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EXEMPTION OF WITNESSES FROM SELF-INCRIMINATION.

"In all criminal prosecutions," the Constitution of Pennsylvania has said for more than a century, "the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

This, and the 5th amendment to the Constitution of the United States, which declares that "No person * * * shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law" are frequently cited as the basis of the right of a person to decline to incriminate himself.

In the constitutional law of the United States it is elementary, that the first eight amendments impose no restrictions upon the state governments[1]. Said Chief Justice Marshall[2] the powers conferred on the federal government by the people of the United States "were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different per-

[1]Permoli v. First Municipality, 3 How. 589; Fox v. Ohio, 5 How. 410. Smith v. Maryland, 18 How. 71; Withers v. Buckley, 20 How. 84; Twitchell v. Commonwealth, 7 Wall. 321; Baron v. City of Baltimore, 7 Peters, 243.

[2]7 Peters, 243.

sons and for different purposes," and he reached the conclusion that "These amendments contain no expression indicating an intention to apply them to state governments. This court cannot so apply them." These explicit decisions of the highest federal court have made little impression on some of the state judges, and the 5th amendment has been repeatedly assumed by judges in the county courts to confer on witnesses therein, freedom from self-inculpation.[3] The Supreme Court of this State, however, has explicitly held, that the provision of the 5th amendment, has no application to state courts.[4]

The provisions of the constitution of Pennsylvania, will be seen on inspection to be confined to criminal prosecutions, and to attach only to the accused therein. The person indicated by "he" in the phrase "he cannot be compelled to give evidence against himself" is, as the antecedent phrases show, the accused in criminal prosecutions. The constitution is less liberal towards persons in this respect, than was the common law, and than is the statute law of Pennsylvania. The 10th section of the act of May 23d, 1887[5] declares that "any competent witness may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any question, which [i. e. the answer to which] in the opinion of the trial judge would tend to criminate him," and the common law had long before the Revolution extended the immunity to all witnesses, whether in civil or criminal cases.

IN CIVIL PROCEEDINGS.

In an action by A against B; for a breach of promise of marriage, a witness called by the defendant was allowed to refuse to answer a question the answer to which tended to expose an act of fornication with the plaintiff.[6] as also in an action by a father for the debauching of his daughter.[7] The exemption may be claimed successfully in an ejectment, involving the question whether a conveyance was in fraud of creditors[8] or in an attachment proceeding under the act of April 15th, 1869, the inquiry

[3]Miller v. Brown, 22 Pa. C. C. 109: Hamburger Co. v. Friedman, 6 Dist. 693; Krug v. Behringer, 6 Dist, 770; Mayer v. Mayer, 16 Lanc. 49.

[4]Page v. Suspender Co., 191 Pa. 511.

[5]P. L. 158, 2 P. L. 4841.

[6]McFadden v. Reynolds, 20 W. N- C., 312.

[7]Phelin v. Kenderline, 20 Pa. 354,

[8]Galbreath v. Eichelberger, 3Y. 515.

contemplating fraud in the defendant[9] or in proceedings under the act of June 11th, 1879, which is a supplement to that of April 15th, 1869,[10] or under the act of July 9th, 1897[11]; in proceedings in equity[12]; in assumpsit to enforce a penalty.[a]

IN CRIMINAL PROCEEDINGS.

In trials of an accused for a crime or misdemeanor, a witness, other than the defendant, may claim the privilege; e.g. for selling lottery tickets[13]; or for bribing members of a nominating convention to vote for a certain candidate[14] or for fornication and bastardy[15]. The immunity exists in testifying before a grand jury[16]; before an examiner appointed by the quarter sessions to take testimony in a desertion case[17]. The quarter sessions judge, sitting as a committing magistrate, must respect the immunity of an accused or suspected person.[18]

SPECIAL PROCEEDINGS.

Election officers must observe the privilege of persons offering to vote[19]. A special committee of city council must respect the privilege in investigation of peculations of the city treasurer[20]. The court will heed the principle, in applications for a rule to take depositions[21].

THE CHARACTER OF THE TESTIMONY—PUNISHMENT.

The immunity conferred by the constitution and by the act of 1887 extends only to testimony which would tend to show the witness guilty of some crime. That of the common law, as we

[9]Brannon v. Ruddy, 8 Pa. C. C., 176. The plaintiff may call the defendant and a grantee from him, under a rule to dissolve the attachment, and they must be sworn. They may then decline to answer any questions, the answer to which would incriminate them; Sullivan v. Wallace 32 W.N.C. 440.

[10]Hortsman v. Kaufman, 97 Pa. 147.

[11]Page v. Suspender Co. 191 Pa. 571.

[12]William Penn Building Association v. Mayer, 2 Mont. 41.

[a]Boyle v. Smithman, 146 Pa. 255.

[13]In re Doran, 2 Pars. 467.

[14]Com. v. Bell, 145 Pa. 374.

[15]Boyce's Case, 26 Pitts. L. J. 181.

[16]In re Doran, 2 Pars, 467.

[17]Com. v. Reed, 5 Dist. 57.

[18]Com. v. Smith, 185 Pa. 553, 569.

[19]Respublica v. Gibbs, 3 Y. 429.

[20]Eckstein's Petition, 148 Pa. 509.

[21]Ladenburg v. Pa. R. R. 453.

shall see, is wider. The crime may be of any gravity: bribing members of a nominating convention, or, being members, accepting a bribe[22]; fornication[23]; assisting in defrauding creditors of A, by accepting a conveyance from him for the purpose of defrauding[24], concealing one's property, so as to evade an execution[25], selling lottery tickets, or, when the law criminalized it, buying them[26]. Wife desertion is a quasi-crime of which a witness will not be compelled to testify to his guilt[27].

PENALTY.

The particular kind of punishment to which a conviction would expose the witness, is not material. It may be imprisonment; but, even when it is only a pecuniary fine, with imprisonment as the means simply of compelling payment of the fine, the witness may refuse to reveal his guilt by his testimony. In *In re* Doran, the punishment for buying a lottery ticket was twenty pounds. A witness was in the trial of X for selling tickets, excused from admitting that he had bought one from X[28]. Penalties, enforceable in civil actions, are sometimes imposed, e.g. for an oil transportation company's not posting a monthly statement of the business done during the preceding month[29]; or for such a company's charging certain shippers more than others.[30]

TESTIMONY WHICH DISGRACES.

In 1802 it was decided that the words *accusare* and *prodere*, in the maxim *nemo tenetur seipsum accusare* (*seu prodere*), are general terms, and not confined to cases where answers to questions would lead to the punishment of the witness. "If" says Shippen C. J., "they would involve him in shame and reproach, he is under no obligation to answer." Hence it was de-

[22]Com. v. Bell, 145 Pa. 374.

[23]McFadden v. Reynolds, 20 W. N. C. 312. Phelen v. Kenderlinè, 20 Pa. 354; Boyce's Case, 26 Pitts L. J. 181.

[24]Galbreath v. Eichelberger, 3 Y. 575. See explanation of this case by Parsons J. in In re Doran, 2 Pars. 467.

[25]Horstman v. Kaufman, 97 Pa. 147; Brannon v. Ruddy, 8 Pa. C. C. 176 Bast v. Anspach, 2 Leg. Gaz. 6.

[26]In re Doran, 2 Pars. 467; Com. v. Roberts, Brightly N. P. 109.

[27]Com. v. Reed, 5 Dist. 57. Wife desertion is a misdemeanor, since the act of March 13th, 1903, P. L. 26.

[28]In re Doran, 2 Pars. 467.

[29]Boyle v. Smithman, 146 Pa. 255.

[30]Logan v. Penna. R. R. Co., 132 Pa. 403; Ladenburg v. Penna. R. R. Co., 6 Dist. 453.

duced that election officers had no right in 1801 to ask one who offered his vote whether, during the revolutionary war, he had continued his allegiance to some one of the United States, whether he had joined the British forces, or taken the oath of allegiance to the king of Great Britain, or whether he had ever been attainted of high treason, and if so, whether the attainder had been reversed[31]. Again in 1803[32] the court held that a witness could not be obliged to say that he had received from his father a gratuitous deed for land, made by the grantor for the purpose of evading his creditors. "If it shall even be conceded" said the court, "that an indictment could not lie against the witness for agreeing to accept this deed, which, though void against creditors might be good against the grantor and his heirs, yet the combination itself was nefarious and immoral, and would justly subject every person concerned in it to ignominy and contempt, and was therefore within the construction of the maxim *nemo tenetur seipsum accusare*] as lately adopted in Respub. v. Gibbs, in bank." That the testimony would degrade the witness in public opinion, although the act admitted would not be punishable, Tilghman, C.J. in 1818 conceded, would "perhaps" excuse him from testifying in some cases, but he held that requiring a witness, who had made a promissory note in the name of a partnership of which he was a member, to testify that the note was given for a private and not a firm debt, was not improper: i. e. apparently, being known to have done such an act would not degrade in public opinion, or, if it would degrade, this was not one of the "cases" where a witness is exempt from self-degradation[33]. Parsons, J. held that, although the sale of lottery tickets was criminalized by statute, as the purchase was not made a crime, a witness could be compelled to say that he had purchased one from the defendant, prosecuted as the seller, despite the consequent degradation of the witness in the opinion of his fellow men[34]. "Where the testimony is relevant and material to the issue" he observed, "the

[31]Respublica v. Gibbs, 3 Y. 429.

[32]Galbraith v. Eichelberger 3 Y. 515.

[33]Baird v. Cochran 4 S. & R., 396. Unfortunately no criterion of the cases in which the witness would be excused from degrading himself was suggested.

[34]*In re* Doran, 2 Pars. 467. "Public infamy" is mentioned as a ground of excusing witness from answering questions, in section 32 Art. iii, and in section 10, Art. viii, of the Constitution.

witness is bound to answer the question, whatever may be its effect upon his character [reputation]. But, when the question asked is not strictly relevant, but only collateral, and is asked under the latitude allowed in a cross-examination, he will not be compelled to answer, if the reply is calculated to degrade him." Rogers J., at nisi prius, held that a witness could be properly compelled to say that he had bought a lottery ticket, because no disgrace attaches to the act of buying or selling lottery tickets "apart from legislative prohibition founded on public policy"[35]. He added the information that if the witness was fraudulently insolvent in consequence of the purchase of lottery tickets, and he was asked if such was not the cause of his failure, he could not be compelled to answer, a suggestion before whose cryptic wisdom, the world may adoringly prostrate itself.

THE TENDENCY OF THE QUESTION.

When the question requires an answer which will be an explicit admission of a criminal [or disgraceful] act the witness will not be compelled to give it. If, e.g. in an action by a father for the debauching of his daughter, the witness could not answer the question how he knew that the daughter was unchaste, without inculpating himself of fornication, he would be excused[36]. But it is possible that the answer to a question will merely state a fact which could lead to a suspicion that the witness had committed a criminal act. The question, e.g. may be whether the plaintiff, in an action for breach of promise of marriage, was a chaste woman. This the witness, says Green J., was bound to answer, because he could answer it "categorically without incriminating himself *necessarily*"[37]. In an earlier case[38] however, the trial judge refused to compel a witness to answer the question whether he did not know that the plaintiff's daughter was not a

[35]Com.. *ex relat.* Keller v. Roberts, Bright. N. P. 109. The purchase of lottery tickets had ceased to be criminal by the act of March 16th 1847. P. L. 476.

[36]McFadden v. Reynolds, 20 W. N. C. 312. Having testified in a for nication and bastardy case that he knows that the prosecutrix had had connection with another man than the defendant, the witness may refuse, on cross examination by the Commonwealth, to state who the man was that had had the connection. Boyce's Case 26 Pitts L. J. 181.

[37]Id.

[38]Phelin v. Kenderline, 20 Pa. 354. The witness asked the court if the question was proper. The court told him he need not answer it, if the answer would criminate himself. He then said "I decline answering then."

virtuous woman. In a prosecution of Wallace for bribing members of a nominating convention, Tate was asked, whether he had heard Wallace talk about drawing a check during the convention; whether he had heard W. make offers of money to A and B, if they would vote for X; whether he Tate, had any conversation with W about how he would vote, whether W had any packages of money there; whether W, during the convention offered A, B, and himself, (Tate), any money, if they should vote for X, and if so, how much. It was held that the answers to none of these questions could tend to incriminate Tate. If he had answered the last question affirmatively, says Sterrett J. "and had then been asked whether he accepted the offer, the question might or might not, according to circumstances, involve a self-criminating answer. But, the question that was put to the witness did not necessarily involve a criminating answer"[39].

WHO DECIDES THAT THE ANSWER WOULD INCRIMINATE?

The witness only knows what his answer to a question, if refusing to perjure himself he answers truthfully, must be. He is not bound to whisper it even to the trial judge, for his immunity extends not merely to the jury, but to the judge or any body, since an admission to any body, could be proved by the hearer of it, in any subsequent investigation[40]. Nevertheless the act of 1887 exempts from answering no other question than, "any question which in the opinion of the trial judge, would tend to incriminate him". The judge may be convinced that the answer will incriminate, by the belief of the witness, declared under oath, that it will. He should state under oath, that the answer will criminate, or tend to criminate him, if he does not show how it does so[41], and unless the court is convinced, despite the opinion of the witness, that the answer cannot incriminate, it will excuse from answering. If the court thinks that no possible answer will tend to criminate, it will compel an answer[42]. When the

[39]Com. v. Bell, 145 Pa. 374.

[40]But, the principle could easily be adopted that a revelation to the judge, made for the claiming of the privilege, should be incapable of proof by him.

[41]Lusk v. Callery, 29Pitts L. J. 261, Stowe P. J. O'Conner v. Tack, 2 Brewst 407. William Penn Building Asso'n v. Mayer, 2 Mont. 41. It is not enough to submit the question to the court, the witness not saying that he believes the answer will incriminate him.

[42]Com. v. Bell, 145 Pa. 374.

court can see what the act is which the witness must confess, if his answer is to be supposed criminatory, it will decide for itself whether the act is criminal under any existing statutes[43] or at common law. E.g. a witness declining to answer whether he had bought a lottery ticket from one on trial for the offence of selling lottery tickets, the court examined the statute, and deciding that the earlier statute penalizing the buying of said tickets was still in force, excused the witness.

IMPROPER COMPULSION BY THE COURT.

As the privilege is that of the witness, and not of the party, in cases in which the witness is not the party, what redress has the witness, if he is improperly compelled to answer? The party against whom he testifies, may nevertheless gain the verdict and judgment. Can the witness appeal and procure a reversal[44]? What redress then has the witness? Can he, exercising his right as he conceives it, decline to answer despite the order of the court? Yes, but not with impunity. He will be punished as a recusant witness with fine or imprisonment or both. Otherwise courts would be "at the mercy of contumacious witnesses" says Sterrett, J. "It would be in the power of the latter at any time, to cause a miscarriage of justice;"[45] and if the trial court punishes with imprisonment, the Supreme court will not discharge on *habeas corpus.*

THE STATUTE OF LIMITATIONS.

If the exposure of the witness to disgrace, excuses him from testifying, long age of the criminal and disgraceful act would hardly withdraw the exemption, for though an act is ancient when it becomes known, the commission of it leaves a perpetual stigma, and if the public have not hitherto known of it, the effect of the present disclosure would be hardly less disastrous to reputation, than the present disclosure of a recent act. These considerations however do not seem to have been very powerful in inducing the court to hold that it is error to compel a man to admit

[43] *In re* Doran, 2 Pars. 467.

[44] In Baird v. Cochran, 4 S. & R., 396, counsel argued that the court's improperly compelling a witness to answer, could not be a ground of reversal, because the party could not assign it for error. Tilghman C. J. not deciding the point, remarked that there was "considerable weight" in the argument.

[45] Com. v. Bell, 145 Pa. 374.

a fornication so old that prosecution is now barred. "His answer," says Green J.[46] "would be sufficient, when testified to by others who heard it, to lay before a magistrate who could commit him to prison to answer the charge in default of bail. It would also be sufficient to place before a grand jury who could find an indictment against him, upon mere proof of his extorted answer." He could be thus compelled to appear in court, employ counsel, undergo expense and trouble "*besides* suffering the shame, perhaps the ignominy, of defending himself, against a criminal accusation made by his own mouth against himself, because he was coerced to do so * *. At least he would be obliged to plead the statute of limitations, and if the crime was infamous on acquital an such a plea would be scarcely better than a conviction." It could have been seen however, that almost none of these dreadful consequences could happen if the court had remembered the principle, elsewhere stated, that, if a man is compelled by the court to answer despite his objection, his answer cannot be used in any later prosecution[47]. Some body might, it is true, make an information founded on the confession, but it would be the duty of the magistrate to dismiss the complaint. If he did not, it would be the duty of the district attorney to drop the prosecution, or the grand jury, to ignore the bill, or for the trial court, when the evidence was offered, to exclude it.

STATUTORY IMMUNITY FROM LATER PROSECUTION.

The view tacitly entertained by the people in adopting the constitution of Pennsylvania, was, that the rule excusing a man from testifying to his own criminal act, was satisfied, when the use of that testimony in any later proceeding to punish the witness for it, was prevented. The 10th section of Art. viii, of the Constitution prescribes that "in trials of contested elections, and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony upon the ground that it may criminate him, or subject him to public infamy, but such testimony shall not afterwards be used against him, in any judicial proceeding, except for perjury in giving such testimony"[48]. A similar provision is in section 32, Art iii, respecting investiga-

[46]McFadden v. Reynolds, 20 W. N. C. 312.

[47]Horstman v. Kaufman, 97 Pa. 147; Com. v. Bell, 145 Pa. 391.

[48]In *In re* election of M. J. Kelly, 5 Lack. L. N. No. 1., a voter was compelled, in an election contest, to say whether he had received money for his vote.

tions and judicial proceedings against any person who is charged with bribery or corrupt solicitation[49]. The courts of some states and of the United States have held that no amnesty is sufficient, which simply forbids the use of the evidence, permitting the punishability of the offence, if proved in some other way, to continue, but this is evidently not the view of the enacters of the constitution of this state. The 22d section of the act of July 12th, 1842, to abolish imprisonment for debt and to punish fraudulent debtors, enacts that "no person shall be excused from answering any bill seeking a discovery in relation to any fraud prohibited by this act, or from answering as a witness in relation to any such fraud; but no such answer shall be used in evidence in any other suit or prosecution"[50]. The validity of statutes containing this provision, seems to be conceded by Gordon J. in Hortsman v. Kaufman[51]. In other cases however, a different view has obtained. It has been held, e.g. that the act of July 9, 1897, providing for the examination of a debtor or others, with respect to the *bonâ fides* of judgments confessed by him, despite the self-incriminatory character of the answers solicited by questions propounded, and providing that the answers shall not, in the language of the constitution *supra*, be used in any other suit or prosecution, is unconstitutional, because the immunity thus given is not broad enough[52]. The answer elicited, suggests McConnell J.[53] may "by indirect means be used against" the witness, by which, probably is meant, may lead to investigations by officers or others, which will result in the discovery of independent modes of proving the guilt. Quoting from Counselman v. Hitchcock, 142 U.S. 547, "It is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offence, or the sources from which or the means by which evidence of its com-

[49]Bribing members of a nominating convention to vote for X as candidate for Congress, is within this section. Com. v. Bell, 145 Pa. 374, 389.

[50]In Uhler v. Maulfair, 23 Pa., 481, it was held, a grantee of the debtor having been compelled to testify, in a subsequent ejectment against him, by one who bought the land at an executor's sale, as the property of the grantor, that the admission made by the grantee as a witness, could not be used against him.

[51]97 Pa. 147.

[52]Hamburger Co. v. Friedman, 6 Dist. 693, Samler v. Myers, 7 Dist. 147 Mayer v. Mayer, 16 Lanc. 49.

[53]Millers v. Brown, 22 Pa. C. C. 109.

mission, or of his connection with it may be obtained or made effectual for his conviction *without using his answers* as direct admissions against him. No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution. In view of the constitutional provision, a statutory enactment to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates," Walling J. concludes[54] that the act of 1897 is in so far as it compels self-incriminating testimony, void. In Samler v, Meyers[55], Wiltbank J., reaches the same conclusion, but for somewhat different reasons. He does not insist that the act requiring the testimony, shall by the fact that the witness gives the testimony, render him immune from prosecution for the offense which he therein confesses, but he apparently thinks that the statute must provide for the impounding of the testimony or for the taking of the testimony before a judge who will exclude questions designed to compel replies that may be used indirectly. He thinks the act of July 12, 1842 valid because the testimony is to be obtained by a bill in equity and the defendant can have the benefit of counsel, and the rulings of a chancellor before he commits himself, and the answers may be impounded. This effort however to show how a statute requiring self-criminating testimony without virtually obliterating the crime confessed, so far as the punishment of it is concerned, is consistent with the right of a person not to disclose facts which may become cues for discoveries by others which may lead to punishment, must be regarded as feeble and unsuccessful.

COMMON LAW IMMUNITY.

It seems that independently of any such provision, the mere fact that the court compelled a witness to testify, despite his objection, would as effectually work his exemption from any later use of his admissions, as would such statutory provision. Referring to the constitutional provision *supra*, in cases of bribery, the trial court having punished a recusant witness, Sterrett J, said, holding that the witness was in fact not privileged, "but, whether the court was right or wrong in holding that the rela-

[54]Krug v. Behringer, 6 Dist.770.

[55]7 Dist. 147. In Page v. Suspender Co. 191 Pa. 511, it was said that whether that part of the act of July 9th, 1897, which compels a person to testify is valid or not, the remainder of the act is valid.

tor was thus protected by the section under consideration, the decision itself [i. e. of the court that the witness must testify] would have shielded him. No court would permit the testimony of a witness truthfully given under such circumstances, to be afterwards used against him in any judicial proceeding." Admitting this principle, as did Gordon J. in Horstman v. Kaufman[56] it is not a little remarkable, that he should have thought that the immunity against future use of the evidence, if secured by statute, was any better than such immunity secured by a principle which the courts would as much and loyally respect as they would a statute. At all events he indulges in a diatribe against the act of June 11th, 1879[57] enabling a plaintiff in an execution, upon filing an affidavit that he believes the defendant owns property which he fraudulently conceals and refuses to apply to his debts, to examine the defendant on oath as to his property, because it does not explicitly say that the testimony thus obtained shall not be used in any later proceeding against him. It ought to be immaterial what the cause of the witness' future immunity is, whether statute or judge-made maxim. What is important to him is, that, by whatever means, what he says under the compulsion of the court shall not be employed later against him. Indeed, this conclusion was reached by Slagle, J.[58], when, speaking of a provision in the act of July 9th, 1897[59] for the examination of a debtor by his creditor, as to the *bona fides* of judgments confessed by him, that "no person shall be excused from answering as a witness as to any matter relating to the inquiry * * * but no such answer shall be used in evidence in any other suit or prosecution," he remarked, holding the act violative of the constitutional immunity, "the effect of the law is the same, with or without the clause prohibiting the use of the evidence in any other proceeding, for the reason that evidence so given, would be regarded as being given under arbitrary compulsion, to which he ought not to have been subjected."

PRODUCTION OR BOOKS AND PAPERS.

As the oral testimony of a witness or party cannot be extorted from him, when it would tend to criminate him, so he cannot be compelled to produce papers, when they contain en-

[56]97 Pa. 147.
[57]P. L. 129.
[58]Hamburger Company v. Friedman, 6 Dist. 693.
[59]P. L. 237.

tries having the same tendency. "The defendant" said Williams J.[60] "could not be compelled to testify against himself as a witness, and for the same reason he cannot be compelled to aid in his own conviction by the production of his books and papers." If to a bill in equity alleging fraudulent conspiracy, the defendant answers denying all fraud he virtually says that his books will not incriminate him. To the application of the plaintiff for the production of the books before an examiner, the defendant must at least allege that they will in his belief, criminate him. Simply replying that his counsel has read to him the rule concerning a witness' immunity, without asserting that the books will incriminate will not be sufficient.[61]

WHO HAS THE IMMUNITY.

The right of a person to decline to answer questions, the answer to which would incriminate him, is not peculiar to any classes. It attaches to non-citizens as well as citizens. Nor does it depend on the character of the criminal or penal act with which he is accused, or which his testimony will disclose. As corporations may for some crimes be indicted, and for other acts be subjected to fines and penalties, enforceable by suits of a civil nature, they may insist, like natural persons, on the immunity. They may, e.g., refuse to produce their books and papers, when the object of demanding them is to establish their liability to a penalty[62]. It is even said by Arnold P. J., that the officers and employes of a corporation cannot be compelled to testify[63] an extension of the privilege so important as to deserve more consideration than seems to have been given to it. If A has formerly been president of corporation X, and is now a director of corporation Y, on a suit against Y for a penalty, A may be compelled to testify for the plaintiff with respect to matters learned by him while president of X.[64]

WHO CAN ASSERT THE IMMUNITY.

The privilege of refusing to answer self-criminatory questions is that of the witness. He may be willing to answer. The

[60]Boyle v. Smithman, 146 Pa. 255, Logan v. Pa. R. R. 132 Pa. 403. The action was for a penalty.

[61]O'Conner v. Tack, 2 Brewst, 407.

[62]Logan v. Penna. R. R. 132 Pa. 403, Ladenburg v. Penna. R. R. 6 Dist. 453.

[63]Ladenburg v. Pa. R. R., 6 Dist. 453.

[64]Ladenburg v. Pa. R. R. 6 Dist. 453.

party who will be affected adversely by his answer, cannot insist on the exclusion of his testimony. Nor when the witness is a party to the proceeding, can his counsel object to the question, unless perhaps instructed by him to do so.[65]

WHEN THE IMMUNITY IS TO BE CLAIMED.

A witness, anticipating that the purpose of a party in subpœnaing him, was to examine him concerning criminal acts, might refuse to obey the subpœna, stay away from the trial, or being present, he might decline to be sworn, or being sworn, he might when the question was put to him, decline to answer it. In Galbreath v. Eichelberger[66] the court refused to compel the witness to be sworn, as it reasonably could if the party calling him stated what information he expected to extract from him, and this information in the opinion of the court, would incriminate the witness. When the testimony to be obtained from the witness does not appear, or appearing, some of it at least is free from a self-incriminating character, the proper course is for the witness to be sworn, and to decline to answer such questions as could not be answered without his incriminating himself. In Eckstein's Petition[67] an examination into the peculations of John Bradsley, treasurer of Philadelphia, was being made by a sub-committee of the finance committee of councils. Mr. Yard refusing to be sworn, because indictments had been found against him for acts connected with the Bardsley peculations, the clerk of common council applied to the court for an order on him to be sworn and testify. The court, making the order, said that Yard should answer any qustions that would not incriminate. "If the witness has knowledge of the accounts and deposits of John Bardsley, late city treasurer, which does not connect him with an improper and illegal use of public funds, there is no sufficient reason why he should not state his knowledge of such use under examination as a witness before the subcommittee."

When the avowed purpose of the examining party is to inquire into matters respecting which the party to be examined is

[65]Lusk v. Callery, 29 Pitts. L. J., 261. Bill in equity charging defendants with a scheme to cause a judicial sale of a railroad in violation of the rights of stockholders. The bill charged what was a criminal conspiracy. At the hearing before the master, defendants' council objected to the examination of them.

[66]3Y 515.

[67]148 Pa. 509.

privileged. the court when its agency is invoked by the examining party, preliminary to the examination, may decline to aid in it. Thus, the court discharged a rule to take depositions of officers and employees of the Pennsylvania Railroad Co. in an action for a penalty[68]. The court refused to appoint a commissioner to take the examination of a defendant, under the act of June 11th, 1879, with respect to fraudulent concealment of property[69] but in Loewi v. Haedrich[70], Pierce J. declined to discharge the appointment of a commissioner, for the reason that the defendant could object to any questions that might require an incriminating answer.

EFFECT OF ALLOWANCE OF PRIVILEGE.

While a party affected by the testimony of a witness which he was compelled to give, despite his just claim of privilege, may not assign this admission as error, the party who loses testimony to which he is entitled on account of the court's improperly excusing the witness from testifying, may cause the judgment to be reversed[71]. As the parties cannot control the witness with respect to the claim of privilege nor the action of the trial court thereon, neither the exclusion of the question nor the act of the witness in procuring its exclusion is to be considered by the jury. In an action by a father for the debauching of his daughter, two of the defendant's witnesses were asked if they did not know that the daughter was not a virtuous woman. They were excused from answering it, on their objecting to it. The court properly told the jury that "it would be unfair to draw any inference from their refusal as to the unchastity of the daughter because people are to be proved guilty upon what a witness swears, and not on what he insinuates; for all testimony must be given under oath." Says Lewis, J., in the supreme ccurt, "The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inference whatever, can be legitimately drawn by them from the legal assertion by the witness of his constitutional right." When the party is the witness who has asserted his privilege, no inference may properly be drawn from that fact,

[68]Ladenburg v. Pa. R. R. 6 Dist. 453.

[69]Horstman v. Kaufman 97 Pa. 147.

[70]8 W. N. C. 70.

[71]McFadden v. Reynolds, 20 W. N. C. 312.

[72]Boyle v. Smithman, 146 Pa. 255.

and the court properly refuses to allow the opposite party to make any comments upon it. "The privilege of the defendant," says Williams, J., "to decline to furnish evidence against himself would be of very little value, if the fact that he claimed its protection could be made the basis of an argument to establish his guilt."[72]

MOOT COURT

SAMUEL STEWART'S ESTATE.

Adoption and Its Effect on the Intestate Law.

STATEMENT OF FACTS.

Samuel Stewart had three daughters but no sons. He accordingly adopted the child of his daughter Mary. Later Mary died. Samuel Stewart has now died intestate, leaving two surviving danghters and his adopted son, Henry. Henry, who was the only child of Mary, claims one-fourth of Samuel's estate as representative of his mother and one-fourth in his own right as an adopted son. An auditor has held that he cannot claim as both son and grandson. Henry files exceptions.

Brown for the Plaintiff.

An adopted child will inherit both from its adopted and its natural parent. Reel's Estate, 50 Pittsb. L. J. 128. Vol. 33, U. S. 1902.

Bruce for the Defendant.

When a grandfather adopts a grandchild and dies intestate, the adopted grandchild inherits only as a child and not in a double capacity as child and grandchild. Morgan v. Reel, 213 Pa. 81.

OPINION OF THE COURT.

BUSHMAN, J.: We can find no fault with the conclusions and findings of the Auditor, since he has followed the ruling of the Supreme Court in Morgan v. Reel, 213 Pa. 81, that case being as this in every respect except that the adopted child was a grandaughter. That Court seems to have had little trouble in reaching its conclusion; the discussion and opinion being very brief. In the words of the Court: "The act of May 19, 1889, P. L. 125, intended to put the adopted child on the same footing as the actual child, but not on any more favorable footing." "His adoption transfered him from the class of children, and his status in the latter."

We are happy to be able to agree with the Supreme Court in this,

for while the act of 1887 makes no mention of taking away from an adopted child the right to inherit from its natural parents, it shows that the Legislature intended that he could only take from the adopting parent in one capacity. The Legislature in the act of April 8, 1883, gave to children by representation of their parents such share as would have descended to such parents, if they had been living at the death of the intestate; and in the act of 1887 the right to take by representation is taken away from one who has been adopted under the act, if recovery is sought by representation from the estate of the adopting parent. The Legislature, in the act of 1887, clearly shows that it intended the adopted child should have no advantage whatever over other children, and the act of 1883 where it comes in conflict with this, can be of no effect.

No injury is done the child, for it must have been shown that the adoption was to his advantage to have been allowed by the court.

Such position has been taken by the Supreme Court of Mass., in Delano v. Bruerton, 148 Mass. 619, while an opposite view is taken by the Supreme Court of Iowa in Wagner v. Vaeuer, 50 Iowa 532.

Therefore the exceptions are overuled, and it is directed that Henry Stewart take only as a child of Samuel Stewart, deceased.

OPINION OF SUPREME COURT.

Samuel Stewart had three daughters. The son of one of these, Mary, he adopted. Had Mary been alive, when he died, this son would have taken one-fourth of the estate, and Mary also one-fourth. Had Mary died the next day, the next hour, the next minute, leaving as her only child this son, he would have taken her fourth and thus have acquired two-fourths. If it is not shocking to see him gain the second fourth, when his mother survives his grandfather by but one minute, it can scarcely be so, to see him gain it, when his mother predeceases her father by one minute.

The legislature has not chosen to say that when a boy is adopted, and thus gains the right to inherit from the adopting person, he shall lose his existing right of inheritance in virtue of his natural relationships. If the son of X is adopted by A, he acquires the power to inherit from A, but he does not lose the power to inherit from X. It is hard to see why, if X is the son of A, and by virtue of that relationship, the son of X normally inherits from A, he should lose the power thus to inherit, because the statute law has given him another power to inherit from A, the statute law not saying that the one capacity shall take away the other.

The power to inherit is the creation of law, and the question must always be, what is the will of the legislature. The language of the act of 1887 suggests no intention to deprive the adopted of any powers of inheritance that he possessed independently of the adoption. The phrase, that he shall inherit "only as one of them" [i. e. the natural children] in which the court, in Morgan v. Reel, 213 Pa. 81 descries such an intention will surely bear a very different interpretation.

Other courts have taken inconsistent views of the question. In Wagner v. Varner, 50 Iowa, 533, it was held that the grandson, adopted by his grandfather, would take the share of a child, in his own right, and

the share by representation of his mother. In Delano v. Bruerton, 148 Mass. 619, the court invented an exception to the statute, holding that the grandchild, if adopted could take but one share, that of a child. In Reel's Estate, 50 Pittsb. L. J. 128 (Vol. 33, N. S.) the orphans' court decided in a careful opinion, that the grandson took two shares of the personal estate. In a subsequent partition of Reel's real estate, the court decided that the grandson took only the share of an adopted son, and lost the share, which, as child of his mother, he would otherwise have been entitled to. As statutes mean what the ultimate court understands them to mean, we are obliged to say that the decision of the learned court below is correct.

Appeal dismissed.

EX PARTE WILLIAM JACOBS: HABEAS CORPUS.

Extradition—Effect on Crime Committed After Extradition.

STATEMENT OF FACTS.

Jacobs was extradited from Great Britain for forgery. During his trial for the forgery he attacked and killed the deputy sheriff who had him in custody and fled. He was acquitted of the forgery. He was found and arrested on the charge of murder. He asks that he be discharged and allowed to return to Great Britain. The court refused to discharge him, holding that he could be held for the murder.

Hatz for the Petitioner.

Jacobs should have had a reasonable time to return to Great Britain. U. S. v. Ranscher 119 U. S. 407; Treaty with Great Britain, Aug. 9, 1842.

Bushman against the Petition.

Appellant is not protected by the treaty of 1842, nor Rev. Stat. secs. 5,272 and 5,275 and is expressly denied protection by Art. 3 of Extradition between U. S. and Great Britain, Mar. 25, 1890. U. S. v. Ranscher 119 U. S. 407, Cosgrove v. Winney, 174 U. S. 64; State v. Vanderfoal, 39 Ohio, 273.

OPINION OF THE COURT.

ATKINS, J.:—This case has reference to the status of a criminal under extradition, proceedings and as far as we have been able to find cases involving extradition, not a single one completely covers the facts of the case at hand and it is with no little hesitancy that we attempt to lay down principles of law upon so important a subject. Counsel for Jacobs contends that by the treaty of 1842, commonly known as the Ashburton Treaty, and also by Revised Statutes 5,272 and 5,275, he should be allowed to return to Great Britain, from which country he has been extradited. Sec. 5,272 has reference only to the giving up of fugitives by United

States and therefore gives us no light on the subject. Sec. 5,275, *inter alia*, provides for "the safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial *for the crimes* or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offences, and for a reasonable time thereafter," etc.

The treaty of 1842 provides that it shall be the duty of either country to deliver fugitives upon demand, who shall be charged with the crime of murder, piracy, arson, robbery or forgery or the utterance of forged paper. In construing this treaty, the Supreme Court of United States, in U. S. v. Rauscher, 119 U. S. 420, said, "It is very clear that this treaty did not intend to depart from the recognized public law which had prevailed in the absence of treaties and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty." In speaking of the rights of the accused, the court further says "he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up and that if not tried for that, or after and acquittal, he shall have a reasonable time to leave the country before he can be arrested upon the charge of any other crime committed previous to his extradition." Whether the court was justified in going to this extent cannot now be questioned for the reason that the result of the decision has been incorporated in the treaty of Mar. 25, 1890, the third article of which is as follows: "No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence *committed prior to his extradition*, other than the offence for which he was surrendered; until he shall have had an opportunity of returning to the country from which he was surrendered."

The difficult part of the case is to determine whether the protection given to fugitives by these treaties has reference only to offences committed prior to the extradition proceedings, or whether it makes him immune from arrest for crimes committed after extradition as was contended by counsel for Jacobs. To this latter view we connot subscribe for the reason that dire results will be sure to follow if such a position were to be taken by the courts. The prisoner would be free to arm himself and kill whom it pleased him and he could not be molested until his "reasonable time" had expired. It seems hard to believe that Great Britain or any other nation would maintain such a position.

Moreover we do not believe that a fair interpretation of either treaty according to the laws of interpretation as laid down in the brief of Jacob's Counsel, justifies such a conclusion. He says we are to follow the intention of the parties as far as it goes and stop where it stops, whatever may be the imperfections which it leaves behind. Inasmuch as the treaty of 1890 specifically says "for any crime committed prior to his extradition," according to the rule above, we are forced to the conclusion that it did not mean to include crimes committed after extradition, and the decision in U. S. v. Rauscher supra leads us to a similar conclusion. The above is not a new doctrine as we find in the Am. and

Eng. Encyc. vol. 12, p. 606, the following statement: "It may now be regarded as well settled by the decisions of State Courts and a recent decision of U. S. Supreme Court that a fugitive from justice surrendered by one state upon the demand of another is not protected from prosecution for offenses other than that for which he was surrendered, but may, after being restored to the demanding state, be lawfully tried and punished for any and all crimes committed by him within its territorial jurisdiction, either before or *after extradition.*" Though the part of this rule referring to offences committed prior to extradition, is not in force in international extradition, yet we have found nothing in either the authorities or cases which leads us to believe that the latter part would not be enforced and accepted by Great Britain or United States.

In the light of these authorities and for the reasons given herein, the writ of habeas corpus must be refused and the prisoner remanded order accordingly.

OPINION OF THE SUPREME COURT.

That one who has been extradited for trial and punishment for one offence, cannot be tried or punished for another, which he had already committed before his extradition, was decided in U. S. v. Rauscher, 119 U. S., 407. The decision has been recently repeated, in Johnson v. Browne, 205 U. S. 309.

The question now before us is whether one who has been extradited and who, after his extradition, and before an opportunity has been afforded him to return to the surrendering country, commits another offence, can be detained, tried and punished for it, until he has had an opportunity to leave the country and until he shall freely return to this country or be again delivered up on second extradition proceedings.

Although there are dicta in U. S. v. Rauscher, susceptible of the interpretation that in no case can an extradited person be tried for any crime other than that for trial for which he was surrendered, there are other dicta of a contrary tenor. In one or two places, the writer of the opinion speaks of the prisoner's right to "a reasonable time to leave the country before he is arrested upon the charge of any other crime committed *previous to his extradition.*" The treaty of 1842 between Great Britain and the United States has been broadened by the convention of July 12, 1889. This convention takes the pains to say for what offenses the surrendered party may not be tried and punished. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offence *committed prior to his extradition,* other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered. If the contracting parties had intended that the extradited person should be triable for that crime only, upon allegation of which he had been surrendered, their intention would have been perfectly expressed, had the words "committed prior to his extradition" been omitted. The insertion of these words makes difficult the inference that they intended what they clearly would have intended had they omitted them.

The inconveniences that would exist, if the nations intended to forbid

the taking of cognizance of crimes committed after extradition are so serious as to render such intention improbable. The alternative would be that for a fresh crime committed after extradition, a second extradition would have to be applied for. But not all crimes are extraditable. In the treaty of 1842 only seven were of this class, and some of the most atrocious and shocking offences were excluded from it. Under the present treaties, political offences are non-extraditable. Could it have been the intention of Great Britain or the United States, after 1842, that if a man was surrendered to one of them by the other, and while awaiting trial and punishment, committed rape or other grave crime, he should be allowed to escape, and the slow and uncertain process of a second extradition relied upon? Could they have intended that the surrendered party should, after a serious polititical offence, be allowed to leave the country although, once out of it, he could never be surrendered at all?

The object of the provision against trying a man for offence *b*, after he had been surrendered for trial for offence *a*, was to prevent the chicanery which would make the charge of an extraditable offence as a means of securing a man for trial for a non-extraditable one. This species of trickery, to which even the state department of the United States has unfortunately not shown itself superior, cannot be indulged, in consequence of the doctrine that the government to which X is surrendered for trial for crime *a*, may, if he commits crime *b*, after reaching its territory, be tried and punished for *b* without fresh extradition.

The opinion of the learned court below, ably supports the conclusion announced by it. A similar result was reached by the Supreme Court of California in Ex parte Collins, 90 Pac. Rep. 827. A, extradited from Canada for perjury, was put on trial. At this trial he became a witness. The jury disagreed. He was now charged with perjury, as a witness in the trial. The court held that he could be put on trial for it, without having a chance to return to British Columbia, and without any second extradition.

In the case before us, the second crime is murder, one of the gravest known to civilization. Surely we are not lightly to assume that when a nation obtains the return of a fugitive on one charge of crime, it obliges itself to submit, should he, on his return, commit other crimes, to the necessity of allowing him to freely leave the country, at the expense of his probable ultimate escape from all liability. It is not in the interest of civilization thus to give immunity to criminals. The keenest sentiment of national sovereignty could not reasonably ask that another nation should bind itself to allow to those who violate its most important laws, the opportunity of escape, because they have violated them after surrender for a comparatively trivial crime.

Appeal dismissed.

THOMAS HOKE vs. SIMON SILTON'Z EXECUTOR.

Guarantor—Offer—Acceptance.

The facts appear in the Opinion of the Court.

Jones, for the Plaintiff.

Mayo, for the Defendant.

REPLOGLE, J. It appears that one Wm. Hallet applied to Hoke for sales of goods from time to time, but Hoke not knowing him, insisted on a guarantee. Haller asked Silton, his father-in-law, to give the guaranty. Silton wrote to Hoke, "My son-in-law desires during the coming year to buy goods frum you, from time to time. I hereby guarantee payment of any goods he may buy, provided that my liability shall not exceed $1000." Receiving this Hoke sold to Haller on four occasions, goods to the amount of $3500. Two months after the last of these sales, Silton died. The next day without notice of this death, Hoke, whose business was in Nebraska (Lincoln) sold $1500 of other goods to Haller. At the time of the last sale, Haller still owed $370 on the $3500. This is assumpsit for the $370 plus $630 part of the price of the goods last sold.

The principal question in this case to decide, seems to be whether the agreement betwee Hoke and Silton made the latter simply a general guarantor, or a special guarantor, which amounts to a surety.

In a contract of suretyship there is a *direct* liability to the creditor for the act to be performed by the debtor, while a guaranty is a liability only for *his ability* to perform this act. In the former the surety assumes to perform the contract of the principal, if he should not, while in the latter the guarantor undertakes that the principal is *able* to perform. The rule laid down in Reigart v. White, 52 Pa. 438 is, "If the act which the surety undertakes shall be done, is not done he is liable at once; but the guarantor is liable only when insolvency is shown."

We see if this was a contract of general guaranty only, the plaintiff could not recover in this case against Silton, until he had first proceeded against Haller, also that if the defendant was a guarantor, he would not be liable, as he had received no notice from the plaintiff that he would accept him as guarantor. This is the contention of the defendant and this doctrine is supported by too many cases in Pennsylvania to be disputed.

In order to decide whether this was a contract of guaranty or of suretyship, we must look to find the intention of the parties. This intention, as in this case, is often difficult to find. It was said in Riddle vs. Thompson, 104 Pa. 333, that the language in the agreement which will make the party a surety or guarantor is not clearly defined by the authorities. On the case of Allegheny Light Co. vs. Reinhold, 7 Dis. Rep. 385, J. White says, "Whether the contract is that of guaranty or surety, does not depend upon the use of the words *security* or *guaranty*. It depends upon the nature of the contract and the circumstances of the case."

Now in this case Silton says, "I hereby guarantee payment of any goods he may buy, provided that MY *liability* shall not exceed $1000."

What does he mean when he says, MY *liability?* We can only infer that he means his own liability. If he had said provided THE liability shall not exceed $1000 then we might infer that he meant his son-in-law's liability should not exceed $1000 and that he would only be a guarantee for his son-in-law for that amount, in case the latter would become insolvent or would not be able to pay.

In such cases as this the courts seem to incline towards suretyship or special guaranty amounting to suretyship rather than general or simple guaranty. P. and L. Dig. of Dec., Vol. 20, Col. 35516. In Setzur vs. Greenwald 2 W. N. C. 395 appeared an agreement—"I hereby agree to guarantee the bills of goods ordered by (C) from (A) amounting to $287." This was held to be a surety. In Main Belting Co. v. Fowkes, 10 Dis. Rep. 6, the agreement was "I will see that you get the money for the goods." This was also held to be a surety. Also Owen vs. Jetter 5 Del. Bo. 392. We think that the language in these cases is not as strong as in this case, as here Silton says "MY LIABILITY." Many other cases might be cited to show the tendency of the courts toward suretyship.

The death of Silton does not relieve his representative from liability. "As the obligation of a surety to pay money on the happening of a future or contingent event, survives the surety and binds his representatives. P. & L. D. of D. Vol. 20, Col. 35692. White v. Comm., 39 Pa. 167—Busch's Est. 12 Phil. 53,

The Act of May 14, 1874 requires notice in writing before sureties can be discharged from their liability. The plaintiff had no notice by writing, or of the death, and it is evident he was not negligent in attempting to learn of the death, considering the time the order was sent and his distance from his surety. Also the fact that part of this debt accrued after the death of Silton, does not affect the case as the goods were sold the day after the death and it can easily be inferred that Hoke did not know of it. It can also be inferred that this is the first time during the transaction that the amount of $1000 accrued, as it is likely that cash was paid for the rest of the goods at the time they were delivered.

In view of these facts we give judgment for the plaintiff for the full amount claimed.

OPINION OF THE SUPERIOR COURT.

The liability of Siltonw as tendered by himself to Hoke. He wrote to Hoke, informing the latter of the desire of his son-in-law to make purchases from time to time during the year, adding "I hereby guarantee payment of any goods he may buy, provided that my liability shall not exceed $1000."

It is not indispensable that we classify and denominate his writing. It is an offer. It might be accepted or declined. It might be accepted for one sale, and not for a second, or it might be accepted by making repeated sales, in reliance upon it. Was then Silton entitled to know whether it was going to be acted on? Some cases leave doubtful whether notice of acceptance must precede any act in reliance on the offer, or whether it is enough, if notice is given of each particular act in reliance

upon it, immediately after such act. In this case, notice of neither sort is shown. We think it should have been.

In Gardner v. Lloyd, 110 Pa., 278, in consideration of the acceptance of a proposal to extend the time for paying certain debts by the creditors, A "guaranteed" to the extent of $10,000 "the payment of the said debts at the times, and in the manner mentioned" in the proposal. Notice of the acceptance of this guarantee was held necessary. In Coe v. Buchler, 110 Pa. 366, Buehler in consideration of $1, guaranteed the fulfillment of the contract, to be made between the plaintiff and a consignee. He was held entitled to notice of the acceptance of the guarantee. In Evans v. McCormick, 167 Pa. 245, McCormick received from Evans, a telegram "Bierly's purchases amount to about $700. Will you guarantee payment." He answered "I will guaranty payment of Bierly bill." Although it was contended that the giving of the guarantee might be regarded as the acceptance of the proposal of Evans to sell goods to Bierly the court held that notice by Evans that he was going to act on the guarantee, or that he had acted on it, was necessary, in order to complete the liability of McCormick.

Schlaudecker desiring to be sole agent for the sale of bicycles, sent what was virtually an application for the appointment. Upon the back of this was a statement by Reed, that in consideration of $1, he guaranteed to the Acme Manufacturing company "the prompt fulfillment of all the covenants and conditions of the within contract on the part of Leo Schlaudecker, and that the within named Leo Schlaudecker will make the payments therein specified according to the terms thereof." It was held that there was no liability on Reed if he had not been notified of the acceptance of his guaranty. Acme Manuf. Co. v. Reed, 197 Pa. 359.

The offer of Silton was to be liable up to $1000 for any goods that should be sold within a year, by Hoke to Silton's son-in-law. When Hoke sold one parcel of goods, he would then accept the guarantee for the price of those goods. But he was not then bound to go on and sell other goods within the year. He might do so or not. The so-called guarantee was therefore, until each sale was made, only an offer, so far as that sale was concerned. With respect then to the sales made after Silton's death, there was simply an offer, which by the making of these sales Hoke accepted. But, when these acceptances occurred, Silton the proposer, was dead. The death of the offerer *ipso facto* revokes it. "This event is in itself a revocation, as it makes the proposed agreement impossible by removing one of the persons whose consent would make it." Williston's Wald's Pollock, Contracts, 42, Helfenstein's Estate, 77 Pa. 328, Phipps v. Jones, 20 Pa. 260.

It appears that the death of Silton was not known to Hoke when he made the last two sales. This we think is immaterial. Silton was in fact dead, and concurrence of his will with that of Hoke was thus impossible. Silton could have revoked the offer at any time. He lost this power by his death, unless the death be a revocation. It is said that his administrator could have revoked? But, how could the administrator know what contracts, and with whom, he had made? Hardship there will be either to Hoke or to Silton. We see no sufficient reason for relieving the for-

mer, at the cost of the latter. It was the act of the former, after the death of Silton, which has caused the loss. There ought to be some substantial reason for shifting it from him to the estate of the dead man. In Slagle v. Anderson, 1 Mona. 30, the death of the guarantor of the repayment of moneys to be advanced to X before certain advances had been made by the guarantee to him, was held to prevent any liability on the part of the estate of the guarantor. Although the death had been in fact known, before the advances were made, this circumstance escapes the attention of the Supreme Court which simply remarks- "The court below properly held that the guaranty in suit was a revocable instrument, and that the death of the guarantor revoked it." Penrose, J., thought, in Busch's Estate, 12 Phila. 53, that a guarantee of the payment under a lease from year to year, might be recalled at the end of any year, and that the death of the guarantor and the grant of letters on his estate, would also recall it. In Illinois Roofing Co. v. Garton, 6 Dist. 407, the guarantee was in some respects similar to that of Silton. Plaintiff wrote to L. W. Mason inquiring as to the standing of his brother George H. Mason, and asking whether he would guarantee payment of anything ordered by George. L. W. Mason replied "I will guarantee all of his bills up to $150 or $200. He is O. K., and if he don't pay I will." Mason died, and the plaintiff, ignorant of his death, then furnished goods. It was held that the death revoked the offer. It is true that the judge persuades himself that the guarantee was not a continuing one, and by that suggestion parries the contention that the death did not revoke. But how absurd it would be to hold that a promise by A to pay for any goods sold up to $200 would be revoked by death and that one to pay up to $200 for any goods, however numerous and valuable that might be sold, would not be. If the promise to pay for the first $200 worth of goods sold is revocable by death, surely the promise to pay for the first $200 worth, or the second $200 worth, or the third $200 worth, must be.

Judgment reversed with v. f. d. n.

JOHN TYLER vs. GEORGE WASHINGTON.

Taxes on Land. Who Liable to Pay.

STATEMENT OF FACTS.

Washington's land was charged with a ground rent of $150 payable to Tyler. Taxes were assessed on the land, which Washington neglected to pay. Tyler sued for a year's rent and by execution caused a sale of the land, becoming thereat the buyer. The taxes were not paid from the proceeds, and thinking that it was necessary for him later to pay them, in order to save the land from sale, Tyler has paid them. He sues Washington in assumpsit for the amount thus paid.

Mauch for the plaintiff. The owner and occupant at the time of assessment is personally liable to pay taxes, and he remains liable although he conveys the land to another.

Hogg vs. Longstreth, 97 Pa. 255.

McClintock for the Defendant. A lien for the payment of taxes remains upon the land itself, even though the land be aliened.

Cooper vs. Holmes, 71 Md. 20.

Dunlap vs. Gallatin, 15 Ill. 7.

OPINION OF THE COURT.

JOHNSON, J. Assuming that the execution and sale of Washington's land conformed strictly to all legal requirements in such cases, the question to be determined is whether or not Washington remains liable far the taxes assessed while he was owner thereof, the land having passed under said sale to Tyler.

At common law, the purchaser of property at sheriff's sale, if taxes are due thereon, would take it *cum onere*.

At the present time however the land is not primarily liable for the debt, but the owner is personally liable therefor. His personal liability is fixed by the following Acts of Assembly- Act of Feb. 2, 1854 P. L. 29; Act of March 24, 1870 sec. 2; Act of April 16, 1879 P. L. 24. Registry Act of Mar. 14, 1865 P. L. 32. The persons charged in the duplicates are personally liable for the tax and their bodies may be taken in execution if no goods or chattles are to be found; in short the collector can look to no other person. Shaw vs. Quinn, 12 S. & R. 298.

No assumpsit will be raised by the mere voluntary payment of the debt of another person; from such an act a request and promise are not implied. But when the plaintiff is compelled to pay the defendant's debt in consequence of his omission so to do, the law infers that he requested the plaintiff to make the payment for him. Hogg vs. Longstreth 97 Pa. 255.

There was here a strict legal liability on the defendant to pay the taxes. It was his duty. The plaintiff was compelled to pay the taxes or lose his land.

It appears to be a clear case for the application of the principle that he who is compelled to pay another's debt because of his omission to do so may recover on the ground that the law infers that the debtor requested such payment. The position of defendant that the action should be against the sheriff for not applying the proceeds of the sale to the taxes is in no wise tenable. He is not the officer charged by law with the collection of taxes but an officer of the court, when conducting a sale, to execute its judgment. The case cited in 62 Alabama 4, was decided under a statute requiring such application of the proceeds to unpaid taxes by the sheriff and can have no weight in this state.

OPINION OF SUPREME COURT.

The taxes assessed on Washington's land, became a lien thereon by virtue of the act of June 4th, 1901. P. L. 364. The second section of this act declares that all taxes hereafter imposed on any land shall be a "first lien on said property, together with all charges, expenses and fees, added thereto, for failure to pay promptly; and such liens shall have priority to and be fully paid and satisfied out of the proceeds of any judicial sale of said property before any other obligation, judgment, claim lien or estate with which the said property may become charged, or for which it

may become liable, save and except only the costs of the sale and of the writ upon which it is made." That a ground-rent, or the arrears of such rent, are one of the charges priority to which is thus given to taxes, can not be doubted. Such rent is an "obligation" a "claim" and an "estate." The 32d section of the act couples ground-rents and mortgages and other charges.

The land was sold, and the proceeds were payable to the taxes. The 32d section of the act expressly says that "On any such sale being made [i.e. any judicial sale] all tax claims shall be paid out of the proceeds thereof first" etc. The tax-claimant was therefore entitled to payment from the proceeds. Whether it actually demanded and obtained payment, or not, the tax-lien was discharged. Allegheny's Appeal 41 Pa. 60; 3 Liens, 451.

Although the 32d section provides that at the first judicial sale for taxes, first ground-rents or mortgages shall not be discharged, if the proceeds of the sale are insufficient to pay the taxes in full, another sale may be made, resulting in the discharge of the ground rent, mortgage, etc. From the proceeds enough will be taken to pay the taxes, before any sum is appropriated to the ground-rent or mortgage.

As all the proceeds of the sale of the land could be appropriated to the taxes, their lien was discharged. The purchaser acquired the premises free therefrom. His subsequent payment of the taxes was voluntary, and can impose no duty upon Washington to reimburse him. It does not appear what was done with the proceeds of the sheriff's sale. If they were all paid to the ground-landlord, he received more than he was entitled to. If the proceeds were paid to Washington, as former owner of the land, he received what should have been paid to the municipality which claimed the taxes. Whether he could be compelled by it to pay that money over to it, it is unnecessary now to determine. If the municipality could have compelled the payment, and its right, by subrogation, has passed to Tyler, the action should have been in its name to his use, and the declaration should have properly stated the foundation of the demand.

It is true that there is a personal liability of the owner of land for taxes assessed upon it, during his ownership; May's estate, 218 Pa. 64; King v. Mt. Vernon Building Association, 106 Pa. 165., a liability not towards the taxing power only, but towards any subsequent owner of the land, who may be compelled to pay the tax, in order to save the land from sale for it. But there is no such liability to the latter, in the absence of this compulsion.

If for any reason, the lien of the taxes was not discharged by the sheriff's sale, it continued, and Tyler paid so much less than the land was worth, as the amount of this undischarged lien. By acquiring the land thus subject to the tax, and for a correspondingly less price, he fell under a duty to indemnify Washington, should Washington be later compelled to pay the tax. He has Washington's land for a price from which has been deducted the taxes, and he is in equity bound to save Washington from the necessity of paying them. By this action he is attempting to

compel Washington to compensate him for doing that for which he has already been compensated.

The lucid opinion of the court below was based on a misconception of the facts, for which it is not responsible.

Judgment reversed.

WILLIAM TRIMMER v. JOSIAH JENKINS.

Deeds.—Must Grantors' Names Appear in the Body of the Deed.

STATEMENT OF FACTS.

A deed of indenture named Samuel Stone, James Harpy, and Henry Harpel as grantors, parties of the first part. These with Jenkins were tenants in common of the tract conveyed. Trimmer was the grantee. The deed was signed by all four, and it was the intention of all that the entire interest should pass to Trimmer. Jenkins however continues in possession. This is an action of ejectment by Trimmer against Jenkins.

Bell for the Plaintiff.

Omission of grantor's name in body of deed is prima facie, a clerical error, if he has signed. The intent of the grantor, when legal, must govern and direct the interpretations of the deed. Means v. Presbyterian Church, 3 W. & S. 303.

Butler for the Defendant.

Where several sign a deed, only those are considered as grantors, who are so described in the premises. Russ v. Stratton, 11 Misc. Rep. 565. (N. Y. Super. Ct.)

OPINION OF THE COURT.

HARRISON, J.:—It appears in this case that a deed of indenture named Samuel Stone, James Harpey and Henry Harpel, as grantors, but these persons with one Joseph Jenkins were tenants-in-common of the tract of land conveyed. William Trimmer was the grantee. The deed was signed by all four parties, and it was the intention of the parties that the entire interest should pass to the grantee Wm. Trimmer. Josiah Jenkins, however, entered into possession and Trimmer is bringing this action in ejectment.

In Pennsylvania the law is well settled that the most important thing in construing a deed is to arrive at the intention of the parties. This being established the courts do not delay long in deciding accordingly. The intent of the grantors, when legal, must govern and direct the interpretations that shall be given to the deed, but if this cannot be clearly learned by the terms in it, no extraneous facts or circumstances can be admitted or received to alter or change it. In this case at bar there is no contention as to the intention of the parties. It is conceded that the intention of all four grantors was to convey his portion of the estate which they held as tenants-in-common. Jenkins intended to con-

vey his one-fourth interest and as an evidence of that fact, he subscribed the deed in question. There was, however, an omission of his name in the deed. Some time ago this omission would have been viewed with suspicion, but today it is well settled that even though there be an omission if the intention of the party is to the contrary, the contrary opinion will prevail, and the deed will be construed as though such an error had not been made. And this would especially be the result when as an evidence of the grantee's intention, besides his admissions, he subscribes the deed with his other co-tenants. The above seems to be the prevailing opinion in: Means v. Pres. Church, 3 W. & S. 312; Griswell v. Gimbling, 107 Pa. 408; Warrall's Account, 5 W. & S. 111.

In Cox v. Freedley, 33 Pa. 124, the Court was of the opinion that the intention of the party, was to be deduced from the language of the instrument; and in making that deduction the court would look at the circumstances under which the conveyance was made.

Authorities to support our view of this case are many and we are of the opinion that the deed in question was valid and effectual to transfer the interest of Josiah Jenkins.

Judgment rendered for the plaintiff.

OPINION OF SUPREME COURT.

Had the deed described the grantors as parties of the first part, had it designated them by the pronoun "we," the appending of the signatures would have been a virtual declaration that those whose names were affixed were the parties of the first part, the "we." No other interpretation would have been possible.

The deed before us is different. It is not a deed the general designation of the grantors in which must be made specific by the signature. It is entirely specific already. It names three persons. It professes to be a grant of a piece of land by these three persons. Jenkins is not one of them.

The deed should describe the grantor, the grantee, the land, an interest in which is to be conveyed, and the interest. The object of the signature, when the designation of the grantor is not indeterminate, is simply to authenticate the averments of the deed. This deed avers that Harpey, Harpel and Stone have granted, bargained and sold the land. When Stone subscribed his name, he adopted the averment. When Harpel subscribed, he likewise adopted it. But what averment is it that Jenkins' subscription adopts? That he conveys, is not asserted by the deed. It is evident that if his name adopts any assertion at all, it must be that found in the deed; and then, he is virtually a subscribing witness, merely, or it must be an averment not found in the deed, and then the deed cannot be his at all. If Jenkins had orally said, I grant bargain and sell the land to Trimmer, and, in order to authenticate it, had written his name on a blank piece of paper, affixing a seal, none would contend that he had made a deed, or that he had conveyed by deed. What better has he done, by subscribing an assertion that three other persons have granted, bargained and sold? His own act is not expressed in the document which he has subscribed. To give sig-

nificance to his signature, it must be detached from the averments which precede it, and associated with averments not written in the deed, nor written anywhere.

The writing of the signature must be interpreted. Was it to authenticate the act of the other three? Was it to manifest that he also had conveyed or was conveying an interest? If the latter, what interest? An undivided fourth, fifth, sixth, seventh, eighth? We seek in the deed in vain for an answer. We may suspect that he intended to show that he was parting with an interest. We may surmise, indeed be strongly convinced, that he was intending to show that he was parting with an undivided quarter. But surely, these intentions are not expressed in the deed. The deed shows acts of Harpey, Harpel and Stone. We think that Jenkins was intending to do a similar act, but not because of anything said in the writing.

The opinions of the courts upon this question are not altogether harmonious, but much the larger number of them have adopted the view that when besides the person named as grantor in the deed, another person not referred to in it, signs, seals and acknowledges it, it cannot be considered his deed, or, at least, no estate passes from him by means of it. In Harrison v. Simons, 55 Ala. 510, was a deed which named three grantors. It was signed by these and also by a fourth person, A. L. Barnett. Says the court, "The persons named in the deed as grantors by signing and sealing it declare and make known to all whom it may concern, that they respectively grant bargain, enfeoff and convey the land therein described to Thomas J. Harrison. * * * But what is declared or certified by the signature and seal of A. L. Barnett? Can they import anything else than is contained in the deed—to wit that the persons described in it as grantors convey and covenant as above? It is not set forth in the deed that A. L. Barnett himself does or shall do any of these things and we cannot attribute any efficacy or meaning to his mere signature and seal, apart or different from what is expressed in the instrument to which they are affixed." With this agree Peabody v. Hewett, 52 Me. 33; Hall v. Ditto, 12 S. W. Rep. 941 (Ky.); Johnson v. Goff, 22 So. Rep. 995 (Ala.); Batchelor v. Brereton, 112 U. S. 396; Agricultural Bank v. Rice, 4 How. 225; Merrill v. Nelson, 18 Minn. 335; Melvin v. Proprietors of Locks, 16 Pick. 137; Cox. v. Wells, 7 Blackf. (Ind.) 410. A few decisions, take the opposite view, among which are Elliot v. Sleeper, 2 N. H. 225; and Hronska v. Janke, 66 Wis. 252. A remark by Washburn, 3 Real Prop. 240, that the naming of the grantor in the deed is unnecessary, is feebly supported by his citations.

It may be noted that the authors of the articles on Deeds in the Am. & Eng. Encyclopedia of Law, and in the Cyclopedia of Law and Procedure adopt the doctrine that the signing of a name to the foot of a deed, the name or its equivalent not appearing in the body of the deed, does not make it the deed of the signer. "A deed signed and acknowledged by persons not named therein as grantors is not their deed," says the Cyclopædia, "and if it is signed and sealed by two, only one of whom is described in the instrument as grantor, it is the deed of that one only."

In Jamison v. Jamison, 3 Wh. 457, although one of the signers of a mortgage, Syndonia was not named as a grantor, the deed purported to convey the premises and also the right, title, etc., "of them the said Robert Jamison and Syndonia his wife." The court remarking that it was "apparent on the face of this instrument, that her interest as well as his, was intended to be conveyed," concluded that the deed was hers as well as his. So far as appears, the deed before us contained nothing indicative that the interest of Jenkins was being conveyed by it. In Jenkins v. Jenkins, 148 Pa. 216, the deed itself contained indications of an intention to convey S. S. Jenkins' estate, although he was named by mistake of the survivor, S. S. Jones in the phrase, "Now this indenture witnesseth," etc.

The intention of Jenkins that his estate should pass by the deed, can be established not by it, but by it in conjunction with parol evidence. The statute of frauds is not satisfied. Nor is the case to be excepted from the operation of that statute. It does not appear that any purchase money has been paid to Jenkins; nor that any expenses have been incurred in making improvements. No possession in virtue of Jenkins conveyance has occurred, for he continues in possession. Without nullifying the statute of frauds, therefore, it will be impossible to decree that Jenkins' estate has passed to Trimmer. It follows therefore that the judgment must be reversed.

Judgment reversed.