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THE DICKINSON SOCIETY.

The most notable feature in the annals of the society during the past month was Prof. Woodward's lecture on Lord Mansfield. The subject was treated in much the same manner as his former lecture on Chief Justice Marshall. These lectures have been especially valuable for the reason that they were not merely biographical sketches, but were instructive expositions of the characters of these men and of the positions they occupied in legal history and literature.

Debates of much interest and benefit have been held at the various meetings. Papers were read by Messrs. Osborne, Clark and Yeagley. The Dickinson Society Weekly has continued to be a source of much entertainment.

The regular election of officers was held on April 12th. Mr. H. Brooks was elected president; Mr. Detrick, vice president; Mr. Shanz, secretary; Mr. Fox, treasurer, and Mr. J. Rhodes, sergeant-at-arms.

ALUMNI NOTES.

Leon C. Prince, '99, who is at presen assisting his father, who holds the chair of History and Political Science in Dickinson College, has recently published an article in the "Arena," entitled "The Passing of the Declaration," which has brought him into prominence among the constitutionalists and politicians of the whole United States. Mr. Prince has certainly prepared an excellent paper on the subject, and one which students of Democracy or Republicanism would do well to read.

Claude L. Roth, '98, won the second prize in the annual junior oratorical contest of the University of Pennsylvania held April 18; he spoke on "Education in Patriotism;" there were six competitors.

Hugh J. Gallagher, '96, spent several days in town about April 10th. He reports being quite successful in his practice at McAdoo.

HON. EDMUND L. RYAN.

Hon. Edmund L. Ryan, Mayor of Kane, Pa., was born in that city February 18, 1875, receiving his academic education in the public schools, graduating from the High School in 1892. He spent about two years gaining valuable experience in surveying on the lines of the Pennsylvania Railroad and in mercantile pursuits, after which he acted for a time as assistant to his father who was then overseer of the poor of McKean county. In the fall of 1894 he began the study of the law in the office of a prominent attorney of his native county, and entering the Dickinson School of Law, was graduated with the degree of LL. B., June, 1897, as one of the honor men of his class.

Beginning the practice of his profession in his native city two months later, unlike most men who adopt this profession he was not compelled to undergo a long and trying novitiate, but at once sprang into prominence as a respected and trusted counselor. Fortune has smiled upon his professional labors, rewarding them with a good share of profit and honor. He has a lucrative practice and is prominent and influential in political and social life in the community, of which a signal proof was given in February, 1900, in his election to the Mayorality by the largest majority ever received by a candidate for the office in Kane.

Mr. Ryan is the youngest mayor in the state and his official duties involve a multiplicity of functions, some of them very trying and vexatious, such as superintending all the police powers, the regulation of the municipality and holding police court, in which breaches of the peace and other violations of city ordinances are tried; but his capacity, integrity, tact and faithful attention to the work enables him to get through them all with comparative ease and pleasure and to demonstrate that the affairs of the city are safe in his hands and will be properly conserved and promoted under his guidance.

Notwithstanding the extensive official and professional exactions upon his time, he is a prominent member of the Board of Trade, taking a lively interest and exerting himself actively in the development of the natural resources of the community, being interested to a more or less degree in the production of oil and the manufacture of glass.

In his official life he has proved himself an able, upright and impartial Mayor, perfectly acquainted with the laws and ordinances of the city and making them the invariable rule of his conduct. As to his professional ability, reference need but to be made to the reputation he has made as a careful and considerate counselor.

The virtues of his private character, less conspicuous in their nature and consequently less generally known, endear him to those who are more intimately asso-

ciated with him, and who see him in the more retired scenes of life. His sociability finds expression, in part, in the good fellowship incident to fraternal orders, belonging to the Free and Accepted Masons, the Odd Fellows, The Elks and is a member of the Tribe of Ben Hur.

While practicing but a few years, Mr. Ryan may be justly said to be the most promising young lawyer of McKean county.

THE ALLISON SOCIETY.

The work of this society during the past month has been of a most encouraging nature, the interest shown by all the members being great and the character of the programmes being such as to insure valuable and interesting sessions. The administration of President Barr, just closed, has been one of the most successful in the history of the society

During the past month the society attended the lecture of Prof. F. C. Woodward, under the auspices of the Dickinson Society, at their invitation, and listened also to interesting addresses in their own hall by Messrs. Phillips, Kaufman and McGuffie.

The regular election of officers took place on Friday, April 12, and was a hotly contested and lively contest. The new officers are:

President—Alexander.
Vice President—Phillips.
Secretary—Helriegel.
Treasurer—Conry.
Executive Committee—McKeehan, Welsh and Donahoe.

This will be the last official term of the school year and all are urged to attend regularly and make the final term of this year's work the best, in point of numbers, enthusiasm and work done, in the history of the organization. At the next election all the offices will be filled by gentlemen of the junior class, who will hold over till the opening of the school next year.

BOOK REVIEWS.

"Mrs. Cherry's Sister" by Minnie W. Baines-Miller. Cloth, pp. 355, S.90. Cincinnati: Jennings & Pye.

This book is not a sermon nor a treatise, but a fascinating story. Mrs. Baines-Miller, whose writings are well known to the reading public and whose books appeal to the heart through the good common sense shown in her pictures of real life and character, seeks in this book to reach the judgment through natural and attractive studies of character taken from real life. The author does not claim to cover the field of the psychologist and does not make any display of her knowledge of his methods, but makes free use of the results of his work in her delineations of characters and situations throughout the story. This book will do much towards a better understanding of the fascination which Christian Science has for so many minds.

"David, The Boy Harper" by Mrs. Annie E. Smiley. Cloth, pp. 300, price S.90. Cincinnati: Jennings & Pye.

The author of this modest sized volume is too well known to the public to make much comment on the above named book. The principal character portrayed by the author is David, King of Israel; his life is given in detail and has been written for an excellent purpose, namely, that of emphasizing the fact that the boy makes the man. The author is to be commended for her excellent style and make-up of the book in general.

The following is a continuation of the schedule of counsel in the Moot Court cases issued in last month's FORUM.

		Plaintiff.	Defendant.
Case No.	125.	Gery,	Johnston,
		Henderson,	Katz.
		Deal, J.	
" "	126.	Mitchell,	Taylor,
		Stauffer,	Kern.
		Hess, J.	
" "	127.	Valentine,	Kemp,
		Kennedy,	Clark.
		Gery, J.	
" "	128.	Brooks, H.,	McIntyre,
		MacConnell,	Rhodes, F.
		Rhodes, J.	
" "	129.	Thorne,	Nicholls,
		Turner,	Moon.
		Trude, J.	
" "	130.	Barr,	Minnich,
		Kostenbauder,	Points.
		Harpel, J.	

		Plaintiff.	Defendant.
Case No.	131.	Shipman,	Basehore,
		Kline, Dan.	Piper.
		Johnston, J.	
" "	132.	Harpel,	Edwards,
		Lonergan,	Osborne.
		Marx, J.	
" "	133.	Helriegel,	Lambert,
		Vastine,	Peightel.
		Detrich, J.	
" "	134.	Elmes,	Trude,
		Rhodes, J.	Conrey.
		Shipman, J.	
" "	135.	Hoagland,	Lauer,
		Cannon,	Phillips,
		Kostenbauder, J.	
" "	136.	Adamson,	Boryer,
		Detrich,	Sterrett.
		Basehore, J.	
" "	137.	Fox,	Hickernell,
		McGuffie,	Miller,
		Brock, J.	
" "	138.	Ebbert,	Donahoe,
		Gerber,	Kline, C.
		Brooks, J.	
" "	139.	Longbottom,	Sherbine,
		Schnee,	Rogers.
		Turner, J.	
" "	140.	Brock,	MacConnell
		McKeehan,	McIntyre.
		Kline, Dan., J.	
" "	141.	Jones,	Keelor,
		Mays.	Crary.
		Taylor, J.	
" "	142.	Cisney,	Wonner,
		Mundy,	Walsh.
		Conrey, J.	
" "	143.	Welsh,	Williamson.
		Wright,	Yeagley.
		Thorne, J.	
" "	144.	Delaney, Leroy,	Watson,
		Brennan,	Cooper.
		Alexander, J.	
" "	145.	Delaney, E. A.,	Gross,
		Claycomb,	Schanz,
		Marx, J.	
" "	146.	Minnich,	Moon,
		Rhodes, F.,	Brooks, H.,
		Nicholls, J.	

MOOT COURT.

HEIRS OF JOHN JONES vs. ANN THOMPSON.

Valid marriages—When widow not entitled to letters of administration.

STATEMENT OF THE CASE.

John Jones was married in 1865, in England, to Mary Smith. In 1870 he left his wife, and a few months later came to Philadelphia.

In 1875 he married Ann Thompson, the first wife being still alive in England. In 1895 the first wife died in England. In 1900 John Jones himself died in Philadelphia.

The second wife, Ann Thompson, applies for letters of administration on the estate. A caveat is filed protesting against the granting of letters of administration to her on the ground that she was never legally his wife, and that therefore she had no right in the estate, and was not entitled to any part of it.

GERY and ADAMSON for heirs.

The prior marriage of Jones rendered his second marriage void. Howard v. Lewis, 6 Phila. 50; Kenly v. Kenly, 2 Yeates 207; Heffner v. Heffner, 23 Pa. 104.

Death of first wife did not validate marriage. Hunt's Appeal, 86 Pa. 294.

CONRY and COOPER for the widow.

The death of Mary Smith in lifetime of Jones validated the second marriage. 2 Brews. 189; 4 Johns. 52; 2 S. & R. 4.

OPINION OF REGISTER OF WILLS.

The questions to be decided in this case are as follows: The first wife, Mary Smith, being alive at time of marriage to Ann Thompson, was the second marriage meretricious, and did it continue so, the first wife dying before Jones? And was the marriage to Ann Thompson legal or invalid? Has she any right to share in the estate?

At common law there were two kinds of disabilities affecting the validity of the marriage relation. The first were termed canonical, depending on the law of the church. Among these were consanguinity and affinity. These causes rendered a marriage voidable only, and it was necessary that the nullity should be declared

during the lifetime of the parties, otherwise they were and continued valid for all civil purposes.

The second kind were civil disabilities, such as prior marriage, idiocy, fraud, force, etc. These made the contract void, *ab initio*, and the union meretricious. In such cases no sentence of nullity was required, but at all times the parties or afterward, the marriage might be considered and treated as null and void. Walter's Appeal, 70 Pa. 392; Johnson's Appeal, 9 Casey 515.

In this case Jones knew when he married the respondent that he was violating the laws of religion and morality in living with her as his wife, and that he committed the crime of bigamy while his first wife was living. He had no reason to suppose her to be dead. As to the respondent, she was married to Jones in 1875, and undoubtedly believed him to be her lawful husband. She had never heard of his former wife or marriage as far as this case shows. There is no presumption of any guilty intent or misconduct involving any moral turpitude on her part in cohabiting and living with Jones under her marriage with him, honestly contracted by her, and duly solemnized in 1875. Heffner v. Heffner, 23 Pa. 104.

The marriage was clearly illegal, and as to Jones meretricious but not as to the respondent; there is evidence to show that she was deceived.

The general rule is that a relation shown to have been illicit at its commencement is presumed to continue so until proof of change. In the case at bar the fact is found the marriage was void, illegal and invalid at its commencement, and continued so down to the death of the first wife, and that there was not a marriage in fact between the date of the death of the first wife and the death of Jones. This is conclusive against respondent. She has failed to establish her claim as widow, and has, of course, no right to participate in the distribution of the decedent's estate, nor is she entitled to letters of administration. Heart's Appeal, 86 Pa. 294; Yardley's Estate, 25 P. F. Smith 208.

KERN, Register.

OPINION OF THE ORPHANS' COURT.

In re caveat filed to prevent granting of letters to Ann Thompson in estate of John Jones.

In 1875 John Jones, the decedent, married the applicant for letters in this case, Ann Thompson. At this time he had a wife living in England by the name of Mary Smith, who continued in full life until 1895, when she died. From 1875 to 1895, and thereafter, until 1900, Jones lived and cohabited with Ann Thompson, when he died.

The evidence shows that at the time of the marriage to the claimant in 1875, the decedent had a wife in full life from whom he had not been divorced. Under all the authorities this second marriage under such circumstances was void. Wayne Township v. Porter Township, 138 Pa. 181; Heffner v. Heffner, 23 Pa. 104.

It is true that the parties cohabited together and bore the repute of being man and wife for five years after the death of Mary Smith. "But cohabitation and reputation alone are not marriage. They are merely circumstances from which a marriage may sometimes be presumed. This presumption may, however, be rebutted by other facts and circumstances." Appeal of Insurance Company, 113 Pa. 204. "It wholly disappears in the face of proof that no marriage has in fact taken place." Estate of Grimm, 131 Pa. 199.

"When a relation between a man and woman living together is illicit in the commencement, it is presumed to continue so until a changed relation is proved. Without proof of a subsequent actual marriage, it will not be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin." Appeal of Insurance Company, *supra*; appeal of Grimm, *supra*; Drinkhouse estate, 151 Pa. 294; Hunt v. Clark, 6 Pa., C. C. 592.

The marriage may not have been meretricious as far as Ann Thompson is concerned. She may have been deceived, yet it was clearly illegal. The cohabitation was illicit in its commencement, and necessarily continued so down to the death of the first wife, and it is admitted that no actual marriage was celebrated from that time to the date of the death of the decedent. We cannot but conclude, therefore, that Ann Thompson has failed to establish

her claims as a widow. Hunt's Appeal, 86 Pa. 294; Hantz v. Sealy, 6 Binney 405.

Letters of administration must be refused.

THOS. NELSON vs. JOS. CARTER.

Right to recover damages for the breach of an oral agreement for the sale of land, when the vendee has made improvements —Measure of damages.

STATEMENT OF THE CASE.

On May 1, 1900, Carter made an oral agreement with Nelson by which he sold Nelson a certain building lot for $500, possession to be given immediately and the price to be paid on Aug. 1, 1900, when Carter was to deliver the deed.

Nelson took possession and erected a house which was worth $2,000. But when he tendered the $500 on Aug. 1, 1900, Carter refused to take it and refused to give a deed, claiming that the contract could not be enforced against him by reason of the Statute of Frauds.

Nelson now brings action against Carter to recover $2,000, the value of the house.

J. RHODES and TRUDE for the plaintiff.

The vendor in a parol contract for the sale of land is liable in damages for its breach, in Pa. The 4th section of the English Statute of Frauds, as it relates to land is not in force in Pa. Bell v. Andrews, 4 Dall. 152; Ewing v. Tees, 1 Binn. 450; Allen's Estate, 1 W. & S. 388; Postlethwait v. Frease, 31 Pa. 472.

The measure of damages is the actual loss to the vendee. Harris v. Harris, 70 Pa. 170; Sausett v. Steinwetz, 8 W. N. 100.

THORNE and MACCONNELL for defendant.

The value of improvements put upon the land does not constitute the measure of damages. The vendee can recover for his actual loss, and not the value of his bargain. Wilson v. Clark, 1 W. & S. 554; Tripp v. Bishop, 56 Pa. 424; McDowell v. Dyer, 21 Pa. 417; Bash v. Bash, 9 Pa. 260.

OPINION OF THE COURT.

The purpose of the Statute of Frauds is to compel men to manifest their intentions in writing, so that land-title may be traced by certain and enduring evidence. If left to parol, the death of witnesses, the mistakes of witnesses, the temptation to perjury, invite discord and confusion and render land-title uncertain and defective. And to promote the peace and happiness of society the legislature has prescribed certain solemnities, without which the title to land cannot be transferred, thus securing clearness and facility in ascertaining title to land and preventing those frauds and perjuries which would inevitably take place.

Our act of Assembly, "for the prevention of frauds and perjuries," is a transcript of the 1st, 2nd and 3rd sections of the English Statute of Frauds. We omit the 4th section of the English Statute which declares, "that no action shall be brought whereby to charge any person upon any contract of sale of lands, tenements, hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith, or some person lawfully authorized."

Thus our Statute of Frauds does not declare a parol agreement for the sale of lands void if not reduced to writing and signed by the parties, nor does it forbid an action for damages for the breach thereof. It goes no further than to limit the operation of the contract in creating and passing an estate or interest in lands, leaving the common law unaltered whereby the party who refuses to perform an oral contract is liable to be sued and respond to the other in damages.

In the case at hand, the vendor complains that the contract it sets up is within the Statute of Frauds, and therefore cannot be enforced. If no part of the contract had been performed by either party, perhaps his refusal would be well grounded. But the vendee has conformed to the agreement in every particular. He took immediate possession and tendered payment at the required time, and now, to allow the vendor to treat the agreement as a nullity, after the lands have been enhanced in value by the vendee, would in effect be using the statute as an instrument of fraud rather than a preventative. It certainly would be fraudulent conduct in a vendor to make a verbal sale of land which he knew to be void and thus entice

a vendee into great expenditures of money and labor, which he meant to reap the benefit of himself.

The plaintiff does not ask for performance of the contract; he asks for damages for the breach of it. He has fully performed his part. The vendor refuses to deliver the deed which he is in position to do. He demands as damages the expense he incurred in the erection of the house.

Recoveries in actions of this nature have been sustained by our courts from the earliest periods.

The first case was Bell v. Andrews, 4 Dall. 152. The action there was by the vendee, not to enforce the contract, or to give him the profit and benefit of it—this was forbidden by the statute—but to recover damages, that should restore him to his rights, as they were before the contract.

Lowry v. Mehaffy, 10 Watts 389, illustrates the law on this subject exactly. Kennedy, J., says "from all that is contained in the statute, it is perfectly manifest that an executory contract for the sale of real estate or made for the purpose of effecting it in any way is not to be regarded otherwise than as binding upon the parties, though not reduced to writing and signed by them; and that in case of either refusing to perform it, he makes himself liable to the other for the loss which the latter shall sustain by reason of such nonperformance."

In Dumars v. Miller, 34 Pa. 319, the action was brought by the vendee, against the vendor, to recover damages for the breach of parol bargain for the conveyance of land. Held, that the vendor is bound to compensate the vendee, not for the loss of his bargain, but for his expenses and trouble incurred.

In accordance with this train of decisions, Thompson v. Shepler, 72 Pa. 160; Allison v. Montgomery, 107 Pa. 455, and Rineer v. Collins, 156 Pa, 342, have been decided.

The only other question for our consideration is the question of the amount of damages.

If anything can be regarded as settled it must be taken to be fully established as the law of Pennsylvania that in an action by a vendee, against a vendor, for a breach of a parol contract for the sale of land, the measure of damages is the money actually paid and the expense incurred on the faith of the contract. Dumars v. Miller, 34 Pa. 319; Rineer v. Collins, 156 Pa. 342.

We therefore conclude that the reason for the defendant's refusal to accept payment and deliver the deed is without merit and judgment is entered in favor of the plaintiff for the sum demanded.

By the Court,

JASPER ALEXANDER.

OPINION OF SUPREME COURT.

The contract between Nelson and Carter was oral, and except for what was done in pursuance of it, fell within the statute of frauds. But two things were done in pursuance of it, which exempt the contract from the operation of that statute: Nelson took possession, and erected a house worth $2000. He did not pay any portion of the purchase money. These acts, it is well settled, render the contract specifically enforceable. Eberly v. Lehman, 100 Pa. 542. It is evident that Nelson, if defendant in ejectment, might have maintained his right to the possession by means of the contract, and the acts done by him in consequence of it. He could likewise have by bill in equity, compelled Carter to execute and deliver a deed for the premises, on the tender of the $500.

When the money was tendered, Carter refused, both to accept it, and to execute a deed, and declared his intention not to abide by the contract. In this respect the case is unlike Allison v. Montgomery, 107 Pa. 455, where it was held that although an oral contract might be rescinded, and an action for damages sustained on it such action could not be resorted to, unless and until the contract had been in fact rescinded. The conduct of Carter was, at least in intention, a rescission. *Cf.* Hathaway v. Hoge, 1 Cent. 339.

As we have seen, Carter had no power to cast off the contract. It was no longer voidable, by reason of the statute of frauds. Nor did any other cause exist for avoiding it. Under such circumstances, may Nelson resort to an action for damages? The action for damages, is the usual remedy furnished by the courts of law, and it has never been understood that the invention

of the additional remedy in equity, deprived a party of his option to employ it or the more ancient remedy at law. Despite the ability of Nelson to maintain his possession and compel a conveyance, nothing hinders his betaking himself instead, to the action for damages.

What damages is he entitled to? It seems to have been assumed, by counsel and the learned court below that the rule was applicable, which regulates damages for breach of unenforceable oral contracts. Under this rule, there could be no recovery for the loss of the bargain, that is, for the difference between the actual value of the land and the price agreed to be paid. This rule is clearly established. The vendee is restricted to compensation for such outlay as he has suffered in reliance on the vendor's intention to make the conveyance; for searcher, for the scrivener's charges, for the cost of a survey, for the improvements which he may have made. Holthouse v. Rynd, 155 Pa. 43; Rineer v. Collins, 156 Pa. 342; Harris v. Harris, 70 Pa. 170; McCafferty v. Griswold, 99 Pa. 270. But the reason of this rule, it is often stated, is, that to allow for the value of the bargain would be substantially to enforce the contract, and so defeat the statute of frauds.

It is by no means clear, however, that any different rule would be applied in Pennsylvania, even if the contract were in writing, or were, although oral, enforceable. The decisions on this subject are remarkably confused, and it is not necessary now, to investigate them. *Cf.* Dumars v. Miller, 34, 319; Tyson v. Eyrick, 141 Pa. 496, and the cases there cited. An exception to the rule, with respect to parol contracts, permits a recovery by the vendee, of the value of the bargain, where there was fraud on the part of the vendor, in making the contract; but his refusal to perform the contract, although he is able to do so, is not fraud. Rineer v. Collins, 156 Pa. 342; Harris v. Harris, 70 Pa. 170; Thomas v. Shepler, 72 Pa. 160. No fraud on Carter's part, in making the contract, is intimated. He has refused to perform it, although he was aware, as we must assume, that Nelson had entered into possession and was making valuable improvements. This in deference to the authorities, we must not regard as such fraud as exposes him to liability to pay Nelson the value of the bargain.

Nelson claims $2000, the money which he has expended upon the lot. Though it was not strictly correct to tell the jury that the sum expended is the measure of damages in all cases, we are unable to perceive that the defendant has been injured by the error. Had the land been conveyed to Nelson, he would have had the lot and house, at an expense of $2500. It may however, not have been worth so much in the market. The expenditure may not have been judicious. Let us suppose that the lot and house are worth only $2000. Then it is evident that the non-execution of the contract has caused a loss to Nelson of but $1500. The mere fact that Nelson spent $2000 would not import that his loss from Carter's breach of contract was $2000.

We think, however, that the jury were required, in the absence of evidence on the point, to assume that the money expended correspondingly enhanced the value of the lot. Carter should have shown, if he could, that it did not. There was therefore no substantial error, under the circumstances, in submitting the expenditures to them, as the measure of damages.

In adopting the rule thus propounded, we should not feel compelled to extend it so as to allow the vendee, in case his expenditures should *more* than correspondingly enhance the value of the lot, to recover, as damages, this increment.

We are aware of a certain inconsistency between the view thus expressed, and the theory that the principle applicable to covenants of warranty, governs in actions for the breach, by a vendor, of his contract to convey land. If A conveys land to B, with a covenant of warranty, B, on a subsequent eviction recovers on the covenant only the purchase money paid, although he may have spent twenty times as much in improving the premises, and this principle is cited in several cases, to justify the refusal to a vendee of the value of his bargain, when the vendor declines to make the conveyance It is evident that the same principle, logically applied, would preclude a recovery by the vendee, for the improvements put upon the premises. Cases cited *supra*, however, recognize a

right to compensation for improvements, and we are reconciled to the effectuation of justice, though at the expense of logical coherence and consequence.

Judgment affirmed.

ALEXANDER CLARK vs. LAFAYETTE INSURANCE CO.

Forfeiture of policy for non-payment of premium—What is reasonable attempt to pay premium.

STATEMENT OF FACTS.

Clark was holder of a policy for $2000 on the life of his wife, Julia Clark, the premium being $52 per year, payable in weekly installments of $1. Among other terms printed on the face of the policy were these: "First, All premiums shall be payable to a regular collector of the company or at the Home Office." "Second, In case the collector fails to call for a premium, it shall be the duty of the insured to pay such premium at the Home or District Office." The policy also contained a stipulation to the effect that in case of any default in the payment of the weekly premium, the policy might be cancelled by the company.

After the policy had been in operation for a considerable time, Clark went, on a certain day, to the District Office of the Company to pay his weekly premium. He found the office open but with no one in charge, and after waiting from three o'clock until about 3.10 P. M., he went home.

This was the last day upon which premium could be paid, but two or three days later Clark met a collector of the company and offered to pay the over-due premium. The collector accepted the money, with the understanding that in case the company should refuse to continue the policy in force, it would be returned to him. The company found, upon investigation, that Mrs. Clark was in very poor health, and therefore refused to continue the policy after default. The premium paid to the collector was thereupon tendered to Clark, who refused to accept it, and later—two days before another premium was due—Julia Clark died.

Alex. Clark now brings action against the company for $2000.

TAYLOR and KATZ for plaintiff.

The tender was sufficient, being made at a proper time and place and the failure to pay being caused by the neglect of the defendant. Carpenter v. Stephens, 12 Wend. 589; Roberts v. Beatty, 2 P. & W. 63; Smith v. Loomis, 7 Conn. 110; 7 Am. & Eng. En. of Law 147, (2nd Ed.)

The question as to the reasonableness of the time must be left to the jury.

VALENTINE for defendant.

The payment of the premium being a condition precedent, which was not complied with, the cancellation of the policy was proper. Lantz v. Ins. Co., 139 Pa. 546; Howell v. Ins. Co., 44 N. Y. 276; Ruse v. Ins. Co., 23 N. Y. 516.

To excuse non-performance of a condition in a policy it must appear that it could not by any means have been accomplished. Beebe v. Johnson, 19 Wend. 500; Wheeler v. Ins. Co., 82 N. Y. 543; Ins. Co. v. Statham, 93 U. S. 24; Klein v. Ins. Co., 104 U. S. 88.

The jury would not be justified in finding plaintiff's attempt to pay an effective one.

OPINION OF THE COURT.

Under the second term in the insurance policy the insured was bound to pay the premium and to pay it at the District or Home Office. If he failed to make the weekly payments the policy stipulated for a cancellation at the option of the insurance company.

It has been repeatedly held that such a stipulation is of the very essence and substance of the contract and non-payment of the premium when due involves absolute forfeiture, Kleim v. Ins. Co., 104 U. S. 88; Ins. Co. v. Stathan, 93 U. S. 24. When a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control will excuse him for the reason that he might have provided against them by contract, Wheeler v. Ins. Co., 82 N. Y. 543; Dexter v. Norton, 47 id. 62; Harmany v. Bingham, 12 id. 99-107; Tompkins v. Dudley, 25 id. 275.

There are, however, one or two limits to this doctrine but the courts seem averse to applying them where they can find an excuse, especially in insurance cases. In Beebe v. Johnson, 19 Wend. 500, it was held that to excuse non-performance in such cases, it must appear that the act to be done could not by any means have been

accomplished. See also, Miller v. Phillips, 31 Pa. 218.

The plaintiff contends, and correctly we think, that if he was prevented by the defendant from performing the condition, he is excused. Thus where an agent was designated as receiver and was changed, delay due to such change not notified to the asssured will not create a forfeiture, Ins. Co. v. Eggleston, 96 U. S. 572; Seaman's Co. v. N. W. Ins. Co., 1 McGray 508. So also if a foreign company gives up its office in the domicile of the insured, and has no legally constituted agent there, Dorion v. Positive, 23 Lr. Can. Jur. 261.

But the question still arises was the defendant company at fault. The plaintiff called at its office, found the office open, remained there ten minutes and then departed. Why the agent was absent we do not know. The necessities of business often require the absence of a man from his office. We cannot see that ten minutes was an unreasonable time to be away. The office was open showing that the agent expected to return shortly. Under these circumstances we think the plaintiff waited an unreasonably short time, especially since it does not appear that he made any effort to pay the premium later in the day. We do not think that under the circumstances of the case the jury could legitimately draw an inference of impossibility of performance which was caused by the fault of the defendant company, and therefore refuse to submit the case to the jury. Baker v. Lewis, 33 Pa. 301; Carbalic v. Newberry Twp., 132 Pa. 91.

But the counsel for the plaintiff has also contended that the defendant company was guilty of fraud for refusing to continue the policy because of Mrs. Clark's ill health which they learned upon investigation. This contention we cannot sustain. We have already decided that the company was not in duty bound to continue the policy. To discontinue it is therefore no wrong. Besides the elements of fraud are entirely wanting. There was no false representation nor the concealment or failure to disclose a material fact. On the contrary the agent received the money with an understanding that the policy might be cancelled and the money refunded. Nor did the plaintiff suffer any damage for the company stands ready to return the premium paid after the expiration of the policy. For the above reasons the non-suit requested by the defendant company is granted.

W. T. STAUFFER, J.

COMMONWEALTH vs. THOMAS SCANLON.

Competency of child as witness—Competency a question for the court.

STATEMENT OF THE CASE.

Scanlon, on trial for larceny of a watch, a witness was called by the Commonwealth who was but 7 years of age. Objection was made to him, because unacquainted with the nature of an oath and too immature to give a trustworthy narration of facts. He was interrogated after instruction as to the nature of an oath, and the court, remarking, that it did not think the witness competent, but that it would let the jury hear the evidence and decide whether he was competent, allowed him to testify. Conviction. Motion for new trial.

SCHNEE and YEAGLEY for the motion.

1. The child was not a competent witness. Com. v. Carey, 2 Brews. 404; Com. v. Wilson, 186 Pa. 1.

2. The question of competency was for the court. Com. v. Ellinger, 1 Brews. 352 DeFrance v. DeFrance, 34 Pa. 385.

ROGERS and WATSON, contra.

1. The child was competent. 10 Mich. 372.

2. Competency of witness on some disputed fact may be properly left to the jury. Lee v. Line, 1 W. N. C. 453; State v. Seanton, 58 Mo. 204.

OPINION OF THE COURT.

This is a motion made by the defendant, Thomas Scanlon, for a new trial on the ground of an incompetent witness having been admitted to testify.

The defendant was convicted for the larceny of a watch; during the trial the Commonwealth called a witness who was seven years old; objection was made to his testifying for the reason that he did not understand the nature of an oath and that he was too immature to give a trustworthy narration of facts.

The witness was instructed as to the nature of an oath and interrogated. The court allowed him to testify, remarking that it did not think the witness competent, but would let the jury hear the evidence and decide whether he was competent.

Whether a witness is competent to testify or not is a question for the court; for if a witness be objected to on the ground of unripeness or imbecility of mind, in all these and like cases the preliminary question of admissability must in the first instance be exclusively decided by the judge, however complicated the circumstances may be.

Taylor's Evidence, 8 Ed. V. I. Art. 23.

This is the doctrine of the text-book and is followed in Pennsylvania.

DeFrance v. DeFrance, 34 Pa. 385.

This being the doctrine in Pennsylvania, the court could not delegate its authority to the jury, it alone was to determine whether the child was a competent witness and it decided that the child was not competent, for the court said "I do not think the child competent to testify;" it was, therefore, error to admit the witness.

The motion for a new trial is sustained and a new trial awarded.

JOSEPH RHODES, J.

JOHN WHIPPLE vs. ELECTRIC LIGHT CO.

Negligence—Scope of employment.

STATEMENT OF THE CASE.

John Banes, employed by the Company to take out the burnt carbons each morning and replace them with new, removed one on the morning of Nov. 11th 1899, at a certain corner and instead of dropping it in a bag which he usually carried for that purpose tossed it towards the gutter of the street. Whipple then passing along the pavement paused a moment and glanced up to observe Banes, when he received the carbon in the left eye, which was thus deprived of sight. This is action for $2,000 damages. Evidence was offered by defendant that Banes seeing a dog on the street playfully tossed the carbon with the object of hitting the dog. He had been distinctly charged in all cases to put the burnt carbons in the bag. Had Whipple not stopped when he did, he would not have been struck.

BRENNAN and WILLIAMSON for plaintiff.

Master is liable for acts of servant done in scope of employment. R. R. v. Derby, 14 How. 467; Hays v. Miller, 77 Pa. 238.

Fact that plaintiff stopped will not prevent a recovery. Newcomb v. Boston Dept., 140 Mass. 596.

LEROY DELANEY and MAYS for defendant.

Plaintiff might have avoided injury by use of reasonable care. He therefore cannot recover. Beathy v. Gilmore, 16 Pa. 463; Ry. v, Taylor, 104 Pa. 306.

Act of servant was beyond scope of employment, hence defendant is not liable. Walton v. Car Co., 139 Mass. 556; Ry. v. Welcome, 19 Ohio. 110.

OPINION OF THE COURT.

It is well settled law that the master is liable for the act of his servant within the scope of his employment.

From the facts in this case there are three questions which present themselves, viz.:

1. Was Banes, the employee of the Electric Light Co., acting within the scope of his employment at the time of the accident?

2. Is the Electric Light Co. liable if the services were in the course of Banes' employment, but in the matter complained of he was acting contrary to the express command of the company?

3. Did the fact that Whipple stopped and looked up at Banes while he was trimming the light constitute contributory negligence on his part?

The rule of *respondeat superior*, or that the master shall be civilly liable for the tortuous acts of his servant, done in the course of his employment, is of universal application. Whether the act be one of omission or commission, whether negligent, fraudulent or deceitful, if it be done in the course of his employment, his master is responsible for it to a third person, and it makes no difference that the master did not authorize or even know of the servant's act or neglect, for even if he disapproved or forbade it, he is equally liable if the act be done in the course of the ser-

vant's employment. Smith on Master and Servant, page 152.

If the servant act improperly in the discharge of his duties, it does not relieve the employer from liability; the ground is that the master has put it in the servant's power to act improperly by entrusting him with these duties, and therefore should be held liable.

The case of Sleath v. Wilson (9 Car. & P. 607) states the law distinctly and correctly.

In that case a servant having his master's carriage and horses in his possession and control, was directed to take them to a certain place; but, instead of doing so, he went in another direction to deliver a parcel of his own, and returning, drove against an aged woman and injured her. Here the master was held liable for the act of the servant, though at the time he committed the offense he was acting in disregard of his master's orders. The master had trusted the carriage to his control and care, and in driving it he was acting in the course of his employment.

Banes was employed by the Electric Light Co. to trim their lamps, and in removing the carbons therefrom it is clear that he was acting in the course of his employment, but in throwing the carbon to the ground, instead of putting it in a bag, as he had been ordered to do, he was doing it in a way contrary to the master's orders, but the company is, nevertheless, liable.

A master is liable for the tortuous acts of his servant when done in the course of his employment, although they may be done in disobedience to the master's orders. Penna. & Reading R. R. Co. v. Derby, 14 Howard 467.

The act of the plaintiff in stopping and looking up at Banes as he was trimming the light was not in itself negligence. To constitute contributory negligence, his position must have been so carelessly taken as to contribute to the accident. Newcount v. Boston Protective Dept., 146 Mass. 596.

There seems to be no negligence on the part of the plaintiff which directly contributed to the injury. The act of the plaintiff in stopping and looking up at Banes was only a condition to the happening of the accident, and in no way the cause of it.

We have made a careful examination of the cases cited in the briefs of the defendant's counsel but are not convinced that they apply to this case.

Judgment for plaintiff.

GUY THORNE, J.

COMMONWEALTH vs. SOULE.

Not proper to ask witness if he has ever been convicted of crime in order to discredit him—Must prove by producing record—False answer to such question is perjury.

STATEMENT OF THE CASE.

Henry Soule, on trial for robbery, offered himself as a witness. He was asked, on cross-examination, whether he had ever been convicted of an offence, or served a sentence in jail or penitentiary, and whether he had not stolen a watch on a certain occasion (different from that at which the imputed robbery occurred). To this question he did not refuse to answer, but answered "No." He is now prosecuted for perjury, on the allegation that the answers were false. Motion to quash.

KLINE, C. S. and CLAYCOMB for plaintiff.

Whether or not the question is admissible, if the witness testifies falsely he may be convicted. Com. v. Bassard, 2 Kulp 113.

The evidence was material, as affecting the credibility of the witness. Com. v. Knapp, 9 Pick. 496; Com. v. Kuntz, 2 Clark 375; People v. Johnson, 55 N. Y. 512.

FOX and SHERBINE for defendant.

The question was improper as conviction must be proved by the record. Buck v. Com., 107 Pa. 486; Stout v. Russell, 2 Yeates 334; Newcomb v. Griswold, 24 N. Y. 298.

The question was not relative to a material matter. It is not relevant to show that defendant has committed other and similar crimes not connected with the one in question. Boyd v. U. S., 142 U. S. 450; Com. v. Jackson, 132 Mass. 16; Lightfoot v. People, 16 Mich. 507.

OPINION OF THE COURT.

In order to sustain a prosecution of this offense, and to constitute the legal guilt of perjury, so that a court would be justified

in passing a sentence upon a verdict of guilty against one so charged, the following averments must be substantially set forth on the record and sustained by proof to the satisfaction of the court and jury.

1. The oath must be false; by this it is understood that the party must know, or believe, that what he is swearing is false. It is said by Chief Justice Tilghman, in Com. v. Cornish, 6 Binn. 249, "That, if a man undertakes to swear to a matter of which he has no knowledge, he is perjured, although what he has sworn turns out to be true."

2. The intention must be wilful. The wilfulness thus indicated seems to be, when the false oath was taken, with some degree of deliberation and consciousness of what the individual is asserting, otherwise it would not amount to voluntary corrupt perjury. 1 Hawk 319.

3. The proceedings must be judicial. It seems to be well settled that all oaths taken before those who are, in any way, legally intrusted with the administration of justice, in relation to any matter regularly before them, are perjuries; and if the false oath is taken in any stage of the proceedings in the cause, although it does not affect the final judgment, or only has relation to some intermediate step to be taken, or if the oath is taken by a party to the cause, it is perjury.

4. The party must be lawfully sworn. The oath must be taken before some one who has competent authority to administer it. Hence if one swears falsely before an individual who acts in purely a private capacity, or before an officer who has no legal authority to administer the particular oath in question, it will not in the legal definition of the offence amount to perjury.

5. The assertion must be absolute. It has been held by ancient writers that no oath shall amount to perjury, unless it be sworn absolutely and directly; and, therefore, when one swears to a thing according as he thinks, remembers or believes, he is not guilty of perjury. But the modern writers seem to lay down a different rule, and it seems to be well settled, that if a man swears that he believes that to be true which he knows to be false, he then swears absolute and the offense is complete. This doctrine is expressly ruled in the case of Com. v. Carnish, 6 Binn. 250. Where it is held that a man may be guilty of perjury in swearing to what he believes to be true. He must have some foundation for his belief.

6. The falsehood must be material to the matter in question; for it has bee held if it be of no importance, though the oath be wilful and false, it will not be perjury.

It is a settled principle of law where a defendant in criminal prosecution, by becoming a witness, waives his privilege as a defendant and places himself in the same position as other witnesses, and is subject on cross-examination to all the legal objections to his credibility that any other witness is subject to. 1 Greenleaf Ev. ¶ 444 (b) , Com. v. Barry, 8 Co. Ct. R. 216. But the question whether he had ever been convicted of an offense or served a sentence in jail or penitentiary, and whether he had not stolen a watch on a certain occasion, were not proper questions to ask a witness upon cross-examination, even for the purpose of affecting his credibility. It was an attempt to prove an alleged fact by incompetent evidence, and the defendant's answer in the negative to an improper question would not be sufficient to make it perjury, even if his answer was false. The proper method of proving his conviction on a former trial, is to show the record for the purpose of impeaching the credibility of his statement. Buck v. Com., 107 Pa. 491.

It is held in 8 Co. Ct. R. 216, Com. v. Barry, that in extreme cases where the record cannot be obtained without the greatest difficulty, a witness may, in the discretion of the court, be asked, for the purpose of discrediting his testimony, whether he has been convicted of a felony or misdemeanor, but if the record of the conviction can be produced in court, it is the best evidence and should be shown in preference to asking the witness whether he has been convicted or not.

In a case for slander, Sullivan v. O'Leary, 146 Mass. 323, where the defendant, on cross-examination, was asked whether he had not used abusive language against a certain person, and whether he had not been sued for the same, and settled it by paying a sum of money to the

person, it was objected to, but the question was admitted and the defendant answered it in the affirmative. Judge Knowlton says, "This was contrary to the well established rules of common law, that one can't be proved to be guilty of an offense for which he is on trial by showing that at another time he committed a similar offense." Com. v. Jackson, 132 Mass. 16. The discretion exercised in regard to cross-examination should not ordinarily go so far as to permit the introduction of evidence which has no legitimate relation to any of the issues on the trial, and which is at the same time of such a character as to be likely to be applied to them by the jury and improperly to affect their verdict.

Again, conceding, for argument, that the questions were relevant, that they were material and that the defendant answered them in the negative, there is no proof that they amount to perjury. There is no positive declaration that a record of his conviction can be produced, nothing but a mere assertion that the answers were false.

To convict one of perjury, two witnesses are necessary, or one witness when the testimony is corroborated by independent circumstances, but in this case no positive proof is shown that the defendant has sworn falsely, and we therefore feel justified in holding that the defendant can not be convicted of the offense for which he is charged. We, therefore, quash the indictment. WM. H. TRUDE, J.

OPINION OF THE SUPERIOR COURT.

The learned court below has quashed the indictment against the defendant, on the ground that it shows that the alleged perjury was not an indictable offence. The Commonwealth has appealed. The jurisdiction of this court to entertain such appeal, is well established. Commonwealth v. Bradney, 126 Pa. 199; Hutchison v. Commonwealth, 82 Pa. 472; Commonwealth v. Keenan, 67 Pa. 203. Was, then, the court of quarter sessions in error in quashing the indictment?

Henry Soule, asked whether he had ever been convicted of an offence, said no, and the indictment charges that in so doing he swore falsely. The theory of the court was, that the question was an improper one, and therefore, a false answer to it was dispunishable. Whether Soule had ever been convicted was material, for the fact of conviction would cast discredit upon him as a witness. The proper mode of proving this was the production of the record of the court. Had the defendant objected to the question he could not properly have been compelled to answer it. He did not object, however, but answered it. We are not aware that the principle has ever been established, that false testimony can be given with impunity, with respect to a material point, simply because the normal mode of proof is presentation of some other evidence than the testimony. The contrary has been recognized. Says Bishop, "whenever the court has admitted evidence, however erroneously, its decision has become to the jury the law for the occasion; they cannot overrule the judge on the question and refuse to be influenced by what the witness says. If now, what he swears to is adapted to influence them and it is corruptly false, it is perjury; otherwise, if it can have no effect on their verdict." 2 Crim. Law 606; (Ed. of 1892.) Reg. v. Gibbon, 9 Con. C. C. 105; Reg. v. Phillpotts 2 Den. C. C. 302. Cf. Commonwealth v. Johnson, 175 Mass. 152.

Henry Soule was also asked whether he had ever served a sentence in prison or penitentiary. He answered, no. Probably this was an improper question. Service of a term of imprisonment is pertinent only as it presupposes a conviction, but from this point of view it is important as affecting the credibility of a witness; U. S. v. Lansberg, 21 Blatch. 169. The conviction, as we have intimated, should be proven by the record of the court. But, as the defendant, instead of objecting to the question, answered it and answered it falsely he may for the reason already given, be convicted of perjury.

The question concerning the stealing of a watch was equally censurable with the others. It might have been objected to. But it was not objected to. It was falsely answered. The answer was material upon the credibility of the witness. It may therefore constitute perjury.

Order and Judgment of Q. S., quashing the bill of indictment, is reversed; the in-

dictment is reinstated; and *procedendo* awarded.

GEORGE ORTON vs. RICHARD GRANT.

Ejectment—Tenancy at sufferance—Right to remove trade fixtures during term of tenancy—Tenancy at sufferance defined.

STATEMENT OF THE CASE.

In September, 1897, plaintiff leased certain premises from one Jordon for two years, with option to renew lease for another two years at expiration of first term. At close of first term, however, he neglected and refused to renew, but remained in possession. In November, 1899, Jordon sold the premises to defendant. Plaintiff then offered to take renewal, but defendant refused and summarily ejected plaintiff from premises, permission being refused to take away some trade fixtures which plaintiff had annexed to the premises, and which it is conceded he might have removed at any time before the close of his original term. Plaintiff sues to recover value of the fixtures.

BROCK and DETRICK for plaintiff.

1. An action in trover will lie for trade fixtures. 107 Pa. 106; 53 Pa. 271; 125 N. Y. 341.

2. A lessee, who holds over with the express or implied consent of the landlord, becomes a tenant from year to year. Philips v. Monges, 4 Whart. 256; Laguerenne v. Dougherty, 35 Pa. 45; 13 S. & S. 64; 4 Rawle 123; 1 Whart. 91; 38 Pa. 353; 126 Pa. 390.

3. A tenant from year to year has the right to remove fixtures. Lemar v. Miles, 4 Watts 356; David v. Moss, 38 Pa. 346; Darrak v. Baird, 101 Pa. 265; 171 Pa. 569; 124 Mass. 571; 125 N. Y. 341; 39 Mo. 178.

4 When land is conveyed which is in the possession of a tenant, the vendee takes it subject to the tenant's right to remove his fixtures. 10 Barb. 496; 51 Maine 160; 39 Mich 150.

DAVIS and BROOKS for defendant.

1. By remaining in possession after refusal to renew the lease, plaintiff becomes a tenant at sufferance. Tiedeman on Real Prop., 189; Hemphill v. Flynn, 2 Pa. 144; Fitzpatrick v. Childs, 2 Brews. 365.

2. A tenant at sufferance may be ejected without previous notice. Tiedeman on Real Prop., 192; Rich v. Keyser, 4 Rawle 33.

3. The right to remove fixtures, as fixed in the original lease, does not attach to the new relation of tenant by sufferance. Hemphill v. Flynn, 2 Pa. 144; 124 Mass. 571.

4. The fixtures erected by the plaintiff became realty upon the expiration of the lease, and trover will not lie for their recovery. Davis v. Moss, 2 Wright 346; Darrah v. Baird, 101 Pa. 265.

OPINION OF THE COURT.

In September, 1897, plaintiff leased certain premises from one Jordon for two years, with option to renew lease for another two years at expiration of first term. At close of first term, however, he neglected and refused to renew, but remained in possession. In November, 1899, Jordon sold the premises to defendant, Richard Grant. Plaintiff then offered to take renewal, but defendant refused and summarily ejected plaintiff from the premises, permission being refused to take away some trade fixtures which plaintiff had annexed to premises, and which it is conceded he might have removed at any time before the close of his original term. The question presented to us is, has a tenant the right to remove fixtures after the expiration of his tenancy? It is a well settled rule of law that in order to remove fixtures such removal must take place before or simultaneous with expiration. But the case before us is of a different category, in this: that at the expiration of the original term the defendant did not vacate but still remained in possession from September until November, a period of about two months. The holding over after the expiration of the term differentiates this from the ordinary case, as the remaining in possession after the expiration of the term is by implication a renewal of the original lease or term. It is a well settled rule of law that a tenant for years who erects fixtures for the benefit of his trade or business may, at any time during the term, remove them from the demised premises, but cannot after the expiration thereof unless he remains in possession and hold over so as to create an implied renewal of the lease. Davis v. Mass., 2 Wright 346.

If a tenant remains in possession after the expiration of his term, and performs all the conditions of the lease, it amounts

to a renewal of the lease from year to year, and we think this defendant would be entitled to remove fixtures during the year. When, however, we are dealing with the question of an implied renewal of a tenancy all the terms of the former lease must be considered. The purpose is not to make a new lease essentially different, but to continue the former so far as its terms may be applicable. In its very nature the implied renewal of a lease assumes a continuation of its characteristic features. Hence if the landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. If that was a tenancy from year to year it will presumptively so continue. The landlord cannot impose a longer term nor one radically different from the former.

The general principle is, that a fixture erected by a tenant on demised premises, for the purpose of carrying on his trade, is personal property and may be removed. Lemas v. Miles; 4 Watts 330.

When a landlord suffers his tenant to remain in possession after the expiration of the tenancy, and receives rent from him a new tenancy from year to year is established, and if no new agreement be entered into the law will presume, in the silence of the parties, that the tenant holds the premises subject to all such covenants contained in the original lease as applied to his present situation. Phillips v. Monges, 4 Wharton 229.

The right of a tenant to remove fixtures is a privilege conceded to him for reasons of public policy, and may be waived by him, and will be regarded as abandoned by any acts inconsistent with a claim to the buildings as distinct from the land, and upon abandonment of the right by the tenant fixtures erected by him immediately become the property of the landlord as a part of the land. A surrender of the premises, after the expiration of the lease, is such an abandonment as vests the title in the landlord. If one enters into possession by the act or authority of the law, and retain possession after the law ceases to authorize it, he is a trespasser and not a tenant at sufferance. And a tenant at sufferance would only exist where the holding over is not in pursuance of an agreement between the parties. Such an agreement would change the relation from a tenancy at sufferance to one at will, or from year to year. And if the parties have not expressly agreed upon any other terms the presumption is that the tenant holds over subject to the conditions of the former lease. After viewing all the facts and laws in the case we think a verdict should be given in favor of the plaintiff.

Judgment entered for the plaintiff.

L. R. HOLCOMB, J.

BOROUGH OF ASKAM vs. JAMES THOMPSON.

Boroughs—Due notice must be given a property holder when a pavement is to be laid in front of his premises and where he refuses to lay such pavement.

STATEMENT OF THE CASE.

The borough of Askam passed an ordinance requiring property owners on certain streets to lay side walks and if not laid within a certain time the borough authorities would lay them and collect from the owners of property. One of the property owners, James Thompson, failed to lay his and the borough authorities acting upon the advice of their attorney proceeded to lay the walk and afterwards to collect. The borough was non-suited, on the ground that sufficient notice had not been given of the intention of the borough to lay the walk. Has the borough any remedy now to recover for the walk, and if not would they be trespassing if they went and tore the walk up and laid it down somewhere else?

BISHOP and DONEHOE for plaintiff.

GERBER and HICKERNELL for defendant.

1. Boroughs are trespassers for acts not done under due process of law. Rutherford's case, 72 Pa. 82; Hannock vs. The Borough, 148 Pa. 635; Boyle v. Borough of Hazleton, 171 Pa. 167.

2. Trespassers cannot force compensation for improvements which they make upon the land of another; neither can they reclaim and remove such improvements from the land.

OPINION OF THE COURT.

The facts come before us in the form of a case stated. The court is therefore confined strictly to a consideration of the

specific facts presented; it cannot aid them by any inference or implication. Lugg v. Tracy, 104 Pa. 493; Diehl v. Iline, 3 Whart. 143; Berks Co. v. Pile, 18 Pa. 493.

The power of the court to render a decision must then depend upon the adequacy of the facts adduced to sustain an intelligent judgment. If the case stated is insufficient for this purpose it must be quashed. Commonwealth v. Howard, 149 Pa. 302.

Such being the law it remains only to ascertain the result of its application to the facts. It is apparent at a glance that no *judgment* can be entered for the reason that the parties have not agreed what that judgment shall be if the law is with the plaintiff, nor what if with the defendant; nor is there any principle agreed upon by which the amount of damages shall be determined. This is a fatal defect, 18 Pa. 493. But even if it were possible to overlook this grave irregularity, we cannot disregard the further circumstance that the facts disclose no issue between the parties. Counsel for defendant have cited much law to the effect that, a borough becomes a trespasser upon an attempt to remove a side walk, the cost of which it has failed to recover, because laid without due notice to the citizen. But it does not appear that the side-walk has been removed, and in a case stated arguments of counsel based upon facts which do not appear in the statement must be ignored. "Judgment must be confined to the issue set forth," P. & R. R. Co. v. Waterman, 54 Pa. 337. So if there be no issue, obviously there can be no judgment.

Inasmuch as it does not disclose facts sufficient to sustain an intelligent judgment, the case stated must be quashed.

BARR, J.

WM. FORBES vs. ASA PACKER.

Contract—Mistake as to number of circulars tendered—damages.

STATEMENT OF THE CASE.

Packer contracted with Forbes to have a die or cut made of himself, and to print for him 5,000 copies to circulate, which he, Packer, was about to send out concerning his business of furniture-maker. The price was $35. Forbes made the die and printed 5,100 copies of the circulars. One hundred of them he intended to keep and distribute to advertise his own business of engraver, but his employee put the 5,100 into the package and delivered it to Packer, who paid the $35 at once. Forbes discovering the error, demanded 100 circulars of Packer, who refused to deliver them, having already mailed them after discovering the excessive number, and intending to pay for the excess. He also refused to allow Forbes to use the cut in order to print other impressions. The value of the 100 circulars to Forbes would be $10, and it would cost $15 to make a new cut and print 100 impressions.

KAUFMAN and MOWRY for plaintiff

1. A person who assumes dominion of the property of another does so at his peril, and, without regard to his motives, is responsible in damages if by means of his act an injury is inflicted upon the real owner. 26 Am. & Eng. Encyc. of Law, 715; 76 Pa. 496.

2. There was an implied contract that, plaintiff should have the right of using the cut for the purpose of making the extra circulars, and defendant's refusal to permit such use renders him liable for a breach of contract.

3. Where a loss must be sustained by one of two innocent persons, it must be borne by him whose act was the cause of it. 4 Rawle 318.

ELDER and PHILIPS for defendant.

1. The burden is on the plaintiff to show that the agreement supports a contractual obligation, giving to plaintiff the right to use the cut.

2. The use by plaintiff, without defendant's permission, of the latter's die, to produce the extra circulars, mars plaintiff's right to recover, since he cannot put in his claim without revealing his own bad faith. 10 Barr 170; 23 Pa. 198; 11 S. & R. 164; 26 N. Y. 217.

OPINION OF THE COURT.

Gentlemen of the Jury:

This is an action brought by Wm. Forbes against Asa Packer, to recover for damages sustained by the plaintiff in sending goods by mistake to the defendant, and being retained by him.

We find a contract between the plaintiff and defendant in this case, that Forbes, the plaintiff, was to make a cut of Packer, the defendant, at the rate of 5,000 for $35.

In printing the cards Forbes printed 5100, intending to use 100 to advertise his own business as engraver. The employe of Forbes by mistake put the 5100 cuts into the package and delivered them to Packer, who immediately paid the $35. Forbes on discovering the mistake demanded the 100 circulars from Packer who refused to deliver them, having already mailed them, and having discovered the excessive number, intending to pay for them. He also refused to allow Forbes to use the cut in order to print other impressions Forbes claims the value of the 100 circulars to be worth $10 to him.

As to the latter part we have nothing to do. It formed no part of the contract, and if a person refuses to allow another to make a cut of himself, an action at law will not be sustained.

As to the former part, the goods being delivered by the employe of Forbes, the result will be the same as though they were delivered by Forbes himself. There is but one question remaining, and that is, can Forbes recover for damages sustained through his own mistake by impliedly offering to contract with Packer for the extra 100 cards at the contract price, which offer was accepted by Packer. This offer was accepted by Packer, and the circulars were mailed before Forbes discovered the mistake and demanded the goods, thus making a binding contract. We, therefore, think, since Forbes sustained damages through his own fault, he cannot recover the amount asked. McCown v. Quigley, 147 Pa. 307. We think that Forbes can recover only 70 cents which Packer intended to pay before the bringing of this action.

We, therefore, think that your verdict should be for the defendant.

FRANK HEAYD RHODES, J.

OPINION OF SUPERIOR COURT.

The contract between Forbes and Packer required the former to make for the latter a cut and to print 5000 copies of a circular on which an impression of the cut was to be made. The cut was when made to be the property of Packer. Forbes had no right to use it, except in order to produce the 5000 circulars. Had Packer been aware of Forbes' intention to print for his own use an extra hundred, he could have prevented it by means of an injunction. Forbes was not authorized either to employ the cut for the production of these circulars or to disseminate the circulars. Levyeau v. Clements, 175 Mass. 376; 2 Beach Injunctions 888.

From this it follows that Forbes has suffered no wrong in being prevented by Packer's act from disseminating the 100 circulars nor in being denied the use of the die to produce another one hundred. The loss therefore of whatever value the ability to distribute the circulars would have conferred on them, is, if *damnum* at all, *damnum absque injuria*. It may be that the 100 additional circulars obtained by Packer were worth to him 70 cents. This is nearly the valuation put on them by the contract. But, the point which is to decide the measure of Forbes' recovery is not the gain to Packer but the loss to Forbes Forbes had by putting the printers' ink on the paper almost totally destroyed the value of the paper. He could not legally distribute the circulars. Indeed he could probably be compelled to destroy them altogether if destruction were the only reasonable security against the improper dissemination of them, 175 Mass. 376. *Cf.* Phillips v. Homfray, 24 Ch. D. 439. The aim of the theories of quasi-contracts is to do equity between parties. We are not convinced that it is inequitable to refuse compensation to Forbes for circulars which he produced with an intent so to use them as to inflict a wrong on Packer, and which had no other value than that which this use imparted to them.

Packer in sending out the circulars discovered that they were in excess of the contract number, and apparently intended to pay for them. This intention is not decisive of a duty to pay. Was it formed with knowledge of the improper purpose with which the supernumerary circulars had been produced? He might well have intended to pay for them if they had been mistakenly printed without having any such intention when he discovered that their printing had been with a design unlawful as to himself.

The 100 circulars have, by Forbes' act, been mingled with the 5000, so that they cannot be distinguished. The effect of a

confusion of goods has been only imperfectly developed in the decisions of this state, McDowell v. Rissell, 37 Pa. 164; Henderson v. Lauck, 21 Pa. 359; Winlack v. Geist, 107 Pa. 297. *Cf.* 6 Am. & Eng. Encyc of Law, 594, and we concede that it is difficult to justify the doctrine that when A even tortiously mingles his 10 quarts of coal-oil with B's one quart of the same sort of oil or his ten bushels of coal with B's one bushel of the same sort of coal, A makes the 11 quarts or the 11 bushels B's. Since the oils and coals are of the same quality no harm is done to B, if A is allowed to take all except the quantity which was originally B's. The 100 circulars were indistinguishable from the 5000 and the mere confusion could have caused no harm to Packer had Forbes taken 100 from the package leaving 5000 for him. Levyeau v. Clements, 175 Mass. 376, however, makes the severer application of the principle of confusion and practically holds that Forbes forfeited the 100 by reason of it. This result, in view of the improper use to which Forbes intended to put the 100 circulars, is not unjust.

What we have said indicates that the plaintiff cannot recover $15 for he is not entitled to the use of the circulars, and he does not pretend that he has suffered a loss of $15 if they were unusable. It also indicates that he cannot recover the 70 cents.

Judgment affirmed.

JOHN HANKS vs. ADAM COFFEY.

Action in assumpsit.

STATEMENT OF THE CASE.

On the death of Amos Coffey, his son Adam being at a distant place, came to his father's house and superintended arrangements for the funeral. Hanks was a singer who rather often was called on to sing at funerals, sometimes obtaining pay and sometimes not. He had well known the deceased, sometimes calling at the house. In the conversation between defendant and Hanks the latter asked who was going to be the administrator and defendant said that, though he was the younger son and not living at home, he thought he would be. Hanks attended the funeral, singing three hymns. Some days afterwards Jas. Coffey's eldest son, with the consent of all the family, took out letters of administration. Hanks, however, demanded pay of $15.00 from Adam Coffey, who refused to pay. Hanks brought this action before a justice of the peace.

E. A. DeLaney and McGuffie for plaintiff.

1. When services are rendered by one person to another, the law presumes a promise, on the part of him who has received, to pay what the services are reasonably worth. Smith v. Milligan, 43 Pa. 107; 5 Penna. C. C. 321; Fillich's Estate, 9 Pa. C. C. 25; 4 Dall 111; 9 Phila. 118; 6 Sup. Court 341; 7 Wright 107.

2. Where a person, assuming without authority to act as agent for another, enters into a contract, either in his own name or in that of alleged principal, the party with whom he contracts may elect to consider him as the principal and hold him liable on the contract. McConn v. Lady, 10 W. N. C. 493; Henry v. Milve, 43 Pa. 418; 104 Pa. 368; 47 Ohio 525; Burgan v. Cahoon, 1 Penny 320.

Wright and Cooper for defendant.

1. Services voluntarily performed, with or without the defendant's consent, however beneficial, afford no ground for an action for payment. Anderson v. Hamilton Township, 25 Pa. 75; Bartholomew v. Jackson, 20 Johns 28; Doyle v. Trinity Church, 133 N. Y. 372; Insurance Co. v. Beatty, 119 Pa. 6; Houch v. Bouch, 99 Pa. 552.

2. The circumstances are not such as to permit plaintiff to make the doctrine of estoppel. Com. v. Nulty, 10 Pa. 530; Millens Appeal, 84 Pa. 3 5; 99 Pa. 432; 120 Mass. 79; Hill v. Eply, 31 Pa. 334

3. The action is improperly brought; if plaintiff has an action it is against the administrator of the estate. Act of Feb. 24, 1834. P. & L. Dig. Decedents estates.

OPINION OF THE COURT.

Between the parties to this litigation we are unable to discover any evidence of a contract. The contract alleged to exist was not founded upon any writing, words or acts by the defendant. It was founded upon mere silence, and the counsel for the plaintiff have failed to furnish any instance of silence in which a contractual relation might have been established.

The facts are clear. Hanks was a singer, who was rather often called upon to sing at funerals, sometimes obtaining pay and sometimes not. He lived at a distance,

was a friend of the decedent, sometimes calling at his house. The learned counsel for the defendant has properly said that "it does not appear that he made singing a practice in the way of a livelihood. He had sung at funerals before, perhaps from a sense of friendliness towards the deceased, or at the request of the decedent's family."

True it is, as the counsel for the plaintiff argue, that the performance and receipt of services generally raises an implied promise to pay for them. This is "generally" the case. But a careful perusal of the law on this subject will convince the examiner that in all cases, except that of parent and child, there must be evidence beyond the relationship that the creation of a debt was intended. Curry v. Curry, 114 Pa. 371. Was there any such evidence in this case? Was there anything done or anything said that would lead one to infer that the parties intended to create a debt? Manifestly there was no agreement. The fact that Hanks asked Adam Coffey, the defendant, who was going to be the administrator has been cited by the plaintiff's counsel as indicating the plaintiff's expectation of a reward. No weight can be attached to such a question. The inquiry was a very natural one—one that any friend would be likely to make in the course of ordinary conversation. There is no reason to think that the defendant did not suppose that the services were given spontaneously, from kindly motives and with charitable intentions. The relation of the parties, the nature of the services and all the pertinent facts cannot justify the inference that the plaintiff was singing for money, or that the defendant understood that pay was to be expected.

The services of Hanks were voluntarily rendered, and a long line of authorities support the doctrine that a voluntary act, performed without request, does not, although beneficial to the other, afford a legal cause of action for compensation; that the act was necessary does not alter the case. P. & L. Dig. Vol. 3, Col. 4642; Anderson v. Hamilton Township, 25 Pa. 76.

In Royal Ins. Co. v. Beatty, 119 Pa. 11, the facts were insufficient to justify a legal inference of a contract where "the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made." How much less, then, is a legal liability on the part of the defendant created when no request at all has been made.

There was, in our opinion, no agreement, express or implied. The services were volunteered, and there is nothing to indicate fairly that Hanks expected compensation for his services.

Judgment for defendant.

MALCOLM B. STERRETT, J.

CHAS. THORNE vs. PHILIP ALRICK.

Damages—Independent contractor—Liability for negligence in performing contract.

STATEMENT OF THE CASE.

Thorne and Alrick owned adjacent lots. On Thorne's was a residence 3 stories high where east wall coincided with the division line between the lots Alrick decided to erect a warehouse on his lot; made a contract with Zeiner & Co., to erect it. The specifications called for a cellar 16 ft. deep. In making the excavation, necessary measures to prevent the falling in of the soil of the Thorne lot were omitted, and when the depth of 8 ft. had been reached, the entire wall of Thorne's lot fell in and the house was demolished.

This is trespass for damages. Zeiner & Co., were contractors for the erection of buildings, and undertook to do all the work, having absolute discretion as to means; the plans and specifications of the building being the only restriction in their discretion.

The contract price was $25,000.

CARY and EBBERT for plaintiff.

1. Where a person digs up the soil of a contiguous lot whereby the foundation walls of a house are injured, such person is liable in damages to the owner of the injured house. Pariton v. Holland, 17 Johns 92; Horran v. Stanley, 16 P. L. Smith 464; Atwater v. Woods, 1 W. N. C. 23.

2. The employer will be liable, if the injurious act complained of was contemplated by the contract, or if the contract work is necessarily harmful. City of Buffalo

v. Holloway, 7 N. Y. 492; Dorrity v. Rapp, 72 N. Y. 307.

BISHOP and DONAHOE for defendant.

1. Where the contractor is independent of his employer in all that pertains to the execution of the work, and is subordinate only in the design, the employer is not liable for the negligence of the contractor in the execution of the work. Harrison v. Collins, 86 Pa. 153; Smith v. Simmon's, 103 Pa. 32; Reynolds v. Braithwaite, 131 Pa. 416; Gas Co. v. Lynch, 118 Pa. 362.

2. To render a person liable for the negligence of another, the relation of master and servant or principal and agent must exist between them. Blake v. Ferris, 5 N. Y. 48; 57 Pa. 273; 80 Pa. 120.

OPINION OF THE COURT.

This is an action by the plaintiff to recover damages for trespass by the defendant, who is the owner of a lot adjoining that of plaintiff. As an incident to the right of property in lands, the proprietor cannot make excavations upon his land which will deprive the adjoining land of that lateral support which is necessary to keep it from falling in. This rule, however, is not applicable under all circumstances. The plaintiff's statement reads that "Zeiner & Co. were the contractors and undertook to do the work, having absolute discretion as to the means," the plans and specifications of the building being the only restrictions placed upon them by the owner. The consideration for the performance of the contract was $25,000. The question now arises as to the relation created between the owner of lot, Philip Alrick, and the contractor. In Harrison v. Collins, 5 Norris 153, Mr. Justice Mercer says, "that if one renders service, in course of occupation representing the will of employer only as to the result of work and not as to the means by which it is to be accomplished, it is an independent employment. Smith v. Simons, 103 Pa. 32; Hookey v. Oakdale Borough, 5 Sup. 404. Therefore, the relation of independent contractor is well established in this case.

There remains, then, the question of liability of the defendant for the negligence of Zeiner & Co. in making the excavations necessary, the measures to prevent the falling in of the Thorne lot were omitted. The owner of an adjoining lot is not liable for injuries resulting from the acts of an independent contractor, unless he has failed to give notice to the adjoining owners that the undertaking is hazardous. In Congregation v. Smith, 163 Pa. 561, the court held "that if the owner had retained the right to direct the manner in which the details of work done by an independent contractor, he is liable only if he exercises this right." The plaintiff offered no evidence that the task was an hazardous one, such as would require notice being given by the defendant. In the absence of evidence of negligence on part of defendant, and on the ground that this was not in our opinion a dangerous undertaking, under these conditions the defendant is not liable for injuries resulting from the negligence of an independent contractor. Gas Co. v. Lynch, 118 Pa. 362; Thomas v. R. R. Co., 191 Pa. 361; Edmundson v. P. M. & Y. R. R. Co., 111 Pa. 316.

Judgment for defendant.

TURNER, J.

THE O. & W. RY. CO. vs. ALLAN LANE, SHERIFF.

Trespass—Levy on corporation property—What exempt from levy.

STATEMENT OF FACTS.

Plaintiff owns railway thirty miles long, entirely in Pennsylvania and connecting two towns. There are no other connecting lines. Under execution on judgment of $10,000 against the company the defendant levied upon a locomotive, derailed it and put a deputy in charge. There was plenty of personal property, known to the Sheriff, out of which judgment might have been satisfied.

This is an action for trespass as on realty and for value of engine.

KEMP and FRANK for plaintiff.

Property of corporation is exempt from levy. Foster v. Fowler, 60 Pa. 27; Johnson Co. v. Miller, 174 Pa. 605.

Sheriff is liable for abuse of authority, Wilson v. Ellis, 28 Pa. 238.

MARX for defendant.

Defendant not guilty of tresspass on realty as he acted under authority of process regularly issued by court having jurisdiction. Bellings v. Russel, 23 Pa. 189; Hodgson v. Millward, 3 Grawl 406.

Locomotives are personal property and defendant by holding locomotive committed no trespass on realty. R. R. v. Luermore, 47 Pa. 467; Youngman v. R. R., 65 Pa. 278.

OPINION OF THE COURT.

The defendant prays for a non-sui against the plaintiff for the reason that the plaintiff has failed in establishing the facts necessary to sustain this action. We cannot in this case enter a non-suit for the simple reason that we think the plaintiffs have a plain cause of action.

The defendant contends, that the writ giving him authority to levy had issued from a court having jurisdiction, also that it was regular, and that defendant acted within the authority conferred by the writ. This may all be true, but notwithstanding this the writ was irregular, for this reason. According to the 72nd section of the Act of June 16th, 1836, regulating executions against corporations "The officer charged with the execution of such writ shall go to the banking house, or other principal office of such corporation, during the usual office hours and demand of the president, or other chief officer, treasurer, secretary, chief clerk or other officer, having charge of such office, the amount of such execution, with legal costs." Until this requirement had been complied with sequestration could not take place. Sequestration under the Act of 1836 was abolished by section 1 of Act April, 1870 and execution by *fi. fa.* was substituted.

It has been expressly decided, however, that whatever was a necessary preliminary to sequestration under the Act of 1836, must now be done before the *fi. fa.* given by the Act of 1870, can issue. Flagg v. Farnsworth, 12 W. N. C. 500.

It is clear therefore, that as no demand in accordance with section 72 Act of 1836 was made by the officer charged with the *fi. fa.* it was irregular and should be set aside. But conceding that the demand was made, the writ could not subject the locomotive to execution. The Act of April 7, 1870 extending the right of execution against a corporation to all its property, was not intended to subject property, before exempt to execution piecemeal. The franchises must be levied on and sold as an entirety. The property of a railroad corporation in actual use for the purposes prescribed in its charter, is not liable to levy apart from the franchises of the company.

In principle, though the subject matter is somewhat different, the cases of Johnson v. Miller, 174 Pa. 605 and Sus. Canal Co. v. Bonham, 9 W. & S. 27 are authorities in point. In the latter case Justice Seargant says "It has always been held and our acts of assembly are construed on the idea that the franchises and corporate rights of the corporation and the means vested in them, which are necessary to the existence and maintenance of the great public object for which they were created, are incapable of being granted away and transferred by any act of the corporation itself, or by process of another against it *in invitum*." Again in Coe v. Hart, Justice McLean remarked "The railroad, like a complicated machine, consists in a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on an abstract, some essential from a planing machine, or any other combination of machinery, as to take from a railroad, its *locomotives* or its passenger cars."

Counsel for the defense placed great stress upon the fact that the plaintiff brought the action against defendant for trespass on the realty. But we do not think this to be a very material point, so we will not enter into a discussion of it, in this opinion. The main question to dispose of is, did the defendant have the right to levy upon the locomotive? And we do not think he did, as was said in Johnson v. Miller, 174 Pa. 605, the Judge commenting on the right of creditors to sell property of a public corporation, which is essential to the exercise of its franchise says "It is undoubtedly the rule that when the operations of a corporation are matters of direct public interest and concern, its property which is reasonably essential to the exercise of its franchises, cannot be alienated by the corporation or sold by its creditors piecemeal so as to stop its operations or defeat the object of its charter."

A railroad corporation is but a servant of the State, and while it has private ends it must obtain them through a faithful discharge of its obligation to the public,

for whose benefits its powers are conferred. Its charter is not only the grant of its own privileges, but it is evidence of their consideration arising in the public benefit, and of its contract to subserve this purpose. If it may be dismantled by seizing those things most essential to its existence, it would be powerless to serve the public or benefit itself.

For the reasons herein stated, we think the defendant was guilty of trespass and that the plaintiff company should recover the value of the engine.

Judgment for plaintiff.

HARRY P. KATZ, J.

OPINION OF THE SUPREME COURT.

A judgment was recovered against the plaintiff for $10,000. It was the right of the creditor to issue an execution upon it. By no other method could he obtain satisfaction. He accordingly caused to issue a *fieri facias*. Upon this writ it became the duty of the sheriff to seize personal property of the debtor, if he could find any that under the law was leviable. We are told that "there was plenty of personal property, known to the sheriff, out of which the judgment might have been satisfied." What the personalty was, and how it was related to the operations and road of the company, we are not informed. This property, amenable, as the company concedes, to levy, the sheriff did not seize. He levied, rather, upon a locomotive, which was standing, apparently, on the track, and removed it therefrom, putting a deputy in charge of it.

It seems to be assumed by the plaintiff that the locomotive was realty, a part of the road. From this premise it is argued that the sheriff had no right to separate it from the road, and treat it as a distinct subject of levy. The conclusion would doubtless follow. We have, however, not been referred to any authority for the doctrine that a locomotive becomes, so far as the corporation or third persons are concerned, realty. That doctrine is not found in Phila., etc., R. R. v. Woelpfer, 64 Pa. 366. Rolling stock is considered personalty by many courts. Pierce, Railroads, 475 (Ed. 1881); Act June 12, 1878; 2 P. & L. 3964; Covey v. Pittsburg, etc., R. R. Co., 3 Phila. 173. We do not think that the sheriff can be held liable for any unlawful conversion of realty into personalty in order that he might levy on the locomotive as of the latter class, because the locomotive was already personalty.

The locomotive, however, is one of the articles of personal property the possession of which is essential to the performance by the company of its public function of transportation. The tracks without locomotives, cars, etc., would be useless. It has long been the policy of the state, not to permit the property, whether real or personal, of a quasi-public corporation to be discerped and torn, part from part, by creditors. This policy was expressed in the 73d section of the Act of June 16, 1836. It requires a demand on the principal officer of the corporation by the sheriff, to whom a *fi. fa* has been issued, for payment. It then permits a levy on detached personalty or realty, that is, personalty or realty whose possession is not essential to the exercise of the franchises in which the public has an interest—East Side Bank v. Columbus Tanning Co., 170 Pa. 1; and if no sufficient property of this class is found, authorizes a return of *nulla bona*, and thereupon a sequestration of the franchises and the thereto essential property of the corporation. The whole of this process is still required, save the sequestration. Instead of that the Act of April 7, 1870, authorizes the issue of a second and special *fieri facias*, commanding the sheriff to levy on personal and real property and franchises of the corporation, and to sell the same. Smith v. Altoona, etc., R. R. Co., 182 Pa. 139; Mausel v. New York, etc., Railway Co., 171 Pa. 606; East Side Bank v. Columbus Tanning Co., 170 Pa. 1; Lusk's Appeal, 108 Pa. 152.

In order to levy and sell property of a quasi-public coporation, deeded to public functions, it is necessary (1) to issue a *fieri facias*, (2) for the sheriff to demand payment at the principal office of the corporation, (3) to levy on detached property, *i. e.*, property whose retention by the corporation is not needful for the execution of its public work; (4) if none such, in sufficient quantity, is found to return the *fi. fa. nul a bona*; (5) then to issue a special *fieri facias*, and (6) under it, to levy on the franchises, and all the property, real and

personal, essential to the public utilities, as a single and undecomposable mass.

It is evident that the sheriff, Allen Lane, did not observe this order of procedure. He knew that the defendant was a railroad corporation. He knew, moreever, that the locomotive on which he levied was in actual use on the road and was needful for the performance of the peculiar work of the corporation. He knew, indeed, that he had no right to levy on any property at all until he had demanded payment from the president or other officer at the principal office, and he further knew that, even if he had made such demand, and without effect, he could not properly levy on the locomotive as a separate chattel and deprive the corporation of its use even temporarily.

It does not appear that the locomotive has been sold by the sheriff. The action seems to be for the sheriff's interference with the plaintiff's possession and use of it by means of the levy. Had there been a sale though it would have been irregular, and, on the seasonable application of the corporation would have been set aside, it would in the absence of such objection by the company have conferred a good title on the purchaser; Lusk's Appeal, 108 Pa. 152. The sheriff has not sold the locomotive, and probably has relinquished his levy. We are to determine whether he is liable to the corporation for his improper seizure of the locomotive. We think he is. The *fi fa* was no warrant to him, to seize any property until the corporation, after demand, had refused to pay the debt. So far as appears it would have been paid had demand been made. But even had demand been fruitlessly made, the writ would have been no warrant for the seizure of the locomotive. In taking it, removing it from the tracks and placing it in charge of a deputy, the sheriff was guilty of a trespass. He has no authority to take the property of persons except that which under definite conditions the law confers on him. If to prevent the defendant from taking $300 worth of property under the statutory exemption, renders the sheriff or constable a trespasser *al initio*, Wilson v. Ellis, 28 Pa. 238; the seizure of property without giving the defendant the opportunity to discharge the debt by a demand would render him such. But more clearly does he become such when he levies on a locomotive and interrupts the corporation's possession and use of it, if the writ in his hands, interpreted by the relevant statute, of which he is bound to take notice, confers upon him no power to make such levy.

It is true that, on the application of the corporation, the court would have arrested the sale of the locomotive had it been attempted, Mausel v. N. Y. etc. Ry. Co., 171 Pa. 606; but that would not have obliterated the damage caused by the temporary expropriation of the company by the acts of the sheriff. For this damage it is clearly entitled to compensation. The judgment of the learned court below is affirmed.