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EDITORIAL.

AN ALUMNI ASSOCIATION.

Already one hundred and seven students have received the diploma of the Dickinson School of Law since its reorganization in 1890. The class graduating this year will add about thirty to that number. Is it not time to form an Alumni Association?

Such associations of graduates of seminaries and colleges have become universal. Whatever reasons may be urged for them, may be more powerfully invoked for an association of the graduates of a law school. They pursue the same vocation. As they settle at scattered points, they do not become competitors in business with each other. It often happens that lawyers have claims against persons who reside in other localities than their own, and are obliged to select some attorney at the residence of the debtor. Unless there were countervailing reasons, an alumnus, needing to secure the services of a distant lawyer, would prefer a fellow alumnus to another. An association would be a means of making the alumni personally acquainted, and of deepening an interest in each other.

An ordinary student does not pass through college or a professional school without forming a warm attachment for it and for his fellow students. He becomes interested in the success of the school, in its eminence, and its influence. The school's success depends incalculably on the loyal sentiments of its alumni. The tender regret with which the graduate recalls his school life will be gradually weakened unless appropriate impressions are revived from time to time. Nothing could so surely perpetuate the love for *alma mater*, as frequent return to it, and renewal of association with its visiting sons. An association would promote reunions in Carlisle, and would disseminate interesting information concerning its members and concerning the current life of the school.

We have heard with pleasure that the class of 1896 has formed a permanent organization. What hinders its members meeting next commencement, and, in conjunction with the class then to graduate, initiating the larger society that shall include all the alumni of the school. The class of 1896 is the largest yet graduated. It represents several states, and many counties of this state. It contains a large amount of ability, and is sure to give the profession in a few years many lawyers of eminence. A striking unity and amity characterized the relations of its members to each other, and their affection for the school is certainly not less than that which alumni of similar institutions usually feel. It was reported sometime ago that the president of this class, Frank C. Bosler, Esq., of Carlisle, was intending to issue a call for a meeting at the next commencement. Will he pardon us, if we thus publicly express the hope that he will not only convoke his own class, but also take steps to inaugurate a general alumni association.

THE ALUMNI.

R. Banister Gibson, '94, who has been practicing in New Bloomfield, Perry Co., Pa. since his graduation, has lately formed a partnership with his brother and they are now located at Erie. We wish the new firm abundant success in their new home.

* * *

Arthur C. Lackey, '95, one of the rising young attorneys of the Perry County Bar, visited Carlisle a few weeks ago, and called upon his friends at the school. He expressed his delight in noting the improvements that have been made in the law school building since his graduation. He is located at Duncannon.

* * *

Dr. John C. Long, '95, is engaged in the practice of the legal profession in Carlisle. He has his office on Court House Avenue with Duncan M. Graham, Esq.

* * *

On Wednesday, April 21st, Evan J. Jones, of the class of '96, was married to Miss Luella M. Sykes, an estimable young lady of Bensinger, Elk County, Pa. Our most hearty congratulations are hereby extended to the young couple. Mr. Jones has built up an unusually large practice at St. Mary's, Pa., since his location there last September.

* * *

J. Harris Curran, '96, who so acceptably fills the chair of professor of mathematics at the Tome Institute, Port Deposit, Md., visited Carlisle recently.

* * *

W. F. Shean, '96, of Scranton, spent a Sunday in Carlisle during the month of April. Mr. Shean is succeeding well in Scranton.

* * *

David J. Glennon, '96, has located at Pittston, Luzerne county's youngest city. He has an office in the Miner's Bank building, a large new structure, and the finest office building in Pittston. Mr. Glennon is prospering in the profession.

* * *

P. Frank Loughran, '93, is practicing at Hazleton, Pa. He is prominently identified with Republican politics in that portion of Luzerne county.

Samuel S. Herring, '92, is the most prominent candidate for the Democratic nomination for District Attorney of Luzerne County. His nomination and election would be a fitting compliment to his ability as a practitioner, and we wish him success.

* * *

Samuel E. Morrow, '96, of Altoona, spent a few hours in Carlisle recently and made a short call at the school. His many friends here were pleased to see him. He is the junior member of the law firm of Morrow and Morrow.

* * *

James F. Santee, '96, has not yet entered upon the practice of his profession and is at present principal of the high school at Shickshinny, Luzerne County, Pa.

THE SCHOOL.

Garrett Stevens, of Reading, entered the School in April. He came to Dickinson from Yale University.

The Senior class has decided to wear caps and gowns for their Commencement exercises to be held in Bosler Hall, on June 7th. They will be the first class from the Law School to wear caps and gowns.

Charles E. Horn, of Scranton, was called home last month by the death of his mother. Martin Herr, of Merchantville, N. J., was summoned to his home by the death of his father. Both young men are Juniors. We extend our sympathy to these gentlemen in their bereavement.

The Delta Chi fraternity of the Dickinson School of Law removed from the third floor of the Stuart Building to their Chapter House at Diffely's Point on Hanover street extension.

A number of English ivy vines were planted on the West and Pomfret street sides of the Law School Building by Frank C. Bosler, Esq., who has shown a very deep interest in the school's welfare. In a few months the building will present a changed appearance.

The subject upon which competition for the Edward Thompson Company's prize of the complete set of the American and English Encyclopedia of reading and Practice will be based, has been announced by Dean Trickett to be "The defences available by the maker of a promissory note against the indorsee." A large number of the Seniors have entered the contest which closes June 1st.

G. H. Moyer, of the Junior class, is one of the four chosen candidates selected by Senator Gobin to be sent as delegate from Lebanon Co. to advance the General's interests in the next Republican State Convention which will be held at Harrisburg next August. If elected, and there is little doubt but that he will be, Mr. Moyer will have the honor of nominating General Gobin for the Auditor Generalship.

A dramatization of the thrilling psychological story, "Dr. Jekyll and Mr. Hyde," by Robert Louis Stevenson, was given in the Sentinel Opera House Friday evening, April 30th, by students of the Junior class of the Law School. A large audience, representative of Carlisle's best people, witnessed the play and deservedly applauded the players. Every part moved with a professional precision, and the participants seemed especially fitted for their particular parts of the cast. Cleon Nivelle Berntheizel took the leading role, and performed admirably the difficult parts and rapid changes. Each participant won many enconiums. The acting was easy and natural, and the players showed a capability of rising to the exact requirements of the climaxes. The complete cast of characters was: Dr. Jekyll, Mr. Hyde, Cleon Nivelle Berntheizel; Mr. Utterson, G. H. Moyer; Dr. Lanyon, Fred B. Moser; Rev. Danvers Carew, G. Frank Wetzel; Inspector Neucombe, A. T. Morgan; Philandar Poole, J. Thompson Caldwell; Guest; Adair Herman; Sarah, Miss Lubertha Jackson; Mrs. Poole, Miss Katherine Boyer; Clara Carew, Miss Josephine Duke; Business Manager, C. N. Berntheizel; Stage Director, Adair Herman; Musical Director, W. Lloyd Snyder.

The play was produced for the benefit of the library fund. The play will be given in some of the neighboring towns.

LECTURES BY PRESIDENT REED.

Dr. George Edward Reed, President of Dickinson College and Law School, on Friday evening, April 23rd, delivered before the law students the first of a series of lectures on "Forensic Eloquence." The spontaneity of applause on several occasions bespoke how eagerly and gratefully the student body drank in the excellent instruction on oratory. In the first lecture, Dr. Reed dwelt upon the necessity for logical form in the body of an address, and the importance of cultivating an oratorical bearing. He emphasized that, first of all for oratorical effect, a speaker should acquire a correct pose, one that would be impressive to an audience and which would allow graceful gestures. Then he illustrated what power is in the eye and how it should be used for telling effect on on audience. The function of the head in oratorical bearing was touched upon, and then Dr. Reed gave the four planes, basic of gestures. He described them to be: For the expression of thoughts of degradation and the like, a plane even with the belt; for feelings of sympathy, a plane level with the heart; for manifestation of strength, gestures direct from the shoulders; and for utterance of sentiment or aesthetic thoughts, movements from or above the head. The hygienic importance of correct posture and gestures was explained also. Before conclusion, Dr. Reed gave with powerful effect, as the key-note of oratory, lines from Hamlet in the opening of Scene II, Act III, of "Hamlet."

The second lecture of the series was given by Dr. Reed on Wednesday evening, April 28, and again the speaker gave practical instruction in the important study of "Forensic Eloquence." Dr. Reed referred, in the commencement of the address, to the voice as a power in oratory. He explained how to produce a good voice as a fitting vehicle to speech, and told of the hygienic necessity of proper respiration. Then he illustrated hand movements as giving force to gestures. The important functions of the voice and hands were explained at length, and illustrated splendidly by a noted speech in Parliament, Dr. Reed reciting it.

THE SOCIETIES.

W. J. Shearer, Esq., one of the prominent members of the Cumberland County bar, lectured before the student body on Friday evening, April 9th. His subject was "Some Celebrated Cases." Mr. Shearer appeared before the student body on a previous occasion during the winter, and on each occasion gave a lecture that was replete with instruction and interesting from beginning to end. From the cases which he cited in his lecture, he drew legal principles which he presented so plainly as to make lasting impressions on the minds of his hearers.

Professor Geo. Edward Mills, the member of the faculty, whose picture appears in this issue of THE FORUM, sat as judge at a moot court case in the Allison Law Society on Wednesday evening, April 9th. The members of the society appreciated his clear exposition of the law in the case argued before him.

THE MOOT COURT.

OVERSEERS OF THE POOR OF WALKER TOWNSHIP vs. OVERSEERS, ETC., OF PORTER TOWNSHIP.

Liability for relief of pauper—Order of relief—Order of removal—Case of sudden emergency.

Rule to show cause why Porter Township should not be held liable for the support of Essic Kline.

JOHN HARRIS WILLIAMS and HORACE CODINGTON for rule.

A district is bound to furnish relief, until the poor person can be removed to place of settlement.—Act of June 13, 1836, § 5, 2 P. & L. 3531; Overseers of Taylor v. Overseers of Shenango, 114 Pa. 394; Kelly Twp. v. Union Twp., 5 W. & S. 535.

Such relief can be given without a *previous* order of relief, in cases of sudden emergency.—Directors of Poor v. Wallace, 8 W. & S. 94; Directors, etc, Chester Co. v. Worthington, 38 Pa. 160; Directors v. Murry, 32 Pa. 178; Nippenose v. Jersey Shore, 48 Pa. 407.

Walker township can then collect such amount expended from Porter township.—Overseers of South Huntingdon v. Overseers of East Huntingdon, 7 W. 527; Bradford v. Keating, 3 Casey 275; Directors v. Murry, *supra;* Nippenose v. Jersey Shore, *supra.*

A. A. WINGERT and JULIAN C. WALKER *contra.*

Porter township cannot be held liable for the amount expended in giving relief to Kline, as the relief was not founded on a previous order.—Act of June 13, 1836, § 6, 2 P. & L. 3532; Overseers v. Baker's Estate, 2 W. 280; Pickett v. Erie County Poor Directors, 3 Pa. C. C. 541. Neither has an order of removal been obtained.—Act of '36, *supra,* § 16, 2 P. & L. 3536; Elk Twp. v. Jordan Twp., 10 Pa. C. C. 245; Overseers of Gilpin Twp. v. Overseers of Parks Twp., 118 Pa. 84. It does not appear that this was a case of a sudden emergency, nor was an order of relief subsequently obtained.

OPINION OF COURT.

Essic Kline, settled in Porter Township, came to a family in Walker Township and while there, became seriously sick. Advised of his illness, the overseers of Walker Township called to see him, but the proprietress of the house, having a teakettle of hot water in her hand, forbade their entering, saying, "if you come inside my house, I will scald you." They did not enter. Without an order of relief, the overseers requested John Macfarlane, a physician, to attend the sick man. He did so and they have paid him twenty-five dollars, his fees for such attendance.

Although Essic Kline was not settled in Walker Township, it was under a statutory duty to take care of him. It is the duty "of every district to furnish relief to every poor person within the district, not having a settlement therein, who shall apply to them for relief until such person can be removed to the place of his settlement." Section 5, Act June 13, 1836, 2 P. & L. 3531. Overseers of Taylor v. Overseers of Shenango, 114 Pa. 394; Overseers v. McCoy, 2 P. & W. 432.

The sixth section of the Act of 13th of June, 1836, 2 P. & L. 3532, forbids relief to any poor person, until an order for his relief has been granted by two justices. In cases of emergency however the courts have held that the relief may be given without an order, and a subsequent order by the justices, approving the relief, will ratify the previous grant of relief by the overseers, or by a private person, the emergency being so stringent as to preclude

consultation with the overseers, before the relief is granted. Directors of the Poor v. Worthington, 38 Pa. 160; Overseers v. Bunn, 12 S. & R. 292; Overseers of South Huntingdon v. Overseers of East Huntingdon, 7 W. 527; Directors v. Wallace, 8 W. & S. 94; Directors v. Murry, 32 Pa. 178; Neale v. Overseers of Plumcreek Township, 12 Pa. C. C. 649; Overseers of Nippenose v. Overseers of Jersey Shore, 48 Pa. 407. There is no particular time within which this order of relief must be procured, after the rendering of the assistance. In 38 Pa. 160, although two and a half years intervened between the physician's attendance on the injured man, and his procurement of an approving order from the two justices, he was allowed to recover. If then, two justices shall approve the relief, their decision unappealed from, will be decisive of the liability of Walker Township, so far as its overseers are concerned. Walker township will then be reimbursable by Porter township. Overseers of South Huntingdon v. Overseers of East Huntingdon, 7 W. 527; Overseers of Nippenose v. Overseers of Jersey Shore, 48 Pa. 402.

But no order of approval of the relief granted by Walker township by the justices having been obtained, this rule must be discharged.

JOHN SMITH vs. LEMUEL ANDERSON.

Lien of fieri facias—Liability of sheriff—Assignment for benefit of creditors—Sale by constable after levy by sheriff.

Action in trespass.

FRANK STROUSS and SYLVESTER B. SADLER for plaintiff cited: Act 16th June, 1836, P. & L. Vol. 1, p. 1947; Am. & Eng. Ency. of Law, Vol. 7, p. 151; Weidensaul v. Reynolds, 49 Pa. 77; Earl's Appeal, 12 Pa. 483; Carey v. Bright, 58 Pa. 70; Troubat & Haly, Vol. 1, p. 886, 896, 861; Vanvalzal v. Croman, 1 Dist. Rep. 190; Hagan v. Lucus, 10 Peters 400; Winegardner v. Hafer, 15 Pa. 144; Am. & Eng. Ency. of Law, Vol. 22, p. 550; Knox v. Summers, 4 Yeates 477; Hartlieb v. McLane, 44 Pa. 501; Dorrance v. Com., 13 Pa. 160; Linton v. Com., 46 Pa. 294; Com. v. Contner, 9 Harris 266; Mitchell v. Com., 37 Pa. 187; Trickett on Liens, Vol. 1, p. 327; Burchard v. Rees, 1 Wharton, 377; Kent's Appeal, 87 Pa. 165; Estate of Matthews, 144 Pa. 139; Braden's Estate, 165 Pa. 184; Brodhead v. Cornman, 171 Pa. 322; Leidich's Appeal, 161 Pa. 451; Ritter v. Brendlinger, 58 Pa. 68; Am. & Eng. Ency. of Law, 2nd Ed., Vol. 1, p. 1155; Siner v. Stearne, 155 Pa. 62; Browning v. Hanford, 5 Hill 588; Wharton on Agency, § 550; Missimer v. Ebersole, 87 Pa. 109.

CLAUDE L. ROTH and A. T. MORGAN for defendant.

Both parties being in fault, neither can recover damages.—Baker v. Lewis, 33 Pa. 301; Heil v. Glanding, 42 Pa. 498; Krum v. Anthony, 115 Pa. 431; Bentley v. Crammer, 137 Pa. 244; Mause v. Traction Co., 175 Pa. 122; Reigard v. McNeil, 38 Ill. 400.

Sheriff not responsible for goods delivered to a bailee at suggestion of plaintiff in execution.—Donham v. Wild, 36 Mass. 520; Wood v. Bodine, 32 Hun. 354.

Sheriff not guilty of a tortious act.—Polley v. Iron Works, 2 Allen 182; Leonard v. Tidd, 3 Metc. 6; Jones v. Fort, 9 B. & C. 764; Bromley v. Coxwell, 2 B. & P. 438.

Sheriff not liable for breaches caused by plaintiff's acts.—Skinner v. Wilson, 61 Miss. 90; Robertson v. Crocker, 11 Ala. 466; State v. Boyd, 63 Ind. 428; Stryker v. Mereles, 24 N. J. L. 542; Dorrance v. Com., 13 Pa. 163.

CHARGE OF COURT.

Gentlemen of the Jury:—

John Smith issued a *fi. fa.* against Samuel Sims, which came to the sheriff's hands at 10:30 a. m., March 5, 1895. On an earlier judgment than Smith's recovered by James Jones before a justice of the peace, an execution was sent out to a constable, two hours later than that to the sheriff. The sheriff, immediately after receiving the writ, levied on a stock of dry goods. The constable made a levy on the same goods two hours afterwards. On March 7, 1895, Sims made an assignment to Smith of the goods on which these levies had been made, and his other property, for the benefit of creditors. Smith took possession of the goods, which, though under the two levies, were still in the store. He sold goods for several days, delivering the proceeds to the sheriff. Jones having in no way assented to the assignment, or to Smith's taking possession of the goods, then directed the constable to make a sale on his execution. That officer thereupon sold enough goods to produce $240, giving the money, less $10 costs, to Jones. The assignee subsequently sold the remainder of the goods for $4,227, less what he had realized for the goods sold before the constable's sale. This is an

action of trespass by John Smith, whose execution was for $10,000 against the sheriff, Lemuel Anderson, for the value of the goods taken and sold by the constable. The plaintiff insists that we should instruct you that he must receive your verdict; the defendant that your verdict must be for him.

The plaintiff's claim against the sheriff, rests on two postulates; (1) his right to the application of the value of the goods taken by the constable, to his execution; and (2) the official liability of the sheriff for permitting the constable's diversion of them.

1. The *fi. fa.* became a lien on the goods, as soon as it came to the hands of the sheriff. The execution directed to the constable did not become a lien until the levy under it was made. Section 18, Act 20th March, 1810; 1 Liens, 375, 376. The priority of Smith's execution, is therefore indisputable. He was entitled to the proceeds of the sale made by the constable, unless by some subsequent act of himself or of the sheriff, he lost his lien. By accepting an assignment of the goods, Smith did not lose his lien, nor by taking any possession of them that was subordinate to that of the sheriff. Two days elapsed between the levy and the assignment, during which, it is possible, Samuel Sims was left in subordinate possession. The assumption of the same possession by his successor in the ownership, Smith, could no more vitiate the lien of the *fi. fa.* than that of Sims. 1 Liens, 333. But besides taking possession, Smith made sales of goods, accounting to the sheriff for the proceeds. We are at liberty to infer, then, that the sheriff had authorized him to make these sales. That officer may employ a deputy, or an auctioneer, to make sales without invalidating the lien of the execution. It does not distinctly appear whether the sales were made at auction or otherwise. But if privately and non-competitively, the lien would not be impaired even as against a non-consenting creditor with an execution in the constable's hands. Leidich's Appeal, 161 Pa. 451. Had Jones consented,—as he did not—there could be no question of the preservation of the liens in their original order. Kent's Appeal, 87 Pa. 165; Matthew's Estate, 144 Pa. 144.

Nothing appears then, that destroyed the right of Smith, gained by the anteriority of his execution, to have the proceeds of the goods covered by the levy applied to his debt. It has been questioned whether, after goods have been levied on by the sheriff, a constable, the officer of a different court, can levy upon them. Vanvalzal v. Croman, 1 D. R. 190. The Supreme Court of the United States has held that a federal marshal could not levy on chattels—in this case, slaves—on which, under process from a state court, a sheriff had already levied. Hogan v. Lucas, 10 Pet. 400. However, in Winegardner v. Hafer, 15 Pa. 144, one constable levied on cattle on which another had already levied, and in McGinnis v. Prieson, 85 Pa. 111, a sheriff levied on goods on which a constable had already levied, and actually sold them. Of the legality of this ouster of the constable, the court had no occasion to speak, but it awarded to him enough of the proceeds to satisfy his execution. It is clear then, that whether the constable could or could not levy on the goods on which the sheriff had already levied, he could not legally withdraw them from the power of the sheriff, so as to prevent his obtaining their proceeds, for the satisfaction of the execution on which he had made the levy. The original posteriority of the justice's writ forbade this disturbance of the sheriff's custody. No later occurrences destroyed the sheriff's right to retain them.

2. A wrong has then been done to John Smith. The primary agent in doing it was the constable. What we now have to consider is, whether Lemuel Anderson is liable to the execution creditor for the resulting damage. By his levy, the sheriff assumes control of the property. It becomes his duty to preserve it, for the benefit of the creditor, and of the owner, the debtor. If it is taken away, Mitchell v. Commonwealth, 37 Pa. 187; even if it is stolen, Hartlieb v. McLane, 44 Pa. 510, he is answerable. He is bound to use the vigilance and the force necessary to prevent eloignment; and if, not withstanding, goods have been eloigned, as he is thereby made liable, he may in trespass recover the value of the articles taken from him. Weidensaul v. Reynolds, 49 Pa. 73. One constable (therefore a sheriff) can maintain trespass against another who, making a later levy, takes and sells the goods, Winegardner v. Hafer, 15 Pa. 144.

Presumptively, then, Anderson the sheriff, is liable to John Smith for the loss of the proceeds of the goods sold by the constable. The burden is upon him to show an exoneration. The only exonerating facts suggested are the possession of Smith. That possession does not appear to have been adverse, but rather in subordination to the sheriff. Was it to be constant or intermittent? In the day time only, or in the night as well? Did he have it when the constable took the goods? Did the constable take the goods with his connivance, or despite his resistance? After they were taken, did he or not inform the sheriff that they had been taken? If Smith's possession was that of assignee only, he had no right to hold the goods as against the constable; for the lien of the constable's execution preceded the assignment. If his possession was as bailiff of the sheriff, did he undertake to keep the goods, for the sheriff's benefit, as inviolably as it is the sheriff's duty towards the execution creditor to keep them? Did he, in other words assume towards the sheriff the position of an insurer of the preservation of the goods, except in so far as they should be impaired or removed by the act of God, sudden accident, or the public enemy? Hartlieb v. McLane, 44 Pa. 510. While the burden is on the sheriff of showing that Smith assumed a certain measure of duty with respect to the preservation of the goods, and that had he performed this duty, in this measure the constable would not have taken them, he has not shown either of these requisites to his discharge. Neither the nature of the terms under which Smith took possession, nor the circumstances under which the constable eloigned the goods, have been made to appear. What is there that shows that Smith was bound to the same constancy of possession, the same stringency of vigilance, the same use of force to guard the things levied on as the sheriff? What is there that shows that the removal by the constable of the goods was not effected despite the most stubborn resistance that Smith was obliged to make? If instead of Smith another person had been the sheriff's bailiff, could the sheriff upon what here appears have sustained a recovery against the bailiff? Smith's liability was not greater than that of an ordinary bailiff, and to prevent his recovering from the sheriff, we think the facts must exist, which, had some other person been the plaintiff in the execution, would have supported an action by the sheriff against Smith. Such facts do not appear. We instruct you therefore, gentlemen of the jury, that your verdict should be for the plaintiff for $240, with interest from the sheriff's return of the plaintiff's execution.

JOHN HARVEY vs. SAMUEL LESLIE.

Mortgagor—Mortgagee—Selling of timber on mortgaged premises—Damages.

Action of trespass. Motion for non-suit.

HUGH R. MILLER and ANDREW S. SHOENER for motion.

A mortgagor in possession has the right to sell, in the usual way, the timber thereon, unless the mortgagee stops him by injunction or estrepement.—Hoskins v. Woodward, 45 Pa. 42; Witmer's Appeal, 45 Pa. 455; Angier v. Agnew, 98 Pa. 587; Wilson v. Mothey, 59 N. Y. 127.

It does not clearly appear that waste was committed. The land may have depreciated in price for other reasons. The clearing of woodland is, in some cases, good husbandry.—Am. & Eng. Ency. of Law, Vol. 18, p. 871.

ROBERT H. BARKER and G. B. SNYDER, *contra.*

The mortgagor is not allowed to depreciate, in any way, the mortgaged premises to the detriment of the morfgagee.—Wright v. Himes, 7 Mont. 156; Hoskins v. Woodward, 45 Pa. 42; Witmer's Appeal, 45 Pa. 455.

The mortgagor may sue for the damages thus occasioned.—Jones v Hoar, 5 Pick. 235; Gilmore v. Wilbur, 12 Pick. 120; Salmon v. Davis, 4 Binn. 374.

OPINION OF COURT.

Leslie, on May 4, 1894, mortgaged a tract of timber land to Harvey for $5,000, but gave Harvey no bond, note, or other obligation for the debt. In the summer of 1895 Leslie sold the timber to Henry Thompson for $2500, who thereupon cut and hauled it off. Harvey learned of the sale of the timber only when half of it had been cut off. He then consulted an attorney, in regard to arresting the continuance of the cutting, but, advised by him that he could do nothing so long as his interest was paid, he did nothing. The timber was all removed by July, 1896. In September, 1896,

Mr. Harvey began foreclosure proceedings, and in Jan., 1897, the land was sold by the sheriff on the *levari facias* for $3,000. This is an action of trespass against Leslie to recover $2,000, the difference between the mortgage debt and the price at which the premises were sold by the sheriff.

The first question we encounter in deciding this controversy is, had Leslie, the mortgagor in possession, the right, as against the mortgagee, Harvey, to cut off and sell, or to sell and authorize the vendee to cut off, the timber. The timber, like fixtures, is real estate, and, in a sense, is a part of the land which is subject to the mortgage. An important difference exists however between the conception entertained by the courts of the mortgagor's rights in respect to timber, ore, coal, etc., and that of his rights in respect to fixtures. A wrong is in all cases done to the mortgagee by removing fixtures.—Hoskin v. Woodward, 45 Pa. 42; Witmer's Appeal, 45 Pa. 455; 1 Liens, 177; 3 Liens, 179. As respects timber, coal, etc., the mortgagee seems to have a conditional right to prevent their removal; that is, he may prevent it if he dispossesses the mortgagor by ejectment or otherwise, or if he invokes the prohibition of the court by estrepement or injunction.—Wright v. Himes, 7 Mont. 156; 3 Liens, 179; 1 Liens, 177. If he does none of these things, the mortgagor may lawfully remove the timber, provided he does not do so with a fraudulent purpose.

"May not," asks Lowrie, C. J., in Hoskin v. Woodward, 45 Pa. 42, "a mortgagor sell in the usual way the lumber, firewood, coal, ore, fruit, or grain found or growing on the land without violating the rights of the mortgagee? Yes, he may until the mortgagee stops him by ejectment or estrepement, for those things are usually intended for consumption and sale, and the sale of them is the usual means of raising the money to pay the mortgage." The same opinion is expressed by Woodward, J., in Witmer's Appeal, 45 Pa. 455. In these cases however what was said on this point was *obiter dictum*. In Angier v. Agnew, 98 Pa. 587, three days before the mortgage matured, the mortgagor sold all the timber on the premises. A year and a half afterwards the purchaser entered on the land, and cut and carried away the timber without the knowledge of the mortgagee. In an action of trespass on the case by the mortgagee against the purchaser of the timber and his employees, the trial court directed a non-suit. In affirming this judgment, the supreme court, per Gordon, J., said that the purchaser had a right to buy because the mortgagor had a right to sell. "We may also add," says the opinion, "that the use of these things," (lumber, firewood, coal etc.), in the way thus spoken of cannot be a fraud *per se* on the mortgagee for he must know when he takes his security, that such articles will continue to be subject to their ordinary use; indeed, as was said on the case cited, they may offer the only means which the debtor possesses with which to pay the mortgage."

Whether Leslie was solvent or insolvent when he sold the timber does not appear. We might probably infer from the fact that the mortgagee pursues him by the action of trespass, that in the opinion of the former, he is not, or will not be, unable to respond to any judgment that may be recovered against him. There is no evidence that the sale was for the purpose of lessening the value of the mortgagee's security, or for any other fraudulent purpose. That the proceeds of the sale of the timber have not been applied to the mortgage notwithstanding the insufficiency of the premises to yield enough at the sheriff's sale to pay the mortgage would not support the inference of any such fraudulent purpose.—98 Pa. 587, *supra*.

Judgment of non-suit will therefore be entered.

SAMUEL TRITT vs. ROBERT SENN.

Agency—Implied agency—Facts sufficient from which to infer.

Action in Assumpsit.

FREDERICK B. MOSER and JOHN H. VINCENT, Jr., for plaintiff.

An agency may be inferred from continuous acts performed by an alleged agent and the recognition of such acts by the principal.—Catasauqua M'f'g. Co. v. Roberts, 2 D. R. 392; Mondorf v. Wickersham, 63 Pa. 87; The Odorilla v. Baigley, 128 Pa. 283; McNiele v. Cridland, 168 Pa. 16; Fenner v. Lewis, 10 Johns. 38; Arnold v. Spurr. 130 Mass. 347; Southern Life Ins. Co. v. McCain, 96 U. S. 84.

That Senn has a claim against Ward is no defence to this action.—McNair v. McLennan, 24 Pa. 384; Catasauqua M'f'g. Co. v. Roberts, *supra*; Ludwig v. Gorsuch, 15 Pa. 413; Hays v. Linn, 7 Watts 524; Sheffer v. Montgomery, 65 Pa. 329.

J. THOMPSON CALDWELL and MARTIN F. DUFFY for defendant.

An agency cannot be implied from the mere fact that at *some* previous time such a relation existed.—Central Pa. Tel. Co. v. Thompson, 112 Pa. 118; B. & O. R. R. Relief Asso. v. Post, 122 Pa. 579; Whiting v. Lake, 91 Pa. 349; Hampton v. Matthews, 14 Pa. 105; Life Ins. Co. v. Shultz, 82 Pa. 46. In order that an agency may be inferred, it must affirmatively appear that former transactions were closely enough related to the transaction in question as to induce a reasonable man, without notice, that such agency still exists.

CHARGE OF COURT.

Gentlemen of the Jury:—

On the 2nd of June, 1896, John Ward, a wine merchant in Harrisburg, ordered from Tritt, in Philadelphia, 10 barrels of whiskey and directed Tritt to ship them to Senn in Carlisle. Ward had, on May 10, 1890, borrowed from Senn $500, and Senn had, in April, 1896, offered to take whiskey to the value of $500 in payment. When, on the 1st of July, 1896, Senn received the bill of lading, he accepted the whisky thinking it had been sent by Ward in conformity with the agreement of the preceding April, and that Ward had for himself, bought it of Tritt. As Ward, however, had been in the habit, as agent for Senn, of buying liquors in Philadelphia, and he had already on several occasions bought for Senn, who had paid the bills, Tritt supposed that the present purchase of the whiskey was made as Senn's agent. In this assumpsit, Tritt seeks to recover $500, the value of the whiskey.

As Tritt, the plaintiff, had no other dealings with respect to the sale of the whiskey than those with Ward, his right to recover from Senn depends on the actuality of an agency for Senn in Ward, or on facts justificatory of Tritt's assumption of the actuality of such agency. Actual agency there was none. Ward had consented to pay, and Senn to receive payment of, his debt to Senn in whiskey. The whiskey was bought in fact by Ward for the purpose of thus discharging his debt. This he could not have done unless the whiskey became his, and his it would not have become if it had been purchased by him as the representative of Senn. As then there was no actual agency in Ward, did facts exist which, as against Senn, justified Tritt in assuming Ward to be Senn's agent, and to sell the whiskey to Senn through him?

No communication from Senn to Tritt occurred. If Ward made representations that he was buying for Senn, they were not only untrue, but they were absolutely without authority. Tritt's warrant then, for believing in the agency of Ward, consisted solely in the fact that on earlier occasions Ward had been Senn's agent in purchasing liquors. The principle is unquestionable, that when A. has with B.'s authority effected several transactions with C. of a certain kind, C. may in the absence of notice of the lapse of the agency, assume its continuance when within a reasonable period after the last transaction, A. attempts another. But, C. would not be justified in inferring from A's having had an authority 5 or 4 or 3 years ago to purchase certain kinds of articles, that he has it to-day. The evidence does not reveal the length of time during which Ward was in fact the agent of Senn, nor the number of purchases made by him as such agent during that time, nor the interval between the last of these authorized purchases and the unauthorized one upon which the present action is founded. We think it would be perilous to permit a jury to guess either the continuance in fact of the agency or the existence of a right in Tritt to believe in the continuance of it from the circumstance that in an anterior period, however remote and however brief, an indeterminate number of purchases were made by Ward for Senn with his authority. It would be very unreasonable to allow one from whom on two or three occasions A had bought goods for X, merely for that reason to sell to A, years afterwards, as the agent for X. The continuance of such agency must not be inferred from its former existence, beyond a probable period. It may be that Ward's purchases for Senn with authority were recent enough to justify Tritt in supposing that authority to continue down to the time of the last purchase. The plaintiff is unfortunate in not having shown precisely how recent such purchases were.

Had Tritt had legal reason to believe in the agency of Ward for Senn, he could have

recovered the price of the whiskey sold to Ward for Senn, whatever the relation between Ward and Senn. Even had the whiskey never in fact reached Senn, without Tritt's default, he would have been liable for the price. He in fact received the whiskey. The only result of compelling him to pay for it would be to thrust on him a purchase that he did not intend to make, and to disappoint his hope of procuring a payment of his debt from Ward. To such results he would have been subjected, had the evidence shown warrant for Tritt's confidence that in selling to Ward, he was selling to Senn.

Your verdict therefore, gentlemen of the jury, must, for the reason stated, be for the defendant.

SAMUEL MACAULEY vs. WILLIAM FINKENBINE.

Executor's sale—Power to sell not revoked by lapse of time named in will—Testator's intention governs.

Ejectment.

JOHN EVERETT SMALL and GEO. B. SOMERVILLE for the plaintiff.

The authority to sell being merely a naked power, that authority is impliedly revoked by non-performance within time specified, and the lands descend to heirs-at-law.—Egerton v. Conklin, 25 Wend. 224; Allison v. Wilson, 13 S. & R. 332; Craig v. Leslie, 3 Wheat. 563; Loomis v. McClintock, 10 Watts 274.

JOHN R. SMITH and ROBERT W. IRVING for the defendant.

Executor's failure to exercise power of sale within a fixed period does not destroy the power. Shalter's Appeal, 43 Pa. 83; Fahnestock v. Fahnestock, 152 Pa. 56; Hackett v. Milnor, 156 Pa. 1.

The testator's intention was that the plaintiff should have no share in his estate.

OPINION OF THE COURT.

Josiah Macauley, dying August 13, 1891, by his will directed his executor to sell "within five years after my death, but not afterwards" his farm and to divide the proceeds equally between his son John and his daughter, Mrs. Margaret Fuller. The executor advertised a public sale for 7th May, 1896. The highest bid being unsatisfactory, the sale was adjourned for one month. For the same reason no sale was then effected. At length, at a fourth adjournment a sale was made for $4,327, on August 9th, 1896. The purchase money was paid and the deed delivered on Sept. 3, 1896. The money was divided equally between John Macauley and Mrs. Fuller. Samuel Macauley, a second son, disputing the validity of the sale, brings this ejectment against the purchaser of the land, William Finkenbine.

The plaintiff, one of three children of the deceased, would be, as to the farm in question, an heir, and as such entitled to an undivided third of it, had there been no devise of the land from him. This third he will recover, in this ejectment, unless there be such a devise.

Josiah Macauley directs his executor to sell, within five years after his death, but not afterwards. It is contended that the sale made by the executor, was not made within the period limited, and from this retardation, the conclusion is drawn that such a sale is void. Is this conclusion correct? It is true, generally speaking that in the execution of powers the intention of the grantor or testator, as to the mode, time and conditions of their execution, must be observed. 18 Am. & Eng. Encyc. Law, 938. If a sale is directed, to take place after a certain period, or event, it has been often held that a sale within that period, or before that event, passes no title. Thus, a sale by an executor during the life of E. under a direction to sell after the death of E. is void. Booraem v. Wells, 19 N. J. Eq. 87; Egerton v. Conklin, 25 Wend. 224; Loomis v. McClintock, 10 W. 274. In Blacklow v. Laws, 2 Hare 40, the vice-chancellor thought the title of the purchaser at such a sale so questionable that he ought not to be compelled to pay for it, by a decree for specific performance. In Richardson v. Sharpe, 29 Barb. 222, the Supreme Court of New York refused to compel a vendee to accept land sold to him *after* the expiration of seven years from the testator's death, under a testamentary power to sell within seven years.

In Shalter's Appeal, 43 Pa. 83, the Supreme Court of this state refused to hold a limitation of time within which a sale was directed to be made, other than "directory." The decedent directed his executors to sell land so soon after his de-

cease as might seem best, in their discretion so that it be "done within one year after my decease." Of a sale made four years after the testator's death, by the administrator *c. t. a.*, Reed J., remarks, he "undoubtedly had the power to sell, although the year had expired, for that was only directory and not a condition precedent." A power to sell within two, or if necessary, four years, was not destroyed but survived the executor's failure to exercise it within the four years. Fahnestock v. Fahnestock, 152 Pa. 56.

The phrase "but not afterwards" in Josiah Macauley's will is a scarcely more emphatic restriction of the power to sell than the limitary expression in Shalter's Appeal. We think it is precatory, hortatory, or directory, and that it does not condition the exercise of the power.

The testator's intention evidently was to direct a sale, for the benefit of his son John and his daughter. To them he gives the entire proceeds. They were owners in equity of the farm. They could have elected to take it in specie, and in that way superseded the testator's power to sell. They have ratified the retarded sale, by accepting the purchase money. Had the sale taken place a few days earlier, Samuel Macauley would have had no estate in the land or in the proceeds of it. It was hardly the intention of his father that he should acquire an undivided third in it, and his brother and sister lose each an undivided sixth, should the sale not be effected within five years.

As we are of opinion that the power to sell did not perish with the lapse of five years, it is unnecessary that we should determine whether the sale effected by the testator is to be regarded as occurring within, or beyond that period; that is, whether the contract to sell and buy, or the consummation of it, by delivery of the deed and payment of the price, is to be regarded as the sale, in the sense of the testator. Fidler v. Lash, 125 Pa. 87 and Wilkinson v. Buist 124 Pa. 253, are not inconsistent with the conclusion we have reached.

Judgment of non-suit.

TIMOTHY ALBRIGHT vs. WESTERN R R. CO.

Railroad—Sale of ticket—Contract—Schedule—Failure to run trains—Injuries—Remote cause—Damages.

Action in Assumpsit.

E. H. HOFFMAN and EDWIN S. LIVINGOOD for plaintiff.

The sale of a ticket makes a contract and the railroad company is bound to furnish all trains as per advertised schedule, unless prevented by the act of God or the public enemy.—People v. N. Y., etc., R. R. Co., 28 Hun. 543; Chicago R. R. Co. v. Iowa, 94 U. S. 155; Gordon v. R. R., 52 N. H. 596; Isaacson v. N. Y. C. R. R., 94 N. Y. 278; Lake Shore, etc., R. R. Co. v. Rosenzweig, 113 Pa. 519.

The act of God cannot be set up as a defence, the blizzard not affecting the track of the train in question.—P. & R. R. R. Co. v. Anderson, 94 Pa. 356; B. & O. R. R. v. School District, 96 Pa. 65.

The breach of the contract by the company was the *immediate* cause of the injuries sustained, and it is therefore liable. —Balto., etc., R. R. Co. v. Kemp, 61 Md. 74; Insurance Co. v. Tweed, 7 Wall. (U. S.) 44; P. R. R. Co. v. Kerr, 62 Pa. 353; Andred v. Christie, 1 Forum 43; Pittsburgh v. Grier, 22 Pa. 54; R. R. Co. v. Hope, 80 Pa. 1; Higgins v. Dewey, 107 Mass. 494.

MILES H. MURR and CLEON N. BERNTHEIZEL for defendant.

A railroad company is not liable for want of punctuality or failure to comply with the schedule, which is not due to its negligence. It is not liable for injuries resulting from unforeseen accidents or misfortunes.—Gordon v. Manchester, etc., R. R. Co., 52 N. H. 596; Meier v. Penna. R. R. Co., 64 Pa. 225; Bowen v. N. Y., etc., R. R. Co., 18 N. Y. 408; P. & R. R. R. Co. v. Anderson, 94 Pa. 351; Livezey v. Philadelphia, 64 Pa. 106.

The failure to run the train was not the proximate cause of the sickness; the company was under no duty to contemplate the sickness as a probable result of its act, and is therefore not liable.—Hoag v. R. R. Co., 85 Pa. 293; P. R. R. v. Hope, 8 Pa. 373; P. R. R. v. Herr, 62 Pa. 353; Fairbanks v. Smith, 70 Pa. 86.

CHARGE OF COURT.

Gentlemen of the Jury:—

The Western R. R. Co's. line connects Hagerstown with Harrisburg. It carries passengers between those and intermediate points. It advertises by printed schedules posted up, and otherwise, that it will run

trains at certain hours. One of the periods published for a train leaving Harrisburg for Carlisle was 10:55 p. m. The Western R. R. Co., also owns several branch roads, one connecting Mechanicsburg and Dillsburg. This branch road became blocked with snow, by reason of a severe blizzard, and in the effort to open it, a wreck occurred on the night of February 7, 1894. The engine destined to pull the train leaving Harrisburg at 10:55 p. m., was sent to the Dillsburg branch, to assist in removing the wreck. Albright, who at Carlisle had purchased a return trip ticket, and had left that borough for Harrisburg the same evening, intending to return on the 10:55 train, appeared at the station in Harrisburg in time to take the train. He then ascertained on demanding the train that it would not run because the engine necessary to pull it was elsewhere employed. He was compelled to remain in Harrisburg over night, spending one dollar for lodging. He was put in a room without fire, caught a cold, had to employ a physician, to whom he paid three dollars. He also lost time on account of his sickness, and for this reason five dollars were deducted from his salary. In this action, Albright seeks to recover these sums.

The sale of a ticket makes a contract between the railroad company and the purchaser to transport him to the point named in the ticket. Cheney v. Boston etc., R. R. Co., 52 Mass. 121; Pollock, Contracts, 15, note. The ticket expresses, however, only a portion of the contract. The rules and regulations of the company, Caldwell v. Lake Shore, etc., R. R. Co., 8 Pa. C. C. 468; Dietrich v. Pennsylvania R. R. Co., 71 Pa. 432; Lake Shore, etc., R. R. Co. v. Rosenzweig, 113 Pa. 519, and the published time tables, are a part of it. The company does not, it is true, unconditionally promise to run the trains at the times published, but it does promise to run them in as close accordance therewith, as it can with reasonable diligence. Gordon v. Manchester, etc., Railroad, 52 N. H. 596; Le Blanche v. London, etc., Railway Co., 1 C. P. Div. 286; 1 Wharton Contracts, § 25; Denton v. G. N. Railway Co., 5 Ellis & B. 860; Sears v. Eastern R. R. Co., 14 Allen 433. If, announcing that it runs a train of a certain hour, from London to Hull, it in fact runs no further than Grimsby, and a passenger who has bought the ticket for Hull, is obliged to stop at Grimsby for the night, the contract is broken, and he may recover his damages. Hamlin v. Great Northern Railway Co., 1 H. & N. 408. So if the train announced to stop at a station and take on passengers, in fact passes it without stop, whereby one who has bought a ticket for passage from that station is disappointed, he may recover damages for the breach of the contract, unless some lawful excuse existed for the failure of the train to stop. Gordon v. Manchester, etc., Railroad, 52 N. H. 596. If with a ticket the passenger presents himself at the station to take a train advertised to start at 9:30 p. m., and the train is delayed for one hour and forty-five minutes, the company is actionable. 14 Allen, 433.

The Western R. R. Co., was then under obligation to furnish passage to Albright at 10:55 p. m. Do any facts appear which qualify this obligation? A heavy snow had fallen on a branch road. A wreck had resulted from the effort to clear this road. The engine destined to draw the train on which Albright was intending to ride, was detached and sent to the wreck. What was the nature of this wreck? Was the clearing of the track so exigent, that it must be done, even at the cost and inconvenience of disappointed passengers? Was the supply of engines so limited, that the diversion of this one was reasonably unavoidable? We are left wholly in the dark upon this matter. *Prima facie*, the duty is on the railroad company to haul its passengers, by trains running on the published times. The burden is upon it, of showing the excusatory facts. In Le Blanche v. London, etc., Railroad Co., 1 C. P. Div. 286, it is said that a delay of 15 minutes would impose on the company the duty of explanation. We find nothing in what it has shown that would constitute an excuse. The plaintiff then would in every case be entitled to nominal damages. Hamlin v. Great Northern Railway Co., 1 H. & N. 408.

We are now to consider what actual damages are recoverable, if any, by the plaintiff. It was late at night. No other convenient communication with Carlisle was at hand, at least none the use of which would in all likelihood not have cost more than the expense of a sojourn in Harrisburg. A delayed passenger may employ a

horse and buggy, Sears v. Eastern Railroad, 14 Allen 433, but may not resort to extraordinary expense, in order to reach his destination, and charge such expense as damages upon the railroad company. Le Blanche v. London, etc., Railway Co., 1 C. P. Div. 286. Albright did right, in betaking himself to a hotel for the night, and he is entitled to reimbursement for what he paid on this account. Hamlin v. Great Northern Railway Co., 1 H. & N. 408.

In the fireless room of the hotel, Albright took a cold, which compelled him to spend three dollars in procuring the attendance of a physician, and to suffer a deduction of five dollars from his salary on account of lost time. Is the defendant liable for these expenses? The rule is, that on a breach of contract the defendant is liable only for such of the consequences of the breach as are natural and probable, and not occasioned by some distinct intervening agency acting in conjunction with the breach. Billmeyer v. Wagner, 91 Pa. 92; West Mahanoy v. Watson, 112 Pa. 574; 116 Pa. 344; Hoag v. Lake Shore, etc., Railroad Co., 85 Pa. 293; Pennsylvania Railroad Co. v. Kerr, 62 Pa. 353; Passenger Railway Co. v. Frick, 117 Pa. 390. This rule is not, nor could any rule for such a purpose be, scientifically precise and the results of the effort to apply it in many cases, are inconsistent and irreconcilable. We are unable to think that it would accord with this rule to allow a recovery for the consequences of Albright's sickness. That Albright should go to a hotel to spend the night, was not an improbable or singular consequence of the refusal of the defendant to carry him to his home. But was it to be expected that the room taken by him would be too cold or that as a result, he would become sick? Could Albright not have procured a warmer room, had he asked for it? We cannot see that the exposure to the risk of taking cold was unavoidable, nor that, even if unavoidable under the actual circumstances, the railroad company was under a duty to contemplate it as a likely result of its own act. In Hobbs v. London, etc., Railway Co., L. R. 10 Q. B. 111, A, his wife and two children, riding on a train, were set out at the wrong station, five miles from their destination, late at night. No conveyance nor inn accommodation could be had. They therefore walked home through a rain. The wife caught cold and medical attendance had to be procured. The jury found that the plaintiff was entitled as damages, to £8 for inconvenience, and £20 for the expenses consequent upon the wife's illness. That great judge Cockburn, C. J., allowed the verdict to stand for £8, but set it aside, as to the £20, holding that that for which damages could be obtained must be something "immediately connected with it (the breach of the contract) and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of." This case was followed by Morton, C. J., in Murdock v. Boston, etc., Railroad Co., 133 Mass. 15. A passenger, whose ticket entitled him to be carried to N, was forcibly ejected at an intermediate point by the conductor, who was a railroad police officer, and for alleged evasion of his fare was delivered by him to two police officers who detained him during the night in a damp cell. For the illness resulting from this detention, the railroad company was not responsible in an action for the breach of the contract of carriage. Although in Weed v. Panama Railroad Co., 17 N. Y. 362, damages for sickness to a passenger for detaining him in a car all night in a sickly region were recovered, the only question considered by the court is the liability of the company for the wilful acts of its conductor.

It remains to consider whether the remoteness, the non-naturalness and non-probableness of the consequence for which damage is claimed, must be submitted to the judgment of the jury, or may be pronounced by the court. The rule in this state is that when the facts are disputed, the jury must judge; but when the facts are unquestionable, the court must decide. Hoag v. Lake Shore, etc., Railroad Co., 85 Pa. 293; West Mahanoy v. Watson, 112 Pa. 574; 116 Pa. 344; Passenger Railway Co. v. Frick, 117 Pa. 390. In the exercise of this prerogative, we instruct you, gentlemen of the jury, that your verdict should be for the plaintiff for one dollar, with interest from February 7, 1894.

ESTATE OF AMOS SANDERSON, DECEASED.

Widow's exemption—Demand for appraisement—Liability of wife as joint maker, with husband, of a note.

Exceptions to Auditor's Report.

HARVEY S. KISER and ALFRED JOEL FEIGHT for exceptants.

1. The sale by the husband to his wife of his *interest* in the furniture, etc., was fraudulent as to the creditors, and is therefore void.—Marshall v. Roll, 139 Pa. 399; Benson v. Maxwell, 105 Pa. 274; Keeney v. Good, 21 Pa. 349. There being therefore personalty belonging to the estate, the widow's exemption must be allowed out of such.—Scott's Estate, 2 Phila. 135; Rhone's O. C. Practice, Vol. 1, 296, § 31.

2. It does not appear that there was an appraisement. The widow's exemption can therefore not be allowed.—Davis' Appeal, 34 Pa. 256; Hufman's Appeal, 81 Pa. 329; Andress' Estate, 10 W. N. C. 52.

JOSEPH F. BIDDLE and I. I. WINGERT for Auditor.

1. By the act of Apr. 14, 1851, P. & L. 1524, the widow may retain either real or personal property to the value of $300.

2. The widow's right to $300 exemption is superior to the rights of all creditors, except a lien for purchase money of real estate.—Compher v. Compher, 25 Pa. 31; Allentown's Appeal, 109 Pa. 75; Peeble's Estate, 157 Pa. 605; Spencer's Appeal, 27 Pa. 218; Nottes' Appeal, 45 Pa. 361; Grave's Estate, 134 Pa. 377; Davis' Estate, 1 Phila. 360.

3. The exemption allowed, even though no demand was made by the widow for an appraisement.—Act, *supra*; Thomas' Estate, 152 Pa. 63; Peeble's Estate, 157 Pa. 605.

4. The right is not dependent on the needs of the widow.—Palethrop's Estate, 14 Pa. C. C. 51.

OPINION OF COURT.

Amos Sanderson and his wife, Julia, who owned a separate estate, purchased jointly of John Harrison, (who had declined to sell to Amos alone,) household furniture, chairs, carpets, tables, etc., at the price of $724.19. For this sum the purchasers executed to Harrison a joint promissory note, with a warrant of attorney to confess judgment. On the warrant, a judgment was entered against both, and became a lien on a house owned by Amos Sanderson. A few days later than the entry of this judgment, Samuel Sibbett recovered a judgment against Amos for $217.10. Six months thereafter, Amos died, and two years after his death, his administrator sold the house for the payment of debts. The net proceeds of the sale were $854.07. Before the administrator's application to the Orphans' Court for leave to sell the house, Julia Sanderson notified him that she demanded the $300 exemption as widow, and as debtor. There was no personalty belonging to Amos, he having sold all his interest in the above mentioned household furniture to his wife. The auditor awarded to Julia $300 from the proceeds of the sale of the house, and to John Harrison the balance, $554.07. To this report, Harrison and Sibbett except.

The sole question to be considered is, whether Julia Sanderson is entitled to the $300 exemption. The right to the exemption is conferred by the 5th section of the act of April 14, 1851, 1 P. & L. 1524. The widow "may retain any real or personal property belonging to said (the husband's) estate to the value of $300," "provided that this section shall not affect or impair any liens for the purchase money of such real estate." The claim is therefore valid as against creditors, whether they have a judgment or not, and as against mechanics' liens and tax liens.—Allentown's Appeal, 109 Pa. 75; Peeble's Appeal, 157 Pa. 605; Spencer's Appeal, 27 Pa. 218. Even as against a judgment for money loaned to the husband in order that he might pay for the land, as such judgment is not for purchase money, the exemption may be asserted.—Nottes' Appeal, 45 Pa. 361. On the theory that a mortgagee is a purchaser, the courts have determined that the widow's claim is not available against mortgages.—Kauffman's Appeal, 112 Pa. 645; Nerpel's Appeal, 91 Pa. 336; Peeble's Estate, 157 Pa. 605. The fact therefore that Harrison and Sibbett had liens on the house does not preclude the widow from demanding $300 from its proceeds.

It has been said in behalf of the exceptants that the widow cannot have $300 worth of land set apart to her so long as there is personalty sufficient to satisfy her demand; and that the decedent's sale of the personalty to his wife Julia being fraudulent as to creditors, he died possessed of personal property, out of which the $300 must be taken. But (a) the act of 1851 declares that the widow may "retain either real or personal property." She may take part of the $300 out of personalty and part out of realty. Even if the personalty ex-

ceeds the $300, she may ignore it, and insist on the exemption of a portion of the realty to the extent of $300.—Grave's Estate, 134 Pa. 377; Klein's Estate, 14 Pa. C. C. 72. (b) There is no personalty. The exceptants allege that the sale by Amos Sanderson to his wife Julia of his interest in the goods was fraudulent, and therefore void, as respects creditors. Of the fraud of that sale there is absolutely no evidence. The husband sold, he did not give, he did not feign to sell, the goods to his wife.

Does the liability of Julia Sanderson for the debt to Harrison preclude her diverting a portion of her co-debtor's property from his claim? Is she indeed liable? By the 8th section of the act of April 11th, 1848, 2 P. & L. 2907, a wife, contracting a debt for necessaries, could be sued jointly with the husband, and if satisfaction of the judgment could not be procured from his property, a levy might be made upon hers. Whether carpets, chairs, tables, etc., are necessaries, it is unnecessary to decide. They may be. But it has been held that, under this act of 1848, the wife assumes no liability by making a contract jointly with her husband.—Berger v. Clark, 79 Pa. 340; Parke v. Kleeber, 37 Pa. 251; Murray v. Keyes, 35 Pa. 384. Harrison refusing to sell the furniture to Sanderson alone, the latter *and* his wife made the purchase and they executed a joint promissory note for the price. Being joint purchasers, therefore, Julia Sanderson would not have become at all liable under the act of 1848.

The contractual power of a married woman has been enlarged however by the act of June 8th, 1893, 2 P. & L. 2887. By the 1st section of that act, she has acquired "the same right and power as an unmarried person to acquire, own, possess, etc., any property of any kind, real, personal or mixed," and by the 2nd section, she "may, in the same manner, and to the same extent as an unmarried person, make any contract in writing or otherwise which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the previous section." A married woman then may "acquire" personalty, and may make any contract appropriate to such acquisition; *i. e.* she may buy, and thus become a debtor for the price. So it was held, under the act of June 3rd, 1887, Adams v. Grey, 154 Pa. 258, where a judgment on a warrant attached to a note for household goods bought by a married woman was sustained. *Cf.* Steffen v. Smith, 159 Pa. 207. The act of 1893 does not diminish, in this respect, the rights and powers conferred by that of 1887. Julia Sanderson therefore is jointly indebted to Harrison with her deceased husband. May she then take the $300 as against Harrison? If she were claiming as an earlier lien creditor, she could probably not diminish the fund to the disappointment of a creditor in whose judgment she was a co-defendant *Cf.* 2 Liens, 791. And possibly she could not, as widow, diminish the fund in a similar way but for the fact that she would be entitled, even as debtor, to demand the $300 against Harrison. These $300 may, for aught that appears, be the only property that she has. Were an execution levied on it, under Harrison's judgment against her, she could protect it by her demand as debtor for the exemption of $300 worth of property. She may therefore take it in this proceeding.

Another objection to the allowance of the $300 to the widow is that she failed to demand an appraisement. She informed the administrator that she desired the $300 out of the land before he applied to the Orphans' Court for authority to sell it. As the 5th section of the act of April 14, 1851, 1 P. & L. 1524 states that "it shall be the duty of the executor or administrator * * to have the said property appraised," we think notification to him of the claim is sufficient. Thomas' Estate, 152 Pa. 63; Peeble's Estate, 157 Pa. 605. In the former of these cases, the widow having demanded the exempted property, but not an appraisement, and the administrators having caused no appraisement to be made, but selling the land under the order of the Orphans' Court for the payment of debts, she was allowed the $300 out of the proceeds. In Davis' Appeal, 34 Pa. 256, the right to share in such proceeds was denied to the widow because she had had an appraisement of some property not equal in value to $300, and did not demand the residue until after the application to the Orphans' Court, and perhaps after advertising had been done. In Hufman's Appeal, 81 Pa. 328, the widow was one of the administrators, and therefore could have caused the appraisement to be made. In Andress' Estate, 10 W. N. C. 52, she was the sole administratrix, and neglected to have the

appraisement made. As we see no reason for disallowing the widow's claim to the $300, the exceptions to the auditor's report are dismissed, and the report is confirmed.

WILLIAM JAMES vs. CARLISLE FIRE ASSOCIATION.

Contract of Insurance—Condition in policy as to non-payment of assessments—What constitutes a waiver of conditions.

Action in Assumpsit.

G. FRANK WETZEL and W. LLOYD SNYDER for plaintiff.

The action of the Carlisle Fire Association in compelling the payment of the assessment of April 1, 1896, and in sending notice of another later assessment constitutes a waiver by the association, and it is estopped from asserting that the policy is forfeited.—Beeter v. Thomas, 4 Pa. C. C. 192; Lycoming Co. Mutual Insurance Co. v. Schollenberger, 44 Pa. 259; Columbia Ins. Co. v. Buckley, 83 Pa. 293; Bonnert v. Ins. Co. 129 Pa. 558; Susquehanna Ins. Co. v. Leavy, 136 Pa. 299; Highlands v. Lurgan Ins. Co., 177 Pa. 566; Cumberland Valley Mutual Protection Co. v. Mitchell, 48 Pa. 374; Lycoming Mutual Ins. Co. v. Stockbower, 26 Pa. 199; Susquehanna Ins. Co. v. Elkins, 23 W. N. C. 396.

Non-payment of an assessment does not absolutely extinguish a policy; it simply suspends its protection during default.—Washington Mutual Fire Ins. Co. v. Rosenberg Light Co., 84 Pa. 373; Crawford Co. Mutual Ins. Co. v. Cochran, 88 Pa. 230; Lantz v. Vermont Ins. Co., 139 Pa. 546.

G. F. VOWINCKEL, Jr., and P. E. RADLE for defendant.

At the time of the fire, the plaintiff was in default and according to the contract of insurance, the policy had become void.—Washington Mutual Ins. Co. v. Rosenberg, 84 Pa. 373; Dilliber v. Knickerbocker Ins. Co., 76 N. Y. 576; Prentice v. Knickerbocker Ins. Co., 77 N. Y. 483; May on Insurance, 583.

The subsequent acts of the association do not constitute a waiver of the default.—Mutual Protection Life Ins. Co. v. Laury, 84 Pa. 43; Washington Mut. Ins. Co. v. Rosenberger Light Co., *supra*; Diehl v. Adams Co. Mutual Ins. Co., 58 Pa. 443; Leonard v. Lebanon Mutual Ins. Co., 3 W. N. C. 527.

OPINION OF COURT.

On January 1, 1895, William James obtained a policy of fire insurance for $5,000 from the Carlisle Fire Association (a mutual insurance company), paying a cash premium. The policy provided for the payment of assessments to be from time to time made upon the members of the Association for the purpose of paying losses suffered by members. It further stipulated that "if any assessment shall remain unpaid for 30 days after notice thereof, the policy shall become void." After several assessments had been made and paid by James, he received notice on April 1, 1896, of another for the sum of $100. This assessment not being paid, suit for it was brought by the Association, and judgment recovered. This judgment was paid in August, 1896. On August 30th, James received notice of another assessment, and on the night of the same 30th of August, a fire consumed the insured buildings of James. In this action he seeks to recover the loss, $3,500.

The only defence made by the Fire Association is that the fire occurred when the plaintiff was in default. He had been in default. Did the default terminate the contract? The provision for forfeiture is made, it seems, for the benefit of the company. On the happening of the default, it may declare the policy void. But it need not do so. It may recognize the continuance of the policy, either by making new assessments for losses occurring after the default, or by proceeding to collect the overdue assessment.—Hummel & Co.'s Appeal, 78 Pa. 320; Columbia Ins. Co. v. Buckley, 83 Pa. 293; Susquehanna Ins. Co. v. Leavy, 136 Pa. 499. As the assured continues liable for the losses that occurred before the expiration of his policy, it may be difficult to understand why the reception of payment of assessments for such losses should be deemed a recognition by the company of the continuance of the insurance relation.—Joliffe v. Madison Mut. Ins. Co., 39 Wis. 111; 16 Am. & Eng. Ency. of Law, 84; but this difficulty does not seem to have been felt by other courts.

During the period of the default, the policy is suspended. No liability would attach to the company for losses then occurring.—Columbia Ins. Co. v. Buckley, 83 Pa. 293; Hummel & Co.'s Appeal, 78 Pa. 320; Crawford County Mut. Ins. Co. v. Cochran, 88 Pa. 230. The subsequent receipt of the assessment revives the indemnity for the future.—Crawford County Mutual Ins. Co. v. Cochran, 88 Pa. 230;

Washington Mut. Fire Ins. Co. v. Rosenberger, 84 Pa. 373. The judgment for the assessment of April 1st, 1896, was paid in August, 1896. The fire occurred on Aug. 30, 1896. Was the payment before or after the fire? As James was in default, and his right to recover depends on some act of waiver by the defendant, we think the burden is upon him if the efficacy of his payment depends upon its anteriority to the fire, to show this anteriority. 2 Biddle, Ins. 416. That he has not done.

Let us suppose then that the payment was after the fire. Then the fire occurred when the policy was no protection to James. Did the subsequent payment retroactively as well as prospectively revive the policy? We think that the reception of payment by the company, after the fire, and with knowledge of the fire, of assessments that ought to have been paid before the fire, will reëstablish the right of the assured to the indemnity. In Lycoming County Mutual Ins. Co. v. Schollenberger, 44 Pa. 259, the fire occurred in the morning. Notice of it was sent to the company immediately. In the evening, the assessment in arrear was paid by the assured "to the agent, and by him reported to the company and retained by them without objection that it had been paid out of time." The receipt was a waiver of the forfeiture of the policy, and the assured was permitted to recover. In Farmers Ins. Co. v. Bowen, 40 Mich. 147, when the fire occurred, there were overdue and unpaid assessments. Immediately thereafter, Bowen, the assured, paid up the assessments to the local agent of the company, "who received the amount with knowledge of the loss, but forwarded the money to the company without mentioning the fire." Some weeks, possibly three after, the directors directed an order to be drawn on the treasurer, in favor of Bowen for the amount of his loss. The former receipt of the assessment, followed by this direction to pay the loss, was a waiver of the forfeiture of the policy. In the former of these cases, the company, when it received the delayed assessment, in the latter, when it resolved to pay the loss, knew of the fire. There is no evidence that the Carlisle Fire Association, when it received the belated payment, had heard of the fire. We do not think the receipt of the assessment, in ignorance of the occurrence of the loss, could with any propriety be interpreted to be the expression of a purpose to be liable to pay the indemnity for it. The Association had a right to collect the money without restoring the suspended life of the policy. It will not be supposed to have intended to assume a liability for $3,500 in the absence of more distinct evidence of such an intention.

It remains to consider the effect of the assessment of Aug. 30th. It does not appear whether this assessment was for losses occurring before the default or after. If for losses before, the assessment would not be a waiver, 2 Biddle, Ins. 377. But, even if for losses after, while such assessment was a recognition by the company of the subsistence of the policy, it apparently did not waive its right to allege the suspension of the protection of the policy. In Crawford County Mut. Ins. Co. v. Cochran, 88 Pa. 230, it was held that though a fire occurred less than 30 days after the last assessment, there being default in the payment of the next preceding assessment, made one year before, no recovery for the loss was possible. It does not clearly appear whether the second assessment was for losses arising since the default, but the interval, viz., one year between the assessments, suggests that it was for such losses. James was in default. This default was not waived by the receipt of payment of the assessment of April 1st, 1896, nor by the notice of the next assessment of Aug. 30th, 1896. He is not therefore entitled to recover. Judgment for defendant.

SARAH HARRIS vs. HENRY HAMLINE.

Result of husband's labor and skill in his wife's business—Wife's property not liable for husband's debts under Act of 1893.

Feigned issue.

BLAKE IRVIN and J. P. COSTELLO for the plaintiff.

Under the act of 1893, a married woman may borrow money and purchase goods on her own credit as if she were a *feme sole*, and the proceeds of business conducted by her belong to her, and cannot be seized by her husband's creditors.—Walter v. Jones, 148 Pa. 589; Association v. Fritz, 152 Pa. 224; Adams v. Grey, 154 Pa. 258; Evans v. Evans, 155 Pa. 572; Campe v

Horne, 158 Pa. 508; Steffen v. Smith, 159 Pa. 207; Gockler v. Miller, 162 Pa. 271; Bollinger v. Gallagher, 170 Pa. 84.

The husband's skill and labor employed in his wife's business does not make her stock liable for his debts.—Holcomb v. Bank, 92 Pa. 341; Troxell v. Stockbridge, 105 Pa. 405; Spering v. Laughlin, 113 Pa. 209; Baxter v. Maxwell, 115 Pa. 469; Walter v. Jones, 148 Pa. 589.

WILLIS E. MACKEY and CHAS. W. HAMILTON for the defendant.

The effort here is not to protect her separate earnings from the grasp of his creditors,—for she had no such earnings,—but rather to appropriate his earnings to her own use, and thus prevent their application to his debts.—Blum v. Ross, 116 Pa. 163; Keeney v. Good, 21 Pa. 355; Jack v. Kintz, 177 Pa. 578.

The husband's assistance in his wife's business is evidence proper for the jury to consider in determining the good faith of the wife's claim of property.—Spering v. Laughlin, 113 Pa. 213.

CHARGE OF THE COURT.

Gentlemen of the Jury:—

The evidence tends to show the following facts: Sarah Harris, wife of John Harris, who was a cripple and without property, borrowed from a brother, on her note, the sum of $2,000. With this money she opened a grocery store. In the store her husband acted, without compensation, as clerk and salesman. The goods originally bought, were sold, and with their proceeds, other goods bought, until nearly all the stock was changed three or four times. On a judgment recovered by Henry Hamline, a creditor of the husband, a levy was made on the stock, assumed to be John Harris'. This feigned issue is to determine whether the goods are Sarah Harris' or John Harris'.

The 1st section of the Act of June 8, 1893, 2 P. & L. 2887, confers on married women the "same right and power as an unmarried person, to acquire, own, etc., any property." The 2nd section of the same act empowers her, as an unmarried person, to "make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise" of the rights and powers granted in the first section. The property in this case was grocer's stores. Mrs. Harris, under the act, had the same power to acquire and to own it, that she would have had, had she been sole. Nor was her power of acquisition limited to exercise in any specific modes. She could get this property by gift; she could buy it for ready money or for other property. She could buy it on credit giving a note, a bond, a judgment, any security that an unmarried person could give. She could get it by any necessary or appropriate contract, says the act. Its terms are so explicit that misinterpretation of them is almost impossible.

The act of 1893 is a substitute for that of June 3, 1887, and is of substantially the same import. Prior to the act of 1887, it was held that a purchase by a married woman on her personal credit, and not on the credit of her separate estate conferred the ownership on the husband. Blum v. Ross, 116 Pa. 167; Walker v. Jones, 148 Pa. 589; Campe v. Horne, 158 Pa. 508. Under that act, however, by a purchase on her personal credit, she, and not the husband, becomes the owner. Says Green, J., in Campe v. Horne, 158 Pa. 508, after remarking that before the act of 1887, it is certain that the law was that a married woman could not buy property on credit, unless she had a separate estate, "but it is equally certain that it is not the law now." Since 1887, she can buy furniture, Adams v. Grey, 154 Pa. 258; or horses, Gockler v. Miller, 162 Pa. 271, or store goods, Walter v. Jones, 148 Pa. 589, on credit and they will become, not her husband's, but hers. She may borrow money, and with it, buy land, Latrobe, etc., Association v. Fritz, 152 Pa. 224; Steffen v. Smith, 159 Pa. 207, or horses, Evans v. Evans, 155 Pa. 572, and she will be compellable to repay the loan. If she is personally liable for the money borrowed, it would be singular if that which she procured with it was not her own. But it has been decided that the land, Campe v. Horne, 158 Pa. 508, the horse, Evans v. Evans, 155 Pa. 572, the store goods, Walter v. Jones, 148 Pa. 589, purchased by her with the money borrowed, will be hers. The $2,000 procured from her brother, were Sarah Harris'; the goods bought by it, were hers. The price obtained by the sale of them was hers. The goods bought by this price were hers. It is quite clear then, that the articles levied upon, on the execution of Henry Hamline, were not the property of his debtor, but of his debtor's wife.

It is suggested, however, that John

Harris acted as clerk and salesman gratuitously, and thus increased the property of his wife, and that for this reason, that property should be appropriated to the payment of his debts. It is well settled however, that when a wife conducts a business with her own property, her employment in it of her husband's skill, labor and time, does not expose the property to seizure for his debts. Baxter v. Maxwell, 115 Pa. 469; Spering v. Laughlin, 113 Pa. 209; Walter v. Jones, 148 Pa. 589; Troxell v. Stockbridge, 105 Pa. 405; Holcomb v. People's Savings Bank, 92 Pa. 341. If then, gentlemen of the jury, you should find that the facts recited by us in the commencement of this charge are established by the evidence, your verdict should be for the plaintiff.

JOHN BRINTON vs. WILLIAM JACQUES.

Action on book account—Effect of entries "merchandise" and "balance"—Presumption of accuracy from part payment—Statute of Limitations.

Rule for new trial.

GEO. T. BROWN and PAUL H. PRICE for the plaintiff.

Part payment of the bill by the defendant is a sufficient acknowledgment and identification of the debt in order to take it out of the Statute of Limitations. Morgan v. Walton, 14 Pa. 321; Sun v. Burr, 26 Pa. 284; Shaffer v. Shaffer, 41 Pa. 51; Barclay's Appeal, 64 Pa. 69; Kunkel v. Kolb, 6 W. N. C. 48.

Payment to attorney of plaintiff is a valid payment and is an admission of the accuracy of the account.-Tassey v. Church, 4 W. & S. 141; Darlington v. Taylor, 3 Gr. 195; Bevan v. Cullen, 7 Pa. 281; Thompson v. Fisher, 13 Pa. 310; Wesner v. Greenawalt 97 Pa. 322; Ahl's Appeal, 129 Pa. 26; Reading Trust Co. v. Reading Iron Co., 137 Pa. 282.

Although the accounts, "To mdse. $6.75" and "To balance March 2nd, $3.45" are lumping charges, the book is admissible to refresh the memory of the plaintiff as to the amounts and dates, and together with the testimony explanatory of the composition of the same, constitute sufficient evidence to go to the jury.—Barnet v. Steinbach, 1 W. N. C. 335; Nichols v. Haynes, 78 Pa. 174.

Failure to make objections within a reasonable time will cause the bill to be *prima facie* evidence against the defendant.—Porter v. Patterson, 3 Pa. 229; Killian v. Preston, 4 W. & S. 14; Sergeant's Exec. v. King, 30 Pa. 83.

EDMUND LOCKE RYAN and THOS. K. LEIDY for the defendant.

The book entries, being lumping charges are not admissible in evidence, and will not entitle the plaintiff to judgment.—Walton's Estate, 4 Kulp 487; Bumgardner v. Burnham, 10 W. N. C. 445; Coll v. Stelwagon, 20 W. N. C. 21; Corr v. Sellers, 100 Pa. 170; Shields v. Garret, 5 W. N. C. 120; Van Roden v. Campbell, 5 W. N. C. 126; Gray v. Dick, 8 W. N. C. 435.

OPINION OF THE COURT.

With John Brinton, a grocer, Jacques began an account on January 20, 1880, which ran on continuously until January 1, 1896. On the latter day, Brinton rendered a bill for groceries sold during this period showing a balance of $1,100. Some of the items amounting to $150, were in this form:—"To merchandise $6.75." Other items, amounting to $200, were in this form:—"To balance March 2d, $3.45." This was explained to mean, that on certain days goods were bought, partial payment for them made, and the residue charged as "balance" in the account. The items of "merchandise" and "balance" represent transactions later than December 1, 1889, at which date $700 was as shown by the account, due. Soon after the bill was rendered, it was put into the hands of an attorney for collection. Jacques paid this attorney $10 on it. For the remainder this suit is brought.

Brinton's claim rests (1) on the book account; or (2) on the testimony of a witness of whom the account is an instrument for refreshing the memory; or (3) on the alleged admission of the correctness of the account by the defendant.

The book account so far as it is composed of "balances," and "merchandise," is not evidence of a debt. The former do not charge any thing else than money, and money charges are not proper components of a book account. Both the "balance" and the "merchandise" items, fail reasonably to specify the articles purchased, and they are also lumping. For this reason, they are not legitimate elements in a book account. Bumgardner v. Burnham, 10 W. N. C. 445; Corr v. Sellers, 100 Pa. 170. But the inclusion of illegitimate entries in a book account, vitiates it, not wholly, but only *pro tanto*

Bumgardner v. Burnham, *supra*. The debt, in so far as it rests on the transactions not represented by these objectionable items *i. e.* to the amount of $700, is then sufficiently established by the book account.

Are the "balance" and "merchandise" items saved by the concomitant testimony? The competency of the book account, inadmissible *per se*, to be received, if supported by the evidence of a living witness whose memory is refreshed by it, is not disputable. Barret v. Steinbach, 1 W. N. C. 335; Henry v. Martin, 1 W. N. C. 277. The witness testifies that on certain days goods were bought, of whose price all was simultaneously paid except the sums entered on the account as "balances." If this testimony were credited by the jury, it would require the conclusion that the defendant is debtor to the amount of these "balances" in addition to the debt shown by the unimpeached portions of the account. No testimony however, complements the entries styled "merchandise."

The conduct of the defendant with respect to the bill rendered, is said to be an admission by him of the accuracy of the bill. The bill was sent to him. Shortly afterwards, not being paid, the claim was left with an attorney for collection when Jacques thereupon paid $10. The retention of an account, sent to a debtor, by the creditor for a time, (variable in length according to the nature of the account, the relation of the parties, their distance from each other, etc.,) without objection, is treated as an admission of the accuracy of the account. The act of sending it is a challenge to the one to whom it is sent, to object if he thinks it incorrect. Recognitions of this principle are very numerous. Bevan v. Cullen, 7 Pa. 281; Thompson v. Fisher, 13 Pa. 310; Tassey v. Church, 4 W. & S. 141; Reading Trust Co. v. Reading Iron Works, 137 Pa. 282; Darlington v. Taylor, 3 Gr. 195; Samson v. Freedman, 102 N. Y. 699; Wiggins v. Burkham, 10 Wall. 129; Toland v. Sprague, 12 Pet. 334. In Ahl's Appeal, 129 Pa. 26, the principle is recognized, but with the qualification that the person to be charged with the account must have the means of knowing whether it is correct. The evidence, however, fails to show how long Jacques had received the bill before he signified his dissent from it. From the mere retention of it, therefore, his assent to it could not be legitimately inferred.

But besides express assent to the veraciousness of a bill, assent may be displayed by conduct. Drawing on an agent for the exact balance shown by the account of the latter; *e. g.* $5623.41, is an emphatic acceptance of the account. Lockwood v. Thorne, 11 N. Y. 170. The debtors giving a due bill for the balance, is equally explicit. Mackay v. Kahn, 44 N. Y. 286; Toland v. Sprague, 12 Pet. 300. Sending, on receipt of a bill showing a balance due the sender, £5, and promising to pay the remainder next week, will turn the account into an account stated. Peacock v. Harris, 10 East 107. In Pinchon v. Chilcott, 3 C. & P. 236, A said to B, "you owe me £3," for turnips already taken by B, from A's ground under a contract. B's reply, "I will send it (*i. e.* the £3) before I draw any more turnips" could be declared on as an account stated.

Jacques had a copy of Brinton's bill. A copy of it was also in Brinton's attorney's hands. On receiving a monition from the latter to pay it he calls, does not object to the bill (*quod non apparet non est*) but pays $10 on it. "There can," says Sharwood, J., "be no more unequivocal acknowledgment of a present existing debt, than a payment on account of it." Barclay's Appeal, 64 Pa. 69. "Payment implies the admission of liability," Jessel, M. R. Harlock v. Ashberry, 19 Ch. Div. 539. Payment "operates as an acknowledgment of the continued existence of the demand" Cooley, C. J., Miner v. Lorman, 56 Mich. 212. Law of Limitations, 351 *et seq.* We think the book account, and the correspondent bill, coupled with the significant act of Jacques of making a partial payment on it, when summoned by the attorney to pay it, sufficient to justify a finding that the bill represented an actual debt.

The action was brought one year after the conclusion of the account on which it is founded; and that account extends over a period of sixteen years. The account is neither a merchant's nor mutual account, and the statute of limitations would, if not tolled in some way, bar all its elements except those of the last five years. The statute is tolled, only by a promise to

pay, or by an acknowledgment, in word or act, which implies a promise to pay, the debt. Of what debt the payment is thus promised, expressly or impliedly, must distinctly appear. Law of Limitations, 324 *et seq*, 354. If the $10 had been paid on account of some debt whose nature and amount were unascertained, it could not be regarded as importing a promise to pay the residue of any particular debt. But the debt was sufficiently identified. It was a book account. A copy of it had been rendered as a bill to Jacques. Another copy was in the possession of the attorney. Demand was made by the latter for payment, and the payment of $10 immediately followed. No circumstances are shown, that might avert the inferences legitimately to be drawn from this conduct of Jacques. If he disputed the bill, the occasion called on him to declare his objection. Instead of objecting, he made a payment on account. *Cf.* McClelland v. West, 70 Pa. 183; Law of Limitations, 335, 336, 337. In Stewart's Appeal, 105 Pa. 307, it is said by Gordon, J., by way of *dictum*, that if a debtor was fully informed of the condition and extent of the account against him, and had made a payment on it, the act might have been such an acknowledgment as would toll the statute. We think the payment of $10 by Jacques an acknowledgment of the debt manifested by the bill on a summons to discharge which, by the attorney, he made the payment. To this conclusion, no hostile inference can be drawn from Verrier v. Guillon, 97 Pa. 63. The account there rendered was disputed by the debtor. No acknowledgment of its accuracy, no partial payment was made. More than six years had intervened between the rendering of the account and the commencement of the action.

A payment, appropriated by the creditor to a portion of a debt that is barred, [and he can make such appropriation, Maloney v. Bartlett, 37 W. N. C. 433,] will not, it is true, toll the statute as to the remainder of the debt. Roylston v. May, 71 Ala. 398; Blake v. Sawyer, 83 Me. 129. Brinton's entire claim was exhibited in one account; and the $10 were paid in answer to a demand for the payment of the entire bill. The evidence then, warranted the verdict of the jury, and the rule for a new trial is discharged.

WILLIS ORRIS vs PETER GRAMAN.

Liability of owner of ferocious animal—Rights of licensee—Effect of direct, extraordinary and unusual consequences of injury—Measure of damages.

Action in Trespass.

HARRY M. PERSING and EDWIN G. HUTCHINSON for the plaintiff.

The plaintiff was a bare licensee.—Bigelow Torts, 224.

The defendant is liable to plaintiff for injuries from his animal, knowing the ferocious character of the dog.—Sylvester v. Maag, 155 Pa. 225; Snyder v. Patterson, 161 Pa. 98; Buckley v. Leonard, 4 Denio, 500; Spring Co. v. Edgar, 99 U. S. 645; Mann v. Weiand, 81 * Pa. 243; Act April 14, 1851, 1 P. & L. 1655, § 11. Even though the plaintiff was a trespasser.—Loomis v. Terry, 17 Wend. 497; Bird v. Holbrook, 4 Bing. 628; Marble v. Ross, 124 Mass. 44.

The amount of damages is a question for the jury.—Scott Township v. Montgomery, 95 Pa. 444; P. & O. Canal Co. v. Graham, 63 Pa. 290.

FRANCIS LAFFERTY and PAUL J. SCHMIDT for the defendant.

The plaintiff was guilty of contributory negligence; hence cannot recover.—D. L. & W. R. R. Co. v. Codow, 120 Pa. 559; Curtis v. Mills, 24 Eng. C. L. 670; Robb v. Connellsville, 137 Pa. 42.

The opening of the old wound was not the immediate result of the dog's attack. The attack was a remote, not proximate cause.—Hoag v. L. S. & M. S. R. R., 85 Pa. 293; Fox v. Borkey, 126 Pa. 164; Schaeffer v. Railroad Co., 105 U. S. 249.

If there can be a recovery, damages must be limited to cost of physician and nurse's charges.

CHARGE OF THE COURT.

On January 24, 1895, Willis Orris was walking along the pavement in front of Graman's house when a gust of wind blew his hat over the fence into his yard. Orris opened the gate and entered the yard in order to recover his hat, when a dog belonging to Graman, and kept by him on the premises, and known by him to be ferocious, ran at Orris and bit him on the hand. The wound thus made healed in two days, but the fear and excitement occasioned by the onset of the animal, and the consequent spasmodic and uncalculated movements caused an old wound, healed for two years past, to open. Orris was compelled to secure the services of a physician and nurse, costing $300. The re-opening of the wound

will shorten Orris' life and has permanently disabled him from work. Orris claims $15,000.

Had the ferocity of the dog not been known, Graman would not be liable for the consequences of its attack on Orris.—Quiltie v. Battie, 17 L. R. A. 521; Rider v. White, 65 N. Y. 54; Conway v. Grant, 14 L. R. A. 196. Knowledge is postulated as the ground of liability in Sylvester v. Maag, 155 Pa. 225; Snyder v. Patterson, 161 Pa. 98; Mann v. Weiand, 81½ Pa. 243. The character of the dog, however, was known by Graman.

For the assault of a dog, thus known to be vicious, he who keeps it is liable to one on whom it makes an attack, although upon the premises. The attacked person may be on the premises by right or license. Sylvester v. Maag, 155 Pa. 225; Buckley v. Leonard, 4 Denio, 500; Brock v. Copeland, 1 Esp. 203; Curtis v. Mills, 5 C. & P. 489. But, the liability will exist although the injured person is a trespasser.—Marble v. Ross, 124 Mass. 44; Carroll v. Staten Island R. Co. 58 N. Y. 136. He was, *e. g.*, a boy, hunting without right on the premises of the defendant, Loomis v. Terry, 17 Wend. 496; a man gathering berries, Sherfey v. Bartley, 4 Sneed, 58; a peddler, entering without permission for the purpose of selling his wares, Woolf v. Chalker, 31 Conn. 121; an artisan going on the land in search of work (if he be indeed a trespasser), Conway v. Grant, 14 L. R. A. 196; a policeman looking for a vicious character, Melscheimer v. Sullivan, 14 L. R. A. 196. Orris was not a trespasser when he endeavored to recover his hat, Bigelow Torts, 224, but had he been, his right to redress would not be impaired.

Orris' recovery has been contested on the ground of contributory negligence. It is so trite a principle that the negligence of the plaintiff, if contributory to the damage will preclude his obtaining compensation for it, that it is wholly superfluous to cite authorities in vindication of it. We are unable to discover any contributory negligence.

It remains to determine for what injuries Orris can secure compensation. The owner of a ferocious dog must contemplate as the probable result of harboring him, that he will attack persons who pass near or come upon the premises. He must contemplate, as a likely consequence of the attack, hurt to the body of the attacked party. He must contemplate, as a consequence of this hurt, the employment of a surgeon and a nurse. For the expenses of medical attendance, and of the ministrations of a nurse, Graman is therefore liable. 2 Sedgwick, Damages, § 483.

But the nature and severity of the results of the attack may vary infinitely. Some are ordinary and usual; others may be deemed quite unusual. Some depend on the peculiar and altogether rare predispositions of the body of the injured person. If they are, however, the consequences of the attack of the dog, the attacked person will have a right to compensation for all of them. For a cancer developed on the breast of a passenger, by his striking something in consequence of a jerk, caused by the sudden stopping of the car, the railroad company was liable.—Baltimore City Passenger Railway Co. v. Kemp, 61 Md. 74. So it was for a hernia caused in a scuffle with a passenger, in the attempt to eject him—Coleman v. N. Y., etc., R. R. Co., 106 Mass. 160. In Terre Haute, etc. R. R. Co. v. Buck, 96 Ind. 346, a passenger, in getting from a train, was hurt. The pain and nervous shock predisposed him to take typho-malarial fever; from this fever, hemorrhage of the bowels and death resulted. The defendant was answerable for these consequences. For insanity resulting from a blow from a stick thrown from a car by a brakeman upon the head of the plaintiff, the company was liable.—Jeffersonville, etc., R. R. Co. v. Riley, 39 Ind. 568. *Cf.* Tice v. Munn, 94 N. Y. 621; Louisville, etc., Railway Co. v. Falvey, 104 Ind. 409; Stewart v. City of Ripon, 38 Wis. 584. Says Mr. Sedgwick, "A common case of directly ensuing loss is where a physical injury stimulates a preëxisting tendency to disease, or leads to peculiarly unfortunate results, owing to a prior injury, or to a delicate state of health, or peculiar physical condition, such as pregnancy. In all these cases the loss is the direct, though unexpected consequence of the injury, and the plaintiff may recover compensation for it." 1 Damages, 5112.

The bite of the dog was no more to be anticipated by his owner than the excitement and struggle to escape him. For the consequences of that struggle, no less than for those of the bite, Graman is properly liable. In Sheffer v. Railroad Co. 105 U.

S. 252, cited by counsel for defendant, the company was held not to be liable for the self destruction of the injured person, inflicted in consequence of the insanity that supervened upon the accident. The opinion gives little evidence of deliberation. But, the materials have not been furnished us for determining what damages, beyond the physician's and nurse's bills, have been suffered. What is the plaintiff's probable longevity? Is he old or is he young? What was his earning power prior to the accident? Was it much or was it little? The jury cannot be suffered wholly to conjecture the magnitude of the damages suffered. We are of opinion therefore, gentlemen of the jury, that you should allow $300, the sum shown by Orris to have been expended by him, and nothing further.

CLARENCE DAY vs. TOWNSHIP OF NEWTON.

Act of March 31, 1860, not applicable to township supervisors—Supervisors not entitled to compensation for use of his wagon—Wages due minor sons of supervisor not allowed—Contract by one supervisor for materials valid—Appeal from auditor's report must precede an action on claim.

GEORGE W. BENEDICT, JR., and H. FRANKLIN KANTNER for the plaintiff.

The Act of March 31, 1860, is inapplicable.—Anderson's Appeal, 9 C. C. 567; Washington Township v. Shoop, 2 D. R. 639; Funk v. Washington Township, 13 C. C. 385.

The plaintiff is entitled to a recovery of $100, for the use of his wagon.—Anderson's Appeal, 9 C. C. 567.

A supervisor may employ his minor sons in the repair of the public roads, and is entitled to a credit for all monies paid to such minors.—Washington Township v. Shoop, 2 D. R. 639; Funk v. Washington Township, 13 C. C. 385.

A supervisor is entitled to a credit for materials purchased *without* consultation with his associate. Sheppard v. Township, 4 Del. 385; Trickett Road Law, p. 289.

HARVEY E. KNUPP and SIMON P. NORTHRUP for the defendant.

Plaintiff cannot recover for use of his wagon. (1) Under Act of March 31, 1860.—Coxe's Case, 11 C. C. 639; *In Re* Hazel Township, 1 D. R. 813; Borough of Milford v. Milford Water Co., 124 Pa. 623. (2) Against public policy. Washington Township v. Shoop, 2 D. R. 639; Frick v. Conrad's Exec'r., 154 Pa. 330; Commonwealth v. Comm'r's. 2 S. & R. 195.

Plaintiff cannot recover wages for minor sons.—Coxe's Case, etc., *supra*.

One supervisor cannot bind township for the performance of a contract for materials. The assent and action of both are required.—Cooper & Grove v. Lampeter Township, 8 W. 125; Somerset Township v. Parsons, 105 Pa. 360; Union Township v. Gibboney, 94 Pa. 534.

Plaintiff cannot recover because procedure is irregular. There was no appeal from auditor's report.—Act April 15, 1834, 2 P. & L. 4689; Northumberland County v. Bloom, 3 W. & S. 542; Northampton County v. Yoke, 24 Pa. 305; Brown v. White Deer Township, 27 Pa. 109; Dyer v. Covington Township, 28 Pa. 186; Blackmore v. Allegheny County, 51 Pa. 160; Northampton County v. Herman, 119 Pa. 373.

OPINION OF THE COURT.

Clarence Day, a supervisor of Newton township, agreed with his fellow supervisor, on a division of the township, each taking control of the roads in the half allotted to him. Day, without consulting his associate, purchased materials, for the price of $100, for use on his roads. Payment of this order to the vendors was refused. He used his own wagon 100 days, and demanded compensation at the rate of $1.00 per day. He employed two of his minor children for ten days, and asked for compensation at the rate of $1.00 per day. The township auditors having refused him credit for these various sums, amounting to $220, he sues the township in the common pleas for that sum.

The first objection to the recovery of Day is, that the purchase of materials, and the hiring of wagons and of laborers for road repair, are so far discretionary that the concurrence of the two supervisors therein is necessary. But the custom of supervisors to allot to each of themselves a portion of the township, and to assume exclusive control over the repair of the roads in the portion thus allotted, is inveterate, and its legality has been often recognized by the courts. Contracts made by each supervisor in respect to the making or repair of roads in his district are valid Pennsylvania Road Law, 298. The absence of the coöperation of Day's colleague, therefore, in the making of the contracts of purchase and hire, is no barrier to his recovery. No other objection has been made

to the claim for $100 for road material, for which the supervisor has paid.

To the recovery for the use of Day's wagon and for the wages of his minor children, are opposed, (a) the 66 section of the act of March 31, 1860, 1 P. & L, 1309; and (b) the policy which forbids a trustee or quasi-trustee from selling to himself as such, what he personally owns.

The Act of March 31, 1860, directs "nor shall any member of any corporation or public institution, or any officer or agent thereof, be in anywise interested in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of any corporation, municipality or public institution, of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale." It also makes the violation of this prohibition a misdemeanor, penalizing it by a fine.

In Coxe's Case, 11 Pa. C. C. 639, and in *In Re* Hazel Township, 1 D. R. 813, Woodward, J., was of the opinion that supervisors are within the scope of this act, and are precluded by it from recovering for the use of their own team, and for the employment of their minor children. On the other hand, Futhey, J., in Anderson's Appeal, 9 Pa. C. C. 567, and Stewart, J., in Washington Township v. Shoop, 2 D. R. 639; (S. C. Funk v. Washington Township, 13 Pa. C. C. 385,) doubted the applicability of the act to supervisors. We think the able discussion of Judge Stewart a sufficient vindication of his view. If the act did embrace supervisors, we cannot share the doubt of Futhey, J., whether it would prevent their recovering from the township for their horses and carts, Anderson's Appeal, *supra*. But see opinion by Furst, J., in Commonwealth v. Hilibish, 12 Pa. C. C. 25. A contract penalized by the act of 1860, is "utterly void, and there is no power that can breath life into such a dead thing." Paxson, J., in Milford Borough v. Milford Water Co., 124 Pa. 610. That the contract, between the supervisor and the township sought to be enforced, is not an express, but merely an implied one, while avoiding some, does not avoid all, the mischief which the act of 1860 intended to make impossible.

Is Day's recovery precluded by public policy? Although to this question a negative answer is impliedly made by Futhey, J., in Anderson's Appeal, 9 Pa. C. C. 569, we again find ourselves in accord with Washington Township v. Shoop, 2 D. R. 639 in giving to it an affirmative answer. The supervisor allowed to employ his own team would be less critical in selecting it among all available teams, less exacting in regard to the amount of time per day during which it should be at the service of the township, and as to the diligence of its teamster. He would have a motive not to look out for teams to be had at a less rate than that which he purposed to charge. The wages of the minor children belong to the father and we cannot assume, in the absence of evidence, that he had renounced to them the right. He would be influenced to employ his sons instead of others who for the same price might render more efficient service, or the same degree of service at a less price. We cannot assume, as the court assumed in Washington Township v. Shoop, that the wages had been paid by the supervisor to his minor sons. We know simply that Day employed two of his minor children for ten days "and made a charge of $1.00 per day each." Day can recover nothing for the use of his teams or for the labor of his sons.

It remains to consider the procedure resorted to by Day to compel the payment of his demand. He presented his account before the township auditors, and they refused to allow the $220. He did not appeal to the common pleas, but commenced an action in that court. The act of April 15, 1834, 2 P. & L. 4689, with its supplements, provides for the auditing of the accounts of the supervisors, and for the preparation by the auditors of a report, directs where the report shall be deposited, and, in section 104, authorizes the supervisors to appeal therefrom "to the court of common pleas of the same county within thirty days." Thereupon the court may direct an issue. The report of the auditors, unappealed from, is as conclusive as a judgment. Its correctness cannot be assailed collaterally, *e. g.* in an action on the official bond of the supervisor.—Dyer v. Covington Township, 28 Pa. 186. If his claim is disallowed by the auditors, he cannot resort to a common law action. The specific remedy furnished by the act of 1834 excludes the common law remedy.—Brown v. White Deer Township, 27 Pa. 109. Analogously, the report of county auditors unappealed from, is conclusive. The sheriff disappointed by them must appeal. He cannot sue the county.—County of Northampton v. Herman, 119 Pa. 373. Their report is conclusive collaterally, *e. g.* in an action on the treasurer's official bond.—Blackmore v. Allegheny County, 51 Pa. 160. It concludes the county, if not appealed from, as against its treasurer, Northumberland County v. Bloom, 3 W. & S. 542; and it concludes the treasurer, Northampton County v. Yoke, 24 Pa. 305. Day, the plaintiff, if dissatisfied with the decision of the auditors, should have appealed therefrom to the common pleas within 30 days. Except on appeal, that court cannot acquire jurisdiction of his claim. Judgment will therefore be entered on the case stated, in favor of the Township of Newton, the defendant.

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