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COLLEGE GRADUATION AS AN ENTRANCE REQUIREMENT TO LAW SCHOOLS

In a recent contribution to the literature of the law, a very learned lawyer, speaking of John Marshall, the greatest of American judges, declared that "his experiences at college had probably little effect upon his mental development." This remark, coming from one who was then dean of a well known law school, just previous to the announcement by the authorities of that school that in the future graduation from college would be a prerequisite to admission, might well be cited as justifying a doubt as to the purpose which those who insist upon a college education desire to accomplish. But Marshall's college experiences were of short duration and we cite the remarks of the learned lawyer solely for the purpose of introducing a discussion of the question whether a college education should be made a prerequisite for admission to a law school.

The history of the American bench and bar furnishes no justification for such a requirement. From the early colonial times, when Andrew Hamilton was "the most eminent practitioner in Pennsylvania and the adjoining colonies," until the present, when John G. Johnson is the acknowledged leader of the bar of Pennsylvania, a large percentage of the most eminent lawyers and judges have been men who were not college graduates.

It has been truly said that the career of George Wythe of Virginia was eminent along many lines, but that "in three respects at least—as statesman, as teacher, and as

jurist,—he had few equals in the galaxy of great men that adorn the annals of Virginia." Wythe was not a college graduate . Nevertheless he became famous for his knowledge of science, of philosophy, of the ancient and modern languages, and, in addition, had the honor of being elected the first university law professor in the United States and the second in the English speaking world—Sir William Blackstone being the first.

Overwhelming proof of Patrick Henry's standing in his profession as a great and profound lawyer, is furnished by the fact that Washington asked him to become chief justice of the United States. Henry never attended college, and it is certain that he gave no sign at the time of his leaving school, nor for many years afterward, of the possession of those intellectual powers which were subsequently to make him a leader in his profession and a supreme power in the stirring events of the early history of our country. Indeed, at the time of his admission to the bar at the age of twenty-four, Henry was a man who had failed in every enterprise he had undertaken and had given no evidence to anyone of those extraordinary gifts which were to make him, in the words of Marshall, "a great orator, a learned lawyer, a most accurate thinker, and a profound reasoner."

Chief Justice Marshall, speaking of a certain American lawyer, said that he was the greatest man he had ever seen in a court of justice. Justice Story attributed to the same lawyer "a great superiority over every man whom he had known." Chief Justice Taney, speaking of the same lawyer, said, "I have heard almost all of the great advocates of the United States, both of the past and present generation, but I have seen none equal to him." The name of this lawyer was William Pinkney. Pinkney was not a college graduate..

The history of William Wirt of Virginia is one of gradual, steady and notable achievement. Without a college education, he became successively Chancellor of Virginia, United States District Attorney and Attorney General of the United States. At the time of his admission to

the bar he had not given evidence of talents or industry from which a great career at the bar could reasonably be prophesied, and, it is said that during his early years at the bar he was "held up as a horrible example from one end of the country to the other." Nothing, however, could be more consistent than the rise and progress of Wirt in his profesSon. From briefless barrister he became the acknowledged leader of the Virginia and the Baltimore bars and his ability as a lawyer is specifically attested by the prominent part he played in the trials of Callender, Burr, and Jefferson, in Gibbons v. Odgen, and the Dartmouth College case, and by the fact that he was elected Professor of Law and President of the University of Virginia.

John Bannister Gibson attended Dickinson College but was not graduated and the tradition is that he made little mark as a student. Few, however, will deny that Pennsylvania, prolific as she has been of great lawyers and judges, has produced few, if any, equal to Gibson. For thirty-seven years he was a member of the Supreme Court of Pennsylvania and it would be difficult to overstate the value of his influence in this great constructive period of the law of Pennsylvania. At the time of his death, his successor, Chief Justice Black, said, "In the various knowledge which forms the perfect scholar, he had no superior. Independent, upright and able, he had all the highest qualities of a great judge. In the difficult science of jurisprudence he mastered every department, discussed almost every question and touched no subject which he did not adorn."

Charles O'Connor, of New York, received almost no education, as the word is understood to-day. The whole time spent by him at school was incredibly short—certainly not more than six months altogether. Furthermore at the time of his admission to the bar the profession of law was aristocratic and "a line was drawn between those who had had a college education and those who had not." In spite of these facts and of the prejudice which existed against him as the son of an Irish immigrant, by earnestness and diligence, he early became one of the leaders, and

later the acknowledged leader of the New York bar, and continued in that position for almost forty years. O'Connor's greatness as a lawyer is attested by those who are themselves regarded as great lawyers. His contemporaries, men who were opposed to him in litigation, who were acquainted with his skill as a draughtsman and pleader, and with his ability in argument, have testified to his greatness. William M. Evarts said that O'Connor was, in his judgment "the most accomplished, in the learning of our profession, of our bar," and that "he was entitled to pre-eminence in this province of learning among his contemporaries in this country, and among the most learned lawyers of any country under our system of jurisprudence." James C. Carter said that "he was, all things considered, the profoundest and best equipped lawyer that has ever appeared at this (the New York) bar" and that "he would not suffer in a comparison with the great lawyers of any nation or any time."

The fame which Lincoln acquired as President is apt to cause us to forget that he won distinction as a lawyer. Justice David Davis of the Supreme Court of the United States once said, "In all the elements that constitute a great lawyer he had few equals." Lincoln said of himself that he had never attended school more than six months in his life and certified in the Congressional Directory that his education had been defective. Those who insist that a college education is a necessary prerequisite to the study of law are prone to argue that the achievements of Lincoln would have been even greater had he received a college education. It is, however, more probable that any other education than that which Lincoln had, might have dwarfed his rugged strength and impaired those solid and resolute qualities, those practical and homely virtues, which were the source of his success.

Stephen Arnold Douglas was a lawyer of eminence and distinction before he became a prominent figure in our national and political history. Douglas was not a college graduate yet when less than twenty eight years old, and

ALUMNI LETTER

The appeal to all old Dickinson law men to take the Law Review did not make every alumnus a subscribed but it did bring us a lot of new subscribers and good letters. It occurs to us that alumni should remember each other in the exchange of business and that a directory of Dickinson alumni or some pages of cards might well be printed in the Law Review to facilitate this end. We'd like to hear from all who approve the idea. Your subscription for Vol. XIX., $1.25, is now due. If you havn't done so, please send us your check without further notice. Havn't some of you been spending weeks in the examination of some question of general interest? Don't you want to share the results by sending us an article for publication? Can't you send us some news about yourself or some other old law men? For instance—we hear from York County:

J. Thurman Atkins, '08, is Asst. Dist. Atty. and Democratic County Chairman.

Fred. B. Gerber and Hon. W. F. Bay Stewart form one of the leading law firms of the county.

Harvey A. Gross, '03, has been making a splendid record as Dist. Atty., and is active in politics.

C. W. A. Rochow, is active both at the bar and in politics.

C. Elmer Welsh has resumed the practice of law.

C. G. Setzer, Dist. Atty., of Carbon county, was married last June.

Jesse Long is Dist. Atty., of Jefferson county. His address is Weissport, Pa.

Anthony Walsh and Geo. Schwartzkopf are practicing together in Pittston.

Foster Heller is referee in bankruptcy in Wilkes-Barre.

Hugh Dever is Atty. for the United Mine Workers at Freeland.

Claude T. Reno, member of the 1911 Legislature, has an active practice in Allentown.

Ira LaBar is Dist. Atty., of Monroe county.

Frank P. Barnhart, member of 1911 Legislature, is practicing in Johnstown.

Alvin Sherbine, member of 1909 Legislature, is also practicing in Johnstown.

Floyd McAlee, is practicing in Easton.

John B. Mulhearn is in the real estate and insurance business at Mauch Chunk.

A. S. Heck is Judge of the 55th Judicial District and lives at Coudersport.

B. Frank Harper has offices at 133 S. 12th St., Philadelphia.

Geo. J. A. Miller is practicing at Slatington, Pa.

F. E. Renard is in the Cornell Bldg., Scranton.

Walter L. Dipple is in the Frick building, Pittsburgh.

Thomas P. Duffy is in the Connell building, Scranton.

A. E. Kountz, is in the Frick building, Pittsburgh.

J. Clarence Funk, is in the Telegraph building, Harrisburg.

B. B. Barr is practicing in Washington, Pa.

Roscoe B. Smith is in the Bennett building, Wilkes-Barre.

Bayard L. Buckley is at 12th and Chestnut streets, Philadelphia.

Gomer W. Morgan is in the Coal Exchange building, Wilkes-Barre.

Joseph B. Jenkins, is in the Watt building, Carbondale.

D. Lloyd Claycomb is in the Central Trust building, Altoona.

Geo. B. Marshall is practicing in Woodbury, N. J.

Charles N. Ulrich is practicing in Catasauqua.

Howard S. Rogers was married last August and is ranching in Montana. His address is Wilborn, Mont.

Clair N. Graybill died in Harrisburg, May 19, 1914.

Wm. N. Cooper is in the First Nat. Bank Bldg., Trenton, N. J. He is now trustee in bankruptcy of the Buffalo Bill Wild West Show.

Charles Alvin Jones is with Sterrett & Acheson, Oliver Bldg., Pittsburgh.

Horace B. King is in the Title Bldg., Baltimore.

H. L. Replogle is in the Moose Bldg., Chicago.

Edgar Easter and Larry Long are in Portland, Oregon.

Eugene C. Shoecraft is about to enter the diplomatic service and is now in Washington, D. C.

A. L. Edwards is a candidate for the legislature. Address Osceola Mills, Pa.

Charles R. Weeks is in the Denton Bldg., Mineola, N. Y.

Wm. B. Surran is in the Bartlett Bldg., Atlantic City, N. J.

J. Olan Yarnell is practicing in Washington, Pa.

J. H. Jacobs is practicing in Reading, Pa.

Louis Silverman is in the Commonwealth Bldg., Philadelphia.

John F. Watson is in Bloomsburg, Pa.

Roger J. Davis is in the Weitzenkorn Bdg., Wilkes-Barre, Pa.

B. J. Duffy is in Tamauqua, Pa.

John E. Myers is in Camp Hill, Pa.

S. D. McCall is in DuBois, Pa.

Francis Lafferty is at 21 N. 7th St., Newark, N. J.

E. C. Amerman is in Scranton, 1711 Linden St.

T. B. Miller is in the Coal Exchange Bldg., Wilkes-Barre.

Wm. F. Shean is in Scranton, 505 Lackawanna Ave.

R. H. Gilbert is in Tyrone.

Thomas S. Lanard is in the Bailey Bldg., Philadelphia.

Chas. A. Ambrose is in Mt. Carmel, Pa.

Florence E. Long is in Flemington, Pa.

within less than seven years from the time when as a penniless adventurer from the East he had been admitted to the bar of Illinois, he became a leader of the bar of Illinois and a member of its court of last resort at an age when most men are just beginning to practice.

Mercer Beasley served as Chief Justice of New Jersey for thirty-three years and is generally considered to have been New Jersey's greatest judge. Tho his father had been Provost of the University of Pennsylvania, Beasley, who entered Princeton, left college before graduation. During his career upon the bench his fame extended beyond the borders of the State. His complete knowledge of the law was a marvel to all who came in contact with him and his opinions were famous for their learning and strength in jurisdictions where he was personally unknown.

It is related that Jeremiah Sullivan Black hated school. He left it finally at the age of seventeen to begin the study of law. His own predilection had been for the study of medicine and he felt no drawing toward the law. Nevertheless by patient labor, by earnest effort and by the help of his own remarkable mentality he acquired such knowledge as enabled him later to serve with distinction as Judge of the Court of Common Pleas, Chief Justice of the Supreme Court of Pennsylvania, Attorney General of the United States and Secretary of State. His career was one of distinguished service to his country. "As most men fight for wealth, for position, and for life, he fought for honor, for justice and for civil liberty. For him there was but one thought—the welfare of his country."

Few treaties upon legal topics have achieved a more immediate and lasting success than Benjamin on Sales. It became a classic on both sides of the Atlantic and deservedly takes high rank among great juridicial productions. The writer of the book, Judah P. Benjamin, who became famous as a leader of the bar in both England and the United States left college at the beginning of his sophomore year and there was a rumor to the effect that he had been expelled. The esteem in which he was held by his contemporaries at

the bar is shown by the fact that upon his retirement in 1883 a great banquet attended by all the leading lawyers of England was held in his honor at which Sir Henry James, the Attorney General, in proposing the health of Benjamin, said, "Who is the man save this one of whom it can be said that he held conspicuous leadership at the bar of two countries."

Thomas McIntire Cooley "made for himself a name and place in our jurisprudence that entitles him to be ranked with the most distinguished jurists of his time." "Probably no judge upon a State Supreme Court left a record, that, all things considered, is superior to his." Certainly as a lawyer, writer and teacher he had few equals. He never attended college yet in the words of one of his colleagues upon the law faculty of the University of Michigan, "somehow he attained a better education than nine-tenths of the college graduates. He learned from reading and the great school of life where most of us get the discipline which is most useful." And as said by a late dean of the same school, "it may have been fortunate for him and the world that necessity made him his own instructor."

These instances sufficiently demonstrate that it is possible for one without a college education to achieve success and render distinguished public service. They are typical and not exceptional. The history of the American bar is replete with cases of similar import and equal persuasiveness. Indeed, in reading this history one experiences a feeling of thankfulness that worthy men have not been prevented by artificial requirements from rendering service to their country at times when their country sorely needed their aid.

From the experiences of the past we should gain wisdom to guide us in the future. Especially is this true when the lessons which the past seems to teach are confirmed and strengthened by the experiences of the present. A present service to the nation, equal to that of the past, is being rendered by men who are lawyers but who are not college graduates. That the nation needs this service will hardly be

denied. To decree that the nation shall not have it would be a dereliction of public duty.

The requirement is not justified by the experiences of those who have attempted to enforce it. In mediaeval France admission to the medical profession was sedulously restricted to men of university training and, as a consequence, the medical profession became notorious for its backwardness and inefficiency. In Germany, centuries ago, an effort was made to exclude from the law schools all who did not have an arts degree. It was found, however, that the length of residence at the university necessitated by this requirement "produced, idleness, dissipation and waste of time" and that the really successful institutions were those who accepted graduates of the secondary schools as candidates for degrees in law "just as freely and rapidly as circumstances would permit."

Harvard was the pathfinder in requiring a college decree for admission to its law school and it is now the common belief that the doors of its law school are closed to all but college graduates. This impression is erroneous. Men who are not college graduates may have, as special students, all the privileges of the school in the way of instruction. "The future Abraham Lincoln and Daniel Webster," said the late Dean Ames of Harvard, "ought not to be excluded from any law school for want of a college degree."

The requirement is not justified by the experiences of American law schools. During the last fourteen years the law school of the University of Pennsylvania has classified its students under these heads: college graduates; men who spent one or more years in college but were not graduated; high school graduates. The general averages of all the men is as follows:

College graduates, 77.7.

Men who attended college but were not graduated, 73.1.

High School graduates, 75.5.

The difference between the general averages of the college graduates and the high school graduates is too slight to be used as the basis of any inference except the con-

clusion that if four years at college, with the consequent expense and postponement of one's admission to the bar, increases one's efficiency only two per cent. it is not worth while. By four years' experience at the bar after admission one's efficiency is increased much more than two per cent.

The experiences of other institutions has been similar to that of Pennsylvania. "We cannot exclude non-graduates from our medical school," said the president of a leading western university, "because so many of our best students are non-graduates." At a meeting of the Association of American Law Schools, Chester E. Cole, Dean of the Iowa College of Law, declared in effect that he had taught the law as a professor in a law school for thirty-nine years and that he had a long restrospect of graduates, numbering thousands, and that those who had made their mark, and advanced the profession, and aided in the establishment of a jurisprudence both wise and beneficient, were not college graduates. President Hadley of Yale, has declared that "the non-college men in our professional schools are as a class industrious, and not a few among them are exceptionally able."

The requirement is not justified by the experiences of the State boards of law examiners. W. R. Fisher, who has served with great distinction as a member of the State Board of Law Examiners of Pennsylvania, speaking of the preliminary examination in Pennsylvania, has said, "A great many college graduates have been turned down in that preliminary examination. I may say that graduates of many prominent universities have failed to pass that preliminary examination."

In the ten years preceding 1911, the percentage of rejections by the State Board of Law Examiners of New York increased from 30 to 57 per cent. At the beginning of this period there were 14 per cent. fewer failures among college graduates than among non-college graduates but in 1911 this difference had diminished to 2.3 per cent.

Judge Franklin M. Danaher, who was for fifteen years

a member of the New York State Board of Law Examiners, and assisted during that time in the examination of twenty thousand applicants, said in a paper which he read before the Legal Education Section of the American Bar Association in 1909, "Our experience is that a high school education requirement is high enough and practically sufficient. * * * An examination of our records shows that there is little, if any difference in the percentage of high school graduates and collegiates," and in the same year the State Board said, "The proposition to exclude from the bar all the bright and ambitious young men whose environment will not permit them to get beyond high school or to go to college may be idealistic; but, if it is, it is also impracticable. A high school education is practically sufficient and sufficently prohibitory."

The requirement is inherently vicious. The standard which it purports to create is entirely inappropriate. It is not that before beginning the study of law, one's mind shall have reached a certain degree of development, nor that one shall have acquired a certain amount of knowledge, nor that one shall have studied certain subjects, nor that one shall have studied certain subjects, for a certain time. It is that one shall have studied certain subjects, for a certain time in a certain place, to wit, a college.

It eliminates the possibility that by the study of subjects other than those included in the curriculum of the average college, one may acquire the knowledge and mental development essential to the successful study of the law. The field of human inquiry, and study, and knowledge, is large and constantly extending. In the average college the attention of the students is directed to only a few of the subjects included therein. There is no evidence to prove that by the study of these few subjects one's mind is especially attuned for the perception and assimiliation of legal principles and the solution of legal problems. That there are many other subjects, the study of which may furnish the "liberal education" regarded as a prerequisite to the study of law cannot be denied. Indeed the fact that within the

last few years a large number of colleges have revised their curricula and eliminated therefrom subjects, a knowledge of which has been for many centuries considered essential to a liberal education ,and the further fact that the curricula of the various colleges differ greatly, seem to furnish cogent evidence of this proposition. It is not fair, therefore, to exclude from the law schools men who have not studied particular subjects but who have studied other subjects of greater difficulty with equal earnestness and, in many cases, greater profit.

There has been much vague talk of culture studies and an effort has been made to create the impression that a college education is essential to culture. This is not true. Culture results whenever a serious student enters any field of inquiry. There is nothing quite so productive of culture as the study of law itself. "The study of law is of great value as an educational factor." said the Hon. W. Blake Odgers in the addressing the Law School of the University of Wales, "It supplies all the fundamental requisites of a good education, for it tends to develop and enlarge the mind, and to quicken and invigorate its powers." From it one acquires a knowledge of ethics, of logic, of philosophy, of psychology, an appreciation of literature, and above all a knowledge of life. If greater culture is desired we can obtain it, and at the same time serve important utilitarian purposes, by increasing the time required to be spent in the study of law.

Assuming, however, that the training and knowledge gained from the study of subjects embraced in the curriculum of the average college is necessary, it by no means follows that these subjects must be studied at college. They may be studied elsewhere with equal advantage and, frequently, with greater profit. "I recognize the ability," said Nicholas Murray Butler, President of Columbia University, "of the best secondary schools to do not only as well as, but even better than, the colleges have been in the habit of doing the work of many of the studies of the freshmen and sophomore years. I believe it to be indisputable that many

secondary schools provide better equipment and better instruction in English history, physics and chemistry than do any but very few colleges. College teaching has at this point, failed to keep pace with the tremendous educational advances of the last generation; while the secondary schools have availed themselves of the new tendencies and opportunities to the utmost."

At a meeting of the American Bar Association in 1905, Horace L. Wilgus said, "I have been connected with university work substantially all of my life, and I desire to say that my observation leads me to believe that the universities do not contain all the knowledge that there is. * * * I sometimes think that there are men in the university faculties who are not really doing the work they might do and that there are people outside who can learn things that are as valuable to them as sitting at the feet of some of the members of faculties." At the same meeting W. R. Fisher said, "I believe in the best education a man can possibly attain, but I believe in his seeking whatever source of information is at his command." Speaking of the preliminary examination in Pennsylvania which is designed to *test the candidates' fitness for the study of law,* Mr. Fisher said, "A great many college graduates have been turned down in that examination. I may say that graduates of many prominent universities have failed to pass that preliminary examination."

The beneficialness of a "college education" is not universally conceded. Dr. William Trickett who is a graduate of a well known college and who served with great distinction as its professor of psychology and later as its professor of the modern languages, has recently said, "There is often much mistraining of youths in colleges. Much time and thought are bestowed by collegians on other than things of the mind. Some colleges are seminaries for propogating pernicious social and economical notions. In many independence, originality, divagation from accepted notions, political religious, philosophical, are frowned on as serious intellectual vices. We think that the proposition that a

college course is a good thing, is entirely too broad. *Some* courses in *some* colleges, are good for *some* men. Anything stronger than this is erroneous and mischievous. At least as true would be the assertion that some courses in many colleges are for many students pernicious." William L. Curtis, Dean of the St. Louis Law School, has said that it is not an uncommon thing for a college course to make a man a poorer student than he was when he finished high school.

A somewhat similar question was presented to the Section of Legal Education of the American Bar Association in 1909, when a rule was proposed which provided that no candidate should be registered as a student of law until he had passed the entrance examination of the collegiate department of the State university or of such other colleges as might be approved by the state board of law examiners. On the suggestion of Simon E. Baldwin of Yale University that there should be an equivalent examination not under college auspices, the rule was amended by adding the words "or any examination equivalent thereto, conducted by the authority of the State." And as said by the chairman of the section, "The proposition in its present form probably represents, as far as may be possible, the present consensus of opinion at the bar."

"The great concern after all," said Dean Richards of the University of Wisconsin School of Law," is not whether a student has an A. B. degree but whether he has sufficient training to carry on the work required." This training may be acquired elsewhere, and freqquently is not acquired at college. It follows, therefore, that by excluding other reasonable tests of a candidate's fitness we will, instead of excluding incompetent men, simply compel many men who are competent to devote their time to something which is for them unnecessary and which may not be to their ultimate benefit.

The requirement does not create a uniform standard. "College graduation" does not stand for definite attainments. The standards of colleges, even in the same juris-

diction, vary greatly and the significance of college graduation is entirely dependent upon the standard of the college. Indeed, owing to the prevalence of the elective system, and the variety of courses which colleges now offer, diplomas of the same college may stand for very different attainments. If the purpose is to adopt a general standard, that purpose is defeated rather than subserved by the requirement. Harvard soon discovered this fact and, as a consequence, it has been compelled in administering its entrance requirements, to classify colleges as follows: "Colleges of high grade;" "colleges of approved standing;" "colleges." This is surely a unique classification and one of which a just application is hardly possible.

The requirement would exclude from the profession many very desirable men. "It is doubtless true," said President Hadley, "that the requirement of a college degree would keep out a large number of unfit men from the rank of advocates. But the indications are that this gain would be offset by the loss of new blood and of the appreciation of public needs which such exclusiveness carries with it." "Require from the student of law whatever degree of professional training you may deem necessary for the fullest public service; but do not burden him with the additional requirement that he shall spend in his secondary education that amount of time which, as many of us know to our cost, only the rich can easily afford."

"What our profession needs," said Dean Cole of the Iowa School of Law, "is moral stamina, integrity and manhood." "We need those as much as we need higher education and I submit to you that the higher education and the extension of this preliminary education will shut out from us the sons of farmers and mechanics, occupying that position in society from which come the moral sentiments and principles which preserve our profession. I say, therefore, to extend the time and require a measure of culture beyond that which the people in that stratum of society can give, is to shut them out and deprive our profession of the advantages which would come from that ruggedness of char-

acter and that sturdy integrity which is certainly found there more than in any other stratum of society." The late Chief Justice Williams of the Supreme Court of Pennsylvania once said that he could not have become a lawyer if a college education had been required.

The possible extent of this exclusion is indicated by the fact that statistics show that fewer than twenty-five per cent. of the students in the law schools in the United States have taken a full college course.

The requirement unduly postpones one's entrance upon a career of actual service to the world. A student who enters college at the age of eighteen and spends four years there, and then spends three years in a law school, does not enter the bar until he is twenty-five, and if he adds a year in a law office, as is commonly done, he is twenty-six before he enters upon an active career at the bar, and, "unless his career is exceptional he will be at least thirty before his earnings will enable him to establish a home and assume the responsibilities regarded as essential to his well being and that of the state."

A leading medical journal has declared that this postponement of entrance to an active career is right, and that the young men who enter the professions must recognize the fact that they cannot, in many cases, afford to be both educated and married, but the feeling entertained by the general public and by the leading educators of the day is that it is bad for both the community and its young men to have its young men so long kept out of the active work of life; that the doors of the professions should not be closed to young men of worth of small means, who could not sustain themselves for so long a period, and that it is bad for a young man who can afford it, to lead for so long a period a life to at variance with the life of the ordinary citizen. The feeling everywhere prevails that men who desire to enter the profession of law should be permitted to begin their life's work in time to reap some of its rewards before the flush and joy of youth are past and that there should be some chance for a man, "altho devoted to a learned profession to have a wife and home."

The requirement will increase the cost of administering the law, for lawyers will demand fees porportionate to the cost of their preparation. The great majority of questions which are addressed to a lawyer require for their solution neither great learning nor exceptional training. To require all lawyers to have exceptional training is to require clients to pay for exceptional training in a multitude of cases in which exceptional training is unnecessary. It would be as sensble to provide that no one might be a physician unless he were able to perform the most difficult surgical operations.

The requirement will tend to introduce a caste system of the worst sort. During the past generation the traditional distinction between the learned and the unlearned professions has been obliterated, and the fact that the work of the manufacturers and the financier, the farmer and the engineer, the journalist and the teacher, involves the same ability and character, and carries with it the same social privileges and responsibilities, that are involved in that of the minister, physician or lawyer, has forced itself upon the consciousness of the nation. "The gain from this source has been so great that it has been sufficient to counteract many of the other dangers by which the democracy of the nation has been menaced." It will, indeed, be a serious misfortune if the collegees and universities undo this work by singling out by artificial restrictions the profession of law as "the peculiar property of those who have inherited wealth and collegiate education." Such a course will arouse antagonisms to the profession of law rather than admiration for it, and, surely, further antagonisms to the profession ought not to be generated.

Influenced by the foregoing, and many other, considerations, the Dickinson School of Law has decided that it will not require college graduation as a condition for entrance. It is not willing to sacrifice its usefulness and influence in the community for the sake of gaining a prestige which would be both fictitious and elusive.

Carlisle, Pa. HARRISON HITCHLER.

MOOT COURT

COM. v. DIETZ

STATEMENT OF FACTS

Dietz was tried for the larceny of some boards. He had been tried before on the same indictment and convicted but the verdict was set aside. In the present trial he refrained from testifying but the Commonwealth offered the notes of his testimony at the former trial. He objected, claiming the right in each trial to decide whether any testimony furnished by himself should be offered. The court allowed the former testimony to be proved.

The facts which allowed the testimony of another witness on a former trial to be used in the latter did not exist in this case. Motion for new trial.

Morosini for Commonwealth.
Davis for defendant.

OPINION OF THE COURT

BENDER, J. The sole question to be decided is whether the testimony given at a previous trial (facts above are very meager as to whether it was voluntarily given), by defendant on some indictment, can be used on a second trial of same indictment if he elects not to go on witness stand.

The general rule that the testimony of a defendant can not be used against him on a second trial of the same indictment if he elects not to go upon the witness stand is not well founded upon principle or authority. He cannot be compelled to give evidence against himself but if he does give it voluntarily, he cannot object having it used against him. His constitutional privilege as far as that testimony is concerned is waived and cannot be reclaimed in any subsequent trial of same indictment. House v. Com., 11 W. N. C., 246.

His admissions or declarations would be evidence against him, why not his testimony under oath? Will a man not be quicker to tell the truth when he is under oath. Com. v. Doughty, 139 Pa., 383.

Nor when Commonwealth desires simply to prove certain admissions of a defendant made upon a former trial is it necessary to put in evidence his whole testimony but if anything is omitted which may tend to explain these admissions, defendant may call it out on cross-examination. Com. v. House, 6 Sup., 92; 139 Pa., 383; 8 W. & S., 127;

151 Pa., 182. There seems to be no question raised as to method of proving the notes. The facts say that "former testimony was allowed to be proved." We must deduce from that, that they were proved in the regular manner and that is by the official reporter. Wh. Cr. Evi., Sec. 231, and this too although stenographer did not recollect testimony independently of his notes. 27 Pa., 30; 73 Pa., 321.

This question seems to be practically settled by the construction put upon competency of Witness Act of 1887, Strait's Pardon 5186, Sec. 8. The substances of this act is: " Whenever any person has been examined as a witness either for commonwealth or for defense, in any criminal proceeding conducted in or before a court of record, and defendant has been present and has had an opportunity to examine or cross-examine, if such witness die or be out of jurisdiction so that he cannot be effectively served with a subpoena or if he cannot be found or becomes incompetent to testify for any legally sufficient reason properly proven notes of his examination shall be competent evidence upon a subsequent trial of same criminal issue.

We have found two cases covering the point involved in case at hand. In Com. v. Doughty, 139 Pa., 383, the Com. proposed to prove by a witness on the stand in this case for conspiracy against Doughty that upon the trial of the indictment against J. D. Boudee et. al. for conspiracy, Wm. Mowse, Collen and Doughty, three of defendants in this case were called as witnesses to testify in said case. They were cautioned by the court before testifying that they need not testify as to anything tha would incriminate them. They did testify and notes of their testimony were allowed at the second trial on the same indictment. The facts in the case at bar do not expressly state that the court did warn defendant. But it is a fair presumption that the court knew the law and did so warn him.

In Com. v. House, 6 Sup., 92, the defendant was indicted on charge of embezzlement and had in a former trial testified and now at this time declined to take the stand. The notes of his former testimony were offered and held admissible. It was laid down very emphatically in that case that the testimony of defendant can be used against him on a second trial of same indictment, even if he elects not to go upon the stand.

Where defendant in criminal case goes upon stand admissions made by him are not inadmissible because elicited under cross-examination for when he consents to take the stand and by swearing to tell the truth, he waives his constitutional privilege and may be cross-examined, not only same as any other witness but cannot object to legitimate cross-examination upon ground that his answers will tend to incriminate him.

Even evidence of defendants commission of another distinct crime is admissible under some circumstances to wit: To establish identity to

show that the act charged was intentional and not accidental, to prove motive, to show guilty knowledge and purpose.

There can be no legal objection to testimony of a Justice of Peace as to what occurred at trial before him. Such testimony is common and the fact that the matter testified to by justice was an admission of defendant can make no difference. This would be so even in a criminal case of highest character. Com. v. Duffy, 57 Conn., 525.

The statements made by defendant while testifying at a former trial are competent either as admissions or for purpose of contradicting him. They were voluntary statements in regard to his connection with transaction, and it is immaterial where or when they were made. Com. v. Reynolds, 122 Mass., 454.

Where a person having been examined as a witness answers questions to which he might have demurred as tending to incriminate himself, his answers are voluntary. 2 Stork Evid., 18; 2 Levin, 157; 2 Mood, 45; 9 Cor. & Payne, 83 and State v. Vaigun, 5 Richardson, 391.

The privilege of a witness to refuse to testify to self-incriminating facts is personal. He alone is entitled to invoke its protection and if he desires he may waive it. 3 Wig. Evid., 3268-2276; Chamber v. Comm., 12 Vt., 491; People v. Loudu, 82 Mich., 109; Evans v. O'Connor, 174 Mass., 287.

As a matter of right he is not entitled to be informed by court or by anyone. 3 Wig., 2269-70; State Com., 157 Ind., 611; Bolen v. People, 184 Ill., 338; Com. v. Slam, 4 Cush., 594; Com. v. Howe, 13 Gray, 26.

In McCoy v. Kolboch, 242 Pa., 123, in an action for malicious prosecution it appeared that defendant after buying a team of mules from plaintiff had employed plaintiff in Maryland as his teamster. A short time later defendant was informed that plaintiff had started off with the mules to Pennsylvania. Under suspicious circumstances, defendant caused plaintiff's arrest upon his arrival in Pennsylvania, but abandoned prosecution. Kolboch had McCoy arrested but immediately released. Then McCoy brought replevin against Kolboch, claiming in that action that he was the owner of the team by repurchase from Kolboch but title was found by jury to have been in Kolboch. In this action for malicious prosecution the record including McCoy's averment was admitted in evidence. 230 Pa., 486.

The rule in general is that where defendant testifies voluntarily at coroner's inquest, his evidence may be used against him or a subsequent trial, under the rule that permits a party's own declarations, admissions, or confessions to be used against him. Where th ediscord has come up is as to when is it voluntary?

The question of the statement being voluntary or involuntary is determined not by whether a person has been subpoenaed to appear and testify before a coroner in a jurisdiction where he can refuse to

answer incriminating questions without incurring legal penalty, but by the fact of whether or not any threats, promises or intimidations were used to extort the statement. Com. v. Cutian, 5 D. R. Pa., 403.

In People v. Molineaux, 168 N. Y., 264, it was held that the testimony of the accused as a witness at the inquest was admissible against him, although it appeared that he had been brought before the coroner by subpoena, had not been advised of his rights, and had been threatened with contempt if he refused to testify, and the court said that, even if the prosecuting attorney at the inquest had stated to the jury, in summing up, that he had suspected the defendant from the first, but had pretended to suspect another person for purpose of lulling defendant into a sense of security, it was immaterial.

In Williams v. Com., 29 Pa., 102, it was held that the testimony of a witness under oath at inquest when he had not been suspected or charged with the crime was admissible against him on a subsequent trial for murder. The last mentioned case was distinguished in 19 Pa., C. C., 631, when defendant was summoned before coroner as a witness and examined under oath by district attorney, the whole course of examination showing that suspicion rested upon him. It was held testimony was involuntary and inadmissible against him.

The rule against the admission of the sworn statements of the accused at coroner's inquest while under arrest applies only where accused was put on his oath and sworn and examined, not on his own motion, but on the motion of the prosecutor. Lyons v. People, 137 Ill., 602.

Where there is nothing to indicate that the defendant was called before the coroner by subpoena or that his testimony was not entirely voluntary, it will be presumed voluntary. St. v. David, 131 Mo., 380.

From the study of above cases the notes of defendants testimony were admissible and motion for new trial is denied.

OPINION OF THE SUPERIOR COURT

The decision of the learned court below is affirmed upon the authority of Com. v. Dougherty, 139 Pa., 383 and C. v. House, 6 Sup. Ct., 92.

With the statement of the learned court below that the question in this case is "practically settled by the construction put upon Sec. 8 of the Act of 1887," we do not agree. The statement of the facts expressly says the facts of the case were not such as to render the testimony admissible under this act. Nor do we perceive in what manner the discussion as to admissibility of evidence to prove a distinct crime, and as to many other points is germane to the question in the present case.

Judgment affirmed.

CLARENDON v. HICKS

Right of a Cotenant to Share in the Benefit of the Purpose of an Outstanding Claim

OPINION OF THE COURT

SMITH, J. This is an attempt by Clarendon to be let unto joint possession with Hicks of a tract of land of which they were tenants in common. Five years ago, Clarendon refusing upon the request of Hicks to contribute toward redeeming the land, a mortgage was foreclosed, Hicks becoming the purchaser. The land has increased in value in consequence of improvements in the neighborhood but Clarendon tenders to Hicks only a sum equal to one half of what he paid at the foreclosure sale.

As argued by the counsel for the plaintiff and admitted by the defendant, there is no doubt that it is a well established general rule that a tenant in common cannot purchase to his exclusive benefit an outstanding adverse encumbrance or title to the common property. A conveyance of such a title to one tenant ordinarily enures to the benefit of all, providing the other or others contribute a proportionate part of the cost of procuring it. Tiffany Real Property 398; Minor and Wurts Real Property 368; Mandeville v. Solomon, 39 Cal., 125; Lloyd v. Lynch, 28 Pa., 419; Weaver v. Wible, 25 Pa., 272; Stevens v. Reynolds, 143 Ind., 467.

In every single reference in support of the general principle given above, most of which were cited by the plaintiff himself, the doctrine is qualified by the statement that "the co-tenants entitled to the benefit of the rule must within a reasonable time contribute or offer to conribute their proportionate part of the price paid." Tiffany, 401.

If one joint tenant purchase an encumbrance on the joint estate or an outstanding title thereto, it will enure at the election of the cotenant, within a reasonable time, to the equal benefit of all. Minor and Wurts Real Property, 427.

Indeed the right of a co-tenant to share in the benefit of a purchase of an outstanding claim is always dependent upon his having within a reasonable time elected to bear his proportion of the expense necessarily incurred in the acquisition of the claim. 17 A. & E. 679; Stevens v. Reynolds, 143 Ind., 467; 41 N. E., 931; Mandeville v. Solomon, 39 Cal., 125. If the co-tenant unreasonably delays until there is a change in the condition of the property or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new acquisition. Buchanan v. King's Heirs, 22 Grattan, (Va.) 414.

A few cases attempt to determine what is a reasonable time. On the whole, however, the authorities are almost universally agreed that no positive answer can be given to the question or definite rule

established. Each case must necessarily be determined upon its own peculiar circumstances. The very foundation for the general rule that one cannot purchase and set up an adverse title against his co-tenants is the fact that any other course would not be consistent with good faith or the duty which each owes to the other. Tiffany, P. 398. It would be just as inconsistent to permit one who had refused to join his co-tenant in saving the common property from foreclosure, to lie by for years and then, if perchance, the property increased in value, to come forth and demand to be let into possession.

Of course delay in some cases would be excusable, but it must always be entirely consistent with perfect fair dealing and good faith on the part of the one asserting his rights, and in no wise attributable to an effort to retain the advantages while shirking the responsibilities. Stevens v. Reynolds, 143 Ind., 467.

In the California case, cited by both defendant and plaintiff, and which is greatly in point, (Mandeville v. Solomon, 39 Cal., 125), the court said "the co-tenant will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying until the rise of the land or some event in the future shall determine his course. Did not the plaintiff in this case do this very thing? He has waited until five years have elapsed, the property has increased in value and the parties in no position to be returned to statu quo, and then comes forth to claim the right of joint possession which would, without doubt, have been his had he exercised his privilege sooner. As the counsel for the defendant has said "Had the property in question depreciated in value, Clarendon would never have been heard from."

To allow a man to thus speculate would defeat the very purpose of the principal concerning the purchase of outstanding adverse titles by co-tenants. Under such a ruling, a co-tenant could permit the common property to be sold under foreclosure proceedings, and afterwards decide when he would come forth to assert his rights, knowing that he could regain possession even after many years had elapsed.

Furthermore, in this case there was an express refusal to contribute when requested. It was held in Stevens v. Reynolds that the privilege of a co-tenant may be waived by an express refusal or by such a course of action as necessarily implies such a refusal. In Buchanan v. King's Heirs, 22 Grat., 414, the court said "before the co-tenant can be held to have abandoned his claim to the benefit of the purchase of the outstanding title, it should appear not only that he has been apprised of the purchase of the claim set up by his co-tenant." It can hardly be presumed that the plaintiff in this case did not have knowledge of the facts. He had been asked to contribute toward redeeming the land. He can be presumed to have known the law and is it not likely that a co-tenant would not have interest

enough in his own property to know that his land had been sold to satisfy a mortgage.

The plaintiff contends that the defendant was fully repaid by the enjoyment of the profits of the land for five years. No doubt the defendant did have the profits although such a fact does not appear. Did he not deserve them? He had put up the money for the property and it does not appear that he purchased it at any great bargain. What profits there were is not brought out by the facts of the case. There is no certainty that there were any at all. On the other hand, it is certain that there were taxes to be paid during each of these five years. The profits are doubtful but the taxes are sure. Moreover, there may have been and it is quite likely that there were assessments to be met during the five years. The increased value of the land in question was a consequence of improvement in the neighborhood and it is hardly likely that it was all the result of passivity.

The plaintiff wants to share equally with the defendant without paying a cent over the bare half of the purchase price although he has had the interest on that sum for five years and the expense of the property has been borne in full by the defendant. The plaintiff has not acted within a reasonable time nor in a just manner and must not recover. Judgment entered for the defendant.

OPINION OF THE SUPERIOR COURT

There is such a relation between tenants in common that if one of them buys a superior title, he is bound to share it with his co-tenants, if they will contribute to the expense of the purchase. The purchasing co-tenant is not obliged to let his fellows into possession, much less, to convey a fractional share of the title thus acquired to them unless they pay their proper portion of the outlay necessary to acquire it.

In the present case, Hicks, after Clarendon's refusal to co- operate with him, purchased the land at a foreclosure sale. He has retained the land five years. It has increased in value. After this long delay, Clarendon tenders one-half of the price paid by Hicks, at the Sheriff's sale, and demands to be let into possession of an undivided half. The court below, in a well considered opinion, has denied the right. We think property. Of a delay in the part of a co-tenant, in claiming a right in land purchased by his fellow, Luron, J., says, "A delay of not less than 4 years during which there has been a large appreciation in the value of the property is unreasonable." Starkweather v. Jenner, 216 U. S., 524. In Wilson v. Linder, 123 Pac., 487, a delay of 7 years was held to be too long. It is unnecessary to prolong this discussion. The judgment is affirmed.

ESTATE OF ATKINS

Witness Adverse to Estate of Deceased Person—Section 5, Clause (e) Act of May 23, 1887

STATEMENT OF FACTS

The administrator of Atkins has filed an account showing that he has for distribution $4800. Sundry creditors whose claims exceed $10,000 prove their claims, among them the executor of Solloway. The son of Solloway, the sole next kin, is offered as a witness to support the claim. A son of Atkins, sole next of kin is offered to defeat the Solloway claim. Both were allowed by the auditing judge to testify. Exceptions.

Raker for plaintiff.

Gunter for defendant.

OPINION OF THE COURT

DAVIS, J. It is apparent that the question involved in this case is the admissibility of the two witnesses. One of the counsel has suggested the insolvency of the Atkins estate. This may be true if the son of Solloway is allowed, as a witness, to support the claim of his father's estate, but the claim of Solloway, on the other hand may be for such an amount that if it were defeated, then the estate of Atkins would be solvent. So we do not think, under the facts as we have them, that the counsel is justified in saying that the Atkins Estate is insolvent.

We think that the competency of these witnesses must be determined according to the Act of May 23, 1887 and perhaps according to clause (e) section 5 which contains an exception to competency of persons to testify in civil cases. Where a party to a thing or contract has died, his right may have passed to his executor, administrator or heirs. In such cases the above clause says that the surviving or remaining party, or any other person, whose interest shall be adverse to the right of the deceased, shall be incompetent, with respect to any matter occuring before the death of the deceased party.

It is not necessary for us to consider the competency of the son of Atkins, because if the son of Solloway is incompetent, then there will be no need of calling the son of Atkins, and if the son of Solloway is competent then we believe that the son of Atkins is competent.

In Kemer Admr. v. Zartman Admr., 141 Pa., 179, it was held that a son and heir-at-law of plaintiff's intestate is a competent witness on behalf of the plaintiff to prove that a book account produced was one of his father's books of original entry and certain accounts therein charged to the defendant's intestate are in the handwriting of his father. But in Horne v. Petty, 192 Pa., 32, it was held that to disqualify a witness, under the clause referred to above, he must have

an adverse interest to that of the deceased; it is not the adverse testimony, but the adverse interest that disqualifies. It is obvious that the son of Solloway has an interest adverse to the estate of Atkins.. If Solloway did not possess any personalty his land would be followed for his debts, and his son would therefore be interested in the suit adversely to the Atkins' Estate and would be incompetent under the Act of 1887.

In Baldwin v. Stier, 191 Pa., 32, a daughter proposed to testify or attack the right of her mother, deceased, to convey her land. The court held that the very language of clause (e), section 5, of the Act of 1887, applies directly to the case when it says "or any other persons whose interests shall be adverse to the said right of such deceased." So a daughter who is an heir-at-law of the mother cannot after the mother's death testify against the title conveyed by her mother.

In Fisher's Estate, 7 D. R., 116, the testimony showed that one Mrs. Pugh handed a watch to her nephew, saying to him that she desired him to have the use of it for his life and that it was to be returned to her, if living at death. She survived him and laid claim to the watch. The auditing judge allowed Mrs. Abrams, daughter and administratrix of said Mrs. Pugh, to testify in the proceeding. In this case it was held that the disqualifications of an executor or administrator, as a witness in favor of an estate, if any ever existed were removed by the Act of May 23, 1887, but in this case she was not only an administratrix but also a distributee and as such her common law liability, as against the estate of a decedent is contained by clause (e) section 5 of Act of May 23, 1887.

There may be some defects in this act and it may not always produce the best results, but we are to discuss the results. We believe that the case before us comes under it and feel that the auditing judge erred in allowing the witnesses to testify.

OPINION OF THE SUPERIOR COURT

Section 5, clause (e) of the act of May 23, 1887, P. L., 158, provides: "Nor, where any party to a thing or contract in action is dead * * * and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall * * * * any person whose interest shall be adverse to the right of such deceased party, be a competent witness to any matter occurring before the death of said party."

This section is applicable to the present proceeding. It "is intended to cover the competency of witnesses in a civil proceeding before any tribunal of the commonwealth. The tribunal may be an auditor, register of wills, or orphans court." Crosette's Est., 211 Pa., 490.

Applying this statute to the facts of the present case, it follows that the testimony of the son of Solloway was inadmissible. The law is settled that in the distribution of the estate of a deceased person, witnesses adverse to such estate cannot testify to any matter occurring before the death of the decedent. Smith v. Hay, 152 Pa., 377; Brose Est., 155 Pa., 619; Crosette's Est., 211 Pa., 490. The son of Solloway was his sole next of kin and would profit if the claim presented by Solloway's executor was allowed, except in the event that Solloway's estate was insolvent. There is no evidence that Solloway's estate was insolvent and the interest of his son was therefore adverse to the estate of Atkins.

If the estate of Atkins is not insolvent the testimony of Atkins son was also inadmissible. The language of the statute excludes any person "whose interest is adverse to the right of such deceased." In reply to the question, "What deceased?" it has been said that the answer is obvious: "Any deceased party to a subject in controversy whose right * * * has passed * * * to a party on the record who represents his interest." Crosette's Est., 211 Pa. Solloway is a deceased party to the subject in controversy and his interest has passed to his executor. If the estate of Atkins is solvent the interest of his next of kin is adverse to the claim presented by Solloway's executor and the testimony is therefore inadmissible. To hold otherwise would be to make the death of one litigant more potent in working incompetency than the death of the other. "When both parties to the litigation represent dead persons the death of each works the incompetency of all persons interested in the estate of the other." Trickett on Witnesses, 277.

The amount of the claims against the estate of Atkins, exclusive of Solloway's does not appear. If the other claims are sufficient in amount to exhaust the estate then the son of Atkins has no interest adverse to that of Solloway's sons. If, however, the other claims are not sufficient to exhaust the estate, the son of Atkins has an interest adverse to Solloway's son. The learned court below has evidently proceeded upon the assumption that the latter is true. Judgment affirmed.

HARPER v. TITLOW

The Conveyance of a Minor—When It May Be Rescinded

STATEMENT OF FACTS

Harper, 20 years old, conveyed a farm to Titlow, who did not know that Harper was a minor. Harper had been a grocer for 2 years, had voted once and had the appearance of a man 24 or 26 years of age. The price paid by Titlow for the farm was a fair one. Six months after the conveyance a railroad was projected through the neighborhood, the effect of the building of which would

be to double the value of the farm. Harper by this ejectment, seeks to annul the conveyance, having tendered to Titlow the purchase money.

Nowicki for plaintiff.

Potter for defendant.

OPINION OF THE COURT

BROWN, J. It is undisputed that a good title passed from Harper to Titlow by the conveyance, as a deed by an infant purporting to convey real property operates to transmit the title thereto, although it is voidable at the election of the infant.

The real question seems to devolve itself upon the questions, whether Harper the vendor is a minor, or has attained his majority at the bringing of this action.

The facts seem to indicate very clearly that Harper at the time of the bringing of this suit was a minor. The conveyance was made when Harper was 20 years old and suit was brought six months after the conveyance.

Since this is a suit by a minor, the plaintiff has erred in practice by not bringing his suit by a guardian ad litem, or by his next friend. Pepper v. Lewis, vol. 8 col. 14026. The defendant might have taken advantage of the error, according to Hardy v. Scanlin, 1 Miles 87, by filing a plea in abatement. The question now arises may an infant maintain a suit in ejectment before he attains his majority.

The general trend of authority seems to be that a suit by a minor cannot be brought until his majority has been attained. Mr. Justice Strong in Seims v. Everhardt, 102 U. S., 300, states that where an infant, feme covert, to whom land had been conveyed, executed with her husband a deed for the same, she must disaffirm it within a reasonable time after she arrives at age. Long v. Long, 41 Ind., 586, also agrees with the case supra. The same rule seems applicable to male minors according to the important decision by Lord Mansfield in Zouch v. Parsons, 3 Buroughs, in which he held that an infant cannot avoid his conveyance of lands, till the age of 21, this is said to follow because if it were otherwise he might also bring a writ analogous to dum fuit infra aetatem and so conclude his right upon the record. Other books give the same reason and say the matter should remain open until he becomes of age and is legally capable of thinking over what he has done. (4 Cruise's Dig. 17, Deed 12; Bac Abr. Infancy and Age, (1) pl. 3.)

Those that contend that an infant may avoid before becoming of age, rely on the ancient rule in 2 Inst., 673, without adverting to the contrary doctrine as laid down by Lord Mansfield. The fact that Harper had the appearance of being 24 or 26 years old, had voted and kept a store, does not deter from the fact that Harper was a minor. Pepper v. Lewis, Vol. 8, 14007, lays down that, if on a

contract executed by other party, the infant seeks to avoid his liability, he must surrender whatever he has received, if it be in the possession, and if during infancy he wastes, he may after age avoid the contract. Likewise Hept v. McGill, 3 Pa., 256, held that an action of ejectment by an infant 2 years old may be maintained when it attains full age. Logan v. Gardner, 131 Pa., 388, that deed of an infant is good until some act of disaffirmance by grantor after coming of age.

According to 17 Wend (N. Y., 119), Harper should have made an entry upon the land and executed a second deed to a third party or done some other act of equal notoriety in disaffirmance of the first deed, before the beginnng of this suit.

Bronson, Judge, also held in the same case that a deed of land executed by an infant cannot be avoided until he come of age. The learned counsel for the plaintiff has cited Tiffany on Real Property, page 1150 which seems to convey the true spirit of previous decisions, viz, the conveyance cannot be avoided by the infant until after he arrives at the age of majority. 97 Mass., 508; 16 N. H., 385.

The chief reason in all decisions in holding that a minor cannot sue until he attain the age of 21, is that being an infant, he has no legal power to consider things over, and there is danger that his act may be the worst thing for himself. (Roof v. Stafford), 9 Cow (N. Y.) 626.

The able counsel for the plaintiff has cited 207 Pa., 293, in support of his contention but that was a case in which the vendee was a minor at the time a mortgage was conveyed and is not applicable to this case.

In the light of the above authorities and weight of opinion, considering Harper a minor, he is unable to sue until he reach majority. Judgment for defendant.

OPINION OF SUPERIOR COURT

The conveyance of a minor, is not void. The ownership of the land passes from him to his grantee. He may however, rescind the conveyance, thus revesting the estate in himself.

The learned court below has understood that when this ejectment was brought, the plaintiff, the grantor, was still a minor. The authorities indicate that he may rescind, only after attaining majority. His deed, says Tiffany, is "effective to transfer title unless it is repudiated by him after attaining his majority." 2 Real Property, 1147. An infant's conveyance of land "is effectual to transfer the title thereto," says Minor and Wurts, Real Prop. 660, "unless it be repudiated by him after attaining his majority." Cf. Shreeves v. Caldwell, 135 Mich., 323; 16 Am. & Eng. Ency., 288, 289. The title remains in the grantee, says Mitchell, J., "until some clear act of disaffirmance is done by the grantor after coming of age." Logan v.

Gardner, 136 Pa., 588. A repudiation of the conveyance before reaching the age of 21 years, would therefore be too soon.

If the plaintiff had already attained adult age, before he brought the ejectment, a different result would be reached. The grantee was mistaken, as to his age, when he made the conveyance. That mistake apparently was not censurable, on account of want of justification. Harper had been in business 2 years. He had voted, thus tacitly asserting his majority. His appearance was that of a man of 24 or 26 years. There was no want of the discretion which comes of adult years for the price charged for the land was a fair one. Does the ignorance of Titlow, of the fact, constitute a bar to Harper's rescission? We think not. Some conscious imposition upon that ignorance must, we think, exist, in order to bar Harper's right to rescind the conveyance. In County Board of Education v. Hensley, 147 Ky., 441; 144 S. W., 63, in addition to facts very like those indicating Harper's majority, it appeared that the grantor had employed misrepresentation or fraudulent concealment of the fact that he was a minor. Asked by the grantee whether there was anything that would prevent him from making a good deed, he had replied that there was nothing except a certain lien upon the lot. In the case before us, there was no misrepresentation or concealment. It does not appear that Titlow knew of the misleading facts when he accepted the deed; of the business of grocer, of the voting. Even if he had known of them it does not appear that Harper was aware of the knowledge and of the inferences that Titlow was drawing from it. Did he know that he had the aspect of a man 24 years old? Did he know that Titlow was taking him to be of such an age?

Had then the plaintiff made it clear that he was above 21 years of age when he instituted the action, he would have been entitled to recover. Affirmed.

CURTISS ESTATE

Lapsed Legacies—Agreement to Take Land Instead of Proceeds of Land Directed by Will to be Sold

STATEMENT OF FACTS

Curtis directed by will his executors to sell his farm and to divide the proceeds equally among his three nephews. One of these died a week before him leaving children. The children claimed one-third of the land unconverted and objected to the executor's selling. He asked the Orphans court for instruction whether to make a sale of more than two undividing thirds of the land. The nephews would have been heirs of the land had there been no will.

Parsons for plaintiff.

Nowicki for defendant.

OPINION OF THE COURT

POTTER, J. The first question is as to the children's right to take. Under Gross' Estate, 10 Pa., 360, where the bequest was to children of brother and sister of testator as a class the present children would not take, and the act of 1844, P. L. 565, would not apply because it is a bequest to a class. But under Todd's Estate, 33 Sup., 117, these children take and by substitution. It was said in that case prior to act of 1897, P. L. 256 amending Act of 1844, there was a legal presumption that where a member of a class died during the lifetime of the testator it was not intention of latter that the issue of the person so dying should take with the will. Under the act the presumption is that the testator intended that if a person actually within the class died leaving issue such issue should take by substitution. There are also cases which hold they would take by substitution where it is bequest to individuals. Cooper's Estate, 13 D. R., 127; Reynolds' Estate, 11 D. R., 387; Wengles Estate, 12 D. R., 63

The second question is as to their right to take in unconverted form. Where the lands directed to executor to be sold and proceeds to go to legatees, the latter if all consent may take the land instead of money. Shollenberger v. Oshworth, 25 Pa., 152. All must join in election, 7 A. & E. Ency., 481; 9 Cyc., 856; Evans' Appeal, 63 Pa., 183; Allison's Exrs. v. Wilson's Exrs., 13 S. & R., 330; Beatty v. Byers, 18 Pa., 105. But in this case only the children wanted to take in unconverted form.

In vol. 3, Pomeroy Equity, page 144, in a note there is stated the reason for the rule. One co-owner cannot elect to keep because others are entitled to have their shares sold and a sale of part of whole would produce comparatively less amount than would result from sale of whole.

Orphans court directs order of sale of all the land.

OPINION OF SUPERIOR COURT

The testator devised the proceeds of his farm, the sale of which by his executor, he ordered, to his three nephews. One of these died a week before him, leaving children. At common law, the gift to this nephew would have lapsed. The Act of July 12, 1897, 4 Stewart, Pards., p. 5143, however enacts that no legacy in favor of the children of a brother or sister of the deceased, shall lapse, if such legatee leave issue surviving the testator, who leaves no lineal descendants. The nephews would have been the heirs had there been no will. The gift to that one of them who died before the testator, did not lapse. His children were substituted for him.

The proceeds of the sale of the land will be distributed among

the two nephews, and the children of the deceased nephew, these children taking what the deceased parent would have taken, viz, one-third.

These children wish to take the land in specie, instead of the proceeds of it. When the proceeds of land are given to two or more persons, all of them may agree to take the land instead, thus working a reconversion. The desire of any member less than the whole, will however be ineffectual to prevent the sale. Willing v. Peters, 7 Pa., 287; Evans' Appeal, 63 Pa., 183. Appeal dismissed.