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EDITORIAL.

DECLINE OF THE JURY SYSTEM.

Everything human is in a state of flux. The most cherished institutions are unable to escape mutation and decay. Every constitution of Pennsylvania has in substance contained the declaration of that of 1874; "Trial by jury shall be as heretofore, and the right thereof remain inviolate." The Federal constitution equally explicitly ordains the maintenance of the right of trial by jury.

Despite these solemn enunciations, trial by jury has suffered a serious invasion. Two forms of the attack on it will here be noticed. In the first place, there has been a constant expansion of what is called equity jurisdiction so that many rights formerly asserted in law courts acting through juries, are now administered by courts sitting as equity courts, and deciding controversies without the aid of juries. Any philosophical lawyer who surveys the history of the jurisprudence of this state, will be struck with the wonderful increase in the ratio of cases now adjudicated by the chancellor to those in which the twelve triers sit as assessors with the court.

In the second place, there is a constant narrowing of the sphere of the deciding power of the jury, even in cases yet nominally submitted to them. Compulsory non-suits on the one hand, and binding instructions on the other, are becoming phenomenally frequent. There is, on the part of judges, an ever lessening confidence in the judgment or integrity of juries, and an ever diminishing willingness to defer to it. Questions whose determination was formerly left to juries, are now decided by the courts. The rule that it is negligence *per se* for one about to cross a railroad tract not to stop, look and listen, is of comparatively recent invention. The opinion of the judge concerning the reasonableness of the time taken for the doing of an act, is often imposed on the jury, whereas formerly it was allowed to exercise an untramelled judgment.

Until recently, the appraisement of the credibility of witnesses was regarded as the peculiar and inviolable prerogative of juries. They might believe one witness and disbelieve two or four, or six witnesses contradictory of him. Within the last eighteen months, the Supreme Court of the state has determined that if the plaintiff testifies to a fact, and five witnesses testify contrariwise, the jury must believe the five and disbelieve the one.

It is not our purpose to express any opinion concerning the desirability of withdrawing from juries portions of their ancient jurisdiction. We simply call attention to the silent and gradual erosion of an institution on which the resources of panegyric have been exhausted, and whose inviolable perpetuation has been the declared purpose of laws and constitutions. Against the forces of human life and society, the stateliest ordinances of a defunct generation, though expressed in documents around which the aureole of sanctity is shed, are nugatory.

A feature which we propose to inaugurate at an early date is the review of legal publications of every description. All books, etc., sent to us will be impartially reviewed by a competent authority.

THE ALUMNI.

J. Harris Curran, Esq., '96, is professor of mathematics in the Tome Institute, of Port Deposit, Md. Mr. Curran is an editor of the Institute monthly, the first number of which was recently issued. He is succeeding admirably at the school, where he is very highly regarded.

* * *

W. F. Shean, Esq., '96, of Scranton, called on friends in Carlisle during February.

* * *

M. T. Dixon, Esq., '96, of Wilkes-Barre, piloted a party of school directors through the Indian School early in February. They came from Harrisburg, where the directors attended an educational meeting. Mr. Dixon is meeting with good success in the Luzerne county court.

* * *

Grant W. Nitrauer, '95, is enjoying a lucrative practice in Lebanon. He is prominently identified with the National Building and Loan Association.

* * *

William H. Deweese, Esq., '93, since his graduation at Dickinson, has been engaged in the active practice of law at Denton, Md. In December, '93, he was appointed counsel to the County Commissioners of the county, which place he held until January, '96, at which time his term of office as State's Attorney began. He was elected to the latter position at the November, '95, election. He was elected president of the Town Council in April, '94, and served in that capacity until his term as State's Attorney began, when he was forced to resign, as one cannot hold two elective offices at the same time in that state. In August, '95, he formed a partnership with Fred R. Owens, Esq., for the practice of law. His expectations have been more than reached, so therefore he has no reason to complain. In December, '93, he became a benedict.

Oscar C. Clark, Esq., '93, is getting along very well at Denton, Md. He enjoys a good practice and ranks up high with the young members of the bar. He succeeded W. H. Deweese, Esq., as counsel to the County Commissioners and is giving complete satisfaction. He has the entire confidence of all that know him.

* * *

Andrew J. Lynch, '93, has settled at Georgetown, Del. In addition to success in the law field, he has entered journalistic circles and is one of the editors and proprietors of the *Sussex Journal*, published in Sussex county, Del.

* * *

Joseph H. Jones, '94, has his office in Glover's Block, West Broad St., Hazleton, Pa., where he has an extensive and lucrative practice. He is active in Republican politics and is spoken of as a very formidable candidate for the office of District Attorney next year.

* * *

Oliver W. Payran, '93, is located at Atlantic City. After leaving Dickinson, he was admited to the bar of New Jersey, and he immediately began practice in Atlantic City, locating in the Real Estate and Law Building. He has two large offices and a well equipped library. He has been successful, having had several important cases in the Supreme Court decided in his favor. He writes that he "will always prize the thorough course in the Dickinson School of Law under Dr. Trickett."

* * *

Lewis S. Sadler, '96, is associated in the practice of his profession, with his father, the Hon. W. F. Sadler. His prospects are very bright. He was recently elected borough solicitor, and is the youngest attorney who has held the office in Carlisle.

* * *

Issa Tanimura, '92, is at present manager of a firm engaged in the raw silk trade at Kobe, Japan. Many of the alumni will remember Mr. Tanimura and the Japanese Carnival given four years ago under his direction, the proceeds of which were used in the purchase of a large number of books for the library.

Chester C. Bashore, '95, soon after graduation opened an office in Carlisle and by his industry has succeeded in getting a considerable clientage. He was recently elected attorney to the County Commissioners.

* * *

H. D. Carey, '96, is located at Jermyn, Pa. He is making a specialty of collections and real estate. He has already acquired a large office practice, and his prospects are very favorable.

* * *

Joshua W. Swartz, '92, one of the rising young attorneys of Harrisburg, spent a short time in Carlisle recently and called on some of the members of the faculty. He is concerned in several very important cases at present.

* * *

Edwin F. Brightbill, '96, has attained great prominence as a lecturer. He recently delivered his very popular lecture on "Condensed Cream—With Directions," before the largest audience ever assembled at the Allentown College for Women, Allentown, Pa. The *Daily Leader*, of that city, commenting on the lecture, among many other complimentary remarks, stated: "It is safe to say that no better pleased audience in Allentown ever wended their way to their homes than the one that Edwin F. Brightbill, Esq., entertained last evening. Should he ever return to lecture in this city he will be sure of a large and appreciative audience." Mr. Brightbill has a large number of engagements.

* * *

C. Grant Cleaver, '95, is the principal of the Milton High School.

* * *

Robert Eldon, '96, is engaged in educational work, having been elected principal of the Lock Haven High School in September, '96, for a term of two years.

* * *

The *Centre Democrat* of Bellefonte, Pa., in its issue of March 4th, printed a portrait and sketch of W. H. Walker, '96. It was a complimentary notice, and predicted much success for Mr. Walker as a member of the firm of Fortney and Walker.

George Points, '96, is serving a term as solicitor to the town council of Bedford, Pa. He is acquiring a good office practice.

THE SCHOOL.

Dr. Reed, president of the College and the Law School, gave an address before the Y. M. C. A. convention, at Reading, and responded to a toast of Dickinson Alumni in New York, last month.

J. H. O'Brien, of Avoca, entered the Junior class last month.

The Junior class organization is as follows: President, Sylvester B. Sadler; Vice-President, Paul J. Schmidt; Secretary, Charles E. Daniels; Treasurer, J. B. Thompson Caldwell; Historian, E. S. Livingood; Sergeant-at-arms, G. Frank Wetzel; Executive Committee, C. N. Berntheizel, Fred B. Moser and George Fred Vowinckle.

The Senior class is officered by the following: President, John H. Williams; Vice-President, Robert W. Irving; Recording Secretary, Harvey E. Knupp; Corresponding Secretary, H. W. Savidge; Treasurer, Willis E. Mackey; Historian, I. I. Wingert; Critic, John E. Small; Sergeant-at-arms, A. J. Feight; Executive Committee, J. R. Smith, A. J. Feight, Geo. T. Brown, Blake Irwin and A. A. Wingert.

THE SOCIETIES.

A. D. B. Smead, Esq., of the Cumberland county bar, sat as judge in a moot court case before the Dickinson Society on February 19th. He handed down a learned and instructive opinion, much appreciated by the members.

Chester C. Basehore, Esq., class of '95, now a member of the Cumberland county bar, acted as judge at a moot court case of deceit, in the Allison Society on February 24. He received the hearty thanks of the society for his services.

Simon P. Northrup has been elected president of the Dickinson society, succeeding E. L. Ryan.

LECTURES BEFORE THE SOCIETIES.

Joseph S. Shapley, Esq., of the class of '93, and now a member of the Cumberland county bar, lectured before the Dickinson Society on Friday evening, February 12th, on "Orphans' Court Practice." Mr. Shapley most clearly and efficiently outlined the practice, dwelling particularly upon the manner of appointing and the duties of executors and administrators. He impressed the student body with the importance and necessity of a thorough knowledge of this branch of the law.

Prof. H. Silas Stuart, of the Law School faculty, lectured before the joint societies on Friday evening, February 26th. His subject was "The Rights of Married Women." He explained how under the common law, marriage absolved all her property rights. Then he elucidated in regular order the statutes of 1848, 1887 and 1893 in Pennsylvania, and told what rights and what restrictions were now placed upon woman in handling and disposing of her property. He contrasted the rights given by the law to the husband and to the wife. The lecture was as interesting as it was instructive, and the Professor held the very closest attention of his hearers. He spoke so clearly and concisely that the students will not soon forget the valuable instruction he gave on the important subject.

Hon. E. W. Biddle, president judge of Cumberland county court, delivered an address before the joint societies on Wednesday evening, March 3rd. His subject was "Assignment for the Benefit of Creditors." The judge modestly termed his address merely a practical talk, but certain it is that it was of great benefit to all who heard him. He explained fully the method of assignment, and how the assets are converted into cash and distributed for the benefit of the creditors. He spoke of the deed of assignment, acceptance by the assignee and duties resultant therefrom, the sale of the personalty and realty, and concluded by an explanation of the statutes of 1876, 1889 and 1893. He illustrated a portion of his address by means of actual legal papers drawn in an assignment in which he was interested several years ago. At the conclusion of the lecture, a very hearty unanimous vote of thanks was tendered the judge for his very able address. Judge Biddle not only has the sincere thanks of the student body for the address given, but also for courtesies extended in the county court-room.

ALMA MATER.

Tune—Annie Lisle.

In that old historic borough,
With its war-scarred walls,
Stands our noble *Alma Mater*
And her ancient halls.

CHORUS:—Lift the chorus, speed it onward,
Loud we praise as one;
Hail to thee, Oh, *Alma Mater;*
Hail old Dickinson.

Scene of many vital struggles,
In our country's youth;
Ever guardian of the motto
"Liberty and truth."

Tho' we part thou'rt not forgotten,
Guardian of our years,
Where we go thou still art with us,
Hast our love and tears.

How we love thee, *Alma Mater*
And thy nooks and shades:
In our hearts we hold thee sacred
Till all Nature fades.

—GEORGE B. SOMERVILLE, '97.

COUNTY COURT PRELIMINARY EXAMINATIONS.

A subject of considerable importance to the legal profession, as well as those preparing to enter it, is the proposed adoption of a uniform system of preliminary examinations of applicants for registration as law students in the various counties of the Commonwealth. That regularity of the method of examinations, in addition to a higher standard of qualifications, is desirable, is admitted by all who have given the matter any consideration. Coming, as we do, in contact with students representing nearly every county in the State, and through them becoming acquainted with the courses of study required by examining boards, we are particularly impressed by the great diversity of the examinations and the variance of the requirements. Appreciating the im-

portance of a good preliminary training as a requisite for the making of a successful lawyer we cannot but concur most heartily with any movement tending to remedy these differences.

The Pennsylvania Bar Association's sub-committee on Curriculum, of the Committee on Legal Education has reported a scheme of preliminary examination which will undoubtedly meet with the approval of a great majority of the lawyers of this State, and which it is expected, will be adopted in every county in its proper time. In the opinion of the members of the committee, it is deemed advisable to demand the same thorough preparation, and on the same subjects, required by the leading colleges for entrance to the freshman class, the recent adoption of a uniform college admission system by the conference committee representing Harvard, Yale, Pennsylvania, Princeton, Columbia and Cornell, being the standard proposed.

It is expected that every applicant should have acquainted himself, ere he thinks of commencing the study of the law, with English grammar, English and American literature, and be competent to show his familiarity with the classics. He should be well-versed in the outlines of general history; in particular, the careful study of English and American history should be emphasized. He should be carefully examined in Latin grammar. Prose composition should be insisted on in the Latin course, in which also he should be thoroughly examined in four books of Cæsar and either six books of the Æneid or the four orations of Cicero against Catiline. The examination in mathematics should include a thorough drill in arithmetic, algebra as far as quadratics, and one book of Euclid. In geography the applicant ought to be examined with more than ordinary closeness, particularly on points of national and international interest.

It is to be regretted that a reform in examinations was not agitated years ago. All indications point to higher perfection in all of the affairs of men, and as the outcome of the present movement, we augur a higher type for the legal profession.

—H. F. K.

THE MOOT COURT.

JAMES J. EVANS vs. CONTINENTAL TRACTION CO.

Street Railways—Act of April 4th, 1868, construed—Negligence—Damages.

Motion to take off non-suit.

BLAKE IRVIN and JULIAN C. WALKER for plaintiff.

The act of April 4th, 1868, 2 P. & L. Dig. 3236, like all other acts creating an exemption from common law liabilities, should be construed strictly. Electric or traction companies were not in existence at the time of the passage of the act, and therefore the exemption does not apply to them.—Cummings v. Pittsburg, etc., Railway Co., 92 Pa. 82; Am. and Eng. Ency. of Law, Vol. 23, p. 399; Gerard v. P. & R. R. R. Co., 12 Phila. 394; Spisak v. B. & O. R. R. Co., 152 Pa. 281; Noll v. P. & R. R. R. Co., 163 Pa. 504; Potts v. R. R. Co., 161 Pa. 396; Christman v. P. & R. R. R. Co., 141 Pa. 604; Richter v. The Penna. Co., 104 Pa. 511; U. S. v. Fisher, 2 Cranch 386. The non-suit was therefore improperly entered and should be taken off.

GEO. W. BENEDICT, JR. and A. A. WINGERT for defendant.

The non-suit was properly entered. Railroad and railway are synonomous terms, and therefore street railways are clearly comprehended in the term "railroads" as used in the act of April 4th, 1868, 2 P. & L. Dig. 3236.—Phila. Traction Co. v. Oberum, 119 Pa. 37; Lockhart v. Railway Co., 139 Pa. 419; Hestonville, etc., R. R. Co. v. Phila., 89 Pa. 210.

Under the act *supra* there can be no recovery.—Fleming v. Penna. R. R. Co., 134 Pa. 477; Mulherrin v. D., L., & W. R. R. Co., 81 Pa. 366.

OPINION OF COURT.

Defendant, operating a street railway by cable and intending to convert it into an electric railway, contracted with Smith to erect poles. Evans, an employé of Smith, was lifting a pole to place it between the tracks, when a car of the defendant carelessly handled, was run over his foot, compelling its amputation. The trial court non-suited the plaintiff solely because of the act of April 4th, 1868, 2 P. & L. 3236, and a motion is now made to take off the non-suit.

Two questions arise. (1.) Did Evans sustain the injury while lawfully engaged or employed on or about the road? We think he did. He was "lawfully engaged"

in his work. His work was, if not "on," "about" the road. The poles were set in a row between the two tracks of the defendant, and at a point so close to them that the plaintiff's foot was run over by the car. The plaintiff was "not an employé" of the defendant, and in this respect answers to the statutory description. That he was the employé of another person, whose business required him to work on or about the road, does not exclude the application of the statute to him. Mulherrin v. Del., L., & W. R. R. Co., 81 Pa. 366. See Spisak v. Balto. & Ohio R. R. Co., 152 Pa. 281, for discussion of cases, and compare Noll v. Phil. & R. R. R., 163 Pa. 504.

(2.) The next question is, was the "road" the road of a "railroad company." The road on which the injury happened is generally called a railway. A way is a road and a railway is a railroad. The synonymousness of these words has been sometimes declared. Hestonville, etc., Passenger Railroad Co. v. Phila., 89 Pa. 210; Gyger v. Railway Co., 136 Pa. 96.

But, while often identified, they are sometimes distinguished. Gyger v. Railway Co., *supra*. It is matter of common knowledge, that the steam roads procured the passage of the act of 1868. At that time there were no electric or traction railways, and horse railways had been developed only to a limited extent. The business of steam railroads brings many persons, not their own employés into relation with them in many sorts of work; *e. g.*, unloading cars, Ricard v. North, Pa. R. R. Co., 89 Pa. 193; Cummings v. Pittsburg, etc., Railway Co., 92 Pa. 82; Gerand v. Pa. R. R. Co., 5 W. N. C. 251: loading cars, Kirby v. Pa. R. R. Co., 76 Pa. 506: hauling freight to car, Balt. & Ohio R. R. Co., v. Colvin, 118 Pa. 230: uncoupling cars pushed into adjacent premises on switches, Stone v. Pa. R. R. Co., 132 Pa. 206. Out of these relations numerous accidents arise, avoidance of liability for which, on the part of the railroads, was the manifest object of the act of 1868. Similar reasons do not extend to passenger railways. They carry no freight. As to passengers, the act of 1868 expressly excepts them from its operation. There is no more reason for the exemption of these railway companies from liability for damages occasioned by their servants, than for the exemption of any corporations, partnerships, or individuals engaged in other business.

While the constitutionality of the act of 1868 has been sustained in Kirby v. Pa. R. R. Co., 76 Pa. 506, the decision in which is probably more acceptable than the reasons alleged for it, we are aware of no case in which the soundness of its policy has been so heartily approved as to justify the extension of it to cases not clearly within its scope. It exempts one sort of corporation from a liability imposed by the common law upon all other corporations, and upon all natural persons. Such a statute, like criminal statutes, like statutes conferring corporate or other privileges, should not receive a liberal construction. We are not aware that in any free country there is a disposition to exempt employers from liability for wrongs to strangers inflicted by their servants and agents. One unmistakable exception has been made by statute, in favor of a business which happens to have enormous power in the state, and whose agency in the procurement of the exception is more than a matter of suspicion. We are unable to consent to gratuitously widen the exemption so as to make another privileged, powerful class of interests.

We shall therefore take off the judgment of non-suit.

HENRY KIRWAN vs. EDWARD CRAWFORD.

Contract for insurance—Negligence—Warehousemen's liability.

Action in assumpsit.

P. E. RADLE and ALBERT T. MORGAN for the plaintiff.

There was a specific contract between bailor and bailee.—Siter v. Morris, 13 Pa. 218; Hoy v. Hart, 91 Pa. 91; Home Ins. Co. v. Balto. Warehouse Co., 93 U. S. 527.

The defendant did not use the usual amount of diligence required of bailees.—2 Am. & Eng. Ency. of Law, 51; Scott v. Bank, 72 Pa. 471; Camp v. Bank, 94 Pa. 409.

The defendant's negligence in not effecting insurance within six days after being requested to do so, was gross negligence.—Remington v. Irwin, 14 Pa. 143; Shepler v. Scott, 85 Pa. 329; Railroad Co. v. McElree, 67 Pa. 311; Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255; Waterman v. Banks, 144 U. S. 394; Sun Fire Ins. Of-

fice v. Ermentrout, 11 Pa. C. C. 21; Leaming v. Wise, 73 Pa. 173; Morgan v. McRee, 77 Pa. 228; Davis v. Stuart, 99 Pa. 295; Knaber v. Ins. Co., 129 Pa. 8.

The plaintiff is entitled to damages to the amount of his loss.—Fiegal v. Latour, 81 Pa. 448; Morris v. Parkham, 4 Phila. 62.

SYLVESTER B. SADLER and CLAUDE L. ROTH for defendant.

The defendant is liable only for negligence which the plaintiff must prove.—Tower v. Grocer's Supply & Storage Co., 159 Pa. 106; Furnham v. R. R. Co., 55 Pa. 53; Steamship Co. v. Smart, 107 Pa. 492.

The agreement is *nudum pactum*, there being no offer and acceptance, and no consideration. Defendant is liable only for misfeasance.—Thorne v. Deas, 4 Johns. 84; Frauenthall v. Derr, 13 W. N. C. 485; N. Y. Tartar Co. v. French, 154 Pa. 274.

The defendant's delay was not negligence.—Insurance Co. v. Spencer & McKay, 53 Pa. 353; Patterson v. Ins. Co., 81* Pa. 458. If negligence, *causa proxima, non remota, spectatur.*—Morrison v. Davis & Co., 20 Pa. 175; R. R. Co. v. Kellogg, 94 U. S. 469; Behling v. Pipe Line Co., 160 Pa. 359.

A valuable consideration would have made the contract one of insurance and void under act of 4th February, 1870.—1 P. & L. Dig. 2385, P. L. 14. § 1; Abbott v. Walker, 118 Pa. 249; Com. v. Vrooman, 164 Pa. 306.

Defendant acted as broker on contract for insurance and is not liable for failure to procure.—1 P. & L. Dig. 2398, P. L. 53, § 43; Abbott v. Walker, *supra*. Under act 1 May, 1876, such a contract is void.—1 P. & L. Dig. 2398, P. L. 53, § 46; Thorne v. Ins. Co., 80 Pa. 15; Holt v. Green, 73 Pa. 198.

CHARGE OF THE COURT.

Gentlemen of the Jury:

Crawford, a warehouseman, received articles on store, charging for them according to their bulk and value. He was in the habit of taking insurance on such articles when requested, and when he did so, his rates were higher than when no such demand was made. Kirwan left with Crawford paintings worth $10,000, that value, being assigned to them in the certificate of storage. At the same time he requested Crawford to take out the insurance, omitting however to specify the amount of the policy, the time during which it was to run, the insurer, or the premium. On the eighth day afterwards the warehouse and paintings were totally destroyed by fire. Crawford made no effort to procure insurance until the sixth day, when he saw an agent, who promised to examine the paintings and agree as to the terms of a policy, but falling sick of pneumonia on the same day, he failed to keep his engagement. On the morning of the day of the fire, Crawford telephoned to the agent of another company to call on him. The fire occurred before this agent saw Crawford. Kirwan demands $10,000 in this action.

The defendant resists a recovery for various reasons, which we will consider *seriatim*.

1. The promise to procure insurance was gratuitous and not enforceable.

It is needless to cite more than Frauenthall v. Derr, 13 W. N. C. 485; Thorne v. Deas, 4 Johns, 84; New York Tartar Co. v. French, 154 Pa. 273, in support of the principle that a gratuitous promise to procure insurance, unless followed by misfeasance, as distinguished from non-feasance, imposes no liability upon the promissor. But, is the promise of Crawford gratuitous? That promise was made at the moment of the deposit of the goods. It was one of the inducements to the making of the deposit. That Kirwan left his paintings with Crawford on account of this promise was consideration enough to make it obligatory. A warehouseman's promise to insure goods is not a "voluntary and gratuitous act," but "an undertaking in connection with the bailment." Tower v. Supply and Storage Co., 159 Pa. 106. The letting of a house, is a consideration for the lessee's promise to have it insured for $6,000. Jacksonville Railway Co. v. Hooper, 160 U. S. 514. If at a purchase of goods the buyer orders the goods, which are to be shipped by water, to be insured by the seller, the act of purchase furnishes the consideration for his undertaking to insure. N. Y. Tartar Co. v. French, 154 Pa. 273.

2. Defendant alleges that the contract was prohibited by statute. The 43d section of the act of May 1st, 1876, 1 P. & L. Dig. 2397, declares that "whoever acts or aids in any manner in negotiating contracts of insurance * * for any person other than himself, receiving compensation therefor" and not being an agent of the company, "shall be deemed to be an insurance broker," and section 44 forbids any person to be an insurance broker "until he has procured a certificate of authority so to act from the insurance commissioner." The 46th section declares that

"one acting as broker without the certificate shall be guilty of a misdemeanor." Defendant infers from these acts that his contracting to procure an insurance was illegal, and that no action can be sustained upon the contract.

But, (a) there is no evidence that Crawford did not have the certificate. As in Arrott v. Walker, 118 Pa. 249, "it is to be assumed" that he had the certificate "because there is no evidence to the contrary; it is to be assumed, of course, that he complied with the law," 118 Pa. 250. [The S. C. do not dissent from this position.]

(b) There is no evidence that Kirwan knew that Crawford had no certificate, even if the latter in fact had none. It would be a singular law that would permit Crawford acting without lawful authority, to set up the illegality of his conduct against one dealing with him in ignorance of the fact which made it illegal. Clark, Contracts 477.

(c) Crawford was not within the scope of the legislation above cited. It has long been usual for wharfingers, warehousemen, factors and commission merchants to cause the goods deposited with them, or in their possession, to be insured. Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Siter v. Morris, 13 Pa. 218. We do not think that the legislation of 1876 was intended to extirpate this practice. It was not designed to require those who caused insurance upon goods with which they dealt, to be certificated.

(d) Crawford could have insured the paintings for their full value, in his own name, and not as agent, and Kirwan could have availed himself of the insurance thus procured. 93 U. S. 527; 13 Pa. 218, *supra*. Surely the statute would not have prevented such an insurance. There is nothing in the case that shows that any other form of insurance was intended. That Crawford promised to do what he might have done without the promise will hardly make the thing done illegal.

3. Defendant alleges that Crawford was in no default when the fire occurred. It must be conceded that Crawford's undertaking was not absolutely to procure an insurance. What was intended by the parties was that he should "exercise diligence and good faith in his effort to procure insurance." Arrott v. Walker, 118 Pa. 249. He could not compel insurers to accept the risk, nor did he undertake that they should. Did he then exercise the diligence that he contracted to exercise? "He made no effort to procure insurance on the paintings until the sixth day after the deposit." The effort made on that day was abortive. He then waited until the eighth day, on which, before arranging for an insurance, the fire happened.

When the facts are ascertained, what is a reasonable time is a question of law for the court. Leaming v. Wise, 73 Pa. 173; Morgan v. McKee, 77 Pa. 228; Davis v. Stuard, 99 Pa. 295. We think we must determine that the omission for six days to attempt to obtain an insurance on $10,000 worth of goods was a non-compliance with the contract. The delay was unreasonably long. In Knaber v. Union Ins. Co., 129 Pa. 8, and Sun Fire Office v. Ermentrout, 11 Pa. C. C. 21, [see the very learned opinion of Judge Endlich] insurance companies instructed their agents to cancel certain policies. In the former the order to cancel, sent from Philadelphia, June 30th, was received in York by the agent on July 1st. He did not cancel, and the saw mill burned down on July 7th. In the latter the order to cancel was sent on January 16th or 17th, and the fire occurred on January 23d, the agent not cancelling. The companies being compelled to pay the losses, in an action by them against the agents the court held, as matter of law, that the delay was unreasonable. In the former case only $500 and in the latter only $1,500 was at stake. In the case before us the very considerable sum of $10,000 was at hazard. No explanation of the tardiness of Crawford is offered.

It is our duty, therefore, gentlemen of the jury, to instruct you, there being no facts in dispute, that your verdict must be for the plaintiff for the sum of $10,000 with interest from the time when the bailment was to terminate, less the fees payable by the plaintiff to Crawford for his services as warehouseman.

EDWARD COOPER vs. FRANCIS H. BOWER.

Devise—Words of Limitation—Trusts—Gift of income—Restricting a fee.

Case stated.

R. W. IRVING and J. P. COSTELLO for plaintiff.

A devise of the rents, issues, and profits of land, is a devise of the land itself.—Van Rensaeler v. Durkin's Executors, 24 Pa. 252; Williams v. Leech, 28 Pa. 89; Francis' Estate, 75 Pa. 220.

When in a devise of a remainder to the "children" of the first taker, it appears that "children" is used in the sense of "issue," it is to be treated as a word of limitation.—Haldeman v. Haldeman, 40 Pa. 29.

By virtue of the act of April 8th, 1833, Purd. Dig. 2103, coupled with the presumption against intestacy as to the remainder, Little's Appeal, 81 Pa. 190, Edward takes a fee.—Dilworth v. Gusky, 131 Pa. 343.

That a fee passes to Edward, may be inferred from the fact that such an estate was given to the other children, and no reason can be assigned for giving Edward a less estate.—Postlethwaite's Appeal, 68 Pa. 478; McIntire v. McIntire, 123 Pa. 329.

GEO. B. SOMERVILLE and HUGH R. MILLER for defendant.

In the construction of wills, the intention of the testator must govern, where that intention is not in opposition to rules of law.—Ruston v. Ruston, 2 Dallas 244.

It clearly appears that the testator intended that Edward should not take a fee. An active trust is created.—McClellan's Appeal, 130 Pa. 451; Watson's Appeal, 125 Pa. 340; Culbertson's Appeal, 76 Pa. 145.

Cooper has not such an interest as would enable him to convey a fee.—Lancaster v. Dolan, 1 Rawle 246; Barnett's Appeal, 46 Pa. 392; Douglas v. Cruger, 80 N. Y. 15; Lewin on Trusts, 470; Williams' Appeal, 83 Pa. 377; Ruby's Appeal, 11 Atlan. Rep. 398.

OPINION OF COURT.

When Morris Cooper died, there survived him a widow, a son, a daughter, and a grand-daughter, daughter of a deceased son. The second clause of his will is: "Second, I give and bequeath to my son Edward Cooper the income of the following properties, viz: 234 State street, 641, 643, 645 Main street, and 347 Clinton street, Doylestown, Pa., and I hereby direct the Bucks County Trust Company to take charge of these houses, collect the rents, keep them in repair, pay the taxes, and pay the balance of income therefrom, in monthly payments, to my son Edward for the support of himself, wife, and children."

Edward Cooper on June 1, 1896, contracted to convey 347 Clinton street, Doylestown, to Francis H. Bower and his heirs for $1,000, payable on the delivery of the deed. The deed being tendered, Bower declined to accept it, because, as he alleged, Cooper had only a life-estate. In this action, Cooper seeks to recover the $1,000. His right to recover rests on his ability to pass to Bower a fee simple. Has he this ability?

That some interest is devised to Edward Cooper is clear. The presumption against intestacy, as to any part of the testator's interest, Little's Appeal, 81 Pa. 190; Widener v. Beggs, 118 Pa. 374, fortified by the fact that his entire estate in the lots devised to his daughter and grand-daughter, is given to them and there is no discoverable reason for giving to Edward a less estate, and by the act of April 8, 1833, Williams v. Leech, 28 Pa. 89; Shirly v. Postlethwaite, 72 Pa. 39; Dilworth v. Gusky, 131 Pa. 343; McIntire v. McIntire, 123 Pa. 329; Crosky v. Dodds, 87 Pa. 359, points to the inference that a fee passes to Edward. Are there any infirmative or corroborative features of the will? The testator directs the Trust company to pay over the income "to my son Edward for the support of himself, wife, and children," and it has been suggested that "children," here to be interpreted as equivalent to issue, shows an intent that a fee should vest in Edward. But, children is normally not a word of limitation, Oyster v. Knull, 137 Pa. 448, and that it is here employed as such, neither the will nor any ascertained circumstances furnish an indicium. Besides, the direction is not to pay the income over to Edward and *to* his children, but to pay it over to Edward. The naming of the children in the phrase which states the object of the payment does not give them an interest in the income. Cressler's Appeal, 161 Pa. 427; Dale v. Dale, 13 Pa. 446; Paisley's Appeal, 70 Pa. 249; Mazurie's Estate, 132 Pa. 157; Haskins v. Tate, 25 Pa. 249.

What are the features of the will infirmative of the hypothesis that the gift of an unqualified fee to Edward was intend-

ed? The gift to Edward is of "the income of the following properties." But, unless qualified, the gift of the income, rents and profits of land, is a gift of the land. Crosky v. Dodds, 87 Pa. 359; Drusadow v. Wilde, 63 Pa. 170; Kline's Appeal, 117 Pa. 139. *Prima facie*, the devise of the income to Edward, followed by no devise to others, vests in him the land itself in fee.

Is there any effectual qualification of the gift of the income, such that it will not be equivalent to the gift of the land? There is hardly room to doubt that the testator intended to interpose between Edward and the lots, the income of which was devised to him, the controlling agency of another. The devises to the daughter and granddaughter are of "the following described properties," while that to Edward is of "the income of the following described properties." The testator likewise directs the Bucks County Trust Company to take charge of these houses, collect the rents, keep them in repair, pay the taxes, and pay the balance of the income therefrom monthly to Edward. Though the lots are not given *to* the Trust Company, these words would be sufficient to create a trust, were the trust legitimate, on account of its purpose and duration. Such functions bestowed on one, made him a trustee, in Sheets' Estate, 52 Pa. 257. The words "My son Levi is to have $2000 out of my estate * * and I do appoint my son George as a committee for my son Levi to take charge of all *his* money and pay him the interest and so much of the principal that will give him a comfortable support," made a spendthrift trust. Smith v. Savidge, 4 Penny. 320; *Cf.* Beilstein's Estate, 147 Pa. 85; Cooper's Estate, 150 Pa. 576. [See Widener v. Beggs, 118 Pa. 374; Hoeveler v. Hune, 138 Pa. 442.]

But is this trust, if trust it be, effectual? How long is it to last? The will does not expressly say. Is it at least for Edward's life? Is it intended to outlast his life? What is the purpose of this trust? Is it to withdraw from Edward, at the instant of constituting him the owner in fee of the lots, the power of managing them and of alienating them? We may doubtless infer such purpose. Will effect be given to it? We know no case in which a trust of this class has been held valid for the life of the devisee in fee. If the trust is valid, it is conclusive against the existence of more than a life estate in the *cestui que trust*. If the estate in him is a fee, that circumstance is conclusive against the validity of the trust. Willard v. Davis, 3 Penny. 87. Two intents, inconsistent in law, have presided apparently over the making of this devise. The first is to bestow the entire estate in the lots, and, since no devisee other than Edward is named, to bestow this estate upon him. The second is, to restrict his proprietary control over the land during, we may presume, his natural life. The will of the law to protect a fee from restrictions deemed incompatible with its nature; *e. g.*, from a restriction on alienability, or other powers of ownership, is stronger than its will to effectuate trusts or other devices by which such restrictions are imposed. The reluctance to strike down a trust, of the class found here, is, we think, less than to hold what would be the inevitable consequence of maintaining it, that the testator died intestate as to the reversion after a life estate in Edward, with respect to the five lots.

It is true that certain cases recognize the possibility of clogging a fee in a married woman by a sole and separate use, Hays v. Leonard, 155 Pa. 574; Wilbert's Estate, 166 Pa. 113; Cobb's Appeal, 168 Pa. 175; Dodson v. Ball, 60 Pa. 492; Megargee v. Naglee, 64 Pa. 216; Wright v. Brown, 44 Pa. 224, and upon the cessation of the coverture determine the fee in her to be divested of all trust, Dodson v. Ball, *supra*, but we are aware of no other species of trust for life that has been deemed compatible with a fee in the *cestui que trust*.

We do not infer the ineffectualness of the trust from its passivity. If it is a trust at all, it is active. Cooper's Estate, 150 Pa. 576; Little v. Wilcox, 119 Pa. 439; Lightner's Appeal, 11 W. N. C. 181; Girard, etc., Trust Co. v. Chambers, 46 Pa. 485; Ashhurst's Appeal, 77 Pa. 464. We think it void because incompatible with the fee which is in the *cestui que trust*.

As a fee passed to Edward Cooper by the devise, untrameled by any trust, judgment will be entered on the case stated for him and against the defendant, for the sum of $1,000.

JOHN RUTT vs. JEREMIAH BONHAM; SAMUEL MANSFIELD, GARNISHEE.

Attachment-executions—Rights of attaching creditor—Mechanics' liens—Contract—Releases.

Rule for judgment on answers of garnishee.

JOSEPH F. BIDDLE and PAUL H. PRICE for plaintiff.

A stipulation in the building contract that the building shall be delivered free from all mechanics' liens, precludes the filing of such.—Shroeder v. Galland, 134 Pa. 277; Benedict v. Hood, 134 Pa. 289; Brown v. Cowen, 110 Pa. 588; Dershermen v. Maloney, 143 Pa. 532; Nice v. Walker, 153 Pa. 123; Given v. Bethlehem Church, 11 W. N. C. 371; Cote v. Schoen, 1 Super. Ct. 583.

Mansfield not having requested releases, Bonham was not required to furnish them.

Bonham having performed his part of the contract, the last installment of $1,000 is due and may be attached.

HARVEY S. KISER for garnishee.

There is no stipulation in the contract that is sufficient to preclude the filing of mechanics' liens.—Moore v. Carter, 146 Pa. 492; Taylor v. Murphy, 148 Pa. 337; Evans v. Grogan, 153 Pa. 121; Rynd v. Pittsburg Natatorium, 173 Pa. 237; Schmid v. Palm Garden Improvement Co., 162 Pa. 211; Smith v. Leirck, 153 Pa. 522.

The attaching creditor stands in the same relation to the garnishee as was occupied by the defendant before the attachment was laid.—T. &. H. Pr., § 1188; Myers v. Baltzell, 37 Pa. 491; Roig v. Tim, 103 Pa. 115.

The furnishing of releases is a condition precedent to the payment of the last instalment.—Kinsloe v. Davis, 167 Pa. 519; Moore v. Carter, *supra*; Schotts v. Bell, 18 Pa. C. C. 427.

OPINION OF COURT.

Samuel Mansfield, owner of a lot in Shippensburg, contracted with Bonham to build a house on it. The contract stipulated that the money should be paid by Mansfield to Bonham in instalments, and, as respects the last instalment of $1,000, that it should "be paid when the building is finished, the said building to be delivered to Mansfield free from all mechanics' liens, and the said Bonham shall, if requested by Mansfield, furnish releases of all persons who could file mechanics' liens before the said $1,000 shall be paid." Before the payment of the $1,000 John Rutt, having obtained a judgment for $1,733 against Bonham, sued out the present attachment execution, attaching the $1,000 in Mansfield's hands. When the writ was issued, there were claims of materialmen to the extent of $1,497, for some of which, to the amount of $734.29 liens had been already filed. For the remainder there is still time to file.

Upon these facts we are asked by John Rutt to enter a judgment against the garnishee.

The duty on Mansfield to pay the $1,000 is by the contract conditioned on the furnishing of releases to him by Bonham if requested. Although he has not already requested, he has not forfeited the right to request now, and in this proceeding he insists on his right to request and obtain the releases.

It is said, in answer to this claim, that no valid mechanics' liens could arise under the contract between Mansfield and Bonham and that the condition of the payment of the $1,000 is illusory and nugatory. An express stipulation that no liens should be filed, would have made the effectual filing of liens impossible. Shroeder v. Galland, 134 Pa. 277; Benedict v. Hood, 134 Pa. 289. Here there is no such stipulation. The agreement is that the building shall be *delivered* free from all mechanics' liens, and that Bonham shall, if requested, furnish releases of liens. As has been said in cases construing similar stipulations, this language recognizes the possibility of filing liens, and provides for their extinction before the final payment. Rynd v. Pittsburg Natatorium, 173 Pa. 237; Evans v. Grogan, 153 Pa. 121; Taylor v. Murphy, 148 Pa. 337; Murphy v. Morton, 139 Pa. 314; Nice v. Walker, 153 Pa. 123; Murphy v. Diebold, 139 Pa. 345; Smith v. Levick, 153 Pa. 522; Schmid v. Palm Garden Improvement Co. 162 Pa. 211. An agreement by the contractor to obtain a release of liens will not preclude even his filing a lien for himself, nor his obtaining a judgment upon the *scire facias*. Moore v. Carter 146 Pa. 492. Execution, however, would be stayed, until the other liens were released.

Mansfield's house is therefore lienable, to the extent of $1,497. He could not be compelled to pay Bonham the $1,000 still due on the contract, until the liens were extinguished, and the rights of Rutt, the attaching creditor, are not superior to Bonham's. Releases have not been pro-

cured. Schotts v. Bell, 18 Pa. C. C. 427.

It is ordered that judgment for the garnishee be entered, and that the attachment be dissolved.

ESTATE OF JAMES LETT, DECEASED.

Devise—Trust—Rule in Shelly's Case.

Petition for the appointment of a trustee.

E. H. HOFFMAN and MILES H. MURR for the guardian.

The decedent's will gives his widow a life estate. Fox's Appeal, 99 Pa. 382; Homet v. Bacon, 126 Pa. 176; Oyster v. Knull, 137 Pa. 448.

Having been discharged of the trust on petition, the sons of the deceased take only the equitable interest for their respective lives. Bacon's Appeal, 57 Pa. 504; Rife v. Geyer, 59 Pa. 393; Oyster v. Oyster, 100 Pa. 538; Taylor v. Taylor, 63 Pa. 481; Mannerback's Estate, 133 Pa. 342; Harbster's Estate, 133 Pa. 351. The Rule in Shelly's Case will not apply to the widow's estate, nor to that of decedent's sons. 2 Washburn Real Prop. 495; Jones v. Laughton, 1 Eq. Cas. Abr. 392; Adams v. Adams, 6 Q. B. 860; Curtis v. Rice, 12 Ves. 89; Tallman v. Wood, 26 Wend. 9; Bacon's Appeal, 57 Pa. 504.

A trusteeship created by will which becomes vacant can be filled by the Orphans' Court. Act 22d Apr. 1846, 2 Pur. Dig. 2034, § 53.

FRANK H. STROUSS and FREDERICK B. MOSER *contra.*

The wife took a life estate. Dunwoodie v. Reed, 3 S. & R. 435; Maurer v. Marshall, 16 Pa. 377; Hahn v. Hutchinson, 159 Pa. 133.

The sons acquired a vested remainder in fee simple. Steacy v. Rice, 27 Pa. 75; Seeley v. Seeley, 44 Pa. 434; Physick's Appeal, 50 Pa. 128; Kepple's Appeal, 53 Pa. 211; Potts v. Kline, 174 Pa. 513; Pennock v. Eagles, 102 Pa. 290.

The Rule in Shelly's Case applying, there is no trust existing for the children of the sons.

OPINION OF THE COURT.

The will of James Lett contains the following: "I give my farm and houses in the town of Carlisle to my widow in trust, she to receive for her own use the rents and income thereof as long as she shall live. After her death, my will is that my sons, John, Uriah and Samuel shall receive the said farm and houses in trust, to take to themselves in equal shares the net income thereof so long as they shall live, and at the death of each, I devise his share to his heirs." During the widow's life, John, Uriah and Samuel were discharged from the trust assumed to be in them. After the widow's death, Amos Randall, being appointed guardian of the children of John, Uriah and Samuel, (all of whom are living,) petitions the Orphans' Court for the appointment of a trustee. Samuel and Uriah resist the petition, but John assents to it.

The Orphans' Court cannot create a trust, and if there is no trust, it cannot appoint a trustee. The fact that it has, on an earlier occasion, assumed that there was a trust, by discharging the supposed trustees, John, Uriah and Samuel, neither created a trust, nor estops anybody from now denying the previous existence of a trust. Is there then a trust? We fail to find any. In the first place, James Lett gives the farm and houses to his widow, and "in trust." But the only duty prescribed is "to receive for her own use the rents and income thereof so long as she shall live." It hardly needs authority to establish the non-existence of a trust, when the legal title is conveyed to one, for the sole benefit of himself. The interests of the widow, *legal* as well as equitable, is merely a life estate, for the testator declares that after her death "my (his) will is my (his) sons * * * shall receive the said farm and houses in trust." If there are trusts at all, there is a succession of them, the widow having the legal estate clothed with a trust, during her life, and the sons the legal estate clothed with a trust, after her death. Plainly the word "in trust," used to characterize the devise of the wife was inept and insignificant.

Do the sons acquire the land subject to a trust? They are, after the widow's death, to receive it, says the testator, "in trust." But in trust to do what? In trust "to take to themselves in equal shares the net income thereof so long as they shall live." They are to hold the land, they are to take to themselves the net income. They are also to determine to what extent the gross income shall be expended, and therefore what shall be the net income which they are to take. Here then, is a complete fusion of the legal and the equitable interest during their life.

Is the trust protracted beyond their lives for the benefit of their children? No

such trust is declared. On the contrary, the testator distinctly states that "at the death of each (son) I devise his share to his heirs." A trust for "heirs," stating no object, specifying no duration, would be void. But the creation of no such trust is attempted.

The trust during the lives of the sons being a "dry" trust, it does not prevent the operation of the rule in Shelly's case.

The land is given to them for life, and at the death of each "to his heirs." The sons take a fee-simple; the heirs take nothing. Inasmuch as *nemo haeres viventis est*, their children are not heirs. There is no trust; there can be appointed no trustee. The petition therefore of the guardian of the grandchildren of the testator is dismissed.

ESTATE OF EDWARD PRITCHARD, DECEASED.

Devise—Effect of date of will—Advancement—Interest—Debt—Declaration of Testator.

Exceptions to the auditor's report.

J. EVERETT SMALL and GEO. T. BROWN for exceptant.

1. It is clear that the testator intended to give Simon an absolute gift or a release of the principal debt. Such intention will control where there is an irreconcilable contradiction.—Newbold v. Boone, 52 Pa. 167; Steckle's Appeal, 29 Pa. 235; Jarmon on Wills, Vol. 2, p. 44; Shreiner's Appeal, 53 Pa. 106; Sniveley v. Stover, 78 Pa. 484; Wentz v. DeHaven, 1 S. & R. 312; Story's Appeal, 83 Pa. 89; Kreider v. Boyer, 10 Watts 54; Kirby's Appeal, 109 Pa. 41.

2. Interest should be charged on advancements from the time of the filing of the executor's account to the time of distribution.—Force's Estate, 11 Phila. 97; Thompson's Estate, 8 W. N. C. 16; Wagner's Estate, 38 Pa. 125; Yundt's Appeal, 13 Pa. 575; Patterson's Appeal, 128 Pa. 269.

EDMUND LOCKE RYAN and R. W. IRVING for Auditor's report.

In cases of doubt, that construction is to be placed upon a will which tends most to preserve consistency.—Redfield on Wills, p. 432; Mutter's Estate, 38 Pa. 314; Howitz v. Norris, 60 Pa. 261; Howe v. Van Schaick, 3 N. Y. 538; Chrystie v. Phyfe, 19 N. Y. 344.

The only consistent conclusion that can be drawn, is that the conveyance was made subsequent to the making of the will. The auditor was therefore correct in deducting the amount of the debt from Simon's share.—Miller's Appeal, 113 Pa. 459; Patterson's Appeal, 128 Pa. 269; Firman's Estate, 2 Dist. Rep. 261; Bailey's Estate, 153 Pa. 402; Pepper's Estate, 154 Pa. 340; Suplee's Appeal, 16 W. N. C. 378; Smith's Appeal, 33 Pa. 9; Etter's Estate, 23 Pa. 381.

The idea that a gift was meant is repelled by the fact that an obligation for the payment of the amount was taken.—Roland v. Schrack, 29 Pa., 125; Haverstick v. Sarbach, 1 W. & S. 390; Patterson's Appeal, *supra*.

OPINION OF COURT.

Pritchard died March, 1890. His will directed that after the payment of debts and legacies, "the remainder of my (his) personal estate shall be divided equally among my children, Amos, Thomas and Simon, and all debts owing to me by any of my sons, and all advances made to them. shall be deemed portions of the remainder of my personal estate, and those of them owing these debts or having received these advancements, shall receive correspondingly less in the distribution; but I have made no advancements to Simon, nor has he ever been indebted to me." Twenty-nine years before the decedent's death, he had sold a farm to Simon for $2,755, taking from him a bond and mortgage for $2,255, and a promissory note for $500, payable Aug. 7th, 1863. The interest on both bond and note was regularly paid by Simon, until his father's death. In a book left by decedent was a memorandum importing that he had advanced $1,700 to Amos and $1,349 to Thomas. The residue of the estate, not including the bond and note of Simon, or the advancements to Amos and Thomas, was $17,492. The auditor has charged Amos and Thomas with their respective advancements, but without any interest. He has charged Simon with a debt of $2,755, with interest thereon, $661.20. He has thus found the estate to amount to $23,957.20, of which the share of each son is $7,985.73⅓. The latter sum, less $3,416.20 ($2,755 plus $661.20) leaves for Simon's present dividend, $4,569.53⅓. Simon excepts because (1) no interest was charged on the advancements to Amos and Thomas. (2.) Because the alleged debt of his was deducted from his share.

The first of these exceptions must be sustained. Advancements do not bear in-

terest unless the person making them expressly declares that they are to bear interest, until one year after the decedent's death. But they then begin to bear interest. Patterson's Appeal, 128 Pa. 269. The exceptant insists that interest for four years should be added to the advancements. As the testator died in March, 1890, and the estate is now undergoing distribution, interest for nearly six years is properly chargeable.

It is an undisputed fact that Simon was indebted to his father since 1861, for the purchase money of a farm, and that interest on the debt has been uninterruptedly paid thereon down to 1890. In the will, however, the testator states that Simon has never been indebted to him. The truth of the statement depends on the time of the making of the will. If the will was made before 1861 the averment is correct, if made after 1861, incorrect.

If the will were shown to have been made before 1861 we should be compelled to say that as the declaration of the testator accorded with the existing facts, it could not be understood either to deny the future existence of debts of Simon or to express the purpose of the testator that in making distribution, such debts, if any, should be ignored.

On the hypothesis that Simon's debts were contracted in 1861, and that the will was made at some later period, nearer to his death, what consequences will flow from the testamentary denial of Simon's indebtedness?

A mere declaration about a fact can neither make nor abolish that fact. An averment by a testator that a son is indebted, would neither *make* nor *prove* him to be indebted. Zimmerman v. Zimmerman, 47 Pa. 378. Nor could an averment that he is not indebted unmake or conclusively disprove the indebtedness. As an admission against interest by the testator it would be strong evidence; but it could not estop; it would not be insurmountable. In the case before us, the fact that Simon was indebted despite the testamentary declaration is admitted.

But, although the testator's statement that a son is indebted or that he is not indebted will not prove the *fact* of indebtedness or non-indebtedness, it may disclose a purpose on his part, that his estate shall be distributed *as if* the indebtedness existed, or as if it did not exist. As he could refuse any share in his estate to the legatee, he can give to the latter as much or as little as he wishes. He may if he chooses *feign* a debt, and direct its deduction from the share of the beneficiary, or *feign* the non-existence of a debt, with the intention to avoid a deduction of it. The important question then is, on the supposition that the will was written after the rise of the Simon debt, does it indicate the intention that the debt should be disregarded in ascertaining Simon's share of the estate? Only two hypotheses in regard to the denial of the debt, are possible. Either the testator intended merely to state a fact, but not to effectuate a definite result by means of the assumption of this fact, if such assumption should be untrue, or, conscious of the fact, he denied it in order to manifest the purpose that it should not be considered, in partitioning the estate. In view of the case of Eichelberger's Estate. 135 Pa. 160, we feel constrained to adopt the latter interpretation. It was there held that a testator having declared that his children should share alike, and having immediately appended a list of debts owed to him by children, it could not be shown that one of the children mentioned as debtor had in fact never been indebted. It was said that the testator evidently intended $3,600 (the debt mentioned), to be deducted from the share of his daughter Jane, and that error in the assumption of the existence of the debt could have no legal consequences.

If the purpose that a sum shall be assumed to be a debt, in determining the shares of children, is controlling, without regard to the truth or falseness of the assumption, *a fortiori*, would the purpose that an actual debt be assumed never to have existed, be controlling, whether such debt existed or not. Pritchard directs an equal division of his estate among his three sons. In making this he orders all advancements to, and debts of the sons to be considered portions of the estate; he then adds "but I have made no advancements to Simon, nor has he ever been indebted to me." If he was conscious, at the moment, of Simon's debt, he could have had no other purpose than that Simon's debt should not be deducted from his

share. Eichelberger's Estate, *supra*, forbids our speculating whether, if he was at the moment not conscious of the debt, he would if conscious, have intended the debt to be ignored. How, (1) can we know that he was not conscious of the debt? It is almost impossible to think, if he had testamentary capacity at all, that he was ignorantly denying such a fact as this. Though the debt was old, there had been an annual revival of the recollection of it; (2) how can we determine that his intention that nothing should be deducted from Simon's share, was conditioned on the assumption that he was not indebted, and that, had he realized that Simon was indebted, he would have directed the debt to be deducted from his share?

On the hypothesis that the will was written after 1861, the report of the auditor would have to be corrected as indicated below. On the contrary hypothesis, the auditor's report would be accurate except as respects interest on the advancements to Thomas and Amos. As important consequences depend on the date of the execution of the will, the report must be recommitted to the auditor in order that he take such evidence as may be offered, upon the date of execution.

Balance in executor's hands.....		$17,492.00
Advances...	$1,700.00	
	1,349.00	
	$3049.00	
Interest for four years on advances...	731.76	
		3780.76
		$21,272.76
One-third.....		7,090.92
Simon's share.....		$7,090.92
Thomas' share,	$7,090.92	
	1,672.76	
	5,418.16	
Amos' share.....	$7,090.92	
	2,108.00	
	4,982.92	

MAUD WATERS vs. SAMUEL IRVINGTON AND TRUSTEES OF DICKINSON COLLEGE.

Deed of trust—Husband's power of disposition of personalty—Fraud on marital rights of wife—Voluntary gift—Revocation—Testamentary provision.

Bill in equity.

H. FRANKLIN KANTNER and CHAS. W. HAMILTON for plaintiff.

1. The deed of trust is invalid, being an attempt to prevent the wife from acquiring a share of the grantor's personalty after his death.—Lonsdale's Estate, 29 Pa. 407; Hummel's Estate, 161 Pa. 215; Thayer v. Thayer, 14 Vt. 104.

2. A voluntary gift is of no effect unless executed by the transfer of the property intended to be given, and by the delivery of the usual evidences of the title to such property.—Withers v. Weaver, 10 Pa. 391; Trough's Estate, 75 Pa. 115; Girard Trust Co. v. Mellor, 156 Pa. 583; Appeal of Waynesboro College, 111 Pa. 130.

3. If a trust, it takes effect as a testamentary provision.—Turner v. Scott, 51 Pa. 132; Frederick's Appeal, 52 Pa. 338; Frew v. Clark, 80 Pa. 170; Gingrich's Appeal, 1 Mona. 301.

SIMON P. NORTHRUP and WILLIS E. MACKEY for the defendant.

A husband can dispose of his personalty freed from any *post mortem* claim by his widow.—Ellmaker v. Ellmaker, 4 Watts 91; Pringle v. Pringle, 59 Pa. 285; Dickerson's Appeal, 115 Pa. 210; Lines v. Lines, 142 Pa. 149; Stone v. Hackett, 78 Mass. 227.

The deed of trust was not testamentary in its character.—Mattocks v. Brown, 103 Pa. 16; Dickerson's Appeal, 115 Pa. 210; Lines v. Lines, 142 Pa. 149.

OPINION OF COURT.

Twenty years after his marriage with Maud Harris, Joseph Waters, for some time disaffected towards her and having ceased to live with her, and with the intent to prevent her acquiring any portion of his personalty at his death, made a deed of trust of his personal property, embracing stocks, bonds, mortgages and judgments, the gross value of which was $497,320, to Samuel Irvington in trust, to allow him, Waters, to receive the income, dividends, interest, etc., during his life and after his death to transfer the *corpus* to Dickinson College. In this deed he stipulated that he might revoke it at any time, and that any sales, gifts, or transfers by himself during life should be deemed a revocation *pro tanto*, and that for the purpose of making such sales, gifts, etc., Waters should at all times have the right to the possession of any certificates, mortgages, bonds or other securities. Of this power to sell he availed himself but once, selling $40,000 of bonds and receiving and appropriating the price. Joseph Waters dying six months after making the deed of trust, without issue, his widow files this bill to procure a decree that as to one-half of the

personalty, the deed of trust is invalid. The defendant demurs.

The validity of the deed of trust as to Maud Waters is denied by the plaintiff for reasons which we shall consider *seriatim.*

1. It is an attempt to prevent Maud Waters from acquiring a share of the personalty of the grantor, should she survive him.

The interest of a wife in her husband's personalty differs from that in his realty. The latter begins before death, and except in special modes, *e. g.* the creation of debts, on which the land may be sold on execution, cannot be divested by the act of the husband without her co-operation. In personalty she has no greater interest until death than the husband's next of kin. Any disposition, with an exception to be hereafter noted, taking effect *dum vivus,* will prevent the acquisition of an estate. Hence over such disposition she has no power. On surviving her husband she cannot dispute its efficaciousness. Ellmaker v. Ellmaker, 4 W. 91; Pringle v. Pringle, 59 Pa. 281; Lines v. Lines, 142 Pa. 149; Dickerson's Appeal, 115 Pa. 198.

If the husband gives his personalty to another, he must if sane, know that the effect of the gift will be to prevent his wife's acquiring a share of it. To do an act with consciousness of the effect is to intend the effect. It would seem to follow from the cases just cited that a gift by the husband even for the purpose of preventing the wife's gaining a share in the subject of it, would be valid as respects her. We are conducted, however, by Hummel's Estate, 161 Pa. 215, and Lonsdale's Estate, 29 Pa. 407, to the conclusion that a voluntary gift of property of which possession is not gotten until death, for the *purpose* of preventing the wife's acquiring any interest, is voidable by her. "No case, "says Sterrett, C. J., "has gone so far as to sustain a voluntary obligation given and received with intent to defraud the wife's rights" and by defrauding the wife's rights, is meant preventing her gaining any proprietary interest in the property of her husband through the intestate law. As it is admitted as if it were an allegation in the bill, that Joseph Waters made the deed of trust with the object of preventing his wife gaining any portion of his estate, we think it invalid as to her.

2. The deed is voluntary so far as the college is concerned, and a second objection to the gift is that it is not valid, until executed by a transfer of the subject of the gift. The deed of trust was made and delivered. It would not have become inoperative, because the choses in action assigned were not delivered to the grantee.—Bond v. Bunting, 78 Pa. 210. A deed of assignment for the benefit of creditors, *e. g.* operates, despite the retention of possession of the things assigned, by the assignor. Had the *deed* not been delivered, the trust would not have taken effect, but the mere non-delivery of the thing assigned would not prevent the rise of the trust. A voluntary bond, delivered, is enforceable, though the money which is to satisfy it, does not pass to the donee.—Hummel's Estate, 161 Pa. 215; Mack's Appeal, 68 Pa. 231.

3. The reservation of a power of revocation, it is urged, makes the deed of trust testamentary, and therefore it cannot prevail against the widow's claim to share in the personalty covered by it.

The ownership passed to the trustee by the deed on its delivery. It *could* be recalled, by a revocation, but until recalled, it remains where the deed deposited it. The revocableness of the deed during the life of Joseph Waters, although making it in a sense ambulatory did not give it the character of a testament, Lines v. Lines, 142 Pa. 149; Dickerson's Appeal 115 Pa. 198; Mattocks v. Brown, 103 Pa. 16.

The demurrer is overruled and the defendant directed to answer.

ESTATE OF JOHN ROBERTS, DECEASED.

Evidence— Will—Latent ambiguity—Auditor's finding of fact.

CLEON N. BERNTHEIZEL and JOHN H. VINCENT for the exceptants.

J. T. CALDWELL and EDWIN S. LIVINGOOD for the auditor.

Parol testimony may explain latent ambiguity.—Brownfield v. Brownfield, 12 Pa 136; Moore's Estate, 6 Mont. 117; Dugan's Estate, 24 W. N. C. 287; Wiltberger's Estate, 24 W. N. C. 493.

In case of latent ambiguity explanatory declarations made by the testator at or about the execution of the will are admis-

sible; so are his previous professions indicative of a design to give his property in a particular way.—Vernor v. Henry, 3 Watts 385; Brownfield v. Brownfield, 12 Pa. 136; Phelps' Estate, 7 Kulp 485; 2 Taylor on Evidence (7th ed.), 1009. Declarations need not be contemporaneous with the making of the will.—1 Jarman on Wills, 756; Doe v. Allen, 12 Ad. & E. 227.

Finding of fact by an auditor must be regarded as conclusive in the absence of plain error.—Penn Bank's Estate, 152 Pa. 65.

OPINION OF THE COURT.

The will of John Roberts stated "I give to Josiah Roberts, son of Josiah Roberts, Jr., my gold watch. I also give to William Roberts $500, and to Josiah Roberts $500." Before the auditor who made the distribution of the estate, it was proven that the testator had two brothers named Josiah and William, each of whom had a son bearing the same name. The brothers and the nephews competitively claimed the legacies. It was shown that the testator had declared, one year after making the will, that he had given legacies of $500 to his nephews, and also that at, and for a year prior to, the making of the will, he had not been on speaking terms with his brothers, while he was extremely fond of his nephews. The auditor awarded the legacies to the nephews, and the brothers except.

There is perhaps a presumption that the testator's affection for his brothers was stronger than that for those who were one degree remoter from him, viz., their sons, and, had we no other evidence, this presumption would probably be sufficient to require the award of the legacies to the brothers. Turner's Estate, 18 Pa. C. C. 127. The evidence admitted rebuts and indeed reverses this presumption. It appears that he was not on speaking terms with his brothers while he was extremely fond of his nephews. As the former or the latter and not both were intended to be beneficiaries, we cannot doubt the accuracy of the decision of the auditor, the evidence being receivable. That the state of the testator's property and his relations to relatives and others can be shown is a commonplace of the law. If a legacy is given to a person of a certain name and description and the name and description equally suit two persons, parol evidence is admissible to determine which was meant.—Iddings v. Iddings, 7 S. & R. 111; Vernon v. Henry, 3 W. 385; Brownfield v. Brownfield, 12 Pa. 136; Patch v. White, 117 U. S. 210; Byer's Appeal, 98 Pa. 479. The degree of cordiality of the testator toward his relatives is not ascertained by his declarations, but by evidence altogether unexceptionable, and would be sufficient, we think, apart from the post-testamentary declaration of the testator, to warrant the conclusion of the auditor. It is a circumstance that the devisor distinguishes between Josiah Roberts, Jr., and his son, Josiah Roberts, and gives to Josiah Roberts described as son of Josiah, Jr., a gold watch; and also, though without the description "son of Josiah Roberts, Jr.," the $500. The nephew Josiah was clearly the legatee of the watch.

But the declaration of the testator that he had given $500 to his nephews was properly received. It tended to show to whom he thought he had given the bequest. That a year had elapsed since the making of the will, can have significance only as making possible his forgetfulness of its terms. As it was presumably in his possession and he was conscious of the power to modify it at any time, the danger of mistake is negligible.—Doe v. Allen, 12 Ad. & Ell. 455; 1 Jarman on Wills, *438; *Cf.* Vernon v. Henry, 3 W. 385. We find it impossible to accept the opinion in Jacobs' Estate, 9 Pa. C. C. 40, and Turner's Estate, 18 Pa. C. C. 127, that such declarations are inadmissible.

The exceptions are dismissed and the report of the auditor confirmed.

GEORGE HUGHES vs. HENRY LIGHTNER.

Time of bringing action—Paper filed—Waiver of objections—Title at institution of action—Lease.

Ejectment.

H. W. SAVIDGE and THOMAS K. LEIDY for plaintiff.

1. The paper filed is an agreement, is legal, valid, and binding, and cannot be repudiated.—Bunting v. Lutz, 132 Pa. 193; Ruggles v. Alexander, 2 Rawle 231; Saeger v. Mead, 171 Pa. 349; Rea v. Gibbons, 7 S. & R. 203; Jobe v. Hunter, 165 Pa. 5; Woddrop v. Thacher, 117 Pa. 340; Johnson v. Chaffont, 1 Binn. 75; Wilkins v. Barr, 6 Binn. 389; Fursht v. Overdeen, 3 W. & S. 470; Heilner v. Battin, 27 Pa. 517.

2. After the death of Charles Hughes, prior to the trial, the plaintiff has suffi-

cient title to bring this action. There need be no second action.—Act of April 13, 1807, P. & L. p. 1699; Ballatine v. Nagley, 158 Pa. 475; Grant v. Levan, 4 Pa. 420; Webster v. Webster, 54 Pa. 161; Am. and Eng. Ency. of Law, Vol. 6, p. 230.

3. The defendant was either a mere trespasser or a tenant at sufferance and cannot deny the title of the decedent or the plaintiff in this action.—Wilhelm v. Shoop, 6 Pa. 21; Losee v. McFarland, 86 Pa. 33; Evans v. Hastings, 9 Pa. 273.

4. The plaintiff can recover an undivided one-third, besides damages and costs.—Act of April 8, 1833, P. & L. 2411; Murry v. Garretson, 4 S. & R. 129.

H. CLAY BEISTEL and HORACE CODDINGTON for defendant.

1. There being no privity between Henry Lightner and Louis Richards, the proper defendant, plaintiff must suffer a nonsuit.

2. The plaintiff must recover upon the strength of his title at the time of the *institution* of the action.—Alden v. Grove, 18 Pa. 377; McCulloch v. Cowher, 5 W. & S. 427; Boyland v. Meeker, 28 N. J. L. 274. Plaintiff must have the present right of possession.—Heffner v. Betz, 32 Pa. 376.

3. If plaintiff recovers at all, he can recover only an undivided third.—Butrick v. Tilton, 141 Mass. 93; Mobley v. Brunner, 59 Pa. 481; Dawson v. Mills, 32 Pa. 302; Ash v. McGill, 6 Wh. 391; Wilne v. Cummings, 4 Yeates 577; DePuy v. Strong, 37 N. Y. 372; Johnston v. Fullerton, 44 Pa. 466.

4. The filing of the paper before the death of Charles Hughes does not preclude the defendant from taking advantage of the fact that the suit was improperly brought.

CHARGE OF COURT.

Gentlemen of the Jury:

Hirons Hughes died intestate in 1894, seized of a tract of land in fee. There survived him his father, Charles Hughes; a brother Jonathan; two sons of a second brother, Edward, deceased; the grandson, George, of a third brother, William, who, and whose only son, father of George, had died before Hirons; and a half-brother, son of his father by an earlier marriage. There also survived Hirons, an uncle, Francis, brother of his father; and an aunt, Sarah Henderson, sister of his deceased mother. Louis Richards, a tenant of Hirons Hughes, under a lease for four years, which had not expired when Hirons died, did not, at its expiration, surrender possession, but retained it through Henry Lightner. Therefore George Hughes brought this ejectment against Lightner four weeks before the death of Charles Hughes. A paper has been filed to the effect that the existence in life of Charles Hughes shall not preclude a recovery if otherwise the plaintiff would be entitled to recover.

The defendant requests us to instruct you (1) that there can be no recovery; (2) that the plaintiff, if he can recover at all, cannot recover more than an undivided third.

Henry Lightner has no right to remain in possession, other than that which grows out of his present possession. Being there he will be permitted to remain there until some one whose right is superior attempts to dispossess him.

Nor is it enough that at the time of trial, the plaintiff should have a superior title. If without right to possession when he instituted the action, he will not be allowed to eject the defendant by means of it, although he may between its inception and conclusion have acquired this right.—Alden v. Grove, 18 Pa. 377; McCulloch v. Cowher, 5 W. & S. 427.

When this action was begun, Charles Hughes was alive. When Charles Hughes died, his next of kin were his father, his brother, the descendants of two deceased brothers and a half-brother. His father became tenant for life.—Section 3, Act April 8th, 1833; 1 P. & L. 2410. The reversion passed, one-third to the brother, Jonathan, one other third to the two sons of Edward, and the remaining third to George, the plaintiff. The half-brother has no interest. He would have inherited the land only in default of the whole brothers and their issue and also in default of the father.—Sec. 4, 5, Act April 8th, 1833; 1 P. & L. 2411. Charles Hughes, therefore, the life tenant, and not George Hughes, a reversioner, had the right of possession when the action was initiated. The devolution of the right of possession upon George a month thereafter does not discharge the action from the vice of precipitancy.

But the agreement that a recovery may be had, if the plaintiff might have recovered but for the existence of the life tenancy, waives the objection. Neither the title nor the right of possession passed by this agreement. These both had been in George Hughes before it was filed. It is simply a stipulation that the plaintiff shall not be compelled to resort to another action, if he is now, at the time of trial, entitled to the possession.

Hirons Hughes had, prior to his death, leased the premises for four years to Louis Richards. His death within the four years did not, of course, terminate the lessee's right to the possession. But, the lease expiring, the heir of the landlord became entitled to the possession and could enforce this right by ejectment. Henry Lightner has no other right than that of Richards.

The first request of the defendant, therefore, we must deny, and we instruct you that the plaintiff is entitled to recover. With the second request of the defendant, importing that the plaintiff can recover only one undivided third, we comply. He owns only an undivided third. He cannot deprive the defendant of more than he owns. He cannot vicariously recover the shares of his co-tenants.—Mobley v. Bruner, 59 Pa. 481; Dawson v. Mills, 32 Pa. 302.

As no facts are in dispute, we direct you to render a verdict for the plaintiff for an undivided one-third of the premises described in the writ.

ESTATE OF CHARLES FOX, DECEASED.

Will—Affect after Marriage—§ 1, 2, 15, Act 8 Apr., 1833, interpreted.

Exception to the Auditor's distribution.

FREDERICK C. MILLER and G. FRANK WETZEL for exceptant.

Marriage and birth of issue work a revocation of a will previously made, when no provision has been made for the widow and issue. Act 8 Apr., 1833, 1 P. & L. Dig. 1450; Walker v. Hall, 34 Pa. 483; Edward's Appeal, 47 Pa. 144; Robeno v. Marlatt, 136 Pa. 35; Wilson v. Ott, 160 Pa. 433. If the wife *alone* is provided for, or the issue *alone*, the will is inoperative. Walker v. Hall, 34 Pa. 483; Edward's Appeal, 47 Pa. 144; Grosvenor v. Fogg, 81 Pa. 400; Robeno v. Marlatt, 136 Pa. 35.

Widow of intestate receives one-third and issue two-thirds.—Act 8 Apr., 1833, 1 P. & L. Dig. 1450; Leinaweaver v. Stoever, 1 W. & S. 160; Heineman's Appeal, 92 Pa. 95.

MARTIN F. DUFFY and CHARLES E. DANIELS for the Auditor.

A widow is entitled to one-half of personalty absolutely when testator dies without surviving children. § 2 Act Apr. 8, 1833, 1 P. & L. Dig. 2408–2409.

Widow may take under provision of will, which is inoperative as to her only when she elects to take against it.—Fidelity Trust Co.'s Appeal, 121 Pa. 1. The intention of the testator must govern,—Roberjot v. Mazurie, 14 S. & R. 42; Coates, Appeal, 2 Pa. 135; Horwitz v. Norris, 60 Pa. 261; Sheetz's Appeal, 62 Pa. 213; Barclay v. Lewis, 67 Pa. 316.

The will is revoked in part as to the residue of the estate, for the benefit of the son.—Walker v. Hall, 34 Pa. 483; Willard's Appeal, 68 Pa. 327; Laird's Appeal, 85 Pa. 339.

OPINION OF THE COURT.

Charles Fox, unmarried, made a will by which he bequeathed his whole estate, personalty only, to certain charities. He however, added, "But, should I at any time hereafter become married, I give to my wife one-half of my estate." Six months after making his will, Charles Fox married, and three months after his death a son was born. The auditor, appointed to distribute the estate, has awarded one-half to the widow and one-half to the son. Counsel for the son except that as to him the decedent died intestate.

Had Charles Fox died intestate, the son would receive two-thirds, the widow one-third, of his estate. Sect. 1, 2, Act April 8, 1833; 1 P. & L. Dig. 2408, 2409.

The 15th section of the same act ordains that "When any person shall make his last will and testament and afterwards shall marry or have a child or children not provided for in such will, and die, leaving a widow and child * * * although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after born, shall be deemed and construed to die intestate; and such widow, child or children shall be entitled to such purparts, shares and dividends of the estate, real and personal of the deceased, as if he had actually died without any will." 1 P. &. L. Dig. 1450.

As to the widow, this enactment operates, whenever the marriage occurs after the making of the will, whether the will does or does not make provision for her. Fidelity Trust Co.'s Appeal, 121 Pa. 1. But, the will is not annulled by it, even as to her. It simply "entitles" her to such purpart, share or dividend as if the husband had died intestate. "If she does not elect to make such claim, the will is not affected in any respect." The will of Charles Fox gives to his widow a larger

share of his estate than would the intestate law. Of this larger share, the 15th section of the Act of 1833, in so far as it aims to declare the results, as to her, of a post-testamentary marriage, does not deprive her. Fidelity Trust Co.'s Appeal, *supra*. The dicta to the effect that the subsequent marriage is *ipso facto* a revocation *pro tanto* of the will, Edward's Appeal, 47 Pa. 144; Walker v. Hall, 34 Pa. 483, are inaccurate.

But, a son has been born after the death of Charles Fox. This son is therefore "entitled to such purparts * * * as if he (the testator) had actually died without any will." As against the charities, his option would be irresistible. Is it ineffectual as against his mother? The import of the statutory language is unmistakable. Such child "shall be entitled to such purparts," etc. If the gift to the widow of one-half, *i. e.*, one-sixth more than under the intestate law she would be entitled to, were indefeasible by the son, so would be the gift of the whole to her. The statute would have been no protection to the son, as against bequests or devises to the widow. But it protects him as against her as well as against all the world. A devise of all the land of the decedent to the widow, is as against the subsequently born son, wholly inoperative. She takes only her dower. Edward's Appeal, 47 Pa. 144; Walker v. Hall, 34 Pa. 483; Robeno v. Marlatt, 136 Pa. 35. There is no difference between devises and bequests. The exception is sustained, the report is recommitted to the auditor, and he is directed to award to the exceptant two-thirds of the fund.

FREDERICK ORMSBY vs. IRA D. PEPPER.

Devise—Trust—Merger of Interests—Title by Sheriff's Sale.

Ejectment.

ROBERT H. BARKER and HERMAN H. GRISWOLD for the plaintiff.

The trust is void. Legal and equitable titles merge in Ira D. Pepper.—Hahn v. Hutchinson, 159 Pa. 133; Ehrisman v. Sener, 162 Pa. 577.

The general power of disposal expressed in the will vested a fee simple in Ira D. Pepper.—Good v. Fichthorn, 144 Pa. 287; Evans v. Smith, 166 Pa. 625; Kiefel v. Keppler, 173 Pa. 181; Ahl v. Bosler, 175 Pa. 527. The devise over to children is therefore void.—Karker's Appeal, 60 Pa. 155; Jauretche v. Proctor, 48 Pa. 466; Evans v. Smith, 166 Pa. 625.

J. HARRIS WILLIAMS and HUGH R. MILLER for the defendant.

The wife intended her husband to take a life estate.—Meyer's Appeal, 48 Pa. 26; Rife v. Geyer, 59 Pa. 393; Lininger's Appeal, 110 Pa. 398; Mercur's Estate, 151 Pa. 49; Hahn v. Hutchinson, 159 Pa. 133; Kennedy v. Kennedy, 159 Pa. 327; Smith v. Snow, 123 Mass. 323.

At the sheriff's sale, the plaintiff purchased only an estate for the life of the husband, which having expired, leaves no title in Ormsby.

CHARGE OF THE COURT.

Gentlemen of the Jury:

Mary Pepper's will contained the clause, "I devise my farm to my husband, Ira D. Pepper, in trust that he shall manage and control it as he shall think best, so that neither it nor the rents and income thereof, shall be subject to any debts that he may contract, but the same shall be his absolutely. And as said trustee, my husband may sell any portion, or all of the said farm, encumber it and make whatever use he chooses of the proceeds. He may also, at his death, devise the said farm if he shall not have otherwise disposed of it, to whomsoever he shall choose. At the death of my husband, and subject to the exercise by him of the powers and rights heretofore conferred upon him, I devise one undivided third to my son John, one to my son James, and one to my daughter Ellen." Ira D. died in July, 1896, having survived his wife twenty years. In 1891 a judgment was recovered against him by Frederick Ormsby for money loaned on a bond, and on a *fi. fa.* and *vend. ex.* his interest in the farm was sold in 1894 by the sheriff to Ormsby. Six months after the acknowledgment and delivery of the sheriff's deed, Ormsby began this ejectment, in which the original defendant's son, Ira D., has been substituted as defendant.

It is conceded by the defendant, that the trust for Ira D. Pepper, created by the will of Mary Pepper, was invalid. He was the trustee and also the *cestui que trust.* The two interests merged. The object of their separation, viz: to exempt the proceeds, or the corpus from liability for debts of Ira D. Pepper, is disapproved by the

courts, and a trust in one for himself, with this object is treated as null. Hahn v. Hutchinson, 159 Pa. 133; Ehrisman v. Sener, 162 Pa. 577. Despite the testamentary direction that neither the land nor its income shall be subject to debts contracted by Pepper, on the judgment recovered against him a valid sheriff's sale could take place. The sale to Ormsby is unimpeachable.

In ejectment, the plaintiff can recover, only if, both when he began the action he was, and at the trial he is, the owner of the land with a right to the possession. This ejectment was brought during the life of Ira D. Pepper, the devisee of Mary Pepper. He has since died, his son by a former marriage, who is in possession being substituted for him as defendant. If Ormsby acquired by the sheriff's sale only an estate *per autre vie.*, as that estate has become extinct he no longer has a right to the possession of the premises. On the other hand, if he acquired a fee, nothing has happened to preclude his present recovery of the land. We must then ascertain what quantity of estate passed to him. As he gained by his purchase whatever estate Ira D. Pepper had, what quantity of estate was devised to Pepper?

The devise is to Ira D. Pepper. The land, and its rents and income, are to be his "absolutely." He may sell it or encumber it, and make any use he chooses of the proceeds. He may devise it, if before his death he has not disposed of it. The devise to Ira, unqualified, would transfer a fee. The addition of the powers to sell, *dum vivus*, and to devise, does not diminish the estate which without it, would have been given. Ahl v. Bosler, 175 Pa. 526; Good v. Fichthorn, 144 Pa. 287; Evans v. Smith, 166 Pa 625. The gift to a husband of an unlimited power to sell and to dispose of the proceeds, following a gift of the "whole income while he lives" there being no devise over, indicates that a fee is intended to vest in him. "Such an estate," says Mitchell J. "is very near a fee simple. The difference is purely technical, and is not one which would be obvious to the ordinary mind." Kiefel v. Keppler, 173 Pa. 181.

What effect are we to impute to the devise over, in Mary Pepper's will? Her language is: "At the death of my husband and subject to the exercise by him of the powers and rights heretofore conferred upon him, I devise one undivided third to my son John," etc. This is not an absolute devise over, but contingent on the non-exercise of the power to convert the land to his sole use, by her husband. We do not think it sufficient to justify the inference that only a life estate was conferred on him. A direction to *him* to devise to John would not have had this effect. Ahl v. Bosler *supra*; Good v. Fichthorn, 144 Pa. 287. We are unable to give a larger operation to a direct devise by the testator, contingent on the non-sale and non-devise by the immediate devisee. *Cf.* Evans v. Smith, 166 Pa. 625; Jauretche v. Proctor, 48 Pa. 466. A fee therefore passed by the devise to Ira D. Pepper. [In Hahn v. Hutchinson, 159 Pa. 133, the court refrains from deciding whether a fee or a life estate passed by the will.]

But, we do not think the estate of Ormsby is admeasured by that of Ira D. Pepper. To Pepper, even if a fee was not given by his wife's will, a power to dispose of a fee was given. He may sell the farm; he may encumber it, he may use in any way the proceeds. Evidently, then, a total alienation of the farm was within the scope of his power. To no particular form of incumbrance is the power to incumber limited. It may be by mortgage, or by judgment. The power to encumber, implies the power to expose to a sheriff's sale of the fee, in order to realize the money with which the farm may be encumbered. Ira D. Pepper has contracted a debt, has suffered the recovery of a judgment, and has suffered a sale on that judgment. Even if he had not himself a fee, the sheriff's vendee at a sale founded on the incumbrance, gains a fee. Ormsby is therefore, entitled to the verdict of the jury.

JOHN SUMMERSON vs RICHARD EVERETT.

Sale—Conditional sale—Bailment.

Issue under sheriff's interpleader.

GRIER B. SNYDER and I. I. WINGERT for plaintiff.

The contract in question is simply a lease. The piano remained in bailment,

and therefore the title did not pass to the defendant.—Clark v. Jackson, 7 Watts 375; Rose v. Story, 1 Pa. 190; Chamberlain v. Schmidt, 44 Pa. 431; Werts v. Collunder Co., 20 W. N. C. 59; Rowe v. Sharp, 51 Pa. 26; Crist v. Kleber, 79 Pa. 290; Enlow v. Kline, 79 Pa. 488; Edwards v. Ward, 105 Pa. 103; Ditman v. Coterell, 125 Pa. 606; Hamilton v. Billington, 163 Pa. 76.

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

The agreement was essentially one of sale and not of bailment. The title therefore passed to the defendant and the piano can be levied upon for his debts. Simon v. Edmundson, 10 Pa. C. C. 315; McClure v. Forney, 167 Pa. 414; Forrest v. Nelson, 108 Pa. 481; Peek v. Heim, 127 Pa. 500; Renninger v. Spatz, 128 Pa. 324; Stephens v. Gifford, 137 Pa. 219; Farquhar v. McAlevy, 142 Pa. 233; Ott v. Sweatman, 166 Pa. 217.

CHARGE OF COURT.

Gentlemen of the Jury:

Summerson, a piano manufacturer, made on Aug. 11, 1894, the following contract: "This attests that Adam Reymer has today hired a piano from John Summerson. The value of the piano is $700. Reymer agrees to pay Summerson in seven monthly instalments *i. e.* $100 per month, as rent for the same. Should any instalment not be paid for three days after it falls due, Summerson may take the piano into his own possession, and this lease thereof shall thereupon come to an end, and no instalments already paid shall be paid back to Reymer, and Reymer shall remain liable to an action at law for all such instalments as shall have become due and be unpaid, when the said Summerson resumes possession of the piano. When the last of the said seven instalments shall have been paid, Summerson shall execute a bill of sale to Reymer for the piano, which from and ever after the said last payment shall become and remain the sole property of Reymer."

Four instalments were duly paid, but the fifth was never paid. Summerson did not exercise his right to retake the piano, but allowed it to remain with Reymer. Three weeks after the fifth instalment became due, Richard Everett, who had obtained a judgment against Reymer, issued an execution thereupon, and caused the sheriff to levy on the piano, as Reymer's. This feigned issue is to determine whose is the piano.

The owner of a chattel may loan it to another, for hire, or not for hire, without exposing it to the risk of being levied upon as the borrower's. On the other hand, a contract to sell a chattel with delivery of possession of it to the purchaser, makes it as the purchaser's, liable to seizure for his debts, despite a stipulation that the vendor shall retain a lien on it, or—substantially the same thing—that the ownership shall not pass to the purchaser until the completion of the payment of the price. Ott v. Sweatman 166 Pa. 217.

In order to evade the last principle, it has become common for vendors to attempt to give to a contract primarily for sale, the semblance of a lease; to distribute the purchase money into instalments called rent, payable over a certain time; to declare that until the payment of the instalments, the subject of the contract though in the possession of the other party, shall remain the so-called lessor's; and to provide for the transmutation of the ownership when the last instalment shall have been paid. In some cases, the parties have succeeded in inducing the courts to give larger prominence to the element of bailment than to that of sale; in others; the court, thinking the former but a disguise for the latter, have determined the rights of creditors of the bailee, by the element of sale in the contract. It would be useless to attempt to reduce these cases to any common principle. To profess that they are capable of harmonization implies a lack of candor or of discrimination. We think however that the more recent cases hold that when the primary object of the parties is to effect a sale, and the form of bailment is intermediately adopted, in order to secure the vendor for the price, the thing, in the possession of the bailee-vendee, shall be deemed his, as respects creditors of or purchasers from him. We also think that the interpretation of the contract of Summerson and Reymer, which these cases warrant will make it primarily one of sale.

Seven hundred dollars, the "value" of the piano are at all events to be paid by Reymer, in $100 instalments. If any of these is unpaid, Summerson may recover possession of the piano. But, such resumption does not excuse from the payment of the remaining instalments; even though they fall due after the cessation of

Reymer's possession. When the last instalment is paid, the piano is to become and remain the sole property of Reymer. It is impossible not to see that the contract was one of sale. The instalments are not a rent, but fractional payments of the price. The duty of paying them is not consequent on the monthly possession, but is absolute; continuing even when the possession is lost. What avails it that the word "hired" and "lease" are used? and that there is a stipulation for a bill of sale after the completion of the payment of the $700? Ott v. Sweatman, 166 Pa. 217; Farquhar v. McAlevy, 142 Pa. 233. We are of opinion that the piano was so far the property of Reymer, as to be leviable for his debt. Your verdict therefore, should be for the defendant.

JOSIAH HUMPHREYS vs. EMILY GRAFT.

IN THE SUPREME COURT.

Gift—Donor's intention—Resulting Trust—Trustee's purchase—Title.

Emily Graft, wife of William Graft, was the daughter of Josiah Humphreys. Wm. Graft contemplated buying a house for $2000 and a lot, and, as a gift to his daughter, Humphreys contributed $1000, expecting the deed to be made to Wm. Graft and Emily Graft. It was in fact, at the instance of Wm. Graft, made to him as sole grantee. Humphreys then insisted that Wm. Graft should give him a judgment note for $1000 to secure the money he had put into the purchase for his daughter, and the note was given. Before judgment was entered on it, Graft made a written contract to sell the house to Amos Farrer for $3000, of which $350 was paid down. Learning of this, Humphreys caused a judgment to be entered for $1000, issued execution, and at the sheriff sale of Wm. Graft's interest in the property, became the purchaser for $1200. Becoming thus the owner of Wm. Graft's right, Humphreys compelled Farrer to pay him $2650, the remainder of the price he had agreed to pay. Emily Graft, insisting that this sum less $200, the amount paid to the sheriff by Humphreys, is her property, sues the latter for $2450.

The court was asked by the counsel for the defendant to instruct the jury that under the evidence there could be no recovery by the plaintiff. This the court refused to do, and instead advised the jury that their verdict should be for the plaintiff for the amount claimed.

Before FISHER, P. J., BOYD and HENNINGER, J. J.

Appeal by defendant.

Error assigned, direction of the court below.

JOSEPH F. BIDDLE and PAUL H. PRICE for appellant.

The intention of the donor must be ascertained and complied with in order that the gift may be fully executed.—8 Am. & Eng. Ency. of Law, 1336; Mulock v. Mulock, 31 N. J. Eq. 602; Doty v. Willson, 47 N. Y. 580.

The gift, containing a condition and not being complied with; reverted to the donor.—Jacobs v. Jacobs, 21 Mo. 277.

The judgment note was *not* held in trust, for the words relied upon must be unequivocal and the relation between parent and child in such cases must be taken into consideration.—Young v. Young, 80 N. Y. 424; Harris v. Richey; 56 Pa. 395; Poorman v. Kilgore, 26 Pa. 372.

H. CLAY BEISTEL and HUGH R. MILLER for appellee.

The gift, being executed, is irrevocable.—8 Am. & Eng. Ency. of Law, 1318; 3 Pomeroy Equity, § 1149; Clough v. Clough, 117 Mass. 83.

A resulting trust arises where the husband invests the money of his wife and takes the title to himself. Light v. Zeller, 144 Pa. 570; Young v. Senft, 153 Pa. 352; Rupp's Appeal, 100 Pa. 531.

A purchase by a trustee at his own sale must be considered for the benefit of the *cestui que trust*.—Sourwine v. Claypool, 138 Pa. 126; Parshall's Appeal, 64 Pa. 299; Cadwalader's Appeal, 65 Pa. 224.

OPINION OF COURT.

Josiah Humphreys, father of Emily Graft, contributed $1,000 toward the $2,000, the price of land about to be purchased by William Graft, husband of Emily, in expectation that the deed should name William and Emily as grantees. The money was paid to the vendor, but the deed named William Graft as sole grantee. A trust thus resulted, as to an undivided half of the land. *See* 12 Am. & Eng. Ency. of Law, 15; Rupp's Appeal, 100 Pa. 431.

To whom did it result? To Josiah Humphreys or to Emily Graft? Had Josiah Humphreys intended that he should be named as grantee the trust would have been for him. Authority is superfluous for so unquestionable a proposition.

But, the $1000 was contributed by Humphreys for his daughter, and with the intention that the deed should name her as a co-grantee with William Graft. When it was actually applied by the latter to the purchase, the gift to Emily was at once executed. The money was no longer

Humphreys', it was not in his possession. It had became the vendor's. Instead of it, was an interest in the land, legal, in William; equitable in Emily. Josiah Humphreys had no estate either in the money by which the land was procured, nor in the land itself.

The legal title to the land was in William Graft. He had therefore the power to dispose of it to a purchaser for value, ignorant of the trust for his wife, and thus to imperil the interest which her father had intended her to have. The latter insisted on obtaining from William Graft a note for $1,000, with warrant to confess judgment, so that he could recover for her, that amount in case of need. Wm. Graft need not have given this note. The land was his and Emily's. Should it be lost by his conveyance, or for his debts, he would owe her, not her father. The father must be regarded then, as obtaining the note for her.

Humphreys' fears of Graft's alienation of the land were not groundless. Graft contracted to convey it to Amos Farrer for $3,000. Of this sum $350 was paid down. Humphreys, learning of the sale, entered judgment upon the note, and issuing execution, sold William Graft's interest in the land for $1,200, becoming the purchaser. In this way Humphreys acquired Wm. Graft's right to obtain from Farrer the, as yet, unpaid purchase money, and this sum was subsequently paid him by Farrer, viz: $2,650. In this action Emily Graft insists that Humphreys must pay her the $2,650 received from Farrer, less the $200 in excess of the judgment on which the sale took place, which Humphreys was compelled to pay the sheriff.

Humphreys had constituted himself a trustee or attorney in fact of his daughter, in taking the judgment from William Graft. He would have fulfilled his duty had he caused the sheriff's sale and allowed the land to be bought by another. He was under no obligation to bid more than the judgment in order to secure the land for his daughter. Unless in bidding the $1,200 he intended to present the product of the bid to her, the trust must be limited to the product of the $1,000. For $1,200 he gets a right that produces $2,650, that is, the $1,000 held by him as trustee and which he applied to his bid, produced five-sixths, and the $200 which he paid in addition, produced one-sixth of the $2,650. For the $1,000 and its product, he is a trustee. For the $200 and its product, he is not a trustee. We think he is in equity liable therefore to pay to Emily Graft only $2,208.33. *Cf.* 12 Am. & Eng. Encyc. Law, 36; Rupp's Appeal, 100 Pa. 531.

In Sourwine v. Claypool, 138 Pa. 126, the father did not bid at the sheriff's sale more than the judgment. The judgment was for $400. The purchase money owing by the vendee of Sourwine was $900. The father received this amount, $900, from the vendee, and "after paying his bid at the sheriff's sale and the expenses of litigation," there remained in his hands $600 (p. 127). His bid must then have been less than $300. The right to the $900 was purchased altogether by the judgment. As the judgment was the property of his daughter, held by him as *quasi-trustee*, the right which was bought by it at sheriff's sale, viz, the right to the $900, was also the property of the daughter.

While therefore we think that the court below was right in declining to instruct the jury, as it was requested to do by the defendant, that there could be no recovery by the plaintiff, we think there was error in advising the jury that their verdict should be for the plaintiff for $2,450.

Judgment modified, into a judgment for the plaintiff for the sum of $2,208.33.

H. SILAS STUART, A. M.

H. Silas Stuart was born in Cumberland County, Pa., in 1855. Graduating from Princeton College, with honors, in the class of '77, he spent the following two years in Europe at the Universities of Edinburg and Leipsic, pursuing with other studies a course in Roman Law. In both Universities, he stood in the highest of the series, among which the students were distributed according to their success. He was admitted to the bar of his native county in 1881, and two years later to the Supreme Court. Appointed a member of the examining board of the bar, soon after his own admission, he still retains that office. In 1891, he was elected professor of the Law of Partnership, the duties of which position he has since discharged with signal ability and satisfaction.