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RESTRAINTS ON THE POWER OF ALIENATION.

That A, in imparting to B a short estate, e. g. for five years, in land, may validly prohibit B's alienating it, whether by sub-lease or assignment, is a commonplace. Whether, if the estate imparted is for the life of B, a denial to B of the power to aliene during his lifetime is good, may be doubtful. It is not doubtful that the same result may be substantially accomplished by the device of a trust. If it is desired to give B all the benefits of land other than that of converting it into money, it may be conveyed to X in trust for him. But, it is probably necessary that X should be clothed with active duties, unless the destination of the remainder were contingent. Otherwise, the trust would be adjudged "dry," and would be executed, that is, annulled. It seems to be necessary that the trustee's will and judgment should, to a degree, displace those of the *cestui que trust.* In other words, an arrangement even by form of trust, with a view to making land inalienable for the life of the beneficiary, will not be tolerated unless it also contemplates a still further reduction of the ordinary power of a life owner. He cannot lose the power to convey, unless he loses more power. But, if the settler or creator is willing to take from him more power, he is permitted to take from him also the power to aliene.

The motive of this attitude of the law it is difficult to detect, unless it be that persons will be more reluctant to create estates without both the power of transfer and also the power of control, than they will be to create estates without the power of transfer merely, and therefore, that the number of estates of the former class will be comparatively few.

A method of securing to B the use of land for his life, with-

out conferring upon him the power to dispose of it after his death has been for centuries recognized. The courts have not forbidden the formation of what are known as life-estates, even though the persons who are to take the land after their expiration are indeterminate, perhaps even as yet non-existent, and therefore, for the time, the future interest is inalienable. Land can be devised or conveyed to A for life, with remainder to such persons as shall, at his death be the children of B who is still childless. Neither A nor any body else can transfer the remainder.

It is permissible to convey land to A for life, and the remainder to such of his children as shall survive him, although until his death only the life estate and not the remainder, is alienable. It would be permitted to convey the remainder to his surviving children, and as representing their parent, the children of his deceased children. In many cases, these would be A's heirs so that virtually the conveyance would be to A for life with remainder to his heirs.

By a singular rule however, while land may be conveyed to A for life, with remainder to persons, who in a great proportion of cases will be his heirs, and the remainder will not be disposable by him, if the remainder is conveyed to exactly the same persons as will be his heirs, that is, if they are designated not by their sonship, or grandsonship, brotherhood or cousinship, etc., but by their being heirs, general, or of the body, by their relationship under the law of descent, as successors to the ownership, the power of disposing of the remainder is conferred on the life-tenant. No mischief sufficiently grave to produce the law's antagonism to an estate for life in A, with remainder to such definite male or female issue as would be heirs, exists, but if the remainder is to issue generally, something has occurred that awaken's judicial repugnance. The remainder is denounced out of existence. The whole estate is given to the life-tenant in order that he may be able to dispose of it. The so-called Rule in Shelly's Case has emerged.

When land is deeded to A and his heirs, we have long understood that it is not deeded to the heirs at all; but to A alone. The words "and his heirs" which seemed to couple with it other recipients of the land did no such thing. There was but one recipient. Those words only told how large the estate was, which he was taking. It was a heritable estate. It might have

been supposed where land was granted or devised to A for his life, with remainder to his heirs, that these words had the same signification. They expressed the *intention* of the grantor simply to pass to A a fee. This is not the explanation of the Rule in Shelly's case. That rule works the increase of the life-estate into a fee, how clear soever the grantor's intention that it shall be merely a life-estate. What then is the motive of the Rule?

Is it hostility to any life estates? No! for these have not all been abolished. That being so, it cannot be hostility to remainders, for if there are life estates, there must be remainders, or reversions.

Is it hostility to the sequence of a remainder in A's as yet indeterminate relatives; in his surviving children for instance, to a life-estate, in A? No, for we have just seen that such sequence is not probitited.

The object of the rule seems to be to avoid the too great multiplication of life estates, that is, of estates whose existence is inconsistent with the desposability of the land itself, i. e., of the maximum estate in land. If land could be really devised or conveyed to A for life only, but with remainder to such persons as, at his death, would under the definition of the interstate law, be his heirs, it might become the fashion to convey lands in this way, and in consequence, a large part of the lands of the state would be always practically inalienable. The life tenant could sell only his life-estate. The heir often could not sell until 21 years after the life tenant's death. The aim of the Rule in Shelly's Case is to preserve a large degree of alienability.

A grant to A and his heirs, if it has not the power to convey the land during his life, is for most purposes a grant to him for life, with remainder to his heirs. It is even more objectionable than a life estate with remainder, for the life estate can be sold, if the remainder cannot; while an inalienable fee, implies that even the virtually included life estate is inalienable. It is not surprising then, that in a jurisprudence which has invented the Rule in Shelly's Case, it should be held that in a grant of land in fee to A, with a prohibition against alienation during the life of A, the prohibition is void. This doctrine is clearly enunciated in Walker v. Vincent,[1] where, a will devising "to my daughter

[1] 19 Pa. 369 Cf. Nauglee's Appeal, 33 Pa. 89; Williams v. Leech, 28 Pa. 89; Cressler's Estate, 161 Pa., 427; McIntyre v. McIntyre 123 Pa. 329.

* * * and to her legal heirs," the addition "all of which etc. I give and devise to my said daughter * * and to her heirs forever, with this express condition and provision that she shall not alien or dispose of the same or join in any deed or conveyance with her husband for the transfer thereof during her natural life; but the same shall be and remain during the period aforesaid inalienable," was declared to be void. The daughter, it was held, could contract to convey in fee. The law however, was not always so understood in Pennsylvania. In McWilliams v. Nisley[1], Gass conveyed to his son-in-law McWilliams and his heirs a piece of land adjoining a piece on which he, Gass, lived subject to the restriction that he "is not to sell" it "during the natural life of the said William Gass" unless the said Gass shall sell the land he now lives on. Tilghman C. J., expressed the opinion that the restriction might endure "during the life of any person in existence at the time of making the will; adding "That is enough for the present purpose; for there is no restraint in this deed, beyond the life of James McWilliams." [the grantee.] The doctrine of this case must be regarded as no longer law.

In Kaufman v. Burgert,[2] a devise in fee was qualified by a proviso that the farm should not be liable to sale for debts, and that the devisee should not sell or dispose of it; but that it should "go and vest in his heirs, unless he shall devise the same by his last will and testament, which he is authorized and empowered hereby to do." He was held to be able to make a valid conveyance in fee.

The reason assigned for decisions of this sort is not always logical. A good reason would be that to allow a suspension of the power to alienate during the life of the first taker, would frustrate the policy of the rule in Shelly's Case, the policy, viz, of not allowing the sequence upon a life estate of an estate in fee to the very same persons as would be heirs of the life

[1] 2 S. & R. 506.

[2] 195 Pa. 274. A similar decision occurs in Jauretche v. Proctor, 48 Pa. 466; Reifsnyder v. Hunter 19 Pa. 41. In McCullough v. Gilmore, 11 Pa. 370, the gift by will was to William who was enjoined "not to leave the same to any but the legitimate heirs of his father's family, at his decease." It was held nevertheless, that his testamentary direction to sell the land was valid. The restraint on the power of devise was void. Cf. also, Sprankle v. Commonwealth, 2 Walker, 420.

tenant. The reason sometimes assigned is different. It is that a "power of alienation is necessarily and inseparably incident to an estate in fee."[1] If it is "inseparably incident," it cannot be separated not merely for life[2] but for any shorter time. If an estate can be a fee, although for five years, or ten years or fifteen years, the owner of it cannot aliene it, it is clear that alienability does not need to attend it all the time.[3]

The legal validity of a restriction on the power of aliening a fee for a comparatively short time, has been not infrequently recognized.[4] In Yost v. Insurance Company[5] it is assumed by McCullom J., that a restriction for thirteen years, that is, until the devisee should reach the age of 30 years, was valid. It is impossible to state with precision for how long such a restraint would be tolerated. Perhaps its permissible length is not absolute, but dependent on circumstances, some circumstances or purposes justifying a longer disability than others.

It has also been intimated that while a general inalienability would not be suffered, a restraint against aliening to a particular person would be, but no case applying the principle is now recalled. "A partial restriction, such as not to alien to a particular person or for a limited time, may be supported."[6] But a prohibition against selling to anybody except X, or his heirs, even for life only, would probably be inadmissable. It has been held by a learned court that under a devise to "my son William * * * he shall not be at liberty to sell or dispose of the same to any other person than to my son John or his heirs, as long as they are in possession of said farm," the restraint against alienation is not permissible and William could sell the farm to a stranger during John's ownership of his farm, but the objection apparently was that the restriction was to last beyond John's life, and so long as

[1]Jauretche v. Proctor, 48 Pa. 466.

[2]As it might under McWilliams v. Nisly, 2 S. & R. 506.

[3]In Libby v. Clark, 118 W. S. 250, cited by McCullom J., in Yost v Ins. Co. 179 Pa. 381, a restriction for five years was held not inconsistent with a fee simple.

[4]McCullough v. Gilmore, 11 Pa. 370; Jauretche v. Proctor, 48 Pa. 466; Kaufman v. Burgert, 195 Pa. 274.

[5]179 Pa. 381.

[6]Kaufman v. Burgert 195 Pa. 274, Jauretche v. Proctor, 48 Pa. 466; McCullough v. Gilmore, 11 Pa. 370; Williams v. Nisly, 2 S. & R. 506.

his farm should be owned by his heirs.[1] "This implies" says Endlich J., "a restriction enduring not only for the life of any person in existence at the time of the making or taking effect of the will, but for an entirely indefinite time. The provision therefore, does not fall within the *dictum* of McWilliams v. Nisly, *supra*" etc.

When a class is defined to one of whom, only, the land is to be alienable, an independent objection to the restriction would be the vagueness of the class. A prohibition on leaving the land at A's death "to any but the legitimate heirs of his father's family" would be void, probably, because of the impossibility of determining whom the heirs of the father's family would comprise.[2]

[1]Hartman v. Herbine, 7 Pa. C.C. 630.

[2]McCullough v. Gilmore, 11 Pa. 370. Cf. Hartman v. Herbine, 7 Pa. C. C. 630.

MOOT COURT

JOHN GRAYBILL vs. FARMERS BANK.

Payment by Check—What Constitutes Acceptance by Bank.

STATEMENT OF THE CASE.

George Fox owing Graybill $250, presented him in payment his check for that amount upon the Farmers' Bank. Graybill telephoned to the bank to know if it would pay Fox's check for $250. The cashier replied by telephone "yes." Graybill then accepted that check and gave Fox a receipt of payment of the debt. Four hours later, Graybill offered the check to the bank for payment but instead of his being paid, was told that Fox had notified the Bank not to pay and had also by another check withdrawn his whole deposit. This is assumpsit for $250.

Paul Smith for the plaintiff.

When check payable to bearer is certified the sum mentioned in it must necessarily cease to stand to credit of the depositor. It passes to the credit of the holder of the check and is specifically appropriated to pay it when presented: Girard Bank vs. Bank of Penn Township, 39 Pa. 92.

Unless expressly provided otherwise by statute no special manner of accepting or certifying a check is necessary. But any words or expressions intended to mean acceptance by the bank is sufficient whether signed or not: Espy vs. Cincinnati Bank, 18 Wall 604; Pierce vs. Kitterdge, 115 Mass. 374.

The bank was estopped from denying the certification of the check by its cashier, though done verbally: Morse vs. Mass. Nat. Bank, 1 Holmes (U. S.) 209.

Davis for the defendant.

The bank's contract is with the depositor and not with the check holder, until the check is presented and accepted: Taylor vs. Bushing, 100 Pa. 23; Northumberland First National Bank vs. McMichael, 106 Pa. 460.

A check is simply an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted: L. R. A. Vol. 31, p. 656.

The Act of May 10, 1881, provides, "that no person shall be charged as an acceptor on a bill of exchange, draft or order drawn for payment of

money exceeding $20, unless his acceptance be in writing signed by himself or his lawful agent."

OPINION OF THE COURT.

TOBIN, J.:—The only question for the determination of the court is, whether a telephone communication promising to pay a certain check constitutes such a certification as will make the bank liable therefor, although the drawer has in the meantime stopped payment The decision of this point depends entirely upon the construction to be placed on the act of May 10, 1881, P. L. 17; P. & L. Dig. pages 346 and 2196, which enacted: "that no person within this State shall be charged, as an acceptor on a bill of exchange, draft or order drawn for the payment of money exceeding twenty dollars, unless his acceptance shall be in writing, signed by himself or his lawful agent." "A check," says Randolph on Commercial Paper "is a bill of exchange drawn on a banker payable on demand." He further remarks, "it presupposes funds of the drawer in the hands of the bank or banker drawn upon." If the paper in this case is to be regarded in effect a bill of exchange, then as it is for the sum of two hundred and fifty dollars, there could be no recovery under the act of May 10, 1881 as there was no written acceptance.

It has been decided that where a national bank upon which a check is drawn telegraphs through its cashier to another bank in response to an inquiry, that the check is good and will be paid, and the second bank relying upon the telegram cashes the check, the bank upon which the check was drawn cannot justify its subsequent refusal to pay the check, on the ground that the drawer had in the meantime stopped payment: Farmer's Bank v. Elizabethtown Bank, 30 Pa. Superior Ct. 271. In Brinkman v. Hunter, 73 Mo. 172, it was held that a telegram of a defendant is a promise in writing within the statute of the state of Missouri relating to the acceptance of bills of exchange. A check by a depositor on his account certified by the bank becomes an obligation of the bank to the payee or holder, and in the absence of fraud or similar exceptional circumstances the amount is as much with drawn from the depositor's account as if the money had been paid out over the counter: Central Guarantee, Trust & Safe Deposit Co. vs. White, 206 Pa. 611. A promise made through the medium of a telegram to pay a draft is the legal equivalent of an acceptance in writing required by the act of May 10, 1881: Ravenwood Bank vs. Renecker, 18 Pa. Superior Ct. 192. In that case the the court said: "The same legislative motive which led to the enactment of the statute of frauds and perjuries bears fruit in this legislation: the purpose was to free certain classes of contracts from the uncertainty involved in establishing them by oral evidence. The legislature made no attempt to prescribe what covenants should constitute an acceptance; it did determine that the only legal evidence of such contract shall be in writ ing signed by the party or his agent." Bouvier defines a check to be "a written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or a bearer, or to such person or

order, a named sum of money." Anderson's Law Dictionary defines a check to be "an order on a bank to pay the holder a sum of money at the bank, on presentment of the order and demand of the money." The paper upon which this suit is brought is an order for the payment of money exceeding twenty dollars and there is no evidence that the bank on which it was drawn accepted it in writing. The act is plain in its terms, and is a flat bar to a recovery in this action. Judgment is, therefore, rendered for the defendant.

OPINION OF THE SUPREME COURT.

The act of 1901 declares that "the acceptance [of a bill] must be in writing and signed by the drawer;" and it further declares that when a check is certified by the bank on which it is drawn, "the certification is equivalent to an acceptance." These make no essential change in the act of May 10th, 1881, except in respect to checks, etc., for sums not as large as $20.

The evil of rules such as this, is strikingly displayed in this case. Graybill was unwilling to receive Fox's check until he was assured that it would be paid. He could not at the moment go to the bank and present it for acceptance. He relied on the telephone. The bank assured him by the telephone that the check would be paid, having every reason to believe that he was about to take the check in some business transaction. The rule requiring a writing, makes the use of the telephone impracticable; for despite the bank's assurance that the check would be paid, and the purchase of the check, in dependence thereon, by Graybill, the bank has since allowed Fox to withdraw his deposit, and declines to pay the check.

It often happens that in attempting to avoid one mischief another is incurred, and the new mischief is not necessarily less in gravity than the old. Doubtless the banking interest prefers the rule which makes a writing indispensable, but, as in the case before us, the particular bank may take advantage of it, to perpetrate an odious wrong upon the person who has unsuspectingly trusted it.

Judgment affirmed.

BARNES vs. NESBIT.

Parol agreement to sell land—Effect of agreement—Measure of damages—Statute of Frauds.

STATEMENT OF THE CASE.

Barnes orally contracted to sell a house and lot to Nesbit for $1,500. Barnes made the deed and tendered it at the time agreed upon. Nesbit refused to receive it, unless Barnes would reduce the price to $1,200. He had

never intended to pay more than $1,200, and had supposed that if Barnes went so far as to make a deed and got in sight of the $1,200, he being in need of money would accept that amount. The house and lot would not bring at a fair competitive sale more than $1,200.

Assumpsit (a) for the purchase money $1,500, (b) for the difference between $1,200 and $1,500 and the cost of the deed, $10.

Memolo for the plaintiff.

Penna. Statute of Frauds does not absolutely avoid a parol contract for sale of land: Tripp v. Bishop, 56 Pa. 424; Hart v. Carroll, 85 Pa. 508. Measure of damages is the consideration that passed between the parties, whether contract executed or executory; McNair v. Compton, 35 Pa. 23; Ewing et-ux. v. Thompson's Adm., 66 Pa. 382.

Cohen for the defendant.

Plaintiff cannot recover purchase price: Hertzog, v. Hertzog. 34 Pa. 418; Hastings v. Eckley, 8 Pa. 197. Measure of damages would be the difference between price agreed upon and market price, at time of agreement: Bowser v. Cessna, 92 Pa. 148.

OPINION OF THE COURT.

P. SMITH, J.:—It is well settled law in Pennsylvania that a parol contract for the sale of lands cannot be specifically enforced as that falls within the Penna. Statute of Frauds: Act March 21, 1772; Tripp et. al. vs. Bishop, 56 Pa. 424, 1867; unless there is a continued, notorious, exclusive possession subsequent to or contemporaneous with the oral contract, with the boundaries distinctly ascertained: Myers vs. Byerly, 45 Pa. 368, 1863. But the rule is that the offended party has his remedy in an action of assumpsit where he will recover the damages he has sustained by the breach of the parol contract: Haines vs. O'Connor, 10 Watts. 313, 1840. The reason for this rule is that the provisions of the first three sections of 29 Ch. 2, c. 3, condensed by our statute into one section—first section Act of March 21, 1772, merely operate upon the estate. Pennsylvania has not reenacted the fourth section of 29 Ch. 2, c. 3, which provides that no action may be brought on an unexecuted parol contract for purchase or sale of lands. So although our Statute of Frauds requires every contract for an estate in lands exceeding a lease for three years to be in writing: Haslet v. Haslet, 6 Watts 464, 1837; it does not avoid a verbal executory contract for sale of land as the English statute does, but leaves it binding upon the parties and simply restrains its effect. The Penna. Act limits the operation of the contract in passing and creating an estate or interest in land, leaving the party who refuses to perform it liable to be sued by and to respond to the other party in damages: Allen's Estate, 1 W. &. S. 383, 1841; Bell vs Andrews, 4 Dall. 152; 1796.

But what damages is Barnes entitled to recover in this action? Manifestly not the $1,500, for that would practically result in carrying the contract into effect notwithstanding our Statute of Frauds: Ellet v. Paxson, 2

W. & S. 418, 1841. The rule as to damages has been laid down as the loss sustained by the non-fulfillment of the contract: Ellet vs. Parson supra; or such damages as under the circumstances of the case appear reasonable: Ewing vs. Tees, 1 Binn. 450, 1808; Wilson vs. Clarke, 1 W. & S. 554, 1841.

What are reasonable damages? What is the loss sustained by the plaintiff? When the vendee has brought the action against the vendor for the non-fulfilllment of a parol contract for the sale or conveyance of land, the rule is laid down by Woodward J., that the measure of damages is the amount of purchase money paid with interest and the expenses; or if no part of the purchase money has been paid, the expenses and trouble incurred by the vendee in endeavoring to procure title. The vendee cannot in addition, where there is no fraud on the part of the vendor, recover damages for the loss of his bargain: Dumars vs. Miller, 34 Pa., 319, 1859. The same doctrine is found in Hertzog vs. Hertzog's Admr. 34 Pa. 418, 1859. The vendee could only get nominal damages for loss of his bargain, because a purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose that he has lost, where the vendor is without fraud incapable of making title on his part: McClowry vs. Croghan's Admr., 32 Pa. 23, 1859. But in case fraud can be shown on part of the vendor then vendee can make him responsible for all loss he can show that he has sustained by such refusal of the vendor to preform the parol agreement: Allen's Estate, supra.

When the vendor brings the action to recover damages for breach of a parol contract for sale of lands against the vendee, as in this case, the rule seems to be that it is not necessary to show fraud on the part of the vendee in order to get as damages the difference between the price agreed upon and the market value of the land at the time of the breach together with the expenses incurred. In Bowser v. Cessna, 62 Pa. 147, 1869, when Cessna refused to take land at his bid made at a public sale, beyond that the Court held that while it may be true that the specific performance of a contract cannot be enforced or, what would amount to the same thing—that the whole of the purchase money could not be recovered from the vendee—still the vendor was entitled to recover the full amount of his loss and damages by reason of the vendee's refusal to take the land at his bid, and that the amount of the vendor's loss was manifestly the difference between the market value and the price bid together with the cost of deed and expenses incurred. In Ellet vs. Paxson the damages were held to be the price agreed upon deducting the market value. Here it was also decided, that it was no answer to say that party agreed to give more than the property was worth. Cf. Meason vs. Kaine, 63 Pa. 335.

With these decisions as precedents, we hold in this case that the measure of damages for the breach of the parol contract by the vendee, Nesbit, is the difference between the price offered by Nesbit $1,500 and the market value of the land, $1,200 together with the cost of the deed $10, making a total amount of damages due to Barnes, the plaintiff, of $310; and thus we direct jury to find.

OPINION OF THE SUPREME COURT.

The first section of the statute of frauds enacts that "all leases, estates, interests of freehold * * * made or created * * * by parol and not put in writing and signed by the parties so making or creating the same * * * shall have the force and effect of leases or estates at will only" etc. Nesbit then acquired by the lease no right to take and retain possession of the land for any period against the dissent of Barnes. On the other hand it would equitably follow that Barnes could not compel Nesbit to pay the consideration mentioned in the contract or any part of it. The contract would furnish no guide to the compensation for use and occupation, should Nesbit take possession for a time, unless the interest on the purchase money for the time of occupation should be assumed to be the compensation.

To compel Nesbit to pay the purchase money agreed upon would be to convert the contract from one for a tenancy at will, into one for a sale of the fee. Though yielding but a sullen respect for the statute, the courts have not had the hardihood so far to defy it.

But, to allow the vendor retaining the land, on the vendee's refusal to accept a conveyance, to recover the difference if any between its market value at the time the vendee should have accepted it and the price he agreed to pay, is palpably equivalent to allowing him to enforce the contract. A part of the price agreed upon, he takes in the land, whose value is appraised in money by the jury. The balance he takes in money. Were the contract "specifically" performed, he could get all in money.

Occasionally the courts have been perspicacious enough to detect and candid enough to concede that to allow the recovery of the difference between the value of the land and the price is equivalent to allowing specific performance of the contract: Carner & Johnston v. Peters, 9 Super. 29; and in Sausser v. Steinmetz, 88 Pa. 324, where a parol lease for five years had been made, and the lessee refused to accept possession, it was held that to permit the lessor to recover a sum equal to the rent for one year, because the lessor had been unable to obtain another tenant, would be equivalent to specifically executing the contract. If the lessor had been able to procure a tenant for $900, half of the rent agreed upon, to allow him to recover the other $900 would also be the same as specific execution.

Nevertheless, the courts have inconsequently held, that the vendor may sell the land a second time, and compel the first vendee to pay any difference between the price he had agreed to pay, and the price obtained at the second sale. They tell us that while to compel the vendee to pay in money the whole price would be to enforce the contract, and to defy the statute of frauds, to allow the vendor to convert the land, for the vendee, into cash, and to look to the vendee for any deficiency is permissible: Bowser v. Cessna, 62 Pa., 148; Ewing v. Tees, 1 Binn. 450. Cf. Ashcom v. Smith, 2 P. & W. 211. Tompkins v. Haas, 2 Pa. 74.

The courts moreover, allow the vendor, after the vendee has refused to accept the land, to retain it and recover from the vendee the difference be-

tween its actual value, at the time when the vendee ought to have accepted it, and the price that he agreed to pay: Ellet v. Paxson, 2 W. & S. 418.

Atlhough then, to compel the parol vendee to pay the difference between the market value of the land and the higher price that he agreed to pay first, is virtually the same thing as to compel him to pay the whole price and, accepting the land, to sell it himself and thus recover back a portion of what he has paid the vendor the court below acted prudently in deferring to the decisions cited by it which must be provisionally accepted as expressing the law.

Affirmed.

THRALL vs. SHELDON.

Evidence of Act of 1887. Surviving Party to Contract.

STATEMENT OF THE CASE.

Thrall recovered a judgment against Sheldon for $4,000. He then died bequeathing the judgment to his sister, Sarah Thrall. She then died appointing Hart her executor. Hart has since died. Sheldon is dead having bequeathed his personal property to his nephews, William, John and Jacob. This is sci. fa. to revive the judgment. The nephews were offered to prove payment of $1,000 to Sarah Thrall and $1,000 to her executor. The Court excluded them. Judgment for Plaintiff for $4000 and interest.

Keenan for the appellant.

Interested persons may testify in favor of the estate of deceased party to a contract in action: Carpenter v. Ins. Co., 161 Pa. 9; Toomey's Estate, 150 Pa., 535.

Thompson for the defendant.

Where both parties represent dead persons, the death of each works the incompetency of all persons interested in the estate of the other: Crosetti's Estate, 211 Pa., 490; Trickett on Witnesses, sec. 217. Words "Thing or contract in action" may be used in sense that it is the subject matter, alone or in conjunction with other matters: Trickett on Witnesses, sec. 100.

OPINION OF THE COURT.

COHEN, J:—John Thrall recovered a judgment against Philip Sheldon for $4,000, He then died bequeathing the judgment to his sister, Sarah Thrall. She died appointing Hart her executor. Hart has since died. Sheldon is dead having bequeathed his personal property to his nephews, William, John and Jacob. This is a sci. fa. to revive the judgment. The nephews were offered to prove payment of $1,000 to Sarah Thrall and

1,000 to Hart. The court excluded them. Judgment for the plaintiff for $4,000 and interest.

The facts do not show who made the payment in question, nor do they show whether Sheldon died before or after Sarah Thrall and her executor. We do not however consider that fact important to the decision of this case.

The only question in the case is whether the nephews were competent witnesses to prove the fact of these two alleged payments.

Clause (e) of the Act of 1887, provides, inter alia, that where a "party to a thing or contract in action is dead * * * * and his right thereto has passed by his own act or the act of the law, to a party on the record, any surviving or remaining party to such thing or contract in action, or any person whose interests shall be adverse to the right of the deceased, shall be incompetent to testify to any matter occurring before the death of the deceased. Under the common law, witnesses were held incompetent for many reasons, which reasons are now swept away or greatly modified. Incompetency under our present law is a rare exception, and its tendency is toward competency as far as is reasonable and just.

The act of 1887, merely retains some of the common law restrictions. The object of clause (e) is that when death seals the lips of one of the parties to "the thing or contract in action," the law prohibits the other party to the "thing or contract in action" who is opposed to the interest of the deceased, from testifying to any matter which occurred during the lifetime of the deceased, for the purpose of equalizing evidential matters.

It says "opposed to the interest of the deceased." What deceased? Can it mean the interest of John Thrall, which would make him the deceased? If such were the meaning intended by the clause, and as it only makes a witnese incompetent to matters which transpired before the death of the deceased, then it is evident that the court should have allowed the nephews to testify, because the payments were made after the death of John Thrall. But we believe such is not the construction which can be placed upon this clause.

In Crosetti's estate, 211 Pa., 490, a controversy between the executor of the deceased husband on one side, and the administrator of the deceased wife on the other, involving the question of ownership of the whole estate, there being two parties to the action, and both being dead, and their interests having passed to personal representatives on the record, the daughter was offered in support of her mother's estate, to prove a gift of the money by the father to the mother. The court in considering clause (e) said, "What deceased? The answer is obvious. Any deceased party to the subject in controversy whose right thereto or therein has passed to a party on the record, who represents his interest. It follows, therefore that if the executor of Christopher Crosetti had brought this action, Christopher Crosetti must be considered within the meaning of the act as a deceased party interested in the thing or contract in action. In his lifetime he had a right to controvert the alleged gift to his wife, and as his lips are sealed by

death, and Louisa Ritahatta, being interested in sustaining the administration of her mother's estate, against the executor of her father, was incompetent to testity to any matter alleged to have occurred during the lifetime of her father."

To hold otherwise would be to make the death of one litigant more potent in working incompetency than the death of the other.

What deceased? Any deceased whose right has passed to the party on the record. It is obvious that it is not the interest of John Thrall. His right, it is true, passed to Sarah, and it is alleged that a payment of $1,000 was made to her, and as her lips are closed from controverting this matter, and her right passed to her executor, Hart, to whom it is alleged another payment of $1,000 was made for which his estate would be liable if the evidence be admitted and his lips likewise being sealed, and the right passing to the executor d. b. n , the plaintiff in this action, it is self evident that the deceased parties here are Sarah and Hart. Therefore the court below was right in excluding the nephews from testifylng to the alleged payments.

The judgment of the court below.is affirmed.

OPINION OF THE SUPREME COURT.

The judgment, by Thrall's bequest, belonged to Sarah Thrall. She dying, Hart became her executor. Hart is now dead. This is *scire facias* by Sarah Thrall's administrator d. b. n. c. t. a., to revive the judgment. The executor of Sheldon is the defendant. The defendant seeks to prove (a) a payment of $1,000 to Sarah Thrall, and (b) a payment of another $1,000 to Hart, her executor.

It is clear that the nephews of Sheldon cannot testify to the payment made to Sarah Thrall. They would be testifying in support of their interest which is adverse to that of Sarah Thrall, to a fact that occurred before her death.

They were offered also, to prove a payment made to Hart, the executor prior to his death. The present plaintiff does not claim through Hart. He is the administrator *d. b. n.* of Sarah Thrall and her rights have passed to him as fully as they had, for the time, passed to his predecessor in the trust. In testifying, the nephews of Sheldon will not reduce any right of Hart. He is to be considered as a trustee, or agent for the creditors and legatees of Sarah Thrall, and it has been decided that the death of an agent with whom X has had a transaction, does not preclude X from testifying in any litigation with the principal involving that transaction, in respect to it: Ins. Co. v. Shultz, 82 Pa. 96; Sergeant v. Ins. Co., 189 Pa. 341. A trustee or executor is like an agent and his death does not close the mouth of the person with whom, as such trustee or executor he has dealt: Norristown Trust Co. v. Lentz, 30 Super. 408.

It is true that the administrator *d. b. n.* may compel Hart to account for

the $1,000, but neither the testimony delivered in the proceeding nor the decree, will fasten the liability upon Hart.

Decree reversed.

SHADEL vs. THROOP.

Commissions—Brokers—Divergence from prescribed Terms —Liability.

STATEMENT OF THE CASE.

Throop owning a house told Shadel that he would sell it for $4000.00, and would give him (Shadel) $500.00 commissions for procuring a purchaser who would pay the price in cash. Shadel found Allison who was willing to pay $4,000.00, but only $2,000.00 in cash, the rest in two years, to be secured by a mortgage. Throop accepted Allison's terms and the conveyance and mortgage were made. Throop denying his liability to Shadel, offers him $100, which declining to accept, he sues for $500.

Clark for the plaintiff.

When a stock broker brings the attention of a buyer to property which he has for sale, and the owner subsequently negotiates the transfer, the broker is entitled to a commission: Gibson's Estate, 161 Pa. 177; Keys v. Johnson, 68 Pa. 42.

Sorber for the defendant.

An agent may be entitled to a *quantum meruit*: *Story* on Agency, s. 329; Martin v. Sillman, 53 N. Y. 615; Gillespie v. Wilder, 99 Mass. 170.

OPINION OF THE COURT.

DAVIS, J.:—Brokers are persons whose business it is to bring the buyer and seller together. They need have nothing to do with the negotiation of the bargain. But they must prove that their agency was the procuring cause of the sale.

If vendors were permitted to employ brokers and agents to look up purchasers, and call the attention of buyers to the property which they desired to sell, and then while such purchasers were negotiating, take the matter into their own hands, and avail themselves of the labor, services and expenses of the broker or agent in bringing the property into market and to accomplish a sale by an abatement in the price and yet refuse to pay the broker a fair compensation, an injustice would be inflicted.

Shadel could not find a purchaser, up to the time of the sale who would pay $4,000 cash. But he secured a purchaser, who would pay the above

amount, but on easier terms. Throop accepted the purchaser, thereby ratifying the act of his agent. Throop was satisfied with Allison and the terms under which he was willing to purchase, It was through the exertions of Shadel that Throop was brought into business relations with the purchaser. He received as much for his property as the stipulated price with Shadel called for, but only on different terms which I don't think alters the case, for the terms were satisfactory to Throop. The principal, Throop, accepted Allison as readily as he would have accepted a cash purchaser. Shadel was the procuring cause of this sale and is entitled to his commission, notwithstanding the fact that the sale was made upon terms different from those upon which he was authorized to negotiate.

Judgment for plaintiff for $500 with interest.

OPINION OF THE SUPREME COURT.

The contract between Throop and Shadel is that the former would pay the latter $500 for procuring a purchaser who would pay, cash, $4,000. It is plain that, if Shadel found X willing to buy at $4,000 only $2,000 of which should be paid in cash the rest being payable in two years, Throop would not have been bound to accept X nor would he have been bound to pay Shadel anything.

But X, being found, negotiates with Throop. Does the fact that X has been brought to Throop by Shadel, make it impossible for Throop to make any contract of sale with X, however material the divergence of its terms from those prescribed to Shadel, without obliging himself to pay the $500?

There are cases that hold apparently that Throop must have no dealings with X, after he finds that he will not comply with the terms, or rather, that if he does, he must pay Shadel for the opportunity thus furnished him. In Keys v. Johnson, 68 Pa. 42, A employed B to find a buyer for $16,000. C was found by B, and sent to A. but he declined to pay $16,000. Instead he offered to transfer to A, in exchange for A's land, a house, and to give A in addition $2,000. A accepted the offer. He thereby became liable to pay *some* compensation to B. It does not appear that the rate had been fixed by the contract or that, if it had, the compensation given, was of that rate. The principle of the decision is that if B, acting under a contract with A, sends C to A, and A takes advantage of the act to make *any* sale, or exchange, he must pay B *something*.

In Seaburg v. Fidelity Ins. etc. Co., 205 Pa. 234, the exact commission stipulated for was recovered by the broker, although the prescribed terms of the sale, were materially deviated from, in the arrangement actually entered into between the vendor and the vendee, and this deviation was necessary in order to induce the vendee to make the bargain.

If, after the agent procures a purchaser who is ready to buy on the designated terms, the vendor, for his own object, modifies them, he should be held bound by his contract, to give the agent the commission agreed upon. Is is not equally clear when he is compelled to yield a portion of his in-

tended demands, in order to induce the proposed vendee to buy and thus entitle the agent to *anything*, that he should not be held to have entitled the agent to *everything*? The contract is that if B procures for A a certain advantage, A will pay B $500. B does not procure A this advantage but a *less* advantage. Why then should B receive as large a fee? Let us suppose that if the purchaser purchases on the terms laid down in A's contract with his factor B, A will get an advantage worth $5,000; and that B, therefore has agreed to procure this advantage or ask nothing. B does not procure this advantage. He makes it possible however by directing C to A, for A to make a contract with C which will procure for him an advantage worth $4,000. A is not bound to accept this advantage. If he does not B earns nothing. Why if A accepts it, shall we say that B earns what he would have, had he obtained for A the advantage worth $5,000?

If A sells a chattel to B, which must possess certain virtues, B's acceptance and retention of it although it does not possess those virtues, does not compel him to pay the contract price. Neither should the acceptance of the service of a factor, which is not as valuable as that which was sold to the principal, compel the principal to pay the price agreed upon.

There are indeed good authorities for the principle that "A broker to negotiate the sale of an estate is not entitled to his commission until he finds a purchaser ready and willing to complete the purchase *on the terms prescribed by the seller*, and assented to by the broker:" Fraser v. Wycoff, 63 N. Y. 445. (Cf. McGavock v. Woodlief 20 How 221) and that a different negotiation made between the vendor and the proposed vendee will not entitle the factor to compensation.

Let it it not be said that there was no substantial difference between a purchase for cash and one upon credit. If that were so, the logical result would be that the vendor would be liable for the broker's commission, although he refused to sell on credit. The broker agrees to obtain a purchaser for cash. He surely cannot compel the vendor to accept a vendee who does not intend to pay cash.

We think that the jury should have been directed to find how much less the service actually rendered by Shadel to Throop was worth than that which he had agreed to render, and proportionately to reduce the $500 compensation.

Judgment reversed.

RUSSELL vs. HOWE.

Mortgage—Act of June 8th, 1881- -Ejectment.

Boyer attorney for plaintiff.

Davis attorney for defendant.

OPINION OF THE COURT.

DUFFY, J.:—This case involves the construction and application of the act June 8th, 1881 P. L. 84. Facts are as follows: Russell made a deed to Howe and his heirs for $2500. At the same time Howe executed a paper in which he said he had lent Russell $2500, and had received a conveyance of lot, describing it, to secure the repayment of it and that when the sum with interest was repaid, he would cancel the deed, and return it to Russel. Howe delivered this paper to Russel, Later Russell made partial payments of $200, $700, $900, $400 and finally of the residue with interest. Howe at last payment did not have the deed at hand, but said he would cancel and return t within three days. He has never done so though 2 years have elapsed, and he declines to give up the possession of the lot. Russell brings ejectment.

Act June 8th, 1881 P. L. declares: "Be it enacted, that no defeasance to any deed for real estate regular and absolute on its face, made after passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the same time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for recording of deeds and mortgages in the county wherein the land is situated, within sixty days from the execution thereof; and such defeasance shall be recorded and indexed as mortgage by the recorder."

There is now but one method left by which a deed absolute on its face can be reduced to a mortgage, and that method in this case, has not been pursued. The act provides that the defeasance must not only be in writing, and of the same date as that of the deed, but it must also be "signed, sealed, acknowledged, and delivered by grantee in deed to grantor," but furthermore, it must be "recorded in office for recording of deeds and mortgages in the county where the land is situated, within sixty days from the execution thereof." If we are to give effect to this act, which is in nowise ambiguous, it is certain the defeasance in this case can be of no effect, for it was neither "sealed, acknowledged or recorded."

It is proposed in this case to impeach the deed by showing that it is not what it purports to be, viz., a conveyance in fee, and to show that it was only a mortgage, and the question arises, how shall this be found? The statute answers this by saying you can do this in no other way than by the exhibition of a written defeasance, "signed, sealed, acknowledged, delivered and recorded."

Courts have always insisted that evidence to impeach a deed shall be clear and indubitable and as the legislature has seen proper to require, for that purpose a still higher type of evidence, the Court cannot take on itself to destroy the enactment for the purpose only of saving a case supposed to be a hard one: Sankey v. Hawley 118 Pa. 30. Provisions of Act June 8th 1881 P. L. 84 have admittedly not been complied with as defeasance has not been recorded as required by its terms.

This construction has been placed on the act, and similar applications of the doctrine have been made in a number of cases since Sankey v. Hawley, supra. of which the following are examples: Loher v. Russel 207 Pa. 105; O'Donnel v. Vandersall 213 Pa. 551.

The argument, and authorities quoted, by the learned counsel for the plaintiff, while presenting an ingenuous scheme, are not in our opinion applicable, as the act presupposes the execution and recording to be separate and distinct matters, as it names sixty days as the time which is allowed to elapse between the "execution" and "recording."

The defeasance is invalid and judgment is given for defendant.

OPINION OF SUPREME COURT.

Legislation which is designed to prevent fraud is often the means by which the grossest and most barbarous fraud may be made successful. The statute of frauds may—no one knows with certainty—have produced more fraud than it has averted. Its provisions however, in this age of writing are not unreasonable. It contents itself with requiring a writing signed by the party to be affected by it. The act of June 8th, 1881 goes absurdly beyond this. The defeasance must be made simultaneously with the deed. Can any one say why? How can it matter, when the defeasance is to be enforced against him who executed it, whether he made it at the time the conveyance was made to him, or a year or five years later? A man may be charged with a trust although when he makes the written declaration, years have elapsed since the origination of it.

The act of 1881 requires that the defeasance be sealed. The seal is of very little moment in modern law. An effectual conveyance of land can be made without it. The declaration which renders a trust enforceable, need not be sealed. Why in a state whose citizens have sense enough to live outside of the precincts of a mad-house, should it be ordained that if A conveys to B as security for $100 a piece of land with $20,000, the conveyance shall be absolute if the written acknowledgment of B that it is defeasible shall not have, after his signature, that odd mark which the gyrations of a pen produced, known nowadays as a seal, but shall be defeasible if that cabbalistic sign be present?

The acknowledgment of a deed is simply one way of proving its execution. An oral admission is made before a justice of the peace and he in writing certifies to it. But an acknowledgment, equally explicit may have

been made before twenty citizens who prove it; nay, it may be made in the face of the court itself, in the trial which involves the efficacy of the defeasance, yet these acknowledgments count for nothing. The conveyance is absolute unless the defeasance has been acknowledged with a view to recording.

The defeasance counts for naught, though it is simultaneous with the conveyance, though it is written, signed, sealed and acknowledged unless within 60 days from its execution it is put on record. The land may be worth $100,000; the consideration for its conveyance may have been a loan of $500. The grantee may most explicitly have declared in writing that he received it as a security. Nevertheless, if the grantor from inadvertence, negligence, unavoidable prevention, fails to put it on record within 60 days, he loses the land. A deed is valid, as between the parties, though never recorded. A mortgage itself is between the parties, valid though never recorded. But if the conveyance is on one piece of paper and the defeasance is on another, the conveyance is good without record, but the defeasance without record is bad, and even as between the parties!

Sankey v. Hawley, 118 Pa. 30, is an example of the frightful wrong and oppression of which by an unscrupulous man, this statute and the courts which administer it according to the letter, may be made the instrument. The case before us is another. Howe, the grantee, has distinctly acknowledged in writing, that he has received the conveyance merely as a security for the repayment of a loan of $2,500. He has, in instalments received that sum from Russell, in repayment of the loan, but has retained the deed. When required to give back the land he brazenly and insolently sets up the act of 1881! And the courts often so ingenious in inventing evasions of harsh and cruel laws, acquiescingly accept the statute and enforce it according to the letter!

Not so did the judges with respect to the statute of frauds and perjuries. They discovered reasons for exempting cases from its letter. Is the spirit of equity dead? Or has it grown timorous before the awful authority of the legislature? The chancellor invented his equitable exceptions to the statute of frauds, even when he recognized the omnipotence of parliament. In this age there is little scruple at declaring acts of assembly void on the ground that they violate a constitution, yet this abominable statute is allowed to work its evil will.

It would not have been difficult to annul this statute in so far as it requires a seal, an acknowledgment and a recording, on the ground that it interferes unduly with the right of possessing and protecting property: Constitution, Art. I, sect. 1. The opportunity to do so has probably passed. There is strident need that the legislature should at the earliest occasion amend the statute so as to eliminate from it its unreasonable features.

Judgment affirmed.

STEPHENS v. TROLLEY CO.

Trolley Car—Negligence.

Van Scoten for plaintiff.

Skinner for defendant.

STATEMENT OF FACTS.

John Stephens was driving a wagon along the tracks of the defendant company on a public street. The engineer of the car whistled as a signal that he should turn out of the track. Not doing this and moving but slowly, the engineer jumped from his car, took the horse by the bridle and turned it out of the track, but negligently, so that Stephens, who was asleep, was shaken from the wagon to the street. He brings this action for $1000 damages.

OPINION OF THE COURT.

SHARMAN, J.:—John Stephens, the plaintiff in this action, was driving along a highway which he had a perfect right to use, subject to that care which everyone useing the public highway must exercise toward his fellow travelers. The part of the highway on which he was driving could be used by the public, since the public and the trolley company have a right of common user of the track; but the car has the superior right to which the traveler must yield on sight or notice, and it is the duty of each to be on the lookout for the other, but the traveler must exercise the greater degree of caution, on account of the trolley company having the superior right of way.

In McKee v. The Harrisburg Traction Company, 211 Pa. 47, the court said that rapidtiy of transit was no longer a mere convenience to a traveler, but that it had become a matter of vital importance to the general business of the community.

Stephens was sleeping when he was overtaken by the car, and on failing to respond to the signals of the engineer, the engineer jumped from his car and, in a negligent manner, turned the team from the track, thereby injuring the plaintiff who now seeks ro recover from the trolley company.

Stephens certainly was negligent in his duty to the public, but we think the case is ruled by Rudgeair v. The Reading Traction Company, 180 Pa.

333, and Murphy v. The Philadelphia Rapid Traction Company, 30 Super. 87. In these cases the motormen left their cars, and in the first case, an assault was committed on the driver of the wagon. In the second, the motorman turned a horse from the tracks, in a negligent manner, and it was ruled that the motormen were acting beyond the scope of their authority.

In the present case there is no evidence to show that the engineer was doing the act under orders from the conductor or any officer of the company.

We, therefore, give judgment for the defendant.

OPINION OF THE SUPREME COURT.

The learned court below has undertaken to say, as matter of law, that the act of the defendant's motorman in turning the plaintiff's horse from the track, was not within the course of his employment. To this determination we have two objections. Ordinarily, what is the scope of a servant's duty is to be decided, not by the court but by a jury. But, even if the court could can take judicial notice of the duties of a motorman, what must it assume to be those duties? If he sees a stone or a child in the track, is it or not, his duty to get out and remove it? If he discovers a vehicle in front of him, is he or not to take steps to turn it off? Does he not owe to the passengers, the adoption of reasonable means to bring them to their destination in a reasononable time? Rapidity of transit is not a mere convenience; "it has become a matter of vital interest to the general business of the community:" Thane v. Traction Co. 191 Pa. 249; McKee v. Traction Co. 211 Pa. 47. Is the motorman not to promote this quick transit by causing the removal from the track of obstacles to it?

Let it not be said that this duty appartains to the conductor. How can the court know that it has been allotted by the company to him? It does not appear that there was a conductor other than the person who was likewise the motorman.

The learned court below has yielded to the authority of Murphy v. Philadelphia Transit Co., 30 Super. 87, which, in turn, cites as its chief justtfication; Rudgeair v. Reading Traction Co. 180 Pa. 333. In the last case the plaintiff complained of a violent assault upon him by the defendant's motorman in resentment of the plaintiff's persistence in keeping on the track-so as to impede the progress of the car. "The principle respondant superior," says the court, "has no application to such a purely personal trespass as that disclosed by the evidence prepared." In Murphy v. Philadelphia Transit Co., supra, A was delivering coal from a wagon, into a cellar. The wagon and horse were standing perpendicularly to the side of the street so that the horse's head would have been struck by an advancing car. A took

hold of a crank in order to lower the wagon which had been lifted so as to shoot out the coal. To hasten matters, the motorman got off the car, took hold of the horse, and started it ahead, causing the crank to escape from A's hand, and revolving rapidly, to strike him in the face. The court reached the conclusion that the motorman was not acting within the scope of his dnty. We are unable to adopt this view.

It seems however, that the plaintiff was asleep when the accident occurred, and it would not have occurred, had he been awake. For a driver of a wagon to be asleep, while he is driving on a public street, which is threaded with a trolley road, and traversed by numberless vehicles and passengers, is in the highest degree careless, unless there were special justificatory circumstances; which he should bring into view. He has shown none such. His contributory negligence therefore, of which the court could in the state of the evidence, take notice, required the non-suit.

Judgment affirmed.