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THE FORUM.

Vol. VII

JUNE, 1903

No. 9

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THE DICKINSON SCHOOL OF LAW,
CARLISLE, PA.

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LAW SCHOOL COMMENCEMENT.

Another year's work in the history of the Dickinson School of Law has been completed, and another large class has gone out to take up the important work for which they have been so thoroughly prepared. The close of the commencement exercises, in Bosler Hall, on the evening of June 9th, marked the graduation of one of the largest classes in the history of the Law School and terminated an instructive and enjoyable programme.

The exercises began on Sunday morning, June 7th, with the Baccalaureate services, in the Allison Memorial church. Prior to the services the members of the graduating class of the Law School and the College, together with the members of the faculties of the respective institutions, met on the lawn in front of President Reed's residence, and from there marched to the church. That edifice was crowded to its doors, nearly every church in Carlisle having discontinued services to permit their members to attend the exercises.

The interior of the church was appropriately decorated and presented a beautiful scene. In various corners were flowers

and plants, the rostrum being almost hidden by great plants and flowers. Seated on the rostrum were: Dr. Reed; Bishop Fowler, of Buffalo; Rev. Dr. Craig, of Newark, N. J.; Rev. Charles M'Crea, of Ridgewood, N. J., and Rev. W. P. Shriener, pastor of the church.

The services opened with an organ prelude by Claude Stauffer. A large chorus, the voices for which were selected from the various church choirs in Carlisle, sang Scheriecker's "Sing Alleluia Forth." Dr. Reed and the congregation joined in responsive scripture reading and then a hymn was sung. Bishop Fowler offered prayer, after which Miss Prince sang with much effect, "In Thee, O God, do I Put My Trust." Dr. Reed, president of the College and Law School, then delivered the Baccalaureate sermon. He chose as his text, the words in Second Peter, 3rd chapter, 18th verse, "But grow in grace and knowledge of our Lord and Savior, Jesus Christ."

It was an eloquent effort, delivered with effectiveness that held the attention of its listeners during its delivery. After defining the word "grace," and elucidating its use in the text, he proceeded to dwell upon the words in the text upon

which his discourse was built, the words, "But grow." He showed that growth must exist in all realms of nature, in animal life, in physical life and in intellectual life. The moment growth ceases decay begins, and in a short while comes the end. Some men in college grow to be seniors but they are still freshmen or sophomores. The ranks of all professions are filled with such men. They have stopped growing. The professions are filled with them. That is the reason why there are so many failures.

At the conclusion of his sermon, Dr. Reed spoke sound words of advice to the graduates. To succeed in law, he said, you must be upright and honest, studious and religious. Religion is just as essential for success in the law, as in any other profession.

Tuesday evening the commencement was held in Bosler Hall, where a large crowd had assembled. The crowd was composed of friends of the graduates, visitors and residents of the town. Among the visitors were many of the alumni.

President Reed presided at the exercises. Seated upon the stage with him were Dr. Trickett and the Law School faculty, several of the incorporators of the school and several distinguished visitors, among whom were: Hon. Gustav A. Endlich, of Reading, Pa., associate judge of Berks county; Judge W. F. Bay Stewart, of York county; Judge Bouton, of Smethport, McKean county; Edwin L. Dively, Democratic candidate for judge of Blair county; Gen. Horatio C. King, of New York.

A large orchestra, under the leadership of Claude Stauffer, played several selections. Judge Endlich then delivered the Baccalaureate address, the subject of his theme being "Individual Liberty and Thought." The address is printed in full in another part of this journal. It was a scholarly talk filled with high thought and eloquence.

Degrees were then conferred by President Reed, the candidates receiving their diplomas as Secretary Wood called their names.

Dr. Reed congratulated the class and spoke words of advice to them after which the prizes were awarded, when the exercises closed.

NOW ATTORNEYS AT LAW.

On Wednesday morning, June 10, the members of the Senior class of the Law School, who expect to practice in Pennsylvania, on motion of Mr. Graham, secretary of the local board of examiners, were admitted to practice in the several courts of Cumberland county. Judge Biddle held a special session of court in order that the class could be admitted. After administering the usual oath, his honor delivered a few words of advice to the class, reminding them that success in their profession depended entirely upon individual effort. The members of the class who were admitted were as follows:

Walter P. Bishop, Johnstown, Pa.
Victor B. Bouton, Smethport, Pa.
Geo. W. Cisney, Tyrone.
D. Lloyd Claycomb, Alum Bank, Pa.
William N. Cooper, Carlisle, Pa.
Paul A. Core, Washington, Pa.
LeRoy B. C. Delaney, Harrisburg, Pa.
Roger J. Dever, Freeland, Pa.
Chas. H. Drumbeller, Harrisburg, Pa.
J. Mechesney Ebbert, Greencastle, Pa.
H. C. Fox, Harrisburg, Pa.
Fred. B. Gerber, York, Pa.
Harvey A. Gross, Hall, Pa.
Henry M. Hamblin, Carlisle, Pa.
Chas. G. Hickernell, Schaefferstown, Pa.
Clifford D. Jones, Edenburg, Pa.
C. H. Keelor, Philadelphia, Pa.
A. S. Longbottom, Crum Lynne, Pa.
R. B. Miller, New Cumberland, Pa.
G. S. Mowry, Alum Bank, Pa.
I. S. Peightel, McConnelstown, Pa.
Alvin Sherbine, Wilmore, Pa.
H. S. Vastine, Riverside, Pa.
Anthony T. Walsh, Pittston, Pa.
Jno. F. Watson, Bloomsburg, Pa.
E. B. Williamson, York, Pa.
R. M. Wright, Huntingdon, Pa.
A. Irving Yeagley, Lebanon, Pa.
E. L. Dively, Altoona, Pa.
Geo. E. Lloyd, Mechanicsburg, Pa.
Adam B. Vera, Custer City, Pa.
Thomas B. Wilson, Bradford, Pa.
Wm. A. Shomo, Harrisburg, Pa.

PRIZES.

The following prizes at the end of the present term were awarded:

William C. Allison Prize to Fred. B.

Gerber, of York, for best work in Constitutional Law.

William D. Boyer Prize No. 1 to W. L. Houck, of Berwick, and Thomas B. Wilson, of Bradford, for excellence in Law of Evidence.

William D. Boyer Prize No. 2 to John E. Rauffenbart and James P. Hedges, both of Atlantic City, N. J., for superiority in work on Contracts.

William D. Boyer Prize No. 3 to George E. Wolf, of Johnstown, for best examination in Torts.

The Dean's Prize to Edward B. Morgan, of Wilkes-Barre, James P. Hedges, of Atlantic City, and Elmer W. Ehler, of Harrisburg, for best work in the law of Real Property.

THESES.

The following is a list of the topics upon which the graduating students of this year have written :

- Opinion Evidence—Claycomb.
- Husband and Wife as Witnesses—Core.
- Origin and Organization of Courts of Record in Pennsylvania—Walsh.
- Title by Descent—Kress.
- Fixtures—Knappenberger.
- Riparian Ownership—Longbottom.
- Legal Status of Women in Pennsylvania—Lloyd.
- Master's Liability for Servant's Wrongs—Phillips.
- Jurisdiction of Justices in Contract actions—Wright.
- Insurable Interest—Cooper.
- Effect of Illegality upon Contracts—Williamson.
- Sunday Law in Pennsylvania—Dively.
- Contractual Liability of Infants—Gross.
- Landlord's Right to Distrain for Rent—Cisney.
- Distress for Rent in Pennsylvania—Yeagley.
- Execution of Wills—Delaney.
- Malicious Prosecution—Vastine.
- Effect of Admissions—Drumheller.
- Liability of Employer to Employee—Gerber.
- Jurisdiction of Justices in Tort actions in Pennsylvania—Dever.
- Character as Evidence—Kauffman.
- Confessions—Ebbert.
- Liability of Corporation for Torts of its agents—Miller.

Release of Damages—Keelor.
Jurisdiction of Justices in Contracts—Bouton.

Title by Descent—Vera.
Divorce in Pennsylvania—Sherbine.
Landlord's Remedy of Distress—Jones.
Contractual Power of Married Women in Pennsylvania—Shomo.
Jurisdiction of Justices in Contracts—Watson.

Distress for Rent—Bishop.
Statutory Rights and Liabilities of Married Women—Hickernell.

Orphans' Courts of New Jersey under Act of 1898—Albertson.

Confessions—Wilson.
Mechanics' Liens—Fox.
Equitable Conversion—Peightel.

Equitable Defences in Suits on Promissory Notes—Hamblin.

Probate of Wills in Pennsylvania—Mowry.

ALUMNI NOTES.

Clark, '01, was recently nominated on the Republican ticket for District Attorney of Warren county. The county being nominally Republican, and Mr. Clark being a strong candidate, his chances of being elected are considered bright.

Among the alumni who were in town during the commencement exercises were the following: Hon. L. P. Holcomb, '01, of Wilkes-Barre; G. B. Stevens, '99, of Reading; F. A. John, '00, Mt. Carmel; Marker, '93, Greensburg, Pa.; Philip M. Gaul, '01, Lehigh, Pa.; Samuel E. Basehore, '01, Mechanicsburg, Pa.; N. R. Turner, '01, Easton, Pa.; Wm. D. Boyer, '92; Clarence E. Vallentine, '95, Scranton, Pa.; James C. Houser, '02, Lewistown, Pa.; H. R. E. Mays, '02, Reading, Pa.; S. C. Boyer, '93.

During the month, Fought, '03, Mt. Carmel, was in town. He was accompanied by Judge Savage, of Sunbury.

Miller, a member of this year's graduating class, has made application for examination for admission to the Maryland Bar.

Miss Marvel, '00, was in town during the commencement exercises.

Announcement has been made of the engagement of Miss Sara Marvel, of Atlantic City, and George Coles, of Lykens, Pa., both members of the class of '00. We extend sincere congratulations and wish them happiness and prosperity.

SCHOOL NOTES.

The Senior class held its annual outing on June 2nd, at Mt. Alto, a delightful resort in the vicinity of Chambersburg. Leaving Carlisle on the 8:39 a. m. train they arrived there at 11 a. m. and returned to Carlisle on the 10.05 p. m. train. During the day the class held a meeting and decided to hold a re-union in Carlisle during the commencement exercises in the year 1906. Walsh was elected secretary and was empowered to make the necessary arrangements for the re-union.

At a meeting of the members of the base ball team just before the close of the term, Wolfe, '05, was elected captain of the team for the next year. This election gives universal satisfaction. The new captain possesses all the qualifications required of an incumbent of that position. He knows the game thoroughly, plays steady and consistent ball at all times, and knows how to handle men. Besides, he is quick to see a point, and is not afraid to act when the occasion requires. Under his leadership Dickinson should have another strong team next year.

George E. Lloyd, George W. Cisney and Henry M. Hamblin took the degree of Master of Arts from the College.

Harry A. Hillyer, '04, was unanimously elected leader of the Mandolin and Guitar Club, on June 10th, the morning after the club's annual concert. Mr. Hillyer will make an ideal leader, being a thorough musician and an energetic worker. Claude Stauffer, who was a member of the class of '03 for the first two years, but who dropped the study of law to complete his college course, was elected president of the musical organization and director of the combined Mandolin and Guitar and Glee clubs.

Among the distinguished persons who attended the commencement exercises of the Law School were Judge and Mrs.

Bouton, of McKean county, parents of Victor B. Bouton, of the Senior class; Judge W. F. Bay Stewart, of York, uncle of Gerber, of the Senior class, and Mr. and Mrs. E. L. Dively, of Altoona, parents of E. V. Dively, who graduated in the two years' course.

On Tuesday evening, June 9th, before the commencement exercises, Hon. W. F. Sadler, at his residence, entertained at a dinner in honor of Hon. Gustav Endlich, the commencement orator, the following distinguished persons: Hon. Gustav A. Endlich, associate law judge, Reading, Pa.; Hon. J. Bouton, president judge of McKean county; Hon. W. F. Bay Stewart, associate law judge, of York county; E. L. Dively, Democratic candidate for judge of Blair county, Gen. Horatio C. King of New York, and Dr. Trickett.

DELTA CHI.

The tenth annual banquet of the Delta Chi fraternity, in Assembly Hall, on the evening of June 5th, brought together every member of the local chapter and many members of the alumni. The menu, the postprandial exercises and the re-union of the alumni and active members made the affair stand out prominently in the annals of the Dickinson chapter. Paul A. A. Core, presided as toast master. After the completion of the formal programme, during the rendition of which several inspiring songs were sung in chorus, short addresses were delivered by the members of the alumni who were present. Those who responded to formal toasts were F. A. John, '00, A. S. Longbottom, '03, T. B. Wilson, '03, M. Patterson, '05, Hon. Frederick Fleitz, and A. L. Dively, honorary members; P. Graul, '01. The informal speeches were delivered by Stevens, of Reading, '99, Marker, of Greensburg, '93, Shapley, of Carlisle, '94, Holcomb, Wilkes-Barre, '01.

The speeches, both formal and informal, were filled with wit and eloquence and were greatly enjoyed.

Those present were: Paul A. Core, A. S. Longbottom, A. T. Walsh, Joseph P. Fleitz, Harry A. Hillyer, F. P. Benjamin, E. V. Dively, Thomas B. Wilson, A. B. Vera, Howard Prickett, Jos. P. Knappenberger, W. L. Houck, Foster Heller, M. Patterson, Leo J. Schwartz-



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kopf, Chas. Spencer, A. L. Dively, G. B. Stevens, F. A. John, P. Graul, J. Shapley and M. Marker.

LOVING CUP PRESENTED TO DR. TRICKETT.

The members of the graduating class of 1903, some time before the end of the school term, decided to manifest in some manner their deep affection and great respect for Dr. Trickett. Accordingly it was decided to present him with a loving cup, the class considering that this would be an appropriate demonstration of their love for the man and their respect for the scholar and instructor. Arrangements were made to present the cup at the commencement exercises of the Law School, on the evening of June 9th, but this could not be done, the cup not arriving until a few days after that event, and after the departure of many members of the class from Carlisle. Upon its arrival, it was presented to Dr. Trickett by a committee of the class who remained to perform that pleasant duty. It will please the donors, who were not so fortunate as to be present when the presentation was made, to know that their token is in the hands of the donee, and that he appreciates the motives that prompted its giving. In expression of that appreciation, he issues the following communication:

TO THE MEMBERS OF THE CLASS OF 1903.

MY DEAR FRIENDS—

I desire, through this medium, to thank you very earnestly for the beautiful token of your friendship, received after the departure of most of you from Carlisle. I shall treasure it as a sacred reminder of the last happy three years, during which by numberless kindnesses and courtesies, you have rendered my relations with you so pleasant. In the sorrow which your going, never to resume your old associations at the school, has left behind, the only consolation that remains is that which springs from the confidence that you will not cease to remember us nor allow your interest in your Alma Mater to abate, and from our sure anticipation for you of a professional success that, coming early, shall grow until life's decline—and may that be long deferred—

and of a happiness that shall deepen and broaden with the years. May Heaven be kind to you. *Valete et salvete.*

Affectionately yours,
WILLIAM TRICKETT.

INDIVIDUAL LIBERTY AND RESPONSIBILITY.

(Baccalaureate Address delivered by Hon. G. A. Endlich, Judge of the Twenty-third Judicial District.)

I have in mind that I am addressing an audience whose sympathetic interest centres upon a band of young gentlemen about to pass from this venerable school, where their pursuits have been ordered by the solicitous care of their elders, into the broader school of life, where the method and measure of their progress will be largely in their own hands. Advisedly I say, "largely in their own hands"; for it will not be given to any of them to be wholly their own masters. Each is to find and take his place in a profession that subjects its members to a code of ethics none may violate with impunity. Each is to find and take his place in a social organism that surrounds him with conventional restraints and duties admitting of no escape save under penalties endurable to but few. Each is likely to find and take his place in a political connection which will exact his acceptance of obligations more or less searching and will jealously scrutinize his conduct with reference to them. And so of a multiplicity of other relations which each may or may not enter into. Not one of them but will bring with it characteristic demands and limitations, circumscribe the freedom of spontaneous action, and create new, as well as modify preconceived rules of conduct. The complexity of these relations in modern life, and the unrelaxed pressure and constant inter-action of the conceptions peculiar to each, have a vast deal to do with directing behavior and moulding principles. In a civilized community every individual is bound to give up some of his liberty of thought and speech and action. Not only is he constrained to obey the laws of the State; but to some degree he must hold himself subject to the traditions and caprices of his professional, social, political, religious and business associations, and permit his course to be shaped, his work assigned to him and

the sphere of his ambitions and achievements defined by them. Living in the world, we also in an important sense live on the world. It is but just that the world, which affords us our living, should have something to say as to the manner and spirit in which we shall earn it. The world finds out what a man is good for, if he is good for anything, and helps him who helps himself to push into the place he can fill. The trouble with so many is, either that they strive for what they are unfitted for, despising that in which they might excel, or that aiming at what is in the line of their abilities, they yet refuse to strain their whole energy towards its attainment. These in part are they that fall by the wayside; for the world ordinarily declines to aid a mistaken purpose in life, as well as one legitimately selected but feebly prosecuted. The world owes no man a living save in the poorhouse; but it yields every man a living who is willing to labor at what he is fit for and to do with his might whatsoever his hand finds to do. The helpful thought for those embarking upon their voyage of uncertain destination is, that there is room in every department for all who are content to occupy those stations to which they are equal, and faithfully and unwearyingly to serve in them. That the inevitable measure of subordination of the individual to his surroundings implies his acceptance, to some extent, of their ethical doctrines, is very obvious. Doubtless he who is most thoroughly in accord with his environment, its moral as well as its material aims, is in a position to exploit it to the greatest advantage to himself; and doubtless the possibility of profitably laboring in any environment is diminished by antagonism to its moral views and aspirations. How powerful an agency self-interest is in molding our principles needs not to be discussed. The average man is wellnigh helpless in its grasp; the most exalted, not exempt from its influence. It stands to reason, therefore, that men will take much of their morality from what they find to be the prevailing thought among those with whom they are allied, to whom they look for countenance and upon whom they lean for support. And the more numerous and intimate these alliances, the more that process

of absorption from, of accommodation to, one's surroundings, will tend to fill one with views representing, not the outcome of one's own reflections nor one's independent deductions from absolute maxims of right and wrong, but the collective or average morality of the various circles to which one belongs and the engrafted doctrines of the associations with whom one's deepest interests are bound up. I do not say, one's material interests. I would not so belittle mankind as to regard its morality as a matter of mere bread and butter. I say one's "deepest" interests, which may, of course, be material, but which may as well be intellectual, professional, religious, social or political.

It is hardly needful to remind you how, at this time more strikingly than ever before, the universal trend is towards association, aggregation. In trade, industry and commerce, individual resources are merged in corporate enterprise. Much of the business of the age cannot be carried on except by the instrumentality of vast corporations. But this is the day of over-incorporation, largely for the purpose of limiting personal liability. And of the concerns thus formed members are again united under central managements and become trusts or pools or combinations. On the other hand, the different departments of labor are organized into unions acting collectively, and forming units in broader federations. Even the business pertaining to the profession of the law is being largely conducted by great law-firms employing specialists and subdividing and systematizing the work much after the pattern of a well-ordered department store. Everywhere, the individual, the natural person, is moved into the back-ground, the collectivity, the artificial person, comes to the fore. Now, I have not a word of wholesale condemnation for any or all of these things; nor am I here, a voice crying in the wilderness, to predict blighting evils as likely to result from them to the body politic,—sure to result, as many are prepared to demonstrate on the basis of a flawless logic, whose signal merit, when applied to the great problems of humanity, is in the fact that it may with certainty be relied on never to hold out. To the calm and thoughtful mind all these phenomena of trusts and

combinations, whether of capital or of labor, and whatever else in that line is presently disturbing the slumbers of the timorous, or through mistaken zeal and ignorance of rights and duties and of the immutable laws of social and economic forces is here and there hampering the even progress of affairs,—all these are but characteristic of a passing period in our civilization,—an experiment that must be, and in spite of everything that can besaid and done, will be, thoroughly tested, to give way in due season to something better and more efficacious. To attempt to stop such a movement before it has exhausted itself is as wise as the attempt of the fabled king to stop the swelling tide of the ocean at a line drawn upon the sand of the beach. It may, indeed, prove worse than futile. At no time are men more firmly convinced that they are on the right track than when they are engaged in a plausible experiment whose possibilities of failure have not yet been demonstrated by experience. At no time are men more willing to fight for an idea, than when, filled with enthusiasm by its pleasing novelty and ignorant of its latent weaknesses, they are opposed in its execution by those who have no other practical knowledge of what it must ultimately lead to. Reasoning from analogy, in such case, amounts to nothing. Differentiating circumstances can always be discovered and urged, convincingly to him who wants to be convinced, against the likelihood that the new departure will entail the same inconveniences a similar one brought with it in the past. Opposition begets stubbornness and bitterness, and the upshot is that the completion of the experiment is deferred,—if, indeed, its progress be not marked with incidental financial and worse calamities. But one thing is sure, that it will be wrought out to its consummation, sooner or later, amicably or otherwise, without convulsions or with convulsions, and that the world will not be spared the whole lesson of it.

In the meanwhile it is well for thinking men to look about them and take their bearings. Great social and economic movements are intricate of analysis and full of potentialities, both for good and for evil, which do not lie upon the surface and

which contemporaries can neither grasp in their entirety nor accurately balance in detail. It is, however, possible to discern some of their salient tendencies and to approximate their necessary outcome. Granting the irrepressible nature of such movements, it then becomes the part of wisdom to endeavor so to influence and direct them as to neutralize that which is pernicious, while aiding the development of what is harmless and possibly beneficial in them; so that the nation and humanity may suffer no permanent injury by their passing. That no legislation, no show of force or authority can provide what is needful for this purpose is a proposition which, I assume, will be self-evident to every student of history. An express train once under way and gathering speed, cannot be stopped, without a crash, by an external impediment thrown across its path. It must be controlled by forces applied through its own mechanism. And so, the mighty movements of our race must depend for their peaceful regulation and for their harmless evolution upon influences exerted within them, under the pressure of that subtle but overmastering agency we call public opinion.

There can be no doubt that among the manifest effects of the associative tendency of our times the one most calculated to give rise to apprehensions of lasting detriment is the obliteration of individual initiative, responsibility and conscience. In the corporation, the individual stockholder is represented by the directorate and executive officers. As a stockholder he profits by their acts and is bound by them whether as an individual he would approve them or not. All this results of necessity from the legal view of his relation to the corporate entity. But more than that: as a man, he is ordinarily not held at all accountable for the moral quality of the corporate acts he benefits by. In the larger combination, denominated a trust, the individual's remoteness, as well as his insignificance and unaccountability, is still more emphasized. In the union, the individual obligates himself to obey the decrees of his associates. His personal sense of right and wrong is allowed no voice in deciding whether in any special instance he will do so or not: and that self-imposed duty of obedience is urged in

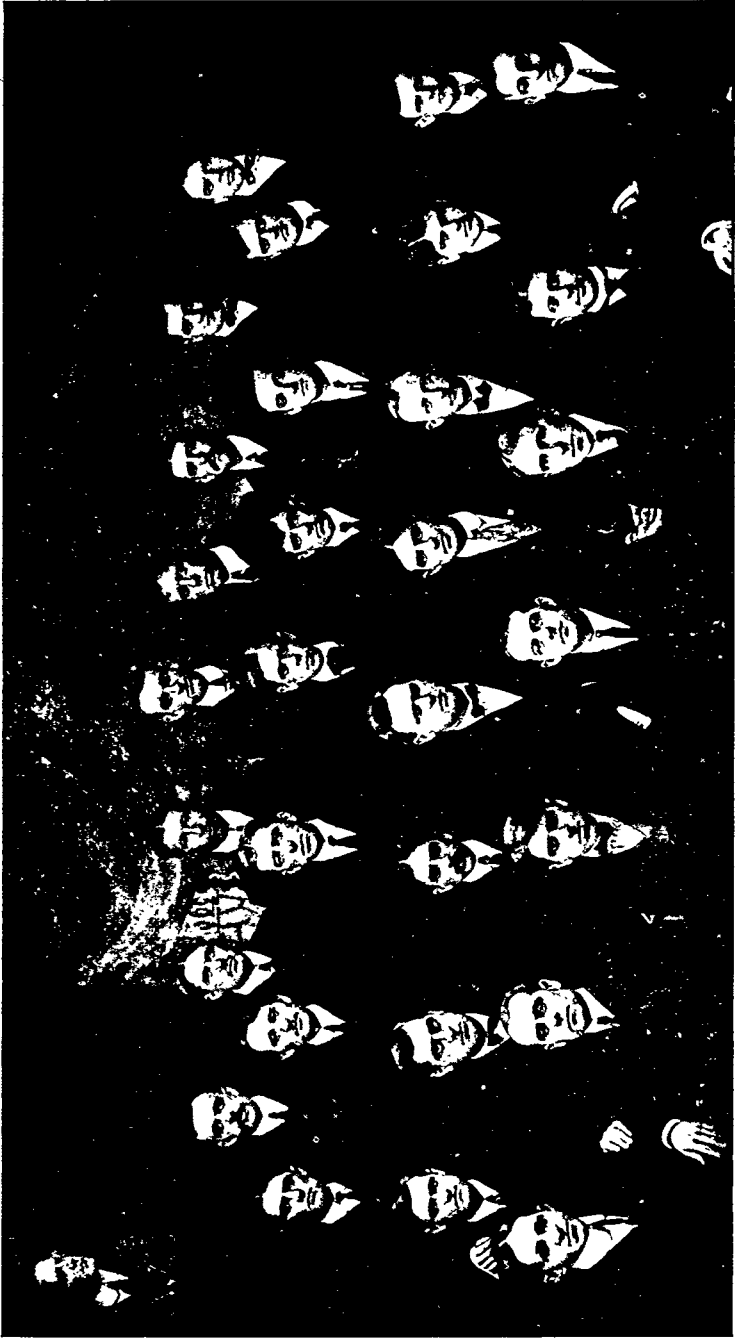
bar of his moral accountability for what he does in pursuance of it. And so in politics, and indeed throughout all the mass and complexity of the modern associative world,—everywhere the practical way of dealing with difficulties involving, not only questions of expediency, but questions of right and duty, is to make them the subject of collective decision, ordinarily at the hands of some delegated authority, a council, an executive board, a standing committee, a convention, or whatever it may be called; to demand of all a compliance with its pronouncement which amounts to the moral effacement of the individual and a virtual abolition of his personal freedom of action; and to predicate upon his self-renunciation absolute from all personal responsibility. That this is a convenient and for temporary purposes effective arrangement may readily be conceded. But let me tell you that there is none to be conceived more utterly at variance with the history and hereditary character of our race and the fundamental principle upon which our civilization and institutions are founded, or with the very essence of the religion we profess.

In the early dawn of social order, upon the highlands of central Asia and in its fertile valleys, men bound together by ties of blood were gathered in tribes, which were but great families, roaming from place to place in search of pasture for their herds under the leadership of an hereditary head, the patriarch. He was absolute ruler of the horde, owner of all the property there was, spokesman, representative and high priest. The nomadic age knew nothing of the individual as a social unit. The tribe, personified in the patriarch, was the unit. And so in all those countries whose polity is patterned after the patriarchal type, the source and fountain of social and political power is the head of the organism, and individual rights exist only in subordination to its despotic will. It is upon no such foundation that the structure of American institutions has been reared.

Neither have we borrowed aught from the spirit of the so-called republics of ancient Greece. The beautiful and expressive language of Athens contained no word equivalent in meaning to the word

liberty as we understand it. It had an euphonious polysyllable that denoted the condition of a citizen as distinguished from that of a slave, and implied the right of equal participation in government. But it had no term by which to describe the independence under the law of the individual as against the state and in relation to his fellows. Indeed, it had no single word synonymous with the noun "individual." The fact is that the Greeks had no conception of individual liberty. Their government, in the classic age, was a popular absolutism without any guarantees of individual rights. In their reasoning they began with the state as the source of everything and deduced every relation of the individual from that position. They never discussed his rights, because as against the state he had none. They assumed that a supreme power must reside somewhere. If it resided with the masses, there was no hesitation about conceding its completeness, its sufficiency arbitrarily to regulate every detail of public and private life, and its utter irresponsibility. Socrates, innocently condemned, declined to escape on the ground that, the state having ordered his death, though unjustly, he had no right as a citizen to withdraw himself from its decree. The loftiest speculations of Greek political philosophy logically led to nothing but a refined communism in which even the family relation was not to be altogether conserved. So utterly were the worth and dignity of the individual sacrificed in studying the welfare of the state,—to such absurd lengths was carried the supposed necessity of sinking all individuality in an indistinguishable mass of citizens, all upon a dead level of equality, that even the right to be virtuous or patriotic above one's fellows was denied. Themistocles was banished because of his supreme services to his people, Aristides because of his preeminent uprightness and devotion to the public interest, and Socrates drank death as a punishment for his purity and wisdom.

Nor will you seek with better success for a recognition of the individual in the Roman commonwealth. We have taken from her stately idiom the phrase *Res Publica*, wherewith to describe our state and our form of government. We have



SENIOR CLASS

derived from her institutions the descriptive names of many of our own. We have gone to her well-stored legal treasury for a variety of principles wherewith to broaden and strengthen and elevate our jurisprudence. Happily we have thus far remained strangers to her system of class interests and representation, to her paternalism, to her apotheosis of the state, and to her ingenious devices for the social and political degradation of the individual.

Greece and Rome have passed away, but the lesson of their history will never pass away. The riches of their art, their poetry, their philosophy, their military science, their statesmanship, their jurisprudence, are left for our instruction and admiration. Their examples of heroism and devotion to duty abide for our inspiration. But inseparably linked in painful contrast with these stands forth the record, swelling as the centuries rolled on, of brutality, civil oppression, public and private corruption and licentiousness, and in the end, of universal decay. Surely, this speaks to us a language we ought to be able to make out. It is not enough to say that Greece and Rome had not the enlightenment of Christianity. There were great thinkers in both who saw moral truths with the clearness of inspired vision, and lived lives as pure and formulated teachings as sublime, as those of devout Christians; and the Roman empire became Christianized before its final downfall. The truth is that "the beauty that was Greece and the glory that was Rome" could never have faded into the hideousness and shame of their decadence, had their social and political fabric contained within it that element of endurance and self-regeneration which resides in a people conscious of the dignity and responsibility of the individual.

Now consider, for a moment, the beginnings of our Teutonic civilization. In them we find neither the patriarchal form of government, nor an iron-bound state as it was viewed by Greek or Roman. We find associations of freemen, whose remote blood-relationship sat but loosely upon them, into tribes or clans, under elective leaders, for common defence and aggression. For the regulation of internal matters in the interest of peace and order and effective organization, each freeman neces-

sarily surrendered some, but as small a modicum as possible, of his individual rights and liberty. Beyond this, every head of a family was his own and his household's lord, a sovereign within his own domain, as free and independent as the birds of the air. His allegiance to the chosen chief of the tribe was in no way similar to the allegiance of the citizen of Rome or Athens. It was not a political allegiance to the state conceived in the abstract; for there was no such thing,—but a personal fealty, the loyalty of man to man. And as time went on and the rudimentary conditions or barbaric existence gave way to more complex ones,—as tribes and clans by stress of external pressure, were driven to confederate together under chieftains holding broader sway, the relation originally established between the minor chiefs and their retainers, was continued in all its characteristic features, between those chiefs and the supreme head, now called king and emperor. Transplanted in all its simplicity and vigor upon English soil, this distinctively Teutonic idea took root there, never again to be dislodged. In Germany, to be sure, much of it has been lost. Buffeted by invasions, exhausted by internal wars, indoctrinated by the principles of the civil law, cowed by princes of great energy and self-assertiveness, and influenced on the one side by the Latin nations still shadowed by the traditions of ancient Rome, and on the other by the Slavs adhering to an essentially patriarchal system, the people of the German states have accommodated themselves to a good deal of what we call police-government and have been deprived of a great share of their ancient heritage. But in England, notwithstanding the repeated attempts of the Stuarts to break down the consciousness of the people that they stood a nation of freemen, that the state was made for the well-being of the individual, not for his absorption, that all the primordial and natural rights capable of being exercised consistently with public order and national safety are his by birth, and that his are the power and duty to use them and the responsibility for the use he makes of them—in England there never has been a time when this fundamental principle has for any

considerable period been successfully obscured. And that is the principle that lies at the foundation of our American institutions.

"All men," runs the Declaration of Independence, "are created equal * * * endowed by their Creator with certain inalienable rights; * * * among these * * * life, liberty and pursuit of happiness." And expressing the same thought in more precise language, the Constitution of this Commonwealth, in its first article, declares that "All men are born equally free and independent, and have certain inherent and indefeasible rights"—among them the right of life and liberty, of property, of individual conscience, and the pursuit of happiness, each in his own way. Nowhere, throughout the organic law of our land, or of this state, is there any recognition of the power or right of any community or association of men to control the freedom or conscience of the individual, or except for purely public purposes his estate, or to assume to act for him in his relations towards his fellow citizens, or to administer his rights or obligations as an individual towards them or the state. Nowhere, throughout the organic law is there any recognition of aggregations of men, of collective interests, of artificial persons as sources or wielders of political or social power. Everywhere the individual, the freeman, is the acknowledged responsible political and moral unit. To him are extended the guarantees of the Declaration of Rights, to him the personal elective franchise, to him the powers of legislation through his representatives, to him the attributes and obligations of sovereignty in the exercise of his assured prerogatives. That a structure built upon such a foundation cannot remain unimpaired, that an organism thus devised cannot continue to function healthily, if its underlying conditions be radically altered, goes without saying. A state, a society, a government resting upon and contrived to ensure the personal liberty and responsibility of the individuals composing its citizenship, must inevitably lose its character, purpose and stay if that personal liberty be renounced and that personal responsibility repudiated by its citizens. The American citizen who surrenders his right of conscience into the

keeping of any aggregation of men, call it what you will, and who yields up to it his freedom of personal action, his right to enjoy his property and the inestimable privilege of pursuing his own happiness in his own way, or who seeks to impose such sacrifices upon others, lays the axe at the root of American institutions. The right of individual liberty, of self-determination, and the idea of individual responsibility are correlative conceptions. The one implies the duty of exercising and conceding to others the freedom of exercising the right so carefully reserved and safeguarded to all; and the other implies culpability in a failure to exercise it, and in obstructing its exercise, as well as in a wrongful exercise of it: and neither that duty nor that responsibility can be shifted to a third person or any association of persons.

Let me restate this cardinal truth, and surely no one will be found to dispute it: our civilization, our American institutions are founded upon the recognition of the individual as the unit of the state and of society, and upon the assumption that he is a free and responsible agent, at liberty and bound to act as such within the law, and that government is instituted to secure and protect him and all his fellows in the peaceful and equal and most ample possible enjoyment of all their rights as freemen. What an illogical and purposeless thing would be a system thus grounded and designed if in the place of individual and morally responsible units, natural men with consciences and votes, there should be substituted, directly or indirectly, associated interests, artificial persons, morally irresponsible aggregations, whether incorporated or unincorporated, not recognized by the fundamental law as endowed with any function in its administration! For such a state of things the Constitution of the United States and the Constitution of this State were never intended to provide. For such a condition they were most ill-adapted. They were made for freemen, who feel the dignity of their manhood, who value the liberties secured to them personally, who have the courage to live and act according to the dictates of their own consciences, who concede the same rights to all others, and who act in the realization of their

responsibility for the use and non-use of their privileges. They were never made for men who would sell their birth-right for a mess of pottage,—who would hand over their property to be managed and juggled with by others,—who would abdicate their consciences and yield blind obedience to the commands of virtual dictators by whatever names they may be known,—who would vote to order without question as to right or wrong,—and who would sneak out of their responsibilities as individual members of society and citizens in a free country by pleading the behests of their chosen associates or self-imposed masters.

Nor is the attitude of such any less repugnant to the mission of Christianity. If there is any one thing about our common religion more unmistakable than any other, it is that its injunctions and its inhibitions are addressed to each individual as an individual. The duties it enjoins are personal duties; the responsibilities it imposes are personal responsibilities; the comforts it brings, the promises it holds out, it offers to each as an individual, to each by himself. Its message is to you personally. No one can receive it for you, no one can answer it for you. By your own acts are you judged, and your own conscience, not that of any other, must in every instance be your justification or your condemnation.

Now, as I have indicated, the associative tendency of our age leads to the substitution of a sort of collective conscience in the place of the individual conscience,—the acceptance of principles prevalent in one's surroundings in the place of independent appeals to one's own judgment of right and wrong. In a measure that tendency is irresistible; but there are limits to one's right to yield to it, *quos ultra citroque nequit consistere rectum*. I have endeavored to show that, after all, individual liberty and conscience are at the very foundation of our institutions, and that they cannot be renounced without damage to the latter, or at least impairment of their usefulness. The young gentlemen who are about to go forth from this institution will presently be called upon to take an oath, in entering upon the office of attorney-at-law. They will be called upon to swear that they will sup-

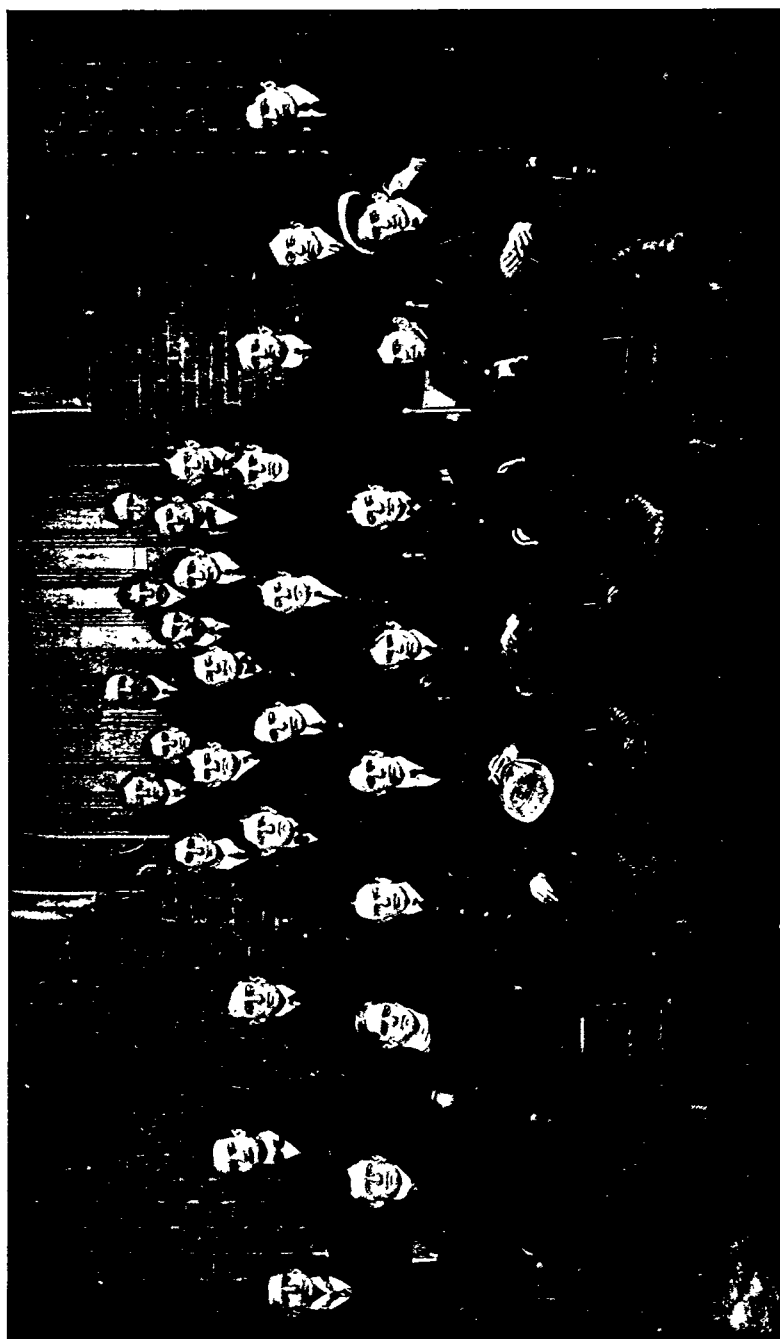
port the Constitution of the United States and the Constitution of the State to which they belong. Let them remember that the duty they will thus assume implies the maintenance in all surroundings of their independence as responsible and self-determining men, and the concession to all others of the like character and freedom of action, and forbids them to suffer either their own consciences and liberties to be supplanted or those of others to be subjugated by any set of associates, business, social or professional. Far be it from me to counsel any young man to devote himself to the ungrateful vocation of the chronic obstructionist or reformer, or to imitate in life that nuisance in the administration of the law, the over-wise twelfth juror who rails at the density of the remaining eleven because they will not concur with him. There is upon every doubtful question—and there are few that have not two sides—a presumption that the many who agree are right and that the few who disagree are wrong. And hence, in one's professional activity, in one's business relations, in one's social affairs, in one's religious connections, in politics, it is ordinarily fair to assume and to act upon the assumption that a difference of opinion, if tried with perfect impartiality and to the end, would be resolved in favor of the great majority. But in every man's life there arise occasions when he is put to the choice of doing or assenting to what is clearly wrong and thereby conforming to the wishes of those with whom his interests lie or whom he desires to oblige, or of declining to join in with them. In these trying situations the highest obligation of American manhood demands the assertion of the dignity of the individual and of his sovereign independence,—a peremptory refusal to abdicate one's judgment in favor of others,—and a sturdy insistence upon the inalienable right to follow the dictates of one's own conscience. There is clearly perceptible in our day a growing disposition to shirk this duty and to obscure the great principle out of which it arises. In politics we hear much of the need of so-called regularity, the requirement, under pain of ostracism, to subscribe unquestioningly to the doctrines propounded and to support unhesitatingly the candidates and meas-

ures proposed by the party organization. In the great and in the small business combinations of latter years, the dogma of solidarity of interests is not only preached to willing ears with alluring plausibility, but pushed to the extreme of justifying the crushing out of those who will not fall in line. In the world of labor, the determination of the right and nature of man's employment, of the compensation to be accepted in return, of the quality and extent of services to be rendered, of the choice of the persons to whom and of those in whose company they are to be rendered, and of the precise moment and cause and period of their cessation, is gradually being withdrawn from the individual and lodged in the hands of organizations. In these and other departments of modern life, the common effort is to absorb the individual in the mass, to obliterate individual discretion, individual endeavor, individual responsibility. And yet it may be safely assumed that all of those prominently engaged in this effort, as well as the vast majority of those following their leadership, are at heart patriotic American citizens. Led to see that the spirit they are fostering is essentially subversive of American institutions and akin to that which made shipwreck of the ancient commonwealths,—hardly one of them but would shudder at the thought. And who shall be bold enough, or pessimistic enough to doubt that a thorough realization of the same truth by the American people generally will avail to call into action such conservative and patriotic energies within the movement itself now going on, as will suffice to give it a direction and impose upon it a moderation which will safeguard the nation against permanent evil consequences and hasten its happy issue out of this period of transition?

Those to whom I am speaking, with an earnestness I wish it were in my power to make more impressive, are but a handful in the vast throng. Those to whom I am more especially addressing these concluding words are but a few young men, without influence and without experience. But they are going out in the service of a noble profession, which will bring them into close communion with all sorts and conditions of men, and with every department of life. Let no man weakly imagine

that because he is but one in a multitude his power is nothing. The great and beneficent achievements in the world's history have invariably been accomplished by individuals, and not by numbers. True, it is idle to measure the strength of the average man with that of the Anakim of our race. But to us and to many, cast in a humbler mould, it is spoken, for the strengthening of hearts, that as "not a sound has ever ceased to vibrate through space, not a ripple has ever been lost upon the ocean,—much more is it true that not a true thought, nor a pure resolve, nor a loving act, has ever gone forth in vain."

Let me then urge upon you, young gentlemen, that as you pursue your life-work in the world, hastelessly and tirelessly bending to it your utmost energies, deferring to the judgment of your surroundings in all matters in which your own reason and conscience do not clearly furnish an infallible guide, you nevertheless steadfastly keep before your eyes your dignity, your independence, your responsibility as individuals. Be not yourselves "dumb, driven cattle," neither permit others to be made such, but do what in you lies to impress all you can reach with a realizing sense of the importance of that principle so vital to our civilization and so tenderly guarded by our fundamental law, the principle of individual liberty and responsibility. It is not a mere bit of constitutional bric-a-brac. It is a living and a present and a sacred thing, which can never be lost without grievous detriment to humanity. Of that principle the American people by its Constitution has avowed itself the standard-bearer among the nations of the earth. See to it that your solemn promise to support the Constitution prove not a hollow form through heedlessness of that which lies at the very bottom of it.



JUNIOR CLASS

EXPLANATORY.

The chief object of the publication of the FORUM, is to embody in it a portion of the work of the Moot Court. A short account of the method pursued is here given.

Two students are selected as counsel on each side. A fifth student acts as judge. The case having been submitted by some member of the Faculty, the counsel investigate the law, prepare briefs and at an appointed time, make their oral arguments. The judge considers the case, and prepares an opinion. If counsel are dissatisfied with this opinion, they appeal to the Dean.

The decision is then reviewed, and is affirmed, modified or reversed.

The FORUM contains the cases stated, a condensation of the briefs of counsel, the opinion of the student judge, and, when there has been an appeal, the opinion of the appellate judge, a member of the Faculty.

Probably 120 appeals were heard during the school year just closed. Some of the cases have appeared in each of the monthly numbers (nine are issued annually). No other Law School offers so large a practice of the sort indicated; nor do the journals published by Law Schools generally embody its results. In this respect, the FORUM is, among Law School journals, unique. No other publishes the work done within the school. Experience shows that the fact that the briefs and opinions of the students are to be printed, deepens their interest in the writing and preparation of them, and leads to greater thoroughness and care.

The June number of the FORUM contains an account of the events attending the Commencement together with the Baccalaureate Address of the Hon. Gustav A. Endlich, which will be found on page 197.

We may add that the FORUM is published by the students of the School, through a committee of editors and business managers.

THE EDITORS.

MOOT COURT.

MUSSEY vs. MUSSEY.

Ejectment — Will — Interpretation — Die without legal issue — Definite failure of issue — Act of July 9, 1897.

STATEMENT OF THE CASE.

I, Henry B. Mussey, of the borough of Camp Hill, make this my last will and testament:

First— * * * *

Second— * * *

Third— * * *

Fourth— * * *

Fifth—I give and bequeath to my son, Henry S. Mussey, my homestead where I now live and the lot of ground fronting on Chestnut Street in said borough and all my personal property and my five acres of land in York County.

If my son, Henry Mussey, should die without legal issue then all I have bequeathed to him shall revert to my legal heirs.

The will was dated 11th Nov., 1897.

Testator's other children were Sarah and Amos. Henry has died having two children, both of whom are dead. His widow survives. This ejectment by Sarah and Amos against the widow.

CORE and EBBERT for the plaintiff.

Action is brought by the right parties. Legal heirs is equivalent to heirs-at-law. Bugby's Appeal, 61 Pa. 116. The intention was to express a definite failure of issue. Taylor v. Taylor, 63 Pa. 483; Eichelberger v. Barnitz, 9 Watts 447; Findley v. Riddle, 3 Binney 139; Shea's Est., 9 Phila. 354; Bently v. Kaufman, 3 W. N. C. 352; Middleworth v. Blackman, 74 Pa. 414; Mitchell v. R. R. Co., 165 Pa. 645; Pierce v. Hubbard, 152 Pa. 18; Miller's Est., 105 Pa. 561; Subert v. Butz, 9 Watts 490.

Henry S. Mussey took a defeasible fee. Montgomery v. Petriken, 29 Pa. 118; Dombough v. McNeal, 61 Pa. 73.

MOWRY and PHILIPS for the defendant.

The widow of a tenant in fee, which fee is determined by the death of the tenant without issue, is entitled to dower in the estate thus determined. Lovett v. Lovett, 10 Phila. 537; Evans v. Evans, 9 Pa. 190; Buchanan v. McCallister, 2 Yeates 373; Taylor v. Taylor, 67 Pa. 281.

Collateral heirs cannot maintain ejectment against a widow in possession of land of which her husband died seised. *Gourley v. Kinley*, 66 Pa. 270; *Seider v. Seider*, 5 Wharton 508.

OPINION OF THE COURT.

Henry B. Musser provided in the fifth clause of his will as follows: "I give and bequeath to my son Henry S. Musser, my homestead where I now live and the lot of ground fronting on Chestnut street in said borough and all my personal property and my five acres of land in York county."

This clause we think is sufficient, under the act of April 8, 1833; P. & L. 1446, which makes it unnecessary to use words of limitation, to give Henry S. Musser a fee simple.

But the testator further provided that, "If my son, Henry S. Musser, should die without legal issue then all I have bequeathed to him shall revert to my legal heirs."

The question now arises what effect does this last clause have on the former? The testator has used the words "die without legal issue," which we think has exactly the same meaning as "die without issue," which has been construed to mean an indefinite failure of issue, unless there is something in the will which indicates an intention of the testator that the words, "die without issue," shall not mean "issue indefinitely," but children when this construction does not apply. But in the case at bar, there is nothing in the will which shows such an intention. Therefore, we conclude that according to the common law, the testator must have intended to create an estate tail in his son, Henry. *Eichelberger v. Barnitz*, 9 Watts 447; *Hill v. Hill*, 74 Pa. 173; *Taylor v. Taylor*, 63 Pa. 481. It was unnecessary for testator to say it should revert to his legal heirs, because it would have gone to them without him so designating. Henry S. Musser thus got an estate tail under the will, which by the act of April 27, 1855, Sec. 1, P. & L. 1882, was enlarged into a fee simple.

Henry S. Musser died leaving a widow and two children. We presume the children died since Henry, because the facts state that he died *having* children. The widow is therefore entitled to the possession of the land, as to three-thirds for life as being the mother of the children who died without issue. She is also entitled to

a life estate in one-third of it as widow of her husband, but this is merged into the life estate in the whole. *Robert's Appeal*, 39 Pa. 417; act of May 25, 1887, Sec. 2, P. L. 161.

Judgment for defendant.

GROSS, J.

OPINION OF THE SUPREME COURT.

The devise to Henry would have given a fee, but for the clause "If my son, Henry, should die without legal issue, then all I have bequeathed to him shall revert to my legal heirs." The words "without legal issue" must be understood to mean, "without legal issue surviving him." To have had issue that died before Henry, would not prevent the taking effect of the ulterior limitation.

Henry has had two children, but they have died before him. He is survived by his widow alone.

The phrase of limitation "without legal issue" must be understood, since the passage of the act of July 9, 1897, P. L. 213, to point to a definite failure of issue, and to create a conditional limitation. It follows that the event has happened upon which the land is, according to the terms of the will, to "revert to my legal heirs."

Ordinarily a widow has a dower in a fee of her husband subject to a conditional limitation, notwithstanding that that fee has determined at his death. *Evans v. Evans*, 9 Pa. 190. In *M'Masters v. Negley*, 152 Pa. 303, a distinction is drawn between a devise over, on failure of issue, and a direction that the land shall "revert," and as a part of the residuary estate be divided among those who would take under the intestate law; a distinction which is said to be exceedingly refined.

Be it noticed that the direction there was that on the death of a child, childless, under the age of twenty-five years, the share of such child should become part of the residuary estate, and be, as such, divided as under the intestate law. The limitation was practically a condition subsequent with reverter to heirs. It was held that on the death of a daughter, under twenty-five years and without surviving children, her husband would *not* have courtesy. Had the devisee been a son, a similar limitation could have precluded dower in his wife.

The direction in the Musser will is that,

on death without legal issue, the land shall "revert to my legal heirs." We must conclude that the widow of Henry took no dower. The provision is substantially a condition subsequent with reverter on breach of it.

It follows that the plaintiff should have been permitted to recover the whole land.

It is but fair to the learned judge who wrote the opinion in the court below to say, that, if the fact were, as he assumed, that Henry, the testator's son, left two children to survive him, the limitation over, or the direction for "reverting" could not take effect. The failure of issue contemplated, viz: that if Henry *at his death*, not occurring, an unconditional fee vested in his children, subject to a dower in his widow. On the subsequent death of these children, their mother, the widow, took the land for her life, and Sarah and Amos, the brother and sister of Henry, took the fee in reversion. It would follow that, during the widow's life, she, and not they, would be entitled to the possession.

Judgment reversed with *v. f. d. n.*

JONES vs. BOROUGH OF SILVER BROOK.

Liability of municipal corporations—Implied contract.

STATEMENT OF THE CASE.

During a small pox siege, about nine families were segregated besides the several cases then existing. The usual guard of ropes and watchmen were placed by order of The Board of Health. The different families were supplied by various grocers who were permitted to come up to the ropes and take orders personally or through the guards.

The delivery of the goods was made in the same way. At no time did the Board of Health order the goods bought on their credit or say that if they were not paid they would do that.

All are able to pay their bills. Jones, one of the grocers, now brings an action of assumpsit against the borough for the goods that he furnished several of the families. He has never made any effort to collect the same from the individuals.

Is the borough liable? Can Jones recover?

WRIGHT and CORE for plaintiff.

It is the duty of a municipality to furnish necessities to its inhabitants who are quarantined during a small pox siege. Zellner v. Allentown, 5 Disct. Rep. 547; 84 Pa. 487.

HAMBLIN and VASTINE for defendants.

In this case the municipality did not create the debt, and the liability to pay it is not upon it. Darbymple v. Wilkesbarre, 2 Kulp 39. Municipality is liable only when patients are unable to pay. Gill v. Appamoose County, 68 Iowa 20; 1 Phila. 20. The essentials of contract are absent and therefore municipality cannot be held. Zellner v. Allentown, 18 Pa. C. C. 162.

OPINION OF THE COURT.

On the trial of this case we were not assisted materially by the citation of cases, by reason of the fact that in Pennsylvania there have been but few cases adjudicated relative to the question involved. Nevertheless the court apprehends no doubt as to what the decision should be.

Briefly the facts are as follows: During a small pox siege about nine families were segregated besides the several cases then existing. The Board of Health directed the usual guard of ropes and watchmen. Supplies were furnished the families by grocers being permitted to come up to the ropes and take the orders either personally or through the guards. It appears that the Board of Health did not direct the goods to be bought on their credit nor did they intimate that they would pay, if the same were not paid for by the individuals. It further appears that all the families were able to pay their bills. On these facts the plaintiff seeks to recover the amount of his bill from the borough, without first attempting to collect from the individuals. It requires only a cursory reading of the facts to establish that if the plaintiff can recover it must be on a contract, either express or implied. We are unable to discover any of the elements of a contract in the case at bar. We see no ground for assumpsit. The borough assumed nothing. No contractual relation existed between the borough and the plaintiff. We are of the opinion that if the borough were obligated to support these families they had the right to designate the grocers who should furnish the supplies, and they did not so designate the plaintiff.

The plaintiff relies chiefly on the case of Zellner v. Allentown, reported in 5 D. R.

547. The facts in that case and the present one are somewhat analogous. The court allowed a recovery in the former. Notice, however, that that case differs from the one at bar in two material features. 1. The individuals were unable to pay their bills. 2. An agent of the municipality contracted with the plaintiff to furnish the supplies.

Whether or not a borough would be liable for supplies furnished, when it appeared that the individuals were unable to pay for the same, need not be considered by this court as that question is not involved in the present suit. Personally I would incline to the opinion that even under such conditions, the borough could not be held unless they designated the grocers who were to furnish the supplies. The law of Iowa is *contra*.

We have already considered the second point of difference in the two cases, viz.: that of contract. We are, therefore, of the opinion that the facts in this case are not sufficient to establish assumpsit against the borough. The action should have been brought against the individuals.

KRESS, J.

OPINION OF THE SUPERIOR COURT.

Had the Board of Health, in the exercise of lawful authority, so completely segregated the families afflicted with small pox, as to prevent access to them by purveyors of food and other necessities, it would have probably been its duty to furnish food to them, and had it, in the exercise of this duty, obtained food from Johns, it or the borough would probably have been liable to pay him. The Board of Health did not do these things. The isolation of the afflicted families was not so complete that they had no access to grocers. It is ascertained that the grocers came up to the ropes, and took orders from the occupants of the houses, directly or indirectly through the guards. The grocers, therefore, sold to the householders, as they would have done, had there been no obstruction to intercourse by the latter with the world. Why then should these householders not pay for what they bought? And why should the grocers be paid by others than the persons to whom they sold?

It does not appear that anything sold, would not have been needed and bought,

but for the quarantine. We can imagine no valid reason for the substitution as debtor, of the borough, which did not buy, nor make buying necessary, for the householders who did buy, and who must have bought, had their commerce with society been not at all restrained.

Perhaps the restriction upon their intercourse, lessened or suspended the earning power of the householder, and consequently, his ability to pay the grocer. It does not appear, however, that he was earning any thing before the establishment of the quarantine, or whether, if he was, he earned less after it, and in consequence of it. But, had these facts appeared, it could not be inferred from them that the Board of Health or the borough was liable for the price of the things sold, unless it also appeared that the consequence of them was that no grocer would sell anything to the householder upon his sole credit.

It is not necessary to consider whether persons who have suffered loss from a quarantine, may obtain redress from the authority which established it. Many unremunerated sacrifices have to be made for the state. When misfortune sends a contagious disease on a man, he does not have to be paid for refraining, whether voluntarily or under compulsion, from communicating it to his fellow-man. He must bear the consequent isolation, as he bears the disease. But, even if the secluded householder had a right to indemnity from the borough the measure of this indemnity would not be the price of the food he ate during the solitude, nor is there any kind of subrogation under which the grocer could take the place of the secluded, in a suit against the Board of Health or the borough.

We are aware of no authority that would sustain such a right, and it would needs be exceptionally eminent to convince us of the existence of such a right. The facts of *Zellner v. Allentown*, 5 D. R. 547, are different *toto coelo* from those of the case before us.

Judgment affirmed.

WM. PENN BANK vs. JOHN
ORMROD.

*Alteration of a non-negotiable instrument
—Endorser not liable thereon—Liability
of such endorser.*

STATEMENT OF THE CASE.

A note made by Henry Drummond and payable to Ormrod, read thus: "Six months from date I will pay John Ormrod five hundred dollars. Value received. This note to be renewed for three months." When the note was presented to the bank for discount, the words "more at six per cent discount" were scored. Ormrod had sold the note after endorsing it to Samuel Tombs, who had caused it to be discounted. Ormrod proved that the last sentence on the note, "This note to be renewed for three months," was not on it when he sold it to Tombs. The bank proves it was on when it bought the note.

LOURIMER and RENO for the plaintiff.

Assignor impliedly warrants that note is valid, and is therefore liable to his assignee. *Sarah v. Wess*, 1 W. & S. 153; *Flynn v. Allen*, 57 Pa. 482. Bank is bound to know signature of drawer. 7 L. R. A. 537.

MORGAN and COOK for the defendant.

A material alteration without consent of the maker or endorser avoids the note as to them. *Hanby v. Carboz*, 150 Pa. 23; *Neff v. Horner*, 63 Pa. 327; *Craighead v. McLane*, 35 Pa. 80. Note in suit is non-negotiable. Act of 1901, P. L. 194.

OPINION OF THE COURT.

We are called upon to decide whether or not this note in controversy is a negotiable instrument. If it is negotiable, it is impossible for the plaintiff to recover against this defendant because of the change in the note after it had been negotiated. With regard to the effect of a material alteration of negotiable instruments, it is said that the same general rule is applicable as governs in the case of the unauthorized material alteration of deeds and other written contracts. From the constant and essential uses to which negotiable instruments are put, it is obvious that even more dangerous consequences would flow from a leniency towards alterations in them than in deeds. This attitude is assumed not only by the United States Supreme Court, but by the Supreme Courts of nearly every State in the Union.

A material alteration in any negotiable instrument by the promisee or holder, without the promisor's knowledge, extinguishes all liability upon the instrument as against the non-consenting promisor. *Wood v. Steel*, 6 Wal. U. S. 80; *Neff v. Horner*, 63 Pa. 327; *Marshall v. Gougler* 10 S. & R. 164; *Wheelock v. Freeman*, 13 Pick. Mass. 165.

On the trial of this cause in the lower court, it was proved by Ormrod that the last sentence of the note—"This note to be renewed for three months"—was not on it when he sold it to Samuel Tombs. Now, the William Penn Bank proves that it was on the note when it bought it from Tombs. Here we have oath against oath, and to support the testimony of the bank we have the written instrument. Therefore, the presumption is that the sentence—"This note to be renewed for three months"—was on it at the time the bank purchased it. Hence, the bank was an innocent purchaser for value, but this does not make Ormrod any the more liable. He proves that when he sold the note to Samuel Tombs it was not on it, and now Tombs remains silent, and there is not a particle of evidence as to whether or not Tombs himself put the added words. Have we a right to say that Ormrod put these words there, or that it was a part of the consideration upon which Tombs purchased the note from Ormrod, or that he authorized Tombs to put it there? We think we have not. The rule that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business is unaffected by any latent infirmities of the securities have no application in this class of cases. The defendant could no more have prevented the alteration than he could have prevented a complete fabrication, and he has as little reason to anticipate one as the other. The law regards the securities of a note after it is altered as an entire forgery with respect to the parties who have not consented and so far as they are concerned deals with it accordingly. But, we must not drift too far from the most vital point in this case. It is argued by the learned counsel for the plaintiff, that this is not a negotiable in-

strument within the meaning and intent of the Act of May 16, 1901, P. L. 194. This act declares that an instrument shall not be negotiable unless made payable to order or to bearer. This note read: "Six months from date I will pay John Ormrod \$500." The wording of the obligation specifically specifies whom he is to pay the money to. It uses neither of the words of the statute, "to order" or "to bearer," or words that could be construed to mean the same. We have not been able to find a single case under the Negotiable Instrument Act of 1901 questioning its constitutionality. We are, therefore, of the opinion that this note was not negotiable and must, therefore, stand good as against the first maker.

Judgment for the plaintiff.

WILCOX, J.

OPINION OF THE SUPERIOR COURT.

The note was a promise to pay John Ormrod \$500; not John Ormrod, or order, or bearer. There was no promise for the substitution of a new payee. The Act relating to Negotiable Instruments, of May 16, 1901, P. L. 194, declares "that an instrument, to be negotiable, must conform to the following requirements, 1st * * *, 2d * * *, 3d * * *, 4th, Must be payable or order or to bearer." Such was the law prior to its enactment. Hence, the note in suit was not negotiable. The direction in section 124 of the act, *supra*, P. L., 1901, 211, that "where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except," etc., is, therefore, irrelevant.

The suit is against Ormrod, and the only ground on which a recovery against him is sought, is that he endorsed the note. He did endorse the note to Tombs, and Tombs later endorsed it to the plaintiff bank. But, it is quite well settled that a mere endorsement by a payee or other party of a non-negotiable note imposes no liability upon him. *Shaffstall v. McDaniel*, 152 Pa. 598; *Woods v. North*, 84 Pa. 407; 14 P. & L. Dig. 23472. Ormrod is, therefore, without liability, whether the alleged alteration was or was not made after he had endorsed.

It is proved that the words "This note to be renewed for three months," etc., were not on the note when Ormrod endorsed it to Tombs and that they were on it when

Tombs endorsed it to the William Penn Bank. These words materially alter the note, and discharge prior parties to it who did not assent in the insertion of them, unless there was negligence in the formation of the note, which made possible the alteration of it in such way as not to awaken the suspicion of a reasonably observant subsequent purchaser of it. There are no facts developed that disclose any such negligence. Because of the alteration, therefore, Ormrod would be discharged, even were he otherwise liable. 3 Randolph, Com. Paper, 856, (1st Ed.).

We are not able to understand some of the reasoning of the learned court below, but what of it we do understand, would seem to conduct to a judgment, not for the plaintiff, but for the defendant. Ours has conducted us to a decision in favor of the defendant.

Judgment reversed.

WM. FLOOD vs. CHAS. GOSSART.

Conditional sale—Recovery in replevin for condition broken—Assumpsit on the contract barred by recovery in replevin.

STATEMENT OF THE CASE.

Flood sold to Gossart a horse, stipulating for payment after delivery of possession, and that the horse should remain Flood's until paid for. The price was \$250.

Gossart obtained the horse but never paid the price though six months had elapsed; whereupon, Flood recovered the possession by an action of replevin. He now sues in assumpsit for the purchase money, after having offered to deliver the horse on payment.

YOCUM and CHAPMAN for the plaintiff.

The property did not pass by delivery in view of the condition. *Buy. on Sales*, 6th Am. Ed. 359; *Haak v. Linderman*, 64 Pa. 499; *Stadtfield v. Huntsman*, 92 Pa. 53; *Martin v. Mathiat*, 14 S. & R. 214. The conditional sale was binding between the parties. *Fasdieck v. Scholl*, 99 U. S. 235, 250; *Swallow v. Emery*, 111 Mass. 355. A former judgment operates as an estoppel, only when for the same cause of action. *Carmery v. Brooke*, 73 Pa. 80; *Schrivver v. Eckenrod*, 87 Pa. 213; *Cist v. Zeigler*, 16 S. & R. 284; *Tams v. Lewis*, 42 Pa. 410.

HUBLER and FLEITZ for the defendant.

For negligence to accept and pay for goods, the seller may recover damages—

the difference between contract and market price. *Tiffany on Sales*, 231; *Vale on Pa. Law*, 106; *M'Combs v. M'Kennan*, 2 W. & S. 216; *Gaspeel v. Morris*, 7 W. & S. 32; *Girard v. Taggart*, 5 S. & R. 18; *Andrews v. Hoover*, 8 W. 239; *White v. Reynolds*, 3 P. & W. 96.

OPINION OF THE COURT.

This case presents a difficult question for solution. Does an act of replevin for a horse sold on condition, bar an action of assumpsit for the purchase price of the same, after it has been replevied for condition broken?

The stipulation was for payment in three months after the delivery of possession, and that the horse should remain the plaintiff's until paid for.

This was a conditional sale, and as between Flood and Gossart it was valid and binding on both, and title does not pass until the payment of the purchase money. *Haak v. Linderman*, 64 Pa. 501. In default of payment the plaintiff may reclaim the horse and use civil remedies for the recovery, as it was a breach of the condition and the right of possession reverts in the seller, and he may either replevy the horse or sue to recover the value. *Sampson v. Hicks*, 134 Pa. 566; *Henderson v. Laucks*, 21 Pa. 359; *Hill v. Freeman*, 3 Cush. 257.

The plaintiff elected to sue in replevin in the former action, and while it does not appear that judgment was obtained in favor of the plaintiff in the replevin suit, we will assume that it was; that being the case the plaintiff was entitled to damages for the detention of the horse. *Warner v. Augenbaugh*, 15 S. & R. 9.

The plaintiff having elected to replevy the horse the remedy was complete in itself, and if we should allow assumpsit to lie, it would be cumulative. The plaintiff cannot adopt both remedies unless it was plainly stipulated in the contract, or a necessary implication arose from its terms. *Seanor v. McLaughlin*, 165 Pa. 150. Nor does it make any difference that the plaintiff offered to return the horse to Gossart, as the contract was at an end when he recovered the horse in the replevin action. *Scott v. Hoyh*, 151 Pa. 630.

This being the case it was *res judicata*. The rule is "*Nemo debet bis vexari pro eadem causa*." The judgment being final for its own purpose and object concludes the subject matter and is a bar to

further litigation, for the evidence to support both actions is the same, that being so, the cause of action is the same notwithstanding the actions are grounded on different writs. *Marsh v. Pier*, 4 Rawl 284. The judgment following the action of replevin would be conclusive evidence in every other species of action; the verdict would be a bar to the action of assumpsit—call it estoppel or conclusive evidence, the effect would be the same. *Ziegler v. Ziegler*, 2 S. & R. 286; *Garvan v. Dawson*, 13 S. & R. 248; *Estep v. Hutchison*, 14 S. & R. 487; *Cist v. Ziegler*, 16 S. & R. 286; *Long v. Long*, 5 Watts 102.

For the above reasons judgment is entered for the defendant.

CORE, J.

OPINION OF THE SUPREME COURT.

The horse was to be delivered to Gossart prior to payment. It was in fact so delivered. But in three months thereafter, Gossart was to pay the price, \$250. Until payment, the horse was to remain Flood's. Gossart has never paid the price. Three months after it became payable Flood recovered the possession by replevin. He now sues in assumpsit for the price.

As the price was not paid when it should have been, Flood had a right to rescind the contract. His ownership had not ceased, and possession is one of its incidents, unless the right thereto has by some agreement become separated for a time, from it. The contract separated from it this right for the period of three months, but no longer. At the expiration of that term, Flood, the owner, could lawfully resume the possession. He might have taken possession himself, without the aid of the court. He chose to obtain that aid, through the action of replevin.

Now, the taking of possession is by no means decisive of the intention to rescind the contract. It might be due to the opinion that, although, the contract would continue, and Gossart would be entitled to regain possession upon payment of the price with interest, he had lost the right to the possession until such payment. The courts, however, have chosen to interpret it as an expression of the intention to rescind. *Andrews v. Campney*, 4 Forum, 124; and cases there cited.

It follows, if Flood's resumption of possession is to be understood as a putting of

an end to the contract, that he can no longer enforce that contract. His action for the \$250 is an endeavor to enforce it. The learned court below has properly decided that he cannot succeed.

Judgment affirmed.

CARLISLE TELEPHONE CO. vs.
EVANS.

Corporations—Action against innocent transferrer of forged transfer—Transferee, though innocent holder, liable.

STATEMENT OF THE CASE.

The defendant, an innocent purchaser of a forged transfer of stock, presented it to the plaintiff corporation, which registered him as a shareholder. The defendant subsequently transferred the stock to an innocent purchaser for value, to whom the plaintiff issued certificates of registration. Neither the plaintiff nor the defendant were negligent. The plaintiff was obliged to reinstate the original holder of the stock, upon the discovery of the fraud, and now sues the defendant for an indemnity.

HUBLER and CHAPMAN for the plaintiff.

The corporation is liable to the true owner who is deprived of ownership on the books of the company by forged transfers. *Pratt v. M'fg Co.*, 123 Mass. 110; *Bank v. Field*, 126 Mass. 345; *Pollock v. Bank*, 7 N. Y. 274. But the transferee on a forged endorsement cannot hold the corporation liable because a transfer on the books has been made on his application. *Bram v. Ins. Co.*, 42 Md. 384; *Hambleton v. Ry. Co.*, 44 Md. 531.

The corporation has a right of action against the person inducing a transfer on the books by means of a forged endorsement. *Tel. Co. v. Davenport*, 97 U. S. 369.

GILLESPIE and MOOREHOUSE for the defendant.

When the certificate was presented for transfer, the corporation was bound to determine its genuineness. *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652; *Western U. Tel. Co. v. Davenport*, 97 U. S. 369.

The corporation is liable to the true owner who is deprived of ownership on the books by forged transfers. *Davis v. Bank of Eng.*, 2 Bing. 393; *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 231; *Pratt v. Stanton Copper M'fg Co.*, 123 Mass. 110.

Where one of two innocent parties must suffer from the fraud of a third, the loss must be borne by the one whose negligence enabled the third party to commit the fraud. *Allen v. S. Boston R. Co.*, 5 L. R. A. 717.

OPINION OF THE COURT.

The defendant, Evans, purchased a forged transfer of stock in the plaintiff company. He presented the transfer to the corporation, which registered him as a shareholder. By this registration the corporation held Evans out to the world as a shareholder. Later, Evans transferred the stock to a third party to whom the corporation issued a new certificate. All the parties except the forger were equally innocent and acted without negligence. At a time after the issuance of the new certificate, the forgery was discovered, and the corporation was compelled to reinstate the owner of the certificate on which the transfer was forged. The corporation brings this action to recover an indemnity from Evans. The case involves one question, and that is, can the corporation fix a liability upon Evans for the presentation of a forged transfer on which it relied, or, in other words, is there an implied warranty of title, in such a transaction? The full and complete discussion of the amount, if any, which the corporation can recover.

It is settled beyond the shadow of a doubt that the corporation was under a duty to compensate or reinstate the original owner, (*Penua. Ins. Co. v. Franklin Ins. Co.*, 181 Pa. 40), and it is also well settled, that the corporation would be confronted by the doctrine of estoppel if it attempted to recall the certificate it issued to the transferee of Evans. This brings us to the main question of the case.

A certificate of stock is a non-negotiable instrument in this and most of our sister states. A stock certificate is also a chose in action giving the right to dividends and a certain interest in the capital of the corporation. The certificate is evidence of ownership. Possession of the certificate is, to a vendee, as possession of the stock, just as possession of a bond is possession of the debt which it represents. It may now be regarded as well settled law, that a party selling, as his own, property of which he is in possession, warrants the title of the thing sold; and if by reason of defect in title nothing passes the vendee may recover his money though there be no warranty, or fraud on the part of the vendor. Chief Justice Sharswood states the law to be so in *People's Bank v. Kurtz*, 99 Pa. 349. Mr. Justice Sergeant, in

Chamley v. Dullis, 8 W. & S. 361, said: "This doctrine (referring to that stated, *supra*) is held to apply to choses in action as well as other descriptions of personal property, and, therefore, if one innocently sells or transfers for value a bank note, negotiable note, bond or other instrument, and it turns out that this instrument is forged, so that it is worthless in the hands of the transferee, the latter may recover back again the value given for it, on the implied warranty of genuineness." While the corporation is not a vendee, yet in many respects, it stands in a similar position. It made the transfer relying upon the title of Evans; and he, Evans, impliedly warranted the certificate to be his when he presented it to the corporation. The transfer agent has a right to rely upon this implied warranty; and if, as a result, the corporation suffers loss, the person who misled them is liable. The telephone company is therefore entitled to damages incurred in reinstating the original owner as a stockholder. These damages would be the value of the stock represented by the original certificate at the time the corporation was compelled to reinstate the original owner, together with the costs of the suit which compelled them to reinstate, and also any dividends which were declared between the time of the registering of the transfer to Evans and the reinstating of the original owner, and which were paid to Evans or any one claiming through the forged transfer. The true owner of the forged transfer could demand payment of any dividends declared on his stock, and, if the corporation had paid them to some one else, they, nevertheless, would be compelled to pay them to him, since he, the true owner, could not be deprived of his property without his consent. These are the only elements of the damages awarded in similar cases, reported in *Bank v. Kurtz*, 99 Pa. 344, and *Railroad v. Richardson*, 135 Mass. 473.

It is, therefore, ordered that judgment be entered for the plaintiff.

HAMBLIN, J.

OPINION OF THE SUPREME COURT.

Evans buying, as he supposed, shares of stock of the plaintiff company, by means of a certificate with a power to transfer, caused the company to register him as a

shareholder, and to issue to him a new certificate. The new certificate was subsequently sold by him to an innocent purchaser for value. The company was, therefore, bound to recognize this purchaser as a shareholder. 2 Thompson, Corporations, § 2573.

The original holder of the stock was not responsible for the forgery of his name to the transfer. It does not appear that any negligence of his contributed to the forgery, or to its succeeding in imposing upon the company. The company is, therefore, liable to him, for having assisted in transferring his shares to another. It must deliver to him an equal number of shares, and pay him as dividends what it has paid to other holders of the same number of shares, or, it must pay him the value of the shares, *plus* these dividends. *Telegraph Co. v. Davenport*, 97 U. S. 369; 2 Thompson, Corp., § 2567; *Pratt v. Taunton, Copper Co.*, 123 Mass. 119; *Penn'a Ins. Co. v. Franklin Ins. Co.*, 181 Pa. 40.

When Evans offered the certificate with the authority to transfer, he tacitly affirmed the genuineness of the signature to the latter. The corporation is not like a banker with respect to its depositors, bound to know the signatures of its stockholders, as against one procuring its recognition of a forged transfer. It is not estopped by such recognition, since Evans did not purchase the shares in reliance thereon. *Hambleton v. Central Ohio R. R.*, 44 Md. 551; *Brown v. Howard Ins. Co.*, 42 Md. 384.

In the absence of any evidence that by any failure earlier to detect the forgery or to give notice of it to Evans, he would suffer a loss which otherwise he might have made good, by being compelled to reimburse the company, he should be compelled to make this reimbursement. *Boston & Albany R. R. Co. v. Richardson*, 135 Mass. 473; 2 Thompson, Corp. § 2582. Judgment affirmed.

THEOBALD'S ESTATE.

Exceptions to final account of executor—Evidence—Interest adverse to deceased—Calling witness as on cross-examination under Act of 1887.

STATEMENT OF THE CASE.

In the attempted surcharge of the administrator with a watch, alleged to be a gift *inter vivos* to Mrs. Stilwell, on excep-

tions to the final account of the executor, can she, the alleged donee, be called as on cross-examination after a receipt proven to have been signed by her is produced by the executor?

In the same case, in the attempted surcharge of excessive counsel fees not rendered for the benefit of the estate, if the attorney has been paid, can he be called as on cross-examination?

DELANEY and WALSH for the exceptants.

The mere fact of a witness having been a party to a transaction with the deceased is no ground for his exclusion unless he is himself interested. *Sheetz v. Haubest's, exr's.*, 81 Pa. 100; *Thompson's Appeal*, 57 Pa. 175; *Ferres v. Thompson*, 52 Pa. 353.

The adverse party may testify, if the title under which the executor prosecutes or defends, was acquired subsequently to the death of his testator. *Chase v. Irvin's Exrs.*, 87 Pa. 286.

Interested parties may testify in favor of the estate. *Porter v. Nelson*, 22 W. N. C. 387; *Third Nat'l Bank v. Hunsicker*, 8 Pa. C. C. 635; *Miller v. Miller*, 150 Pa. 535.

A party having an interest adverse to the deceased is competent to testify against his own interest. *Weiser's Estate*, 5 York 5.

Longbottom and Drumheller for the executor.

Cited Section 7, Act of 1887, and *Dickson v. McGraw Bros.*, 151 Pa. 98.

OPINION OF THE COURT.

It is arrant nonsense for counsel to ask us to give an opinion upon a state of facts, which is as incomplete as this. We have decided the case by uniting into the facts the inference of other facts which we have drawn therefrom. If we did not do so, the facts in respect to drawing a legal decision therefrom would be incomprehensible.

The Act of May 23, 1887, Sec. 7, provides: "In any civil proceedings whether or not it be brought or defended by a person representing the interest of a deceased or lunatic assignor of anything or contract in action, a party to the record or a person for whose immediate benefit such proceeding is prosecuted, or any other person whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination."

Is the donee's interest "adverse to the party calling him as a witness"? If not, the donee cannot be called to testify as on cross-examination.

The gift was made in the lifetime of the deceased, fully executed and a receipt was given by the donee to the deceased in his lifetime. Even if the case should go against the executor he could have no action against the donee, the gift being fully executed. For the same reason neither could the heirs recover the gift from the donee. Therefore, if no right or privilege of the donee is affected by this suit, he is not a party interested. The case of *Dixon v. McGraw*, 151 Penn. 98, is in point. Mrs. Dickson's land was sold in execution to McGraw, and subsequently on another execution to Mary Dickson. In an ejectment by Mary Dickson against the grantee of McGraw, now dead, Mrs. Dickson and her husband could prove that the first sale was upon a fraudulent judgment and for that reason void. The court said: "The witness not only had no 'adverse interest' but had no interest whatever in the event of suit, and were, therefore, competent witnesses." It follows then that the donee has no interest adverse to the party who intends to call him to testify as on cross-examination. Therefore, in this case he cannot be called as on cross-examination and compelled to testify.

Unless by order of court an executor has no right to pay counsel fees, which were not rendered for the benefit of the estate. If the professional services are rendered for a person interested in the estate and not for the benefit of the estate, the executor will not be allowed credit for such fees. *Reeser's Estate*, 100 Penn. 79. There is no evidence of collusion between the executor and the attorney. Regardless of a refunding bond, if any was given by the attorney, the executor could recover from the attorney the money which was not legally due him from the estate, and which had been paid by the executor through a mistake of fact. However, in case the executor is not surcharged for such payment, he could not recover from the attorney. Hence, it is clear that the attorney is interested in the case to the extent of not having the executor surcharged. His interest is adverse to the exceptants. As the exceptants have called him, it follows that he is a "person whose interest is adverse to the party calling him as a witness." The result is that in

accordance with the provisions of the Act of May 23, 1887, the exceptants may call and compel him "to testify as if under cross-examination."

COOPER, J.

OPINION OF THE SUPREME COURT.

Of the exceptions to the account of the administrator of this estate, one charges that excessive fees have been paid by him to counsel. These fees have been paid. Nothing appears from which it may be legitimately inferred that they, or any part of them, could be recovered back. The exceptant called him, but wished, treating him as a hostile witness, to be free from responsibility for his testimony, and to be allowed to examine him by leading questions.

The testimony was, so far as appears, concerning events that have occurred since the death of Theobald. The attorney is, therefore, entirely competent to testify for the exceptant or the accountant. Indeed, were he a claimant in person, he would be competent to support his demand by his own testimony. Section 6, of the Act of May 23d, 1887, enacts that "Any person who is incompetent under clause (e) of section five by reason of interest, may nevertheless be called to testify against his interest," etc. But the attorney is not incompetent under clause (e).

Section 7, of the act of 1887, declares that in any civil proceeding, whether the estate of a deceased or lunatic person is or is not involved, any person "whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination." By this section, if the attorney is interested adversely to the exceptant, he can be called for cross-examination.

We cannot understand from the language of this section, that any kind of interest will subject to this mode of examination. The common law did not allow calling all persons who from friendship for one party, or hostility to another, from interest in a similar question, or otherwise, had or might be presumed to have a bias against the party proposing to call them, without responsibility and for cross-examination. We do not understand the 7th section to change the law in this respect. Nobody can be called by a party

for cross-examination, not having been first called by the opposite party—unless it is apparent that he is legally interested in the decision which his testimony will assist to frame. Will he share in the sum recovered? Will the defeat of the plaintiff save him, or as evidence tend to save him, from a liability to lose money or other property? If he has a desire for the success of party B, which is not grounded in the possibility of his own pecuniary or proprietary gain, or avoidance of loss by result of the controversy in which he testifies, such desire does not make him a person "whose interest is adverse." The attorney will gain no money that he has not already gained, nor lose money that he has, if the accountant prevails, and the exceptant fails. Hence, he is not to be called by the latter, as for cross-examination, unless and until he has been called and examined by the former.

It seems to have been thought, at the audit, that if the attorney had received compensation for services not rendered to the estate, but to the administrator, individually, or if he had received excessive compensation for services rendered to the estate, he could be compelled to pay back to the estate, in the former case, all that he had received, and, in the latter case, the excess beyond a fair compensation. But why so? The money he got was not, specifically, a portion of the estate. The administrator has paid him so much, and now asks to be reimbursed from the estate. Unless the attorney gave a refunding bond, or in some way agreed that if the administrator failed, at the audit, to charge the estate with the amount paid, he would repay, he is at no risk. His testimony tends to save him from no pecuniary loss.

The accountant has omitted to charge himself with a gold watch, once the property of the deceased. The excuse for so doing is, that prior to death, the deceased gave it *mortis causa* to Sarah Stilwell. The executor produces a receipt from Mrs. Stilwell, and it is tacitly admitted that she has in fact received the watch. If it clearly appeared that she could not, whatever the result of this controversy, be compelled to deliver the watch back, she could have no visible interest in it. Hence, she could not be called for cross-examination.

As the watch is conceded to have been the property of the decedent, if it continued such until his death, it is improperly withheld by Mrs. Stilwell. She can be compelled to deliver it, either by an action by the administrator, or by a decree of the Orphans' Court, which has jurisdiction over those who wrongfully have and retain possession of a dead man's assets. *Watt's Estate*, 158 Pa. 1; *Brook's Appeal*, 102 Pa. 150; *Odd Fellows' Savings Bank's Appeal*, 123 Pa. 356. Will she be protected from this liability by a decree in favor of the administrator in the proceeding before us?

The defense of the administrator is, not that he has been unable to recover the watch, although it is unjustly detained, but, solely, that it is the property of Mrs. Stilwell. The exception denies this, and the exceptants have undertaken to support the denial. We are inclined to think, that (though Mrs. Stilwell, if not called on to defend, would not be bound by the decree against the administrator, and, therefore, could not take advantage of a decree for him, as an estoppel against a subsequent proceeding against her) a decree in favor of the administrator would be *prima facie* evidence, or at least would be evidence, in her favor should she be subsequently proceeded against. *Cf. Hay's Appeal*, 152 Pa. 1384; *Phillips v. R. R. Co.*, 107 Pa. 465; *Sergeant's Heirs v. Ewing*, 36 Pa. 156; *Bunnell v. Smith*, 8 W. N. C. 352; *Kessler v. M'Conachy*, 1 Rawle, 435; *Holmes v. Frost*, 125 Pa. 328; *Cox v. Hartranft*, 154 Pa. 457.

It follows, we think, since Mrs. Stilwell could use the decree in favor of the administrator to defend her right to the watch, that she is to be treated as a party having to the exceptants, an adverse interest, and that she can be called for cross-examination.

Decree reversed with *procedendo*.

BREWER vs. BELFORD.

Promissory notes—Sunday law—Endorsers liability on a note delivered on Sunday when endorsed on Saturday.

STATEMENT OF THE CASE.

Belford sold, on Sunday, a horse to Adam Schofield, who, at the same time, delivered a promissory note at three months

for the price, viz.: \$150, which note was payable to Belford, and had been endorsed by him on the previous day. Three days before the note became due, Belford waived protest. The note was not paid. In this assumption, the defense is that the note was made on Sunday. Schofield continued to keep the horse until two weeks before this suit, when he sold it for \$175.

DIVELY and SHOMO for plaintiff.

The endorser of a negotiable note warrants its validity. *Norton on Bills and Notes*, p. 162; *Whitemore v. Montgomery*, 165 Pa. 253; *Chestnut v. Harbaugh*, 78 Pa. 473; *McSparren v. Neeley*, 91 Pa. 17; *Zimmerman v. Rote*, 75 Pa. 188; *Muron v. Reed*, 79 Pa. 380.

FLYNN and HILLYER for defendant.

Contracts entered into on Sunday are void, and the policy of the law is to leave the parties where it found them. *Kepler v. Keefer*, 6 Watts 231; *Fruman v. Ahl*, 55 Pa. 325; *Whlm v. Applegate*, 26 Pa. 140; *Sherman v. Roberts*, 1 Grant 261.

OPINION OF THE COURT.

This is an action by Brewer against Belford to recover on a note for purchase price of a horse, viz.: \$150, purchased from Belford by Schofield.

The defense, to payment of the note, which is in the hands of Brewer, a third party, is that the note was executed and delivered on Sunday, and while endorsed by Belford the day previous to the sale, being thus executed and delivered, is rendered void by our act of assembly, passed 22d of April, 1794.

This act among other things provides: "If any person shall do or perform any worldly employment or business whatsoever, on the Lord's day, commonly called the Sabbath, works of necessity and charity excepted, etc., and be convicted thereof, he shall pay four dollars," etc.

At common law the making of a contract or giving of such note, as we here have, was not prohibited and, therefore, would not have been void on that account. Contracts could be made on Sunday if they did not come within the statute which forbade "worldly labor, business or work of a man's ordinary calling." But our statute is more comprehensive and had a recovery on this note been attempted as between the original parties to the contract, we should have no hesitation in saying there could be no recovery.

But here a new phase presents itself.

The note has passed into hands of a third party, and endorsed by Belford the day previous to the sale of the horse. We can scarcely conceive of such an arrangement in conveyance of a negotiable paper but we thus interpret statement of facts.

We also presume that the transfer of note from Belford to Brewer took place some time subsequent to sale of the horse, and not on Sunday, and since the delivery, and not the signing of a note fixes date of its delivery, we believe that the endorsement of note by Belford did not take effect until transfer of same to Brewer.

In doing this, an entirely new contract was created and when Belford transferred endorsed note to Brewer, he implicitly guaranteed validity of it, or at least payment, and Brewer took same divested of all equities existing as between original parties.

There seems to be a well founded principle, supported by eminent authority, starting far in the past and extending up to present time, which holds "where a bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to the title." Goodman v. Harvey, 4 Ad. & E. 370. Also, that "a holder of a bill of exchange endorsed in blank, or other negotiable paper transferable by delivery, can give a title which he does not himself possess, to a person taking them *bona fide* for value." Bush v. Scribner, 11 Conn. 388; Miller v. Race, 1 Burrow 453.

In McLaughlin v. Conn., 4 Rawle 464, and Bullock v. Wilcox, 7 Watts 328, the rule is laid down that "a *bona fide* holder for value and without notice, of a negotiable note made to A B or bearer, is entitled to recover on it against the maker, free from any equities subsisting as between the original parties."

The Pennsylvania courts are very emphatic in their refusal of relief to any party who, by reason of fraud practiced upon him, signed a negotiable note. Zimmerman v. Rote, 75 Pa. 188; Phelan v. Mass., 67 Pa. 59.

How much more so should they be where he who commits the fraud knowingly and willingly, seeks to set up his own wrong to protect himself as against an innocent purchaser? Unger v. Boas, 13 Pa. 600.

In order to defeat payment, Belford must not only show not to have taken note under given circumstances, but burden of proof is upon him to show that plaintiff took it *mala fide*.

Judgment for plaintiff.

FLEITZ, J.

OPINION OF THE SUPERIOR COURT.

The note of Schofield was made by him and delivered to Belford, in exchange for a horse, on Sunday. No right of action sprang out of such a note. Kepner v. Keefer, 6 W. 231.

We are not informed when this note was endorsed to Brewer. The name of Belford was written upon it, for some reason even before its delivery to him, viz: on Saturday. There is no reason for inferring that it was delivered to Brewer on Sunday. If Belford wishes to take any advantage from the assumed fact that it was delivered on Sunday, he should have proven it. Hadley v. Snevily, 1 W. & S. 477.

By endorsing the note Belford warranted that it was valid and enforceable. Norton on Bills and Notes, p. 162. Whether it was so or not, that is, whether Schofield could be compelled to pay it by Brewer, as a *bona fide* purchaser for value, it is unnecessary for us now to decide. The question is merely whether Belford, as endorser, can be compelled to pay the note. "In warranting its validity, he agrees that if the paper cannot be enforced against the acceptor or maker, because of some illegality in its inception, for example because it was given for a gaming debt, or void for usury, or given for other illegal considerations, these defences will not avail him."

If Belford pays the note, he must look to Schofield either as maker of the note, (which he cannot do), or as holding a horse which has not become his by any valid contract, or, as having, as seller of the horse, received \$175, which in equity belongs to Belford.

Judgment affirmed.

BOYD vs. AMES.

Mortgage—Alienation of mortgaged premises—Payments by mortgagor not binding on terre tenant.

STATEMENT OF THE CASE.

Ames made a mortgage of six adjoining houses to Boyd for \$5,000, and shortly after sold one of them to John Trempe who took possession. Boyd became aware of the conveyance within a few days after it occurred. Ames continued to pay the interest, and, occasionally a small part of the principal, through 24 years. Trempe was never called on for any, and never paid any. In the 25th year, after the maturity of the mortgage, Boyd sues out this *scire facias*, calling on Trempe as *terre tenant*.

MCDONALD and JONES for the plaintiff cited.

Act of 1705 (1 S. M. L. 59); Trickett on law of Liens in Pa., vol. 1, 160; Jones on Mortgages, vol. 2, 28; Michener v. Michener, 17 W. N. C. 266. Mather v. Clark, 1 Watts 491; Corvan v. Getty, 5 Watts 531.

SCHWARTZKOPF for the defendant cited.

Frear v. Drinker, 8 Pa. 523; Michener v. Michener, 17 W. N. C. 266; 2 Wharton 340; 4 Casey 505.

OPINION OF THE COURT.

Although the record is not clear on this point, we will assume that this mortgage was recorded. This being so, the *terre tenant* cannot plead ignorance of the existence of the mortgage when his interest was attached. While the estate remaining in the hands of the mortgagor is primarily liable for the mortgage debt and the mortgagee should proceed against the property remaining in the hands of the mortgagor, nevertheless, we are justified in inferring from the fact that the *terre tenant* was called in that the property in the mortgagor's hands was insufficient to pay the mortgage, consequently, we are to determine whether the interest of the *terre tenant* is liable in this instance. There is no presumption of payment as regards Ames.

The lapse of twenty years without evidence of partial payments or other recognition of the debt by the mortgagor within that time, or assertion of its non-payment by the mortgagee within that period, is presumptive evidence of payment.

As Ames continued to pay the interest and occasionally a part of the principal through twenty-four years, he plainly does not come within this rule. But will these partial payments made by the mortgagor and which have prevented a presumption of payment arising in his favor, be admissible to bind the *terre tenant*?

If the statutory period had elapsed without anything arising to rebut the presumption of payment, then the question as to whether or not an admission by the mortgagor after the presumption had arisen, would have the effect of binding the interest of the *terre tenant*, is a question we are not called upon to decide.

In this case the payments had been made before the presumption arose, and if the *terre tenant* defended this action on this ground it would in effect be setting up as a defense something that never existed.

In Turner v. Flenniken, 164 Pa. 471, five years after the land was mortgaged, the *terre tenant's* interest attached. Suit was brought twenty-eight years after the date of the mortgage. Payments had been made by the mortgagor three years before suit was brought, and twenty-five years after date of mortgage. The *terre tenant* requested the court to charge that, as against him the part payments were insufficient to rebut the presumption of payment. Court refused to so charge, and on appeal it was held to be no error.

In Levers v. Van Buskirk, 7 W. & S. 70, the *terre tenant's* interest attached fifteen days after the mortgage was given. Eleven years later an amicable action in ejectment was brought on an agreement between the parties to the mortgage. The *terre tenant* was not a party to the action at all. Judgment was rendered for the plaintiff and entered. Thirteen years after the judgment was given and twenty-four years after the mortgage was given, *sci. fa. sur* judgment was issued against the heirs of the mortgagor and the *terre tenants*. The plaintiffs offered in evidence, to rebut the presumption of payment arising from the lapse of more than twenty years, the record of the proceedings in the amicable ejectment suit. The evidence showed ejectment instituted by plaintiffs' ancestors to recover a portion of the land mortgaged and the judgment thereon.

Court held that it was no objection that the original ejectment and proceedings were against the mortgagor alone; that the *terre tenant* bought after the mortgage was given and recorded and, therefore, took the lands subject to it. We think this principle governs the case at bar and consequently judgment is rendered for the plaintiff.

BENJAMIN, J.

OPINION OF THE SUPERIOR COURT.

This case presents a question which, so far as we have discovered, has not been distinctly considered by any court of this state. The facts of *Turner v. Flenniken*, 164 Pa. 469, might have suggested it, but do not seem to have done so. The two or three lines of the opinion, *Williams, J.*, which deal with them, indicate that the question had not arrested his attention. In *Levers v. Van Buskirk*, 7 W. & S. 70, the mortgagor conveyed to Van Buskirk a portion of the premises, April 20, 1810. In 1821, an amicable ejectment by the mortgagee, Levers, against Horn, the mortgagor, for another part of the premises, was brought, to enforce payment of the balance of the debt. The suit was referred to referees, who found \$1426.90 still due. Judgment was entered on the award. A *scire facias* to revive this judgment was issued in 1829, and an *alias* in 1834; to which the return was made known to the widow and heirs of Van Buskirk. They pleaded, denying that Horn had interest in the land, when he made the mortgage (untrue), and that they were *terre tenants* of any land, which had been of Horn, against whom the judgment had been rendered (untrue). They also pleaded payment, and *nil tenent*. At the trial they filed a disclaimer as to the lands for which the ejectment had been brought. The jury, April 29, 1835, found due \$2489.16, on default of payment of which, plaintiff should have liberty to take out a *habere facias possessionem* for the lands described. Another ejectment, for the land sold by Horn to Van Buskirk, was brought August 18, 1841. The court found in the proceedings recited, a sufficient demand within 20 years before Aug. 18, 1841, to repel the presumption of payment. The case is no authority, therefore, for the doctrine that though no demand had been made on Van Buskirk, nor any payment made by him for 20 years, pay-

ments or acknowledgments made by the mortgagor in that time would rebut the presumption. *Cf. Limitations*, p. 495, 496.

The question has been learnedly discussed in *Ely v. Wilson*, 61 N. J. Eq. 94, and the result reached is that, if a part of the mortgaged premises is, with the knowledge of the mortgagee conveyed to another, and the period of presumption runs by without payment or acknowledgment by the grantee, and without demand upon him, his land is discharged because of the adverseness of the possession of the land by the *terre tenant*.

Not deciding whether, after conveyance of the land the mortgagor can waive or destroy the presumption of payment as respects his grantee, by making payments upon his bond, we think that the controversy between *Boyd and Ames* is to be solved by other principles. The act of April 29th, 1855, P. L. 369, P. & L. Dig. 2227, enacts that "In all cases where no payment, claim or demand shall have been made on account of, or for any ground rent, annuity or other charge upon real estate for 21 years, or no declaration or acknowledgment of the existence thereof shall have been made within that period by the owner of the premises subject to such ground rent, annuity or charge, a release or extinguishment thereof shall be presumed, and such ground rent, annuity or charge shall thereafter be irrecoverable," etc.

The act speaks of "ground rent, annuity or other charge." Are mortgages embraced within "other charge"? *Sharswood, J.*, in 1871, remarked, "my opinion is that the act should have a liberal construction, and be held to apply to all kinds of charges upon real estate, to which the ordinary presumption of payment applied, making such presumption to be *juris et de jure*," but the members of the court were "divided in opinion." *Pratt v. Eby*, 67 Pa. 396. It may be inferred, from a *dictum* in *Biddle v. Hoover*, 120 Pa. 221, that *Paxson, J.*, entertained, in 1888, the opinion of Justice *Sharswood*. There is no reason for conclusively presuming ground rents or legacies paid in 21 years from the last payment, recognition or demand, that would not justify the same presumption as to mortgages.

If the presumption is applicable to mortgages, it is necessary to ascertain

whether the partial payment, or payment of interest, which is to prevent the rise of the presumption must be made by the owner of the premises.

The "declaration or acknowledgment of the existence" of the charge, must, by the express language of the statute, be made "by the owner of the premises subject to" such charge. An acknowledgment by the covenantor, in a ground rent deed, will avail nothing, as against the *terre tenant*, who has been owner for 21 years, without making acknowledgment. *Barber v. Mul-len*, 176 Pa. 331.

The significance of a payment is that it implies an acknowledgment of the existence of the debt. So it is viewed, in cases involving the tolling of the bar of the statute of limitations. *Coleman v. Fobes*, 22 Pa. 156; *Limitations*, p. 351. There ought not to be a difference between the effect of acknowledging by paying, and that of acknowledging in some other mode. If the mortgagor's verbal admission will not affect his grantee, the *terre tenant*, neither should his admission implied in the act of making a payment of interest or of part of the principal. Hence, in *Gassman's Estate*, 3 Walk 126, *Ashman, J.*, held, that a payment by the covenantor on a ground rent deed within 21 years, would not keep alive the ground rent, as respects a portion of the premises transferred more than 21 years ago, to a *terre tenant*. Another ground for the decision was that the covenantor having conveyed for a full price—a part of the premises, which Gassman ultimately acquired, the retained portion was in equity bound to indemnify him, and that the owner of the rent subsequently became the owner of this retained portion. The conveyance of a part of the mortgaged premises, to Gassman, was made in 1833. The owner of the other portion paid the rent to about 1850 without suit. Then the rent for 1861–1863 was paid, and suit brought for the intervening rent, and judgment recovered against the owner of the other portion. The claim against Gassman's estate was for the rent accruing from 1863 to 1869, and from 1869 to 1878. The estate was undergoing distribution in 1881.

For 24 years Ames, the mortgagor, continued to make payments at intervals, but Trempe was "never called on for any, and never paid any." To the *scire facias* now

sued out, we think that Trempe has a good defence under the act of April 27, 1855
Judgment reversed.

HEIRS OF THOMAS LAZARUS vs. M. W. MORRIS.

Eminent domain—Taking property for school purposes under Act of April 9, 1867—Estate acquired by school district.

STATEMENT OF THE CASE.

In the year 1868, the Hanover school district, of Luzerne county, Penn'a, being unable to procure an eligible site for a school house, took advantage of the Act of April 9th, 1867, sec. 1, P. L. 51, and gave damage to the owner of the land condemned under the above mentioned act in the amount of \$375.00. Proceedings were perfectly regular under the act. Land was in the name of the heirs of George Deal. Equitable title was in Thomas Lazarus. Lazarus satisfies the judgment for \$375.00. In 1874 he, Lazarus, becomes the owner in fee by deed of a certain tract of which the land appropriated by the aforesaid district is a part. Deed was of the common form, granting all the right, title and interest, together with the remainder or remainders, reversion or reversions, etc.

The school district aforesaid held the land from the time of the taking until 1896, June the 6th. At that time they abandoned the site, where the school house had been erected, and M. W. Morris received a deed for the same, consideration being \$1,000.00, cash.

Ejectment by the heirs of Thomas Lazarus v. M. W. Morris.

GERBER and WATSON for the plaintiff.

Lazarus had a title which passed to his heirs and will support ejectment. *McCullough v. Stover*, 119 Pa. 432; *Hawn v. Norris*, 4 Binn. 77; *Deitzler v. Mishler*, 37 Pa. 82.

The exercise of eminent domain by the State or its grantee is in derogation of private right, and the authority in the grantee is to be strictly construed. *Lance's Appeal*, 55 Pa. 26; *Cemetery v. R. R. Co.*, 68 N. Y. 591.

Only an easement will pass unless a fee is necessary. *Lyon v. Gormley*, 53 Pa. 263; *Phil'a, W. & B. v. Williams*, 54 Pa. 108; *Jessup v. Loucks*, 55 Pa. 350; *Western Pa. v. Johnson*, 59 Pa. 294; *P. & L. E. R. v. Brice*, 102 Pa. 23.

When an easement or a base or conditional fee alone has been given, and con-

dition broken, the right of possession is in the original owner. *Turnpike Co. v. Stoeber*, 6 W. & S. 379; *Lance's Appeal*, *supra*; *Craig v. Allegheny*, 53 Pa. 477; *Haldeman v. R. R. Co.*, 50 Pa. 425.

BISHOP and HAMBLIN for the defendant.

In determining the quality of the estate taken, the intention of the legislature controls. *Scott v. Pittsburg*, 1 Pa. 309.

To arrive at the intention of the legislature it is necessary to consider (1) the object to be accomplished, and (2) state of the law when act of 1867 was passed. Act of May 8, 1854, P. & L. 1, p. 755. As to power of disposal of property held by school district. *McCullough v. School District*, 11 Pa. 447.

OPINION OF THE COURT.

The only point in dispute in this case is as to the nature of the estate taken by the school district under the condemnation proceedings, as provided by the Act of Assembly of April 9, 1867. "The right of the Commonwealth to take private property, or authorize it to be taken on compensation made, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose. The public interest must be at the basis of the exercise or it would be confiscation to exercise it. This being the reason for the exercise of such power, it requires no argument to prove that after the right has been exercised the use of the property must be held in accordance with and for the purpose which justified such taking. The exercise of the right of eminent domain, whether directed by the State or its authorized agent, is necessary in derogation of private right, and the rule in that case is that the authority is to be strictly construed." *Lance's Appeal*, 55 Pa. 16. This case along with others is cited for authority that, under the act of 1867, there is a presumption against the school district taking a fee. Yet, we think, a careful study of the case will show that the point decided was, that, after the right has been exercised, the property must be held and used in accordance with and for the purpose which justified its taking. There is no presumption against a fee passing; for even in cases where a fee passes under the right of eminent domain, the property must be held and used for the purposes which justified its taking. It is settled, that when a fee simple is acquired under the right of eminent domain, and the purpose for which such right was

exercised no longer exists, a cessation of that use would not revert the title thereto in the former owner. *Haldeman v. P. R. R.*, 50 Pa. 425; *North Branch Canal Co. v. Hirun*, 44 Pa. 418. When the quantity or interest to be taken is not definitely set forth by the legislature, only such an estate or interest is taken as is necessary to answer the purposes in view, and the courts enforce a strict construction of this principle. But in all the cases where this construction has been applied, the grantees have been private corporations. In *Pitts., etc., R'y Co. v. Bruce*, 102 Pa. 23, authority was given the Canal Co. to take and use such land and material as may be necessary to construct and maintain the works. It was held that when the canal was abandoned the use and occupation of the land reverted to the original owner of the fee.

In the case of the *Union Canal Co. v. Young*, 1 Wharton 410, affirmed in *Wyoming Coal Co. v. Price*, 81 Pa. 156, it was held, that when land is taken by eminent domain by the state, for the purpose of building a canal, (where there was a dispute as to the estate taken by the state) the presumption is that a fee is acquired and not a mere easement. The act in question provides: "It shall be lawful * * * * to enter upon and occupy sufficient ground for the purpose * * * * and to use and occupy the same for the purpose of erecting thereon a school house, and for all damages done and suffered, or which shall accrue to the owners of such land, by reason of the taking of the same for the purposes aforesaid, payment shall be made; the viewers having viewed the premises, they shall determine the quantity and value of the land so taken," etc.

Prior to the passage of this act, the acts of 1836 and 1854 empowered the school districts to purchase and hold real estate necessary for school purposes, and to sell, alien, and dispose of the same. It is insisted, that under the act of 1867, only an easement is taken; that the land can only be held so long as it is used for school purposes, and on a discontinuance of this use, the land so taken, reverts back to the original owner.

The act of 1867, gives the district power to occupy the ground for the purpose of erecting a school house, and compels it to pay damages for the taking for such pur-

poses, but it also provides that viewers shall determine the value of the land taken, for the purposes aforesaid. We think that under this statute the school district is limited to taking land for school purposes only, but that it does not confirm their ownership to the land so taken, for the period while the land is used for such purposes.

It would hardly be reasonable to suppose that the legislature intended that the school district should take a less estate under the act of 1867, than was permitted to be taken under the previous acts.

Judgment for defendant.

PEIGHTEL, J.

OPINION OF THE SUPREME COURT.

Lazarus, the equitable owner under a contract of sale, of a tract of land, a part of which was, in 1869, taken by the school district for a school site, obtained as damages \$375, assessed according to the provisions of the act of April 9th, 1867, 1 P. & L. 774. In 1874 he received a deed for the tract. After using the lot for school purposes from the time of taking it, the school district in 1896, ceased to use it for a school and conveyed it in fee to M. W. Morris for \$1,000. This ejectment is to test Morris' title.

If the school district obtained a fee, the conveyance to Morris passed that fee to him, and Lazarus cannot recover. The only rival conceptions of the right acquired by the district would be that of a base fee determinable upon the cesser of the use by it of the land as a school site, or that of an easement similarly determinable.

The distinction between base fee and base easement is unimportant, even if substantial. Though it has been said that the right acquired by a railroad company to its way, is more than the latter, is the former; Pa. Schuylkill V. R. R. v. Reading Paper Mills, 149 Pa. 18 (a *dictum* cited approvingly in later cases). Reading v. Davis, 153 Pa. 360; Pittsburg, etc., R. R. Co. v. Peet, 152 Pa. 488; Philadelphia v. Ward, 174 Pa. 45, [a bridge case], it is conceded to be terminable by the cessation of the use of the strip for railroad purposes. The important question is, not whether the district got a fee—so far as a fee is different from an easement—but whether what it got, ended with the termination of the use of the lot for a school house.

It seems, generally, that when rights over land are acquired under the eminent domain, they are terminable. This is true of the public's right of way, over highways, or streets; of a railroad's right of way. But, from the language of the act of assembly, governing its acquisition, the right of the Commonwealth to the land taken for the Pennsylvania canal, has been repeatedly held to be an absolute fee. Cameron v. Pittsburg, etc., R. R., 157 Pa. 617; Penna. Canal Co. v. Billings, 94 Pa. 40; Smucker v. Penna. R. R., Pa. 40; Penna. Canal Co. v. Harris, 101 Pa. 80; Commonwealth v. McAllister, 2 W. 190; Wyoming Transportation Co. v. Price, 81 Pa. 156. Pittsburg acquired a fee in the Du Quesne Way, 1 Par. 309.

The right of the city of Reading to the site of a pumping station was assimilated by the court to that of a railroad to its way, in Reading v. Davis, 153 Pa. 360, although the city had erected its pumping plant, a dwelling house and a stable upon it, but this comparison was by way of *dictum* only. On the other hand, Philadelphia having taken an entire tract for a reservoir site, the trial court's instruction to the jury that the measure of damages was the value of the land at the time of taking, was approved, no suggestion being made that the terminable quality of the city's tenure should be considered in mitigation of damages. Warden v. Philadelphia, 167 Pa. 523.

Answering the precise question awaiting decision, there are a *dictum* of Judge Elwell, acting as referee, that the legal title remains in the person who was expropriated, "to whom the property will revert should it cease to be used for the purposes of a public school house for Troy school district;" Long v. Fuller, 68 Pa. 170; and a *dictum* of a very excellent judge, Rowe, of Franklin County, "I think a school district taking land under the act of 1867, for the site of a school house, acquires the fee and not a perpetual easement." Waynesboro' school district, 1 Pa. C. C. 422. The considerations suggested by Judge Rowe are persuasive. The school district acquires usually a bare lot. It erects a building upon it which may cost thousands or tens of thousands of dollars. If its interest is terminable, it can never change the site of the school without sacrificing what it paid for the

land, and much of what it expended in the erection of the building. When a narrow strip of land is taken, for a street or road, costly improvements are not put on it. Besides it would be excessively inconvenient to treat the strip as susceptible of abandonment for road purposes, and of becoming the property in fee of some other than the adjacent land owner.

The theory that the district gets a determinable estate, would in cases of long tenure for school purposes, before abandonment, entail difficulties in the ascertainment of the reversioner. A plot might be used for 100 or 150 years before its school use should cease. If it is then reverted to the heirs of the grantor, these would probably be undiscoverable. The adjacent land may have passed by conveyance, devise, execution-sale, etc., to others than him who owned when the school site was taken. A sale of land, on which is a street or roadway, would carry the soil under the street or road, but we know no established principle that would carry an acre school lot, by implication, on the conveyance of the tract of which it formerly formed a part.

The learned court below, and Judge Rowe, in the case cited *supra*, have adverted to the diction of the act of 1867, the viewers "shall determine the quantity and value of said *land* so taken," but this value is not declared to be the measure of damages. If the price taken, is part of a larger, the viewers would have to set off the advantages, if any, to the remainder, against the disadvantages of being deprived of the school site. We do not understand that the legislature is laying down any measure of damages different from the one recognized in railroad or highway cases.

Upon the whole, we are satisfied with the conclusion reached by the learned court below.

Judgment affirmed.

STEVENSON vs. MILLER.

Executory contract for sale of land—Incumbrances arising after contract but before delivery of deed releases vendee—Equity jurisdiction.

STATEMENT OF THE CASE.

An executory contract was entered into by the above named parties for the sale of land. Stevenson, the seller, giving a bond to convey a title free from all incumbrances. Before the time for conveyance, a fourth part of the land was taken by the right of eminent domain exercised by a railroad company. The defendant, purchaser, now claims the right to rescind the contract on grounds of failure of consideration; but the plaintiff tenders a deed and prays that the contract be specifically enforced.

WILSON and LLOYD for the plaintiff.

Eminent domain overrides all rights of private property, and subordinates all private contracts to its operation. *Brown v. Corey*, 43 Pa. 495; *Paliret's Appeal*, 67 Pa. 479. 91 Pa. 216.

Specific performance for sale of land will be decreed at suit of vendor. *Findley v. Aiken*, 1 Grant 83; *Kauffman's Appeal*, 55 Pa. 383.

HOUCK for the defendant.

The bill is simply for the purchase money. There is an adequate remedy at law. *Finley v. Aiken*, 1 Grant 83; *Werli's Appeal*, 57 Pa. 467; *Smalt's Appeal*, 99 Pa. 311; *Dorff v. Schmunk*, 197 Pa. 298; *Derry v. Heck*, 6 Foran 41.

Equity will not interfere when objection is made to form of action by demurrer. *Adams v. Beach*, 1 Phila. 99; 1 F. & H. Practice 75; *Adams' Appeal*, 113 Pa. 449; *Drake v. Lacoe*, 157 Pa. 17.

OPINION OF THE COURT.

This bill in equity for the specific performance of a contract, arises upon a contract for the sale of land, the terms of the contract being as follows: Stevenson, the seller, gave a bond to convey a title free from incumbrances. Before the time for conveyance, a fourth part of the land was taken by the right of eminent domain exercised by a railroad company. The defendant purchaser now claims the right to rescind the contract on grounds of failure of consideration; but the plaintiff tenders a deed and prays that the contract be specifically enforced.

The question, therefore, which confronts us in this case, is, does the right of

eminent domain as exercised by the railroad company, give the defendant the right to rescind his contract on grounds of failure of consideration?

Bouvier defines the right of eminent domain as "The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner." A railroad is declared to be a public use in the following cases: 135 U. S. 641; 9 N. Y. 588; 43 N. Y. 137, and 47 N. J. L. 43.

Brown v. Corey & Peterson, 43 Pa. 495, holds "an entry on another's land to build or use a lateral railroad, is an entry under the state, exercising the right of eminent domain and in pursuance of public law; and all private contracts are subordinate thereto."

It is also held in this case that "no covenants or private contracts between citizens can possibly be violated by the exercise of the right of eminent domain, because none can stand in the way of State authority. It is a resumption by the sovereign of a clear right of sovereignty, in subordination to which the covenants of the deed were made. Had the parties expressly contracted against the exercise of this right, they could not have found the sovereign, much less can their covenants, made for other purposes, be permitted to have the effect claimed for them."

The principle of this case is analogous to the case before us and upon this principle, as laid down so clearly, we are of the opinion that the right of eminent domain overrides all rights of private property and subordinates all private contracts to its operation. Therefore, the bond given by *Stevenson*, to convey a title free from all encumbrances, has not been violated, and the defendant has no grounds upon which he may legally refuse to perform the contract. But has the plaintiff brought his action in the proper court? The defendant challenges the jurisdiction of equity by demurrer. The prayer of the plaintiff that the contract be specifically enforced amounts to a suit for simply the purchase money.

In *Finley v. Aiken*, 1 Grant 83, Justice Black says the act of 1836 confers upon

the courts of equity the power of "affording specific relief, when a recovery in damages would be an inadequate remedy." This is all that relates to the subject now in hand. Thus if a party cannot be compensated in damages, he may go into chancery, not for remedy, but for relief. This implies that he must be suffering something, from which he desires and ought to be relieved. What can that be in the case of a party who seeks the benefit of a contract? Certainly not the contract itself, for he does not ask to be relieved from that; the evil which he demands that equity shall cover, is the inability of the law to do him justice, it is not enough, therefore, to show that damages would be inadequate. If there be a complete remedy at law for him in any shape, then equity can give him nothing, which with the smallest propriety could be called relief.

Justice Black says: "This indeed is the very ground on which all equity jurisdiction is based. It admits its functions to be extraordinary and professes to interfere only when justice can be done in no other way. To assume jurisdiction in equity of a cause which can be as well determined in an action at law, is not to do equity, but to administer law in a form not legal, it would not be granting relief, but simply usurping power. The rule to which I have here referred as the true one, is so universally acknowledged that it was stamped indelibly on the very form of the proceeding. Every bill for specific performance prays for relief, on the express ground that the plaintiff has no remedy at law."

In *Finley v. Aiken*, the bill was dismissed on its merits, so that the case is an authority only for this: that a bill for specific performance will be entertained on behalf of a vendor only when his contract stands in need of the specific relief which a court of equity only can give. But, where, as in this case, no decree is sought but one for the payment of money, which can be readily recovered in an action at law. The case is not one of specific relief and consequently does not fall within the equity head of granting relief where a recovery in damages would be an inadequate remedy. *Kauffman's Appeal*, 55 Pa. 383.

The opinion of Justice Black, in *Finley*

v. Aiken, is followed by the following cases: Deck's Appeal, 57 Pa. 467; Smaltz's Appeal, 99 Pa. 311; Dorff v. Schmink, 197 Pa. 298; Derry v. Heck, 6 Forum 41.

The opinion of this court is, that this is not the proper action for the plaintiff to enforce his claims and the demurrer is, therefore, sustained.

PRICKETT, J.

OPINION OF THE SUPERIOR COURT.

But two objections to the granting of the decree prayed for by the plaintiff, are made, viz: (a) the incidence of the eminent domain of the state, between the making of the contract and the time for the delivery and acceptance of the deed, and (b) the want of jurisdiction of the court, on a bill in equity.

Stevenson's bond stipulated for a conveyance of the land "free from all encumbrances." A right of way of a railroad company, like that of any non-municipal corporation or individual, is an encumbrance, within the meaning of the term, as used by the parties. 2 Tiffany, Real Prop. 905; Dyer v. Wightman, 66 Pa. 425. It differs, in this respect, from a public road, Patterson v. Arthurs, 9 W. 152; Wilson v. Cochran, 46 Pa. 233, which *prima facie* is not treated as an encumbrance of the class intended. Peck v. Jones, 70 Pa. 83. [But see People's Saving Bank v. Alexander, 3 Cent. 388, where the fact that a street had been laid out prior to making the contract, though not yet opened, prevented specific performance at the suit of the vendor.]

A covenant of warranty or against encumbrances, is not applicable to rights of way or other easements which come into existence by the exertion of the state's eminent domain, after the conveyance. Though the eminent domain of the state exists always, and all contracts for the sale or lease of land, are made subject to it, the covenant is not understood to be a guarantee against its existence or a future appropriation in the exercise of it by the state, or the state's delegate. Frost v. Earnest, 4 Wh. 86; Ake v. Mason, 101 Pa. 17; Schuylkill & Dauphin R. R. Co. v. Schmoelle, 57 Pa. 271; Dyer v. Wightman, 66 Pa. 425; Dobbins v. Brown, 12 Pa. 75; Barnes v. Wilson, 116 Pa. 303; Peters v. Grubb, 21 Pa. 455. This is because it is difficult to suppose that the parties con-

templated that the grantor or lessor was making himself liable for the consequences of acts which were to occur in the future, and without authority derived from him or his predecessors in ownership.

The case before us is not that of a covenant in a deed, making the covenantor responsible after the conveyance. It is a bond to do a future act, that is, to convey land at a future time, and further, then to convey it "free from all encumbrances." The vendor might have put encumbrances on it before, and he might put them upon it after making the contract. His bond would surely be violated by encumbrances of the latter class as much as by those of the former. The bond does not distinguish between encumbrances created by the obligor and those created by another; and the vendee would find, when he was called on to accept a conveyance, a railroad's right of way then on the premises, equally irksome and objectionable whether it had originated from a release or grant from the vendor, or had been taken *in invitum*. The question is one of interpretation of the contract. Our conclusion is that Stevenson in using the language of the bond, undertook that when at a future day he should convey, the land should be free from encumbrances; that the right of way is an encumbrance, and that he, therefore, is not proposing to perform his contract, when he tenders a deed for the land in its present condition. Other courts may on a similar state of facts have reached another conclusion.

It is unnecessary to consider whether, had the right of way not been an encumbrance of the class from which the contract was that the land should be free, Stevenson could have enforced specific performance by a bill in equity.

Appeal dismissed.

JEFFRIES vs. SHILLON.

Ejectment—Wills, construction of—Enforcement of a contract to convey an executory devise.

STATEMENT OF THE CASE.

John Shillon, in 1891, devised to Fred. Thompson, a farm with a proviso that if no children survived him, the farm should go to Harrison Shillon if Harrison should then at Fred.'s death, be alive. Thompson

had six children whose ages at their death ranged from eight to twenty-four years. Four years after Shillon's death, Harrison contracted to sell his interest in the farm to Jeffries. The farm was worth \$20,000. Four years after this, Thompson, his wife, and all his children were drowned in a shipwreck while on a voyage to Bombay. Harrison, now entitled to the farm, had he not contracted to sell it to Jeffries, takes possession. This is an ejectionment.

CAREY and JONES for plaintiff.

If a grant of an executory devise be made by one who becomes the devisee subsequently to the happening of the contingency, his grant would by estoppel, convey to the grantee, the interest which he subsequently acquires. *Tiedman on Real Property*, 532; *Goodlittle v. Woods*, *Willes* 211; *Jones v. Rowe*, 3 *Tenn.* 88; 36 *L. R. A.* 75; 32 *L. R. A.* 595.

RENO and HENNEKE for defendant.

Plaintiff cannot recover because of his own laches in not making a tender of performance. *Graver v. Scott*, 80 *Pa.* 88; *Nicol v. Carr*, 35 *Pa.* 384; *Bell v. Clark*, 11 *Pa.* 92; *Riter v. Maul*, 46 *Pa.* 376; *Russel v. Baughman*, 94 *Pa.* 104.

OPINION OF THE COURT.

There is no dispute whatever that the estate involved in this case is an Executory Devise, it clearly fits itself to the definition of such as given by Mr. Tiedman in his book on Real Property, page 508: "An executory devise is a future interest or estate in lands limited in a will in such a manner that it cannot take effect as a remainder or as a future use,"—the same definition in substance is set forth in the case of *Lovett v. Lovett*, 10 *Phila.* 537.

The fact has arisen as to whether such an interest is alienable or not. In consideration of this point, the law as laid down, by the eminent writer above mentioned, holds that they are alienable and devisable whether the devisees are vested in title or contingent and descendible to the devisee's heirs, if he should die before the devise vests in possession. However, Mr. Washburn in his book on Real Property, page 681, vol. 2., says:—"That they are only alienable when the devisee is an ascertained person"—and this seems to be the general doctrine which is taken by our courts in many cases of this nature.

The question as to whether Harrison Shillon had any interest to contract for the sale has been disputed and alleged by the respective parties to the case, and in

lieu of this the court deems it only proper to take into consideration the construction of the facts of this case—should any children have survived Fred. Thompson then, of course, there would not be any vesting of the title of the farm in Harrison Shillon and the interest he had had would at such an event be abolished. The fact now arises, did any children of Thompson live longer than he did himself?

By the Code of Napoleon the rule appears that in case several meet death by the same disaster the presumption as to survivorship is to be ascertained by the circumstances of the event and in absence of all such evidence then by age and sex of the person. There is much dispute on this law. The rule is not uniform in this or foreign countries. In the case of *Coye v. Leach*, 8 *Metcalf (Mass.)* 371, a similar chain of facts, so far as cause of death is concerned, appears to the case at bar, and it was held that a father and his daughter died together; that there was no legal presumption that either survived the other. In summing up the authorities this seems to be the general rule.

Going further and considering the facts more deeply the court can but decide that all of Thompson's family died together as it is plainly set forth that Thompson and his family were drowned, that—"Harrison Shillon now being entitled to the farm * * * * *," from this but one and only one reasonable conclusion can be drawn, and no dispute can arise that Harrison Shillon is entitled to the farm.

The defence claims that the contract of sale was an agreement to convey the interest which Harrison Shillon then had, and not the interest which he might acquire, should the title of the farm become vested in him. This is a clear cut rule and no other logical reason can be drawn. It would be folly to say that Harrison Shillon would (in sound mental capacity) contract to sell a \$20,000 farm for \$8,000, unless he was pushed for some money. In this case no facts show that he was in need of money. The court does not deem it expedient to presume such. If it were to presume every little difficulty that might arise (and does not exist in the facts) it would never reach a decision. The facts must be judged as they are and not as they might be.

In the case of *Hale v. Hollen*, 36 *L. R.*

A. 75, the court held that a contract with reference to the mere expectancy of an inheritance may be equivalent to an assignment of the property. Also in *Power's Appeal*, 63 Pa. 443, it was held: "An heir, or expectant devisee, may sell or assign his expectant or consigned interest, and if the contract be a valuable consideration, equity will enforce it." The same doctrine appears in the case of *Bayler v. the Commonwealth*, 40 Pa. 37. From this law, but one conclusion can be drawn and that is—Jeffries was possessed of a good title and had the right to possession—*provided* first, that the consideration was valuable; second, that he made a tender of the money prior to the commencement of the suit; third, that the contract was a valid one.

Whether the consideration was a valuable one or not—the court certainly thinks it was when the great chance that was taken, is brought to mind; for the chance was just as even that Jeffries would get it as that he would not.

Concerning the fact in reference to payment of the \$8,000 being tendered prior to the commencement of this suit, the facts do not say that such was not done and the court has no right to so presume. Therefore, according to the law it should be considered that he did tender it; as a man is looked upon as doing that which he is legally bound to do. It can not be disputed that this is a valid contract at all. It possesses all the qualities of such and none of illegality. It is not a wagering contract, nor any species of such, so the court can but judge it valid in every detail as all of the other properties exist.

It is quite true, as has been held in *Lane v. Raymond*, 2 S. & R. 65, that the burden is upon the one who claims the land against the one in possession, and that the plaintiff must recover on the strength of his own title and can not rely on the weakness of that of the defendant; also that the plaintiff must then show that he had title at the commencement of the suit and that he was entitled to possession. *Schrack v. Zubler*, 34 Pa. 38.

The acts of April 22d, 1856, do not work a bar to the action in this case as argued by the defence. These acts provide that actions brought upon a contract for sale of and, as in this case, must be brought

within five (5) years from the making of the contract. In the case at bar, the action was commenced within that time—it being instituted four (4) years after the making of the contract.

Therefore, in consideration of the facts and law as above cited, the court finds that the title at the commencement of this suit was in Jeffries; that he claims entirely upon it and not upon the weakness of that of defendant, and in lieu of such. Judgment is rendered accordingly.

KEELOR, J.

OPINION OF THE SUPREME COURT.

The devise of John Shillon was to Fred. Thompson, in fee, subject to a conditional limitation over to Harrison Shillon. "If no children survived" Thompson, the farm was to go to Harrison, should he be then alive. This limitation is upon the double contingency, (a) that no children of Thompson's lived after him, and (b) that Harrison survived him. The second of these contingencies has been fulfilled. Harrison Shillon has survived Thompson. Has the first been fulfilled?

Thompson, while, with his family, making a voyage to Bombay, eight years after John Shillon's death, perished with them in shipwreck. He who alleges that any of the children survived Thompson, must prove it. But there is no evidence to support that averment. The case must be disposed of as if it appeared that parent and children died simultaneously. *Coye v. Leach*, 8 Met. 371; *Fuller v. Linzee*, 135 Mass. 468. A good discussion of cases by Van Vorst, J., may be found in *Newell v. Nicholls*, 12 Hun. 604. The question was thoroughly canvassed in *Underwood v. Wing*, 19 Beavan. 459; affirmed in 4 De. Gen. M., and G., 633; *Wing v. Angrove*, 8 H. L. C. 183. The presumption that both parent and child perished together, is pronounced "safest and most convenient" by Greenleaf, *Evid.* (16 Boston Edit.), p. 125. Prof. Wignore, in a note, remarks: "If death by the same calamity is all that is proved, the person who asserts the survivorship must fail." Best states that "when, therefore, a party on whom the onus lies of proving the survivorship of one individual over another, has no evidence beyond the assumption that, from age or sex, that individual must be taken to have struggled longer against

death than his companion, he cannot succeed." Evid. (Chamberlayne's Ed.) 395. We do not know the sex of the oldest children, nor the age of Thompson. There are no circumstances which would justify the inference that the former, or the younger children, survived him. Harrison Shillon alleging the survivorship of the children, in order to defeat the plaintiff, the burden is on him to establish that survivorship. He has failed to do this.

We must assume then, that no children survived Fred Thompson. The event has occurred, on which his fee was to come to an end, and a fee in Harrison Shillon was to arise. The right to this fee has passed to Jeffries, if the contract between Harrison and him was valid.

That contract is not invalid because, when it was made the interest of Harrison Shillon was still contingent. Contingent remainders and contingent executory devises are assignable, if the contingency does not attach to the person who is to take.

The ejectment is a substitute for a bill in equity for a specific performance. Would a chancellor enforce the contract?

There are no fraud, duress, undue influence revealed. It is not clear that for the inadequacy of the price to be paid for the land, the chancellor would decline to compel the vendor to make the conveyance, unless it was so great as to suggest fraud or imposition of some sort. Fry, Specific Performance, 205; Bispham, Equity, 436. When the contract was made by these parties, the vendor had only a contingent estate. It seemed very improbable that it would ever vest. Thompson had six children. They had all passed the perils of early childhood. That they would all perish before or with him, was extremely unlikely. It is by no means clear, therefore, that, though the value of an unconditional fee was \$20,000, the value of the contingent fee was greater than \$800. If such a fee is to be sold at all, it must be sold at a price greatly below that of the absolute fee, and to adopt the principle that specific execution of contracts, when the price contracted for is greatly below that of an absolute fee, will be refused, is practically to determine that sales of contingent interest will not be recognized by courts of equity. Cf. Len-

nig's Estate, 182 Pa. 485; Wistar's Appeal, 80 Pa. 484.

Four years, however, have elapsed since the contract was made, during which the plaintiff has neither paid nor tendered the purchase money, nor demanded a conveyance. He has waited until the event has befallen, upon which Harrison Shillon's estate was to vest. Equity will not specifically enforce a contract where there has been long delay in making payment, especially if a material change in the value of the premises has occurred. Bispham, Equity, 437. While it remained dubious whether Shillon would ever become owner, Jeffries showed no haste to pay the price and take the risk. Now that the interest which he has bought, has risen in value from \$800 to \$20,000, he bestirs himself, and demands performance by his vendor. The circumstances exist under which he should be remitted to his action at law for damages.

It is true that ejectment could not have been successfully brought prior to the death of Thompson, but that is not the slightest justification for not tendering the money to Harrison Shillon long ago, and for showing a real purpose to insist on the bargain by filing a bill in equity, before, after long delay, it could be seen how the contingency was to turn out.

Judgment reversed.

NOLAN vs. WESTERN UNION TELEGRAPH CO.

Negligence—Delay in sending message—Defendant liable—Measure of damages—Counter proposal not an acceptance—Plaintiff must show damage resulting from the negligence—Nominal damages recovered.

For facts see opinion of Superior Court.

PARK and KAUFFMAN for the plaintiff.

Where damage results from negligent delay on the part of a telegraph company the company is liable. U. S. Tel. Co. v. Wenger, 55 Pa. 262; True v. Tel. Co., 98 Mass. 239; Smith v. W. U. Tel. Co., 150 Pa. 561.

The measure of damages is the difference between the contract price and the market price. Manville v. W. U. Tel. Co., 37 Iowa 214.

MCNEAL and HENNEKE for the defendant.

A telegraph company is not a common carrier. *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299.

The liability of the telegraph company may be limited by reasonable regulations expressed in its contract with the sender, as requiring a repeating of the message. *Passmore v. W. U. Tel. Co.*, 78 Pa. 238; *Grinnell v. W. U. Tel. Co.*, *supra*.

Negligence constitutes no cause of action unless it expresses or establishes some branch of duty. *Fox v. Barkley*, 126 Pa. 164.

OPINION OF THE COURT.

The two important questions which arise in this case are those of negligence and damages.

The plaintiff seeks to recover against the telegraph company, for damages sustained by the negligence of the company in delivering a message, and the amount sought to be recovered is the difference between the real value and the market value of the horse. The law is well established that a telegraph company, on accepting a message for transmission, is under a legal duty to transmit it without error or delay, and is liable in damages for any injury of which its negligence in the performance of this duty is the proximate cause. *A. & Eng. Ency. of Law*, vol. 25, p. 778.

It has been argued by counsel for the defense, that the breach of Streeter's contract to hold the offer open for forty-eight hours, and selling the horse before that time, constitutes a breach of contract for which he should be held liable to the amount of damages claimed against the telegraph company; but we think that Streeter's breach of contract is too remote to be a cause of the injury to Nolan, and that the proximate cause of the loss to Nolan was the negligence of the telegraph company in transmitting the message.

The rule is, that in such a case as this, where there seems to be a proximate and a remote cause of a loss or injury, the law regards the proximate cause as the efficient and responsible cause and disregards the one being remote. *Herr v. Lebanon*, 149 Pa. 222.

The defendants also allege that when Streeter sent the message, he accepted the contract on the back of the telegram which is as follows: "It is agreed by the sender of the following message, that the company shall not be liable for mistakes or delay in the transmission or delivery

or for non-delivery, of any unrepeatable message, beyond the amount received for sending the same, nor for mistakes or delays in transmission or delivery." We find no Pennsylvania authority on this particular point. It is conceded that the telegraph companies may make regulations for the transmission of messages, but it is established by numerous cases, that a regulation of a telegraph company designed to protect it from responsibility, for gross negligence of its agents or employees in the transmission or delivery of a message, is unreasonable, against public policy, and void. *Candee v. Telegraph Co.*, 34 Wis. 470; *Tyler v. W. U. Telegraph Co.*, 8 Albany L. J. 181.

It seems to be the unbending rule that a telegraph company, on receiving a message, is required to transmit it, and is liable in damages for negligence so to do, independent of any express contract. *Western Union Tel. v. Reynolds*, 77 Va. 173; Vol. 5 A. & Eng. Corp. cases, 182. But even for a very slight error, as in the case of changing a word, sometimes, it must respond in damages. It has been held in one case, that a delay in delivery of thirty minutes was not such negligence as would subject the company to any damages, even though a slight injury would result, and that it was a reasonable delivery. *Julian v. Western Union Tel.*, 98 Ind. 327.

In this case arises the principle of principal and agent, as in the case of the *Telegraph Company v. Drysburg*, 35 Pa. 300, which held that a telegraph company may be considered as an agent of the sender of the message, and is liable, as wrong doers, for any misfeasance in the execution of the duties confided to them; also in support of this may be cited: *Passmore v. Western Union Tel.*, 78 Pa. 238.

The question of the amount of damages should here be considered. As was said before, the damages to be recovered for the negligence of a company, is the actual loss suffered. The plaintiff claims to have suffered a loss of the difference between the market value and the real value of the horse. The difference being \$100.

In the case of the *Western Union Tel. v. Wenger*, 55 Pa. 262, it was held, that the company had incurred such a liability in damages as the sender of the message

had sustained in consequence of such negligence of the company.

We, therefore, instruct the jury, that the delay of the company, in delivering the message whereby the plaintiff suffered the loss he claims, was such negligence on the part of the company as would make them liable to such plaintiff, and that the amount of damages to be recovered should be the difference between the real value of the horse and the market value, or \$100, and that verdict should be for the plaintiff.

CLAYCOMB, J.

OPINION OF THE SUPERIOR COURT.

Streeter offered the horse to Nolan for \$300, Nolan to notify him of his acceptance in forty-eight hours. Nolan, four hours before the expiration of this time, telegraphed to Streeter that he would take the horse, and directed Streeter to draw a draft upon him at three days, and to send at once, by mail, a bill of sale, and, by railroad, the horse. The message was not promptly sent, and in consequence, did not reach Streeter until an hour after the period of forty-eight hours allowed to Nolan for the notification of his acceptance. After making the offer to Nolan, Streeter had made another to Sergeant subject to Nolan's option. A half hour before the expiration of the twenty-four hours, Streeter informed Sergeant that he might have the horse, and Sergeant forthwith accepted. The horse was worth \$400. This is an action against the Telegraph Co. for \$100, the difference between the actual value of the horse and the price at which Nolan expected to get it.

The plaintiff had a right to expect the immediate despatch of his telegram, and for a failure to send it at once, could recover the resulting damages. What are these damages?

We must assume, the contrary not appearing, that Streeter would have kept his promise to sell, had he received a message from Nolan, responsive to the offer, in due time. He had, it is true, made an offer of the horse to Sergeant, but that was subject to the option of Nolan. He, also, did not wait until the expiration of the forty-eight hours, before informing, but a half hour before informed, Sergeant that he could have the horse. We would not be justified in inferring, however, that three hours before thus informing Sergeant, he

would have declined to let Nolan have the horse. He was getting no larger price for it from Sergeant than from Nolan, and had no visible inducement to prefer the former to the latter.

It was not necessary, in order to justify a recovery by Nolan, that he should have had an option for the forty-eight hours, which was binding on Streeter. On the contrary, whether the option was binding on Streeter or not, if the acceptance is to date from the delivery of the message to the telegraph company, he had acquired a right to the horse, of which the delay of the company has not deprived him. It is only if the acceptance was not to be complete before notice of it to Streeter, that the company has occasioned any loss.

We are of opinion, however, that actual notice to Streeter was necessary to constitute the acceptance. It does not appear whether the offer was made to Nolan by word, by messenger, by mail, by telephone or telegraph. It does not appear that the circumstances warranted Nolan in using the telegraph as the instrument of communication. If they did not, Streeter would not be bound as by an acceptance, from the mere delivery for transmission, to the company, of the message. Streeter's offer was of the horse if within forty eight hours Nolan should "notify" him of the acceptance. In the absence of additional evidence, we cannot regard the deposit of the message as a notification.

From what we have said, it follows that the reception of the message within the forty-eight hours would have been necessary in order to bind Streeter. He was not bound, and Nolan has lost the right to the horse. But, let us suppose that the message had been promptly given. Would it have bound Streeter? If it would not, its non-transmission in time, cannot be supposed to have caused Nolan's loss of the horse, for we cannot assume that, Streeter would, though not bound, have sold the horse on the terms presented in it, in the absence of testimony from him, or of other evidence, that he would. It is a principle of the law of contracts that the acceptance must coincide with the offer. An offer for cash is not validly accepted by a suggestion of payment in the future. Streeter's offer was of the horse for \$300; *i. e.*, for \$300 to be paid on the delivery of

the horse. The latter was to be simultaneous with the payment. But, what is Nolan's alleged acceptance? He instructed Streeter that he would take the horse, and would pay, through a draft in three days, the horse being delivered at once to the common carrier for him. This is the introduction of new terms. It is not an acceptance, but a counter-proposal, in which there is no evidence that Streeter would have acquiesced. It follows that no loss accrued to Nolan from the tardiness of the defendant. *Cf.* Western Union Telegraph Co. v. Burns, 70. S. W. R. 784 [Texas].

Perhaps Streeter would have accepted it or, *perhaps*, he insisting on cash, Nolan would have withdrawn his counter-proposal, and accepted the offer made, but about such matters neither we, nor with our sufferance, the jury, may speculate.

The remarks already made indicate that the judgment of the learned court below must be reversed.

It was argued by counsel that the rule of the company requires counter-transmission of messages, at an additional charge to the sender, in order to make the company liable for errors of negligence of subordinates. But (a) it is not in evidence, that such a qualification was attached to the contract between Nolan and the company. (b) Such a qualification has no relevancy to the cause of complaint in this case. *Cf.* Tobin v. Telegraph Co., 146 Pa. 375; N. Y. & W. Printing Telegraph Co. v. Dryburg, 35 Pa. 298; W. U. Telegraph Co. v. Richman, 19 W. N. C. 569; 6 Cent. R. 565. Nolan does not allege that the message was erroneously transmitted. It was correctly transmitted. Counter-transmission would have been useless. The fault of the defendant was not its negligence in the sending, but its negligence in not sending for several hours after the leaving of the message with its servants. Possibly, while a telegraph company cannot, by contract, limit its liability for its own negligence, N. Y. & Washington Printing Telegraph Co. v. Dryburg, 35 Pa. 298, it may limit its liability for negligence of its servants, itself not having been negligent. Passmore v. Telegraph Co., 78 Pa. 239; Western Union Telegraph Co. v. Stevenson, 128 Pa. 442; *Cf.* Willock v. Railroad, 166 Pa. 184. That the company would have been

liable for the loss of the profit on the horse, had its negligence caused that loss, we think clear. Ordinarily, if nothing apprises the company of the nature of the loss likely to ensue upon mistake or delay of transmission, only nominal damages, or, at the most, the price paid by the sender of the telegram to the company, can be recovered. *Ferguson v. Anglo-American Telegraph Co., Lim.*, 178 Pa. 377. But when the telegram itself suggests the nature and possible magnitude of the actual loss to arise from error, the company will be liable for it. The actual order by telegraph being for "two hand bouquets," if it is delivered as an order for 200 bouquets, the loss to the addressee from the effort to comply with the order, *e. g.* \$100, may be recovered by him. *N. Y. & Wash. Printing Tel. Co. v. Dryburg*, 35 Pa. 298. If the telegram sends the addressee to South Carolina instead of Staten Island, the extra expense, *e. g.* \$71.25, can be recovered. *Tobin v. Telegraph Co.*, 146 Pa. 375. The telegram directing the addressee to buy for the sender shares of stock, the company must anticipate a possible loss in a rise in price of the stock, if the message is not promptly delivered, and will be liable for that rise. *U. S. Telegraph Co. v. Wenger*, 55 Pa. 262. The message being to an agent to sell oil, the company will be liable for a loss if the message delivered directs the agent to buy oil. *Western U. Tel. Co. v. Stevenson*, 128 Pa. 442. *Cf.* Passmore v. W. U. Telegraph Co., 78 Pa. 238.

As the plaintiff would apparently have lost the horse, even had the company promptly transmitted the message, the defendant is not liable for the difference between the value of the horse and the price which would have been paid for it.

Judgment reversed with *v. f. d. n.*

DILLSTOWN BOROUGH vs. TELEPHONE COMPANY.

Bill in equity—Injunction—Fraud used in procuring the passage of an ordinance—Act of March 31, 1860—Ordinance impairing obligation of contracts.

STATEMENT OF THE CASE.

Dillstown, a borough, authorized the telephone company to plant poles, and string wires between them, the company

undertaking to plant the poles at prescribed distances from each other, and to render service gratuitously to the council, burgess, and other officers. There was a secret understanding that each of the council who voted for the ordinance should receive two hundred and fifty dollars in six months from the passage of the ordinance. The poles and wires were established and were used by the officers of the borough. A new council having come into power, the ordinance was repealed on the grounds of fraud in passing it, and the officers undertook to remove the poles. The company resisted. This is a bill for an injunction.

YOCUM and COOK for petitioners.

The repeal of the ordinance is void because it impairs the obligations of a contract. *R. R. Co. v. Chicago*, 176 Ill. 253; *Moore v. New York*, 73 N. Y. 238; *Clark v. Elizabeth*, 81 N. J. L. 566; *Com. v. Patch*, 97 Mass. 221; *Freeport v. Marks*, 59 Pa. 257; *Speer v. Blairsville*, 50 Pa. 150.

LOURIMER and JACOBS for the respondent.

The ordinance which authorized the company to plant their poles, is void, and the company acquired no rights under it. *Act of March 31, 1860*; *Milford Borough v. Water Co.*, 124 Pa. 610; *Harrisburg v. Telephone Co.*, 15 Pa. C. C. 518; *Thomas v. St. Ry. Co.*, 167 Pa. 120; *Millerstown v. Bell*, 123 Pa. 151.

OPINION OF THE COURT.

From the record of the case it appears that the telephone company received authority to construct, maintain and operate its line in the borough of Dillstown by virtue of an ordinance passed at a meeting of its council. The contract thus entered into has since been rescinded by a newly elected council on the ground of fraud in the passage of the ordinance, conferring the right to the occupancy of the street to the telephone company. It seems to be an uncontradicted fact that each member of the council who worked for the ordinance was to receive \$250, six months after the same became effective. The sole question for our determination, we believe, is this: Is an ordinance, procured by fraud, valid? We think not. The ordinance was obtained in a manner which renders the transaction irregular, and reflects little credit either upon the councilmen or the parties with whom they dealt. If such men as these are entrusted with the performance of important public duties

and their acts declared legal, cities and boroughs could be plundered at will and the public left without redress. Borough business should be transacted in an orderly and dignified manner. Questions coming before council should be determined upon their merits, uninfluenced by the promises of pecuniary reward to the individual members of the body, and when a corporation comes into a court of equity claiming rights against the public, under an agreement purporting to have been executed by borough officers, the agreement should be conscionable, and should have been obtained by fair and conscionable methods. In the case of the *Street Railway v. Inter-County Street Ry. Co.*, 167 Pa. 100, it was held that neither council nor officers can contract in any other way than by ordinance, and if such ordinance, giving consent to a corporation to use its streets or property, has been obtained through fraud, it should be treated as a private contract between the borough and the corporation, and as such, is subject to the same rules that govern contracts between individuals. Also *People v. O'Brien*, 111 N. Y. 1. The act of March 31, 1860, controls this case to a great extent. This act provides that it shall not be lawful for any councilman, burgess, trustee, manager or director of any corporation, municipality or public institution to be at the same time secretary, treasurer, or any officer subordinate to the president, and directors who shall receive a salary therefrom or be the surety of such officers; nor shall any member of any corporation or public institution or any officer or agent thereof be in any wise interested in any contract to the sale, or furnishing of any supplies or materials to be furnished to or for the use of any corporation, municipality or public institution, of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such compact or sale. And any person violating these provisions or either of them shall forfeit his membership to such corporation, municipality or institution and his office or appointment thereunder, and shall be held guilty of a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not ex-

ceeding \$500. It was held in the *Commonwealth v. Essex Company*, 13 Gray 239, that if the ordinance had been obtained by promises to the individual members of the council which improperly influenced their action so as to render the ordinance voidable for fraud, the borough could rescind the contract, just as in the case of contracts between individuals. But who was to rescind the contract in the case at bar? Surely the persons who gave their consent would not revoke it on the ground of their own fraud. We think that the action taken by the newly elected council, was perfectly legal and binding upon the telephone company. This question has been settled in this state by the supreme court, in its decision in the *Lehigh Coal and Navigation Company v. Inter-County St. Ry. Co.*, 167 Pa. 75. There, the consent of the supervisors of Rahn township to the occupancy of its public road had been obtained by means of a contract similar to the one made use of in the case at bar. In that case, the consent of the supervisor to the use of the road was given in consideration of the promise of the railway company to provide employment for the supervisor and his son, at an agreed price per day. Mr. Justice Williams, in this opinion, says: "This was a very plain case of bribing a public officer. A consent so obtained, if otherwise valid, could confer no rights on those who bought it. The contract which was given for it was as utterly worthless as the consent. Neither the buyer nor the seller took anything by their bargain; nor did the township against which both buyer and seller were contriving, lose anything by the transaction. And again, in *Thomas v. The Inter-County Ry. Co.*, 167 Pa. 120, the same justice said: "The action obtained in this case was upon a subject of importance to the citizens and taxpayers of the district. The constituents of the councilmen had the right to have the question considered on its merits, and determined on the best judgment of the officers authorized by law to speak for them." We follow the rule laid down in the navigation company's case, with no doubt of its wisdom or justice.

We are, therefore, of the opinion that the ordinance of the Dillstown borough, authorizing the telephone company to

construct and maintain its plant in the borough, was procured by fraud, and therefore void.

Injunction denied.

WILCOX, J.

OPINION OF THE SUPREME COURT.

This is a bill by the company praying for an injunction that the borough shall not remove the poles which have been planted by the company.

That the borough has control of the streets and can remove purprestures and nuisances therefrom, will hardly be disputed. If the telephone company has no right to maintain the poles, it should, and if it does not, the borough both may and should, remove them. *Cf. City of Philadelphia v. Phila. & R. R. R.*, 58 Pa. 253.

The company had no right to plant and maintain its poles in the streets, unless it got that right from the ordinance of council. That council can give such right by ordinance, is not to be doubted, and it can charge a fee for the exercise of the right. *Harrisburg v. Telephone Co.*, 15 Pa. C. C. 518; *Millerstown v. Bell*, 123 Pa. 151; 2 *Boroughs*, 59. As council gives the authority by an ordinance, the ordinance must be so passed as to be valid.

The validity of the ordinance of Dillstown borough is not otherwise attacked than by proof that the members of council who erected it, did so in consequence of a bribe. There was an agreement that each of them, who voted for it, should within six months, receive from the company \$250.

Ordinarily, the motives of legislators, or the influences brought to bear on them, in enacting a law, cannot be investigated, for the purpose of rendering the law nugatory. *Sunbury & Erie Railroad Co. v. Cooper*, 33 Pa. 278, and ordinances of boroughs or cities enjoy a similar immunity. *Borough of Freeport v. Marks*, 59 Pa. 253. But, Lowrie, C. J., remarked in the earlier of these cases: "We do not say that a party who has obtained the passage of a private Act of Assembly, by bribery, imposition, or other fraudulent means, can claim any benefit from it if the fraud be shown; perhaps this would be treated in the same manner as a judgment in court, or a title from the land office, obtained by fraud". After remarking that the courts

will not, in general, inquire into the motives of the council in passing ordinances, Dillon observes: "But it would be disastrous, as we think, to apply the analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently for their own advantage or to the injury of others. We suppose it to be a sound proposition that their acts, whether in the form of resolutions or ordinances, *may be impeached for fraud* [Italics Dillon's] at the instance of persons injured thereby." 1 Munic. Corp. § 811, 4th edition. That an ordinance giving privileges on the streets to a corporation may be avoided on proof that it was procured by bribing the councils, is asserted in *Thomas v. Inter-County St. Ry. Co.*, 167 Pa. 120.

In the case just cited, an owner of property along a street was permitted to enjoin the company from constructing its railway upon the street in front of his premises, that is, the court, in this collateral way, treated the ordinance as void. It was void, because the consent of the borough had not been effectively given by its council. We doubt not that the borough itself could treat the ordinance as void, by compelling the company to remove the rails or to refrain from laying them, or by removing the rails by its own officers. Dillstown, without repealing the ordinance, could have by its officers removed the poles of the plaintiff.

It is immaterial that the succeeding council, before abating the poles, repealed the invalid ordinance. Repeal of a voidable ordinance may be unnecessary, but if the first ordinance is in fact voidable, no harm surely can be done to the beneficiary under it, in notifying him, by a repealing ordinance, of the purpose of the borough to treat it as null.

Appeal dismissed.

LUTHERAN CHURCH ET AL vs. REED'S EXECUTORS.

Wills—Legacies—When a charge upon the realty.

STATEMENT OF THE CASE.

"I, William Reed, of Shamokin township, Northumberland county, and State of Pennsylvania, being of sound mind, memory and understanding, do make and

publish this my last will and testament, hereby revoking and making void all former wills by me at any time heretofore made.

"And first, I direct that my body be decently interred at Jacob's church in a Christian-like manner, and that all persons assisting in my burial be paid for such service, and I direct that the graves for myself and for my beloved wife, at her death, be each walled up with brick laid in cement and both well covered with flag stone, and that a proper monument be erected at each of our graves.

"Item. I give, devise and bequeath to my beloved wife, Sarah, the use of all my real and personal estate during her natural lifetime. I order and direct that the stock and farming implements be sold after my death and that the proceeds thereof be for the use of my beloved wife, Sarah.

"Item. I give, devise and bequeath five hundred dollars to Jacob's Lutheran Church, the same to be in charge of the trustees of said church to be by them invested in real estate security and the interest thereof to be paid annually toward the minister's salary at said church.

"Item. I give, devise and bequeath one hundred dollars to the Jacob's Lutheran Church, the same to be invested in real estate security and the interest thereof to be paid annually to the organist of said church.

"Item. I give, devise and bequeath to William R. Tietsworth, son of Alfred Tietsworth, five hundred dollars, the same to be paid to him after the death of my beloved wife, Sarah, upon his arriving at the age of twenty-one years.

"Item. I give, devise and bequeath to Alfred Tietsworth five hundred dollars to be paid to him after the death of my beloved wife, Sarah.

"Item. I give, devise and bequeath to the heirs of my sister, Mariah Young, one thousand dollars, to Elizabeth Deibler one thousand dollars, to Julianna Rohrbach one thousand dollars, and after the payments above mentioned all the balance of my estate shall be equally divided—four parts, and the heirs of my brother, Simon Reed, deceased, shall receive one part, and the heirs of my sister, Mariah Young, deceased, one part, and Elizabeth

Deibler one part, and Julianna Rohrbach one part. The said bequests shall not be paid to any one until after the death of my beloved wife, Sarah.

"I do hereby constitute and appoint Simon Vought sole executor of this my last will and testament.

"In witness whereof, I, William Reed, the testator, have to this, my will written one sheet of paper, set my hand and seal, this thirtieth day of March, A. D., 1901.

WILLIAM REED [SEAL].

"Signed, sealed, published and declared by the above named William Reed, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names, at his request, as witnesses thereto, in the presence of the said testator and of each other.

CLARA V. VOUGHT,
J. W. SHANNON,
SIMON VOUGHT."

Are the legacies a charge on the land, the personality being insufficient to pay them?

CLAYCOMB and JONES for the plaintiff.

That a legacy is a charge upon land, need not be expressed definitely; the intention of the testator governs. *McCorn v. McCorn*, 100 N. Y. 511; *Estate of Barbara Lutz*, 50 L. A. R. 847; *Meter's Estate*, 169 Pa. 66; *Com. v. Shelby*, 13 S. & R. 347; *Clery's Appeal*, 35 Pa. 54.

CISNEY and KEELOR for the defendant.

A mere direction that devisee shall pay a legacy does not thereby create a charge upon the land. *Park's Appeal*, 10 Norris 327; *Wright's Appeal*, 2 Jones 256; *Hamilton v. Parker*, 13 (Smith) Pa. 332. Personality is the primary fund for the payment of legacies. *Millon's Appeal*, 46 Pa. 65; *Bredin v. Gilleland*, 67 Pa. 34; *Com. v. Shelby*, 13 S. & R. 348.

OPINION OF THE COURT.

Whether a legacy is charged upon the real estate of the decedent is always a question of the testator's intention. The language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered. *McCorn v. McCorn*, 100 N. Y. 511. The doctrine is well settled, however, that legacies of money are to be paid out of the personal estate, and that if the personal estate is insufficient therefor, the legacies are to abate, unless the real estate is charged with the payment of them.

In construing a will, it is to be presumed that no man, in making a final disposition of his estate, will make a legacy, save with the honest, sober-minded intention that it shall be paid. But when there is no express provision, or no clear implication that the legacies are a charge upon the land, the realty cannot be charged.

In *Brant's Appeal*, 8 Watts 202, it was held: "There is, however, a class of cases in which a legacy may be a charge on lands devised, in the hands of a *bona fide* purchaser for value from the devisee; but it must be a case in which a specific legacy is annexed as a condition to the devise, or when the lands are devised subject to the payment of a sum or several sums." A direction that a devisee yield and pay out of the land a specific sum, is a charge upon the land. *Hoover v. Hoover*, 5 Pa. 351. This doctrine was reaffirmed in *Cable's Appeal*, 91 Pa. 327, also in *Hammond's Estate*, 197 Pa. 119. In *Lloyd's Estate*, 174 Pa. 186, the following words made the legacy a charge upon the real estate: "I order that John Mills unto his own use, pay the sum of one thousand dollars out of the estate."

We will now turn our attention to the will of Reed, and attempt to find his intention as indicated by the will itself. In the second item he makes the following provision: "I give, devise and bequeath to my beloved wife, Sarah, the use of all my real and personal estate during her natural lifetime." Throughout the entire will this is the only mention made of the real estate. This provision postpones the payment of any of the legacies until after the death of his widow, Sarah.

In the last item of the will, testator, after giving three one thousand dollar legacies, directs: "And after the payment of the above mentioned, all the balance of my estate shall be equally divided—four parts." We think it reasonable to infer that the intention of the testator was, that his entire estate was to be reduced to money, and this to be done previous to the payment of the three one thousand dollar legacies, above mentioned. He concludes the item as follows: "The said bequests shall not be paid to any one until after the death of my beloved wife, Sarah." Testator speaks of all the legacies as to be "paid," and hence, treats the realty and

personalty as a blended fund, out of which the legacies are to be paid. This view is strengthened by the fact that no disposition whatever is made of his real estate. This doctrine is supported in *Roland v. Miller*, 100 Pa. 47. In this case the testatrix directed that "all her personal estate shall be equally divided among her children and heirs at law." In a subsequent item, she makes a similar disposition of the proceeds from any sale or sales of her real estate. The real estate as realty was not devised. It was held that at death of testatrix there was a conversion of the entire estate, and that the realty and personalty was a blended fund.

In view of the cases which have held the legacies to be a charge upon the land, we are unable, in the construction of the present will, to discover an intention on the part of the testator to make the payment of the legacies to Jacob's church, a charge upon his real estate. We are of the opinion, however, that the legatees may look to the realty and personalty as a blended fund for the payment of the legacies, in so far as that fund will reach.

SHERBINE, J.

OPINION OF THE SUPERIOR COURT.

William Reed's will devised *all* his real and personal estate to his wife, Sarah, for her life. The stock and farming implements were to be sold, however, the proceeds invested, and the income therefrom to be paid to her during life. Then follows a gift of \$500 to the Jacob Lutheran church, the annual interest of which was for the minister's salary; a further gift to the same church of \$100, the interest of which was for the organist. It is not said, in immediate connection with these gifts, when they are to be paid, but as *all* the personalty and realty are given to the wife for life, they are evidently not payable until her death.

A gift of \$500 to William Tietsworth, and one of \$500 to Alfred Tietsworth, are directed to be paid after the death of the widow.

After these follows the clause: "I give, devise and bequeath to the heirs of my sister, Mariah Young, \$1,000, to Elizabeth Deibler \$1,000, and to Julianna Rohrbach \$1,000, and after the payments above mentioned all the balance of my estate shall be equally divided—four parts: "One be-

ing given to the heirs of my brother, Simon," one to "the heirs of my sister, Mariah Young;" one to Elizabeth Deibler, and one to Julianna Rohrbach. "The said bequests shall not be paid to any one until after the death of my beloved wife, Sarah."

The property of the testator was real and personal. He devised both to his widow for her life. We are not to presume that he died intestate as to the reversionary interest therein. He has given legacies, payable upon his widow's death, and has directed "all the balance of my estate" to be equally divided among four sets of legatees. This balance embraces land as well as personalty. The case is then, of a gift of legacies, and of a posterior gift of the rest and residue of his estate, including personal and real estate. This makes the legacies a charge upon the land as well as personalty. If the latter is insufficient, the former must answer. *Bennett's Estate*, 148 Pa. 139; *Markley's Estate*, 148 Pa. 538; 3 Liens, 517.

Appeal dismissed.

STOKES vs. JALOUSE.

Trespass—Removing party wall—Easement for support—Limitations of such easement.

STATEMENT OF THE CASE.

Stokes' grandfather erected a brick house, twenty-eight feet wide and forty feet deep. A lath and plaster partition running from front to rear, divided the house into two equal parts. Each part had in it a door and a window on the first floor, two windows on the second and third floors. Stokes sold the one-half to Jalouse. It was then in a very dilapidated state. Ten years afterwards, the borough authorities condemned it as a nuisance and Jalouse tore it down. The eastern side of Stokes house was then left exposed, and the rain and wind have broken the plaster. This is an action for damages for breach of the right to protection from the elements.

MILLER and CORE for the plaintiff.

A partition in a house, when used as a support by both parties, is a party wall. *National Bank v. Taylor*, 44 Iowa 343; *Schile v. Brokhahus*, 80 N. Y. 614. When the owner of two adjoining buildings

grants one of them, without expressly stipulating against the right of support, he is presumed to respectively grant and reserve the right of support. *Partridge v. Gilbert*, 15 N. Y. 601. The defendant must compensate the plaintiff for disturbance of possession, and damage from having left his house exposed. *Eter v. Layster*, 60 N. Y. 253; *Brooks v. Curtin*, 50 N. Y. 639; *Qwisher v. Sipp*, 19 Pa. Sup. Ct. 43.

BOULTON and VASTINE for the defendant.

In the absence of express contract, owners of adjoining buildings or portions of the same building, cannot compel each other to repair his building or portion, in order to protect the property of either. *Pierce v. Dyer*, 109 Mass. 374. If one owner removes his building carefully, he is not liable for damages resulting from exposure to weather of the other building. *Partridge v. Gilbert*, 15 N. Y. 601.

OPINION OF THE COURT.

This house was in such a dilapidated condition when the defendant came into possession of it that it was condemned by the borough authorities as a nuisance, and defendant tore it down, probably because he wanted to erect a new and more modern building; and probably because he was compelled to. He did not touch the dividing or party wall, but simply removed that part of the building which was situated upon his own land. Now, in being the owner of a house which was built so close to the plaintiff's house that one division or party wall formed the common support between the two buildings, was each owner respectively compelled to allow his whole building to stand indefinitely one at the pleasure of the other, (one the insurer of the other's building), or be liable in damages one to the other, if, in the course of improvement, one removed his building?

Under *Equitable Easements*, Tiedman, page 571, we find this statement: "If the *quasi-servient* estate has been conveyed, it is a question of some doubt whether there is reserved to the grantor by implication an easement to maintain a burden upon the granted estate."

In *Sanderson v. The Coal Co.*, 113 Pa. 150, the Court said: "A rule which casts upon an innocent person the responsibility of an insurer is a hard one at the best, and will not be generally applied unless required by some public policy or the contract of the parties." In the same case

it was said: "We think that every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, clean and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm." Also that "Damages resulting from another from the natural and lawful use of his property by the owner thereof are, in the absence of malice or negligence, *damnum absque injuria*."

Kent says: "If the owner of a house in a compact town finds it necessary to pull it down and remove the foundation of his building, and he gives notice of his intention to the owner of the adjoining house, he is not answerable for the injury which the owner of the adjoining house may sustain by the operation, provided he remove his own with reasonable and ordinary care." 2 Kent, Com. 437.

An easement, uncertain in its extent and duration, without any written or record evidence of its existence, fettering estates and laying an embargo upon the hand of improvement which carries the trowel and the plane, and not demanded by any consideration of public policy should not be held to exist by mere implication. *Morrison v. Marquardt*, 24 Iowa 35; *Haverstick v. Sipe*, 33 Pa. 368; *Rennyson's Appeal*, 94 Pa. 147; *Keats v. Hugo*, 115 Mass. 204.

In the case at bar, it must be remembered that the defendant did not remove any part of the party or division wall, and it is not claimed that said wall was injured by the workmen who removed the building; but the plaintiff claims, by the removal of said building, the party wall was left exposed to the rain and wind, which cracked the plaster, thus damaging him.

It is well settled that an owner of land adjacent to another cannot remove the earth upon his own land so as to withdraw the support of his neighbor's soil. If he attempts to do so he may be enjoined, or if done, he is responsible in damages. By both the ancient and common law, A cannot dig a pit upon his land so near the edge of it that B's land will tumble into it; but this rule does not apply where B has burdened his land with artificial weight, as by a building. It is strictly

confined to cases where he has not thus increased the lateral pressure.

In *Clemens v. Speed*, a case decided by the Kentucky Court of Appeals, in June, 1892, we find a case analogous to the one under consideration, and we think the decision of that case is according to sound reason and good judgment. It is said in that case, as in this one, that a right may be acquired in the form of an easement to support from an adjoining building; but the court said: "We cannot assent to this. It would be a rule at war with reason and justice. It would make the owner the insurer of his neighbor's house, in case he desired to take down his own, or was compelled to remove it owing to its condition. It would make him liable for all damage, however carefully he may have acted. It would in great measure prevent all improvement." "It is difficult to see how an easement or prescriptive right can be acquired to the lateral support of another's building, when that of each owner is altogether on his own land."

Therefore, we are of opinion that the defendant had a right to remove his building, if he used reasonable care and diligence to prevent damage to the plaintiff, which he seems to have done, as negligence in removal is not alleged. We think he is not liable to plaintiff for the damage complained of as it was *damnum absque injuria*, and no action will lie.

This case might have been decided upon other grounds. The building being condemned as a nuisance by the authorities, etc. A discussion of which we forbear, as we believe we would have arrived at the same conclusion.

EBBERT, J.

OPINION OF THE SUPREME COURT.

The double house was so constructed that each half was dependent upon the other. The division between them was of lath and plaster, and the removal of one-half, would expose this partition to wind, rain and frost, and speedily destroy it, and, meanwhile, make the other half uninhabitable. When Stokes sold the eastern half to Jalouse, he impliedly retained to himself, the right to Jalouse's omission to do anything that would impair the protection on the eastern side of the western half. *Richards v. Rose*, 9 Exch. 218 (3 Gray, Cases, 485); *Doyle v. Ritter*, 6 Phila. 577 ;

1 *Tiffany*, Real Prop. 690 ; *Pierce v. Dyer*, 109 Mass. 374.

Stokes, however, acquired no right that Jalouse should keep his half, or, particularly, the plaster wall, in repair. Though the owner of an upper story has a right that the owner of the lower shall not remove it, or weaken it, so as to impair the support of the upper, he has no right to compel the owner of the lower to keep it in repair, in order that it may yield this support to the upper. 1 *Tiffany* Real Prop. 725. The same is true of easements generally. The same principle applies to lateral support or defence. Though Jalouse would commit a wrong to Stokes, if he tore down his house, or otherwise deprived Stokes' east wall of its defence against weather, he commits no wrong in not expending money or labor, in counteracting the agency of natural forces which impair that wall. *Pierce v. Dyer*, 109 Mass. 374.

The half sold to Jalouse was already in a "very dilapidated state" at the time of sale. Ten years have since elapsed. It has become so ruinous as to have been condemned by the borough authorities as a nuisance, and, in obedience to their order, to have been torn down. Stokes knew that he did not, by selling to Jalouse, impose on him the duty of maintaining the eastern half in order to furnish protection to his, Stokes', eastern side. Jalouse might have neglected to do anything to his half, until its walls and roof were entirely destroyed. He had a right to abstain from repair until a duty to the public compelled him either to repair or to tear down altogether.

When this option was forced upon him by the needs of the public, we think he had the right to exercise it without restraint of any duty towards Stokes. Stokes must be regarded as selling the half to Jalouse with knowledge that Jalouse need make no repairs, and that, when abstinence from repairs compels re-construction or destruction, he may, if he prefers, destroy instead of reconstructing. As *Colt, J.*, remarks, in *Price v. Dyer*, *supra*: "It is to be considered that the necessity which lies at the foundation of the right [Stoke's] arises from the existing relations of artificial structures, for the time being constituting part of the freehold, but liable to be destroyed by the action of the elements or by mere lapse of time. When thus destroyed, it is fair to presume that the parties intend, in the absence of any agreement, that the easement shall end with the necessity which created it. There can be by implication, no mutual easement of perpetual support, applicable to future structures."

Judgment affirmed.