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THE FORUM.

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EDITORIAL.

Does the Law School need a dormitory? To one mingling with the students of the Law School, the above question comes most frequently: in fact it is a question agitating the minds of not a few of the present attendants of the Law School. Among the many arguments in the affirmative of this question are that, (1) dormitories are essential elements to a well regulated educational institution. (2) The student body would be intact. (3) College students are obliged to room in dormitories and are thus kept under the direct management of the faculty. Why not Law students? (4) Association of student with student is conducive to the intellectual health of all concerned. (5) It would increase the attendance of our rapidly growing and prosperous Law school. (6) Students coming to the school would not be inconvenienced by being compelled to hunt rooms which, as is very often the case, are unsuitable. (7) The student body would gladly welcome such an acquisition as filling a much needed want. We understand that buildings in close proximity to the Law School are for sale which would be most appropriate for our required dormitories. Will the institution grant her students this boon and add to its honor and efficiency? Let us hope she will. Or will some kind benefactor come forward in this hour of greatest need?

The students of the School of Law no less than those of the College and of the Preparatory School, most sincerely and profoundly deplore the sudden death on Sunday morning, January 23rd, of Rev. M. J. Cramer, S. T. D., LL. D. Dr. Cramer was at the time of his death, professor of Philosophy in Dickinson College, in which chair he had won the appreciation of the students by his erudition, his skill as a teacher, and his uniform kindness and courtesy. As was well said by Dr. Reed, the president, at the obsequies, Dr. Cramer was a "great man." He had for twenty years occupied important diplomatic posts under the government of the United States. He was a many-sided scholar; a profound thinker; an eager student of politics; an able preacher. As the brother-in-law of General U. S. Grant, he had came into contact with many of the great men of his own country, and his European sojourn had given him intimate relations with scientific men, statesmen, and even kings of the old world. His decease was very sudden, and has cast a gloom over all the institutions grouped around the college, as well as over the whole community. We most sincerely condole with the bereaved widow, and the only son, in this terrible affliction.

The organization of the Plume and Platter Club is another sign that our school is abreast with the times. All other schools

of any note have their glee club, orchestra, musical, dramatic and similar organizations. The Plume and Platter Club is a dramatic organization similar to the Mask and Whig of the University of Pa., and Hasty Pudding, of Harvard. From the character of the work of the organization last year, the school will have no fear that the Club will not thoroughly uphold the reputation of the Law School. Publicity is now one of the essentials to success in almost all our business undertakings and just as business men advertise to this end, so educational institutions do the same with the limited means afforded them. Schools are now famous not alone for their philosophy but also for the organization of their students, as foot-ball elevens and glee clubs. Nothing that we know of attracts young men more to a school than strong, successful organizations among the student body. The Law School has its full representation in the College organizations but their success is the success of the college. The Plume and Platter Club is an organization of Law students and will appear before the public as such. Hence, being strictly an organization for the Law School, it deserves the united support of the Law students, and it will do more than its share to bring to the notice of young men the existence of our school, and the character of the student body and the work done there by them.

ALUMNI PERSONALS.

Thomas K. Leidy, '97, who is practicing at Reading, is meeting with great success. His offices are located at No. 40 North 6th street.

* * *

Edwin S. Livingood, ex-'98, is travelling through the Western states for his health.

* * *

Harvey S. Kaiser, '97, Doylestown, spoke on the Reform movement before the Farmer's Institute at Richborough, on February 9th.

* * *

Paul H. Price, '97, is studying in the office of Ex-State Senator Edwin H. Shearer and expects to take the examinations at the Berks County Bar in the fall.

J. Wilmer Fisher, '96, is enjoying a first-class clientage, especially in the Orphans' Court, at Reading.

* * *

Quite recently there appeared in the Philadelphia Inquirer pictures of George Edward Mills, '92, our professor of Torts, and Lewis S. Sadler, '96, who are spoken of as nominees for the office of District Attorney at the Cumberland County Bar.

* * *

It is with pleasure we note that Frank C. Bosler, '96, is a prime mover in the Sugar Beet Industry. As a result of his efforts and thorough knowledge of the subject, he has interested the farmers of Cumberland and Franklin counties in the cultivation of sugar beets and contemplates the organization of a company which may possibly locate its plant at Carlisle.

* * *

We are indebted to Harry F. Kantner, '97, who is progressing in the office of Daniel R. Schmick, Prothonotary of Berks county, for news of some of the boys.

* * *

Edmund L. Ryan, '97, lately spent several days in Carlisle.

* * *

S. A. Soult, '94, is a candidate for Republican nomination for District-Attorney in Northumberland county.

* * *

Judge Louis E. McComas, of Hagerstown, Md., recently elected senator to succeed Arthur P. Gorman, graduated from Dickinson College, in 1866, and we are proud to say also, that this distinguished gentleman is one of the incorporators of the Law School.

LEGALES JOCI.

FORCE OF HABIT.—It is said of an Illinois judge who, as an attorney, had been somewhat noted as an objector, that during his first term on the bench when an improper question was asked by a lawyer, he exclaimed, "I object." As the hilarity in the court room subsided, he said with great dignity, "That objection is sustained." No one took exception.—*Case and Comment.*

COMMON LAW DELUGE.—At common law a "widow's quarantine" permitted a widow to *reign* forty days and forty nights in the principal mansion of her husband.

HOW IT AFFECTED HIM.—Friend—How do you feel when your wheel throws you down?

Lawyer—(who is learning to ride). Like suing some one for damages.—*Puck.*

HOLDING IT UNDER ADVISEMENT.—A Missouri justice of the peace at the close of a case announced with great dignity: "I will hold this case under advisement until next Monday morning, at which time I will render judgment for the plaintiff."—*Case and Comment.*

TOO MUCH OF A JOKE.—Judge—Now Sam, tell me why you stole those shoes?

Sam—Oh yer honor, I jes took 'em for a joke.

Judge—(not without wit). Took them for a joke did you, well how far did you take them?

Sam—About a mile, yer honor.

Judge—Well Sam, that's carrying the joke a little too far,—sixty days.

THE SCHOOL.

Miss Julia Radle, accompanied the Junior College Quartette as elocutionist, on their recent trip to Dillsburg.

Many of the students have been attending the sessions of Courts of Quarter Sessions and Common Pleas during the last two weeks. Some of the cases were of a very interesting character and much was learned by the students in regard to methods of procedure in the trial of the various cases that come before the court.

The Middle Class having completed the study of Agency, has taken up the subject of Damages.

Robert W. Irving, Esq., '97 post-graduate, was assigned by Judge Biddle to defend the two Indian girls charged at the recent term of court with attempting to burn the Girls' Building of the Indian School. His eloquent plea for the girls, who plead guilty of the charge, elicited words of praise from many who were present.

Jno. G. Miller, '99, who has been confined to his home at Pine Grove Mills, Pa., for the past two months with an attack of typhoid fever, has recovered and resumed his studies in the school.

A. J. Feight, post-graduate '97, has been elected Councilman on the Republican ticket in New Cumberland. He was supported by Democratic voters.

The following members of the Senior Class have been appointed a committee to make all arrangements for the coming commencement to be held June 6: Chas. E. Daniels, Chairman; Sylvester B. Sadler, Wm. K. Shissler, Miles H. Murr and Francis Lafferty.

Among the Law students who attended the February reception at Wilson College were A. M. Duvall, Clarence R. Gilliland, G. Fred Vowinkle, Alfred J. Feight, Merkel Landis and Cleon N. Berntheizel.

Several of the students attended the lecture by Dr. Gilbert, of Huntingdon, in Bosler Hall, Tuesday, Feb. 8, on the subject: "The Origin of Man, or, A Study in Anthropology." Dr. Gilbert, who is a most forceful and interesting speaker, held the close attention of the audience during the entire ninety minutes consumed in the delivery of his address.

Samuel B. Hare, '98, Arthur M. Duvall, '98, Hugh Miller, post-graduate, '97, W. Lloyd Snyder, '98, Chas. R. Weeks, '99, took part in the rendition of the oratorio, "The Daughter of Jairus," given by the Dickinson Musical Association in Bosler Hall, Friday evening, Feb. 11th.

Among the many men of genius in the class of '98, Jackson O. Haas stands at the head as an inventor. For six years preceding his course at the Law School he was pursuing that line of work at Baldwin Locomotive Works, where he has left many traces of his mechanical genius. His more important inventions include an improved self-binder adapted to the use of straw rather than twine, a square hole augur, an improved lathe, a tool holder, a ball bearing centre and many others. Now

he is learning to invent defences where none exist.

W. B. Freed, '99, and G. H. Moyer, '98, visited their homes during the past week.

P. E. Radle, '98, and A. Frank John, '99, delivered addresses Tuesday evening, Feb. 15th, before a meeting of the Sons of Veterans held in Harrisburg.

THE ALLISON SOCIETY.

On the second meeting night of the present term, Chester C. Bashore, Esq., of the Cumberland County Bar, an almunus of the Law School and at present a candidate for the Republican nomination for District-Attorney, sat as judge in an interesting case before the Allison Society. The plaintiff was represented by Messrs. Freed and Wood; the defense by Messrs. Reese and Haas. The argument was able and thorough, the question at issue being one involving certain rights of executors.

Mr. Bashore, in a clear opinion, decided in favor of the plaintiff.

"*Resolved*, That the Policy of the Government Should be Retrenchment in the Matter of the Pension System," was the subject of the lively and hard fought debate in the society on Wednesday evening, February 2nd. The affirmative was upheld by Messrs. Weeks and Sypherd; the negative by Messrs. Wood and Stephens. The arguments were ably compiled, and were adduced with much clearness and force. The judges were Messrs. Thomas B. Pepper, A. T. Morgan and R. P. Stewart, of the Dickinson Society. Two decided in favor of the affirmative and one for the negative.

Hon. W. F. Sadler, ex-Judge of Cumberland county, and a member of the Law School faculty, lectured before the Allison Society, Wednesday evening, February 9th, the Dickinson Society joining with the former. President Pepper, of the Dickinson Society, presided. Judge Sadler's prominence not only in Cumberland county, but at many other Bars as well, and his recognized ability and learning in law caused the students to treasure highly the very valuable instruction given in a lecture on "Banks and Clearing Houses." The Judge began with a history of the Bank of England and then proceeded with a statement of the purposes and progress of banking institutions in the United States. The final part of the lecture was devoted to a discussion of clearing houses. The lecture was exceedingly interesting and in fields of instruction where the students have not gone to any great extent. It will be remembered with much profit. On motion of W. A. Jordan, a very hearty vote of thanks was tendered Judge Sadler.

DICKINSON SOCIETY.

The Dickinson Society continues to prosper. Three new members, M. D. Davis of Mt. Carmel, Pa., Eli Saulsbury of Georgetown, Del., and Geo. B. Betson of Baltimore having been added to the roll.

On Friday evening, Jan. 21, Prof. A. G. Miller spoke before the society on "The Duties and Functions of a Grand Jury in Pennsylvania." The lecture was brim full of interesting facts, presented in a very able manner, which was attested to by the applause which greeted the speaker at the close of his address and by the unanimous vote of thanks which was tendered him by his audience. Professor Miller is the head of the Department of Blackstone in the school, and in addition to this enjoys a lucrative practice before the bar of Cumberland county and is also engaged in several successful manufacturing enterprises.

On Friday evening, January 28th, Jno. R. Miller, Esq., the genial secretary of the Examining Board of the Cumberland County Bar, sat as judge in the trial of a case which was argued by Lane & Scheeline for the plaintiff and Henry & Roth for the defendant. In addition to being a good fellow, justly popular among the boys, Mr. Miller is a lawyer of no small ability as is evinced by his large and successful practice.

On Friday evening, February 4th, the society was treated to one of Prof. H. Silas Stuart's usually excellent addresses, the subject being "Liens." The speaker presented his subject in such a manner as

only one who is well versed in this difficult branch of the law can, and was listened to with the closest attention by every one present. At the close of his address Prof. Stuart was extended a vote of thanks, and requested to favor us with his presence in the near future, and deliver his lecture on "Justinian and his Principles," to which he consented, when we are sure a still larger audience will greet him.

At the meeting of February 11, President Pepper, after serving the usual term of six weeks retired, and Mr. J. Austin Sullivan, of Altoona, was unanimously elected to succeed him. President Pepper characterized his administration by unusual activity in behalf of the best interests of the society, in which he was ably assisted by Mr. Duffy, chairman of the executive committee. Let us hope that the new president will carry out the policy of progress outlined in his inaugural address so that when the time comes for him to lay down the gavel for the last time, the society may be the better for his having served as its president.

THE MOOT COURT.

MRS. SMITH vs. JOHN RAY.

Specific performance—Reimbursement of agents—Usury—Resulting trust.

Bill in equity, praying a decree for a conveyance.

GARRETT STEVENS and CHAS. E. DANIELS for the plaintiff.

1. A resulting trust arises in favor of the plaintiff.—Am. & Eng. Encyc. Vol. 10, p. 8; Appeal of Cross and Gault, 97 Pa. 471; Crawford v. Thompson, 142 Pa. 551. Salsbury v. Black, 119 Pa. 200; Hoover v. Hoover, 129 Pa. 201; Earnest's Appeal, 106 Pa. 310; Nixon's Appeal, 63 Pa. 279; Bickel's Appeal, 86 Pa. 204; Fahnestock's Appeal, 104 Pa. 46.

2. Ray is entitled only to $2,172 with legal interest.—Act of April 10, 1879. 1 Vol. Brightly's Purdon's Dig. 272; Wolbach v. Lehigh Build. Ass'n, 84 Pa. 211; Tanner's Appeal, 95 Pa. 118. He was not her agent.

3. Defendant's claim is usurious.—Act of May 28, 1858, 1 Vol. Brightly's Purdon's, 1062; 1 Vol. Forum 12; Bosler v. Rheem, 72 Pa. 54; P. & S. R. R. v. Lewis, 33 Pa. 33; Hartman v. Danner, 74 Pa. 36; Evans v. Negley, 13 S. & R. 218; Vantine v. Wood, 13 Pa. 270.

MISS JULIA A. RADLE and J. AUSTIN SULLIVAN for the defendant.

1. Defendant acted as agent.—Valentine v. Parker, 5 Pa. 333; Strimpfler v. Roberts, 18 Pa. 283; Goss v. Helbring, 77 Cal. 190; Churchhill v. Palmer, 115 Mass. 310; The Odorilla v. Baizley, 128 Pa. 283; 2 Kent. 614, Note; Mundorff v. Wickersham, 63 Pa. 87; Wright v. Burbank, 64 Pa. 247; Kramer v. Dinsmore, et. al., 152 Pa. 264; Clark on Contracts, 720.

2. An agent is to be reimbursed for *all* sums which he has paid out, in the due course of the agency.—Maitland v. Martin, 86 Pa. 120. And may recover interest from the time of payment.—Delaware Ins. Co. v. Delaunie, 3 Binn. 294; White v. Nat. Bank, 102 U. S. 658; Elliot v. Walker, 1 Rawle 126; Trotter v. Grant, 2 Wend. 413; Crase v. Cockle, 76 Ill. 484.

STATEMENT OF THE CASE.

Prior to December 1, 1890, James Kellogg contracts to sell a lot of land to Sarah Smith for $1,000. Having paid $900 of the purchase money, Mrs. Smith makes a written contract with John Ray, to build on the lot a two-story frame house, for $2,000, payable at the completion of the work, viz, on May 1, 1891. As Ray objects to building the house on land to which Mrs. Smith has not the legal title it is agreed, at the same time, that Ray shall pay the balance of the purchase money with interest, $172, to Kellogg, and receive a deed. On May 1, 1891, when the house is finished Mrs. Smith is unable to pay for it. It is therefore verbally agreed between her and Ray, that the latter shall borrow $2,172 from a building association, and give the association a mortgage on the premises. The mortgage is accordingly made, in the name of Ray, conditioned for the payment of $40 monthly until the maturity of the stock. To the negotiations between Ray and the association Mrs. Smith is not a party. On Nov. 1, 1897, Ray has fully performed his contract with the association, having paid to it, altogether $2,700, and at his instance, the mortgage is satisfied. On May 11, 1891, Ray procures from Mrs. Smith a sealed undertaking on her part to pay the money to the association, according to the terms of the mortgage; he engaging to convey the land to her, as soon as the association is paid. Ten days after this, Mrs. Smith informs Ray of her inability to pay so much, and he verbally agrees that she shall pay monthly what she can. She ac-

cordingly makes monthly payments down to November, 1897, not however, to the association, but to Ray, and seldom of so much as $40. About the 11th of May, 1891, Ray executes a lease to Mrs. Smith, stipulating for the payment of $40 per month. This lease Mrs. Smith signs as lessee. Mrs. Smith having paid $1,200 to Mr. Ray, and offering to pay what remains of the principal debt of $2,172, and interest thereon, at the rate of 6 per cent. files this bill in equity to compel Ray to receive the amount she tenders, and make a conveyance to her of the land. Ray declines to make such conveyance until all that he has paid the Association, $2,700, shall be repaid him.

OPINION OF THE COURT.

On this demurrer, the only question is, whether Mrs. Smith is, on the facts averred, entitled to a conveyance.

Mrs. Smith, by the contract with Kellogg, acquired an equitable estate in the lot. She could compel a conveyance of it, by tendering the purchase money. Morgan v. Scott, 26 Pa. 51. Kellogg could it is true, convey the land to a third person, but such person would take it, subject to precisely the same trust, if he knew of the contract. Magee v. Magee, 1 Pa. St. 405. As Ray knew of the contract with Kellogg, he acquired the land subject to the same duty to convey it, on the payment of the purchase money. Has then the purchase money been paid?

Mrs. Smith not only induced Ray to buy the land from Kellogg, but to erect a house on it for $2,000. When the time for payment arrived, she was unable to make it. She in substance agrees that Ray shall borrow the money, and charge the land for its repayment. She also binds herself personally by the agreement of May 11, 1891, as she had orally a few days before, to Ray, to pay the association, and so discharge his bond to it. The money is thus obtained by Ray, *i. e.* not only the $2,000 contract money, but the $172 residue of the purchase money. We think that *eo. instanti*, she became entitled to a conveyance. She would have taken the land, it is true, subject to the mortgage to the association. If, she neglecting to pay the association, Ray had paid it, as he in fact has paid it, he would have had a right to an assignment of it, or to subrogation to it, and, although he has satisfied it of record, it is not too late for him to obtain subrogation. It would be inequitable to compel him to convey the land to Mrs. Smith without permitting him to revive the mortgage. For how much then, must the mortgage be revived?

Had Mrs. Smith borrowed the money directly from Ray, or had she simply continued on the footing of her original contractual indebtedness to him, it is entirely plain that all she would have been obliged to pay him would be $2,172 with interest at the rate of 6 per cent. But as he insists on immediate payment, she authorizes him to borrow the money from a building association, on the terms on which such associations usually lend moneys, and promises to repay the association, in discharge of his liability upon his bond. Can she, after he has borrowed the money from the association, in exact accordance with the agreement, has entered into a bond and has discharged the bond, refuse to pay him any portion of the sum thus paid by him, because, had she been a borrower from *him*, she would have been compelled only to pay a less sum? When Ray borrowed from the building association, he acted for her as her agent. Whatever interest she knew he would have to pay, he can recover from her. In Stevens v. Davis, 3 Metc. (Mass.) 211, it is said that if the creditor, when his debt becomes due, is induced by the debtor to borrow an equivalent sum, from a third person, so as to enable him to give more time to the debtor, on the debtor's promise to repay a bonus that the creditor would have to pay the lender, such bonus is not usury. Cf. Kimball v. Boston Athenaeum, 3 Gray 225; "Where a debtor, being unable to raise the money, with which to pay his creditor, directed the latter to raise it elsewhere, promising to pay him whatever rate of interest he might be obliged to pay, and thereupon the creditor borrowed the money at usurious rates, it was held that he was acting merely as the agent of his debtor, and could recover of him the full amount of interest paid." Shirley v. Spencer, 9 Ill. 583; 27 Am. & Eng. Encyc. 1051.

It is suggested that Mrs. Smith could not have made herself liable to the Build-

ing Association for interest at a greater rate than 6 per cent., and consequently, that she could not make herself liable to Ray who did obtain the money from the association. One case just cited, negatives this position. It was lawful for Ray to contract to pay to the association the interest he paid, and he entered into this contract at the instance, and for the benefit of Mrs. Smith. He did not wish to sue her, and sell the lot with the house he had just erected on it, and for which he may have had a mechanic's lien. Both she and he supposed that she could pay off the debt gradually in the manner in which associations require debts to be paid. Whether it was wise for Mrs. Smith to enter into the arrangement, the loan was in fact procured at her request. Besides, it does not appear how Mrs. Smith was precluded from borrowing from the association. The suggestion that she was a married woman is not supported by the evidence. The title Mrs. is not decisive. If she was a married woman, she had authority under the Act of April 10, 1879, 1 P. &. L. 464, to join the association, to borrow money and bid premiums therefor, and to execute a bond and mortgage. While the husband must join in such bond and mortgage, there is no suggestion that if husband there was, he would have refused to unite with Mrs. Smith in such bond and mortgage.

We see nothing in the lease or in the supposed parol understanding with Mrs. Smith, that she might pay such smaller monthly sums than $40, as she should be able, to exonerate her from the duty of reimbursing Mr. Ray for all the money he paid to the association.

It seems a hardship that a needy borrower must pay such a high rate of interest. But building associations have received the sanction of universal use in the Anglo-Saxon world. In England, in all her colonies, in every American State, so far as we know, they flourish. A most pointed encomium has been passed on them by one of our most judicious and trusted chief-justices. The contrivance adopted by Mrs. Smith and Mr. Ray was simply a substitute for her personally entering the association, and contracting the debt to it. We do not see therefore that the law can look with disapprobation on a relation by which she indirectly assumed the burdens of borrowing membership, when it applauds the direct assumption of them.

Bill dismissed.

JAMES FORD AND HENRY FORD vs. WILLIAM FORD.

Words of limitation in a deed—Title by estoppel—Mortgagor and mortgagee.

Bill in equity for partition.

ALBERT T. MORGAN and ISAIAH SCHEELINE for the plaintiff.

1. The word *heirs* is necessary to convey a fee by deed.—Tiedeman on Real Prop., 27; Mattock v. Brown, 103 Pa. 16; Oyster v. Knull, 137 Pa. 448.

2. There can be no estoppel.—Am. & Eng. Encyc. 7 vol. 12; Brown on Negligence, 1 vol. 566; Larkin's Appeal, 38 Pa. 457; Hepburn v. McDowell, 17 S. &. R. 383; Alexander v. Kerr, 2 Rawle 83; Glidden v. Strumpler, 52 Pa. 400; Crest. v. Jack, 3 Watts 238; Davis v. Davis, 26 Cal. 23. Equal means of knowledge.—Brant v. Virginia Coal and Iron Co., 93 U. S. 326; Hill v. Epley, 31 Pa. 331; Knouff v. Thompson, 16 Pa. 357; Jaques v. Weeks, 7 Watts 261; Hood v. Fahnestock, 1 Pa. 470; Savings Inst. of Cambridge, v. Littlefield, 6 Cush. 210; Hill v. Meyers, 43 Pa. 170.

FREDERICK B. MOSER for the defendant.

1. The commissioners conveyed a fee.—Act of April 18, 1853, Brightly's Purdon's, 12 Ed., 1832; Grim's Appeal, 1 Grant 209; Smyth v. Neill, 1 W. N. C. 43; 2 Brown on Dec. Ests. 1194; Bloodharts' Estate, 2 C. C. 476; Bashore v. Whisler, 3 Watts 494.

2. Where the sale is made on a purchase money mortgage, the purchaser takes both the equitable estate of the vendee and the legal estate of the vendor.—1 Troubat & Haly, 7-8; Horbach v. Riley, 7 Pa. 81; Zeigler's Appeal, 69 Pa. 471.

3. The receipt of the money with knowledge estops the heir.—Smith & Wife v. Warden & Alexander, 19 Pa. 424; Spragg v. Shriver, 25 Pa. 282; Maple v. Kussart, 53 Pa. 348.

STATEMENT OF THE CASE.

Thomas Ford died January 10th, 1867, leaving a widow and three sons, James, Harry and William to survive him. At his death he was possessed of several tracts of land in fee. The Orphans' Court authorized the administrator to sell the lands of said decedent for the payment of debts. On February 10, 1869, the several tracts were sold and Martha Ford, widow of de-

cedent, bought one tract consisting of 100 acres.

The premises of the deed to her, contained the following words, "hath granted, bargained, sold and conveyed and by these presents doth grant, bargain, sell and convey unto the said party of the second part, all the following described tract, etc."

On March 1, 1870, Martha Ford conveyed to her son, William Ford, his heirs and assigns, all the above described tract of land, the said Martha Ford taking a mortgage on the same for $3,000, the full amount of the purchase money.

On June 5, 1888, Martha Ford died. Her heirs who were also the heirs of Thomas Ford, sold the above described property of Wm. Ford under foreclosure proceedings, making all parties not joined as plaintiffs, parties defendants. At the foreclosure sale said Wm. Ford bought in the property for $3,000, paying the other two heirs their shares, $2,000. The Sheriff's deed contains all the operative words necessary to convey a fee. James and Harry Ford have filed a bill for partition.

Wm. Ford in his answer claims a fee by virtue of the conveyance to himself and the mortgage.

OPINION OF THE COURT.

If Thomas Ford had had only a life estate in land, there would have been nothing for the Orphans' Court to sell; Grim's Appeal, 1 Grant 209. He had, in fact, an estate of fee simple in the land, which is the subject of the present controversy. Dying, his executor solicited from the Orphans' Court and obtained leave to sell it for the payment of debts under the act of March 29, 1832, 2 P. & L. 3315. He made the sale and to his grantee, Martha Ford made a deed, the premises of which used the words "hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey unto the said party of the second part, all the following described tract." No other words of the deed qualify this phrase. It is therefore contended that Mrs. Ford acquired under it only a life estate. It is accurately stated by the learned editors of Leading Cases in the American Law of Real Property that "The rule of the common law is that in order to vest an estate in fee simple in a natural person, the deed of conveyance must contain an express limitation to the said person and his heirs, the word "heirs" being the operative term. There are few rules of the common law which have been so inflexibly and so constantly enforced as this, even the manifest intention of parties to a deed being made to give way before it." Vol. 1, 53, Hileman v. Bouslaugh, 13 Pa. 344.

The deed, however, to Mrs. Ford, was made by the executor as the agent of the Orphans' Court. The act of 1832 does not expressly and we think, does not tacitly, authorize that court to subdivide the estate of the decedent into an estate for the life of the purchaser, and the reversion in his heirs. And it is not at all likely that the Orphans' Court attempted to do so unwarranted and improper an act. Were the petition of the executor, and the decree of the court before us, we should doubtless find in them enough to justify the reformation of this deed, by the insertion of the word "heirs," or to suggest a more liberal interpretation of the words actually used, than they ordinarily receive. But, the record is not before us. The means of reformation are wanting. The words of the deed to Mrs. Ford must therefore receive their traditional interpretation and we must solve the controversy between these parties on the hypothesis that she obtained only a life estate.

Believing herself however to have obtained a fee, she, on March 1, 1870, conveyed the land to William Ford, his heirs and assigns. This transaction imparted to him, it need hardly be said, no greater interest than she herself had. Had he paid the price for a fee simple he would not have attracted to himself any interest of other parties than his grantor. William Ford paid none of the purchase money, but imposed a mortgage on the land for its entire amount. It does not appear that he was in any way encouraged to make the purchase and give the mortgage, by the reversioners, James and Harry Ford. As against them, William acquired only an estate for the life of his grantor. He already had an undivided third in it, in fee, subject to the life estate.

But, after the death of the widow, on June 5, 1888, her administrator obtained a judgment upon the mortgage to her given by William; and thereupon he caused a

sheriff's sale of the mortgaged premises. At that time the life estate of the widow was extinct. The mortgage had absolutely no value, if the estate covered by it was only a life estate. The purchaser at the sale, however, paid $3,000 for it. It must have been clear to the administrator, and to James and Harry Ford, that the purchase was made on a misapprehension as to the estate which was being acquired; and in ignorance of the fact that the very persons to whom the purchaser was paying the purchase money were at the instant of receiving it, intending to claim the land precisely as if no sale had been made. The instrumentality of the sheriff was employed by these persons to make the sale, but whether or not there shall be estoppel against disputing the title acquired by the vendee cannot depend on the nonuse, or the use of an agent, or of the sheriff, as agent, to make the sale. They practically represented to the buyer, that he was buying the fee which they knew that he thought he was buying; they cannot now be heard to deny that the fee passed to him. Miller's Appeal, 84 Pa. 391. It cannot matter, whether this buyer was William Ford or another person. If Martha Ford had, subsequently to her conveyance to William, acquired from her sons the reversion, and had accepted payment of the mortgage from William, her fee would have inured to him. When through her, in the exercise of her right, they induce him, by the foreclosure proceedings, to pay them, we think the same result follows. One who with knowledge, accepts the proceeds of an unauthorized sale of his property, is estopped to dispute the validity of the sale. 7 Am. & Eng. Encyc. 19, note; Maple v. Kussart, 53 Pa. 348; Cunningham's Estate, 137 Pa. 621; Onwake v. Harbaugh, 148 Pa. 278. If in the same instrument A gives to B certain property, and to C certain other property which B claims, B's acceptance of the gift precludes his disputing C's right to the property given to him. Zimmerman v. Lebo, 151 Pa. 345; Cummings's Estate, 153 Pa. 397; Tompkins v. Merriman, 155 Pa. 440.

We do not think Fairchild v. Dunbar Furnace Co. 128 Pa. 485, inconsistent with the conclusion reached by us. A was tenant by the courtesy of what had been his wife's lands, and his sons, who were also hers, had the reversion. A sold certain mining rights to X, and undertook to obtain such a concurrence in the sale by the reversioners, as would pass their interest. This he did not do, and died. The consideration for this sale, was a tract of land which was conveyed to him by X. At his death, this tract with other property, descended to the sons. The fact that they occupied and enjoyed this tract along with other property that came from the father, it was held, did not estop them from denying X the right to continue to enjoy the mining privileges after their father's courtesy had become extinct. We cannot think that if the tract had not been conveyed, they could have compelled a conveyance by a bill in equity or otherwise, or indeed, have accepted a conveyance voluntarily, but with knowledge that it was intended to be the equivalent of a continuing mining right, without estopping themselves from disputing such right.

One of the counsel for the plaintiffs very ably pressed on our notice, the case of Brant v. Virginia Coal and Iron Co., 93 U. S. 326. A having a life estate sold it to B, who gave a mortgage for the price. This mortgage was subsequently transferred by A to the remaindermen, who paid a full consideration for it. They instituted foreclosure proceedings during the life of A and the land was judicially sold to X, who, in turn, sold it to Y. Y undertook to cut timber from the tract, after the death of A. The remaindermen were not estopped from obtaining an injunction to prevent the cutting. But it distinctly appears that Y knew that he was getting only a life estate. When he and his grantee were denied a fee, by the remaindermen, he was only denied that for which he did not pay. This circumstance distinguishes this case *toto cœlo* from the one before us.

As then James and Harry Ford have lost their estate in the land by estoppel, no partition can be made between them and William. The bill is therefore dismissed.

COMMONWEALTH vs. HARRY HARRISON.

Collateral inheritance tax—Heirs—Whether failure of issue is definite or indefinite—Rule in Shelly's Case.

Case stated.

MILES H. MURR and LLEWELLYN HILDRETH for the Commonwealth.

1. Nellie Harrison took a fee under the rule in Shelly's case and the act of 1855.—Shelly's Case, 1 Rep. 94; Hileman v. Bouslaugh, 13 Pa. 344; Kleppner v. Laverty, 70 Pa. 70; Appeal of Cockins and Harper, 111 Pa. 26; Taylor v. Taylor, 63 Pa. 481; Doebler's Appeal, 64 Pa. 9; Seybert v. Hibbert, 5 Pa. Sup. Ct. 537; Giffin's Estate, 138 Pa. 327; Bassett v. Hawk, 118 Pa. 94; Little's Appeal, 117 Pa. 14; Keim's Appeal, 125 Pa. 480; Allen v. Markle, 36 Pa. 117; Toman v. Dunlop, 18 Pa. 72; Dunwoodie v. Reed, 3 S. & R. 440; Findlay v. Riddle, 3 Binn. 151.

2. Defendant takes by inheritance from Nellie and must pay the tax.—Act of April 8, 1833, P. L. 316; Brightly's Purd. 1067; Act of May 6, 1887, P. L. 79; Brightly's Purd. 305-308; Commonwealth v. Eckert, 53 Pa. 102.

ARTHUR M. DEVALL and CHARLES MCMEANS for the defendant.

1. The real estate passed under the will, the rule in Shelly's Case not applying.—Taylor v. Taylor, 63 Pa. 481; Guthrie's Appeal, 37 Pa 9; Tyler v. Moore, 42 Pa. 374; Carroll v. Burns, 108 Pa. 386; Curtis v. Longstreth, 44 Pa. 297; Robins v. Quinliven, 79 Pa. 333; Stambaugh's Estate, 135 Pa. 587; Eichelberger's Estate, 135 Pa. 160; Parkhurst v. Harrower, 142 Pa. 432; Giffin's Estate, 138 Pa. 327; McDonald v. Dunbar, 20 W. N. C. 559; Fowler's Appeal, 23 W. N. C. 500.

2. Lineal heirs are not subject to the tax.—Act of May 6, 1887, P. L. 79; Brightly's Purd. 305-306; Com. v. Hackett, 102 Pa. 505; Waugh's Appeal, 78 Pa. 442; Com. v. William's Executors, 13 Pa. 29.

OPINION OF THE COURT.

The will of John A. Harris dated Nov. 29, 1880, contained the following clause: "After my death my property belongs to my wife for her lifetime; after her death to go to her heirs in equal shares. A certain lot of four acres of land, being a part of the old farm, I give and bequeath to my two grand children, George and Mary Harrison in equal shares. In case one of the children dies, the property to go to the other. In case both the children die, the property to go back to my own heirs." A codicil of October 18, 1886, was as follows: "The heirs of George Harrison, Harry and Nellie, to receive his share of the real estate, after the death of my wife. If either Harry or Nellie dies without heirs, their share to go to the other heir; if both children die without heirs their share to go to my own heirs. My personal property to go to John and Mary after the death of my wife." George Harrison had died in the life-time of the testator. Some time after the death of the testator, Nellie died. The commonwealth insists in this case stated that the land passes to Harry by descent, and that a collateral inheritance tax must be paid to it of $450.

The first section of the Act of May 6, 1887, P. L. 79; 2 P. & L. 4485, enacts that all estates, real, personal and mixed, passing from any person either by will or under the interstate laws to any person other than father, mother, husband, wife, children and lineal descendents, or the wife or widow of the son of the person dying seized, shall be subject to a tax of five dollars on every hundred dollars of the clear value of such estate. If the interest which was Nellie's, passes from her to Harry, by the devise of their great-grandfather, no tax is assessable on it. If it passes by inheritance from Nellie, to her brother, it must bear the tax.

The gift in the original will to the testator's wife "for her lifetime" with remainder to her heirs, would, if not qualified by the codicil, have given her a fee simple; under the rule in Shelly's case. The decisions on this point are too numerous for citation. It would follow that Nellie took a fee in one-fourth of the land by inheritance from the widow, which at her death was inherited by her brother. The codicil however, makes it plain, that the testator supposed he had given to George Harrison, an undivided half of the land. He there directs that the heirs of George Harrison, Harry and Nellie, are "to receive *his* share of the real estate." Amended by the codicil the devise is therefore, of all the land, to the widow for her life, and after her death, of one-half of it, to Harry and Nellie. Thus a fee in remainder is bestowed upon them. What is the effect of the limitation over on death without heirs? If either dies without heirs, his or her share is to go to the other. Heirs then is equivalent to

heirs of the body. Cole's v. Ayres, 156 Pa. 197; Cochran v. Cochran, 127 Pa. 486; Vail v. Ward, 1 Forum 161.

But, die without heirs, when? No time is specified. If an indefinite failure is meant, the estate in Nellie and Harry remains a fee simple, for though at common law this limitation would have cut down the fee simple to a fee tail, the fee tail would be instantly reconverted to a fee simple by the act of April 27, 1855, 1 P. & L. 1882. The estate depending on it would be annulled, and on the death of either Harry or Nellie seised of the interest, it would pass under the intestate law to the survivor.

It is likely we think, that the death without heirs contemplated by the testator was a death during the lifetime of the widow. He apparently expected his widow to survive him. To her he gave a life estate. The grand-children were not to take possession of the land until her death. He was probably providing, when he directed how the land should go over, on the death of Nellie or Harry, for a death before the time when they were to take possession. Ralston v. Truesdell, 178 Pa. 429. But, they have survived the widow. The condition on which the cross limitation over from Nellie and Harry was to take place, has not been realized.

If we should interpret the testator to mean by the expression "dies without heirs" a death before the testator, King v. Frick, 135 Pa. 575, Coles v. Ayres, 156 Pa. 197; Vail v. Ward, 1 Forum, 161, the limitation over has equally failed to take effect. An absolute fee simple vested in the grandchildren at the instant of the testator's death.

There is no other possible interpretation. The death without heirs, was either a death at any time (an indefinite failure of issue); or a death before the widow, but after the testator; or a death before the testator. In the first case, Harry and Nellie took a fee simple by statutory enlargement of a fee tail; and in the second and third cases, a fee simple subject to a conditional limitation which has never taken effect. Nellie was therefore seized at her death of an undivided fourth of the land in fee simple, which devolved upon her brother, her next of kin.

It may be well, in order to avoid misconception, to add that no question arises, in this case, as to the "certain lot of four acres." That lot seems to have been devised directly to the grand-children. The phrase "in case one of the children dies, the property to go to the other" must, we think, mean in case he dies in the lifetime of the testator, since no life estate being given in this lot to the widow, the death of the testator was the time when the devise was to take effect in possession.

It follows that the commonwealth is entitled to judgment, for $450.

FRANCIS FITHIAN, TO THE USE OF HENRY TINIANS vs. SOBIESKI HOKLER.

A forgery cannot be ratified—Estoppel may preclude forgery as a defence.

Sci. fa. sur mortgage.

ADAIR HERMAN and A. FRANK JOHN for the plaintiff.

1. One who with knowledge treats a transaction as valid waives his right to disaffirm it.—Woltjen v. Lauer, 2 Leg. Rec. 194; Adams v. Sage, 28 N. Y. 103; Masson v. Boret, 1 Denio 73; Harper v. Jeffries, 5 Whar. 41.

2. Defendant is estopped from alleging forgery.—Com. v. Moltz, 10 Pa. 530; Hill v. Epley, 31 Pa. 331-335; Sergeant's Executor v. Ewing, 30 Pa. 75; Chapman v. Chapman, 59 Pa. 214-18-19; Martin v. Ives, 17 S. &. R. 366.

3. A forged instrument may be confirmed or adopted.—Garret v. Gonter, 42 Pa. 143.

EDWIN G. HUTCHINSON and B. JOHNSON MACEWEN for the defendant.

1. No estoppel arises from defendant's conduct. Henry Christian B. and L. Ass'n v. Walton, 181 Pa. 201.

2. The assignee of a bond assumes all its defects.—Frantz v. Brown, 1 P. & W. 261; Lane v. Smith, 103 Pa. 420; Hoopes v. Beale, 90 Pa. 82; Clark on Cont. 536.

3. The law does not permit the ratification of a crime.—B. &. L. Ass'n v. Walton, 181 Pa. 201; Shisler v. Vandyke, 92 Pa. 449; McHugh v. Schuylkill Co., 67 Pa. 395; Lyon v. Phillips, 106 Pa. 66.

4. The person undertaking to ratify must have full knowledge of the material facts.—Combs v. Scott, 12 Allen 493; Pittsburgh and Steubensville R. R. v. Gazzam, 32 Pa. 340; Miller v. Board of Education, 44 Cal. 166; Drakely v. Gregg, 75 U. S. 267; Titus v. Cairs R. R. Co., 46 N. J. 393.

STATEMENT OF THE CASE.

Francis Fithian executed a mortgage to himself for $2,000 on a certain house and

lot belonging to Sobieski Hokler, in the name of Hokler, whose name he forged. He also executed two bonds, each for $1,000 payable to himself by Hokler. One of these bonds he assigned for full value to Tinians who had no knowledge of the forgery. Fithian subsequently informed Hokler of the forgery but stated that the money he had obtained on the mortgage he had paid to a creditor of Hokler named Simlar, and as a proof of the payment, he produced a receipt from Simlar, which, however, was forged. Under the belief of the genuineness of the Simlar receipt, he (Hokler) paid two installments of the interest as it fell due on the Tinians bond, in all $120.

Under the same belief, Hokler when applied to by Homer Norton to whom Fithian had offered for sale the other bond, informed him that he had no defense to the bond and mortgage and would pay it at maturity; thereupon Norton bought the bond for $900. The mortgage was assigned to Tinians for himself as to the bond assigned to him and as trustee for him who should become assignee for the other.

OPINION OF THE COURT.

This *scire facias* is sued out on the mortgage. The two bonds which the mortgage was given to secure, have been assigned by the mortgagee, one to Tinians and the other to Norton. Those assignments carried with them a proportional interest in the mortgage. Under the plea of *non est factum*, the execution of the mortgage and bonds has been denied by the defendant. He, in fact, did not execute them. They were forged by Fithian, the obligee and mortgagee. In his favor, therefore, there could be no recovery. The question before us is, whether his assignees occupy a better position.

Tinians purchased the bond at par without suspicion of its want of genuineness. No act of Hokler induced this purchase, or the error under which it was made. If Hokler is liable on the mortgage, he is so solely because, with knowledge of its being a forgery, he ratified it, by the act of paying two installments of interest. Such payment manifests a purpose to assume and perform the obligation expressed in the mortgage, that is, if efficient at all, it is a ratification or adoption. In this state, however, validity cannot be given to a forged bond or mortgage by a mere ratification. Building & Loan Association v. Walton, 181 Pa. 201; McHugh v. County of Schuylkill, 67 Pa. 391; Shisler v. Vandike, 92 Pa. 447. In Garrett v. Gonter, 42 Pa. 143, a mortgage had been executed by A, in the name of B, under what pretended to be a power of attorney from B, but which was forged. Strong J., holds that B could ratify or adopt the mortgage, but he does not hold that the power of attorney could have been ratified. If there had been no power of attorney, the mortgage might have been adopted. The forged power was as ineffectual as no power, but the principal in whose name the mortgage was made without previous authorization, could adopt it. In Shisler v. Vandike, one whose name had been endorsed on a note could not, by acknowledging the endorsement, and expressing the purpose to pay the note, after it had been brought by X so ratify it that X could compel him to pay it as endorser. As against Tinians, Hokler's defense is valid.

Is the position of Norton better than that of Tinians? Norton applied to Hokler, before purchasing the bond, in order to ascertain whether he had any defence to it. He denied that he had any, and said that he would pay it at maturity. Thereupon Norton bought it for $900. In this transaction exist all the elements of an estoppel in pais. It was Hokler's duty to speak, if he intended to dispute the genuineness of the bond and mortgage. He dissipates all fear, from Norton's mind, and thus induces him to buy them. If he is not estopped, it is because one whose name is forged, cannot estop himself from asserting the forgery. We have searched in vain for authority to sustain such a principle. In Building and Loan Ass. v. Walton, 181 Pa. 201, *supra*, Fell J., remarks: "Nor was there evidence of any act of the defendant upon which to base an equitable estoppel." The possibility of such estoppel is assumed by Strong J., in Garret v. Gonter, 42 Pa. 143. Cases in which parties have been estopped by negligence or other acts, from refusing to pay altered notes, are numerous. Van Duzer v. Howe, 21 N. Y. 531. Acts that induce a party to alter his position, will estop

from alleging an instrument to be a forgery.. Dodge v. National Exchange Bank of Columbus, 20 O. St. 234; Woodruff v. Munroe, 33 Md. 147; Casco Bank v. Keene, 53 Me. 103; Weed v. Carpenter, 4 Wend. 219; 1 Am. & Eng. Encyc. 1185, 1186.

A double forgery was committed by Francis Fithian. He not only fabricated the bonds and the mortgage, but the better to impose on Hokler, the receipt of Simlar, a creditor of Hokler. It was under the influence of the statement of Fithian that he had with the proceeds of the mortgage paid Simlar, and of the receipt bearing Simlar's name, that he became willing to adopt and assume the obligation of the bonds. But Norton is in no way responsible for the deception. He did not know that Hokler was influenced by it. He did not even know that the bond he was buying had not been executed by Hokler. Hokler knew it was forged, but told Norton that he had no defence to it. That he *would* not thus have misled Norton, had he not himself been misled, does not make the act the less an estoppel. Under the admitted facts therefore, gentlemen of the jury, you have no alternative to rendering a verdict for the Norton bond.

JOHN CAPLON vs. SAMUEL SAKTONE.

Guarantors—Assignment for benefit of creditors - Partial payment of debt will not discharge Guarantor—Guarantor, to be bound, must have notice of acceptance of his promise.

Assumpsit.

MARTIN HERR and O. G. MCCANDLESS for plaintiff.

There was a sufficient consideration for defendant's guaranty. 9 Am. and Eng. Ency. of Law, 70; Paul v. Stackhouse, 38 Pa. 302; Standley v. Miles, 36 Miss. 434; McNaught v. McClaughry, 42 N. Y. 22. A creditor, after crediting his claim with the amount received from the assignee, is not debarred from collecting any balance due. 3 Am. and Eng. Ency. of Law, 156; Sanborn v. Norton, 59 Tex. 308. The acceptance of a promissory note which provides for the extension of time will not discharge the guarantor. Miller v. Spain, 41 Ohio 376; 5 Lawson Property Rights, p. 4113.

J. THOMPSON CALDWELL and MARTIN WOLF for defendant.

Guaranty is not binding without acceptance. The contract of guaranty is vague and indefinite as to time. Kay v. Allen, 9 Pa. 320; Unangst v. Hibler, 26 Pa. 150; Kellogg v. Stockton, 29 Pa. 460; Story on Contracts, p. 555; Babcock v. Bryant, 12 Pick. 133. There was no notice of amounts furnished to Harris. Clark *et al.* v. Remington, 11 Metc. 361; Mussey v. Rayner, 22 Pick. 223. Guaranty is non-continuing. Anderson v. Blakely, 2 W. & S. 237; Aldricks v. Higgins, 16 S. & R. 212.

OPINION OF THE COURT.

Caplon, a wholesale dry goods merchant, was applied to by Amos Harris, for goods from time to time, which were furnished. When Harris' debt grew to $347, Caplon objected to further sales on credit, in the absence of security. Harris then procured from Saktone, a paper of this purport: "I will be responsible to the amount of $1,500 for any balance due on account of goods sold or to be sold by John Caplon to Amos Harris. [Signed], Samuel Saktone, August 17, 1896." This being delivered to Caplon, he continued to sell goods in quantities whose values were $193, $217, $341, $417, $266, $912 respectively. Payments on account were made from time to time, of the following amounts: $100, $250, $210, $300, $275, $50, $75, $190. Harris, after the first three purchases following Saktone's guaranty, gave Caplon his note for $400 payable six months after date, on Caplon's expressing a desire for additional security. Two months after the last sale had been made, Harris made an assignment in trust for the benefit of creditors. A dividend of 49 per cent, was received from this estate by Caplon. He brings assumpsit on the guaranty for the remainder.

The import of Saktone's guaranty is quite obvious. It contemplates goods already "sold or to be sold." It assumes a liability not merely for the first $1,500 worth of goods to be sold, but for "any balance due on account" of such goods. The parties had in view successive sales and successive payments, and Saktone undertook for any excess at any time of the sum of all the sales over the sum of all the payments. The existing excess, after deducting the dividend from the assigned estate is nearly $700.

The defendant urges several reasons why there should be no recovery against him. These we will consider *seriatim.* 1. It is suggested that no notice was given

by Caplon to Saktone, that he had accepted the guaranty. He in fact accepted it, for, as the jury might well infer, he continued to sell goods to Harris, after his receipt of Saktone's undertaking and he would not have done so, but for that undertaking. But, the decisions require more than this acceptance. The guarantee must notify the guarantor thereof. The Pennsylvania cases do not distinguish between notice before action in reliance on the guaranty, of the intention to rely on it, and notice after such action. We are not prepared to hold that Caplon was required before he gave any credit to the guarantee, to inform Saktone that he was going to give such credit. We are of opinion, however, that within a short time after his first sale, he should have notified Saktone of it, in order that Saktone might realize that the responsibility which he had proffered had been accepted. Gardner v. Lloyd, 110 Pa. 278; Coe v. Buehler, 110 Pa. 366; Evans v. McCormick, 167 Pa. 247; Kay v. Allen, 9 Pa. 320; Unangst v. Hibler, 26 Pa. 150; Kellogg v. Stockton, 29 Pa. 460; Bay v Thompson, 1 Pears. 551. Six sales at intervals occurred and Saktone had no intimation that they had been made, or that they had been made in reliance on his assumption. He is therefore not responsible.

2. It is urged that the taking by Caplon of the note for $400, discharges *pro tanto*, Samuel Saktone. This result, it is said is wrought in either of two ways. (a) The note was a payment of so much of the account, or (b) by accepting it, Caplon agreed to extend the credit for six months. A promissory note may be received in payment of a book account, but in this state, the mere receipt of it is not *prima facie* evidence that it was taken as payment. Hutchinson v. Woodwell, 107 Pa. 509; McCartney v. Kipp, 171 Pa. 644; Weakly v. Bell, 9 W. 273; Kemmerer's Appeal, 102 Pa. 558. We know nothing of the purpose of the parties in making and accepting this note. It must therefore be deemed to be merely a collateral security for the book account.

In accepting it, did Caplon agree to give time? The principle is thoroughly established that an agreement supported by a consideration by the creditor with the debtor to give the latter time, without the consent of the surety, endorser, or guarantor, will discharge such surety, endorser or guarantor. Siebeneck v. Auchor Saving's Bank, 111 Pa. 187. But it is equally well settled in Pennsylvania, that the acceptance of the debtor's promissory note payable at a future day by the creditor does not establish an agreement to wait until that day. Hutchinson v. Woodwell, 107 Pa. 509. *Cf.* Bank of Pennsylvania v. Potius, 10 W. 148.

(3.) The estate of Harris was assigned for the benefit of his creditors. It was in relief of Saktone, that Caplon proved his claim and received therefrom 49 per cent. of the debt. A debtor does not discharge himself from his debts, by making an assignment of the benefit of his creditors. For any residue of his debts, after the application thereto, of the proceeds of the assigned property, he remains individually liable. It need hardly be remarked that an acceptance from the principal of a partial payment of the debt, does not discharge the guarantor.

For error in our instruction to the jury, the verdict for the plaintiff is set aside and a new trial is awarded.

Milesburg Building and Loan Association, now for the use of J. Lincoln Miller, vs. John Miller, William Miller, J. Lincoln Miller, George Miller and Mrs. Mary Butler.

Mortgage — Payment — Satisfaction — Assignment—As security for debt owing to mortgagee's assignee.

Sci. fa. sur mortgage.

JACKSON ORLANDO HAAS and FRANK J. LAUBENSTEIN for the plaintiff.

1. Consideration is not essential to the assignment of a mortgage.—Am. and Eng. Encyc. 15 vol. 843; Sicard v. Davis, 31 U. S. 124; Adair v. Adair, 5 Mich, 204; Jackson v. Eaton, 20 Johns. 4 8; C. & U. W. R W. v. Nicoes, 57 Ill. 464

2. No resulting trust.—Barnett v. Dougherty, 32 Pa. 371.

3. Money advanced on the same mortgage may be recovered on a *sci. fa.*—Farnum v. Burnett, 21 N. J. E. 87; Garber v. Henry, 6 Watts 57; Moroney's Appeal, 24 Pa. 372; Friedley v. Hamilton, 17 S. & R. 70; Irwin v. Tabb. 17 S. & R. 418; Walden v. Ph. Ins. Co., 5 Johns. 320; Mauffitt's Adm. v. Ryud, 69 Pa. 389; Anderson v. Neff, 11 S. & R. 207; Springville S. F. & L. Ass'n v. Raber, 11 Phila. 546.

FRANCIS LAFFERTY and WILLIAM M. FLANNIGAN for the defendants.

1. There was no consideration and a resulting trust arose.—Hasel v. Beilstein, 179 Pa. 560; Boyd v. M'Lean, 1 Johns. Ch. 582; Midmer v. Midmer's Executors, 26 N. J. E. 299; Livermore v. Aldrich *et. al.*, 59 Mass. 434.

2. The assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee.—Geiger v. Peterson, 164 Pa. 352; Morgan's Appeal, 126 Pa. 500; Theyken v. Machine Co., 109 Pa. 95; Bank v. Thomas, 19 W. N. C. 515; Hexter v James, 1 Leg. Rec. 194; Mott v. Clark, 9 Pa. 398; Ashton's Appeal, 73 Pa. 153.

3. One of several tenants in common cannot purchase a mortgage for the purpose of depriving the others of their interest.—Fisher *et. al.* v. Hartman *et. al* 165 Pa. 16.

OPINION OF THE COURT.

On August 17, 1872, James Miller gave a mortgage for $600 to the Milesburg B.* & L. Association, and on August 2, 1875, died intestate. No letters of administration upon the estate, were ever issued. The five children agreed with each other and their mother, the widow, Mrs. Eliza Miller, to contribute monthly, so much as was needed to pay the dues to the association, upon the mortgage, and after her death, to sell the premises, and equally divide among themselves the proceeds. The widow died April 25, 1895. The children made unequal payments upon the mortgage. One of them, Mary Butler, contributed $13 per month, but J. Lincoln Miller, one of them, made none. The widow also made some payments. J. Lincoln Miller sent to his mother during her lifetime for her support, a considerable sum of money, probably $500. On November 30, 1881, the building association assigned to him the mortgage, which had already been fully paid. The object of the assignment, on Lincoln's part, was to secure a home for the mother during her life, the mortgage being for as much as the premises were worth. This *scire facias* on the mortgage is sued out, for the use of J. Lincoln Miller, against himself and the other heirs, as terre-tenants.

On these facts, it is entirely clear that there can be no recovery. The mortgage was paid at various times, in small amounts, and the association might have assigned it to any one of the payers, to secure him for any excess of his contributions above those of the others. But those who made the payments did not solicit an assignment. After the mortgage became extinct by full payment, J. Lincoln Miller, who made no payments, procured an assignment of it. He paid nothing for it. He was cognizant of the fact that it had been paid in full. But had he given a full consideration and been ignorant of the payment, the assignment would not avail him as against the land, since the mortgage was in fact paid. Theyken v. Howe Machine Co., 109 Pa. 95; Reineman v. Robb, 98 Pa. 474; 3 Liens, 236.

It has been held that a judgment which has been paid, may by the agreement of the debtor and creditor, be continued to secure the payment of a new debt, Pierce v. Black, 105 Pa. 343; and such an agreement will even preserve the lien of the judgment, as against liens acquired by others subsequently to the agreement, Merchants' National Bank v. Mosser, 161 Pa. 468. It is possible that had the terretenants agreed with the Building Association, that the latter although paid might assign the mortgage to J. Lincoln Miller to secure another debt, and in consequence of such agreement, had the association assigned the mortgage to secure the repayment of moneys paid by him to their mother, he could maintain this *scire facias*. On no other conditions could he do so. No such agreement has been made. It does not even appear that Lincoln has any claim against the other heirs, for any contributions he made to the support of his mother. The only contract that appears was to pay the mortgage, sell the premises at the mother's death and equally divide the proceeds. Under this contract, on a sale of the premises, those who made the payments would have a right to reimbursement, and only the residuum would be divided equally. So far as appears, the moneys paid by Lincoln to his mother were a pure gratuity, for which he contemplated no compensation. Had it been made to appear that the agreement was that the five children should contribute money both for the widow's support and for the discharge of the mortgage, and that all thus contributing should be reimbursed out of the proceeds of sale, and had it appeared that, in pursuance of such an agreement Lincoln paid moneys to his mother, while the others paid money to the Asso-

ciation, he would *pari passu* with them, have had a right to reimbursement. The case is destitute of any facts that would justify the acquisition of the mortgage by Lincoln, and its enforcement against the land.

The verdict therefore must be for the defendant.

PATRICK DENNIS, JR., vs. CHARLES THROCKNORTON.

Binding effect of agreement under seal—Specific performance of contract—Will made after written contract does not annul the contract.

Bill in Equity.

CLARENCE GILLILAND and WALTER J. HENRY for the plaintiff.

The sealed contract can be enforced.—Candor and Henderson's Appeal, 27 Pa. 119; Cooch v. Goodman, 2 Q. B. 580; Darr v. Munsell, 13 Johns, (N. Y.) 430; Page v. Trufant, 2 Mass. 159; Wallace v. Miner. 6 Ohio 367; Doughty v. Miller, 50 N. J. E. 529.

A will made subsequent to a written contract does not take the place of or annul the written contract. Hill v. Groom, 1 Beav. 540, Van Dyne v. Vreeland, et. al., 11 N. J. E. 370; Meek's Appeal, 97 Pa. 313; Schutt v. Miss. Soc. M. E. Church, et. al., 41 N. J. E. 115.

S. H. MILLER and ELI SAULSBURY for the defendant.

No further proceeding can be had until an account shall have been taken in the proper Orphans' Court of the debts and assets of the estate and the amount be ascertained.

Rhone's O. C. Practice, Vol. II, p. 278.

Equity will not enforce the contract specifically. Cooper v. Penna, 21 Cal. 404.

Equity will endeavor to do perfect and complete justice. Jones v. Menhall, 115 Mass. 244.

STATEMENT OF THE CASE.

Patrick Dennis, Sr., and Patrick Dennis, Jr., and Thomas Buck agreed to form a partnership association, the Dennis' and Buck contributing respectively $50,000. Patrick Dennis agreed by a sealed writing with his son, that he would contribute $30,000, the son $20,000, and that, on the death of either, he should bequeath his shares to the survivor. The money was accordingly contributed, the association organized, business commenced and conducted for seven years. Then Patrick Dennis, Sr., died, leaving a will in which he gave $2,000 to his widow, gave equal shares in the residue of his estate, except the stock in the association, to his son Patrick, and to his daughter Mary; and gave the stock in the association to his son Patrick, charged however, with the payment of all his private debts, amounting to $3,450, and with the payment of an annuity of $350 to the widow. Patrick, the son, has never made a will. The shares of stock have no market value, never having been sold. This bill is filed against the executor of Patrick Dennis' will, to require him to transfer to Patrick, the plaintiff, (son) the $30,000 of shares held by the decedent at his death.

OPINION OF THE COURT.

The agreement between the Dennises was that on the death of either the survivor should become the owner of his shares in the association. It impliedly stipulated that these shares should not be aliened during life, except to the other party to the contract, and that, if not alienated, they should be bequeathed to the survivor. A contract for a conveyance by A's heirs at A's death, to B, is valid. Meck's Appeal, 97 Pa. 313. It is easy to infer then, that a contract to prevent the devolution of land on the heirs, by devising it to the party with whom the contract is made, is enforceable. Logan v. McGinnis, 12 Pa. 27; Kauss v. Rohner, 172 Pa. 481, as is a contract not to alien or devise the land away from the heir. Carson v. Cemetery Co. 104 Pa. 575; Taylor v. Mitchell, 87 Pa. 518; *Cf.* King's Estate, 150 Pa. 143; Wall's Appeal, 111 Pa. 464. The contract between the father and son provided for an unconditional bequest of each to the other of his shares of stock. The father's bequest charging on the son in respect of it the payment of his debts, and an annuity to the widow of $350, is not a fulfillment of the agreement.

Equity is asked specifically to enforce this contract. It is too well settled to need discussion, that a promise, not supported by a consideration will not be specifically performed. But, the Dennis promise was not gratuitous. For the father's promise, he received, (1) the son's contribution of $20,000 to the business, and (2) the son's promise to bequeath his shares therein to him; (3) the embarkation in the business

and its conduct for seven years by the son. These were surely ponderable considerations.

An obstacle to the specific enforcement of the contract it is urged, is the existence of debts to the amount of $3,450, and the absence of personal property from which to pay them. We do not think that these debts prevent the performance of the contract. By that contract, the son acquired a species of interest in the father's shares. He was a purchaser of that interest. The right of creditors of the father, to resort to his estate, is subordinate to the right of the son, to the transfer of the shares at the death of the former.

In the vast majority of cases in which the chancellor is asked to specifically excute contracts, the subject matter of the contract is land. Performance of sales of chattels is ordinarily not coerced, because compensation in damages, the remedy furnished by an action at law, is deemed an equivalent. 3 Pomeroy, Equity, § 1402. Equity courts are reluctant for this reason to compel a transfer of shares of stock. Dungan v. Dohnert, 11 W. N. C. 330, n.; Edelman v. Latshaw, 159 Pa. 644. But when the shares have no market value, when possession of them will give peculiar advantages to the party, and the securing to him of these advantages was one of the objects contemplated in the contract, the courts will compel the conveyance of shares of stock. Goodwin Gas Stove Company's Appeal, 117 Pa. 514; Hepworth v. Henshall, 153 Pa. 592; Johnson v. Brooks, 93 N. Y. 337; 22 Am. & Eng. Encyc. 993. In Foll's Appeal, 91 Pa. 434, the court declined to compel A to transfer, as he had agreed, to B, 15 shares of stock in a national bank, with a view to giving B the control of the bank, because, the bank being a quasi-public corporation, it was not sound policy to assist one man to get such control. The partnership of which the Dennises were members, was purely private. It was entirely legitimate for each to desire to retain after the death of the other, the ascendency in the concern which had been had from their concert. The shares have no well known market value. The deprivation of the son of a controlling voice in the business may induce losses to him which cannot be estimated with any precision, and for which any attainable compensation might prove wholly inadequate. We think specific performance an appropriate remedy. Crofut v. Layton, 68 Conn. 91.

The plaintiff, the son, has never made a will, and it is suggested that for this reason, not having performed his undertaking, he is not now in a position to enforce that of his deceased father. Of the agreement of the parties, a bequest is a purely modal performance. The substance of the agreement is that the shares should become the survivor's. Had the son died first and intestate, the father would have been aided by a court of equity, to procure a conveyance of the shares. The contract did not require the making of a will, at any particular time. It cannot be broken by the son until his death, and it can never be broken now, for the condition on which the bequest was to be made, viz: the father's survival, has not happened.

Let a decree be drawn up in conformity with the prayer of the bill.

SAMUEL ROBBINS vs. CHARLES DOBBINS.

Bailment—Bailee's lien for board of horse bailed—Agency—Undisclosed principal—Quasi contract.

Assumpsit.

MERKEL LANDIS and HERMAN M. SYPHERD for the plaintiff.

1. The agency may be implied from the relation of the parties.—Williams v. McKinley, 65 Fed. Rep. 4; Kribs v. O'Grady, 58 Am. Dec. 312; Bank v. Bank, 16 N. Y. 145; Norton v. Bull, 43 Mo. 113; Hull v. Jones, 69 Mo. 587.

2. A private agent acting for an undisclosed principal is *prima facie* liable.—Welch v. Goodwin, 123 Mass. 71; Pond v. Clark, 57 N. Y. 653; Cobb v. Knapp, 71 N. Y. 348. No privity of contract between Charles Dobbins, Jr., and Samuel Robbins.—Smith's Leading Cases, 1659; New Zealand Land Co. v. Watson, 7 Q. B. D. 374.

3. Bailee has a right to detain the thing bailed until compensated.—Trickett on Liens, 2 vol. 729; Young v. Kimball, 23 Pa. 193; Buckner v. Croissant, 3 Phila. 219.

MISS JULIA A. RADLE and GEO. W. AUBREY for the defendant.

1. The action should be brought against Charles Dobbins, Jr., instead of Charles Dobbins.—Hale on Bailments, 52; Harter v. Beauchard, 64 Barb. 617; DuBois v. D. & H. Canal Co., 4 Wendell 288; Jackson v. Brown, 5 Wendell 592; Fox v. Drake, 8 Cowen 191; Butler's Appeal, 26 Pa. 63;

Hays & Nick v. Lynn, 7 Watts 524; Moore's Executors v. Patterson, 28 Pa. 502; Fulweiler v. Baugher, 15 S. & R. 45; Youghiogheny Iron Co. v. Smith, 68 Pa. 340. Bailee acquired a lien.—3 Trickett on Liens, 555; Cadwalader v. Dilworth, 26 W. N. C. 32; Williams v. Smith, 153 Pa. 462; Hartman v. Keown, 101 Pa. 338; Bayle v. Lukens, 2 Del. 383.

2. The right to recover the $48 is denied.—Sand v. Martin, 2 vol. Forum 10; Hale on Bailments 220; Evans on Agency, 126.

OPINION OF THE COURT.

Dobbins received a horse from his son, (who was going to Europe) to keep until his return. Being thus in charge of the horse, he arranged with Robbins that Robbins should keep the horse at his livery stable, feed him and tend him. for $4 per week. After Robbins had kept the horse four weeks, Dobbins notified him by writing, that the horse was not his, and that he would no longer be responsible for his keep, but did not offer to take the horse away, nor indicate to whom it could be returned. Robbins on the same day sent a messenger to Dobbins, and stated through him, that he would return the horse to Dobbins that afternoon, but Dobbins forbade, saying that he would not receive it. The horse then continued with Robbins for twelve weeks longer. He brings this action for sixteen weeks board; $64.

It is immaterial, for the decision of this case, how we classify the relation of Charles Dobbins to the horse of his son. He was not its owner. He was its depository or its mandatory, Hale, Bailments, 41 *et passim.* It was in his custody, and a part of the task he assumed with respect to it, was duly to house, feed and tend it. Whether his situation was such that the son must have known that he could not perform this task, except by means of a livery stable keeper, does not appear, nor is it important. The horse was in the possession of Dobbins, and he had a right to place it in the charge of Robbins. No one is contesting that right. He agreed with Robbins to pay him $4 weekly, if he, the latter, would take the horse and give him his keep. The horse was received, in pursuance of the contract, by Robbins. The arrangement might probably have been ended at any time, by Dobbins or by Robbins; it could certainly have been ended at the expiration of any week. It was neither ended nor attempted to be ended, until four weeks had elapsed. The plaintiff, then, has a right to recover $16. Has he a right to recover more?

At the end of four weeks, Dobbins for the first time informs Robbins, that the horse does not belong to him, and declares, both that he will not receive it from Robbins, and that he will not be responsible for its keep. The relation between the defendant and plaintiff was that of bailor and bailee for mutual benefit, a *locatio custodiae*, or *locatio operis faciendi.* It could be terminated by either: by Dobbins on his demanding the horse, and paying the compensation thus discharging Robbins' lien, Yearsley v. Gray, 140 Pa. 238; Young v. Kimball, 23 Pa. 193; by Robbins on his tendering the horse and declining longer to keep it. If Dobbins had requested the horse, after offering to pay all charges due, Robbins could not recover for its keep after refusing to surrender it. But Dobbins does not demand the horse. On the contrary he refuses to relieve Robbins of its custody. Robbins could not properly turn the horse loose. He would, by so doing, have become liable for any damage that it might commit. Goodman v. Gray, 15 Pa. 188; McIlvaine v. Lantz, 100 Pa. 586; Rossell v. Cottom, 31 Pa. 525. He was bound to keep it confined, and he was bound to provide food for it. Humanity forbids the starvation of it. Even if the contract between Dobbins and Robbins was ended by the notification from the former, the law casts on him the duty of compensating the latter for such expenses as his enforced possession of the horse occasioned. In Preston v. Neale, 12 Gray 222, an outgoing tenant left in the house a stove and three trunks. These being in the way of the incoming tenant, who nevertheless was bound to take fair care of them, he removed them to a safe place, and was permitted to recover compensation from their owner. In the absence of other evidence, the contract price of $4 per week may be assumed to be a fair recompense for the keep of the horse. Andrews v. Keith, 168 Mass. 558. Whether under the stray law or other law, Robbins might have ultimately rid himself of the bailment of the horse, we are not now called upon to decide.

The attorneys for the defendant invoked the principal that as the bailment of his horse to his father, by the son, authorized the father to make such contract of agistment as became necessary, the son was liable, under such contract to Robbins. Hale on Bailments, 52; Harter v. Blanchard, 64 Barb. 617. It does not follow from that principle, that Charles Dobbins is not also liable. He made the contract. He did not disclose his principal. He did not inform Robbins that he was not the owner of the horse. He then became personally liable; Clark Contracts, 740.

The motion for a non-suit is overruled.

JAMES FARLEY ET AL. vs. AMERICAN MFG. CO. AND JACOB JAMISON.

An insolvent corporation cannot purchase its own shares—Nor reduce its assets—Actual fraud not necessary—Assignee for benefit of creditors represents the consignor and does not acquire the rights of creditors.

Bill in equity, to declare sale o stock void, etc.

CHARLES S. SHALTERS and G. FRANK WETZEL for the plaintiffs.

1. The assets of a corporation are a trust fund for the payment of its debts, and the claims of its shareholders are subordinate to the claims of its creditors.—Taylor on Private Corporations, Sec. 654, 655; Am. and Eng. Encyc. 23 vol. 856; Sawyer v. Hoag, 84 U. S. 610; Lane's Appeal, 105 Pa. 60; Bell's Appeal, 115 Pa. 92. Creditors may follow corporate assets.—Taylor on Priv. Corp., sec. 656, 669, 552, 813; Sawyer v. Upton, 91 U. S. 60; Wood v. Dummer, 3 Mason 308; R. R. v. Howard, 74 U. S. 393.

2. An insolvent corporation cannot purchase its own shares, even when there is no actual fraud.—Taylor on Priv. Corp., sec. 135, page 105, note; Columbian Bank's Est., 147 Pa. 436; Coleman v. Oil Co., 51 Pa. 74; Am. and Eng. Encyc., 23 vol. 677.

3. In equity, the court regards the relative rights of all the creditors.—Taylor on Priv. Corp., sec. 669, 513; Jamison's Estate, 163 Pa. 155; Pfohl v. Simpson, 74 N. Y. 137; Turnbull v. Lumber Co., 55 Mich. 387.

W. LLOYD SNYDER and PAUL J. SCHMIDT for the defendants.

1. In the absence of prohibition by statute, a corporation may purchase its own stock.—Bank v. Bruce, 17 N. Y. 507; Dock v. Cordage Co., 167 Pa. 370.

2. Where there is a *bona fide* transfer of stock to the corporation, the stockholder is relieved from all liability.—Neiller v. Brown, 18 Hun 571; Billings v. Robinson, 94 N. Y. 415; Isham v. Buckingham, 49 N. Y. 216; Harrison's Case, L. R. 6 Ch. 286.

3. As long as the affairs of a corporation are carried on in good faith, creditors cannot interfere in the corporate management.—Taylor on Priv. Corp., 639. Especially, if acts complained of were done before their claims arose.—Taylor on Priv. Corp., 638; Graham v. Railroad Co., 102 U. S. 148.

STATEMENT OF THE CASE.

The American Manufacturing Company was a corporation, making agricultural implements. Of these A had sold $19,000 worth to X, taking X's note in payment, with a mortgage as a security. Jamison was a shareholder in the company to the extent of $1,000, the entire stock being $40,000. On Aug. 3, 1894, the company agreed to buy Jamison's stock, and in payment to transfer to him $1,000 of its claim against X. Notes to the extent of $1,000 were handed back to X who at the same time made two notes for $500 each, payable directly to Jamison, with a warrant of attorney to confess judgment and abundantly secure. On this day, the corporation was insolvent, in the sense that its matured liabilities greatly exceeded its money on hand, and such additional money as it could hope to obtain by sale of any of its property within a reasonable time. It continued, however, to do business, making and selling machinery for four months; during which time it paid off some debts that were mature on Aug. 3, 1894, but contracted new debts in excess of those thus paid. At the end of the four months, an action for $1,500 begun some time before, was nearly ready for trial, and the corporation, seeing no way of continuing business, made an assignment in trust for the benefit of its creditors, to John Farley. One of its creditors, on the 3 Aug., 1894, was James Macpherson, whose debt was $734.09. Horace Hadrian became a creditor, for material sold, on Sept. 11, 1894, to the extent of $399.19. These creditors in union with Farley, file this bill against this corporation and Jamison to declare the sale of the stock of Jamison void, and to compel him to refund the $1,000 with interest. No actual fraud was intended by Jamison. He had quarreled with the principal stockholders and the directors and president

and both they and he desired to sever a relation that was no longer agreeable. It does not appear that he knew of the exact situation of the corporation. He did know that it had not been prospering, and that no dividends had been declared for two years.

The incapacity of a corporation to pur chase its shares of capital stock, recognized in England, 1 Cook, Stocks and Stockholders 414, has not been maintained in this country, Dock v. Schlichter Jute Cordage Co., 167 Pa. 370; although in Coleman v. Columbia Oil Co., 51 Pa. 74, it is said that the practice of corporations buying their own stock is not to be commended. It is however held in the American courts, that the capital stock is a trust fund for the benefit of creditors, and that the withdrawal of it from them, will be ineffectual if the other assets of the corporation prove insufficient to satisfy their debts. Sawyer v. Hoag, 17 Wall. 610; Handley v. Stutz, 139 U. S. 417; Langer v. Upton, 91 U. S. 56; 23 Am. and Eng. Ency. 856; Crandall v. Lincoln 52 Conn. 73; Columbian Bank's Estate, 147 Pa. 422; Lane's Appeal, 105 Pa. 49; Bell's Appeal, 115 Pa. 88; If the stock has not been fully paid in, creditors may by a bill in equity, compel the payment of it. Lane's Appeal, 105 Pa. 49; Bell's Appeal, 115 Pa. 88. If stock having been fully paid up, the corporation should permit the stockholder to take out what he had paid in upon it; the creditors could by a bill compel him to pay back the sum thus taken out; Buck v. Ross, 68 Conn. 29.

The Amer. Manufacturing Company, on Aug. 3, 1894, held notes of X to the amount of $1900 for agricultural implements, and a mortgage securing their payment. Notes to the extent of $1000 were handed back to X, and he made new notes, payable directly to Jamison. The property of the corporation was therefore lessened, in order to buy Jamison's shares. It is evident that if this process had been repeated, in favor of all the shareholders, the property of the corporation would have been consumed in paying back to them what they had contributed to it, and the creditors would have been entirely unprovided for.

It is evident that this result would follow, whatever the motive of the corporation and of the shareholder, in the repurchase of the stock. For that reason, and for the reason that in many cases it would be practically impossible to show what the motive was, the purchase by the company of its own stock, will, generally be voidable, if its avoidance becomes necessary for the satisfaction of debts, although it was made in good faith and although the fact of insolvency was unknown to the stockholder; 2 Thompson, Corporations, § 2062. In Columbian Bank's Estate, 147 Pa. 422, an effort was made to show that the stockholders knew of the insolvent state of the bank, but we cannot think that the result could have been different, had his ignorance of such state been absolutely clear. Whatever doubt there may be, then, as to Jamison's knowledge of the condition of the Manufacturing Company, it was in fact then insolvent. His withdrawal of his contribution to the stock was then unlawful, and he must return it Buck v. Ross, 68 Conn. 29.

The plaintiffs in the bill are Farley the assignee, Macpherson and Hadrian. Macpherson was already a creditor when Jamison sold his stock to the company, Hadrian became such between that sale and the assignment in trust. The American Manufacturing Company is, along with Jamison, the defendant. As respects the Company and Jamison, the purchase of his stock was perfectly valid. Neither he nor it could avoid it. As a constructive fraud, a diversion of trust funds from the *cestui que* trust, only the *cestui que* trust can take steps to annul it. It is well settled in Pennsylvania, that an assignee for the benefit of creditors occupies the position of the assignor. He does not acquire the rights of creditors. Hence, conveyances fraudulent as to them, he cannot set aside. If anybody, they only can annul such conveyances. Assignments, 127; Jordan v. Mosser, 9 Pa. C. C. 325. As respects Farley therefore, the bill must be dismissed. But Macpherson's right to assail the purchase of the Jamison stock is unquestionable. As the demurrer does not complain of the misjoinder of parties, it must as to him be overruled. Hadrian was not a creditor, when Jamison's stock was bought by the Company and he did not become such until five weeks afterwards. It is probable that, if Hadrain had had actual knowledge of this purchase, when he gave his credit, or if so long a

time had then elapsed as to repel the inference that he had given credit on the assumption that the number of shareholders had not been reduced, he would not now be allowed to attack the purchase, 23 Am. and Eng. Encyc. 863. We see no facts which preclude him from complaining that the purchase was injurious to him.

It does not appear, in the bill, that Macpherson and Hadrian have obtained judgments and issued executions thereon, to which the return of *nulla bona* has been made. Nor, does it appear that any distribution of the assigned estate has been made wherein there has been an adjudication upon the claims of these persons. The demurrer, however, does not question the right of the plaintiff for this reason to maintain the bill. The demurrer is overruled, and the defendant ordered to answer within the time prescribed by the rule of court.

ESTATE OF HENRY BATTERSON, DECEASED. EXCEPTIONS TO AUDITOR'S REPORT.

Mortgage—Accompanying Bond—Personalty, the primary fund for payment of testator's debts.

FRANK H. STROUSE and FREDERICK C. MILLER for the plaintiff.

There was no express declaration in the will that James Batterson should take the farm *cum onere*. Hoff's Appeal, 24 Pa. 200, Lennig's Appeal, 52 Pa. 135; Hirst's Appeal, 92 Pa. 491; Rhone's O. C. Practice, p. 212. The fact that a mortgage is given as security does not render the obligation any the less a debt. Hoff's Appeal, *supra*; Lennig's Appeal, *supra*. The debts of a decedent must first be paid out of the personalty. Act 24th Feb. 1834, B. P. Dig. 591; Ramsey's Appeal, 4 W. 71.

MARTIN F. DUFFY and WALTER G. TREIBLY for the defendant.

The auditor's report favors equality among the children. Pyle's Appeal, 5 Pa. Sup. Ct. 336; Stephey's Appeal, 4 Pa. Sup. Ct. 550. The land is the primary fund for the satisfaction of the mortgage. Mosely v. Marshall, 27 Barb. 42; Jumel v. Jumel, 7 Paige 591; Cumberland v. Codrington, 3 Johns. Ch. R. 229; Wisner's Estate, 20 Mich. 442. There was no accompanying bond nor express covenant in the mortgage and hence no personal liability. Scott v. Fields, 7 W. 360; Hoffman v. See 3 W. 352; Bantleon v. Smith, 2 Binn 146.

Henry Batterson's will devised his farm X to his son James; another farm, Y, to his daughter Sarah, his forty shares in the First National Bank of Mechanicsburg to his daughter Jane. He divided the residue of his estate equally between his three children. The shares of stock were at Batterson's death worth $2000. Farm Y was worth about $1700, and farm X about $2300. On farm X there was a mortgage for $700, for money borrowed two years before, by Batterson. James, the son, who was appointed executor, as such, paid the mortgagee the principal with $37 of accrued interest, and in his account, claimed credit for this payment, and for the payment of $375 more of debts. The daughters except to the credit of $737, and the auditor has reported that that payment should have been made by James, as devisee, and not as executor, and denied to him the credit. The balance of personalty admitted by the executor was $2419. This was increased by $737. After the expenses of the audit were deducted, the residue $3000, was divided equally among the three children. To this denial of the credit of $737 by the auditor, James Batterson excepts.

It is a well settled principle, that when a debt for which the decedent is personally liable, is also secured by a lien or charge on land, and the land is devised or descends, the personalty must bear the burden of the debt, for the benefit of the heir or devisee, Hoff's Appeal, 24 Pa. 200; Moore's Appeal, 88 Pa. 450; Lennig's Appeal, 52 Pa. 135; Hirst's Appeal, 92 Pa. 491; Merkel's Estate, 131 Pa. 584. It is equally clear that if the deceased is not personally liable for the lien, the lien on his land is not payable from his personal estate, and the land will not therefore be exonerated thereout, unless there is a declaration in the will of his purpose that it be exonerated. Hirst's Appeal, 92 Pa. 481. If a mortgage is on a tract of land when A becomes the purchaser of it, the duty of paying the mortgage from his personalty, on his death depends on his having became personally liable for it. If he did not thus become personally liable, the mortgage is not payable from the personal estate, in relief of the devisee; Moore's Appeal, 88 Pa. 450; Hirst's Appeal, *supra*. If he did thus become personally liable, the devisee will be relieved; Hoff's Estate, 24 Pa. 200; Lennig's Appeal, 52 Pa. 135;

Reigelman's Estate, 174 Pa. 476. Hence it always becomes a question whether the grantee of land so assumed the mortgage on it, as to do more than undertake to indemnify the grantor from the payment of it. If he did, and the mortgagee might, in the name of the grantor, or in his own name, maintain an action against the grantee for the mortgage, Merriman v. Moore, 90 Pa. 78; on the death of the grantee, his personal estate would have to pay the mortgage, and thus discharge the land from its burden, Moore's Appeal, 88 Pa. 450; *In re* McCracken's Estate, 29 Pa. 426.

The mortgage on the Batterson farm, was placed on it by Batterson "for money borrowed" ten years before his death. If the mortgage was the only security for the borrowed money, if there was given for it no bond, note, or personal undertaking of any kind; if the lender was to look solely to the land, by means of his mortgage, Batterson did not become indebted for it. A mortgage in the usual form does not impose a personal liability, and assumpsit cannot be maintained upon it; Baum v. Tonkin, 110 Pa. 569; Reap v. Battle, 155 Pa. 265; Scott v. Fields, 7 W. 360; Fidelity Ins. and Trust Co. v. Miller, 89 Pa. 26; 1 Jones, Mortgages, 548; nor must a debt of the mortgagor accompany the mortgage. Not only may he make the mortgage to secure the debt of another person, and thus not assume any individual liability, 2 Jones, Mortgages 241, (Edition of 1879), but, even when it is given to secure the repayment to the mortgagee of a second money by himself, it may be understood that the remedy on the mortgage shall be the only remedy. 1 Jones, Mortgages, 4850; Ball v. Wyeth, 99 Mass. 338. If such is the case, there exists no debt in the proper sense of the word. A personal action could not be sustained against the mortgagor; no property of his could be taken in execution to secure the repayment of the money. If the Batterson mortgage was not accompanied by any personal liability, it was not payable out of the personal estate. The remarks of Agnew J., in Lennig's Estate, 52 Pa. 135, that "when encumbered by the mortgagor for his own *debt*, the land is but a pledge or security for its payment, and the primary liability rests in equity upon the personal estate to redeem it, and this even where no bond or covenant for the payment accompanies the pledge" must not be so interpreted as to clash with this principle. A bond is not necessary, nor a note, nor a covenant or formal undertaking of any kind, in order that a personal liability should spring up from the borrowing of money, but, if it is understood that only the mortgaged premises are to be answerable for the repayment, the law will not, despite the contract, thrust a personal liability upon the borrower.

It does not expressly appear whether Batterson gave a bond or note for the borrowed money. He did borrow the money. An agreement by the lender to look solely to the land mortgage, is so extremely rare, that we think it incumbent on the party who alleges such an agreement to prove it. From the mere fact of borrowing and agreeing for the repayment of the loan, a personal obligation to repay would arise, unless excluded by explicit agreement. We must then assume that Batterson was personally bound to repay the $700. If so, in the absence of a clear indication that he intended his son James to take the land devised to him *cum onore*, the mortgage is payable out of his personal estate. The auditors report must then be rectified.

Balance,	$2,419
Deduct expense, of audit,	156
	$2,263
Payable to James Batterson,	$754.33
" " Sarah "	754.33
" " Jane "	754.33

JAMES MAYNARD vs. SAMUEL McKINN.

Step-father's liability for maintenance of step-son during the life of latter's father.

Assumpsit.

WALTER B. FREED and ROBT. P. STEWART for plaintiff.

The defendant had notice that Maynard was supporting his child and acquiesced in Maynard's conduct. This creates an implied contract for which defendant is liable. 6 Ad. & El. 718; Mortimer v. White, 6 M. & W. 482; Thayer v. White, 12 Metc. 343; Story on Cont. 139, Sec. 82 (a); Miller's Appeal, 100 Pa. 570. A step-father is under no obligation to support his step-children. Brookfield v. Warren, 128 Mass. 287; Worcester v. Marchant, 14 Pick 512; Williams

v. Hutchinson, 3 N. Y. 312. A father is liable for the support of an infant child not able to earn its own living. Act June 13, 1836, P. L. 539, Sec. 28; Wertz v. Blair Co., 66 Pa. 11.

B. FRANK FENTON and CHAS. G. MOYER for the defendant.

If the step-father receives his step-children into his home and supports and educates them, he stands in *loco parentis* and can not maintain an action for such support. They mutually assume the relation of parent and child. Horton's Appeal, 94 Pa. 62; Mulhern v. McDavitt, 16 Gray 404; Sharp v. Cropsey, 11 Barb. (N. Y.) 224. The son was taken surreptitiously by the mother after divorce without a decree as to the custody of the child. 37 L. R A. 589. The father was willing to support his child but the step-father assumed the obligation. Chilcott v. Trimble, 13 Barb. (N. Y.) 502; Duffey v. Duffey, 8 Wright 399.

OPINION OF THE COURT.

McKinn and wife were divorced. A son, nine years of age, continued to live with the father for two years thereafter, when, his mother meeting him, induced him to come and live with her. She having been married to Maynard, with whom she was living, the son went with her. When shortly afterwards, McKinn was informed that his son had gone to his mother's, he sent the boy's trunk and clothing to Maynard's house. Here the son continued to live for the future. At the expiration of three years, Maynard brought this action against McKinn for the support of the boy for three years.

There can be no doubt that the father is bound to support his minor children Should he neglect to do so, he would be liable to such persons as sold food, clothing and other necessaries to him. Along with this duty of support, exists the right of control and companionship. It is possible for other persons to establish the relation of quasi-parent to the child, and to assume the burden of supporting it, so that, after giving it food, clothing and shelter, they would have no recourse for compensation to the father. Thus, if an uncle, also guardian of a child, takes it to his house, and treats it as his child, he can not charge her estate with the cost of her support. Norton's Appeal, 94 Pa 62. A grandfather, who, on the death of the child's mother, takes it to his home, and there supports it, cannot be reimbursed from the estate of its father. Duffey v. Duffey, 44 Pa. 399 A step-father who has taken his wife's child into his house and there supported it, cannot be repaid by the guardian of the child. Douglas's Appeal, 82 Pa. 169; Ruckman's Appeal, 61 Pa. 251. Several of these cases intimate that had there been a contract between the quasi-parent and the father, or the guardian of the child, for compensation to the former, there might have been a recovery for such compensation.

The father is entitled to the custody of the child, and the duty of support accompanies that custody. If the mother, after being divorced from him, retains the child, there arises, as respects the father, a duty on her to maintain it. She cannot sup port an action against him for reimbursement. Titler v. Titler, 33 Pa. 50. Said Lowrie C. J., in that case, "The father is willing to take the child and support it himself. If she prefers to keep it, she can claim nothing from him as a right; and we cannot enforce the duty of generosity. When a man abandons his child and casts it upon the public, he becomes liable for its support. But it is entirely impossible to treat the child as thus cast on the public, when the fact simply is, that the mother has deserted the father, and carried away the child and continues to support it. This is merely leaving it with her, until she chooses to restore it, and while she keeps it on such ground, she has no claim for compensation."

McKinn's wife has after divorce, married Maynard. She has enticed the boy from McKinn, and, with the consent of her present husband, has kept him in his house. He has been supplied by Maynard with food, clothing and necessaries. If Maynard was unwilling thus to support the child, he had a means of avoiding the burden. He might have returned him to McKinn. He might have notified McKinn that the boy was at his disposal, and that if not brought away, compensation for his support would be expected. He might have insisted on a promise from McKinn to reimburse him for any expenses. He did none of these things Yielding to the wishes of his wife, he allowed the child to remain in his house, as a member of his family. He has no right after the acquiescence by the boy's father, in the loss of his society and the control of

his education, to surprise him with a demand for compensation. There was no express contract by the father to compensate the step-father. Nor are there any facts from which an implied contract can be constructed. Titler v. Titler, 33 Pa. 50; Duffey v. Duffey, 44 Pa. 399. In Toss v. Hartwell, 168 Mass. 66, a case strikingly like the one at bar, the court after saying, "If there is a legal obligation [to support the child] it rests upon the ground that he [the father] is entitled to the custody, the society, and the services of the child. He must also have the right to determine where his child shall live. If a son chooses to leave voluntarily his father's house, and live elsewhere, his father is not responsible for his support. Angel v. McLellan, 16 Mass. 28. So, if a child is induced by another to leave his father, without any necessity for so doing, the person thus influencing him to leave would, in case he furnishes supplies, have no cause of action against the father. Dodge v. Adams, 19 Pick 429, 432," concludes, "If the plaintiff chose to receive him, he had no right, without communicating with the defendant, to look to the father for the boy's support."

Judgment of non-suit.