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EDITORIAL.

ABOUT BRIEFS.

The maker of a brief must bear in mind that the court, for whom he intends it, is not altogether imbecile. He does not need to write a formal argument. He does enough when he states, briefly but lucidly, what he regards as the governing principles. We say, briefly and lucidly. One of these qualities is almost as important as the other. The court can not take kindly to a prolix statement, however clear, and a statement admirable for brevity, if wanting in perspicuity, is a delusion. Terseness, clearness, these are the greatest virtues of style that the advocate can exhibit before the court.

But a well stated principle should not be left to commend itself to the credence of the court without authority. It is sometimes of interest to a judge to know what a lawyer thinks about a certain legal proposition; but there is a natural doubt of the correspondence of the opinion expressed by the attorney for a litigant, with that which he really entertains. Besides the judge would much rather know what some court of authority has said on the subject. Every proposition of law should be sustained, when possible, by adjudications. The names of the parties in a case as well as the volume and page where it is reported should be given. It is a sign of the indolent lawyer, that he contents himself with designating the volume and page alone. Nor should it be assumed that all cases involving a principle are equally worthy of citation. In some the principle is only obliquely alluded to. These are not as authoritative as those in which it is consciously and deliberately stated, and adopted as the *ratio decidendi*. The opinions of the courts vary in value, according to the ability of their writers, or the care with which they have been composed. The decision of a higher court is to be preferred, other things being equal, to that of a lower; a more modern to an older. When many cases are cited, the more cogent, and direct, should be distinguished from the other. The court has other work to do, than to determine any one particular cause. It may lack opportunity, or inclination to read many decisions, when one or two well selected ones would abundantly convince it. If it should happen that the first one or two cases read by it seemed indecisive, irrelevant, or adverse, it would suspect the judgment or the diligence of counsel, and possibly do him and his cause less than justice. It sometimes happens that the precise principle desiderated is not found in any decision; but that principles more or less similar may be. It is then often necessary to compare several cases together, and the citation of a greater number of cases is not only pardonable but advisable.

It is needless to add, that the brief ought to be composed in the English language, and ought to be fairly decipherable. Most lawyers, who do not command

a typewriter, are capable, when they try, of producing tolerably legible characters with the pen. An illegible brief is often worse than none, for, besides failing to enlighten the judge, it exasperates him through the fruitless efforts he has made to translate it.

Students who are to graduate in June 1898, are now commencing to work on their theses. These theses cover 50 pages of legal cap. The topics are selected by the writers, subject to the approval of the dean. It is expected that the cases will be studied, and the doctrines therein found, constructed into a systematic treatise. Long quotations are to be avoided. These theses can not be made to serve a double purpose. They will win no prize. Prize essays are additional.

A supplementary volume on the Law of Boroughs in Pennsylvania, by Dean Trickett, is now going through the press. It will contain the results of the adjudications during the four years that have followed the publication of the first volume.

THE LAW OF DIVORCE.

On the invitation of the Faculty of the School of Law, Wm. Hardcastle Browne, A. M., of the Philadelphia Bar, delivered a lecture upon the above subject to a large and attentive audience in the Court House on Friday evening, December 10th. He was introduced in a complimentary speech by Judge Biddle. Mr. Browne illustrated the leading divisions of his theme by a description of several reported cases, with a narration of facts. He has written and published two books on the subject upon which he lectured. One was a Digest of all reported cases on the theme of Divorce, found in the printed decisions of the appellate courts of the United States. At a much later date, he wrote a Commentary on the Law of Divorce and Alimony.

Mr. Browne has also written a large Digest of Decisions on the Law of Negligence in Pennsylvania, followed the present year by a two volume edition of the Law of Decedents' Estates in this Commonwealth. He has edited abridged editions of both Blackstone's and Kent's Commentaries, copies of all which works he has presented to our library.

In addition to these legal works, he is the author and compiler of numerous literary volumes.

The following is an extract of a letter received from the Collector Publishing Co. by one of the students of the Dickinson School of Law.

"We are very glad to receive such communication from the Dickinson Law School, which we judge from observation of the various law schools of the country and notes that we have received from them is unquestionably one of the best law schools of the country, and is giving its students as good a preparation for their after work as they could hope to obtain in any other school, and better than nine out of ten. In fact, the system and work of your school, as described to us by yourself and other students, commands our admiration, and must command the admiration of every legal educator. We shall be glad to hear from you as often as your convenience will permit."

The January *Law Student's Helper* contains a report of one of the Dickinson moot court cases, as given in the Law School FORUM.

It is with pleasure that the FORUM notes the January number of the *Law Student's Helper*. The *Helper* in its January number reports the case of James Buchanan v. Shamokin Ry., remarking on the thorough way in which the Moot Court work is carried on at our school.

The FORUM while thanking the *Law Student's Helper* for the recognition given it, also wishes to state that many complimentary remarks from other sources are being made about the FORUM and the work done at the Dickinson School of Law.

THE LIBRARY.

It is just three years ago that the Library received its largest donation, the sum of $1,000 presented as a New Year's gift by Mrs. Mary Cooper Allison of Philadelphia. When the school opened, in October 1890, it had not a single book. During the year, the Dean put in the Pennsylvania Supreme Court reports beginning with Barr. Certain incorporators made contributions by which digests and a few text books were procured. From

publishers others were obtained. In 1891, a Japanese bazaar was held by Mr. Issa Tanimura, of Tokio, then in the school, from which $400 was realized. The funds of the school have been in part employed in securing additions. In this way the library has grown until it is now a larger and more useful collection of books than nine lawyers out of every ten in the state of Pennsylvania have regular access to. The gift of Mrs. Allison was the means of placing at the disposal of the students the reports of New York, of the Circuit Court of Appeals, and of the Supreme Court of the United States, and the English reports; the most important single addition yet made to the school library. It is proper to recall that the re-opening of the law school was projected in 1890 by four gentlemen, Dr. Reed, President of the college, William C. Allison, Esq., husband of the benefactress to whom we have referred, Hon. W. F. Sadler, and Dean Trickett. It was made possible by the generous offer of Mr. Allison to fit up the building, then in a very dilapidated state, for law school uses. While he lived the school had no more solicitous and generous patron; the names of this estimable gentleman and of Mrs. Allison, who survives him, will forever be remembered by those who from time to time, come to the school and gain their professional preparation within its walls. In the name of the students we send respectful and cordial New Year's greetings to Mrs. Allison.

ALUMNI PERSONALS.

Thomas K. Leidy, '97, has been admitted to practice at the Berks County Bar.

* * *

On January the 3rd, an editor of the FORUM had the pleasure of paying a visit to J. Banks Kurtz, '93, in his comfortable and well situated offices in Altoona. Mr. Kurtz is one of the most successful young attorneys in that busy city and reflects much credit upon his *Alma Mater*.

* * *

D. D. Lewis, a former member of the class of '99, has left school and intends to start in a short time for the Alaskan gold fields.

D. L. Fickes, '95, spent a few days in Carlisle during the holidays.

* * *

Rush Trescott, '95, is Assistant District Attorney in Luzerne county.

* * *

The marriage of Wm. D. Boyer, '92, to Mrs. Louise Alton Hosie, of Brooklyn, has been announced.

* * *

Harry F. Kantner, '97, has been made Deputy Prothonotary of Berks county.

* * *

Charles C. Greer, '93, who is practicing very successfully in Johnstown, has lately made quite an addition to his library. An editor of the FORUM found him most pleasantly located.

* * *

Samuel C. Boyer, '93, shows by a letter, recently received from him, that he has not lost his interest in the school.

* * *

Homer Shoemaker, '92, was married last month.

* * *

Joshua W. Swartz, '92, has been made secretary of a Harrisburg Building and Loan Association.

* * *

John Small, '97, who recently passed his examinations in Northampton county is practicing in Shamokin.

* * *

G. W. Betson, Jr., of Greenboro, Md., entered the middle class on the opening of the Winter Term.

* * *

J. G. Davis, of Baltimore, Md., entered the Junior class at the opening of the Winter Term.

* * *

W. Harrison Walker, '96, is fast advancing to the front in the community where he is practicing his profession. He has lately associated with David F. Fortney, Esq., one of the leaders in the Centre Co. Bar. The following from the Millheim Journal has come to our notice:

"W. Harrison Walker, Esq., the hustling junior partner of the law firm of Fortney & Walker, of Bellefonte, was in

town on Friday, the 14th inst., attending to legal business of a very important nature to some of our citizens of this end of the county. Mr. Walker is one of the most promising young attorneys at the Centre County Bar, and we are always glad to welcome him in our community."

GLEE CLUB AND ORCHESTRA TRIP.

The Dickinson Glee Club and Orchestra during the holidays, took a most successful trip through a portion of Pennsylvania including the towns of Millersburg, Wiconisco, Mt. Carmel, Shamokin, Sunbury, Williamsport, Altoona, Johnstown and Martinsburg. All along the route the boys were most enthusiastically welcomed, and their concerts received comments which are of no little credit to the club.

What added greatly to the pleasures of the trip was the splendid entertainment which the club received at several of the towns, by students and Alumni of the Law School. At Wiconisco, Messrs. Miller and Coles of the Middle Class were on hand to greet the boys. At Shamokin half of the Junior class warmly welcomed them and was instrumental in having a dance tendered to them. Rufus Lincoln, '96, who is practicing at Shamokin, also aided in their entertainment.

Messrs. John, Shoener and Strauss met the club at Mt. Carmel and gave the boys a hearty reception. During their stay in that pleasant mining town, they acquired a more appreciative idea of real estate, by being shown the masses in the coal, coal, ground; an experience which, once tried, makes a sufficiently lasting impression. The miners enjoyed immensely a song from the boys four hundred feet under ground. The club gave a concert at Altoona upon the solicitation of J. Banks Kurtz of the class of '93 and at Johnstown the boys were warmly welcomed by Chas. C. Greer, of that same illustrious class, who was the means of having a reception tendered to them after the concert in the Y. M. C. A. Hall. The trip throughout was eminently successful and the efficient manager of the organization, C. N. Berntheisel, '98, is now arranging a southern trip at Easter.

J. F. Santee, '96, has been appointed Deputy Prothonotary of Luzerne County.

THE SCHOOL.

The second term of the school year 1897-'98 opened on Wednesday, January 12th, with a large attendance of the students, ready to enter upon the work of the long term which ends June 6th, the faculty not deeming it wise that the attention of the students be distracted from their work by a short Easter vacation.

The FORUM extends the sympathies of the school to Mr. W. Flannigan of the Junior class who was summoned home on the morning of the 21st of January because of the serious illness of his mother. The FORUM hopes for the early return of Mr. Flannigan and the speedy recovery of his mother.

The FORUM is pleased to report the convalescence of Mr. John G. Miller of the Junior class. Mr. Miller was unable to join his class at the opening of the Winter Term, because of typhoid fever. He expects to return to school about the first of February.

Geo. L. Schuyler, of Milton, Pa., entered the Junior class at the opening of the term.

G. Frank Wetzel made a pleasant call on William Hardcastle Browne, Esq., of Philadelphia, who rendered himself so popular with the students by his able lecture on Divorce delivered last term.

Mr. Browne who is one of the most eminent authorities on divorce in this country contemplates presenting the school with a complete set of his works, including works on Negligence, Decedents' Estates, Abridgments of Blackstone's and Kent's Commentaries and Divorce. He is now engaged in interpolating the last named work with the very latest cases decided upon the subject and upon the completion of which he expects to make the presentation to the school.

The students of the law school appreciate very much the kindness of this erudite and distinguished gentleman.

The photograph of the Junior class which is to adorn the pages of the *Microcosm* was taken a few weeks ago by photographer Line.

Messrs. Moyer, Berntheisel, and Shalters have been appointed as the Executive Committee of the Senior Class.

Changes are being made in our curriculum from time to time in consequence of change to the three year course. During this term the Juniors study Bailments and Carriers instead of Private Corporations as heretofore.

Special attention is being given by our students to the study of Blackstone, as its importance becomes more thoroughly impressed upon them by almost every lawyer with whom they come in contact. We might speak of this as a Blackstonian revival.

The Middle class has taken up the subject of Evidence under Dean Trickett, and Equity with Hon. J. M. Weakley as instructor.

Harvey Knupp, '97, of Harrisburg, has returned to take a post-graduate course.

A. Frank John, '99, and Marlin Wolf, '99, were the center of attraction Tuesday evening, January 18th, at Irving College, Mechanicsburg.

THE ALLISON SOCIETY.

On the opening evening of the new term, January 12th, the Dickinson Society united with the Allison Society to listen to a lecture delivered by J. W. Wetzel, Esq., than whom there is not a more able lawyer at the Cumberland County Bar. Mr. Wetzel, who was introduced by Mr. Charles E. Daniels, President of the Allison Society, pleasantly welcomed the students back to Carlisle, and the Law School. Then he gave a very interesting lecture on "Jury Trials." Mr. Wetzel first told of the importance of knowing the jurisdiction of cases. Then he proceeded, step by step, in an explanation of the proper conduct of a case. He told of the care necessary in selecting a jury, the manner of conveying salient points of fact and of law to the jurors, the treatment of witnesses, and the method of procuring evidence, and other essentials of a trial. The lecture was an unusually instructive one because Mr. Wetzel made every point so plain and practical, giving experiences students do not find in books, but which result from years of practice in the courts. The lecture was the more appreciated on that account, and every one was benefited by it. On motion of F. B Moser, a vote of thanks was tendered Mr. Wetzel, and the heartiness of the vote evidenced plainly how pleased the students were by the lecture.

J. W. WETZEL, ESQ.

The Allison Society has elected the following officers for the present society term: President, Charles E. Daniels; Vice-President, Charles G. Moyer; Secretary, Herman M. Sypherd; Treasurer, Walter B. Freed; Prothonotary, Charles McMeans; District Attorney, Daniel R. Reese; Sheriff, J. O. Haas; Justice of the Peace, Edwin G. Hutchinson; Auditors, J. Perry Wood and Merkel Landis; Executive Committee, G. H. Moyer, G. Frank Wetzel and R. U. Capwell.

THE MOOT COURT.

BENJAMIN THOMAS vs. ARCHIBALD FRANKLIN.

Fraudulent representations by agent.—Principal's liability for same.—Toll of the Statute of Limitations.

Trespass for deceit.

JACKSON ORLANDO HAAS and CHARLES MCMEANS for the plaintiff.

1. The fraud of the agent is imputable to the defendant.—Bennett v. Judson, 21 N. Y., 238; Ind., Penn. & Chi. Ry. Co. v. Tyng, 63 N. Y. 653; Garretzen v. Duenckiel, 50 Mo. 104; Hart v. Bor. of Girard, 56 Pa. 23; Chonteaux v. Leech & Co., 18 Pa. 224; McNeile v. Cridland *et. al.*, 168 Pa. 16; Brooke v. N. Y., L. E. & W. R. R. Co., 108 Pa. 5.9.

2. The offer of $400 was an acknowledgment sufficient to toll the statute of limitations.—Palmer v. Gillespie, 95 Pa. 340; Patton's Ex. v. Hassinger, 69 Pa. 311; Suter v. Sheeler, 22 Pa. 309; Burr v. Burr, 26 Pa. 284.

MARTIN R. HERR and DANIEL R. REESE for the defendant.

1. The representations of the agent were not within the apparent scope of his authority.—Armor Co. v. Bruner & Baxter, 19 N. J. E. 331; Mooney v. Miller, 102 Mass. 217.

2. The right of action is barred by the statute of limitations.—Brightly's Purdon's Digest, 12 Ed., page 1213; Morgan *et. al.* v. Tener *et. al.*, 83 Pa. 305; Wickersham v. Lee *et. al.* 83 Pa. 416; Morrell v. Trotter, 12 W. N. C. 143; Trickett on Limitations, § 193; Harrisburg Bank v. Forster, 8 Watts, 12.

STATEMENT OF THE CASE.

On 3rd Feb. 1891, Franklin conveyed a tract of land to Thomas, by a deed which described it by courses and distances and area. The area was stated to be "5 acres 31 perches more or less." The land within the boundaries was in fact but 4 acres 153 perches. Two weeks prior to the conveyance, Amos Conkling, agent for Franklin, made a contract with Thomas for the sale of the tract to him. He told Thomas that it contained 5 acres 31 perches; that a certain house which was in fact just beyond it, was on it; that a certain valuable spring just beyond it, was on it, etc. The land, if it had contained this house and spring, would have been worth $2,500 more than it was in fact worth. Thomas agreed to pay and did pay $4,700 for the land. Conkling had been employed to find a purchaser, but had received no instruction from Franklin as to the manner in which he should induce a purchase. A few days after the conveyance, Thomas, for the first time had the land surveyed and discovered that it did not embrace what it had been said by Conkling to embrace. He complained to Franklin, who offered to appease him by paying him $400. This he declined to accept. Finally, on March 19, 1897, this action of trespass for a deceit, was brought. Defendant asks court to require a verdict for defendant.

CHARGE OF COURT.

The gravamen of this action is the alleged fraud of Franklin upon Thomas. Let us see whether the elements of fraud may be discovered.

(1). There was a representation to the effect that land sold, had upon it the house and the spring.

(2). This representation was untrue. The house and spring are not within the boundaries of the premises.

(3). The representation was material. The price paid by Thomas was $4,700. Without the house and spring, the land was worth $2,500 less than it would have been with them. In the absence of other evidence of the value of the land, the jury would then be justified in concluding that the land actually conveyed to Thomas was worth $2,200. Features of it that would have more than doubled its value can scarcely be said to be otherwise than material. Sutton v. Morgan, 158 Pa. 204; Griswold v. Gebbie, 126 Pa. 353.

(4). That the representation was made, in order to persuade Thomas to make the purchase, might reasonably be inferred from the fact that they were made by the agent of the vendor to Thomas in the course of the negotiation.

(5). Was the representation fraudulent? The erroneousness of the representation does not make it *ipso facto* fraudulent. Kreiter v. Bomberger, 82 Pa. 59; Erie City Iron Works v. Barber, 106 Pa. 125; Griswold v. Gebbie, 126 Pa. 353. It must be made with knowledge of its falsity, or with consciousness that the statement exceeds the knowledge of the person making it. There must be "some moral wrong," Erie City Iron Works v. Barber, 106 Pa. 125; Freyer v. McCord, 165 Pa. 539. Is there evidence of such knowledge on the part of Franklin's agent? We think there is. He was agent for the sale of this land. He made a specific statement to the effect that a house and a spring were on it. He may have believed that they were on it. If so, we think there was no fraud. He may have believed they were not on it; he may have been conscious of ignorance whether they were on it or not. In either case, he would have attempted to commit a fraud. But whether the house and spring were on the premises, one interested in them, as owner or as agent of the owner, might be presumed to know. We think that, in the absence of evidence tending to show ignorance on Conkling's part, the jury may legitimately infer that he had knowledge. Knowledge that a declaration concerning the area of land which greatly exceeded the truth was false, was *prima facie* presumable, in Griswold v. Gebbie, 126 Pa. 353; Kreiter v. Bomberger, 82 Pa. 59. No facts appear elucidating how Conkling could have believed

that the statement he made was true. We see nothing in Keefe v. Sholl, 181 Pa. 90, inconsistent with this conclusion. The jury must determine whether Conkling's representation was known by him to be untrue, or in excess of his knowledge.

(6). Did the representation induce the purchase by Thomas? If it did not, it did him no injury. Frequently the vendee himself testifies to the influence on his act of the representation.—Sutton v. Morgan, 158 Pa. 204; Boyd v. Shiffer, 156 Pa. 100, and only he can have direct consciousness of such influence. But the causal relation of the representation to the act may be a matter of inference. "If," says Jessel, M. R., "it is a material misrepresentation, calculated to induce him (the vendee) to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and, in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms and showed clearly by his conduct that he did not rely on the representation." Redgrave v. Hurd, L. R. Ch. D. 1 *Cf.* Holbrook v. Burt, 22 Pick. 546; Tiedeman, Sales, 224. *A fortiori*, if it is not an inference of law, it is at least one which the jury may draw.

It was suggested that the land was open to the inspection of Thomas, and that it was negligent in him not to have examined it, and for this reason he cannot be allowed to allege that he was imposed on by the misrepresentation. But, it matters not how gross his negligence, how foolish his reliance on the statement of the vendor. If he in fact relied, he must have redress. Sutton v. Morgan, 158 Pa. 204; Redgrave v. Hurd, 20 L. R. Ch. D. 1. The opportunity to discover the facts may be so full as to make improbable the plaintiff's assertion that he relied on the representation. This can be its only effect.

The sale to Thomas, however, was made through Conkling. Franklin had no direct communication with him.. Franklin gave no instructions to Conkling as to the means to which he should resort to persuade purchasers. The serious question then presents itself whether the fraudulent representation of Conkling is imputable to Franklin. It is so far imputable to Franklin, that Thomas would have a right to rescind the contract, on the tender of a reconveyance, Freyer v. McCord, 165 Pa. 539; Sutton v. Morgan, 158 Pa. 204. But is it imputable, as a fraud for which the action for deceit would lie against him? While some respectable authorities hold its imputability in this sense, Huffcut, Agency, 164, we think that in Pennsylvania that imputability is denied. Says Mitchell J., "While the general rule that the principal is liable for his agent's misrepresentation is unquestionable, as was held in Griswold v. Gebbie, 126 Pa. 353, yet the action of deceit being founded on fraud or moral wrong, to sustain it against the principal on such representations, the fraud should be clear, and there should in addition be some evidence of participation or knowledge on the part of the principal or circumstances which should have put him upon inquiry." Freyer v. McCord, 165 Pa. 539. In Keefe v. Sholl, 181 Pa. 90, the court remarks on the want of proof of knowledge of the falsity of the representation of the agent. "On the contrary the defendant (the principal) called as on cross-examination, testified positively that *she* had no knowledge of the alleged false statements," as if *her* innocence of them would exempt her from liability. Remarking that the action for deceit is not founded on the contract but on the "fraudulent representations and guilty knowledge, on the part of the defendant," the court adds "in the absence of any evidence of such knowledge on her (the principal's) part especially, there could be no recovery," and cites 165 Pa. 539 *supra*. For want of evidence of participation by Franklin in the fraud practiced by Conkling we think there can be no recovery against him.

The statute of limitations is invoked by him. The conveyance took place on February 3, 1891. The land was surveyed a few days afterward, and was then discovered not to contain the house and spring. The action was brought on March 19, 1897. More than six years had then elapsed since the survey. But, on Thomas' complaint to Franklin, the latter offered to "appease him by paying him $400." This Thomas declined to accept. Does this offer make a new starting point for the

period of limitation? We think not. The $400 were offered in satisfaction of the claim, and were refused. It is well settled that an offer made by way of compromise will not toll the statute. In Currier v. Lockwood, 40 Conn. 349, the rejected offer of a ton of coal in payment of a note for $17.14 did not give a new starting point to the statute. An offer to pay $7,000 in settlement of an unliquidated claim was similarly impotent; Bell v. Morrison, 1 Pet. 351, *Cf.*; Weston v. Hodgkins, 136 Mass. 326; Smith v. Eastman, 3 Cush. 355; Slack v. Town of Norwich, 32 Vt. 818.

For the reasons stated, gentlemen of the jury, your verdict should be for the defendant.

CHARLES BRADY vs. AUGUSTUS SMALL.

Statute of Limitations.—Liability of Attorney for negligence in conducting suit.

Trespass.

W. LLOYD SNYDER and B. JOHNSTON MACEWEN for the plaintiff.

1. The statute of limitations does not bar recovery.—Wickersham v. Lee *et. al.* 83 Pa. 416; Moore v. Juvenal, 92 Pa. 484; Lichty v. Hugus, 55 Pa. 434; Vanhorn v. Scott, 28 Pa. 316; Trickett on Limitations, page 253.

2. Defendant's second request should not be granted.—Cox v. Livingston, 2 W. & S. 103; Godefroy v. Jay, 7 Bing. 413; 20 E. C. L. 187; Gilbert v. Williams, 8 Mass. 51; Lawall v. Groman, 180 Pa. 532.

EDWIN G. HUTCHINSON and ORIGEN G. MCCANDLESS for the defendant.

1. The statute runs from the time of the breach of duty.—Howell v. Young, 5 Barn. & Cress. 259; Wilcox v. Plummer, 29 U. S. 172; Moore v. Juvenal, 92 Pa. 484; Derrickson v. Cady, 7 Pa. 27; Rhines v. Evans, 66 Pa. 192; Hays v. Ewing, 70 Cal. 127.

2. The plaintiff must show that he could have recovered in the former action.—Quinn v. Van Pelt, 56 N. Y. 417; Brownfield v. Hughes, 128 Pa. 197; Cox v. Livingston, 2 W. & S. 103; Hallock v. Hastings, 13 Cal. 204: Gambert v. Hart, 44 Cal. 542.

STATEMENT OF THE CASE.

Charles Brady was run over by a railroad car of the X company on 3 May, 1890. He employed Augustus Small, an attorney, to bring suit against the company. The suit was brought. No declaration was ever filed and for this reason, under a rule of court, on 11 January, 1891, a judgment of non-suit was entered. Though aware of this non-suit, Small never informed Brady of it, but on the contrary, caused him to believe that the suit was pending and would be prepared for trial. Six years elapsed, from 3 May, '90, before Brady learned the fate of his action. He then consulted another attorney who advised him that it was now too late to sue again. The present action was then brought on August 12, 1897, against Small, for his negligence. Brady proved the accident, its consequences in his personal disablement, the pain and suffering, the inability to work for 3 years after the accident; his diminished earning power, his probable length of life, his physician's bill, and nursing expenses. He did not prove that the negligence of the X company was the cause of the injury. Small requested the court to charge (1) the statute of limitations bars recovery, (2) the measure of damages being what was lost by the alleged negligence of defendant in the action against the X company and there being no evidence that anything could have been recovered, in that action, there can be no recovery, not even of nominal damages.

OPINION OF COURT.

The points of the defendant require us to consider, in the first place, whether the statute of limitations bars recovery. The suit against the X company was begun on May 3, 1890. A judgment of non-suit was entered in this action on January 11, 1891, in consequence of the omission of Augustus Small, the attorney for the plaintiff, to file a declaration. This negligence, (if negligence it was) of Small, therefore, preceded January 11, 1891. The action was brought on Aug. 12, 1897. If the negligence for which the suit is brought, is that involved in the omission to file the declaration, the suit is *prima facie* barred.

It is suggested, however, that there was a continuous negligence of the defendant. He neglected his duty, it is said, not only when he gave the occasion for the judgment of non-suit, but, also, when he failed, subsequently to begin a new action, and this most recent negligence took place within the six years preceding the institution of the action. The cessation of the suit begun on May 3, 1890, did not cause

the loss of the damages which might have been recovered in it, for the same damages might have been recovered in a second. The neglect to preserve the first action, created a duty to commence a second, and the omission to commence a second was therefore a violation of such duty for which an action will lie. We do not think, however, that it is permissible to treat these duties as distinct, and the violations of them as independent causes of action. When an attorney collects money, it is his duty to pay it over at once to his client, but if he does not pay it over on the first week after its receipt, it is his duty to pay it over during the second week. If he does not pay it over in the second week, it is his duty to pay it over in the third week. There is a continuing duty to pay over, and there is a continuing negligence in not paying over. However, the statute of limitations bars an action against the attorney for not paying the money to his client, in six years from the time when he was first negligent or derelict. Campbell v. Boggs, 48 Pa. 524. When an attorney receives a claim to collect, he should in a reasonable time if necessary institute the action. So soon as the reasonable time runs by, he is guilty of negligence if he has not brought the suit. The failure to sue each successive year, month, week or day, is a fresh negligence, or a continuation of the former negligence. Nevertheless, the statute of limitations will preclude an action against the attorney for neglect to sue, when six years have run from the commencement of this negligence. Rhines v. Evans, 66 Pa. 192 *Cf.*; Stephens v. Downey, 53 Pa. 424. Analogously we think, the negligence of Augustus Small having been continuous from his suffering the action to lapse to his permitting a new action to be made useless by the bar of the statute, the statute barred this action as soon as six years ran from the time when actionable negligence was first consummated.

But, although Small was aware that the case had been non-suited he never informed Brady thereof, but, on the contrary caused him to believe that it was still pending and would be prepared for trial. Perhaps the failure of Small to inform Brady, had the latter sought no information from him, would not have prevented the running of the statute, Campbell v. Boggs, 48 Pa. 524. Brady was not indifferent, but inquiring of him, was deliberately misled. Until he knew of the fact, he was not apprised that he had any cause of action, and only in six years from his gaining this knowledge, would the statute bar the action. Rhines v. Evans, 66 Pa. 192; Campbell v. Boggs, 48 Pa. 524; Glenn v. Cuttle, 2 Gr. 273; McCoon v. Galbraith, 29 Pa. 293; Wickersham v. Lee, No. 1, 83 Pa. 416.

The second point requires us to consider whether there can be a recovery because of the plaintiff's failure to prove that had the first action been duly prosecuted, it would have resulted in a recovery. The right to recover in that action, depended on the negligence of the X company and upon the exemption from negligence of Charles Brady. But Brady, in this action, has furnished no evidence upon these questions. His present action is against Small, for the consequences of his negligence. This consequence is the loss of the damages which would have been recovered in the action against the X Co. Cox v. Livingston, 2 W. & S. 103. It is a general principle, that in such an action the negligence and its consequences must be proven by the plaintiff. Are we to assume that the negligent act of Small was the cause of an injurious consequence until he shows that it was not? And are we further to assume that the injurious consequence was the loss of the whole amount for which the suit was being prosecuted? Had the case been carried forward to trial the trial might have resulted in an adverse verdict and judgment. And the judgment might have proven uncollectible because of the insolvency of the defendant. We think it is incumbent on the plaintiff at least to show the probability of a recovery, and of the solvency of the defendant. In Staples v. Staples, 85 Va. 76, it is held that an attorney is liable only when his negligence is shown, and to the extent of the loss shown. He is not liable necessarily for the face of the claim. *Cf.* Hays v. Ewing, 70 Cal. 127. The plaintiff must show that his claim was a valid one, and that it was collectible, 3 Am. & Eng. Ency. 392. We are not convinced that Godefroy v. Jay, 7 Bing. 413, and Grayson v. Wilkinson, 5 Sm. & M. 268; 2 Sedgwick, Dam.

569, which seem to hold that the burden is on the attorney to show that there could not have been a recovery, may be accepted as expressing the law. It would be unreasonable to require Small to show how the accident happened. Nothing appears that reveals that he has ever been informed as to the witnesses on whom Brady relied to prove the features of the accident. As Brady has not shown the negligence of the X company, and therefore has not shown that had the suit against it been prosecuted, anything would have been recovered, we do not think the damages to which he is entitled in this action are such as would have compensated him for his injuries, had the X Company been the negligent cause of them.

Is Brady entitled to nominal damages?

For a breach of contract, the plaintiff has a right to nominal damages, because the breach independently of other damage, is actionable. If the attorney's omission to exercise care is to be regarded as a breach of the contract, nominal damages should be recoverable from him for it, and Godefroy v. Jay, 7 Bing. 413, and Cox v. Livingston, 2 W. & S. 103, both intimate that such damages may be recovered. *Vide* 1 Sedgwick, Damages, 148. If then, the failure to file the declaration was not justified by the neglect of the plaintiff to furnish Small with the necessary information, or by other facts, we think he is liable for nominal damages.

J. A. KOHL'S ESTATE.

Exceptions to Valuation by Appraisers.

MARLIN WOLF and PAUL J. SCHMIDT for plaintiff.

The court has the power to set appraisement aside if made below real value.—Sleeper v. Nicholson, 1 Phila. 348; Vandevort's Appeal, 43 Pa. 462. Appraisers must be well and truly without prejudice or partiality.—Leonard v. Cox, 64 Mo. 34; Reiff's Appeal, 2 Barr (Pa.) 257. Creditor may intervene and prevent confirmation of appraisement.—Grave's Estate, 134 Pa. 377.

A. FRANK JOHN and FRANCIS S. LAFFERTY for defendant.

Any creditor of the decedent may cite the executors to account.—Peter's Estate, 1 Phila. 581; Shafer's Appraisers, 46 Pa. 131. One of the appraisers being a nephew, can not set aside the appraisement.—Vandevort's Appeal, 43 Pa. 462; Macaltioner's Estate, 26 W. N. C. 296. Only strong, convincing proof can overcome value fixed by appraisers.—Fox's Estate, 5 Kulp 218; Drygalski's Estate, 6 Kulp 50. Two appraisers is all that is required.—2 Rhone O. C. Practice p. 363. Interest not allowed on running accounts before settlement.—Smith v. Velie, 60 N. Y. 106.

OPINION OF COURT.

J. Adam Kohl died testate July 16, 1893. A wife and three children survived him. He owned a farm of 125 acres, and two lots with houses erected on them. He appointed his son Zwingle Kohl and another executors. There were judgments against him at the time of his death amounting to $2400. The farm has been sold for $1800. On the widow's claim to $300 worth of property, an appraisement of the lots and houses was made. One of them was valued by the appraisers at $200 and the other at $100. The judgment creditors who cannot be paid from the proceeds of the farm except to the appraisement (1) because a nephew of the widow was one of the two appraisers; (2) because the lots were valued at too low a sum. On the part of the exceptants, five depositions were taken, in which the land appraised is estimated as worth from $600 to $800. Two witnesses for the widow agreed that the valuation of the appraisers was not too low.

The claim of the widow is based on the 5th section of the act of April 14, 1851, 1 P & L. 1524. The act of April 8, 1859, 1 P. L. 1528, directs that the same appraisers that appraise the "other personal estate" shall appraise the property taken by the widow. The widow may take land, or chattels, or both land and chattels. The same appraisers that appraise the general estate will appraise land that is elected by the widow. And we doubt not that when, as here, there is no personal estate, the appraisers of the real estate taken by the widow will be as in other cases two in number and will be appointed by the same authority.

(1) It would be more in harmony with the principle that one is not to be a judge of his own cause that the selection of persons to appraise the property to be taken by the widow should not be made by her. The law, however, has given the administrator the right to choose the appraisers even when, being the widow, she intends to claim the exempt property, *e. g.* Macal-

tioner's Estate, 26 W. N. C. 296. There is always room to suspect that the persons appointed by her will be at least friendly. Even the bias of relationship is not *per se* a disqualification. That one of the appraisers is her brother-in-law does not make him incompetent.—Vandevort's Appeal, 43 Pa. 462. A surety on the bond of the administratrix, who is the widow, may be an appraiser, although he is under an appreciable predisposition to be liberal towards the widow, and thus diminish the assets for which he may be liable. We cannot set aside this appraisement because one of the appraisers was a nephew of the widow.

(2) Is the appraisement inadequate? With respect to nothing are the judgments of men more apt to differ than the value of things, and few appraisements would stand if the courts yielded easily to the proofs of their inadequacy. The court cannot substitute its judgment for that of the appraisers unless the evidence clearly requires it.—Davenport's Estate, 4 Kulp 255; Dixon's Estate, 1 Kulp 141. While creditors, the fund for the payment of whose debts is diminished by the abstraction of the exempt property, Graves' Estate, 134 Pa. 377; Runyan's Appeal, 27 Pa. 121, Himes' Appeal, 94 Pa. 381, Williams' Estate, 141 Pa. 436; Baldy's Appeal, 40 Pa. 328, or a devisee, Kern's Appeal, 120 Pa. 523, may except to the appraisement because of its inadequacy, the burden is upon them to support their exceptions by the proof. O'Neill's Estate, 1 D. R. 392; Macaltioner's Estate, 26 W. N. C. 296. If the appraisement is set aside, the court cannot by itself or by an auditor make a substitute, Davis' Estate, 5 Kulp 162, Vandevort's Appeal, 43 Pa. 462, but would have to require the administrator to appoint other appraisers, whose appraisement might again be assailed. Is there then sufficient ground to overturn the appraisement in this case?

Five men think the property worth at least twice as much as the valuation placed on it. On the other hand, the two appraisers acted under oath and official responsibility, and their judgment is corroborated by two witnesses. In Drygalski's Estate, 6 Kulp 50, two witnesses appraised the property which at $250 had been set apart to the widow, at $700, while in Bobb's Estate, 1 Woodw. 317, five witnesses testified to a higher value than that assigned by the appraisers. Three witnesses supported the estimate of the appraisers. In neither was the appraisement set aside. Here a majority of one of the witnesses condemns the appraisement. We do not think, however, that we should set it aside.

The exceptions will be dismissed, and the appraisement confirmed. Runyan's Appeal, 27 Pa. 121; Sellers' Estate, 82 Pa. 153; Himes' Appeal, 94 Pa. 381.

COM. TO USE OF AMOS ATTOLE vs. ALEX. McCOY, et. al.

Sureties on administrator's bond—Guardian an improper person to bring an action on bond.

Assumpsit.

FRED C. MILLER and WM. M. FLANNIGAN for plaintiff, cited:

1. Failure on the part of the administrator to file his bond within thirty days, works a forfeiture of the bond.—Commonwealth v. Bryan, 8 S. & R. 127.
2. The executor of an administrator can not be charged as the representative of the original intestate.—Arlin v. Miller, 22 Ga. 330; Scott v. Fox 14 Ind. 388.
3. As to duty of the executor of an administrator see Smith v. Moore, 4 N. J. Eq. 485.

WALTER G. TREIBLY and W. J. HENRY for the defendant, cited:

1. The estate of a deceased administrator is not liable for the subsequent acts of his personal representatives.—Stephens' Appeal, 56 Pa. 409.
2. The guardian is not the proper person to bring the action.—Drenkle v. Shorman, 9 Watts 485; Commonwealth v. Barnitz, 9 Watts 257; Connelly's Appeal, 1 Grant 366.
3. Foster's failure to perform duty was in his capacity as guardian.—Warfield v. Beard, 13 Bush. (Ky.) 77.

OPINION OF COURT.

On Nov. 14, 1893, William Bowman died intestate. A widow Annie, and a child 3 years of age, named Frank, survived him. One month after Bowman's death, his widow received letters of administration on his estate. She entered into a bond for $6000, with Alex. McCoy and Peter Snagel as sureties. Nearly three months after the grant of letters, the administratrix died, not having filed inventory or account. She left a will in which she appointed her brother, Frank Foster, executor and guardian of her son Frank. After receiving letters testamentary, Foster stated an account

of Annie Bowman, as administratrix of William Bowman. This account showed a balance in his hands of the estate of William Bowman of $3287.88. On July 21, 1894, on the report of an auditor, the court decreed the payment of the balance to "an administrator *d. b. n.* of the estate of Wm. Bowman to be appointed." No such administrator has ever been appointed. Foster has wasted the fund and absconded. He has since been removed from the guardianship of Frank Bowman, and Amos Attole has been substituted. This action is on the bond of Annie Bowman, against her sureties.

Several objections are urged by the defendants to a recovery. (1) It is said that as Foster was both executor and guardian and was in the former capacity bound to pay over the fund to himself in the latter capacity, he will be presumed to have done so, and the sureties on his guardian's bond are liable only. This position neglects two important facts. (a) As guardian, Foster had no right to receive the money from himself as executor. If assets are unchanged, chattels, etc., the administrator *d. b. n.* has the right to receive them in specie, from his predecessor or from the executor or administrator of such predecessor.—Sibbs v. Phila. Saving Fund Society, 153 Pa. 345; Potts v. Smith, 3 R. 361; Allen v. Irwin, 1 S. & R. 549. Unconverted stock, or its value, may be recovered by the administrator *d. b. n.* from the administrator of the original administrator, although no account has been settled of the trust.—Lewis v. Ewing, 18 Pa. 313. When assets have been converted by the administrator, his executor may retain the proceeds until the settlement of the account, Slaymaker v. Farmers' National Bank, 103 Pa. 616; and if the administrator causes a deposit in bank in the name of the intestate, to be transferred to his account as administrator, the credit in his name is regarded as the proceeds of the conversion of the deposit previously standing in the intestate's name, and the administrator may retain it, as against the administrator *d. b. n.* until his account is settled.—Sibbs v. Phila. Saving Fund Society, 153 Pa. 345.

After the account of the administration by the original administrator has been settled, the balance therein shown to be due the estate is payable to the administrator *d. b. n.* Section 31, Act Feb. 24, 1834, 1 P. & L. 1493; Little v. Walton, 23 Pa. 164. In Croyell v. Blackfan, 1 Pittsb. 327, after a decree of distribution of a balance shown by an administrator's account to be in his hands, he was removed from office. The decision of the court below, that, on the subsequent appointment of an administrator *d. b. n.*, the balance was payable to him, rather than to the distributees designated in the decree, was affirmed by an equally divided Supreme Court. It is entirely clear that the money in the custody of Frank Foster, as executor, was payable, not to the guardian of his nephew, but to an administrator *d. b. n.* There is no presumption therefore that he paid it over to himself as guardian.

But (b) the court decreed that he should pay the balance to "the administrator *d. b. n.* to be appointed." It will not be gratuitously assumed that he paid it over to some one else. It appears then that there can be no recovery at the suit of the use-plaintiff.

(2) Against any recovery at all it is urged that there has been no default on the part of the administratrix, and that for this only, are she and her sureties liable. The liabilities of the sureties are to be determined by a fair interpretation of the bond. The bond (Sec. 24, Act March 15, 1832, 1 P. & L 1468) stipulates for (1) the exhibition in the register's office, within 30 days, of a true inventory; (2) well and truly administering the goods, chattels, and credits according to law; (3) making a just account within one year; (4) delivering and paying over "unto such person or persons as the said orphans' court, by their decree or sentence pursuant to law, shall limit and appoint" all the rest and residue of goods, chattels and credits remaining in the administrator's account, etc.

The first of these stipulations was violated. No inventory was filed in the life of Annie Bowman. The bond is therefore forfeited. Com. v. Bryan, 8 S. & R. 127. Judgment would have to be entered for the penalty, had the suit been brought by the proper party, and the damages assessed by the jury.

It does not appear that any damage was caused by the neglect to file the inventory. Nor is it evident that any devastavit was

committed by Mrs. Bowman. If she had converted the assets into money, and they were in her custody as money or were standing in her name in the bank, her executor had a right to receive them, and hold them, even as against an administrator *d. b. n.* Sibbs v. Phil. Savings Fund, 153 Pa. 345. If the administrator *d. b. n.* could not have prevented this, neither could the sureties on Mrs. Bowman's bond have prevented it. If assets of Bowman's estate remained unconverted at Annie Bowman's death, the right to them in specie passed to the administrator *d. b. n.* Her executor had no power to take them, and convert them, and administer them. Bowman's Appeal, 62 Pa. 166. We must infer then from the settlement of the account in the orphans' court, that it embraces only what was properly inserted in it, the moneys in the hands of the administratrix. There was no devastavit of the estate until after Annie Bowman's death, and, so far as appears, the sureties upon her bond could not have withdrawn the assets from the hands of her executor. How long time elapsed until he filed the account, does not appear.

Probably if one administrator is superseded by another on account of his dismissal, etc., he, and his sureties, would remain bound for the delivery of the assets to his successor. He would have custody of them, until he passed it over to the latter. But, it is difficult to see how an administratrix, who dies, is liable for the eloignment, or spoliation of the property by her executor or administrator. And, if she is not bound for such post-mortem eloignment or spoliation, her sureties cannot well be, for their responsibility is exactly commensurate with hers. "No action can be maintained on the bond of a deceased administrator for the assets of his intestate on hand and capable of identification at his death, or for waste and mismanagement after his death." 7 Am. & Eng. Encyc. 229, citing State v. Rottaken, 34 Ark. 144. It would be a hardship to make persons who become responsible for the acts of A., and who contemplate no wider liability, responsible also for the acts of B. Doubtless there ought to be some security against such acts as are here disclosed. If the sureties of the primary administrator are not liable, those of her executor or administrator should be. But, if neither of these classes is, there is a *casus omissus* in the law. It is not just by a lax construction of the bond to impose a liability on persons who did not voluntarily assume it. *Cf.* Stephens' Appeal, 56 Pa. 409.

For the first reason, that the action is not begun by the proper party, there can be no recovery.

SAMUEL RUSH vs. ADAM TAYLOR.

Retention of possession after sale—Fraud on creditors—Executions issued after sale.

Feigned issue.

ROBERT STUCKER and B. FRANK FENTON for John Lippincott.

1. Retention of possession is conclusive evidence of fraud on creditors.—Garman v. Cooper & Co., 72 Pa. 32; Miller v. Garman, 69 Pa. 134.

2. As the sale was fraudulent as to both creditors, Lippincott, having prior judgment and the earlier execution, should be paid first.—Welsh v. Murray, 4 Dallas 320; Appeal of John Jacobs, 107 Pa. 137; Watt v. Steel, 1 Pa. 386.

FRANK H. STRAUSS and HERMAN M. SYPHERD for Samuel Rush.

1. Sale was void—retention of possession.—Clow v. Woods, 5 S. & R. 275; Babt v. Clemson, 10 S. & R. 428; Young v. McClure, 2 W. & S. 150; McKibben v. Martin, 64 Pa. 352; Garman v. Cooper, 72 Pa. 32; Bentz v. Rockey, 69 Pa. 71.

2. Goods are not subject to levy when the party has notice of the bailment.—Billingsley v. White, 59 Pa. 464.

OPINION OF THE COURT.

Adam Taylor, carrying on a retail shoe business, made a bill of sale of all his stock and fixtures to one of his creditors, Charles Frome, in partial payment of the debt. The debt was $4,700, and the stock was accepted by Frome, at $4,500, credit to this extent being allowed to Taylor. Under an agreement with Frome, Taylor continued in the store, making sales to customers as before, and accounting for the proceeds to Frome. Nothing was done about the premises to indicate to others that the sale had occurred. Two weeks after this sale, John Lippincott obtained a judgment for $1,334, and although he was aware of the arrangement between Taylor and Frome, issued an execution and directed the sheriff to levy on the store goods. Samuel Rush also obtained a judgment for $3,997 and issued an execution, on the

day following that on which Lippincott issued execution. The sheriff sold the store goods on both of these writs, and the proceeds, $4,493, are in court for distribution. It has been agreed by the parties that Frome may take the proceeds, as the sale to him is valid against the executions. Rush and Lippincott allege that it was invalid as against them, but Rush contends that it was valid as to Lippincott, and invalid as to himself, and therefore that he should receive the proceeds.

The sale to Frome was not fraudulent. The debt of $4,700 existed. The goods were honestly appraised at $4,500. Taylor and Frome intended, to this extent, to satisfy the debt. No fraud upon others was contemplated, and the facts do not make fraud possible.

But, there is what is called fraud in law, and we are to inquire whether it tainted the sale. Fraud in law is not fraud. It is, rather, something whose existence, though it be not fraud, produces the same effects that fraud, if present, would produce. If fraud were present, it would make the sale voidable by the creditors injured by it. Are there any facts attending this sale, which, though it be free from fraud, impart to it the same voidableness by creditors?

The prior relation of debtor and creditor, between vendor and vendee, and the circumstance that the price paid was a portion of the existing debt, does not vitiate it. Pressel v. Bice, 142 Pa. 263; Garretson v. Hackenberg, 144 Pa. 107; Goddard v. Weil, 165 Pa. 419; 8 Am. & Eng. Encyc. 856.

The fact that the vendor is indebted, does not preclude his selling; nor that in addition, he is insolvent. 8 Am. & Eng. Encyc. 856. The law has given to creditors a means of preventing sales becoming effectual as against them. They may acquire what is known as a lien. But the debt itself is not a lien. Nor is the judgment which may result from the action founded upon the debt a lien upon the debtor's chattels. The sale to Frome, however, was made before Lippincott's and Rush's judgments were recovered.

Pennsylvania is one of the few states that still adhere to the principle that the sale of a chattel shall be void as to a creditor of the vendor, who chooses to insist that it shall be void if the chattel is not at once delivered to the vendee. Tiedeman, Sales 113. For some time there has been a reluctance to apply this principle, and numerous qualifications and exceptions have been introduced. McGuire v. James, 143 Pa. 521; Goddard v. Weil, 165 Pa. 419; Crawford v. Dairs, 99 Pa. 576. We think however, that the facts disclosed in the case before us, do not except it. No change of signs was made; Taylor continued in the store making sales as before for two weeks. There was nothing to suggest to the world that the proprietorship of the stock of goods had passed to Frome, nor do we see anything in the circumstances to show the unfeasibility of the adoption of some tokens or badges of the sale.

The sale to Frome, though honest, was a secret sale. What effect would this secrecy produce, as respects Rush and Lippincott? Their debts had probably been contracted before the sale. Neither it, nor the manner of it, therefore influenced them in giving credit. The secrecy of the sale could not injure them except by preventing such steps to collect their debts, as a knowledge of the sale would have probably led them to adopt. This possible injury does not vitiate the sale. No injury which the law appreciates takes place until the creditor incurs expense in issuing an execution. If the sale remains secret until then, it is voidable by the creditor: if it is made public before then, a later execution will not entitle the creditors to annul it. The object of the requirement that though the sale is honest, it shall be accompanied by a change of the possession of the thing sold, is to advise creditors and purchasers whose policies may be adopted in ignorance of it. In ignorance of the sale, one may buy the chattel still in the vendor's possession from him. As to him the vendee cannot claim it. In ignorance of the sale, a creditor may issue an execution and direct a levy upon the chattel. As to him, the vendee cannot claim it. The change of possession then, is a means of notice; *a* means; not the only means; not even the best means. When other, equally good means of notice exist, change of possession is not indispensable. When A conveys land to B, and again to C, C's title will be good, unless B has made it conveniently possible for C to know of his

purchase, either by taking possession of the land, or, by recording his deed, or by express information. C's knowledge of the previous conveyance, is the object to be accomplished. If he has it without recording the deed and without taking possession, these are unnecessary. If B has taken possession, and thus invites C to apply to him for information, neither the recording nor actual notice is necessary. The same principle applies to a sale of a chattel. Frome's possession would have been a means of knowledge to Lippincott and to Taylor. But, knowledge is better than the means of knowledge.

Before Lippincott issued his execution, he knew of the sale to Frome. As that sale was honest, the only thing that could impair it would have been his want of the means of conveniently knowing it. But, he knew it. He needed therefore no other means. When he issued his execution and directed the sheriff to levy on these goods, he attempted to deprive Frome of them. To allow him to succeed would be to assist him to frustrate the policy of the law which allows a creditor to obtain a preference over other creditors, by obtaining payment of the debt, and would be to say that such a preference can be obtained by a *fi fa* but cannot be obtained by a sale, even though it be known to the issuer of the *fi fa*. The sale to Frome is clearly good as against Lippincott.

Lippincott has no right to the fund as against Frome. But, he has the earlier execution, and for this reason, his right to the money is superior to that of Rush. Only in one point is Rush more advantageously situated. He was ignorant of the sale. After some reflection we have decided that the principle found in 1 Liens, 297, and 3 Liens, 365, that when claim *a* is superior to *b*, and *b* is superior to *c*, *a*, though inferior to *c* alone, will be superior to both *b* and *c*, is not applicable. The claim of Rush must be paid from the money in court, and the residue awarded to Frome.

JAMES BROOKS vs. WILLIAM BROWN.

Evidence—Damages—Neglect of an attorney.

Trespass.

Motion to take off non-suit.

JONATHAN R. SMITH, BLAKE IRVIN and ROBERT H. BARKER for the plaintiff.

1. The plaintiff is not required to show that he could have recovered against Wilcox and company.—Godfroy v. Jay, 7 Bing. 187.

2. Even if no actual damages are shown nominal damages may be recovered.—Cox v. Livingston, 2 W. & S. 103.

3. The question of negligence should have been submitted to the jury.— Berg v. Abbott, 83 Pa. 177; Godfroy v. Dalton, 6 Bing. 460; Rights, Remedies, and Practice, 1 Vol. 303; Dearborn v. Dearborn, 15 Mass. 315: Bastian v. Phila. 180 Pa. 227.

ROBERT W. IRVING, HUGH K. MILLER and ALFRED J. FEIGHT for the defendant.

The plaintiff cannot recover damages from the defendant, his attorney, for negligence in the trial of a cause, unless he also proves that, but for the defendant's neglect, the action could have been successfully maintained.—Brownfield v. Hughes, 128 Pa. 194; Ballard v. New York, etc. R. Co., 126 Pa. 141; Gambert v. Hart, 44 Cal. 542; Hastings v. Halleck, 13 Cal. 204.

A full statement of the facts appears in the opinion of the court.

OPINION OF THE COURT.

From the testimony offered on behalf of the plaintiff, James Brooks, it appeared that he was employed in the mill of Wilcox & Co. in the year 1889; that while so employed he was injured by one of the machines used by the said Wilcox and Co., and the amputation of his right arm rendered necessary in consequence thereof. Believing that the accident was due to the negligence of the owners in not providing reasonable and proper safeguards for their machinery, Brooks employed William Brown, the defendant, who was an attorney-at-law, to bring an action against Wilcox and Co. for the recovery of the damages he had sustained, in the Common Pleas of Dauphin County. Brown filed a *praecipe* on the 10th day of August, 1889, and the service of a summons was had on the defendants. No statement of the cause of action was filed. The rules of the Court provided that if no statement be filed for six months after the institution of a suit, that a judgment of *non pros* may be entered on motion of the defendant. This was done on behalf of Wilcox & Co. on the first day of March, 1890. The plaintiff had no knowledge of it until January 1, 1896—more than six years had then elapsed since his right of action had accrued against

Wilcox & Co. Upon the presentation of these proofs the plaintiff rested his case.

The defendant then moved the court to enter a compulsory non-suit, on the ground that the plaintiff was not entitled to recover damages from the defendant, because he had not shown that he would have been entitled to recover from Wilcox & Co.

The court being of the opinion that the burden was on the plaintiff as contended for by the defendant, entered a non-suit and the motion before us is to take off the same, on the ground that the action of the court was erroneous.

The plaintiff contends that in any event, he was under the evidence entitled to recover nominal damages from the defendant. That, in considering the present motion it is immaterial whether the burden was on the plaintiff, (in order to entitle him to substantial damages), to show that there might have been a recovery by him against Wilcox & Co. or not. It is insisted that there was evidence of a neglect or breach of duty on part of Brown, and that this established a cause of action and it was the duty of the court to have submitted the case to the jury.

With this view we now coincide.—An examination of adjudicated cases clearly establishes the Law of Pennsylvania to be, that when an attorney has been negligent, to the detriment of his client, "the cause of action is the breach of duty and not the damages sustained which are only an incident." Lavall v. Groman, 180 P. S. 540. Here there was a failure to secure a loan by a first lien as stipulated. The time for payment of the loan, however, had not arrived when the action was brought against the attorney.

In Miller v. Wilson, 24 P. S. 114, there had been a failure on part of an attorney to record a mortgage until the property was otherwise encumbered. The Court says "It was argued that the plaintiff had not as yet suffered any loss from the defendant's violation of duty. But we hold it clear law that the attorney subjected himself to an immediate action. The right of action in such case accrues at the time when the contract or duty of the defendant is violated."

"The breach of duty and not the consequential damage is the cause of action."—Moore v. Juvenal, 92 P. S. 484. Our duty in the case is plain and imperative to sustain the plaintiff's motion.

And now, 17th January, 1897, it is ordered that the compulsory non-suit entered be taken off.

JOSEPH MOORE vs. ABRAM KELLOGG.

Adverse possession—Vendor and vendee—Boundaries.

Trespass.

THOMAS B. PEPPER and CHAS. G. MOYER for the plaintiff.

Continued possession of the vendor is not adverse to his vendee until some unequivocal, hostile act is brought to the knowledge of the owner.—Ingles v. Ingles, 150 Pa. 397; Connor v. Bell, 152 Pa. 444; Olwine v. Holman, 23 Pa. 279; Buckholder v. Sigler, 7 W. & S. 154; Jackson v. Burton, 1 Wend. 341; Doe v. Butler, 3 Wend. 150; Cadwalader v. App, 81 Pa. 194; Bannon v. Brandon, 34 Pa. 263; Zeller's Lessee v. Eckart, 4 How. 288; Main Tp. School v. Reichard, 142 Pa. 226; Tamm v. Kellogg, 49 Mo. 118.

SAMUEL B. HARE and WALTER B. FREED for the defendant.

1. The boundaries actually fixed on the land are the true boundaries.—Hall v. Powel, 4 S. & R. 456; Yoder v. Fleming, 2 Yeates 311; Tamm v. Kellogg, 49 Mo. 118; Burrell v. Burrell, 11 Mass. 293; Potts v. Everhart, 26 Pa. 493.

2. Open, notorious, and uninterrupted possession up to a boundary line, although not the true one, for the statutory period, cultivating the land, and taking the profits, will give a good title.—Tamm v. Kellogg, *supra*; Dem. ex Dem Saxton *et. al.* v. Hunt, 20 N. J. L. 487; Cooper v. Smith, 9 S. & R. 25; Hole v. Rittenhouse, 25 Pa. 491; Susquehanna Coal Co. v. Quick, 61 Pa. 328.

STATEMENT OF THE CASE.

In 1867 Henry Storthing owned a tract of land in the borough of X 150 feet wide on the main street and 140 feet deep. On the lot stood a house 22 feet wide, the west side of which was 30 feet from the west line of the lot. Fifty-two feet east of the eastern side of the house was a paling fence, running at right angles with the main street, and parallel with the side of the house. The ground between this fence and the western side of the lot was used as a yard for the house, being in part sodded, in part planted with flowers, and in part paths. The remainder of the lot was planted with vegetables. On August 7,

1867, Storthing conveyed a portion of this lot to Joseph Moore. The deed described the land conveyed as bounded by a line running from the eastern corner along Main St. for the space of 68 feet by lines running perpendicular to this, from both termini, 140 feet, and by a line parallel to the first, 68 feet long. Moore took possession of the part between the paling fence and the eastern line, cultivating it for a series of years. In 1887 he erected a house on it 30 feet wide, the eastern end being 10 feet from the eastern line of the lot. Five years after this, Moore removed the paling fence to a line 68 feet west of the eastern line of the lot. Meantime, Storthing had conveyed the other portion of the lot to Kellogg. Kellogg, on the day following Moore's removal of the fence, set it back to its former position. After the conveyance by Storthing, he and Kellogg continued to use the land between the paling fence and the western line, with the residue of the western part of the lot, as before, as a yard and garden. Moore having brought this action of trespass *q. c. f.* and obtained a verdict, we are asked to award a new trial for errors of law.

OPINION OF THE COURT.

Storthing's lot was 150 feet wide. A paling fence ran across it perpendicular to Main street, at the distance of 46 feet from and parallel with the eastern boundary of the lot. His deed of Aug. 7, 1867, purported to convey so much of this land as was inclosed by a line parallel with the eastern side, at the distance therefrom of 68 feet, and that side. The tract thus conveyed, therefore, embraced 22 feet west of the fence. Had the fence been described in the deed as a boundary, the grant would have been confined to the land to the east of it, despite the circumstance that the distance of 68 feet would have gone 22 feet beyond it. But, the fence was not called for as a limit. Hence, there being nothing to control the distance, the grantee, Moore, became the owner of the eastern part of the tract, of a width of 68 feet. Breneiser v. Davis, 134 Pa. 1.

Moore then, becoming the owner on Aug. 7, 1867, of the land on which the fence stood, had a right in 1892 to remove it to the western margin of that land, unless by some act, he had ceased at that day to be the owner. He had not conveyed it. The cessation of his ownership is suggested to have occurred on account of the continued possession of the western part of the lot up to the fence, by the grantor Storthing and his alienee Kellogg, for a period exceeding 21 years. A house stood on this western portion, and the ground between the fence and the western boundary, had been prior to the conveyance and was at the time thereof used in connection with the house as a lawn and garden. It was in part sodded with grass, in part planted with flowers and vegetables and in part laid out into paths. The house and the lawn and the garden were thus in the possession of Storthing and his grantee Kellogg for the 25 years intervening between the conveyance to Moore and his removal of the fence. But, was this possession adverse? A vendor may remain in possession of all or some of the land conveyed adversely to his vendee and thus destroy the vendee's title. Limitations, 70, but the mere retention of possession will not be deemed hostile. "The retention of the possession by the grantor will be regarded as provisional, and in subordination to the will of the grantee, until the former commits some act of hostility which plainly indicates to the latter the intention to deny his right." Ibid 71; Kern v. Howell, 180 Pa. 315; Ingles v. Ingles, 150 Pa. 397; Conner v. Bell, 152 Pa. 444; Olwine v. Holman, 23 Pa. 279; Buckholder v. Sigler, 7 W. & S. 154. In Conner v. Bell, *supra*, A had sold from a larger tract, a piece of land but continued to occupy the residue of the land and, in conjunction with it, a portion of the piece conveyed four feet wide at one end, and tapering to a point, up to a fence. This occupancy was after the conveyance what it had been before. It was not adverse. "If," says McCollum, J., quoting from Olwine v. Holman, *supra*, "he (the grantor) wishes to change the character of the possession, he must manifest his intention by some act of hostility to the title of his vendee, plainly indicating to the latter the intention to deny his right, and to hold adversely to it."

The date of the conveyance from Storthing to Kellogg is not ascertained. That conveyance granted to Kellogg only the portion of the tract not previously conveyed to Moore. Such conveyance was

perhaps an implied disclaimer by Storthing and by Kellogg of any part of the land previously conveyed to Moore. We cannot regard the continuance of the possession by Kellogg as hostile. But even if the possession of Kellogg was hostile, it does not appear that it had continued for 21 years, when the trespass complained of by Moore was committed, or when the verdict was rendered. He who seeks to defeat a right by adverse possession, must show its existence for the statutory period.

No error was therefore committed by the court in the trial of the action. The rule for a new trial is discharged, and judgment is directed to be entered upon the verdict.

CHARLES CREELIN vs. JAMES ARNOLD.

Lessor and lessee—Illegality of contract—Damages—Evidence.

Assumpsit.

G. FRED. VOWINKLE and J. KIRK BOSLER for plaintiff.

Where a contract is capable of two constructions, the one making it valid, and the other, void, it is clear law that the first should be adopted. Lorrilard v. Clyde, *et. al.* 86 N. Y. 387; Wharton on Contracts, pg. 338-9. The sale of liquors by a licensed dealer is a lawful business and a loan made to carry on such a business is not against public policy. Brewing Co. v. Booth, 162 Pa. 100.

PHILIP E. RADLE and GEORGE W. AUBREY for defendant.

Plaintiff was obliged to have license. Act June 9, 1891, P. L. 257. It is illegal to carry on distilling or brewing without license. Act April 10, 1849, P. L. 570. The purpose being illegal, the lease was void. Ernst v. Crosby, 140 N. Y. 365. If any part of an indivisible promise is illegal, the whole is illegal. Clark on Contracts, p. 481-492; Filson's Trustees v. Ames, 5 Barr 452. A landlord is not liable for work done by mechanic at tenant's request.—FORUM, Vol. I, p. 76; Moore v. Weber, 71 Pa. 429.

OPINION OF THE COURT.

On Nov. 15, 1893, Arnold, by a writing, "for the consideration of $20 per month, lets or rents to Creelin from Nov. 15, 1893, to April 1, 1895, a house known as house No. 2 of Arnold's property, to be used as a bottling shop. It is further agreed that Creelin shall hold and possess all the fixtures, appliances and utensils and the good will of the said bottling shop until April 1, 1895. It is further agreed, by the party of the first part, Arnold, that Creelin may and can dispose of or sell to responsible parties, the fixtures and good will of said bottling shop." A bottler's license had been taken out by Arnold, in January 1893, but it was agreed between him and Creelin that the latter would not insist on a transfer of it to him. Creelin took immediate possession of the shop, which he retained until February 15, 1894, when Arnold made a lease of the shop to Frank Tully, selling to him the good will and fixtures for $150. Creelin had spent $60 in supplying the house with water pipes and drainage. This assumpsit is brought by Creelin to recover as damages for the breach of the terms of the contract by Arnold, the $60 thus expended and the $150, the price of the good will and fixtures received by Arnold.

So far as appears, the lease, if it had not been accompanied by the agreement that Arnold's license should not be transferred to Creelin, would have been valid. It gave to Creelin the right of possession until April 1, 1895. The dispossession of Creelin on February 15, 1894, by Arnold and his new lessee, Tully, was therefore wrongful. He might have regained the possession by the action of ejectment. But, a tenant, when he has been evicted, is not limited to the ejectment. He may, if he chooses, refrain from all steps to re-occupy the premises, and he may sue the evicting landlord for damages.—Trull v. Granger, 8 N. Y. 115.

Creelin's right to maintain an action upon the lease is contested because of his agreement with Arnold, at the execution of the lease, not to require a transfer of the license. A sale of liquors without a license is illegal; and the license granted in January of 1893, to Arnold, was an authority to *him*, but not to the house, to sell. His successor in the possession of the premises acquired no right to prosecute the business in virtue of that license, unless he was substituted for Arnold in respect to it, *i. e.* unless it was transferred to such successor by the court of quarter sessions.—Section 7, Act April 20, 1858, 1 P. & L. 2722; Blumenthal's Petition, 125 Pa. 412. If Creelin and Arnold intended that the former should sell liquors before he obtained a license, they intended an unlawful act and as this intention accompanied the formation

of the lease, which was the means by which it was to be carried into effect, the lease itself was infected with illegality. No right of action can spring, directly, *e. g.* for the rent, or indirectly, *e. g.* upon the the covenant for quiet enjoyment, broken by an eviction, from it. Clark, Contracts, 392, *et passim.*

But, an intention to commit a crime is not to be lightly imputed to Creelin. It appears simply that Creelin was not to insist on a transfer of Arnold's license to him. But, was he to sell liquor without a license? Or did he accept the lease in November, with the object of not commencing business on the premises until, seven or eight weeks later, he obtained a license from the court? We are unable to infer from the not insisting on a transfer of Arnold's licence, the purpose to sell without a license. The facts warrant a suspicion of the existence of such a purpose; nothing more. If Creelin in fact sold liquors in the interval between November 15th, and the license court, this would have strengthened the suspicion that such sales were in the contemplation of the parties. But, that such sales were made is purely conjectural. We find nothing, therefore, to prevent the enforcement of the contract of lease.

Creelin has been evicted by the joint act of Arnold his lessor, and Tully. The measure of damages for such eviction, would be what, as Sharswood, J., says, the term "would be worth to an assignee who would assume the payment of the rent," Dyer v. Wightman, 66 Pa. 425; the difference between the value of the lease, and the rent to be paid; Taylor, Landlord Tenant, 265; (Ed. of 1879); Mack v. Patchin, 42 N. Y. 167; Trull v. Granger, 8 N. Y. 115. *Cf.* Duffield v. Rosenzweig, 144 Pa. 520; Pittsburg, etc., R. R. v. Jones, 111 Pa. 204.

May Creelin then recover the $60 expended by him for pipes and drainage? Did this expenditure enhance the value of the premises, by making them more commodious, and healthy? We know not. It may have been useless; or it may have added inappreciably to the value of the term. It is the term of which the eviction deprived Creelin. Its value he may recover, but nothing else. The money spent on the premises is no measure of the value of the lease thereof.

Can he recover the $150, the price obtained by Arnold for the good will and fixtures? These had been sold to Creelin, at the making of the lease and Arnold, apparently agreed to permit any responsible party to whom Creelin might in turn sell them, to succeed him as tenant of the premises. The good will is, we think, practically inseparable from the lease, an incident which made the lease more valuable. We do not think its value as an independent item can be recovered. In estimating the value of the lease, in excess of the rental, the effect on it of the annexation of the good will may be considered. In no other way can compensation be allowed for its loss. *Cf.* Pittsburg, etc. R. R. v. Jones 111 Pa. 204. The fixtures are personal property. They were sold to Creelin and thus became his. The subsequent sale of them by Arnold, was a trespass. Creelin is entitled to recover their value. The motion for a non-suit is therefore overruled.

T. M. KNOX & CO. vs. JOHN JOHNSON, et. al. TRADING AS JOHNSON MERCANTILE COMPANY, LIMITED.

Joint stock associations, act of June 2, 1874, May 1, 1876, etc.—Description of property contributed—Liability as general partners.

GABRIEL H. MOYER and MERKEL LANDIS for the plaintiff.

1. When property has not been contributed, described, scheduled, and valued as the act of May 1, 1876, directs, there is no payment of the capital; and the members are liable as general partners.—Haslet *et. al.* v. Kent *et. al.*, 160 Pa. 85; Maloney v. Bruce, 94 Pa. 249; Vanhorn v. Corcoran, 127 Pa. 255; Shetle v. Strong, 128 Pa. 315.

2. There must be a *strict* compliance with the act.—Eliot v. Himrod, 108 Pa. 569; Hite N. Gas Co.'s Appeal, 118 Pa. 436; Hill v. Stetler, 127 Pa. 145. A contribution of real estate, without any reference whatever to an existing lien, is defective.—Bank v. Creveling, Miles & Co., 177 Pa. 270.

RUEL U. CAPWELL and ROBT. P. STEWART for the defendant.

1. Only a *substantial* compliance with the act is necessary.—Lander v. Logan, 123 Pa. 34: Laflin & Rand Co. v. Steytler, 146 Pa. 434; Rehfuss v. Moore, 134 Pa. 462; Cock v. Bailey, 146 Pa. 328.

2. The property contributed was accessible to creditors.—Stahle v. Spohn, 8 S. &

R. 316; Bradley v. O'Donnell, 32 Pa. 279. An interest in lands held under articles of agreement, on which nothing has been paid, is a valid contribution although these facts have not been mentioned.—Cock v. Bailey, *supra*.

On January 15, 1891, the "Johnson Mercantile Company, Limited" was organized under the act of June 2, 1874, P. L. 271; 2 P. & L. 3402, and its supplements. The statement recorded in the office of the recorder of deeds gives the names of the partners, and describes the character of the business to be done. The capital contributed is thus described:

Frank Clark,		$8,000 cash.
Thomas Jones,		8,000 cash.
John Johnson, Machines (naming them), flour, feed, etc.,	$2,000	
land, (described by meters and bounds),	$5,600	$7,600 cash.

The land contributed by Johnson, he held under an article of agreement, under which the vendor engaged to convey it, as soon as the purchase money should be fully paid. The three partners estimated the land as worth $6,800. They deducted from this sum the unpaid purchase money, $1,200, crediting Johnson with the balance. In making the valuation, they acted with fairness, and the land is now worth $8,000. In June 1895, the association made an assignment for the benefit of creditors. A dividend of 41 per cent. on all claims was paid out of the proceeds of the estate thus assigned. T. M. Knox & Co. bring this action against the defendants as general partners, for the remaining 59 per cent. *i. e.* for $279.03.

In the organization of a partnership association it is necessary that a "statement" be made, acknowledged, and recorded, containing the full names of the partners, "the amount of capital, of said association, subscribed for by each," the total amount of capital and when and how to be paid; the character of the business to be conducted, and the location of the same, the name of the association, with the word *limited* added thereto, the contemplated duration of the association, and the names of the officers. An observance of these requirements is a precondition to the exemption of the members from the ordinary liability of partners. Vanhorn v. Corcoran, 127 Pa. 255; Haslet v. Kent, 160 Pa. 85; Fearing v. Carroll, 151 Pa. 79; Electric Co. v. Weber, 172 Pa. 635; First National Bank of Danville v. Creveling, 177 Pa. 270.

Under the act of 1874, the contributions of the partners had to be made in cash. Its supplement, of May 1, 1876, P. L. 89; 2 P. & L. 3408, authorizes contributions in "real or personal estate, mines or other property, at a valuation to be approved by all the members subscribing to the capital of such association." Apparently any interest in land can be contributed; leaseholds; Cock v. Bailey, 146 Pa. 328; equitable estates under contracts of purchase in fee; Cock v. Bailey, 146 Pa. 328; legal estates, charged with liens, Ibid: Laflin & Rand Co., v. Steytler, 146 Pa. 434. Personalty, of various forms may be contributed, *e. g.*, machines, tools, implements, Laflin & Rand Co. v. Steytler, 146 Pa. 434; possibly bills receivable and contracts under which moneys will be earned by the association. *Cf.* Gearing v. Carroll, 151 Pa. 79; Maloney v. Bruce, 94 Pa. 249. Whatever the property, however, it must be so well described in the statement that persons dealing with the association may be able to identify it, and if they choose estimate its value. Otherwise, the partners will be personally liable for debts; Gearing v. Carroll, 151 Pa. 79; Vanhorn v. Corcoran, 127 Pa. 255; Haslet v. Kent, 160 Pa. 85; First National Bank of Danville v. Creveling, 177 Pa. 270.

As the object of a description of the thing is to enable creditors to appraise its value, and determine, in view of all the assets of the association, whether they can safely give it credit, it is manifestly necessary not only to describe the thing, but to disclose the nature of the interest in it, which, the contributing partner possesses. If a partner had an undivided one-third in a farm, worth $24,000, a description of the land with an appraisement of it at $24,000, but without mention of the fractional estate of the partner would be misleading. The same would be true if the partner held only a leasehold for 30 years, or a life estate on the land. Nor is there a material difference, if the partner owns a tract of land subject to a mortgage, or has an equitable interest in land under a contract of purchase, which he cannot ripen into a legal estate, without paying a

sum of money, and which may be extinquished by the vendor, for default in paying the money. In First National Bank of Danville v. Creveling, 177 Pa. 270, a tract of land was bought by A, B and C for $20,000, payable in quarterly instalments of $1,250, and secured by a mortgage. Only $1,250 of this money had been paid, when the limited partnership was formed. The statement described the land, and put a valuation on it—excessive apparently—of $75,000. It did not mention the mortgage; and the valuation was, apparently, that of the land, and not of the interest therein, of A, B and C. The statement was adjudged bad because it did not disclose the existence of the mortgage.

Of the good faith of Johnson and his copartners, in estimating the value of his contribution, and describing it in the statement, there need be no doubt. They honestly estimated the land as worth $6,800. They subtracted therefrom $1,200, the unpaid purchase money. But, they described the interest of Johnson in such a way that creditors would understand it to be an unencumbered fee simple. When they inspected the land, and made a valuation of it, they could assume that he had a full right thereon. They would put their own appraisal upon it. They might consider it worth $5,000, or $5,600, or $6,000, or $7,000. But, if they might be misinformed as to what the interest of Johnson really was, it is plain that this deception might influence them in giving credit. Perhaps it would have been enough, as in Cock v. Bailey, 146 Pa. 328, to have said "subject to such liens as may be against the same" without indicating definitely what the liens were. In the case just cited Paxson, J., says "That some of it (*i. e.* the land) was a mere equity of redemption could have misled no one, as it was so described in the articles." The creditors of Johnson & Co. had reason to suppose that the whole value of the Johnson land, whatever it was, was pledged for the payment of their and others' debts. The statement misled them. Johnson *et. al.* are therefore personally liable to the plaintiffs.

Judgment for the plaintiffs.

SARAH HESS vs. PASSENGER R. R. CO.

Defendant's negligence must cause accident—Dogs are property.

FRANK T. MORROW and FRANK B. SELLERS, JR., for plaintiff.

I. Slight doubt in favor of plaintiff is sufficient to take case to jury.—Bucklin v. Davidson, 155 Pa. 362; Fisher v. Monongahela R. R. Co., 131 Pa. 292.

II. (a) Violation city ordinance evidence of negligence.—Pa. R. R. Co. v. James and wife, 81½ Pa. 194; Hanlon v. S. Boston R. R. Co., 129 Mass. 310. (b) Negligence question for jury.—Pa. R. R. Co. v. Long and wife, 75 Pa 257; Pa. R. R. Co. v. Lewis, 79 Pa. 33.

III. Plaintiff not negligent. Dogs at large.—Goodman v. Gay, 15 Pa. 189.

IV. Trespass no defense to injury.—State v. Rivers, 90 N. C. 738; Richardson v. Carr, 1 Harr (Del) 142.

V. Dog is property.—Commonwealth v. Depuy, 148 Pa. 201; Heisrodt v. Hackett, 34 Mich. 283.

RALPH H. LIGHT and GEORGE W. COLES cited the following cases to substantiate the respective points presented for defendant.

1.—Moss *et. al.* v. Traction Co., 180 Pa. 389; Conner v. Traction Co., 173 Pa. 602; Lane v. Atlantic Co., 111 Mass. 136; Linderman v. Penna. R. R. Co., 165 Pa. 118; Greiner v. P. R. R. Co., 175 Pa. 1; Conusky v. Connellsville Street Ry. Co., 4 Sup. Ct. Rep. 631.

2.—Rogers v. Lee, 140 Pa. 475; Marshall v. R. R. Co., 132 Pa. 226; 30 Pittsb. Journal, p. 51; Gill v. R. R. Co., 59 Pa. 129.

3.—Furniss v. Richards, Dist. Rep. 1895, p. 784.

4.—Glennin v. Wisson, 18 W. N. C. 7; McIlvane v. Lantz, 4 Outerbridge, 586; P. & R. R. R. Co. v. Schertle, 97 Pa. 450.

STATEMENT OF THE CASE.

Sarah Hess, on August 7, 1897, owned a dog, for which 2 weeks before she had paid $150, and for which she had been offered $175 the day following her purchase of him. The dog was playing and gamboling with another dog, as the car of the defendant was approaching, leaped up and playfully ran across the tracks. While he was between the tracks, he was struck by the car, and its wheels ran over his body severing it. The car was running at the rate of 14 miles per hour at the moment of the collision. The ordinance of the borough allowed 6 miles per hour only. The street in which the accident occurred was much frequented; foot passengers and vehicles crossed it often, and there was also much

longitudinal locomotion on it with horse and vehicle.

Defendant asks the court to grant a non-suit, (1) no negligence of defendant shown; (2) the dog was a trespasser; (3) the dog is not such property that damages for its death can be recovered; (4) plaintiff was negligent.

1. The only negligence of the defendant suggested, is the alleged excessiveness of the speed with which its car was running, when it ran over the plaintiff's dog. The car was then moving at the rate of 14 miles per hour. The street was much frequented. The borough ordinance forbade a greater rate than six miles an hour. We have so lately considered the pertinency of ordinances, in questions of negligence, that it is useless now to spend time in further discussion of it. The jury are aware of the aptness of a speed of 14 miles per hour, to produce accidents, and their determination that the maintenance of such a velocity was negligent would not be unreasonable.

But, the negligence of the defendant is not actionable unless it caused the accident. The accident was the collision between the car and the dog. The dog was not a passenger calculating his chances o crossing the track, and foiled in the attempt to cross by the undue speed of the car. He was gamboling in the roadway. Whether, had the car been going at the rate of six miles per hour, he would have been struck, or if struck, killed, we see nothing in the cause to indicate. How then can the speed of the car be said to have caused his death? It is not alleged that the motorman was inattentive; that he did not adopt due precautions to avoid the dog. The dog, unexpectedly, as it appears, when the car was very near him, leaped up and ran across the track. His doing so was not caused by the motion of the car. Whether, doing so, he would nevertheless not have been struck, *i. e.* would have got over the track, had the car been running with a reasonable swiftness, is purely a matter of speculation.

2. We think it unnecessary to determine whether the dog was or was not a trespasser.

3. The Act of May 15, 1889, P. & L. 222, Commonwealth v. Depuy, 148 Pa. 201, and the 7th section of the Act of May 25, 1893, P. L. 136, enact that all dogs shall be personal property, and shall be subjects of larceny. At common law the dog was not the subject of larceny. 4 Bl. Com. 235; Findlay v. Bear, 8 S. & R. 571; Blair v. Forehand, 100 Mass. 136; but it did not follow that he was not property, for whose injury or eloignment a civil remedy would lie. Wright v. Ramscot, 1 Saund. 84; Uhlein v. Cromack, 109 Mass. 273; 1 Am. & Eng. Encyc. 347; 4 Bl. Com. 235; Heisrodt v. Hocker, 34 Mich. 283. For this particular dog, the plaintiff paid $150, and she was offered for him $175. He was not only property, but he had a considerable pecuniary value, more than has the ordinary horse. It hardly bears discussion therefore that for depriving his owner of him, by negligent killing, the party guilty of the negligence would be answerable.

4. If the plaintiff's negligence in any way contributed to the killing of her dog, she could not recover his value of the defendant. But, her negligence, as well as that of the defendant, must be proven. Does the mere presence of the dog on the street prove it? Leaving a horse without control, on the street, is presumptive negligence, Dickson v. McCoy, 39 N. Y. 400; Gannon v. Wilson, 18 W. N. C. 7. The horse is a large animal. He is not as intelligent, nor as intimate an associate and friend of man, as the dog; nor is it the habit of society to tolerate his running at large, as they permit and tolerate the freedom of the dog. It cannot be said to be *per se* negligence, for the plaintiff to have deliberately allowed her dog to be upon the street. But, there is no evidence of such deliberate permission. For aught that appears, the dog may have been on the street—as, in several cases before the courts of this state, very young children have been on them—without fault on the part of owner or parent. We are not prepared to adopt the principle that the owner of a dog must, absolutely, keep him out of the street, or be remediless if he is killed wantonly or negligently by another.

For the first reason assigned, the plaintiff must be non-suited.

HARRY ELLIOTT vs. GEORGE McALLISTER.

Vendor and Vendee—Trust in after acquired title—Judicial Sale—Divestiture of second mortgage.

Sci. fa. sur mortgage. Motion for a new trial.

WENCEL HARTMAN, JR., and CLAUDE L. ROTH for the plaintiff.

1. John Jones purchased the five acres as trustee for Harry Elliott.—Clark v. Martin, 49 Pa. 299; Brown v. McCormick, 6 Watts 60; Church v. Church, 25 Pa. 278; Dentler's Appeal, 23 Pa. 505

2. McAllister took subject to the trust.—Hays v. Hays, 179 Pa. 277; Locher's Appeal, 104 Pa. 609.

3. The second mortgage was not divested.—Good v. Schoener, 10 Leg. Int. 561, 16 Phila. 656; Kennedy v. Borie, 166 Pa. 360; Saunders v. Gould, 124 Pa. 237; Taylor v. Smith, 2 Whar. 432; Woodburn v. Bank, 5 W. & S. 447.

D. EDWARD LONG and CLEON N. BERNTHEIZEL for the defendant.

When a sale is obtained under *levari facias*, the vendee shall hold "clearly discharged and freed from all equity and benefit of redemption and all other incumbrances".—Act of April 10, 1849, Brightly's Purdon's Digest, p. 483.

OPINION OF THE COURT.

John Jones, owning a farm of 50 acres, on which John Logue had a mortgage for $2000, on March 15, 1890, conveyed five acres of it to James Hocket. He did not cause the mortgage to be released as to the part thus conveyed. On September 20th of the same year Hocket gave a mortgage for $200 upon the five acres to Harry Elliott.

On the Logue mortgage a *sci. fa.* issued Feb. 15, 1894, to which Jones, Hocket and Elliott were parties defendant. On the judgment recovered, the 50 acre tract was sold by the sheriff. Jones became the purchaser. On July 1, 1896, Jones again conveyed the five acre part to George McAllister. On Sept. 15, 1897, Elliott issued a *sci. fa.* on his mortgage, making Hocket and McAllister defendants. Judgment for plaintiff. Defendant moves for a new trial.

If the sheriff's sale on the Logue mortgage divested the ownership of Hocket of the five acres and the mortgage thereon to Elliott, the *scire facias* cannot be maintained. On the other hand, if Hocket's and Elliott's interests were not divested by the sale on the Logue mortgage, there is no effectual defence to it.

Ordinarily, a judicial sale on the earlier of two liens divests all later liens, as well as all interest derived from him who was the owner of the land, when the lien was created, subsequently to the creation of such liens. A sale on the earlier of two mortgages would divest the later. A sale on a mortgage would divest the estate of one who became a grantee subsequently to the making of the mortgage, and any mortgage or other lien which such grantee might impose on the premises. The sale on the Logue mortgage therefore divested the estate of Hockett, and the mortgage given by him to Elliott, unless the special facts prevented.

The sheriff's sale on the Logue mortgage was to Jones. Jones was, at the time, already the owner of 45 acres of the tract then sold, and he had recently been the owner of the other five acres. As the case before us involves the effect of the sale on the five acres only, its effect on the other 45 will be pretermitted.

Had Hocket acquired the five acres under and subject to the $2,000 mortgage, it would have been his duty, as respects Jones, to have paid at least that fraction of the mortgage which would equal the ratio of the value of the five acres to the value of the 50 acres. But he did not buy thus subject to the mortgage. *Quod non apparet, not est.* We cannot presume such a subjection of his purchase to the mortgage, in the absence of evidence. When he bought the five acres, equity cast on Jones, as the owner of the remaining 45 acres, and on the 45 acres, the burden of paying the whole mortgage. He might have paid the money to Logue, without compelling him, or inducing him (for we do not know whether Logue was compelled or induced) to resort to a sheriff's sale. But Logue resorting to sheriff's sale, the money paid by Jones, must be considered as paid, so far as the five acres are concerned, in the discharge of his duty toward Hocket. As to the 45 acres, he had the option either to pay the $2,000 or to sacrifice his land. As to the five acres, he had no option either to pay the $2,000 or to allow Hocket's land to be sacrificed. He was, as to Hocket, under a

duty to pay the money, if such payment became necessary, in order to save the land.

It does not appear whether the Logue mortgage was created by Jones or by some preceding owner of the land, nor, is it material. His duty towards Hocket was precisely the same as if he had himself made the mortgage. He had, we must presume, obtained the price for an unencumbered title, and his obligation to protect Hocket was absolute.

It is possible that had some stranger become the purchaser at the sheriff's sale, the subsequent transfer of the land to Jones would not have revived the title of Hocket, and the mortgage thereon, to Elliott, Rauch v. Dech, 116 Pa. 157; Rushton v. Lippincott, 119 Pa. 12. But, *Cf.* Dentler's Appeal, 23 Pa. 505. The sale was made directly to Jones. He thus practically pays the Logue mortgage, and his estate in the 45 acres must be considered as continuing precisely as it was before the sale, except that it is freed from the mortgage incumbrance; Kennedy v. Borie, 166 Pa. 360; Woodburn v. Farmers' & Mechanics' Bank, 5 W. & S. 447; Taylor v. Smith, 2 Wh. 432; Good v. Schoener, 16 Phila. 656; Saunders v. Gould, 124 Pa. 237. If he had placed any mortgages or liens thereon, they would not be divested. Can it make any difference whether he has placed a mere lien thereon or whether he has absolutely conveyed it? We think not. His purchase of the 50 acres, was as to the 5 acres previously sold to Hocket, simply the means of discharging the Logue mortgage in conformity with his duty. The law will concede that he acquired a title as to the 5 acres, by the sheriff's sale, only in order to make it *ev instanti* lapse by estoppel into his grantee, Hocket.

Jones has conveyed to McAllister the 5 acres. But McAllister has received them subject to Jones' disabilities. The record of the proceedings on the *sci. fa.* on the Logue mortgage, shows that Hocket was a terre-tenant. McAllister, as purchaser of the estate acquired by Jones, at the sheriff's sale on that mortgage, is affected with notice of all that the record of the action reveals. McAllister therefore holds the five acres, precisely as Jones did, subject to an estoppel against the assertion of his right, to the detriment of Elliott. Elliott has a right to have execution against the premises. As no error was committed in the trial, the rule for a new trial is discharged.