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SOME LAND TITLE FACTS

In the searching of land titles it is desirable, if not absolutely necessary, for the searcher to be acquainted with the sailent features of the goverment's formation and its political organization. For example, the land in question is located in Franklin County. It is necessary to know the boundaries and confines of the county to determine whether or not the land is actually located therein. Furthermore, in the interests of a complete search it is expedient to know something concerning the erection of the county as such, e. g. that Franklin County was erected in 1784, that it formerly was part of Cumberland County which in turn was erected in 1750, having been formerly a part of Lancaster County, and that the latter county was erected in 1729, having been formerly a part of Chester, one of the three original counties of the state, that subsequently a part of Bedford County which was erected in 1771 from Cumberland County, became a part of Franklin County in 1798 constituting what is now called Warren Township. Thus the searcher after exhausting the records in Chambersburg, would be led to Carlisle, or in case of land situated in Warren township, to Bedford and then to Carlisle, and from thence to Lancaster and finally to West Chester to complete the possible chain of title as it would be traced through the

recordations in the Recorders Offices in the respective counties. Again, in the inspection of the deeds themselves, some knowledge is desirable concerning the origin of titles, the operations of the original owners, the conditions of their holding and the reservations, if any, as made in the original grants. It is through such sources that titles to beds of streams, roads and other quasi public places will appear. Formerly, the accuracy concerning the precise location of county lines was as important in criminal law as it now continues to be in real property, but this was changed by the provisions of Section 48 of the Act of March 31st, 1860, P. L. 427 giving jurisdiction in criminal cases to the courts of either county where the alleged locus of the offence was within five hundred yards of the county line.

The present article is a collection of facts relative to land lore of Pennsylvania, some trite, others tedious, many important and not a few curious and forgotten, gathered from many obscure sources with the thought that they may prove helpful to the student and also to the practicioner of land law.

In looking through text books on the land law of Pennsylvania, one is impressed with the dearth of material as to facts which might be termed indigenous to Pennsylvania. It is true that such books are devoted to an exposition of principles of law rather than facts of history, nevertheless, no searcher of titles in this state is able to furnish a complete and intelligent abstract without a fair knowledge of the political history of the state.

With this apology, let us proceed.

The early settlements of Pennsylvania were made on the banks of the Delaware by the Swedes and other European adventurers about 1623. These Swedish settlements were reduced to Dutch control in 1655 and the Dutch were in turn conquered by the English in 1664. The New Netherlands and the Colonies on the Delaware were granted on 12th of March, 1664, to James, Duke of York, by the Royal Charter of Charles II.

William Penn, English Admiral and "great captain commander," under James, Duke of York, loaned Charles II the sum of 16,000 pounds. Upon the death of Admiral Penn in 1670, this claim on the Crown came into the possession of William Penn, his son. Penn asked the Crown, at a council held on the 24th of June, 1680, for "a tract of land in America, North of Maryland, bounded on the East by the Delaware, on the West limited as Maryland, "northward as far as plantable;" this latter limit Penn explained to be "three degrees northwards." See Enc. Brit. Vol. 21, page 101.

The province of Pennsylvania was granted to William Penn by the Royal Charter of Charles II, dated 4th of March, 1681. The charter defined the limits of the province as follows:

"All that Tract or part of land in America, with all the Islands therein conteyned, as the same is bounded on the East by Delaware River, from twelve miles distance, Northwarde of New Castle Towne unto the three and fortieth degree of Northern Latitude if the said River doeth extend soe farre Northwarde, But if the said River shall extende soe farre Northwarde, then by the said River soe farre as it doth extend, and from the head of the said River the Easterne Bounds are to bee determined by a Meridian Line to bee drawne from the head of the said River unto the said three and fortieth degree. The said lands to extend westwards, five degrees in longitude, to bee computed from the said Easterne Bounds, and the said lands to bee bounded on the North, by the beginning of the three and fortieth degree of Northern Latitude, and on the South, by a Circle drawne at twelve miles, distance from New Castle Northwards, and Westwards unto the beginning of the fortieth degree of Northerne Latitude; and then by a streight Line westwards, to the Limit of Longitude above menconed."

Penn was made the absolute proprietor, but the sovereignty was reserved to the crown and Penn was to hold the province,

"as of our castle of Windsor, in our county of Berks, in free and common socage, by fealty only for all services, and

not in capite or knight service: Yielding and paying therefor to us, our heirs and successors, two beaver skins, to be delivered to us at our said castle on the first day of January in every year; and also the fifth part of all gold and silver ore which shall from time to time happen to be found within the limits aforesaid, clear of all charges."
Parenthetically or by way of interpolation, the learned reader may compare the matter just quoted with the opinion of Mr. Justice Woodward in Wallace v. Harmstad, 44 Pa. 492, holding Pennsylvania land titles to be allodial which opinion Mitchell on Real Estate and Conveyancing pronounces as "full of historical errors."

Penn was given power to make laws with the advice and approbation of the freemen, of appointing officers and the granting of pardons. The laws were to be consistent with the laws of England and were to be transmitted to the privy council for approval or disapproval within five years from the date of their passage. If the laws were not disapproved within six months after they were transmitted and delivered, they were to be in full force.

Certain conditions or concessions were agreed upon by Penn and the "adventurers and purchasers in the same province" on July 11th, 1681. The concessions provided for the allotment of the land to purchasers and provided for the opening of roads and dealing with the Indians.

Penn published the "Frame of Government" or Constitution on 20th of April, 1682. This constitution was confirmed by "the laws agreed upon in England" which were signed 5th of May, 1682.

Penn arrived in the province on October 27th, 1682, the affairs having been administered temporarily by William Markham, his cousin. The first assembly met at Chester on December 4th, 1682. The first business transacted after organizing and electing officers was that of deciding an election contest, wherein Edmund Cantwell, the sheriff of New Castle, was charged with the "undue electing of a member to serve in the assembly from that county." Abraham Mann, the sitting member was deposed and John Moll, the

contestant seated by a unanimous vote. See Votes of the Assembly, Vol. 1, page 1. The "Frame of Government and laws agreed upon in England," were ratified by this assembly.

The first assembly under the constitution was held in March, 1683, and a new "Frame of Government" or constitution was published April 2nd, 1683. It is of interest to note in passing that this assembly passed the first short form deed in these words: "Chapter LXXVIII. Be it &c. That for avoiding long and tedious Conveyances, and the many Contentions which may arise about the Variety of Estates: All grants of Estates shall be either of the inheritance, or for life or lives, or for years, any number not exceeding fifty years; Which Grants shall be thus contracted in these words: A. B., the &c., day of, etc., in the year according to the English accompt 168—etc. from him, and his heirs, and assigns, Grants to his etc., (describe the bounds) with all its appurtenances), lying in the County of etc., Containing etc., acres, or thereabouts, to C. D., and his heirs (if in fee) or to E. F., if for his life: (if for lives); or to G. H. for 100 years (if J, K, L, M, N, O, shall so long live); or to P. Q. for fifty years, for the consideration of etc., pounds in money paid, and of yearly rent to be paid to A. B. and his heirs and assigns, upon the etc., day of etc.; In witness where of he sets his hand and seal,—seal, Sealed and Delivered in the presence of R. S. T. Acknowledged in open Court, and certified under the Clerk's hand and Court Seal, the etc., day of etc.,—168—etc.; and Registered the etc., day of etc., 168—etc."

This act was abrogated by William and Mary in 1693. According to the terms of Penn's Charter already quoted the abrogation of acts of assembly was to take place within five years of the passage thereof. Apparently, therefore the above action of the Council transgressed the terms of the charter. Nevertheless, the act is a curious bit of evidence showing that the fathers had anticipated the Pennsylvania Legislature in the Short Form Deed Act of April 1, 1909, P. L. 91 by a period over two centuries. This fact is respectfully referred to that class of hyper-cautious lawyers who

refuse to use the present short-form, commented upon by Mr. Robey in his recent work on Pennsylvania Real Estate and Conveyancing. See page 87.

In 1692, Penn was deprived of control of the government of the province by William and Mary who succeeded James II on the throne of England. Benjamin Fletcher, governor of New York was appointed governor. Fletcher appointed William Markham lieutenant-governor. In 1694, Penn being restored to control, Markham was commissioned deputy-governor.

"Markham's Frame of Government," was published with the consent of the proprietor who was in England since 1684. Penn returned in 1699 and a "Charter of Privileges" was granted by him and approved and agreed to by the Assembly on 28th of October, 1701. Recorded in Patent Book A, Vol. II, page 125.

In order to protect his interest in the province of Pennsylvania, on August 24th, 1682, Penn obtained a grant from James, Duke of York and Albany of the town of New Castle, and a district of twelve miles around it. On the same day he obtained a grant from the Duke of York of the counties of Kent and Sussex which together with New Castle or Delaware were known as "the three lower counties." On the 31st of August, 1682, he obtained the deed from the Duke of York for the province of Pennsylvania in practically the same terms as the Royal Charter. Penn was now the sole proprietor of what has since become the States of Delaware and Pennsylvania and he became also one of the owners of East and West Jersey. The two provinces were united under one governor in 1699.

Penn and his successors as Proprietaries purchased lands from the Indians at various times and finally at the treaty at Fort Stanwix a deed dated October 23rd, 1784 conveyed the residue of the Indian lands to the Commonwealth of Pennsylvania. This deed was signed by the Chiefs of the Six Nations, and the Chiefs of the Wyandotte and Del-

aware Indians executed a deed for the same land at Fort McIntosh on January 21st, 1785. See appendix to Journal of Assembly of the Session of February, April, 1785.

On January 13th, 1696, Col. Thomas Dougan, Earl of Limerick, in the kingdom of Ireland, former Governor of New York, conveyed to William Penn, by a deed which is recorded in the Rolls Office in Book F. Vol, 3, Page 242 "All that tract of land lying on both sides of the river Susquehanna, and the lakes adjacent in or near the province of Pennsylvania, in consideration of one hundred pounds sterling,—"Beginning at the mountains, or head of the said river, and running as far as, and into the bay of Chesapeak, which the said Thomas lately purchased of, or had given him by the Susquehanna Indians, with warranty from the Susquehanna Indians." The deed of Col. Dougan to Penn was confirmed by Articles of Agreement between William Penn and the Susquehanna, Shawona, Potowmack and Conestogoe Indians, dated April 23rd, 1701 and recorded in Book F, Vol. 8, Page 43. This grant included all the land adjacent to the Susquehanna River, from Schuyler Lake and Otsego Lake, now in the State of New York, to the Chesapeake Bay and secured to Penn the entire control of the Susquehanna River.

According to the Royal Charter and the foregoing deeds, the Province of Pennsylvania had within its boundaries all the land west of the Delaware River between the 40th and 43rd degrees of North Latitude and westward to the 80th degree of Longitude. This included all of the present State of New York westward of a line drawn from the head of the Delaware in Greene or Delaware Counties to a point southwest of Johnstown, thence along the 43rd degree of latitude which runs a few miles south of Little Falls, Herkimer, Utica, Syracuse, and Towanda. The city of Buffalo is located within the grant as is also a portion of Ontario, Canada. A large portion of this territory was under French control until 1763.

We have shown thus far that the grants to Penn from the several sources mentioned together with the purchases from the Indians extended the confines of the province far into what is now New York state and westward into land under French control and southward into parts of the present states of Maryland and West Virginia. These vague and indefinite boundaries gave rise to disputes first with Lord Baltimore, see Penn v. Lord Baltimore, 1 Vesey 455, eventuating in the Mason and Dixon Line before the Revolution and afterwards between the several states and finally settled by Commissions appointed for the purpose by Pennsylvania and the states of New York, New Jersey, Delaware and Virginia, thus determining the present lines of the states. An interesting fact in this connection is that the Delaware line at what was referred to in the original charter as the twelve mile circle was only finally determined by an Act of the Assembly of 1923. A reference to the map of the state will readily disclose the circle in the southeast corner.

In England and its colonies, the county was an important administrative division. The name county was introduced after the Norman Conquest and is equivalent to the old English "shire." Three of these English counties, Chester, Durham and Lancaster, were called counties palatine, because the owners had in those counties "jura regalia" as fully as the king had in his palace. See Bl. Com. Book 1, Page 117. Penn's authority in the government of Pennsylvania more nearly resembled the government of these three counties than any other except that of England itself. The government of Pennsylvania was monarchial in form and Penn was its King. It was closely akin to that of the great barons of Europe who had regal independent jurisdiction. In Pennsylvania, the counties are civil divisions of the State for political and judicial purposes. They are administrative districts and the districts for the registration of land titles. Power to organize these counties was given to Penn by the Royal Charter in the following terms:

"And we do further, for us, our heirs and successors, give and grant unto the said William Penn, his heirs and assigns, free and absolute power to divide the said country and islands into towns, hundreds and counties, and to erect and incorporate towns into boroughs, and boroughs into cities, and to make and constitute fairs and markets therein, with all other convenient privileges and immunities, according to the merits of the inhabitants, and the fitness of the places, and to do all and every other thing and things touching the premises, which to him or them shall seem requisite and meet, albeit they be such as of their own nature might otherwise require a more especial commandment and warrant than in these presents is expressed."

At the beginning of the provincial government the representatives from Pennsylvania were spoken of in the first Assembly as representatives of the "freemen of Pennsylvania," at the meeting of the next Assembly they were spoken of as representatives from the counties of Bucks, Philadelphia and Chester. See Votes of Assembly, Vol. 1, Page 1, et. seq. Hence, we have the three original counties from which the other counties have been formed. We have no record defining the boundaries of these counties as such.

LANCASTER County was erected from a part of Chester by an Act of the Assembly passed May 10th, 1729, 1 Sm. L. 176; Pa. St. at L. Vol. IV., Page 131. The boundaries were as follows:

"That all and singular the lands within the province of Pennsylvania, lying to the northward of Octoraro Creek, and to the westward of a line of marked trees, running from the north branch of the said Octoraro Creek, northeasterly to the river Schuylkill, be erected into a county, and the same is hereby erected into a county, named, and from henceforth to be called, Lancaster county; and the said Octoraro Creek, the line of marked trees, and the river Schuylkill aforesaid, shall be the boundary line or division between the said county and the counties of Chester and Philadelphia."

YORK County was erected from a part of Lancaster by an Act of Assembly passed August 19th, 1749, 1 Sm. L.

198; Pa. St. at L. Vol. V, Page 70. The boundaries were as follows:

"That all and singular the lands, lying within the province of Pennsylvania aforesaid, to the westward of the river Susquehanna, and southward and eastward of the South Mountain, be erected into a county; and the same is hereby erected into a county, named, and henceforth, to be called York; bounded northward and westward by a line, to be run from the said river Susquehanna along the ridge of the said South Mountain, until it shall intersect the Maryland line, southward by the said Maryland line, and eastward by the said river Susquehanna."

See Cumberland County for boundaries between Cumberland and York Counties.

CUMBERLAND County was erected from a part of Lancaster by an Act of the Assembly passed January 27th, 1750, 1 Sm. L. 201; Pa. St. at L. Vol. V, Page 87. The boundaries were as follows:

"Bounded northward and westward with the line of the province, eastward partly with the river Susquehanna, and partly with the said county of York, and southward in part by the said county of York, and part by the line dividing the said province from that of Maryland."

On the 9th of February, 1751, the Assembly passed an Act, 1 Sm. L. 206; Pa. St. at L. Vol. V, Page 105, fixing the boundary between York and Cumberland Counties as follows:

"That the creek, called Yellow-Breeches Creek, from the mouth thereof, where it empties itself into the river Susquehanna aforesaid, up the several courses thereof, to the mouth of a run of water, called Dogwood Run, and from thence on one continued straight line, to be run to the ridge of mountain, called the South Mountain, and from thence along the ridge of the said South Mountain until it intersects the Maryland line, shall be and is hereby declared to be the boundary line between the said counties of York and Cumberland."

The Act of 31st of March, 1823, P. L. 191; 8 Sm. L. 113; fixes the Yellow-Breeches Creek as the boundary between York and Cumberland counties as follows:

"Section 3. And be it enacted by the authority aforesaid, That the centre of Yellow-Breeches Creek shall, in all cases, be taken as the line between the counties of York and Cumberland; so far as the same creek is a division line between said counties."

For Franklin boundary, See Franklin County.

BERKS County was erected from a portion of Philadelphia, Chester and Lancaster Counties by an Act of the Assembly passed 11th of March, 1752, 1 Sm. L. 212; Pa. St. at L. Vol. V, Page 133. The boundaries were as follows:

"That all and singular the lands, lying within the province of Pennsylvania aforesaid, within the metes and bounds as is hereinafter described, be erected into a county, and the same are hereby erected into a county, named and henceforth to be called Berks; bounded as follows, by a line, at the distance of ten superficial miles southwest from the western bank of the river Schuylkill, opposite to the mouth of a creek, called Monocasy to be run northwest to the extremity of the province, and southeast, until it shall intersect the line of Chester County, then on one straight line crossing the river Schuylkill aforesaid, to the upper or northwestward line of McCall's manor, then along the said line to the extremity thereof, and continuing the same course, to the line dividing Philadelphia and Bucks counties, then along the said line northwest, to the extent of the county aforesaid."

The act of 17th April, 1795, 3 Sm. L. 227; Pa. St. at L. Vol. XV, Page 312, defines the line between the counties of Berks, Northampton, Northumberland and Luzerne as follows:

"Beginning at the forks of Mahantango and Pine creeks, at the place called the Spread Eagle, and from thence north sixty-six degrees east, until the same shall in-

terest the line dividing the counties of Berks and Northampton, and from thence the same course to the Lehigh creek; thence along the east bank of the said Lehigh creek to the head thereof; from thence a due north course to the boundary of the state; which shall hereafter be deemed and taken to be the boundary line between Berks and Northumberland, and Northampton and Luzerne counties."

See Lebanon County for boundary between Lebanon and Berks.

NORTHAMPTON County was erected from the northwest part of Bucks County by an Act of Assembly passed 11th of March, 1752, 1 Sm. L. 214; Pa. St. at L. Vol. V, Page 141. The boundaries were as follows:

"That all and singular the lands, lying within the province of Pennsylvania aforesaid, be erected into a county, and the same is hereby erected into a county, named, and henceforth to be called, Northampton; to be divided from the county of Bucks by the upper or northwestward line of Durham tract, to the upper corner thereof; then by a straight line to be run southwestwardly to the line dividing the townships of upper and lower Milford; then along the said line to the line dividing Philadelphia and Bucks counties; and then by that line to the extremity of the said province."

The islands in the Delaware River were annexed by the Act of 1783. See agreement between New Jersey and Pennsylvania.

See Berks County.

BEDFORD County was created by an Act of the Assembly passed the 9th of March, 1771, 1 Sm. L. 330; Pa. St. at L. Vol. VIII, Page 46. It was erected from a portion of Cumberland County and its boundaries were as follows:

"Beginning where the province line crosses the Tuscarora mountain, and running along the summit of that mountain to the Gap near the head of the Path Valley; thence with a north line to the Juniata; thence with the Juniata to the mouth of Shaver's creek; thence northeast

to the line of Berks county; thence along the Berks county line northwestward to the western bounds of the province; thence southward, according to the several courses of the western boundary of the province, to the southwest corner of the province; and from thence eastward with the southern line of the province to the place of beginning."

The Assembly passed an Act on March 21st, 1772, 1 Sm. L. 386; Pa. St. at L. Vol. VIII, Page 229, explaining the boundaries of Bedford County and defining them as follows:

"Beginning where the province line crosses the North or Blue Mountain, that runs between the Great and Little Coves and that part of Cumberland county called Connegocheague; and thence along the summit of the said mountain to the beginning of the Tuscarora mountain to the Gap, near the head of the Path Valley; from thence a north line to the Juniata river; thence up the Juniata to the mountain that divides the Kishicocolus Valley from the Standing Stone Valley, and along the summit of that mountain to the head of the Standing Stone Creek; from thence northeast to the line of Berks county; thence by Berks county line to the western bounds of the province; thence southward, according to the several courses of the western boundary of the province, to the southwest corner thereof; and from thence with other boundaries of the province to the place of beginning."

The passage of the Act of March 21st, 1772, erecting Northumberland County and on the same day the Act explaining the boundaries of Bedford County necessitated the passage of "An Act for the better ascertaining the boundary line between the counties of Cumberland, Bedford, and Northumberland," on the 30th of September, 1774; 1 Sm. L. 472; Pa. St. at L. Vol. IX, Page 396. This Act defined the boundaries of Bedford County as follows:

"Beginning where the line (dividing Pennsylvania and Maryland) crosses the North or Blue Mountain, that runs between the Great and Little Coves and that part of Cum-

berland county called Conecocheague; and thence along the summit of the said mountain, to the beginning of the Tuscarora Mountain, and running along the summit of the said Tuscarora Mountain to the Gap, near the head of the Path Valley; from thence a north line to the Juniata river; thence up the Juniata to Jack's Narrows; thence along the summit of the ridges and mountains which divide the waters falling into the said northeast side of the said Juniata, above Jack's Narrows aforesaid, from the waters which fall into the said river, below the said Narrows, to Tussey's Mountain, at the head of the Standing Stone Creek; thence along the summit of Tussey's mountain, to the ridge dividing the waters falling into Bald Eagle Creek from the waters of Little Juniata; thence along the said last mentioned ridge, to the Chestnut Ridge; thence along the Chestnut Ridge, to the head of the southwest branch of Bald Eagle Creek; from thence a straight line to the head of Moshannon Creek, thence down Moshannon Creek, to the west branch of Susquehanna; thence up said west branch, to the purchase line run from Kittanning to the said west branch, to the line of Westmoreland county; thence along the southeast boundary of the said county of Westmoreland, as the same is described in the act erecting the said county of Westmoreland, to the line dividing Pennsylvania from Maryland aforesaid; and thence along the said line last mentioned, to the place of beginning."

NORTHUMBERLAND County was formed from a part of the counties of Lancaster, Cumberland, Berks, Northampton and Bedford by an Act of the General Assembly passed the 21st of March, 1772, 1 Sm. L. 367; Pa. St. at L. Vol. VIII, Page 143. Its boundaries were as follows:

"Beginning at the mouth of Mohontongo creek on the west side of the river Susquehanna; thence up the south side of said creek, by the several courses thereof, to the head of Robert Meteer's spring; thence west by north to the top of Tussey's mountain; thence southwesterly, along the summit of the mountain, to Little Juniata; thence up the northeasterly side of the main branch of Little Juniata, to the head thereof; thence north to the line of Berks coun-

ty; thence northwest along the said line, to the extremity of the province; thence east, along the north boundary part of the Great swamp; thence south to the most northern part of the Swamp aforesaid; thence with a straight line to the head of the Lehigh, or Middle creek; thence down the said creek so far, that a line run west-south-west will strike the forks of Mohontongo creek where Pine creek falls into the same, at the place called Spread Eagle, on the east side of said creek to the river aforesaid; thence down and across the river to the place of beginning."

See Berks County.

The Act of 21st of February, 1815, Sm. L. 248, annexes the townships of Turbit and Chillisquaque in the county of Columbia to Northumberland, the change to take place May 1st, 1815.

WESTMORELAND County was formed from a part of Bedford County by an Act of the General Assembly passed the 26th of February, 1773, 1 Sm. L. 407; Pa. St. at L. Vol. VIII, Page 314. This county was bounded as follows:

"Beginning in the province line, where the most westerly branch commonly called the South or Great Branch of Youghiogeny River crosses the same; then down the easterly side of the said branch and river to the Laurel Hill; thence along the ridge of the said hill, northeastward, so far as it can be traced, or till it runs into the Allegheny hill; thence along the ridge dividing the waters of Susquehanna and the Allegheny river, to the purchase line, at the head of Susquehanna; thence due west to the limits of the province, and by the same to the place of beginning."

Section XVIII of the act of the 8th of April, 1785, 2 Sm. L. 317; Pa. St. at L. Vol. XI, Page 584 provides as follows:

"That all the land within the late purchase from the Indians, not heretofore assigned to any other particular county, shall be taken and deemed, and they are hereby declared, to be within the limits of the counties of Northumberland and Westmoreland, and that from the Kittanning

up the Allegheny, to the mouth of Conewago creek, and from thence up said creek to the northern line of this state, shall be the line, between Northumberland and Westmoreland counties, in the aforesaid late purchase."

The Act of 1st of March, 1806, 4 Sm. L. 287; Pa. St. at L. Vol. XVIII, Page 114 provides that part of the line between Westmoreland and Fayette Counties shall be as follows:

"Beginning where the state road now crosses the line of Somerset County; thence on the nearest and best ground for a public highway to intersect the Pittsburg road at or near Lobengier's Mill."

The Act of the 10th of April, 1807, 4 Sm. L. 455; Pa. St. at L. Vol. XVIII, page 644 provides that the middle of the Monongahela river shall be the division line between the counties adjoining the same.

Concluded in the December Issue

MOOT COURT

McKEE v. RAILROAD CO.

Evidence —Witnesses —Expert Testimony —Admissibility —Negligence— Verbal Notice

STATEMENT OF FACTS

McKee was conductor of a train running on a short road of fifteen miles. Before starting a train, he was verbally told not to start until a certain freight train which was coming towards the station, had arrived. He started oblivious to this notice, and encountered the freight train, which collided with his, the effect of the collision being that he was seriously hurt. In this action for damages he alleges negligence of the defendant in not giving him notice in writing. The court allowed an expert witness to say that such notice should be written, since written, they could be better understood and remembered. Verdict for McKee for $2000, Appeal.

Holleran, for the Plaintiff.

Rothchild, for the Defendant.

OPINION OF THE COURT

RAMEY, J. We are of the opinion that the lower court erred in admitting expert testimony as to the necessity of the order being written; for, in Kuhn v. R. R. Co., 255 Pa. 445, reaffirmed in 261 Pa. 148, it was ably stated that, "Necessity is the ground on which expert testimony is admitted. Whenever the circumstances can be fully and adequately described to the jury and are such that their bearing on the issue can be esteemed by all men without special knowledge or training, opinions of witnesses, expert or otherwise, are not admissible." And as was held in Strothers vs. R. R. Co. 174 Pa. 291, a case where an expert witness was one who was called upon to testify as to his opinion concerning the value of a certain strip of land, an expert is one who is fully qualified in his subject and not merely one who is possessed of better judgment in the matter than the jury.

In Comm. vs: Farrell; 187 Pa. 408, the court held: "Two things must concur to justify the admission of expert testimony. First, the subject under examination must be one that requires witnesses, that the court and jury have the aid of knowldge and experince

such as men not especially skilled do not have, and such therefore, as cannot be obtained (from ordinary) witnesses." In the case cited the expert was put on the stand to prove that a pocket-book which had been found in the possession of the alleged murderer was formerly that of the deacesed. His means of determining the matter was to prove that the repairs upon each pocket-book had been made by the same person, with the same thread. Here the expert was not permitted to testify (1) because there was no question of art ar skill raised by the evidence upon which special knowledge was needed, etc. This, we think, is the question in the case at hand.

In Louisville, New Albany and Chicago R. R. Co. vs. Heck, 50 N. E. 988, "And all messages and orders respecting the movemen of trains must be in writing." But this was a ruling of the Railroad Co. itself. We can find no cases ar statutes in this state, that require orders to be in writing. It is, however, the practice for all railroad companies, for their own protection to issue orders in writing rather than verbally. But can it be said that the plaintiff is to be alleviated for his negligence and oblivion merely because the practice of the railroad company was not put to the highest degree of efficiency. We are therefore, of the opinion that the counsel for the plaintiff is wrong in his contention that, "The plaintiff was justified in disregarding the verbal notice as insufficient."

In view of the foregoing we are of the opinion that the necessary requisites for the admission of expert testimony was not present in this case for we believe it to be within the power of any ordinary witness to testify as to the practice on that particular railroad. Also we think it error for the court to have allowed the jury to pass on the reasonableness of the notice. And for these reasons the judgment of the lower court must be reversed.

OPINION OF SUPREME COURT

The accident was due to the failure of McKee to obey an oral order not to start his train until a certain other train which was coming on the same track had arrived. McKee's act was the result of his forgetfulness of the order.

Forgetfulness is an element of want of care, and prima facie McKee could not transfer from himself responsibility for the collision which resulted in his injury.

He palliates this carelessness, by alleging that it was not negligence in him to forget, a question possibly for the court: otherwise for the jury.

But, he must prove negligent causation of the injury by the

defendant. In what respect was it negligent? In not having put the notice to McKee in writing. Possibly it was negligent in trusting to an oral notice.

But, while possibly, the jury might permissibly have found such negligence, could it be influenced so to decide by the opinion of a so-called expert? The difference between the effect of a written and that of an oral notice, on a human mind, is a matter of which the ordinary man has sufficient knowledge to form an opinion. There is no need of a so-called expert. So holds Kuhn v. Ligonier Val. R. R. Co., 255 Pa. 445, which the learned court below has scrupulously followed. It remains simply to affirm its satisfactory judgment AFFIRMED.

MIDDLETON v. HARRIS

Negligence—Automobiles—Trolley Cars—Failure to stop on meeting Car—Act of April 30, 9191, P. L. 678—Contributory Negligence—Case for Jury.

Bailey for Plaintiff.
Bialkouski, for Defendant.

Rubinstein, J. This case comes to us on appeal. Middleton while alighting from a trolley-car, was run into by an automobile operated by Harris. He admits having seen Harris coming towards the car. The learned court below takes the view that, since Middleton had seen the car approaching and had taken no special pains to avoid bing run into by it, he was contributorily negligent. Counsel for the plaintiff below maintains that the learned court below erred in so holding, and contends that the plaintiff was under no duty to anticipate that the defendant would continue to run past the trolley-car while passengers were alighting.

The Act of June 30, 1919, P. L. 678, provides as follows, Sec. 14: "When a motor vehicle meets or overtakes a street passenger car which has stopped for the purpose of taking on or discharging passengers, the motor vehicle shall not pass said car on the side on which passengers get on or off until the car has started, and any passengers who have alighted shall have gotten safely to the side of the road."

Thus, a passenger alighting from a trolley-car and striving to attain the sidewalk is justified in anticipating that a motor vehicle which has been running behind the car shall have stopped. In the case of Hanley v. Bakey, 77 Pa. Superior Court, 36, we find a

case whose facts bear a striking resemblance to the facts of the case a bar. The court, after quoting the Act of Assembly, supra, continues. "The passenger, being lawfully on the public highway, was justified in relying on the exercise of reasonable car by the driver of the automobile to avoid injury, and a failure to anticipate this flagrant disregard of a statutory duty, did not constitute contributory negligence."

Says the court in Hennessey v. Taylor 189 Mass., 583, "There is no imperative rule of law which has been called to our attention generally requiring a pedestrian, when lawfully using the public highways, to be continuously looking or listening to ascertain if auto cars are approaching, under the penalty that upon a failure to do so, if he is injured, his negligence will be conclusively presumed."

In the early case of Brown v. Flynn, 31 Pa., 510, the court enunciated the doctrine that a party is not bound to guard against the want of ordinary care on the part of another; he has a right to presume that ordinary care will be employed to protect him and his property from injury. Applying what now seems to be appellated "The Common Sense Doctrine," (Orlady, P. J., in Hanley v. Bakey, Supra) the court in the case of Lewis v. Wood, 247 Pa. 545, stated that "aside from the Act of Assembly, it was a reckless, negligent act of the defendant, in driving his machine so close to the car when passengers were alighting and would necessarily proceed to cross the street to the sidewalks." This rule was applied in the case of Gillespie v. Shafer, 69 Pa., Superior Court, 389.

It appears to us that the learned court below either ignored the pertinent Act of Assembly or was unaware of its existence; and because we are unable to reconcile its rather singular holding with the great number of authorities we have examined, we must find that the learned court below erred. The motion for a new trial will, accordingly, be granted.

OPINION OF SUPREME COURT

The Act of June 30, 1919, P. L. 678 forbids an automobile to pass a street passenger car, which has stopped to discharge or receive passengers, on the side on which it is receiving or discharging. This act was violated by the defendant, with the accident as the result. He was then grossly negligent, and is answerable for the injury to the plaintiff, unless a contributory negligence on his part is visible.

The burden of showing this contributory negligence is on the defendant.

Ordinarily, whether there was such negligence, is to be determined by the jury. The court has undertaken to make the decis-

ion, on the ground (a) that Middleton saw the car coming and (b) took no special pains to avoid being run over by it.

He saw the car approaching; but at what distance was it? Was there clear indication that the defendant intended to run by the car? He had a right to come up to the car, but not run past it. Was there anything in defendant's action to show that he intended to do the latter act? It does not appear. Pointing to the conclusion that he did not so intend, is the act of assembly; and the a priori probability that Harris did not intend to ignore or violate it. Middleton reasonably presumed that the law would be obeyed and nothing decisive of a different intention is shown to have happened, when the injury was inflicted. The plaintiff would properly assume that the defendant intended to observe the injunction of the statute until something was done by him indicating a different intention. What was that act? How long before the actual collision, did it take place?

It is clear that, if there was contributory negligence, it was to be discovered by the jury, and not by the court. Cf. Lewis v. Wood, 247 Pa. 545.

The judgment of the learned court below is AFFIRMED.

HIMES v. STEVENS

Sales—Verbal Contract—Failure of Delivery—Sales Act of 1915, P. L. 543, Section 4

OPINION OF THE COURT

C. Holleran J., The facts of the case as presented by the evidence are briefly, these: Stevens visited the furniture store of the plaintiff and purchased or attempted to purchase furniture, the value of which was $724. The contract for this purchase was verbal and it was agreed between the parties that credit was to be extended to the defendant for sixty days. The plaintiff shipped the goods, but with the proviso that they should not be delivered by the carrier unless paid for. This was directly in contravention of the conract as contemplated by the parties at the time of its inception. To put it more concisely, the Himes Company by this direction to the carrier has put itself in the unenviable position of a defaulting plaintiff.

This case seems to be one which would fall under the provisions of the 17th Section of the Statute of Frauds, which has now been transplanted into the 4th Section of the Sales Act of 1915,

P. L. 543, which provides: "No sale or contract for the sale of goods, or choses in action of the value of $500 or more shall be allowed to be good unless it is in writing, or something shall be given in part payment or the buyer shall receive the goods."

See Mason and Heflin Coal Co. v. Currie, 270 Pa. 221, and Manufacturer's Light and Heat Co. v. Lamp, 269 Pa. 517, cases in this act. The contract to sell in the case we have before us evidently falls within this section of the Sales Act, and, since it is not in writing, we can eliminate the possibility of the first requirement having been complied with.

Now as to the other requirements, was there an acceptance of the goods? We think not. The defendant has given a quotation from the Sales Act to support his contention but, we think, nevertheless, there is no acceptance of the goods in the matter contemplated by the framers of the act requiring an acceptance.

The plaintiff quotes a New York doctrine as to delivery, but, it is inapplicable here since there was no delivery even within the rules of that state. Our reason for so believing is this: When the seller imposed, as a condition of delivery, the restriction on the carrier, not to deliver unless paid, he made the carrier his agent, and thus avoided the application of the rule laid down by our sister state.

For the various reasons we have just recited our judgment is for the DEFENDANT.

OPINION OF SUPREME COURT

The purchase was of goods at the price of $734.00. The contract was oral. The Sales Act provides that oral purchases equal to or exceeding $500 "shall not be enforceable by action, unless," etc.

Unless the buyer has accepted part of the goods and actually received the same. But, while the goods were sent by common carrier to the buyer, the bill of lading forbad delivery except on payment. No payment was made and none of the goods were received by the vendee.

Or, unless the vendee gives something in earnest to bind the contract. Nothing was thus given.

Or, unless a part of the price was made. But no such payment was made.

Or, unless some memorandum in writing of the sale is signed by the party to be charged, or his agent, that is, in this case, Stevens, the vendee. But no such memorandum was executed.

The contract, then, is uninforcible. Cf. Josephson. Bows vs. Wintraub, 78 Sup. 14. .. ..

The judgment of the learned court below must be AFFIRMED.

LIPPINCOTT v. R. R. CO.

Negligence—Railroads—Crossings—Collision of Street Car and Locomotive—Concurring Negligence—Fellow Servant Rule—Contributory Negligence—Case of Jury

STATEMENT OF FACTS

Plaintiff, a motorman, in crossing the defendant's road was injured by a locomotive running into his car. When he reached the track, he saw the safety gates, which had been down, lifted. At the same time the conductor of his car, who had run ahead to make an observation gestured to him to cross. Influenced and determination, gestured to him to cross. to him to cross. Influenced and determined by these concurring signals were given negligently since those who gave them, if properly careful, could have seen the approaching locomotive. Verdict for $,000. Motion for new trial.

Miller, for the plaintiff.

McMenamin, for the defendant.

OPINION OF THE COURT

Klein, J. The question to be considered in this case is whether the plaintiff contributed to his njury by his own negligence, and if so does it affect his right to recover damages.

Counsel for the plaintiff contends that the watchman was negligent in raising the gates and that this was the natural and proximate cause of the plaintiff's injury. He further contends that the negligence of the conductor can not be imputed to the motorman in this case.

Counsel for the defendant contends that, if the motorman could not see the approaching train, it was his duty to descend from his car and make an observation, and that the negligence of the conductor prevents the plaintiff from recovering damages.

We think there is no doubt in this case that the watchman was negligent in raising the gates. He was in a position to make a careful observation of the tracks and knew that there was a duty imposed upon him to protect those who might cross the track at that point. To strengthen this argument we might add that the business of the plaintiff carried him across these tracks many times in one day and that he would have to rely on the judgment of the watchman in order to keep his car running on the schedule which was required. It can only be said then that the raising of the gates was the natural and proximate cause of the plaintiff's injury. So held in a similar Pa. case, 218 Pa. 216.

The other point to be considered is whether the negligence of a fellow-worker can be imputed to the plaintiff in this case. We are of the opinion that the mere fact that the conductor also kept a lookout ahead of the car and signalled the plaintiff to approach would not, in itself, be enough to defeat the latter's right of recovery. This was so held in a Presbyterian case; Young v. Phila. Rapid Traction Co., 248 Pa. 174. In an Illinois case regarding the exact point in question the facts were as follows: "The plaintiff was employed by a railroad other than the defendant. He was injured in a collision between cars of his own company and a locomotive of the defendant's company. It was contended that the injury was due to negligence on the part of fellow members of his train crew in failing to keep a proper lookout. The court held that, even though it were true that plaintiff's coworkers were to blame in the respect indicated, since such fault was combined with the negligence of the defendant, both of which causes contributed to the accident, either or both wrongdoers were liable to the plaintiff so long as the latter was free from contributory negligence, and the negligence of one could not be used to exonerate the other. 192 Ill. 9.

We think that the above ruling of the Illinois court is correct and this we believe is the prevailing law in Pennsylvania. In Wood v. Pennsylvania Railroad Company, a Pennsylvania case on point, the court held that, "An innocent third person cannot be deprived of his remedy because his injury resulted from the concurrent negligence of two others." This undoubtedly refutes the argument of the learned counsel for the defense and compels the court to hold that the negligence of the conductor cannot be imputed to the motorman, plaintiff in this case, thereby making his contributorily negligent.

After a reconsideration of the facts at bar we can only sustain the verdict for the plaintiff and deny the motion for a new trial.

OPINION OF SUPREME COURT

The liability of the defendant is predicated upon its having negligently induced the plaintiff to attempt to cross the railroad track, just as a train was approaching.

The safety gates had been down. The plaintiff saw them lifted. He could construe this only as a declaration by the gate keeper, that no train was in the neighborhood. He was induced by this assurance, to cross the track, and in doing so, suffered the injury of which he complains. The tacit declaration of the gate keeper decided the motorman to make the venture. It was the cause, in a true sense, of the act, which was the cause of the collision. The R. R. Co. is responsible for the results of the act of the gate keeper. It cannot be tolerated, that the R. R. Com-

pany should set up agencies to instruct people as to the safety of crossing the tracks, and thus decoy them into a place of danger and not be liable for the results.

The motorman saw two signals of safety; that given by his conductor, and that given by the gate keeper. He was influenced by both. It is idle to wonder whether either signal alone would have induced action. They concurred. The result is to be attributed to both. The R. R. Co is not to be acquitted because the conductor was likewise negligent in giving his signals.

The conductor was in no sense, the agent of the motorman. He might well be liable to the latter, for having misled him to his injury. But, his liability in no way interferes with that of the railroad.

For some of the positions here taken, Siever v. Pittsburgh, Etc. Ry. Co., 252 Pa. 1, may be consulted.

The doctrine that the common master of two servants is not responsible to one of them for injuries caused by the malice or negligence of the other, has no pertinency here. The conductor was not the servant of the Railroad Company. No attempt is made to make the latter liable, for an injury caused by the servant of the other.

The judgment of the learned court below is AFFIRMED.

SELLERS v. GOLDEN

Vendor and Vendee—Fraudulent Misrepresentation—Action for Money—Evidence—Province of Court and Jury

STATEMENT OF FACTS

Assumpsit by vendor of land for purchase money against the vendee Golden. Golden refuses to pay, alleging that the proximity of the land to a certain water course was highly important to him and that Sellers assured him that it was twenty (20) feet distant whereas it was two hundred and fifty feet distant. He stated that had he known the fact he would not have agreed to purchase.

The court told the jury that they must find the evidence of deception clear, explicit and indubitable, also that the defense is invalid unless they find that the decision to purchase was induced by the representation.

OPINION OF THE COURT

Goodman, J. On this appeal, the defendant assigned as error

the charge of the learned court below. The correctness of this charge is the only question for our consideration.

The learned court below, in its charge considered two distinct questions of law.

(1) As to the sufficiency of the evidence of the fraud to justify the attempted rescission of the contract and,

(2) As to the necessity that the defendants decision and purchase should have been induced by the fraud alleged.

Preliminary to the consideration of these questions, we desire to state that though there is nothing shown in the facts of the case as to the form of the contract, we are proceeding under the assumption that the contract of sale between the parties was in writing, otherwise, the action of the plaintiff is clearly not maintainable.

Meason v. Kaine, 63 Pa. 325.

We shall now take up the questions of law raised in the charge of the learned court below in the order stated:

We think the charge of the learned court below as to the necessity for clear, explicit and indubitable evidence on the part of the defendant in order to establish the fraud which he alleges is correct. In actions of this character, when the defendant is attempting to defend his repudiation of a written contract by alleging fraudulent statements by means of which he was induced to enter into the contract, evidence of such alleged fraud must be clear, explicit and indubitable. Sulkin v. Gilbert, 218 Pa. 255. Bruce v. Loeb and Loeb, 28 Pa. Sup. 22. 426 R. C. L. 366.

We believe that the counsel for the defendant has failed to distinguish between the nature of the evidence required to prove fraud when the attempt is to rescind a written contract, by showing that the party was induced to enter into the agreement by means of certain fraudulent representations, and other cases of fraud i. e. fraudulent transfer of goods and lands. This distinction has been recognized and observed by our courts. We have already defined the character of the evidence required in the first class of cases. In the second class of cases, the evidence need not be of the high character required in the first class of cases. It may be shown by the same amount of proof which would establish any other fact. The authorities which the counsel for the defendant cites are clearly reconcilable with the authorities cited above, if the distinction is borne in mind. In each of the cases cited by the counsel, the fraudulent act charged is clearly within the second class of cases. In the case of Montgomery Web company v. Prenett, 133 Pa. 505, the fraud alleged was the assignment by a corporation of practically all its property for a nominal con-

sideration. In Kaine v. Weigley, 22 Pa. 182, the fraud alleged was the purchase of real property by a grantee with intent to defraud creditors by not paying purchase price at time of conveyance. The case of Landis v. Neff, 9 Atlantic 926 involved fraudulent representation by an infant. See also case of Eby v. Eby, 69 Pa. 323.

We shall now consider the second question raised by the charge. The learned court charged the jury that the defense is invalid unless they find that the decision to purchase was induced by the representations of the plaintiff."

We believe that this rule of law is clearly correct "Reliance by the purchaser on the misrepresentations of the vendor is necessary to found a charge of fraud thereon, and the representation must also have been made in regard to a material fact operating as the inducement to purchase. It is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to the purchaser to enter into it. The state of facts as represented must be the ground on which the transaction has taken place, that is, it must appear that the purchase would not have been made but for the false representation.", 27 R C L Page 361 and cases cited. Sulkin v. Gilbert Supra.

After an examination of the case of Marshall v. Gilmary, 53 N. W. 811 and Enchilberger v. Mills Land and Water Company cited by the counsel for the defense as showing the erroneousness of the charge of the learned court blow, we are unable to agree with the learned counsel. We believe that the doctrine laid down in these cases is in accord with the rule of law as quoted above and thus supports the charge.

We believe the case at bar is governed by the case of Sulkin v. Gilbert supra. In that case the facts were in the main similar to those of the case at bar, except that the defendant did not testify that he had been induced to enter into the contract by means of the misrepresentations, and that in the case at bar the court did not give binding instructions.

The lower court gave binding instructions for the plaintiff on the ground that there was no corroboration of the testimony of the defendant as to the misrepresentations and therefore that the evidence of the misrepresentation was not clear, precise and indubitable.

The Supreme court in affirming the judgment for the plaintiff stated that the case called for binding instructions but not for the reason given by the lower court, that though the evidence of the misrepresentations must be clear, explicit and indubitable, there need be no corroboration to constitute such evidence as the court clearly states "The testimony of a single witness even though con-

tradicted may carry conviction to the minds of the jury and when this occurs, the law approves and sustains." The binding instructions were proper because there was no evidence that the defendant was induced to enter into contract by means of the alleged misrepresentation. That before defendant can succeed in his defense, he must prove to the jury that he was induced to enter into the contract by the misrepresentation.

We are unable to find the distinction between the facts of Sulkin v. Gilbert supre and those of the case at bar, except as already pointed out in our statement of the facts of the case which the counsel for the defendant stresses as cause for a different holding in the case at bar.

We therefore hold that the charge of the learned court below was correct and affirm the judgment in favor of the plaintiff.

OPINION OF SUPREME COURT

The vendee contends that he is not bound by the contract of purchase, because he was induced to agree to purchase the land, by the vendor's misrepresentation, as to the distance between a certain stream and the premises. That the stream is 250 feet, instead of 20 feet, seems not to be contested.

Was the representation made by the vendor? The court has told the jury that they must find the evidence of this misrepresentation "clear, explicit and indubitable." This instruction is sanctioned by Stewart, J., in Sulkin v. Gilbert, 218 Pa. 255. Why such fact must be supported by stronger evidence than many other facts, on which as serious results are suspended, it is hard to see. Is it that deception of the vendee of land, by the vendor, as to its physical qualities, its locality, its nearness to or distance from a named object, is so unusual, so monstrous, so difficult to believe?

In criminal cases, the prosecution must establish the guilt of the defendant, by evidence that causes belief beyond a reasonable doubt, that is, I suppose, by evidence that is indubitable. But, the gravity of the result to the defendant, is the alleged reason for the adoption of this standard. What justifies the requirement in a civil case, in which the effort is to compel performance of a contract to buy land, of the rule of the criminal court? It is hard, indeed, to discover a justification.

There was no error, under the authority of 218 Pa. 255 in the instruction as to the need of explicit and indubitable evidence.

The defendant stated that had he known the fact as to the relation of the stream to the land, he would not have purchased the land. His testimony was not decisive, but it was important. Nothing appears to disprove the defendant's testimony on this point. We see no error in the court's instruction.

The well written opinion of the learned court below fully justifies its decision. The judgment is AFFIRMED.