was entirely proper for the defendants to disprove malice, this could not be done by proof of their own declarations in the absence of the plaintiff, and which did not affect the prosecution or purport to affect it: Thomas v. Miller, 165 Pa. 216. The case of Dietz v. Langfit, 63 Pa. 234, is not authority for the admission of such declarations. There it was sought to disprove the presumption of malice arising from the termination of the prosecution through the return "ignoramus" by the grand jury, and for this purpose the defendant, who was the only witness called before the grand jury, was allowed to show that he had stated to the grand jury that he did not wish to prosecute the case further, for reasons which he stated, and it was thereupon ended. In the present case the defendants could not justify on the ground that the prosecution was pursued under the advice of the justice. It is no part of his official duties to counsel litigants, and his directions afford no shield for errors committed in pursuance thereof: Brobst v. Ruff, 100 Pa. 91; Beihofer v. Loeffert, 159 Pa. 365. The third and fourth assignments are sustained.

It was competent for the defendants to show the circumstances under which the prosecution was terminated, and that its termination was without their concurrence or knowledge. If the action of the grand jury resulted from the mistake of the district attorney, and by reason thereof the defendants and other witnesses for the commonwealth were not sworn, this fact might be shown to rebut, so far as it might do so, the presumption of want of probable cause arising from the discharge of the plaintiff. Hence the testimony of the district attorney and of the defendant Mauser, in so far as it shows the circumstances which led to the finding of the grand jury, was admissible. But the testimony should be confined to this subject; the expression of the intentions and future purposes of the district attorney and of the defendants, or either of them, in the absence of the plaintiff, and forming no part of the res gestæ, could not be thus introduced in evidence against the plaintiff. With this qualification the fifth and sixth specifications of error are overruled.

The judgment is reversed, and a venire facias de novo is awarded.

Estate of Erastus Potter, deceased. Appeal of Le Grand Wells.

Contracts with the aged—Scrutiny and policy of law.

The law is especially solicitous and careful of childhood and old age. The rights of the latter are to be guarded with as much of carefulness and solicitude as the former. A contract, made with an aged woman, who is unadvised as to her rights, a waiver of which is imputed from the execution of such contract, will be closely scrutinized and strictly construed in her favor.

Mistake of law — Equity will relieve when mixed with imposition or fraud.

Where with a mistake in law, there is found mixed up other ingredients showing misrepresentations, stating that which is not true or concealing that which ought to have been made known, where imposition, undue influence, mental incapacity or surprise are established, relief will be afforded to one who has thus been imposed upon and induced to do that which is contrary to equity to maintain.

Widow's exemption—Waiver obtained by undue influence—Equity.

A paper purporting to be a waiver of a widow's right to exemption executed by an aged widow in ignorance of her rights and of the significance of the paper at the solicitations of her husband's creditor without advice or opportunity to seek advice, will not be permitted to interfere with her rights to claim the benefit of the act of 1851.

Widow's exemption—Waiver of—Laches.

There can be no fault or laches committed by a widow as to claiming her exemption until she has knowledge of her rights, and there is a proper officer from whom she can claim it or until she can compel the appointment of such an officer. An ignorant, aged and illiterate widow had no knowledge of her right to the exemption until several years after her husband's death. Her claim for exemption was presented to the administrator eighteen days after letters issued. *Held*, that there was no laches.

Argued Jan. 17, 1898. Appeal, No. 28, Jan. T., 1898, by Le Grand Wells, from decree of O. C. Susquehanna Co., Aug. T., 1897, No. 53, in the matter of exceptions to widow's inventory. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Exceptions to widow's inventory and appraisement. Before SEARLE, P. J.

It appears from the auditor's report that Erastus Potter died

January 20, 1893, testate, bequeathing and devising all his property to his widow, Jenett Potter. His property consisted of some personal property and thirty-three acres of land. The widow continued to reside on and receive the income of said property until after the real estate was sold by the administrator of said estate, March 30, 1896. The will was duly probated December 7, 1893.

The principal debts of the decedent were three judgment liens to Le Grand Wells and one judgment lien to G. G. Wells. After the probate of the will Le Grand Wells, one of the lien creditors, called on the widow and she signed a revival of judgment and a waiver of her right to claim the widow's exemption, giving him at the same time a note for $339.05 for a debt she, individually, owed him and revived one of the estate judgments, as terre-tenant and owner of the real estate of said decedent by last will.

In January, 1896, the widow and her coexecutor renounced the right to administer, and an administrator c. t. a. was appointed. On February 6, of the same year an order of sale was issued by the orphans' court to the administrator to sell the real estate of the decedent for the purpose of paying the judgments against it. On February 3, 1896, the widow elected to take $300 exemption out of the real estate of her deceased husband, which was duly appraised, and $300 awarded to the widow as her exemption out of and from the same.

Other facts appear in the opinion of the court.

The auditor sustained the exceptions to the widow's inventory and appraisement, and ordered distribution to the lien creditors only, as a matter of law, holding that the fact, that the widow remaining silent for upwards of three years after the death of her husband, and making no claim for her exemption, is a conclusive proof of a waiver of her right to the same.

The court below sustained exceptions to the auditor's report, touching confirmation of the widow's inventory and confirming the said inventory finally. Le Grand Wells, a lien creditor, appealed.

Errors assigned among others were (1) in refusing to confirm the auditor's report. (2) In sustaining exceptions thereto and confirming the widow's inventory.

T. J. Davies, for appellant.—A delay of over three years on the part of the widow in exercising her right of exemption is gross laches and operates as a conclusive proof of a waiver of her right: Kerns' Appeal, 120 Pa. 523.

Numerous cases can be cited that hold that a party claiming exemption must not allow expense and cost to be made before making their claim: Williams' App., 92 Pa. 69; Miller's App., 16 Pa. 300.

The authorities are numerous that hold that an extension of time or forbearance is sufficient consideration for an agreement: Hesser v. Steiner, 5 W. & S. 476; Giles v. Acklec, 9 Pa. 147; Gorder v. Bank, 7 Atl. Rep. 144; Horner v. Jones, 6 Phila. 258.

A contract of a married woman to pay the debts of her husband creates a moral obligation: Holden v. Banes, 140 Pa. 63.

Possession by a widow of the real estate devised to her is evidence of an election under the will: Zimmerman v. Lebo, 151 Pa. 345.

Mere ignorance of the law will not relieve her from the effect of acceptance under the will: Light v. Light, 21 Pa. 407.

Where a widow accepts part of a bequest under a will, she is estopped from afterwards claiming her exemption, where it injures other beneficiaries: Maier's Est., 1 Pearson, 420.

The widow's inventory should not be confirmed, and money awarded to the widow, for the following reasons: (1) because the widow did not make her claim for exemption in a reasonable time; (2) because she waived the right of exemption in writing under seal; (3) she is estopped from claiming her exemption, because she accepted and elected to take under the terms of the will of her husband; (4) because the widow failed to proceed and claim her exemption under the provisions of the act of November 27, 1865, and as therein provided; (5) because judgments No. 92, January term, 1894, and No. 91, January term, 1894, became liens upon the real estate described in her inventory, prior to making claim for her exemption, by virtue of her acceptance under the will of her deceased husband.

A. B. Smith, Jr., for appellee.—The relation between the contracting parties appears to be of such a character as to render it certain that they did not deal on equal terms and the transac-

tion is pronounced void. It is incumbent on the party in whom such confidence is reposed to show affirmatively that no deception was used, and that all was fair, open, voluntary and well understood: Stepp v. Frampton, 179 Pa. 284.

Allowance has been had of a widow's exemption after a period longer than three years: Cocker's Est., 1 Dist. Rep. 81.

The laches of the widow, if any, in this regard, are excused by the circumstances: Kirchner's Appeal, 6 Dist. Rep. 138; McWilliam's App., 117 Pa. 111.

OPINION BY BEAVER, J., February 19, 1898:

The facts of this case are peculiar, and its determination must rest upon those facts. They are very fully stated in the opinion of the presiding judge in the court below, and need not be specially recounted here.

The law is especially solicitous and careful—and rightly so—of childhood and old age. The rights of the latter are to be guarded with as much of carefulness and solicitude as the former. As the time approaches for the passage into what we call second childhood, which is practically as helpless as early childhood, there is no reason why the law should not exercise discriminating care in regard to transactions made with persons in the one class as in the other, and why it should not throw the same protection around both.

Eliminating from the consideration of the case the testimony in regard to misrepresentations which would amount to fraud, and threats which would amount to duress, which is not wanting, but which doubtless, on account of the age of the one witness and the youth of the other, was eliminated from the consideration of the case, both by the auditor and the court below, and which is in part at least denied, it clearly appears by the testimony of the appellant himself and from other testimony entirely undisputed, that the appellant came into the home of a widow woman who had reached the three score years and ten usually allotted to man, nearly a year after the death of her husband, when she and her granddaughter, about thirteen years of age, and a small boy, of ten or eleven years of age, were the only persons present—the man of the house, another grandson, a youth in his teens, being absent—with three papers previously prepared for her signature. One of these was the re-

vival of a judgment obtained against her husband in his lifetime, in which she described, or is made to describe herself, as "terretenant and owner of the real estate of said decedent by last will;" another, a judgment note for three hundred and thirty-nine and $\frac{5}{100}$ dollars, with five per cent commission, and the other a paper purporting to be a waiver of her right to exemption from or out of the real estate of the decedent. None of these papers was read to the widow nor did she read them, for the reason probably, as she says, that she "could not read writing to amount to anything." It is alleged, both by the widow and her granddaughter, that she asked to have them read and objected to signing anything which she did not understand. It is clearly apparent that she was not only entirely ignorant of the contents of the papers which she signed, but that she was also ignorant of her rights as a widow. It nowhere appears in the testimony of the appellant, or elsewhere, that there was any agreement as to the extension of time for the payment of the debts of the deceased husband for any definite period. It would seem, therefore, as if the indefinite statement contained in the agreement waiving exemption had been inserted for the purpose of giving an apparent consideration for the execution thereof. Shortly after the execution of this paper, she became aware in some way of her rights as widow under the act of 1851, and some two years thereafter and eighteen days after the issue of letters of administration c. t. a., she presented her petition or election to have set aside and appraised to her, as her widow's exemption, the sum of three hundred dollars out of said decendent's estate, and elected to take the same from the real estate therein described. Appraisers were appointed, who returned that the real estate was of greater value than three hundred dollars, and could not be divided so as to set apart a portion thereof, to the amount of three hundred dollars, as the widow's exemption. Exceptions were filed to this appraisement and, upon the confirmation thereof by the court, this appeal was taken.

In Whelen's Appeal, 70 Pa. 410, this general principle, approved by the Supreme Court, is laid down: "It is clearly settled that where, with a mistake in law, there is found mixed up other ingredients showing misrepresentations, stating that which is not true or concealing that which ought to have been made known, where imposition, undue influence, mental inca-

pacity or surprise are established, relief will be afforded to one who has thus been imposed upon and induced to do that which it is contrary to equity to maintain." It is therein also held "that, when a party has acted under a misconception or ignorance of his title, and has executed an agreement or conveyance to his prejudice, he will be relieved in equity." The latter principle is quoted in Wilson v. Ott, 173 Pa. 253. See also Russell's Appeal, 75 Pa. 269.

Applying these principles to the facts of this case, we are clearly of opinion that the confirmation of the widow's appraisement should stand, and that the paper writing purporting to be a waiver of her right to exemption, having been executed in ignorance of its contents, which should have been communicated to her, and in ignorance of her rights as a widow, when she had no one with whom to advise,—her age, her failing memory and the other circumstances attending the execution of the papers being considered,—should not be allowed to interfere with her right to claim the benefit of the act of 1851, commonly called the widow's exemption act.

Was she guilty of laches in making this claim? Under the circumstances, for the reasons fully and clearly stated by the court below, we think not. The will was not in the possession of the widow. It was not produced for a year after the death of her husband. Practically the entire personal estate had been exhausted in the payment of preferred debts. After the probate of the will, the appellant had the same right to require the issue of letters as had the widow to take them. It does not appear that he suffered by the delay, or that he incurred any expense in consequence thereof. On the other hand, the widow, by her agreement to the revival of the judgment obtained against the husband in his lifetime, prevented the accumulation of costs. She made her demand upon the administrator c. t. a., eighteen days after the issue of letters to him. This case is easily distinguished, by its facts, from Kern's Appeal, 120 Pa. 523. See Williams' Estate, 141 Pa. 436.

Her election to take, under the terms of the will of her deceased husband, did not prevent her claim for the benefit of the exemption law, even if such election had been made in a way which was binding upon her: Peebles' Estate, 157 Pa. 605. The widow's application was not made under the pro-

visions of the Act of November 27, 1865, P. L. (1866) 1227—and the provisions of the said act did not, therefore, apply to the proceedings in this case.

The judgment against the husband revived against the widow as terre-tenant, and that against her were liens only upon her estate as devised under the will. They did not bind her interest under the exemption law, as widow, which was not real estate and which did not attach, until her claim was made.

The assignments of error are all overruled, the decree of the court below is affirmed, and the appeal dismissed, at the costs of the appellant.

Estate of Erastus Potter, deceased. Appeal of Le Grand Wells.

Widow's exemption—Effect of liens existing against decedent and widow.

A widow taking under a will subsequently claimed her exemption out of proceeds of sale of certain real estate. Judgments existed which were liens on the husband's estate and also a personal judgment against her. *Held*, that the judgments were only a lien upon the interest acquired under the will, and that they did not bind the proceeds of the sale of the real estate claimed by the widow as her exemption.

Argued Jan. 17, 1898. Appeal, No. 27, Jan. T., 1898, by Le Grand Wells, from decree of O. C. Susquehanna Co., Nov. T., 1896, No. 26, in distribution of the estate of Erastus Potter, deceased. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Exceptions to auditor's report. Before SEARLE, P. J.

It appears from the record that a question arose in the distribution of the estate of Erastus Potter, deceased; on exceptions filed to the auditor's report by the widow, the exceptions were sustained by the court and the fund was awarded to the widow on her exemption claim.

Other facts appear in the report of the preceding case.

Le Grand Wells, a lien creditor of decedent and of the widow, appealed.

Errors assigned among others were (1) In sustaining exceptions to auditor's report and awarding the fund for distribution to the widow, Jenett Potter. (5) In the opinion of the court, stating as follows: "The fact that Erastus Potter devised to his widow the land incumbered to the full extent of its value could not have the effect of merging her right of exemption out of it, into the title she took by the devise, if it did, the lien creditors of Erastus Potter would by virtue of such merger have a lien prior to the widow's right to exemption. If the right of exemption merged in the title devised, it merged upon the death of Erastus Potter by virtue of his will giving the land to his widow."

T. J. Davies, for appellant.

A. B. Smith, Jr., for appellee.

OPINION BY BEAVER, J., February 19, 1898:

We have this day filed an opinion in No. 28 of January term, 1898, in which the same parties are appellant and appellee respectively, in which the questions involved in this appeal have been discussed and determined.

The record here raises no question which has not been decided in No. 28 above mentioned. The questions relating to the validity of the widow's exemption, as raised in the former case, practically cover all the points raised and argued herein. Admitting the validity of and giving full effect to the judgments of the appellant against the husband of the appellee and also against her, they were only a lien upon the interest which she acquired under the will of her deceased husband. They were not a lien upon any interest which she may have acquired by virtue of her claim for her exemption; first, because the claim for exemption was not made until after the judgments were entered, and, second, what she acquired under said claim was not real estate, but money to be paid out of the proceeds of real estate. She acquired no real estate or interest therein, under the claim, and, therefore, there could be no merger with the estate held by her as devisee under the will of her deceased husband. But even if she had acquired real estate under her claim for exemption, it would not have been the completion of

a title previously commenced. It would have been held by her by a title entirely independent of what she acquired under the will, and would not have been bound by the lien of the judgments of the appellant. When the inventory of the appraisers appointed to make appraisement under her claim for exemption was confirmed, she became entitled to the payment of $300 out of the proceeds of the sale of the real estate, as made by the administrator.

The decree of the court below, making distribution, is, therefore, affirmed and the appeal dismissed, at the costs of the appellant.

Joseph Louchheim *v.* James and Charles A. Maguire, Appellants.

Practice, C. P.—Statement—Affidavit—Effect on defective statement.

A statement must be self-sustaining; that is to say, it must set forth in clear and precise terms a good cause of action.

A statement which alleged the indorsement and delivery of a note to plaintiff, that he is the present holder and that the note has not been paid, does not necessarily require an affidavit of defense, but the defendant having chosen to answer it by affidavit, waives the incompleteness of the statement and must rely upon his affidavit.

Practice, C. P.—Sufficiency of affidavit—Promissory note—Fundamental defense.

An affidavit which distinctly avers that plaintiff is not a bona fide holder for value before maturity, but that he has taken the note since maturity for purposes of collection and in the interest of the payee for the purpose of avoiding the defense which defendants have thereto, is sufficient to put plaintiff upon proof of bona fide holding. When, therefore, the affidavit alleges fundamental defenses which go to the foundation of the right of the promisee to recover, a question is raised for the jury.

Affidavit of defense—Contract of performance.

In an action to recover on a contract for putting down cement pavements, it appears that the contract specifically provided that: "The party of the second part hereby guarantees all work done and all materials furnished by the said party of the second part, under and by virtue of this agreement for a period of five years from the completion of said work, against all defects, whether in work, labor or materials; and said party of the second part agrees on notice in writing from said party of the first part, or a duly

authorized agent of the same, to repair said work and keep it in good order and condition for said period of five years, reasonable wear and tear excepted." The defendant filed an affidavit of defense expressly denying that the contract was substantially performed, and averring defects in coping and curbing, and in the foundations, and an insufficient quantity of cement used; that the contractors were notified of the defects and requested to repair them, to which notice they paid no attention, and that by reason of the failure of the contractors to complete the work in accordance with the contract and agreement defendants have been and will in future be, compelled to pay out large sums of money to repair the same and place it in proper order and condition, and in so doing expend a much larger sum of money than that for which this suit is brought. *Held*, the affidavit was sufficient to prevent judgment.

Argued Dec. 14, 1897. Appeal, No. 151, Oct. T., 1897, by defendants, from judgment of C. P. No. 4, Phila. Co., June T., 1897, No. 829, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit on a promissory note.

It appears from the record and affidavit that this was an action on a promissory note for $500. Defendants filed an affidavit of defense averring that the plaintiff was not a holder of the note for value before maturity and without notice, and further setting out certain defenses on the merits as between the original parties.

The material facts sufficiently appear in the opinion of the court.

After hearing, the court made the rule for judgment absolute, and damages were assessed in the sum of $509.31. Defendants appealed.

Error assigned was making absolute the rule for judgment for want of a sufficient affidavit of defense.

John K. Andre, with him *Henry F. Walton*, for appellants. —The affidavit of defense alleges that the plaintiff was not a holder of the note for value before maturity, and that the contractors to whom the note was given did not do the work in accordance with their agreement, and it is sufficient, therefore, to send the case to a jury: Lane v. Penn Glass Sand Co., 172 Pa. 252.

Samuel K. Louchheim, for appellee.—The work having been completed, the defendants cannot successfully defend a suit for the contract price, because of defects subsequently arising, or repairs needed in said work.

An averment in an affidavit of defense setting forth a claim of damages amounting to more than the plaintiff's claim is too vague an allegation to constitute a defense: McBrier v. Marshall, 126 Pa. 390; Stevens v. Hallock, 7 Kulp, 260.

Even if the statement is demurrable, the defendant having filed an affidavit must set forth facts sufficient to make out a case of fraudulent circulation of the note: Newbold v. Pennock, 154 Pa. 591; McKnight v. Pugh, 4 W. & S. 445.

OPINION BY BEAVER, J., February 19, 1898:

"To entitle a plaintiff to judgment for want of an affidavit of defense or for want of a sufficient affidavit of defense, the statement of his demand, under the act of May 25, 1887, must be self-sustaining, that is to say, it must set forth in clear and concise terms a good cause of action, by which is meant such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim:" Bank v. Ellis, 161 Pa. 241.

The averments in the plaintiff's statement that "The said J. H. Louchheim & Co. then and there indorsed and delivered the said promissory note to the plaintiff, by means whereof the defendants then and there became liable to pay to the plaintiff the sum of money in the said promissory note specified" and the averment by the plaintiff "that he is the present holder of said note, and that neither the whole nor any part thereof has been paid" do not distinctly set up an indorsement and delivery before maturity for a valuable consideration and without notice. The statement did not necessarily require an affidavit of defense but the defendant, having chosen to answer it by an affidavit of defense, waived the incompleteness of the statement, and must rest upon his affidavit: Newbold v. Pennock, 154 Pa. 591; Bank v. Furman, 4 Pa. Superior Ct. 415. The defendants distinctly aver in their affidavit that they are informed, believe and expect to be able to prove that the plaintiff is not a bona fide holder of said promissory note for value before maturity, but that he has taken the same since maturity for the

purpose of collection, and in the interest of the said J. H. Louchheim & Co., and for the purpose of avoiding the defense which defendants have thereto. This averment fully meets the requirements of Newbold v. Pennock, supra, and puts the plaintiff upon proof of bona fide holding.

We have, therefore, but a single question remaining, namely, is the affidavit of defense good as between the makers and payees in the note upon which the suit is founded? The note is alleged in the affidavit of defense to have been given in part payment for work done under a contract in writing between the makers and payees for "all material, labor and tools required for the laying and putting down of the cement pavements, yards and alley-ways, curbs and coping, in the erection of one hundred and fifty-six houses now in the course of erection on Poplar and Wyalusing streets, between 38th and 39th streets, in the 24th ward, city of Philadelphia," and the laying of "the vitrified brick on the two streets above mentioned, to wit, on Poplar and Wyalusing streets, between 38th and 39th streets, according to the specifications contained in exhibit 'A,' and under the supervision and inspection of the highway bureau of the city of Philadelphia." The said agreement contains the following clause: "And the party of the second part hereby guarantees all work done and all materials furnished by the said party of the second part, under and by virtue of this agreement, for a period of five years from the completion of said work, against all defects, whether in work, labor or materials, and said party of the second part agrees, on notice in writing from said party of the first part or a duly authorized agent of the same, to repair said work and keep it in good order and condition for said period of five years, reasonable wear and tear excepted."

The affidavit of defense avers that the work was not done in accordance with the agreement. It specifies the places where, and the character of the defects alleged. It sets forth that "The defect in said coping and curbing is shown by the curb being broken and split, the top coat of the same having cracked, so as to leave the concrete bare. This is caused by the foundations not being properly put in by the said J. H. Louchheim & Co. and an insufficient quantity of cement being used in making the concrete. The cinders making the foundations

were not properly rammed, and the concrete was not made with sufficient cement to form a solid mass necessary to make a good pavement; by means of said defects the pavements rise in certain places, making it dangerous for pedestrians to pass over them." There is also an averment that defendants were notified of these defects and requested to repair them at once, to which notice they paid no attention.

The allegation is further made that "by reason of the failure of the said J. H. Louchhein & Co. to complete said work, in accordance with the contract and agreement, defendants have been compelled to pay out and will be in the future compelled to pay out a large sum of money to repair the same, and place it in proper order and condition, a much larger sum of money than that for which this suit is brought."

These allegations are fundamental. They go to the foundation of the right of the contractors to recover, as fully to all intents and purposes as in Lane v. Penn Glass Sand Co., 172 Pa. 252. We think they fairly raised a question for the consideration of a jury, and that the affidavit should have been held sufficient.

Judgment reversed and a procedendo awarded.

Gerson L. Kahn *v.* James Maguire and Charles A. Maguire, Appellants.

Argued Dec. 14, 1897. Appeal, No. 152, Oct. T., 1897, by defendants, from judgment of C. P. No. 4, Phila. Co., June T., 1897, No. 830, in favor of plaintiff, for want of a sufficient affidavit of defense. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Reversed.

The facts in this case are similar to those in the preceding case, and the cases were argued together.

John K. Andre with him *Henry F. Walton*, for appellant.

Samuel K. Louchheim, for appellee.

OPINION BY BEAVER, J., February 19, 1898:

In the case of Louchheim v. Maguire, we have this day filed an opinion, in which it was held that the affidavit of defense therein filed was sufficient, and that the entry of judgment should have been stayed, in consequence thereof. The facts of this case are similar and, for the reasons stated in the former case, we enter the same judgment. (See ante, p. 635.)

Judgment reversed and procedendo awarded.

John R. Jones, Cornelia P. Jones, Administratrix, v. James E. Cleveland, Appellant.

Contract—Rescission of—Question for jury.

In an action to recover for goods sold and delivered an alleged rescission of the contract becomes the vital point in the case, and there being some evidence of rescission it was reversible error to affirm plaintiff's point as follows: "There is no proof that the contract of sale ever was rescinded and abrogated by the consent of the parties."

Argued Jan. 10, 1898. Appeal, No. 11, Jan. T., 1898, by defendant, from judgment of C. P. Luzerne Co., Oct. T., 1894, No. 285, on verdict for plaintiff. Before RICE, P. J., WICKHAM, BEAVER, ORLADY, SMITH and PORTER, JJ. Reversed.

Assumpsit for goods sold and delivered. Before WOODWARD, P. J.

It appears from the evidence that there was a sale and delivery on behalf of Jones to the defendant Cleveland of fifty tubs of butter, through a sales agent by the name of Staples. The butter was delivered to the defendant and some of it was sold by him.

There was evidence tending to show that subsequent to the sale and delivery Staples, the agent, visited defendant's store in Wilkes-Barre where they had a conversation in which it was alleged that the butter was not good, whereupon Staples telephoned Jones at Binghamton and received from him an answer

to the effect that he was to dispose of the butter to the best advantage he could, and that finally, after making efforts to sell to others, he did sell the whole of this butter to Cleveland at 12 cents a pound, receiving from Cleveland two checks in payment, and gave him a receipt in full.

Out of the proceeds of one of these checks he took his expenses and commission and sent the balance to one Beemer, who he says bought the butter at 11 cents a pound, he having sold it on his account to Cleveland. The court left the question to the jury to decide whether Cleveland was either actually or by force of law, a party to this fraud, stating that there was a fraud beyond doubt. It instructed the jury at the same time that the law applicable to the facts is stated in Bradlee & Co. v. Kemmerer, 108 Pa. 368.

Verdict and judgment for plaintiff for $466.39. Defendant appealed.

Errors assigned among others were (1, 2) In rejecting testimony relating to a second bill of goods between the parties; the offer being made for the purpose of showing that at the time the butter in controversy was bought from Staples and settlement made with Staples, the defendant was not acquainted with and had no knowledge of the plaintiff in the transaction, and that he bought the butter from Staples, believing that Staples was the bona fide owner of said butter. (5) The defendant takes exception to the following statement in the charge of the court, to wit: "Mr. Staples was a sales broker, who traveled the country and effected sales for Mr. Jones. He had no interest in the ownership or property, but was merely a commission broker or intermediate man, who sold the property of another, receiving for his service a commission on the sales. His habit was to receive orders and to forward them to Jones, his employer, at Binghamton, who proceeded to fill them." (6) The charge of the court was vicious and misleading to the jury, as follows: "Up to this point we have the evidence of the sale and delivery of this butter by Jones to Cleveland, and, though there were nothing else in the case, the plaintiff would be entitled to recover the full amount claimed in this suit for the purchase money of the butter." (7) In affirming the plaintiff's first point, which was as follows: "1. If the jury believe that

Staples, who sent the order to plaintiff, pursuant to the proposition contained in the order from Staples, packed up and sent the goods by the D. & H. R. R. to the defendant at Wilkes-Barre, and the goods were there delivered to the defendant, the contract of the sale was thereby consummated and defendant became the debtor of J. R. Jones for the specified price of said goods." (8) The court erred in affirming the plaintiff's second point, which read as follows: "2. If the jury believe from the evidence that the plaintiff was a merchandise broker, the defendant had no right to make payment of the butter to him, unless he was authorized by Jones to make such payment, and the burden of proof is cast upon the defendant to establish by satisfactory proof that Jones authorized the defendant to make such payment." (9) In affirming plaintiff's third point, which reads as follows: "3. That there is no proof that the butter after it was accepted and received by the defendant and appropriated by him was ever delivered in fact to said Jones, or the contract of sale between Jones and Cleveland ever was rescinded and abrogated by the consent of said Jones and Cleveland, nor was there any proof that said butter was ever delivered to said Beemer by Jones or his authority." (10) In affirming the plaintiff's fourth point, which was as follows: "4. That Staples' position and functions as broker with reference to this butter had wholly terminated and ceased when the butter reached the hands of Cleveland, and he no longer represented the said Jones." (11) In affirming the plaintiff's fifth point, which reads as follows: "5. That the defendant cannot avail himself of his ignorance that the plaintiff, Jones, was his vendor, unless he shows that he had used due diligence to ascertain the fact previous to his paying Staples the moneys he paid him for the butter." (12) The court erred in qualifying the defendant's first point, which reads as follows: "1. If the jury believe that Cleveland honestly thought he was dealing with Staples, or with Staples and Beemer, and paid for the butter as he testified, then the verdict should be for the defendant. *Answer:* We may qualify that point and affirm it by saying: 'Provided he was not negligent in acting on the knowledge which he had in the premises.' With that qualification we affirm the point." (13) In qualifying the defendant's second point, which reads as follows: "2. If the jury believe that

Cleveland at first refused the butter, and that then the plaintiff, or his manager, instructed Staples to sell it for what he could get, and in pursuance thereof, he sold it to Beemer, then the verdict must be for the defendant. *Answer:* We say that may be affirmed if the jury believe that the transaction was, as we said before, untainted and free from fraud; with that qualification the point may be affirmed." (14) In charging the jury as follows: "Whatever else is true in this case, it is plain that in this transaction Staples and Beemer did not act as honest men should have acted; that they were guilty of a dishonest unbusinesslike trick in their manner of conducting this business, which resulted in cheating Jones out of every dollar of his money for this butter. In other words, the owner of the property employed a man as his agent on commission, who disposed of the property, received his commission, put it in his pocket and then sold the property a second time to Beemer, received commission again from Beemer, and now goes on the stand to testify for the defendant." (15) The defendant excepts to the whole of the charge of the court, in that it is not sufficiently explanatory of the law governing the case, and in the general assumption that Cleveland was connected with a fraudulent undertaking to cheat the plaintiff.

Jno. F. Scragg, with him *E. C. Newcomb*, *E. F. McGovern* and *Jas. L. Lenahan*, for appellant.

A. J. Colborn, Jr., with him *D. J. M. Loup*, for appellee.—The charge was warranted under the evidence, and the strong expressions used by the court were right and proper, the whole controversy was rightfully left for the determination of the jury: Knapp v. Griffin, 140 Pa. 604.

Strong expressions of opinion upon the facts, which, if taken in connection with the whole charge, does not amount to a binding instruction, is not ground for reversal: Rogers v. Davidson, 142 Pa. 436; Didier v. Penna. Co., 146 Pa. 582.

OPINION BY BEAVER, J., February 19, 1898:

This case was, in the main, well tried and fairly submitted to the jury. The evidence in regard to the receipt of the bill for a second shipment of butter was properly rejected. The testi-

mony was irrelevant and threw no light whatever upon the receipt or failure to receive the bill for the first shipment. If received, it would not have established or tended to establish the fact which was alleged to be the purpose of its introduction. The first and second assignments of error are, therefore, overruled.

As to the admission of the testimony of W. H. Jones in rebuttal, it was entirely within the discretion of the court, and was properly admitted. The denial of the conversations detailed by the defendant's witnesses on cross-examination in chief was of such conversations as were in the mind of the counsel who conducted the examination. The testimony in rebuttal was a denial of the conversations as they were detailed by the defendant's witnesses. The defendant suffered in no way by the admission of this denial.

The statements of fact, as contained in the parts of the charge complained of in the fifth and sixth assignments of error are abundantly sustained by the evidence, and were a fair and clear epitome of the evidence in regard to the status of Staples and the transaction conducted by him, as the agent of Jones, with Cleveland.

The answers of the court to the points of the plaintiff and defendant, as complained of in the seventh, eighth, tenth, eleventh, twelfth and thirteenth assignments of error were correct. Cleveland's acquaintance with Staples and former knowledge of his business, the positive testimony of one of the plaintiff's witnesses as to the mailing of the bill or invoice of the first consignment of butter, made yet more emphatic by his cross-examination upon the subject, were all facts which were to be considered by the jury, and properly influenced the court in qualifying the points which relate to the knowledge and good faith of Cleveland. The manner in which the court characterized the transaction between Staples and Beemer did the defendant no harm, and was certainly no stronger than the facts warranted. One of the most significant facts in the case, which tended to show collusion between Staples and Beemer, namely, the sending of the money received from Cleveland by the former to the latter, instead of to Jones the owner, was not mentioned by the court.

There was no general assumption by the court that Cleveland

had knowledge of or was connected with any fraudulent undertaking to cheat the plaintiff, and nothing in the general charge or in the answers to points justifies the inference of such assumption. The fourteenth and fifteenth assignments of error are, therefore, also overruled.

The ninth assignment is as follows: "That there is no proof that the butter, after it was accepted and received by the defendant and appropriated by him, was ever delivered in fact to said Jones or the contract of sale between Jones and Cleveland ever was rescinded and abrogated by the consent of said Jones and Cleveland, nor was there any proof that said butter was ever delivered to said Beemer by Jones or his authority." It is true that there was no proof that any of the first shipment of butter was ever actually redelivered to Jones, nor was there any proof that any of the butter was ever delivered to Beemer by Jones or by his authority. The rescission of the contract between Jones and Cleveland was a vital point in the case. There was some evidence of such a rescission. It is found in the testimony of Staples, Jones's agent, who testified that he had called Jones by telephone from Cleveland's office in Wilkes-Barre, had informed him that Cleveland would not accept the butter and was told by him to dispose of it to the best advantage; in accordance with which instructions he resold the butter as stated by him in other parts of his testimony. If the jury had believed this testimony, they would have been warranted in finding that the contract had been rescinded. There was error, therefore, in affirming that portion of the plaintiff's third point which stated that "There is no proof that the contract of sale between Jones and Cleveland ever was rescinded and abrogated by the consent of said Jones and Cleveland." For this reason, the ninth assignment of error must be sustained.

The judgment is reversed and a new venire awarded.

J. B. Gwinn and Frank L. Gwinn, Appellants, v. E. M. Lee, John A. Magee, D. M. Anderson, J. L. Hunter and S. B. Eisenhuth.

Partnership—Equity of partners and creditors—Effect of death or transfer.

The equity of creditors must be worked out through the medium of that of the partners.

In the absence of an agreement a legal dissolution is effected by death of a partner or the transfer of a partnership interest.

Partnership—Transfer of shares—Liability for pre-existing debts.

The transfer of a partner's interest or shares in an unincorporated banking association and a continuance of the business without any separation of past from future liabilities, or discrimination between past and future profits will not make the new concern liable for pre-existing indebtedness of the bank. The creditors of the former firm or firms which may have constituted the banking association have no claim attaching to the partnership effects which have passed to the succeeding partnership; the latter firm may sell unhampered by any lien or trust in favor of the creditors of the former firm or assign for the benefit of creditors, and in that case the only persons entitled to participate in the distribution are the creditors of the firm to which the property belonged at the time of the assignment.

Equity practice—Pleadings—Injection of one defendant as supplemental plaintiff.

While in a sense both parties in equity are plaintiffs and a decree may in some circumstances be entered in favor of the defendant without a cross bill, yet the necessity for proper and formal pleadings is not destroyed. It is not permitted on mere motion after replication filed in the regular way and after reference of the case that one defendant may on mere motion urge new facts which would qualify the original statement and without affidavit or service of notice to other defendants inject a new plaintiff to urge grounds of relief which the other party plaintiff could not press.

Equity—Jurisdiction once attaching embraces all points in contest.

Equity ever looks to great principles rather than the special modes of procedure, which latter must always give way when they come in conflict with the application of these principles to cases embraced within them, and a doubt as to equitable jurisdiction will not prevail after a full hearing and after heavy costs have been incurred.

When equity takes cognizance of a litigation it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction attached from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors a multiplicity of suits.

Argued May 6, 1897. Appeal, No. 187, April T., 1897, by plaintiffs from decree of C. P. Clarion Co., Aug. T., 1894, No. 2, dismissing plaintiffs' bill as to certain defendants and refusing certain relief asked for. Before RICE, P. J., WICKHAM, BEAVER, REEDER, ORLADY, SMITH and PORTER, JJ. Affirmed.

Exceptions to referee's report.

It appears from the record that John B. Gwinn filed a bill in equity against Lee and others as copartners praying for the appointment of a receiver for the beneficial association, for an accounting and contribution and general relief. An answer was filed and the case sent to a referee. The referee reported in favor of granting the prayers of the bill to which certain exceptions were filed, as follows:

2. Equity has no jurisdiction to warrant the referee in his report and proposed decree.

3. The referee erred in finding that the transfer of stock made the transferees members of the original company.

5. The referee erred in finding John A. Magee liable for $247.67, E. M. Lee liable for $87.69, J. L. Hunter liable for $119.27, and D. M. Anderson liable for $34.62, and in recommending that they be compelled to pay these amounts.

6. The referee erred in finding that the plant of the Bonanza Oil & Gas Company was liable for and could be confiscated to pay the claim of plaintiff, and in recommending that a receiver be appointed to take charge of and sell the same.

7. The referee erred in finding that Frank Gwinn had the right to intervene and compel the payment of the aforesaid sums, which were sustained by the court below in the following decree:

"And now, April 2, 1897, in accordance with our opinion filed in above stated case, and having heard the parties by their counsel, and on due consideration had, it is hereby ordered and decreed, that the plaintiff's bill be dismissed as to John A. Magee, D. M. Anderson, J. L. Hunter and S. B. Eisenhuth, at the cost of the plaintiff, and that the relief prayed for by the plaintiff and Frank L. Gwinn as to said Anderson, Hunter, Magee and Eisenhuth, defendants, be refused; and that the relief prayed for by the plaintiff and Frank L. Gwinn as to E. M. Lee, defendant, in the 1st and 2d paragraph of plaintiff's

prayer be refused; and the bill is referred back to S. K. Clarke, Esq., Referee, for further proceedings against such of the defendants as were copartners with plaintiff when the debt now held by him was contracted. The question of costs as between the plaintiff and said remaining defendants to be considered and disposed of by the referee and the court at the final hearing."

Other material facts appear in the opinion of the court.

Errors assigned, among others, were, in sustaining the fifth, sixth and seventh exceptions. (4) In ordering and decreeing that plaintiffs' bill be dismissed as to John A. Magee, D. M. Anderson, J. L. Hunter and S. B. Eisenhuth, and that the relief prayed for by the plaintiff and Frank L. Gwinn as to said defendants be refused. (5) In ordering and decreeing that the relief prayed for by plaintiff and Frank L. Gwinn as to appointment of receivers and accounting, be refused.

B. J. Reid, with him *J. T. Maffett*, *F. R. Hindman*, *J. A. F. Hoy*, and *F. J. Maffett*, for appellants.—The court below regards the cases of Christy v. Sill, 131 Pa. 492, and Powell's Appeal, 2 Pa. Superior Ct. 618, as ruling this case. Our contention here is not in conflict with the rulings in either of the cases referred to, and it is in exact accordance with the principles laid down in Baker's Appeal, 21 Pa. 76, which was approved in later cases.

The equities of partnership creditors depend on the equities of the partners, and as long as a partner continues to have an interest in the partnership, so long do the equities of the firm creditors continue: Richard v. Allen, 117 Pa. 199. See also Menagh v. Whitwell, 52 N. Y. 146.

Don. C. Corbett, *W. A. Hindman* and *Harry R. Wilson*, with them *W. H. Hockman* and *Cadmus Z. Gordon*, for appellees.

Where one of several partners pays the debt of the partnership the joint liability is thereby extinguished. It then becomes a question of accounting between the partners. The partner paying the debt is confined to his claim for contribution: Booth v. Farmers and Mechanics Nat. Bank, 74 N. Y. 228.

The cases of Christy v. Sill, 131 Pa. 492, and Powell's Appeal,

2 Pa. Superior Ct. 618, are abundant authority for the ruling of the court below.

OPINION BY ORLADY, J., February 19, 1898:

The facts in this case have been found by a referee, and no exception has been taken to any fact found by him. In 1889 a number of persons organized a company to drill a well for oil and gas, and as a written declaration of their purpose signed an agreement, as follows: "We whose names are hereto subscribed do hereby agree to take and pay for the number of shares set opposite to our respective names, for a formation of a company to operate for oil and gas. Shares to be $20.00 each, and the company to be known as the Bonanza Oil and Gas Company of Curllsville, Pa. When forty shares are taken the company will meet, organize, choose a president, secretary, and treasurer, and procure a charter for the company in accordance with the laws of the commonwealth of Pennsylvania. Shares limited to ." The two persons named as plaintiff, with thirty-five others, joined in the agreement and specified the number of shares desired by each. These subscriptions ranged from one to five, and aggregated seventy-five shares, so as to make a capital stock of $1,500, all of which was paid in cash to the treasurer. The organization was not perfected into a corporation as suggested in the subscription to the capital stock.

In March and April, 1889 several meetings of the stockholders were held; certificates of stock were issued to the various members; a constitution was adopted and subsequently amended; officers were regularly elected until December, 1891, after which time no meeting of directors, executive committee nor stockholders was held.

In the constitution it was provided, "all shareholders by transfer are to be considered members of the original company; and each share of stock is to be entitled to one vote. Transfers of stock shall only be made by a vote of two thirds of the stock;" the later provision was afterwards changed, so that any member had a right to make sale or transfers of his stock at will.

Numerous transfers of the stock were made by assignments noted on the books of the company and others by indorsements on the certificates alone. The dates of these transfers are very uncertain, but at the date when the indebtedness mentioned in

the bill was incurred the seventy-five shares of stock were held by thirty-nine persons, and at the conclusion of taking the testimony the seventy-five shares were held by seven persons.

One of the appellees purchased seventy-two shares of stock after the debt was incurred. Three of the appellees were members of the original company and still own stock. Both of the appellants were members of the original company, and one of them, Frank L. Gwinn, retains his stock, and is a defendant in the bill in equity. Three of the original stockholders advanced of their personal funds certain money to develop the business, and for the money so used by and for the association, J. B. Gwinn, the then president, and R. H. Urser, the secretary, on September 20, 1889, gave a judgment note for $1,529.71, to the creditor. The interest on this debt was regularly paid by the association until October 1, 1892. On October 24, 1893, a personal judgment was entered against J. B. Gwinn and R. H. Urser on the note given for the indebtedness of the association. Payment was demanded by the holder of the judgment, and on March 27, 1894, J. B. Gwinn paid the amount of said judgment ($1,708.06) and had the judgment assigned to him. We do not have the testimony adduced before the referee, but in the opinion of the learned judge who made the decree it is stated, "The plaintiff was one of the original members of said company, being the holder of four shares. He sold one share to his son, Frank L. Gwinn, on April 30, 1889, leaving him still the owner of three shares, which he continued to hold a considerable length of time after the judgment note was given to the Newells for the indebtedness of the company, which three shares he finally transferred to E. M. Lee along in 1891 or 1892."

On June 29, 1894, J. B. Gwinn filed a bill in equity against fifty-three persons, in which the organization of the association, some of the transfers of stock and subsequent management of the business was detailed, and prayed:

1. That a receiver be appointed to take charge of the plant and assets of the association and convert the same into money, if found necessary in the liquidation and payment of debts of the association.

2. That an account may be taken and stated of the receipts and expenditures of said association by its successive officers

and managers, and that any balances found in the hands of such officers or managers, be ordered to be applied under the direction of the court to the payment of said debts.

3. That the said defendants may severally be ordered to pay over to your orator, in liquidation of the debt represented by the judgment note, and the judgment thereon mentioned in the third and fifth paragraph of the bill, such sums as in equity may be found due from them to your orator by way of contribution towards any balance of said indebtedness not covered by the proceeds of the property and assets of said association.

4. And that your orator may have such further and other relief as the circumstances of the case may require, etc.

No demurrer was filed, the appellees answered the bill, and after a replication was filed, S. K. Clarke, Esq., was appointed a referee, to take testimony and report the facts, law and form of a decree.

During the progress of the hearing before the referee, when an objection was made to the right of J. B. Gwinn, to ask for the appointment of a receiver, as he had parted with his interest in the association, and was only its creditor as of the date he took an assignment of the Newell judgment, Frank L. Gwinn was brought on the record as a plaintiff to urge the relief asked for in the first prayer, by filing in court a paper called "Joinder of Frank L. Gwinn in plaintiff's application for a receiver," as follows—"And now, February 13, 1895, Heinman & Hoy, attorneys for Frank Gwinn, one of the defendants and a stockholder in the Bonanza Oil and Gas Company, at the time the debt in this case was contracted, and still a stockholder therein, and as attorneys for other defendants joins in the application of the plaintiff for the appointment of a receiver;" which was indorsed by the court, viz, "June 28, 1895, the within motion presented in open court, and upon due consideration thereof, the same is referred to the referee for hearing and to report the facts and the law in the premises, and to make such recommendation to the court as he may believe just and equitable; and if the applicants are entitled to have a receiver appointed," to which order the attorneys for appellees excepted.

The referee made report and suggested a decree, to which exceptions were filed, and after argument in the court below a decree was entered dismissing the plaintiff's bill as to four

of the five appellees at the costs of the plaintiff, and the relief prayed for by the plaintiff and Frank L. Gwinn as to the four named defendants was refused, as well as to the other appellee in the 1st and 2d paragraphs of the prayer, and the bill was referred back to the referee for further proceedings against such of the defendants as were copartners with the plaintiff when the debt now held by him was contracted. To which decree only the plaintiff and Frank L. Gwinn excepted.

Under the undisputed facts John B. Gwinn, at the time of filing the bill in equity, was only a creditor. The fact that he had been a former member of the partnership did not change his status. He withdrew from the association in 1891 or 1892, and on March 27, 1894, he took an assignment of the Newell judgment. He does not aver who the partners were at the time the liability was created, but does say that changes occurred in the membership, by persons who were not original shareholders purchasing the stock at different periods between the organization of said association and the filing of the bill.

Following Christy v. Sill, 131 Pa. 492, and Powell's Appeal, 2 Pa. Superior Ct. 618, we must hold that this association was a mere partnership; that upon a transfer of stock the assignee acquired the rights and became subject to the obligations of a partner as fully as an original member of the firm or holder of the stock, or which is the same thing, acquired such rights and became subject to such obligations; the retirement of one member, or the admission of a new member, works a dissolution of the partnership. If the business is continued the creditors of the former firm have no equity attaching to the partnership effects of that firm which passed to the succeeding partnership. The new firm has absolute dominion over the property, unhampered by any lien or trust in favor of the creditors of the former firm. The fact that the interests of the partners are represented by shares of stock which are transferable like shares in a corporation, and after such transfer the business is conducted as before, without separation or distinction made between past and future liabilities, does not change these rules. The stockholders in such a copartnership have the rights and responsibilities of, and in their relation to the public and each other are general partners. The equities of the creditors must be worked out through the equities of the

partners, and if none of the partners has an equity to have a preference in the distribution, then of course none of the creditors has any.

The provision in the constitution in regard to the effect of transferring stock cannot be credited with any further purpose than the similar but stronger one in Powell's Appeal, supra, and it only secured the purchasers admission into the new firm and prevented a winding up of the business.

Under the facts found by the referee, neither the plaintiff in the bill nor Frank L. Gwinn had any equity which would entitle him to have the assets of the partnership, as it existed at the time the bill was filed, applied to the payment of debts incurred before John A. Magee, D. M. Anderson, J. L. Hunter and S. B. Eisenhuth became members of it.

It cannot be permitted under our system of administering equity that on a mere motion of a defendant, new facts could be urged which would qualify the original statements, and, without affidavit, notice to, or service upon the other defendants, a new party plaintiff could be substituted to urge grounds for relief which the present plaintiff could not press. No action was taken by the referee of this motion, but he treated it as effective for its intended purpose. The case should have proceeded as if this application had not been made: Equity Rules, 50, 51, 52, 53; Cassidy v. Knapp, 167 Pa. 305.

It has been frequently held that when a court of equity takes cognizance of a litigation it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction attached from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors a multiplicity of suits: Myers v. Bryson, 158 Pa. 246. The reason is that the parties are properly in court in a case of which the court has jurisdiction of the parties and subject-matter. It will sometimes happen that the precise form of relief prayed for is, upon a view of the facts as presented in the evidence, either impossible or inapplicable; and a court of equity will in that case extend such other form of relief as may be appropriate on a consideration of the case presented. This is done to prevent a failure of justice from defective pleading, and to prevent a multiplicity of actions for the same act or omission: Ahl's Appeal, 129 Pa. 49.

Equity ever looks to great principles rather than special modes of procedure, which latter must always give way when they come in conflict with the application of these principles to cases embraced within them: Hudson v. Barrett, 1 Parsons, 414.

A doubt as to equitable jurisdiction will not prevail after a full hearing and after heavy costs have been incurred: Drake v. Lacoe, 157 Pa. 17; Searight v. Bank, 162 Pa. 504; Evans v. Goodwin, 132 Pa. 136.

The parties are in court. Considerable costs have been incurred, and as in Schuey v. Schaeffer, 130 Pa. 23, a decree such as law and equity would require, and which would be binding upon all parties ought to be made. The assignments of error are overruled. The plaintiff was not entitled to have a receiver appointed for a partnership of which he was not a member nor creditor, nor to an account based on its receipts and expenditures. He may or may not be entitled to the relief asked for in the third and fourth prayers, all of which depends on the facts adduced in the evidence which is not before us.

The decree of the court is affirmed and the record remitted for further proceedings.

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Ex. 2 M.B.