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# The Forum - Volume 1, Issue 2

# THE FORUM.

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## EDITORIAL.

### THE TIME TEST.

It is the fashion to test a man's fitness to become a lawyer, in part, by the time he has professedly spent in acquiring the fitness. If he has studied law only one year, he *cannot* be fit. If he has studied law three years, how very fit he must be!

Now, if we knew nothing else of one person's knowledge than that he had spent three years in acquiring it, and of another person's than that he had spent but one year, we should reasonably infer that the former had larger knowledge than the latter. Were there no examining boards, it would be well enough to say that no one should be admitted to the bar until he had seemed to study two or three years. But there are examining boards. And their declared reason for being is that they may learn what the candidate knows. That being so, what more idle or stupid policy than that of requiring a certain minimum time to elapse between the commencement of the study and the admission to the bar? Two men come before the same board at the same time. They are found equally intelligent, equally well informed on the law. But Mr. A. gained *his* competence by a good mind sedulously applied during one year. Mr. B. gained his competence by a dull mind sedulously applied during three years, or he gained his competence by a good mind exerted lazily and spasmodically upon the law during three years. Which of the two gives the better promise? But Mr. B. will be taken and Mr. A. will be left. If Mr. A. had the merit of having spent three years instead of one in gaining what qualification he has, he would be taken too!

So, it comes to pass, that the rule prescribing a time test is a discrimination against capacity and industry, and a premium on incompetence and indolence.

* * *

The editors are sincerely gratified by the cordial greetings extended to THE FORUM. Kind expressions and congratulations have been received from many gentlemen of much prominence in the legal world, and the newspapers of several cities have welcomed warmly the new periodical. To one and all we extend our hearty thanks for their kind words.

* * *

The thanks of the students of Dickinson School of Law are extended to the Court of Cumberland county for favors shown them in the court house. The students appreciate the courtesies extended whereby they are allowed seats within the bar enclosure during the trials of cases. They thus obtain at short range a practical exemplification of the working of the court.

* * *

WE wish to thank the editors of *The Dickinsonian* for their very kind words of praise and encouragement for THE FORUM in recent numbers of their weekly.

## THE ALUMNI.

H. Eugene Marker, '95, was admitted to the bar of Westmoreland County in the beginning of October, 1896. He has an office with his preceptor, H. A. Cline, Esq., in Greensburg, the county seat. In recent bereavements, he has our sincere sympathy.

* * *

Richard J. Goodall, '96, was admitted to the Blair County bar in the second week of December, 1896. He immediately opened an office in Tyrone, and within a week afterwards was able to report that he had already had some business.

* * *

George W. Huntley, Jr., '93, has lately opened an office at Mt. Carmel, Pa. He was formerly located at Ridgway. Other considerations than the quest for clients induced the change, for he was doing well in the latter town. He is at present concerned with the Hon. George A. Jenks, of Brookville, in a case involving a $26,000 estate in Jefferson County.

* * *

George B. Parker, of the class of '96, was admitted to the Pittsburg bar some time ago. He passed the very rigid examination of the Examining Committee of that city with a most excellent showing. Governor Hastings lately appointed him a notary public. He has his office in the Park Building.

* * *

Samuel A. Lewis, '95, was admitted to the Frederick, Md., bar a few months ago. He is forging ahead well in his profession.

* * *

Jacob H. Reiff, '95, is located at New Cumberland, Pa. Besides practicing in Cumberland County, he has considerable business in the Dauphin County Courts, to which bar he was lately admitted. He was a welcome visitor at his *alma mater* a few weeks ago.

* * *

Herman Berg, Jr., '96, has opened pleasant offices in the Henderson Building, Carlisle. His clientage is increasing from day to day and as a consequence he is in a happy frame of mind.

E. J. Jones, '96, has already established a lucrative practice at St. Marys, Elk County, Pa. In order to be admitted, he was subjected to a rigid examination which he passed very satisfactorily. He is the attorney for the St. Marys' branch of the National Building and Loan Association.

* * *

John M. Rhey, of the class of '96, has our hearty congratulations on his reappointment as Journal Clerk of the Pennsylvania State Senate. He occupied a similar position at the last session, and his valuable services then secured his reappointment. He has an office in Carlisle.

* * *

Charles C. Greer, '93, is located at Johnstown, Pa., where he has a pleasant home. His wife was a Miss Bratton, of Carlisle. He has had unusual success in the practice of his profession.

* * *

Samuel Morrow, '96, is associated in the practice of his profession with his brother at Altoona. A class-mate who saw him lately reports him as being pleased with his work thus far and hopeful of the future.

* * *

M. J. Dixon, '96, is located at Wilkes-Barre where he is acquiring an extensive practice. He also has a branch office at his home in Avoca, Pa.

* * *

Rush Trescott, '95, is practicing at Wilkes-Barre, where he is meeting with great success. Mr. Trescott is a nephew of Ex-Judge Rhone, of Wilkes-Barre.

* * *

S. S. Herring, '92, has his office at Wilkes-Barre. He is a member of the firm of Herring and McCormick, which enjoys a large and lucrative practice in Luzerne County.

* * *

Neil C. MacEwen, '92, is situated at Kane, Pa., and is a successful lawyer. He has been interested in several very important suits, the most noted being that of the Kane Borough v. the Kane heirs, which involved about fifteen hundred acres and numerous buildings. He is solicitor for the borough, and is extensively interested

in real estate and insurance lines. He recently formed a partnership with ex-District-Attorney Calkins, of Cameron County. He visited his *alma mater* last month.

* * *

J. Wilmer Fisher, Esq., '96, spent a few days in Carlisle, leaving for Reading on the 1st inst. He has acquired some practice in the Orphans' Court, and intends to make this class of work a specialty.

* * *

John M. Wilson, of the class of '94, has his residence at Trout Run, Pa., and practices at Williamsport. He is reported as doing well.

## THE LACKAWANNA ALUMNI.

Every class that has been graduated from the Dickinson School of Law is represented at the Lackawanna Bar, and one class is *mis*represented. There are twelve of us here, and the object of this article called by your editor "News Notes," is not to send news, not to encourage hope in undergraduates, not to suppress truth, but to sound a note of warning. "Don't come to Scranton." There has been a committee appointed by the Judges of Lackawanna (at the request of the Bar) whose business it will be to catch all men who intend to apply for admission here, and to kill them, or commit them without benefit of clergy. Don't come, we're full, I mean the Bar is full—that is, what I really want to say is that the Superior Court is sitting here this week.

W. D. Boyer, '92, who, with W. M. Curry, occupies a suite of four offices in the Commonwealth Building, is doing a flourishing business. Boyer is one of the successful promoters of Scranton. He can sell more bonds—printed on green paper and having thereto attached a peck or two of worthless coupons—than any man that came out of the Law School.

S. C. Boyer, '93, says the law is too dirty for him. He has left it and gone into the book business. What do you think of a man who says the "law is dirty," and goes into the business of selling George Elliot's novels at $25.00 per set—half down and the other half at $1.00 per month? You can buy them anywhere anytime at $5.00. All I can say is—alas!

Curry, '94, is the Epworth League lawyer of the crowd. He is versatile. He led the Epworthless League on Monday night and went into court on Tuesday morning and tried a suit to recover on a note given to protect margins in a bucket shop. The court frowned him down by nonsuiting him, and expressed surprise at a young man of his standing trying to recover on a gambling contract.

D. B. Replogle, '93, is (by his sign) an "Advokat." He is also a patent attorney. He has also a *specialty*, to wit, real estate, insurance, orphans' court, criminal law, and general law business. This is the age when a man must have a *specialty*. Replogle has crowded all the other *Specialists* to the wall. He owns a fine home and was married not long ago. For most of his brethren from Carlisle he has a withering scorn. May God bless him!

One of the most successful of our men is D. L. Fickes. He has made a business of saving fund work, and is prospering. Recently he refused a flattering offer to form a partnership with an older attorney, preferring to paddle his own canoe. He was recently retained to defend a man in Monroe County who was arrested for peddling without a license. Fickes shipped his books by freight the day before—Purdon's Digest, 2 vol.; Dunlap's Forms; Wharton's Crim. Law, 4 vol.; Blackstone and Kent—and went "by easy stages" on D. L. & W. R. R. to Stroudsburg on the day of hearing. Arrived at the station he engaged a four-horse team to cart his law to the Squire's—about twelve parasangs into the woods. The whole township turned out. There were sales, and games, and horse trades—oh, it was a big time. The case was finally called. Fickes made the argument of his life. The judgment was "Young man, I vas my mind already made before you vas come, aind it; guilty, mid $4 found."

T. P. Duffy, '96, has offices with J. F. Gilroy. Duffy is an old Scrantonian and is doing well.

J. Frey Gilroy has two offices—one in central Scranton, and one in Providence, near his home.

Jeffreys, '96, and Ruddy, '96, are together. Both seem satisfied with the progress they are making. They are bright and industrious.

Shean, '96, is with M. P. Cawley. Shean is pleasant and hopeful. Cawley was a member of the Law School in Scranton, but did not attend at Carlisle. He was admitted to the bar here when the Law School closed. The firm is doing business, and doing it well.

J. H. Bonner, '95, is the bane of Replogle's life. They are suing each other when they don't sue somebody else, and they keep things moving.

As for the writer of this article "he stands mute." Pressed to plead, he fixes his eyes on the skies and exclaims in the language of the psalmist, "In the midst of life we are in debt."

C. BALENTINE, '94.

Mr. Balentine is to be congratulated on the victory he achieved in a murder case tried during the first week of February at Scranton. Though the commonwealth presented very strong evidence against the defendant, Mr. Balentine so effectively followed out the plea of self-defence that the jury returned a verdict of manslaughter instead of first degree murder as the commonwealth asked. The daily papers of Scranton complimented Mr. Balentine very highly on the way in which he handled the case. [Editors FORUM.]

### A SIGN OF THE TIMES.

There was a bright young lawyer,
But he had more hope than cash;
He waited for a client till
His bank account was——

"There's always room at the top," they said,
"Of the ladder of fame sublime."
But the rongs were filled with women, so
Pray how was he to climb?

"We can only build their ladders then"
He sighed, as well he could.
His shingle's down, he's saying naught,
But sweating sawing wood.

—*Berntheisel, '98.*

## THE SCHOOL.

J. Austin Sullivan, '98, was ill for a week in January.

Some of the Seniors have begun to write their graduation theses.

Snyder, '98, is leader of the college orchestra. Berntheisel and Devall, juniors, are also members of the orchestra.

Miller, '97, who has won distinction as a bass singer, recently took part in a very successful concert at Mt. Carmel, Pa.

James D. Edwards and William Escott, of Kingston, and J. C. Manning, of Pittston, visited Daniels, '98, last month.

Quite a number of the students heard the lectures given in Bosler Hall by Dr. Super, of the College faculty. The lectures were part of a series dealing with German literature. They were very interesting and highly instructive.

A series of lectures are to be held under the joint direction of the Dickinson and the Allison Law Societies. The committees are as follows: Allison—Somerville, Walker and Wetzel; Dickinson—Beistel, Caldwell and Lafferty.

Three students entered the Junior class this term. They are G. H. Moyer, of Lebanon, who is well-known in P. O. S. of A. circles; J. F. Scott and Charles F. Ralston, each of whom came from the University of West Virginia.

The criminal court of the county opened on the 1st inst. and continued for a week. It was followed by two weeks of civil court. The students are taking advantage of the opportunities thus afforded, by attending and noting the proceedings.

Moyer, '98, and Berntheisel, '98, were in the cast of "The Drummer Boy of Shiloh" given last month by local talent of Carlisle. Berntheisel and Snyder went to their homes in Columbia during the last week of January to take part in an amateur play.

John Hays, Esq., one of the most prominent members of the Cumberland County Bar, has kindly consented to deliver a lecture before the student body in April. The school is to be congratulated upon securing the services of so eminent a practitioner as Mr. Hays.

Both the Senior and Junior classes had their pictures taken for the college annual,

The Microcosm. This publication has been received with much favor for the last few years and the present management is working hard to make this year's edition more interesting and valuable than ever.

Thursday, January 28th, was observed as Day of Prayer for Colleges. Rev. Wallace MacMullen, D. D., of Philadelphia, preached the sermon in the Allison M. E. Church to the students of the College and the Law School. Dr. MacMullen is a scholarly preacher, and very eloquent, and his sermon was greatly enjoyed.

H. W. McDowell, a former member of the class of '97, is now in Denver, Col., where he is conducting a successful grocery business. Mr. McDowell left Carlisle about a year ago for the gold fields of Alaska where he succeeded in finding some of the coveted ore. He expects to enter the Senior class of the Denver Law School next fall.

The Junior class has chosen the following officers for moot court work: Judge, G. Frank Wetzel; Prothonotary, F. B. Moser; Clerk of Orphans' Court, J. Austin Sullivan; Register, Lloyd Snyder; Recorder, Martin F. Duffy; District Attorney, Claude Roth; Sheriff, A. M. Devall; Justice of the Peace, Robert Stucker; Constable, P. J. Schmidt.

The Senior class organization for moot court practice is as follows: Judge, Thomas K. Leidy; Prothonotary, George B. Somerville; Clerk of the Orphans' Court, H. F. Kantner; Clerk of the Quarter Sessions, Paul H. Price; Register and Recorder, C. H. Hamilton; District Attorney, John E. Small; Sheriff, E. L. Ryan; Justice of the Peace, Simon P. Northrup; Constable, Andrew S. Schoener.

George B. Somerville and Thomas K. Leidy, represented Dickinson Chapter of the Delta Chi Fraternity at the annual convention held at Cornell University, Ithaca, New York, January 28th, and 29th. Mr. Somerville read a very interesting paper on "What Shall Be the Standard of our Candidates," and Mr. Leidy dedelivered an oration on "The Supreme Court of the United States," both of which were well received. They report having a very enjoyable time.

A joint meeting of the senior and junior classes was held Wednesday afternoon, January 27th. John H. Williams, president of the senior class, presided. It was decided to organize a base ball association. Samuel B. Hare, '98, was elected manager, and Albert C. W. Rochow, '97, was chosen assistant manager. An executive committee was appointed to act with the managers. The members of the committee are Williams and Feight, '97; Devall and Hoffman, '98. It is proposed to organize a club at once. There is good playing timber in the school.

## DICKINSON SOCIETY.

The Dickinson Law Society commenced the new term very successfully by deviating from the course pursued during the fall term and furnishing lectures instead of the usual moot court trials. The first lecture was delivered by Prof. George E. Mills, Esq., a member of the faculty, and one of Cumberland County's bright young practitioners. Adhering closely, as he did, to the important doctrines of that momentous subject "Landlord and Tenant," he interested the members for about an hour, discussing various relevant principles which prompted considerable individual thinking and resulted in not a little researching, incontrovertible evidence of the interest manifested and of the lecturer's ability.

The following week William J. Shearer, Esq., of the Cumberland County Bar, favored the society with a lecture on "Criminal Practice," a subject which he handles with a perfection that can be acquired only by an experience such as he has had, being concerned in a large percentage of the important murder cases tried in the different courts in the Cumberland Valley during the last decade, and establishing a reputation as a criminal lawyer, which is recognized throughout the state. The lecturer spoke of the origin of our present system of having counsel for the defence, dwelling upon its advantages and disadvantages to considerable extent and in a manner most entertaining and instructive. He then charged his hearers,

never to shirk duty when called upon to defend one charged with homicide, and ever to "stick to the law" bearing in mind that no lawyer is judge until he be elected judge, nor juror until he is chosen as a juror. The latter principle was vividly illustrated by the lecturer narrating experiences and citing a case, in which he took an active part, with telling effect upon his audience and which made a lasting impression.

Both lecturers were liberally applauded, and a hearty vote of thanks was extended by the society to each, with a mark of appreciation not to be mistaken for mere courtesy.

### ALLISON SOCIETY.

Hon. J. M. Weakley, of the School faculty, was presiding judge at a moot court case of the Allison Law Society on Wednesday evening, January 20. His clear elucidation of the law of bailment was very highly appreciated, and the society extended him a hearty vote of thanks, with the expressed hope that he again preside at one of the moot-court cases.

The society in January elected to membership Benedict, '97, Livingston, Scott, Ralston and Moyer, all '98.

John R. Miller, Esq., Chief Burgess of Carlisle, lectured before the Allison Society, the Dickinson Society joining, on Wednesday evening, February 3. His subject was "Early Land Titles in Pennsylvania." The address was replete with interesting data concerning titles and lands in the early days of the Commonwealth, and Mr. Miller spoke in such an interesting manner that he had the closest attention and appreciation of the student body. The lecture was a highly instructive one and a vote of thanks was heartily tendered Mr. Miller.

## THE BENEFIT OF CLERGY.

The old time laws and legal fictions are interesting to the historical student. They afford, in their quaint fictions and queer reasons, valuable evidence concerning the social customs, laws and habits of our stern forefathers. Researches, which are full of interest, have recently been made among these antiquities. Were it not for such researches the people of these generations would know very little of "Benefit of Clergy," the "Right of Sanctuary," the "Law of the Forest," and "Trial by Ordeal."

British legal reformers have always shown a strong disinclination to make a clean sweep of a system, no matter how full of abuses. They followed this plan with the "Benefit of Clergy." At first the privilege of escaping just punishment for crime was confined to such as had the clerical dress. In those days the clergy, like the king, could do no wrong. Soon the very door-keepers of the churches crept within the benefit of clergy law. The custom carried with it a trial in the bishop's court, where twelve compurgators, or witnesses to good character, quickly cleared the criminal. "Benefit of Clergy" soon became the criminal's golden gate. The requirements were very simple. A person must needs be able only to read the first verse of the 51st Psalm in Vulgate. The "Neck Verse," as it soon became known, contained but three words,—"*Miserere Mei, Deus*," and few were the criminals who could not read or memorize these words. Women in those days were outside the beneft of clergy, but they were admitted by James I.

Henry VII. added a painful necessity to the claiming of a man's clergy. A murderer was to be branded on the crown of his thumb, with the initial letter of his crime. A capital "T" marked those accused of other felonies. No second benefit of clergy could be obtained. Both the branding iron and the "Neck Verse" were finally abolished, the former in 1705 and the latter in 1779. But from the time of Edward VI. until 1841, every peer in the realm, "though he cannot read," as the statute ran, enjoyed his clergy, and often used it, as the State Trials show.

CALDWELL, '98.

## THE MOOT COURT.

### ESTATE OF FRANCIS LEGRAND.

S. P. NORTHRUP and P. H. PRICE for Exceptants.

When time is annexed, not to the payment, but to the substance of the gift, it is contingent. Gilliland v. Bredin, 63 Pa.

393; Stover's Appeal, 77 Pa. 282; Campbell v. McDonald, 10 W. 179; Patterson v. Hawthorne, 12 S. & R. 112; Provenchere's Appeal, 67 Pa. 463; Pennock v. Eagles, 102 Pa. 290; McClures Appeal, 72 Pa. 414; Moore v. Smith, 9 W. 403.

Beginning to reside in Camp Hill is a condition precedent. Campbell v. McDonald, 10 W. 179; Hutchin's Estate, 9 Phila. 300.

A condition, though whimsical, will be respected. Campbell v. McDonald, *supra;* Gilliland v. Bredin, *supra;* Stover's Appeal, *supra.*

Death of Thomas and Samuel before the lapse of eighteen months, did not relieve from the condition. Stover's Appeal, *supra;* Patterson v. Hawthorne, *supra.*

Little's Appeal, 117 Pa. 14, differs from this case in the act to be done; and in that the legacy was to McComb and his heirs.

A specific legacy lapsing, falls into the residue; Gilliland v. Bredin, 63 Pa. 393; Campbell v. McDonald, 10 W. 179; Massey's Appeal, 88 Pa. 470; Woolmer's Estate, 3 Wh. 476; Harland's Estate, 13 Phila. 229; Reimer's Estate, 159 Pa. 212.

HORACE CODINGTON and H. CLAY BEISTEL for Auditor's Report.

The condition was subsequent, not precedent. Dunn v. Sargent, 101 Mass. 336; Burd v. Burd, 40 Pa. 182; Hutchin's Estate, 9 Phila. 300; Furness v. Fox, 1 Cush. 134.

The interest, therefore, being vested, the possession alone being dependent upon the condition, which became impossible of performance, by the act of God, the interests are absolute. Hutchin's Estate, 9 Phila. 300; Parker v. Parker, 123 Mass. 584; Merril v. Emery, 10 Pick. 507; McLachlan v. McLachlan, 9 Paige 534.

Even though the legacy be contingent, the legatee had that interest which would enable him to fulfil the condition and claim under the will. Little's Appeal, 117 Pa. 14; 37 Barbour 496.

If there is any doubt as to whether or not the condition was precedent, such doubt will be resolved in favor of the estate being vested. Chess's Appeal, 87 Pa. 362; Amelia Smith's Appeal, 23 Pa. 9; Peterson's Appeal, 88 Pa. 397; Chew's Appeal, 37 Pa. 23; Lantz v. Trusler, 37 Pa. 482; Young v. Stoner, 37 Pa. 105; Womrath v. McCormick, 51 Pa. 504.

OPINION OF COURT.

The bequests of Francis Legrand are of $2,500 "to each of three of my brothers who shall take up their residence in Camp Hill before, or within eighteen months after, my decease." He had three brothers, John, Thomas and Samuel, who, when the will was written, and at his death, were residing beyond Pennsylvania. John took up his residence in Camp Hill, six months after Francis' death. Thomas, not resuming residence in Camp Hill, died nine months after Francis. One of Thomas' sons, Isaiah, moved to Camp Hill six months after his father's death. The other, Julian, remained beyond the state. Samuel, having moved from Camp Hill before the will was written, his son Harry had remained in that borough, until Francis' death and afterwards. Two other children of Samuel, Sarah and Jefferson, accompanied him on his removal. Samuel died, never returning to Camp Hill, one year after Francis' death, and Sarah and Jefferson never came to Camp Hill.

The auditor has allowed to John $2,500, $2,500 to Isaiah, and $2,500 to Harry.

Who are the legatees? They are described by two notes. They are (1) brothers of the testator; they are (2) such brothers as shall take up their residence in Camp Hill within eighteen months after the decedent's death. Possession of either note without the other, will not entitle. To reside, not being a brother; to be a brother, not residing, will not answer the definition of the benefited class. The principle stated thus, by Smith, on Executory Interests, p. 281, is applicable; "Where real or personal estate is devised or bequeathed to such children * * as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, *without any distinct gift to the whole class, preceding such restrictive description*, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is necessarily contingent on account of the person. For, until the age is attained, the character is sustained, or the act is performed, the person is unascertained; there is no person answering the description of the person who is to take as devisee or legatee." McBride v. Smyth, 54 Pa. 245; Fairfax's Appeal, 103 Pa. 166; Chambers v. Wilson, 2 W. 495.

It is hardly correct to speak of the legacy as being contingent. It is contingent only as every legacy, gift, or grant is, viz: upon the existence of the designated legatee, devisee, grantee. A deed to X is void, if X is not in existence. A legacy to Samuel Thompson would be a nullity, if there were no Samuel Thompson. *This* legacy is null, if there are not brothers, *who resume residence* in Camp Hill within

eighteen months after the testator's death.

But, had there been first, a gift to each of the three brothers of $2,500, with a subsequent *proviso* that the gift should be void, unless they should within eighteen months after the donor's death, have begun to reside in Camp Hill, we think the same result would in substance have been reached. As the testator can withold his gift altogether, he can condition it as he chooses. He can require, e. g. a personal appearance in the county, for the purpose of demanding the legacy. Campbell v. McDonald, 10 W. 179; Stover's Appeal, 77 Pa. 282 (reversing Hutchin's Estate, 9 Phila. 300.) Francis Legrand has chosen to give $2,500 to such of his brothers as begin to reside in Camp Hill within eighteen months. His will cannot be revised by the Courts for any supposed capriciousness or whimsicalness. We cannot speculate as to whether he contemplated the possibility of a brother's dying in six months or as to what he would have done had he contemplated such possibilty. He has given the $2,500 to his brothers, not to his nephews; and to such *brothers* only as shall begin to dwell in Camp Hill.

John is such a brother. He must receive the legacy. Thomas and Samuel, though brothers, were not *such* brothers. They cannot receive the legacy. Isaiah and Harry, were not *such* brothers, and were not brothers at all. The award of a legacy to them by the auditor was therefore erroneous.

The legacies claimed in behalf of Thomas and Samuel having lapsed, fall into the residue of the estate, and pass to the residuary legatee. Massey's Appeal, 88 Pa. 470.

The exceptions of the residuary legatee, to the award to Isaiah and Harry Legrand, are sustained. Those of Julian, Sarah and Jefferson Legrand are dismissed.

The report is recommitted to the auditor that he may rectify his distribution in accordance with this opinion.

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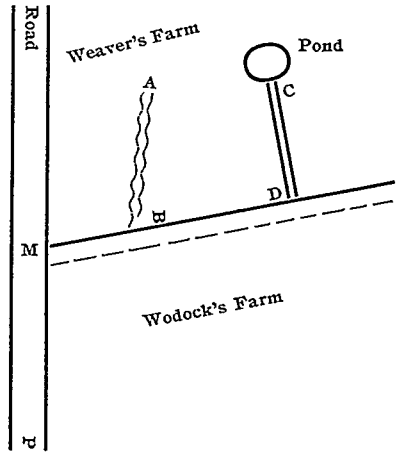
## AMOS WEAVER vs. JEFFERSON WODOCK.




Weaver's and Wodock's farms adjoin, and are bounded by a road. This road from M towards P is lower than the farms. Wodock's farm is lower than Weaver's. The water falling on a large part of Weaver's farm is drained into a natural gully A–B, and thence upon the ravine on the edge of Wodock's farm, through which it reaches the road at point M and pours down to P, and further. At another point in Weaver's farm there is a natural depression, and the water falling upon about twenty acres is drained into this depression, from which it has no outlet, but in which it remains until it evaporates or is absorbed by percolation into the soil. Weaver cut a ditch C–D from this pond to the ravine on Wodock's farm, through which the pond was wholly drained upon Wodock's land, and ultimately upon the road. Wodock to prevent the flow of water from Weaver's farm erected an embankment along the edge of his farm. In consequence the pond on Weaver's land became full and a large lake was formed by the water that had previously flowed upon Wodock's land.

In this trespass, for preventing the drainage of Weaver's farm, it is agreed that the damage caused by the pond is $150; and that by the occlusion of the gully A–B, $225. The question of law is presented, whether Weaver is entitled to recover.

HARVEY E. KNUPP and HERMAN H. GRISWOLD for plaintiff.

Damages are recoverable for preventing the natural flow of water from the dominant to the servient estate. Surface water drained into a ravine, a natural water course, cannot be obstructed by the owner of the servient estate. Kauffman v. Griesemer, 26 Pa. 413; Martin v. Riddle, 26 Pa. 415; Miller v. Laubach, 47 Pa. 154; Meixel v. Morgan, 149 Pa. 418; Davidson

v. Sanders, 1 Super. Ct. Rep. 432; Huddleston v. Borough of Bellevue, 111 Pa. 110; Pa. Coal Co. v. Sanderson, 113 Pa. 160; Rhoads v. Davidheiser, 133 Pa. 228; Glass v. Fritz, 148 Pa. 324; Bierer v. Hurst, 155 Pa. 523; Angell on Water Courses, p. 123; Amer. and Eng. Ency. of Law, Vol. 28, p. 959; Keller v. Staltz, 71 Pa. 356; Bells v. McClintock, 9 Watts 119.

JULIAN C. WALKER and GEO. W. BENEDICT, JR., for defendant.

Plaintiff had no right to cause the pond to be drained upon the defendant's land, by cutting the ditch, A–B. Kauffman v. Griesemer, 26 Pa. 407; Martin v. Riddle, 26 Pa. 415; Meixel v. Morgan, 149 Pa. 415; Glass v. Fritz, 148 Pa. 324; Pfeiffer v. Brown, 165 Pa. 267; Sackrider v. Beers, 10 Johns. 241.

Defendant had a right to erect the embankment to obstruct the flow from the pond, and because he could not do so without obstructing the flow from the gully, also on account of the slope of the land, he is not liable for the latter obstruction.—Kauffman v. Griesemer, *supra;* Merritt v. Parker, 1 Coxe (N. J.,) 526; Glass v. Fritz, *supra;* Martin v. Riddle, *supra.*

OPINION OF COURT.

Weaver's and Wodock's farms are contiguous, the latter being lower than the former, and, having, along the division line, a ravine. A part of Weaver's farm is drained into a gully, which pours at right angles into this ravine. At another point there is a pond of water on Weaver's farm, which he has attempted to drain, by cutting a ditch from it, at right angles into the ravine. This ravine, beginning eastward of the pond, runs westerly, at an inclination, past the point where the gully empties into it, until it reaches a highway which skirts the farms of both Weaver and Wodock. Wodock has erected an embankment on his land, along the edge of the ravine, for the purpose of preventing, as he has prevented, the flow of the water through the ditch from the pond, and through the gully, upon his farm.

That Weaver had a right to have the water flowing into the gully, borne upon Wodock's farm, is not to be questioned. The latter was in this respect servient to Weaver's. Meixell v. Morgan, 149 Pa. 415; Glass v. Fritz, 148 Pa. 324; Kauffman v. Griesemer, 26 Pa. 407. The land is agricultural. Wodock's is by nature lower than Weaver's. The gully is a natural depression, and the drainage of a portion of Weaver's farm through it, upon Wodock's is not due to artificial modifications of the ground.

It was the duty of Wodock to allow the water thus visiting his land, an unobstructed entrée. For impeding it by any artificial barrier, he is liable to an action of trespass. Glass v. Fritz, 148 Pa. 324. [Formerly trespass on the case; Kauffman v. Griesemer, 26 Pa. 407; Martin v. Riddle, 26 Pa. 415.]

Clear as is the right of Weaver to an unimpeded passage of the water through the gully upon Wodock's land, it is, we think, equally clear that in permitting the pond to be drained by an artificial channel, upon Wodock's farm, he committed a trespass. One man cannot drain his land at the expense of his neighbors. In the enjoyment of the drainage instituted by nature, he will be defended. He cannot supply himself to the detriment of others with a drainage which nature has withheld. Kauffman v. Griesemer, 26 Pa. 407; Glass v. Fritz, 148 Pa. 324.

Wodock has encountered the trespass thus committed against him by Weaver, by erecting a barrier to keep off the water pouring upon his land, through the ditch. This he had a right to do. "Against any contrivance," says Woodward J, "to reverse the order of nature (*i. e.* to make that land servient which was not by nature servient) he (the owner) might peaceably and on his own land take measures of protection." 26 Pa. 407, 414, 415; Martin v. Riddle, 26 Pa. 415; Glass v. Fritz, 148 Pa. 324.

But the means adopted by Wodock to dam back water pouring through the ditch, also prevents the access to his land of the water coming through the gully. Is he justified in inflicting the latter injury incidentally to his warding off the former injury aimed at himself? If water is improperly turned by B, an owner of land, into a channel which *naturally* conducts from A's land the water falling upon it, upon C's, C cannot defend himself from B's wrongful act by an obstruction to the flow of the water from A's, although the water from A's is mingled with that from B's and one cannot be excluded without the other. Martin v. Riddle, 26 Pa. 415. In short, a man cannot defend himself from B's wrong, by inflicting a wrong on A.

The problem here is different. It is, can Wodock obstruct the flow on his land of water properly flowing on it from Weaver's by a contrivance reasonably necessary to prevent the aggression of the water from the pond? We think he can. "Against injuries of this nature" (i. e. improper diversion of water upon a neighbor) says Jones, P. J. "one may protect himself by necessary countervailing structures, and if *some damage* result to the party whose action rendered such structures necessary, not more however than may be unavoidable from a judicious and reasonable exercise of the right of self-protection, the party so damnified would have no just ground of complaint." Kauffman v. Griesemer, 26 Pa. 407, 410. In Merritt v. Parker, 1 Coxe (N. J. L.) 460; Kinsey, C. J., maintained the same doctrine, saying, "In the present case, it is impossible that Parker could discriminate between the water that was drawn from the creek, and that which belonged naturally to the rivulet; neither could he prevent the one from flowing into his land without keeping out the other also."

But, it does not appear that the stretching of an embankment along the ravine, and the obstruction of the water in the gully were a necessary concomitant of the prevention of the flow of the pond-water through the ditch. So far as appears, the one justifiable result could have been accomplished without the other.

We think therefore that the plaintiff is entitled to a judgment for $225, the damage arising from the blockade of the gully.

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## SAMPSEL vs. OVERSEERS OF BENNER TOWNSHIP.

GEO. B. SOMERVILLE and H. S. KISER for plaintiff.

The place of settlement of an illegitimate child is the place of settlement of its mother at the time of its birth.—Act of June 13, 1836, § 11, P. & L. Dig. 3553; Nippenose v. Jersey Shore, 48 Pa. 402; Lower Augusta v. Selinsgrove, 64 Pa. 166; Wayne Township v. Jersey Shore, 81½ Pa. 264.

The order of removal was made out in accordance with the act of June 13, 1836, and the defendants were compelled to grant relief.—Sugarloaf v. Schuylkill, 44 Pa. 481; Moreland v. Union, 6 Pa. C. C. 566; Bradford v. Keating, 27 Pa. 275; Renovo v. Half Moon, 78 Pa. 301.

No intendment is made against an order of removal.—Reading v. Cumree, 5 Binn. 80.

Overseers have the power to make contracts for the keeping of those placed in their charge.—Parker City v. Shaffer, 3 Penny., 101; Act of '36, *supra.*

WILLIS E. MACKEY and E. L. RYAN for defendants.

The court of Common Pleas has no jurisdiction in this case.—Nippenose v. Jersey Shore, 48 Pa. 402.

It does not appear that an order of relief was gotten previous to the order of removal, and the latter is therefore void.—Overseers of Elk Township v. Overseers of Jordan Township, 10 Pa. C. C. 245.

An adjudication by two justices is necessary, in order that relief may be given.—Overseers v. Baker's executors, 2 Watts 280; 2 Purd. Dig. 1704. It does not appear that there was such an adjudication in this case. The overseer therefore had not the capacity to bind the township.

### OPINION OF COURT.

Mertie Ammerman, a bastard, was born in Benner Township where her mother had a legal settlement. After her birth, her mother went to Spring Township, carrying Mertie with her, and the latter was placed under the charge of the overseers of Spring. Under an order of removal, signed by two justices, she was taken back to Benner, one of the overseers of which contracted with Sampsel, a resident of Spring Township, to furnish support to the child there, in order that it might not be deprived of the nurture of its mother. Sampsel having recovered $182 for the maintenance of Mertie Ammerman before a justice of the peace, we are now entertaining an appeal from the judgment of the justice.

The overseers can make contracts of the sort of which this with Sampsel is a specimen. An instance may be found in Overseers of Poor of Parker City v. Shaffer, 3 Penny. 101. No point has been made that but one overseer made the contract with Sampsel. We think the objection, had it been made, could have availed nothing.

But the overseers cannot make binding contracts for the support of everybody. Do the conditions here exist for the effectual making of the contract?

Benner was the township of settlement of Mertie Ammerman. § 11, Act June 13, 1836; 2 P. & L. 3553; 2 Purd. 1706; Nippenose v. Jersey Shore, 48 Pa. 402; Lower Augusta v. Selinsgrove, 64 Pa. 166. She

never acquired any other. If she was a pauper, it was the duty of the overseers of Benner to provide for her. But, the overseers are not the judges of her being a pauper. "No person shall receive relief from any overseers, before such person, or some one in his behalf, shall have procured an order from two magistrates of the county for the same." Sec. 6, Act 13 June, 1836; 2 Purd. 1704; 2 P. & L. 3532.

No order by two magistrates for the support of Mertie Ammerman was procured. The precondition to the power of the overseers to furnish a support to her, was therefore wanting. No facts appear that could dispense with such order.

It may be said that the order of removal from Spring Township is equivalent to an adjudication that she was a pauper. So far as appears, that order was not preceded by an adjudication that she was chargeable or likely to become chargeable on Spring Township. If the reasoning of Krebs, J. in Elk Township Overseers v. Jordan Township Overseers, 10 Pa. C. C. 245 is to be accepted, that order was for this reason void. But, even though as between the two townships, the order of removal be deemed conclusive, we cannot see how it can have any effect upon the relation of Benner Township to Sampsel.

Sampsel claims on a contract with the overseers. He must show their capacity to make the contract. He must show an adjudication by two justices, that Mertie Ammerman was a pauper, and as such, chargeable on Benner. There has been no such adjudication. In an action in the Common Pleas, whether she was in fact a pauper chargeable to the township cannot be collaterally inquired into. Only the justices, or the Quarter Sessions on appeal, can consider that question.

The order for removal may be made "where any person has, or is likely to *become* chargeable." §16, act June 13, 1836. The order of the justice therefor for the removal of a person, is not necessarily an adjudication of more than that he is likely to become chargeable" to the township. But likelihood to become chargeable would not warrant the overseers in granting maintenance, for the probable future necessity for public relief might never become actualized.

We do not think, despite the suggestion of Woodward, C. J. in Overseers of Nippenose Township v. Jersey Shore, 48 Pa. 402, that the remedy was improperly sought before the justice; and on appeal, in the Common Pleas. *Cf.* Overseers of Poor of Parker City v. Shaffer, 3 Penny. 101; Directors v. Murry, 32 Pa. 178; Directors v. Worthington, 38 Pa. 160.

For reasons indicated, the plaintiff is not entitled to recover.

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JOHN SMITH vs. ABEL STEVENS.

The plaintiff's claim is founded upon the following facts. On the 20th day of May, 1890, the plaintiff, John Smith, and the defendant, Abel Stevens, entered into articles of agreement for the sale of a piece of land in the township of Middlesex, county of Cumberland. In the said agreement a covenant against incumbrances was entered into. On the 1st day of September, 1890, in accordance with the agreement, a deed for the land was duly executed and delivered. No covenant against incumbrances was included in the deed, but one of general warranty was. Shortly after the plaintiff, John Smith, found that there was a mortgage against the land for the sum of $500, and was compelled to pay the same by reason of a *scire facias* issued on the mortgage, resulting in a judgment, and of threatened execution upon the same. He avers that in accordance with the articles of agreement, it was the duty of the defendant to pay the said mortgage, which he was wrongfully compelled to pay, and he therefore brings this suit.

HENRY W. SAVIDGE and JOHN HARRIS WILLIAMS for the plaintiff.

A parol stipulation by the vendor of land to refund the purchase money in the event of a failure of title, and to reimburse the vendee for any costs and expenses incurred, will not be merged in a deed containing a covenant of special warranty, but no covenant of title, afterward accepted by the vendee in consideration thereof. Close v. Zell, 141 Pa. 390.

A covenant in an agreement for the sale of coal, to convey together with the coal certain mining rights, is not merged in the deeds subsequently made for the coal, which omitted to convey the mining rights. McGowan v. Bailey, 155 Pa. 256.

In a covenant against incumbrances, if incumbrances exist, the covenant is broken as soon as entered into; in general warranty, the covenant is broken only by eviction. Knepper v. Kurtz, 58 Pa. 480.

The existence of the mortgage, and the threatened enforcement of the judgment recovered on it, constitutes constructive eviction. Sprague v. Baker, 17 Mass. 585.

JOHN E. SMALL and H. FRANKLIN KANTNER for the defendant.

A grantee, who, under an agreement for the conveyance to him of lands, is entitled to insist upon a deed with a covenant against incumbrances, is tendered a deed not conforming to the agreement, accepts it and an incumbrance unknown at the time to either party is thereafter discovered. In the absence of fraud no legal liability rests upon the grantor, nor is the grantee entitled to any relief. Whittemore v. Farrington, 76 N. Y. 454.

The acceptance of the deed constituted a full execution of the prior agreement, which is merged in the deed. Rice v. Lewis, Atlantic 810; Madore's Appeal, 129 Pa. 15; Whittemore v. Farrington, 76 N. Y. 454.

A mortgage is an incumbrance which affects the title and a covenant of this kind is broken the instant it is made. Funk v. Voneida, 11 S. & R. 109; Memmert v. McKeen, 112 Pa. 320.

The agreement not having been under seal, and the covenant having been broken at the time of the making of the contract of sale, the action is barred by the Statute of Limitations.

CHARGE OF COURT.

*Gentlemen of the Jury:*

On May 20th, 1890, Smith and Stevens entered into articles of agreement for the sale of a tract of land by the latter to the former, the agreement containing "a covenant against incumbrances." On Sept. 1, 1890, in accordance with this agreement, a deed was duly executed and delivered, in which there was no covenant against incumbrances, but there was one of general warranty. Shortly after, Smith discovered a mortgage for $500 upon the land, which, on account of a *scire facias*, a judgment, and a threatened execution, he was compelled to pay. He sues in assumpsit to recover the $500 from Stevens.

The articles contained a "covenant against incumbrances." A mortgage is an incumbrance, Rawle Cov. Tit. 96, and its existence even, still more its enforcement, was a breach of the covenant. Rawle, Covenants for Title, (4th. ed.) 89; Wilson v. Cochran, 46 Pa. 229; Knepper v. Kurtz, 58 Pa. 480. For its mere existence, Smith would have been entitled to nominal damages. Having paid the incumbrance, he may recover what he has so paid. Funk v. Voneida, 11 S. & R. 109.

But, two objections to such recovery have been urged. It is said, (1) that the Statute of Limitations has barred the action; and (2) that the covenant in the articles has been drowned in the deed.

(1) The articles were under seal. The Statute of Limitations does not run against a specialty. The "covenant against incumbrances" is a specialty.

(2) Nor are we convinced that the covenant was merged in the deed. The theory of merger is founded on the presumed or proved intention of the parties. Express evidence of intention to merge the articles in the deed, there is none. The covenant in the deed is not equivalent to that in the articles, so that the intention to absorb the latter in the former cannot be inferred from their identicalness. A deed with special warranty does not extinguish a previous parol agreement to refund the purchase money on a failure of title. Close v. Zell, 141 Pa. 390. A deed with general warranty does not put an end to an oral promise by the vendor to indemnify the vendee for improvements, should the title prove worthless. Richardson v. Gosser, 26 Pa. 335. A special agreement to repay to the vendee all costs, charges and damages, on account of any action brought against him by any claimant of the land, survives the deed. Cox v. Henry, 32 Pa. 18. A deed to A's son, under and subject to a mortgage, does not merge the previous promise by A to pay the mortgage and so indemnify the grantor. Stockton v. Gould, 149 Pa. 68; *Cf.* McGowan v. Bailey, 155 Pa. 256. We think the covenant in the articles survived the conveyance.

But, the declaration of the plaintiff will permit him to recover on the covenant of *warranty*, if it has been broken. Has it been broken? That covenant is broken only on an eviction. On the judgment recovered on the *scire facias sur* mortgage, an execution and a sheriff's sale were threatened, and the mortgage was purchased to avoid the sale. This was a constructive eviction. Brown v. Dickerson, 12 Pa. 372; Rawle, Covenants for Title, Ed. 1873; 162, 168, 169, 171; 18 Am. & Eng. Encyc. Law, 990, 991, 992. *Cf. Dicta* in Stewart v. West, 14 Pa. 336, [In Sprague v. Baker, 17 Mass. 585, was a covenant for *quiet enjoyment*, which is broken, according to Gibson, C. J., Stewart v. West, 14 Pa. 336, by the mere commencement of an action on the better title.] Hauck v. Single, 10 Phila. 551; Dickinson v. Voorhees, 7 W. & S. 353.

The covenant was then broken, and the

amount of money paid to secure the land, not exceeding the price paid for it, can be recovered as damages by the plaintiff. We cannot, therefore, gentlemen of the jury, instruct you, as we have been requested, that there can be no recovery. On the contrary, we instruct you that, on the undisputed evidence, the plaintiff is entitled to a verdict for $500, with interest from the time he paid that amount to the mortgagee.

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## ESTATE OF JOHN DAMBACH, DECEASED.

HUGH R. MILLER and PAUL H. PRICE for the exceptants.

(1.) Presumption of payment arises after twenty years.—Reed v. Reed, 46 Pa. 239; Eby v. Eby's Assignee, 5 Pa. 435; Stout v. Levan, 3 Pa. 235; Peter's Appeal, 106 Pa. 340. (a) Computation runs from the period when the money was demandable.—Deimer v. Sechrist, 1 P. & W. 419. (b) Presumption is complete on the expiration of twenty years, after which it gathers strength with every succeeding year and requires a corresponding increase in the weight of evidence to overthrow it. —Cope v. Humphreys, 14 S. & R. 15; Bentley's Estate, 9 Phila. 344.

(2.) Should the presumption be repelled, the amount of $1,000 and interest from the death of the decedent can only be claimed. —Bachman v. Killinger, 55 Pa. 414.

THOMAS KEMMERER LEIDY and JOSEPH F. BIDDLE for claimant.

The claimant, Mary Dambach, by reason of her marriage, has never been able to sue her husband on the bond.—Act 8 June, 1895, 2 P. & L. Dig. 2906; Ritter v. Ritter, 31 Pa. 396. Marsteller v. Marsteller 93 Pa. 350; Wormley's Estate, 137 Pa. 101.

No right of action could accrue to the claimant until the death of her husband and her appointment as administratrix, so that the statute of limitations or the presumption of payment could not run against her before Oct. 7, 1895.—Act 27 March, 1713, 1 P. & L. Dig. 2670; Kutz's Appeal, 40 Pa. 90; Lahr's Appeal, 90 Pa. 507; Miller v. Miller, 44 Pa. 170; Towers v. Hagner, 3 Wh. 48; Gregory v. Commonwealth, 121 Pa. 611; Diemer v. Sechrist, 1 P. & W. 419; Small v. Small, 120 Pa. 366; Kennedy v. Knight, 174 Pa. 408.

### OPINION OF COURT.

On April 3rd, 1860, Mary Kneff, who did not reach her majority until April 12th, 1862, married John Dambach. On the same day her guardian loaned, of her money, $1,000 to John Dambach, taking a bond for $1,000 from the latter, payable in 2 years with 4 per cent interest. When Mary Dambach reached majority, the guardian assigned to her this bond. On 7th Oct., 1895, her husband died, she becoming administratrix. Filing her account as such in July, 1896, she claims a credit therein for the bond, and interest thereon, in all $2,450. To this credit the next of kin of John Dambach except. The auditor has dismissed the exception and to his report an exception has been filed of the same import.

That Mary Dambach is entitled to the principal of the bond, unless it has been paid, there is no dispute. Thirty-two years have elapsed since it became payable. Under ordinary relations, it would have been presumed paid in twenty years. The presumption is founded on the improbability of inaction for so long a time by the creditor, if his debt has not been paid. If that inaction can be accounted for by some other supposition than that of payment, the presumption is repelled.

The inaction is fully accounted for by the existence of the marital relation between John and Mary Dambach.

At common law the wife could not sue her husband. Ritter v. Ritter, 31 Pa. 396; Marsteller v. Marsteller, 93 Pa. 350. By statute from time to time, a partial power to sue him has been conferred. She might recover her property from her husband, whenever he had deserted her, or neglected or refused to support her, or had been divorced from her *a mensa et thoro* in an action in the name of a next friend. Sec. 3, Act April 11, 1856; 2 P. & L. Dig. 2906. She might bring suit against him, even without a next friend, if he had deserted or abandoned her, or driven her away from his home. Sec. 2, Act June 11, 1879; 2 P. & L. Dig. 2907. The act of June 3, 1887, P. L. 333, did not authorize a suit by a wife against the husband; Small v. Small, 129 Pa. 366; Kennedy v. Knight, 174 Pa. 408, and the third section of the act of June 8, 1893, 2 P. & L. Dig. 2905, expressly declares that "she may not sue her husband" except (a) in proceedings for divorce, or (b) to recover or protect her property, whenever he has deserted, or neglected, or refused to support her. At no time then down to the discoverture of Mary Dambach, by her husband's death, has she been able to maintain a suit against

him. This is a full explanation of the delay in resorting to legal demand. The presumption of payment is overthrown.

It remains to consider whether Mary Dambach is entitled to recover interest on the bond from date. It purported to bear 4 per cent interest until maturity, and thereafter it bore six per cent. Ludwick v. Huntzinger, 5 W. & S. 51. Had the bond remained with the guardian, he could have coerced payment of the principal and the interest. When the ward accepted the bond from him, in partial discharge of the liability as guardian to her, must we suppose that the duty of the obligor to pay interest was suspended?

When money or other property of the wife is with her consent taken by her husband without stipulation for rent or interest, there is a presumption that he is not to pay her for the use of this money or property. Wormley's Estate, 137 Pa. 101; May v. May, 62 Pa. 206. If he takes it without her consent, May v. May, 62 Pa. 206; or if he expressly agrees to pay interest, Graybill v. Meyer, 45 Pa. 530, he must pay interest. We see no circumstance to indicate a consent of Mary Dambach to the retention of the $1,000 without interest to her husband. He had received it, as a loan, from her guardian. It does not appear that she was a party to the loan, though perhaps the coincidence of the making of the loan with the marriage justifies a suspicion that she consented to it. If she is to be regarded as consenting to it, she must also be regarded as consenting to it on the assumption of the husband to pay 4 per cent. The payment was to be made despite the coverture, because the coverture existed when the bond containing the stipulation for interest was made. The express undertaking to pay interest negatives the hypothesis of an understanding with his wife that he was not to pay it. Nor do we see any reason for surmising that when the bond matured, she consented to the total suspension of interest. The remarks of Pearson J. in Bachman v. Killinger, 55 Pa. 414, are not entirely convincing. They are not endorsed by the Supreme Court, for they were favorable to the plaintiff in error, who could not therefore complain of them. In Kennedy v. Knight, 174 Pa. 408, interest was allowed the wife on the husband's note, but, unfortunately, the stipulation concerning interest, therein, is not described, and the parties by a case stated, consented to the judgment for interest if the court should be of opinion that there could be a judgment for the principal. The decision of the C. P. of Cumberland County in Stuart v. Searight, 524½ May Term, 1896, if correct, is not wholly relevant, because of a divergence in the facts, from the present case.

We have concluded that Mary Dambach, assignee of the bond, may collect on it both the principal and the interest at the rate of 4 per cent. for two years, and at the rate of 6 per cent. for the remainder of the period. The exception is dismissed.

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## ESTATE OF JOSEPH POLLOCK, DECEASED.

Exception to the Auditor's distribution.

GEO. T. BROWN and H. CLAY BEISTEL for the exceptant, cited: Beatty v. Byers, 18 Pa. 107; Jones v. Caldwell, 97 Pa. 45; Fisher v. Harris, 10 Pa. 459; Brown's Appeal, 27 Pa. 62; Dunda's Appeal, 64 Pa. 325; Gray v. Smith, 3 W. 289; Roland v. Miller, 11 W. N. C. 431; Allison v. Wilson's Executor, 13 S. & R. 330; Laird's Appeal, 4 W. N. C. 473; Bailey v. Bank, 104 Pa. 425; Mellon v. Reed, 123 Pa. 14; Chew v. Nicklin, 45 Pa. 86; Campbell v. McLain, 51 Pa. 200; Wistar's Appeal, 54 Pa. 60; Grim's appeal, 105 Pa. 376; Parshall's Appeal, 65 Pa. 224; 1 Lewin Trusts 379, Coff v. Biddle, 14 Pa. 444; Sheet's Estate, 52 Pa. 257; Campbell v. Pa. Life Ins. Co., 2 Wh. 53; Carson v. Marshall, 37 N. J. Eq. 213; Patterson v. Lenning, 118 Pa. 571; Barker's Appeal, 120 Pa. 33, Beeson v. Beeson, 9 Pa. 279; Rham v. North, 2 Yeates 117; Whichcote v. Lawrence, 3 Ves. 740; Chronister v. Bushey, 7 W. & S. 152; Spencer and Newbold's Appeal, 109 Pa. 317; 1 Perry Trusts, §428; 2 Lewin Trusts 869; Potter v. Burd, 4 W. 15; Darroch v. Hay, 2 Yeates 208; Stuart v. Com., 8 W. 74; 1 Rhoue's Orphans' Court, 586, 1 P. & L. Dig. 1482, §115.

ALFRED JOEL FEIGHT and SIMON P. NORTHRUP for the auditor cited: Witman and Geisinger's Appeal, 28 Pa. 378; Green v. Roworth, 113 N. Y. 462; Burr v. Sim, 1 Wh. 252; Rice v. Bixler, 1 W. & S. 445; Sherban v. Com., 8 W. 212; Costen's Appeal, 1 Harris 298; Estate of Andress, 14 Phila. 240; Erwin's Estate, 56 Pa. 405; Edward's appeal, 47 Pa. 144; Bleight v. Bank, 10 Barr 132; Sterr's Estate, 13 Phila. 239; Bouslough v. Bouslough, 68 Pa. 500; 1 P. & L. Dig. §60, 1943; 1 Cord, Married Women 714; McCaffrey v. Woodin, 65 N. Y. 459; Wistar's appeal, 54 Pa. 60; Buckner's Estate, 136 Pa. 23; Grim's Appeal, 105 Pa. 375; Fryer v. Rishell, 84 Pa. 521.

OPINION OF THE COURT.

Joseph Pollock, dying in January 1875, left to survive him 3 children, of whom one was Mrs. Josephine E. Snyder. His will "ordered" the executor to sell his real estate and to divide the proceeds of it equally among these children. Isaac Irwin was made executor. The real estate not being yet sold, Mrs. Snyder on 10th Nov., 1887, borrowed a sum of money from Isaac Irwin, mortgaging her interest in the land, as if it were still land. The land being still unsold on 1 Jan., 1895, Isaac Irwin was, at his own request discharged from the executorship, and his brother R. S. Irwin substituted as adm. d. b. n. c. t. a.

The land was sold by R. S. Irwin, administrator, and an auditor was appointed to make distribution of the proceeds. Before the auditor, Mrs. Snyder, in Nov., 1895, claimed the proceeds to the exclusion of her mortgagee Isaac Irwin. Later, on 31 January, 1896, she assigned her interest in the proceeds to L. H. Frantz. On the 28th of the same month, Isaac Irwin "for value received" assigned the mortgage to R. S. Irwin, adm. d. b. n. c. t. a.

The audit not yet being ended, Frantz claimed before the auditor the ⅓ coming to Mrs. Snyder; and R. S. Irwin, the admin. d. b. n. claimed as much of that ⅓ as was necessary to satisfy the mortgage. The auditor allowed Irwin's claim, awarding to Frantz the balance only of the ⅓. To his report in this respect Frantz files exceptions.

That the interest in the land of the heirs was, by the will, converted into one in the proceeds of it, there can be no doubt. Cases are so numerous, that it would be tedious to cite them. Let the following suffice. Bailey v. Allegheny Nat. Bank, 104 Pa. 425; Mellon v. Reed, 123 Pa. 1; Bright's Appeal, 100 Pa. 602; McWilliam's Appeal, 117 Pa. 111; Jones v. Caldwell, 97 Pa. 42; Pyle's Appeal, 102 Pa. 317. When she made the mortgage Mrs. Snyder owned simply an equity in the land consisting in the right to compel its sale and receive a share of the proceeds, or, jointly with the other two legatees, to accept the land in specie. Her mortgage, however, was in the form in which it would regularly have been, had she been a co-tenant of an undivided ⅓ of the land.

Was then, this mortgage effectual to pass to the mortgagee the interest which the mortgagor in fact had? We think so. "As between themselves" *i. e.* the mortgagor and mortgagee, says Sterrett, J. in a case in which a woman having an interest similar to that of Mrs. Snyder, executed a mortgage, "As between themselves, the mortgage was at least an equitable assignment of that interest."—Bailey v. Allegheny National Bank, 104 Pa. 425; Andress' Estate, 14 Phila. 240. So, an ordinary deed of conveyance would pass the grantor's right to the proceeds of the sale directed by the testator. Horner's Appeal, 56 Pa. 405; Costen's Appeal, 13 Pa. 292; 1 Jarman, Wills 603 [Ed. 1881, Little, Brown & Co.]

Does the relation of the mortgagor to the mortgagee invalidate the mortgage? It is urged, by exceptants (1) that the executor, Isaac Irwin, being trustee to sell the land, became, when he acquired the mortgage, a purchaser of that which he was to sell, and (2) that Irwin was trustee of the land to sell it for the benefit of Mrs. Snyder, and this fiduciary relation infects his purchase of her interest with presumptive fraud.

1. Did Irwin buy at his own sale? He was trustee to sell the land, but not the interest in its proceeds of Mrs. Snyder. She only could sell that. She only was the vendor of that, and he only the vendee. The two relations did not unite in him. Had he exposed the land to sale and thereat become the buyer, the two relations would have been blended in him. His interest as buyer would have been inconsistent with what ought to be his interest as seller. As buyer, he would desire to obtain the land at the lowest price; as seller, he ought to desire to get for it the highest price. We cannot see the combination of incompatible positions in Irwin.

2. Did the fiduciary relation between Irwin and Mrs. Snyder presumptively vitiate the mortgage? When a trustee buys from the *cestui que trust*, the trust property, "the evidence must show that the trustee made full disclosures to his *cestui que trust* to sustain" the purchase; Miggett's Appeal, 109 Pa. 520; Spencer's Appeal, 80 Pa. 317. This principle readily commends itself to approbation. But,

Mrs. Snyder did not sell her interest in the land to Irwin. Had she done so, there would have been danger of imposition by him upon her, in respect to the value of the interest, relatively to the price he was paying for it. But, he simply takes a mortgage of the interest to secure the repayment of a sum of money. All excess beyond this sum remains with Mrs. Snyder, despite the mortgage. The only conceivable imposition that might have been practiced on Mrs. Snyder is, compelling her to resort to borrowing, by delay in selling the land, or exacting a mortgage for a larger sum than was actually lent. If Irwin was unreasonably tardy in making the sale, he might have been quickened by the Orphans' Court, on the application of Mrs. Snyder. That she did not thus apply, may be taken to indicate that to her, the reasons for delay seemed satisfactory. If damage came to her, because of the delay, Irwin could have been surcharged in the settlement of his account. Surely he could not be punished by a forfeiture of $200, $2,000, or $20,000 that he might have loaned to Mrs. Irwin.

The possibility that the mortgage is for more money than was actually loaned, exists. We cannot see that there was a larger probability of such form of imposition in this than in the ordinary relation of a lender and borrower. The mortgagor may always, under stress, contract to pay more than he has received, and the law allows him to show that he did so contract. Hence we cannot find the relation between Irwin and Mrs. Snyder adequate cause for dispensing her from proving the excess, and imposing on him the burden of disproving it.

Among many authorities examined we find none to the effect that one holding towards another, in regard to anything, the relation of a trustee, and lending money to his *cestui que trust*, can obtain payment only on the condition that he affirmatively negatives the want of consideration, except Wistar's Appeal, 54 Pa. 60. (The point was not decided by the supreme court.) After much reflection we find ourselves unable to apply here the salutary principle therein applied by Judge Allison. The evidence of special ascendancy over the mind of Wistar may have been strong. There was none of any such ascendancy of Irwin over the mortgagor.

The exceptions are overruled, and a decree will be entered in conformity with the recommendation of the auditor.

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## SAMUEL MORRISON vs. CALEB OYSTER.

It is agreed between the parties, plaintiff and defendant, in the above stated action that the following facts shall be submitted to the Court in the nature of a special verdict or case stated for its determination.

That on the 24th day of October, 1890, Abraham Morrison made his last will and testament which was duly probated in the Register's office of the Dickinson School of Law on the 15th day of December, 1891.

That among the provisions of the said will were the following: "And to my two sons James Morrison and Samuel Morrison I sell my homestead farm for $7,000 and for the same I give, bequeath, and cancel for my two sons, James Morrison and Samuel Morrison, $4,000 as their share and portion of my worldly goods and estate."

"It is further my will and I do declare it, that James Morrison shall work the farm that I give to him and Samuel Morrison, and farm the same until all the charges thereon are fully paid, and after all the said charges are fully paid, the said Samuel Morrison to receive the proceeds of the said half of the said undivided farm, but forever prohibited from selling the said half or any part of the said undivided farm. Nevertheless the said Samuel Morrison to receive the proceeds during his natural life, and when the children or legal heirs of Samuel Morrison come to the age of twenty-one years or more, then the said half of the said farm to belong to the children or legal heirs of the said Samuel Morrison forever."

That on the 5th day of November, 1896, Samuel Morrison, the plaintiff, entered into articles of agreement with Caleb Oyster, the defendant, for the sale, for $5,000, of his undivided half interest in the farm so devised to them, the said James Morrison and Samuel Morrison, and that the said defendant declined to receive the deed offered, on the ground that Samuel Morrison could not convey a fee simple estate.

If the Court therefore be of the opinion that Samuel Morrison under the will of Abraham Morrison took a fee simple estate in the land devised to him, then judgment to be entered in favor of the plaintiff for $5,000 and costs. But if the Court should be of the contrary opinion, then judgment to be entered in favor of the defendant.

G. B. SNYDER and HORACE CODINGTON for plaintiff.

The first clause of the will is sufficient

to vest in the plaintiff, in fee simple, an undivided half-interest in the farm.—Fahney v. Holsinger, 65 Pa. 388.

After granting a fee, the testator could not prohibit the plaintiff from selling any part of it, by a subsequent provision. Jauretche v. Procter, 48 Pa. 466; Good v. Fichthorn, 144 Pa. 287; Levy's Estate, 153 Pa. 174; Evans v. Smith, 166 Pa. 625.

"Children," in this case used in connection with the expression "or legal heirs," is a word of limitation. Burkhart v. Bucher, 2 Binn. 455; Hardin v Hays, 9 Pa. 151; Potts v. Greisemer, 174 Pa. 516; Potts v. Kline, 174 Pa. 513.

I. I. WINGERT and A. S. SHOENER for defendant.

"Children or legal heirs" are words of purchase. Hill v. Hill, 74 Pa. 173; Oyster v. Knull, 137 Pa. 448; Pierce v. Hubbard, 152 Pa. 18; Weigley v. Conrade, 132 Pa. 147. The plaintiff took but a life estate. Robbins v. Quinliven, 79 Pa. 333; Chew's Appeal, 37 Pa. 9; Lantz v. Trusler, 37 Pa. 482; Cote v. VonBonnhorst, 41 Pa. 243.

The construction is to be made, not solely on the bequest itself, but on the bequest taken in connection with the context, as well as the circumstances under which the will was made. Rewalt v. Ulrich, 23 Pa. 388.

OPINION OF COURT.

Unless modified and limited by subsequent provisions, the first paragraph of the testator's will, referred to in the case stated, which annexes a charge to the land devised to Samuel Morrison, gives him a fee simple. Fahney v. Holsinger, 65 Pa. 388.

In order to reduce this to a lesser estate the intention of the devisor to do so must clearly appear from the other paragraphs of the will.

The clause which prohibits the plaintiff from selling any part of his interest in the land, being in direct conflict with the fee previously given, is void. Jauretche v. Procter, 48 Pa. 466; McIntyre v. McIntyre, 123 Pa. 329; Evans v. Smith, 166 Pa. 625.

Does it then plainly appear from the last clause in his will that the testator intended to restrict the devise to the plaintiff to a life estate? There must be clear evidence of such intent to justify the Court in arriving at such a conclusion. Mickley's Appeal, 92 Pa. 514. While the rule is that "children" is a word of purchase and is not to be construed as a word of limitation, yet it may be coupled with other words or expressions which force the conclusion that an indefinite failure of issue was contemplated. Guthrie's Appeal, 37 Pa. 9.

The word "heirs" is usually construed to be a word of limitation, a devise to "lawful heirs" denoting an indefinite failure of issue.

We are of the opinion that the word "children" in the present case is qualified and limited by the words "or legal heirs" and that these make it a word of limitation. This we think is justified by the determinations in Mason v. Ammon, 117 Pa. 127; Potts v. Griesemer, 174 Pa. 516; Potts v. Kline, 174 Pa. 513.

We are therefore of the opinion that the plaintiff took a fee simple under the devise and that he may recover in this action.

And now February 6, 1897, judgment is entered in favor of the plaintiff and against the defendant for the sum of $5,000 with interest from the 1st day of December, 1896.

W. F. SADLER, P. J.

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## MARY ADAMS ET AL. vs. JOHN WYMAN.

R. H. BARKER and HARVEY E. KNUPP for plaintiff.

1. The trust should be determined.

(a) For want of purpose. Ogden's Appeal, 70 Pa. 501; Yarnell's Appeal, 70 Pa. 339; Kay v. Scates, 37 Pa. 37; Kuhn v. Newman, 26 Pa. 227.

(b) Since all who are interested are in existence, are *sui juris*, and have by their acts consented to its determination. Culbertson's Appeal, 76 Pa. 145; Perry on Trusts, § 920.

(c) It is not such an active trust that the statute of uses will not execute it. Kuhn v. Newman, *supra*.

(d) It places a useless cloud upon the title and makes the property less marketable. Bacon's Appeal, 57 Pa. 504; Bispham's Equity, pp. 90-93; Kay v. Scates, *supra*.

2. The trust offends the doctrine of perpetuities and should be declared void from its beginning. Donohue v. McNichol, 61 Pa. 78; City of Phila. v. Girard's Heirs, 45 Pa. 27; Smith's Appeal, 88 Pa. 195; Coggin's Appeal, 124 Pa. 10; Lawrence Estate, 136 Pa. 354; Lewis on Perpetuities, § 446; Gray on Perpetuities, § 513.

HERMAN H. GRISWOLD and J. R. SMITH for defendant.

The trust is an active one. The fee is in the trustee. Barnett's Appeal, 46 Pa. 392; Hawkins on Wills, 140; Rife v. Geyer, 59 Pa. 395.

An active operative trust leaves no power in the *cestui que trust* to dispose of the estate. Shankland's Appeal, 47 Pa. 113; Williams Appeal, 83 Pa. 377; Mannerback's Estate, 26 W. N. C. 9; Sim's Estate, 130 Pa. 451; Hutchison's Appeal, 81 Pa. 509.

The doctrine of equitable conversion applies and the heirs take only a legacy, and have no interest whatever in the real estate as such. Roland v. Miller, 100 Pa. 47; McWilliam's Appeal, 171 Pa. 111; Bispham's Equity, p. 71; Craig v. Leslie, 3 Wheaton 563.

OPINION OF COURT.

By his will, probated May 10th, 1892, George Adams declares "I give and devise all the real estate that I own to my executors and their successors upon the following trusts, to wit, that the said executor shall hold the said five tracts of land during a period of 75 years after my decease with the right to the exclusive control and management of the same, and with the right to receive and collect the annual rents and profits of the said lands, and shall pay the same after deducting all proper expenses to my children, share and share alike. After the expiration of the trust, I direct my executors to sell the said real estate and divide the proceeds among all my children, share and share alike, that may be living, and to the legal descendants of either of my said children that may be dead, the legal descendants of said children to take only such portion or share of said proceeds as their deceased parents would have taken, if alive."

On 2d June, 1896, the two children of George Adams, Mary and Arthur, agreed in writing to sell the five tracts to Wyman for $3,300. Wyman declining to accept the deed and pay the purchase money, on the ground that the grantors could not convey a good title, this action of assumpsit is brought by the vendors to recover the money.

If the trust declared in the will of George Adams is valid, it is manifest that the interest which Wyman ought to get by a conveyance, would not pass to him. The legal ownership is not in the vendors. They have no right of possession. The trustee is to have exclusive control and management, to collect the rents, to deduct therefrom the proper expenses, and to pay the residue to the children. Finally at the expiration of 75 years, he is to sell the land. It is evident that the *cestuis que trust* have only an equitable right, which does not include the right of possession. Sim's Estate, 130 Pa. 451; Earp's Appeal, 75 Pa. 119; Shankland's Appeal, 47 Pa. 113; Hutchison's Appeal, 81 Pa. 509. As Wyman has not contracted to accept such a right, he cannot be compelled to pay for it.

But the vendor contends that the devise in trust is void, and that, in consequence, the testator, as to the five tracts which are the subject of it, died intestate, they descending upon Mary and Arthur, as his heirs.

Is the trust void? The trust is to pay over the rents, etc., to the two children during their lives, if they do not exceed 75 years in length, and, on the lapse of the 75 years, to sell the tracts and divide the proceeds. No provision as to the proceeds is made, between the death of Mary and Arthur, if it should happen less than 75 years after the testator's death and the time of sale. The mere fact that the estate granted to the trustee might exceed the period needed for the execution of the trust, does not vitiate it. If land is conveyed to A in fee, in trust for B for life, the trust for B's life is valid, despite the excess of the estate over that of B. So, a term of 75 years might be conveyed to A in trust for B for his life, or so much of his life as should not exceed 75 years. The possibility that the term should exceed the life, would not vitiate the trust.

What we have to consider now, is the effect of a duty to sell imposed on the trustee, to be performed beyond 75 years. The sale would divest the interest of the heirs of the testator, and transfer it to the vendee. Who the vendee will be is contingent. Until the exercise of the power, the estate to be acquired by it will be without alienability. While the sale when it takes place, may take place within twenty-one years after existing lives; e. g. the lives of Mary and Arthur, it may not. They may die more than twenty-one years before the end of the period of seventy-five years. This possibility exposes the provision for sale to the condemnation of the rule against perpetuities. Coggins' Appeal, 124 Pa. 10; Donahue v. Nichols, 61 Pa. 78; Hillyard v. Miller, 10 Pa. 326; Laurence's Estate, 136 Pa. 354.

But, will the annexation of a trust to sell at a point of time too remote, to a trust for the benefit of persons living when the trust is created, infect this trust for living persons with its own vice? There is a rule that if a trust transgresses the will in part, it transgresses it altogether. We are not able however, to interpret this rule so as to make it signify that if there is a series of trusts created by the same deed or will, some of which, as being contingent and remote, are void, the trusts earlier in the series, that are not too remote, especially if they are not contingent but vested, will be vicious. We have examined, we think, all the reported decisions of the Supreme Court, and we do not find an instance in which a present vested interest whether in a trust or not, has been overthrown because of the voidness of a subsequent contingent remainder, trust or power. In all cases the first vested interest had expired and the nullity only of the succeeding interest, originally contingent, was declared. See Mifflin's Appeal, 121 Pa. 205; Smith's Appeal, 88 Pa. 493; Davenport v. Harris, 3 Gr. 164; Laurence's Appeal, 136 Pa. 354; Coggin's Appeal, 124 Pa. 10. In Laurence's Appeal (p. 365) Clark J., quotes Lewis on Perpetuities. "When, under a power, interests are given by way of particular estate and remainder, and the particular estate is limited to a valid object of the power, but the remainder is too remote, the appointment will not be wholly void, but only the gift in remainder. In such cases, the interests in respect of which there is an excess of the power, being distinguishable and separable from the valid portion of the appointment, there is no reason for involving the limitation in the remoteness of the remainder." (See remarks on Smith's Appeal, on page 366; also in Coggin's appeal, 124 Pa. 10; Mifflin's Appeal, 121 Pa. 205.)

We have then a devise to a trustee for a term of 75 years, charged with a trust to pay the net income of the term annually to Mary and Arthur. Their interest is immediate and vested. The trust, at the expiration of 75 years, to sell the tracts and divide the proceeds is void for remoteness. But the voidness of the power and of the interests to spring out of its exercise cannot impair the vested, immediate and unexceptionable interest of Mary and Arthur in the preceding trust.

During the lives of Mary and Arthur, until the expiration of 75 years, there is an active trust. They cannot by their deeds pass an unincumbered estate. Judgment must therefore be entered for the defendant on the case stated.

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## REBECCA ANDRED vs. THOMAS CHRISTIE.

IN THE SUPREME COURT.

Henry Mylin, an habitual drunkard, went in the evening, to the hotel of Thomas Christie, and in the absence of Christie was supplied, for money, with several draughts of whiskey by a servant in the hotel. This servant was not authorized to sell drinks, but on two or three occasions, in the temporary absence of Christie, had sold, and his actions had not been disapproved.

At about ten o'clock, Mylin went, while partially drunk, to another hotel in the same town and procured additional drink. He soon became violently drunk, and as was usual with him, quarrelsome and brutal. On his way along the street, he met Jacob Andred, a young man eighteen years old whom he, without provocation, violently struck with a club. The blow felled Andred, his head striking the curbstone and he became insensible. The night was cold and he remained stretched on the pavement for an hour, when a belated citizen passing along, found him and had him conveyed to a neighboring house. Andred recovered from the immediate effects of the shock, but was attacked with pneumonia, the result of his long exposure, and in three weeks, despite careful nursing and competent medical attendance, he died.

Andred was living with his mother at the time of the assault and had been, for two years, supporting her with wages earned by him. He was intelligent, amiable and devoted to his mother, of good health and earning eight dollars a week.

The jury has rendered a verdict for $1,800 for the plaintiff, the mother, in the action against Christie for damages for the death of her son. On a reserved point, whether under all the evidence the verdict should not be for the defendant, the Court, after argument of the point, entered judgment, *non obstante veredicto*, for the defendant. Before DOUGHERTY, P. J., CAREY and BENNETT, J. J. DOUGHERTY, P. J., dissenting.

Plaintiff appealed.

*Error assigned* was entry of judgment as above.

HENRY W. SAVIDGE and GEO. B. SOMERVILLE for appellant.

The relation of agency may be established by circumstances.—Valentine v. Packer, 5 Pa. 333; Woodwell & Co. v. Brown, 44 Pa. 121; 2 Kent, 614, note. So also may acts done without previous authority be ratified.—Clark on Contracts, 720.

Persons selling liquor to persons of known intemperate habits are responsible for injuries committed by such persons while under the influence of such liquor.—Taylor v. Wright, 126 Pa. 617; Fink v. Garman, 40 Pa. 95; Davies v. McKnight, 146 Pa. 610.

A reserved point—"whether under all the evidence, the verdict should not be for the defendant" is not a proper reservation.—Newhard v. Penna. R. R. Co., 153 Pa. 417; Wilson v. Steamboat Tuscorora, 25 Pa. 317; Wilde v. Trainor, 59 Pa. 443.

THOS. K. LEIDY and ALFRED JOEL FEIGHT for appellee.

A wilful wrong by an agent does not bind the principal.—Evans on Principal and Agent, 559. So also where the agent acts outside of the scope of his employment.—Evans on Principal and Agent, 557, 558, 563; Kerns v. Piper, 4 Watts 222; Bard v. Yohn, 26 Pa. 482, 489; Pollock on Torts, 51, 60. An alleged ratification must be with a knowledge of all the material facts. Greenfield Bk. v. Crafts, 2 Allen 269; Combs v. Scott, 94 Mass. 493.

There is no evidence that the defendant's servant knew of Mylin's intemperate habits. No liability results therefore.—Taylor v. Wright, 126 Pa. 617.

The act of selling liquor by the servant of Christie was not the proximate cause of the injury. There was an intervening cause and the defendant is not liable.—Hoag v. Lake Shore and Michigan R. R. Co., 85 Pa. 293; Penna. R. R. Co. v. Kerr, 62 Pa. 353; West Mahony Township v. Watson, 116 Pa. 344.

When two or more causes concur to produce an effect, and it cannot be determined which contributed the more largely, or whether without the concurrence of both it would have happened at all, and a particular party is not responsible for *all* of the causes, there can be no recovery for an injury thus caused.—Burdick's Cases on Torts, 38; Marble v. Worcester, 4 Gray, 395; Jenks v. Wilbraham, 11 Gray 142; Davidson v. Nichols, 11 Allen 514.

OPINION OF COURT.

In the Court below a verdict for $1,800 was rendered by the jury for the plaintiff. The Court however, before submitting the case to the jury, had reserved the point whether under all the evidence, the verdict should not be for the defendant. Afterwards, after argument of the point, it entered judgment *non obstante veredicto* for the defendant. And the question before us is whether the evidence justified, in law, a verdict for the plaintiff. If so, judgment should have been entered upon it. If not, the judgment for defendant despite the verdict, has been properly entered.

It is conceded that the sale to Mylin was in violation of the law. The act of 8th May, 1854; P. L. 663; 1 P. & L. Dig. 2719, makes any person, furnishing intoxicating drinks to another, in violation of law "civilly responsible for any injury to person or property in consequence of such furnishing," and directs that "any one aggrieved may recover full damages" from the person so furnishing.

We think the learned court below correct in holding that the fact that drink furnished by others than defendant contributed to the drunkenness of Mylin, will not prevent a recovery.

Their opinion that the intervention of the servant of Christie in the sale, will not excuse Christie, is, we think, likewise unimpeachable.—Zeigler v. Commonwealth, 22 W. N. C. 111; Smith v. Reynolds, 8 Hun. 128.

The grounds of recovery, when recovery is possible, are (1) "injury to person or property" and (2) the consequence of this injury upon the furnishing. The person aggrieved is, of course, the person who suffers, in himself, or in his property, this injury.

(1) We are then to inquire whether there is an injury to person or property. Jacob Andred suffered an injury to his person. But he is dead, and the present action is not by him or his executor. The law has given to the mother a species of property right in the life and earning power of her son, of which his death is a violation.—Act April 15, 1851; 2 P. & L. Dig. 3233; Act April 26, 1855, 2 P. & L. 3234; Fink v. Garman, 40 Pa. 95; Birch v. Railway Company, 165 Pa. 339. The death of a husband, or son, has, under the civil damage acts, been held to be an injury to property.—Taylor v. Wright, 126 Pa. 617; Davies v. Mc Knight, 146 Pa. 610. [See case referred to in 146 Pa. 610.] But do not understand that counsel question whether the death of a son is an injury to property in the sense of the act of May 8, 1854; or whether his mother is aggrieved by his destruction.

(2) The critical question is then, whether the injury to property, which, in the legal

sense, Rebecca Andred has suffered by the killing of her son, is "*in consequence* of such furnishing" of whiskey as is alleged in the declaration.

The killing of young Andred was posterior to the sale of liquor to Mylin. We think the jury could legitimately have inferred—as in fact they have inferred—that the killing was a result of the sale. The sale put the whiskey into Mylin's power; that was the condition of his drinking it; the drinking, they may have found, as they properly could, caused him to be "violently drunk"; the drunkenness, to be quarrelsome and brutal; the quarrelsomeness and brutality, to fell to the ground young Andred, without provocation; the felling to the ground, his insensibility and his lying an hour on the cold pavement. The pneumonia was the result of this exposure; the death was the effect of the pneumonia.

The chain of sequences is possibly somewhat longer in this case than in some others arising under these or similar acts, but the additional links are as firmly bound to those which precede as any of the earlier to their neighbors. Perhaps a review of some of the cases may not be unprofitable. Sale of whiskey; the drinking it; the drunkenness, mounting a horse while drunk, falling off, getting under the wheel of the vehicle; instant death.—Fink v. Garman, 40 Pa. 951. Sale; drinking; drunkenness; walking home 3½ miles; entrance into barn, climbing into hay mow; falling thence to floor; removal to house; death next day.—Taylor v. Wright, 126 Pa. 617. Gets liquor October 25th, drinks; drunkenness; goes home assisted by son-in-law; falls; rolls into gutter containing water and mud; lies there some time, being heavy, till help can be got; reaches home an hour after leaving saloon; is put to bed; shows symptoms of bronchitis next day; on second day, of pneumonia; and dies the 8th day after the fall.—Davies v. McKnight, 146 Pa. 610. Sale; drinking; drunkenness; exclusion from hotel; departure; gets on tracks of a railroad; is struck by a locomotive; is injured; leg must be, and is, amputated.—Veon v. Creaton, 138 Pa. 48. (The father did not recover in this case, only because he did not show that he was "aggrieved.")

There are cases which hold that if drunkenness leads to an *act* by the drunken person which injures himself, and by the injury to himself, his father, mother, etc., suffers a detriment, the detriment is in "consequence" of the furnishing, although in such a case, an act of the inebriate is a mediate cause. Thus, a man intoxicated killed his wife with an axe and then cut his own throat with a razor. His son, 15 years old, could recover from the vendor of the beer by which the father was made drunk.—Neu v. McKechnie, 95 N. Y. 632.

So, the inebriate may by his acts provoke another to hurt him, and by this hurt his mother or father, husband, etc., may be injured and will have an action against the liquor seller. In Jackson v. Brookins, 5 Hun. 530, a sale of liquor was made to four men, who becoming drunk, a brawl ensued, in which three of them killed the fourth. His widow had an action against the tavern-keeper. [This case was cited and not disapproved in Mead v. Stratton, 87 N. Y. 493.]

A drunken man, lodging at X's house, returns to it in the night, and in attempting to get in with violence, alarms the owner, who, in order to defend his house, fires at him, inflicting a wound from which the inebriate dies. The vendor of the liquor was liable to his widow.—Schmidt v. Mitchell, 84 Ill. 195.

The drunken man's act may be directed to the person of the plaintiff. He may while drunk, with a pistol shoot A, A will have an action against the vendor of the intoxicant.—King v. Haley, 86 Ill. 106. He may beat and wound A, A will have the same action.—English v. Beard, 51 Ind. 489. "If," says Clark, J., in an illustration, "the drunken man had assaulted his father and inflicted personal injuries upon him, or had applied the torch to his father's house, or had mutilated or destroyed his father's property, then, the father, being aggrieved, might have sustained a suit for the injuries suffered."—Veon v. Creaton, 138 Pa. 48.

In Bertholf v. O'Reilly, 74 N. Y. 509, a son made drunk, drove his father's horse excessively, killing it. The father had an action against the tavern-keeper.

The father had a property-right in the horse. This right was injured by the act of the drunken man. The sale of the liquor was therefore connected casually with the plaintiff's injury, through the voluntary act of the drunken man directed against

the horse. Suppose, instead of the horse, a son, devoted to his father, rendering him a support, and worth more to the father than many horses. Is the hurt to A through his *horse*, traceable to the sale of the liquor, and the hurt to A through his *son* not traceable to the sale of the liquor?

In Schafer v. The State, 49 Ind. 460, the complaint alleged that Schafer sold liquor to Harris, which caused his intoxication, and that Harris because of such intoxication inflicted a mortal wound with a knife on the body of Henry Cox, the husband of the plaintiff. The complaint was held not objectionable as not averring that the death of Cox was a consequence of the furnishing of the liquor. While the judgment was reversed because the 1st, 2nd, 3d, 4th, 5th, 7th and 9th paragraphs of the bill were demurrable, it was clearly held that the verdict on the 6th and 8th paragraphs, had they been distinguished from the rest, would have been good. Yet the only cause of action was the killing by the drunken man, of the husband of the plaintiff.

The chain of causation may have two or twenty links in it. Responsibility can hardly be graduated according to their number. It is quite as easy to see that the killing of Jacob Andred would not have occurred, if Mylin had not prostrated him and rendered him insensible, and that he would not have struck him, if he had not been drunk, as it is to see in the cases first cited from Pennsylvania, that the inebriate would not have died but for the intoxication. The responsibility of the dram-seller cannot be cut off because the whiskey, instead of killing Mylin evoked in his brain a fierce frenzy, which caused him to clutch a club and fell an unoffending youth. If the alcohol had caused death in *him*, his wife would have suffered an actionable wrong. Why does not the mother of Jacob Andred, when the same alcohol as incontestably causes death beyond the inebriate in whose arteries it courses?

It may not be uninteresting to compare Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Thomas v. Winchester, 6 N. Y. 397; Carter v. Toune, 103 Mass. 507; 98 Mass. 567.

*Judgment reversed*, and the record is remitted to the court below with direction to enter a judgment upon the verdict.

## STEPHEN MEREDITH vs. DAVID DAVIDSON.

IN THE SUPREME COURT.

April 2, 1892, Meredith contracted to sell a house and lot to Davison for $5000. "to be paid for at any time within three years." The deed was made and delivered thirteen days later. The deed stated the consideration to be $5,000, and acknowledged the receipt No note, bond, mortgage or other security additional to the written contract was taken by Meredith and no money was paid by Davison at the deliverance. The deed contained a covenant of general warranty. There was, at the time of conveyance, a mortgage for $500 on the premises, which a former owner had put on and subject to which, without notice of its existence, Meredith had purchased the premises. He was not aware of its existence when he sold and conveyed to Davison. Davison, however, knew of it when he bought. Neither Meredith nor Davison was ever called on to pay any portion of interest or principal.

Assumpsit was brought by Meredith against Davison, June 19, 1893, to recover the $5,000 with interest from date of delivery of deed. The court permitted a recovery for the whole amount claimed. Motion for a new trial.

The reasons assigned by the counsel for a new trial, are:

1. No right of action accrues against the defendant for the purchase money until three years after the contract was entered into.

2. Under all the evidence submitted, the verdict should have been for the defendant. After argument on the reasons submitted, the court sustained the motion for a new trial. Before CAMPBELL, P. J., URBAN and HARTMAN, J. J., HARTMAN, J. dissenting.

Plaintiff appealed.

*Error assigned* was entry of judgment as above.

GEORGE T. BROWN and WILLIS E. MACKEY for appellant. When an engagement by simple contract is subsequently confirmed or continued by a sealed instrument, the simple contract becomes lost and swallowed up in that under seal and becomes totally extinguished.—Smith, Contracts, § 23; Bishop, Contracts, § 129; Smith v. Evans, 6 Binn. 102; Wilson v. McNeal, 10 W. 422; Crotzer v. Russel, 9 S. & R. 78; Williams v. Hathaway, 19 Pick. 387; Hower v. Barker, 3 Johns. 506; Whitbeck v. Wayne, 16 N. Y. 532.

JOHN E. SMALL and H. FRANKLIN KANTNER for appellee.

A stipulation contained in a contract for the sale of land, but omitted from the deed executed in pursuance thereof, will not be extinguished by merger, when its place is not taken or supplied by the ex-

press or implied operation of the provisions and covenants which the deed does contain.—Bean v. Steltz, 4 Mont. 105; Feed v. Ritchey, 12 Cent. 551; McElroy v. Nucleus, 131 Pa. 393; Close v. Zell, 141 Pa. 390; McGowan v. Bailey, 146 Pa. 572; S. C. 155 Pa. 256; Stockton v. Gould, 149 Pa. 68.

OPINION OF COURT.

On April 2, 1892, Meredith contracted to convey to Davison for five thousand dollars a house and lot "to be paid at any time within three years." The conveyance was made thirteen days afterward, but although the deed acknowledged the receipt of the five thousand dollars no part of that sum was in fact paid, nor was bond, note, mortgage, or other security taken for it. At the time of the conveyance there was a mortgage on the premises for five hundred dollars, placed thereupon by a former owner, of whose existence Meredith was ignorant, but Davison was aware, when the conveyance was made. There has been no demand for interest or any part of the principal of this mortgage. This assumpsit was brought June 19, 1893, to recover the $5,000 purchase money. A recovery by the plaintiff for the whole amount permitted at the first trial was set aside, and on a new trial the Court below directed the jury to render a verdict for the defendant.

The action is upon the covenant contained in the articles. By a singular inversion of normal position the counsel for plaintiff insisted that the articles had been merged in the deed, while counsel for the defendant as strenuously contended against such merger. The deed contains no covenant to pay money by the grantee. It is a mere conveyance lodging the ownership of the premises in him. It recites the payment of the five thousand dollars. If the plaintiff is to recover at all, he must recover upon the contract found in the articles. There is no other.

It would startle the legal world to hold that by that conveyance of land in execution of the vendor's part of the contract of sale, the vendee's part is merged and lost. There are cases which hold that even the vendor's covenants are not all merged in his grant. A parol promise to return the purchase money if the title is not good, is not merged in a deed which contains a special warranty.—Close v. Zell, 141 Pa. 390.

The deed is not always a merger of the contract even with the respect to the subject matter of the conveyance.—McGowan v. Bailey, 146 Pa. 573; 155 Pa. 256. Other cases may be found.

A careful research has failed to discover a single case in which it has been supposed that a conveyance which is the vendor's fulfilment of his duty under the contract, is also a discharge of the pre-existing contractual duty of the vendee The delivery of the deed is often the precondition to the payment by the vendee. He engages to pay *when* the deed is delivered or afterwards. It would indeed be singular if the performance of the very condition upon which the duty to pay is to become absolute should extirpate that duty. We think authority is unnecessary for the doctrine that whatever the effect of a deed on the grantor's contractual obligation, it cannot affect those of the purchaser. It is of course possible for the parties to change the price or terms of payment, at the time of the conveyance. Bonds, notes, etc., may be given for the purchase money, and these might merge the covenant in the articles of agreement. The deed of conveyance itself, could produce no such result. In Stockton v. Gould, 149 Pa. 68, A. and B. agreed to exchange lands and to pay the mortgage on that which each obtained by the exchange. This agreement was not merged in the conveyances. A could sue B upon the agreement. There was in Feed v. Ritchey, 12 Cent. 551 an action on articles for purchase money after the delivery of the deed. See McElroy v. Nucleus Assn., 131 Pa. 393. The articles, in so far as they contain the vendee's covenants, survive the grant and the grantor may sustain on them an action for the purchase money. He can sustain such an action on nothing else.

We have next to consider the effect of the mortgage for five hundred dollars upon the right of the plaintiff to recover. That the grantee had received a covenant of general warranty under which, if he is ever evicted, he will obtain an indemnity, would not preclude his obtaining a deduction from the purchase money when he has sued for it. The principle in Pennvania is that a grantee, sued for purchase money, may defend on the ground of in-

cumbrances, or defects of title, notwithstanding that his deed contains covenants upon which in case of subsequent eviction he could sue. Thus, the widow's dower being charged on the land, the grantee, although he has a covenant of general warranty, may obtain a deduction from the price in the suit for it; Roland v. Miller, 3 W. & S. 390. The same was held, where there were legacies charged on the land.—Fuhrman v. Loudon, 13 S. & R. 386; where a judgment lien, Christy v. Reynolds, 16 S. & R. 253, or a mortgage, Coke v. Kelley, 13 S. & R. 165; Juvenal v. Jackson, 14 Pa. 519; *Cf.* Murphy v. Richardson, 28 Pa. 288; Wilson v. Cochran, 48 Pa. 107.

The existence of the mortgage for five hundred dollars would have entitled the defendant Davidson, to deduct that sum from the purchase money finally or at least until the removal (Juvenal vs. Jackson, 14 Pa. 519,) although there was a covenant of warranty and the covenant had been not broken, but for the fact that Davison knew of the mortgage when he accepted the conveyance. The appropriate principle is that when a vendee, with *knowledge of* an incumbrance or defect of title, accepts a deed with a covenant against such defect, he is presumed to rely on the covenant, and, until he is evicted or the covenant is otherwise broken, he cannot detain any portion of the purchase money when he is sued for it. Juvenal v. Jackson, 15 Pa. 519 (a mortgage lien); Wilson v. Cochran, 48 Pa. 107, (a right of way); Bradford v. Potts, 9 Pa. 37. (rival title in another); Lighty v. Shorb, 3 P. & W. 447; Fuhrman v. Loudon, 13 S. & R. 386, (legacy charged on the land.) In as much therefore as David Davison had knowledge of the five hundred dollar mortgage, when he accepted the covenant of warranty, he will be presumed to have intended to depend upon the covenant, and not upon a right to detain a corresponding portion of the purchase money.

There remains to consider whether the time stipulated for the purchase money had arrived when this action of assumpsit had begun. It needs no authority to establish the principle that there can be no recovery in a suit prematurely brought, even if, before the trial, the debt has become payable. The contract here was to convey a house and lot for $5,000 (to be paid at *any time within three years.*) Who has the power to select the point within the three years at which payment shall be made? The vendor or the vendee? The burden of paying is on the latter. The money is not bearing interest. The delay must be intended to benefit the vendee. It follows, we think, that the option concerning the exact time is with him, *Cf.* Horstman v. Gerker, 49 Pa. 282; Paterson v. Judge, 17 W. N. C. 127; Hoffman's Petition, 14 W. N. C. 563; Schotte v. Meredith, 138 Pa. 165. He may tender payment; he cannot be compelled to pay before the expiration of the three years. The action brought fourteen months after the making of the contract was premature. We see no error in the decision of the learned court below and therefore the judgment is affirmed.

HON. J. M. WEAKLEY.

James M. Weakley was born in Dickinson Township, Cumberland County, Pa. After completing his preliminary training, and teaching school for several years, he studied law with the late W. H. Miller, Esq., and was admitted to the bar of his native county, April 12, 1862. He soon after formed a law partnership with the Hon. W. F. Sadler, which continued until 1869. At that time he was appointed by Gov. Geary, Assistant Secretary of the Commonwealth, which position he resigned, Jan. 1, 1871, to become a member of the State Senate, to which he had been elected from the Franklin-Cumberland district. He has always maintained an influential position in his profession, being regarded as an efficient and successful advocate. In 1892, he was chosen professor of Equity and Pleading, in the Dickinson School of Law, which position he still holds.