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## RES GESTAE

Human assertions are fallible. The events may not have been clearly perceived; or they may be imperfectly remembered, or the purpose of the declarant may not have been correctly to represent them. In order to reduce the risk that the assertion is untrue, the agents of the law have invented the practice of requiring the witness to swear that what he is saying is the truth. It is also required that the testimony shall be delivered in the presence of the party who is to be adversely affected by it, and, subject to a cross-examination which may expose defects of memory, insincerity, bias. The oath and the cross-examination do not guarantee the fidelity to truth of the witness' assertions. They only increase the probability of their truth. Nor can we a priori say that there are not other circumstances that give a sufficient promise of fidelity to fact, to justify the acceptance of non-sworn assertions, which have not been made in the hearing of those who are to be disadvantageously touched by them. The result of the experience of the judicial officers, is the conviction

that several sorts of statements may be properly heard and acted upon, though not accompanied by a religious appeal, nor exposed to adverse interrogation. Prof. Wigmore, in the third volume of his treatise on Evidence mentions the following specimens of such statements; dying declarations, statements against interest, statements about family history, attestations of subscribing witnesses, regular book entries, recitals in ancient deeds, official statements, officially printed copies, e. g. of statutes, learned treatises and spontaneous declarations. To the last class, we shall pay some attention.

By some mishap a vicious designation for this class has gained vogue. Such declarations are said to be a "part of the res gestae," and for that reason admissible. A statement may, of course, be a part of some res gestae, or the res gesta which is being investigated. Did B slander A.? Then he used words, and the use of the words denounced as slanderous, must be proved. Did A destroy with intention to revoke it, a will which he had already executed? That he threw it into the fire is relevant. But with what intention? Possibly A's act was the result of a mistake as to the identity of the instrument that he was burning. Perhaps he said something which tends to illumine his intention. Then the language used by him is a part of the complex behavior which constitutes revocation; is a "part of the res gestae."

But the cases are many in which so easy a vindication of this expression is not possible, in which the quality of the act, under investigation, is not modified by words spoken; but in which the words spoken are used simply as evidence of the acts, which are the alleged ground of the judgment sought from the court. A has killed B. The law says, if so, he must be electrocuted. But the decree of death cannot be issued, until the crime of homicide is proved. One of the elements of the proof is a statement made by B. shortly after the assault, that A was the assailant. The statement is not a part of the matter al-

leged, as basis of the decree, but only evidence of that matter. An act and a subsequent assertion about the act are never one, nor is there a complex somewhat from which a pre-appointed penalty is to follow. The penalty follows the homicide; not the assertion of the victim, which is simply a declaration from which is to be inferred, possibly, the homicidal act of the defendant.

Acts and other events may be so related that in the trial for doing one of them, evidence of the rest may be relevant. A is alleged to have killed B. with a gun. But he must have procured a gun. He may have bought it; he may have stolen it. He must have arranged his own conduct so as to bring himself to the place, at the time, when the murderous act was done. Proof of these acts, would be relevant in the trial for the shooting. These acts would be "parts of the res gestae." Indeed, no crime in the abstract can be proved. That A. killed B. is not to be heard. Where, when, how, with what instrument, what preceding situation may have furnished a provocation or an opportunity? It sometimes happens that in proving one crime it is competent to prove some different preceding or accompanying crime. A man, e. g. may steal the gun with which he later slays another.[1] Around every major fact is a fringe of minor attendant facts. These are relevant, in investigation of the capital fact. The most philosophic of our justices, Lowrie, J., has said[2] "It is a principle of law, of logic, of philosophy and of common sense, that, in order to decide with accuracy upon the character of any phenomenon or transaction, we must know all the facts of which it consists, and all the circumstances that are truly connected with and influence it. This is essentially what is, in short, called the rule of the res gestae." The same judge remarks of res gestae,[3] "This term means the transaction in controversy,

[1]Commonwealth vs. Morrison, 266 Pa. 223; Commonwealth vs. Coles, 265 Pa. 366.

[2]Hollinshead vs. Allen, 17 Pa. 275.

[3]Young vs. Commonwealth, 28 Pa. 501.

or matter under investigation, whether it be a principal fact in a cause or only an incidental and collateral one, and the rule is that in order to understand and interpret the fact and give it its place and value, we must have it with all the circumstances which properly constitute a part of it." He adds, "The expression matter under consideration is more true to the comprehensiveness of the principle, for it includes states and conditions of persons and things, as well as acts done, and also the relations in which parties stand to each other except where these relations have been defined by law or by contract."

This definition of res gestae seems, unfortunately to have been abandoned in favor of one furnished by Dr. Francis Wharton, whose definition is the following: "The res gestae may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense that they are part of the immediate preparations for or emanations of such act, and are not promoted by the calculated policy of the actors." This, or portions of it, are frequently cited as authority.[4]

A few observations on this description of the res gestae may not be inappropriate. The definition distinguishes between the "litigated act" and its undesigned incidents. These incidents, not the "litigated act," strange to say, are the res gestae. One would have supposed that the litigated act would have been at least one of them.

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[4]Bausback vs. Reiff, 244 Pa. 559, Coll vs. Transit Company, 180 Pa. 626; Riley vs. Carnegie Steel Co., 276 Pa. 82; Commonwealth vs. Gardner, 282 Pa. 458.

But, the res gestae are the "undesigned incidents" of this act. Why undesigned? A kills B. with an axe, and then throws the body into an adjacent river, for the purpose of concealment of the murder. Is that act not one of the res gestae? Is it undesigned? Precisely why the admissibleness of the proof of the incidents of the litigated act is conditioned upon their being "illustrative of such act," is not apparent; nor indeed, what it is, precisely, to be "illustrative" of the act. The effort in numerous cases, is to find a justification for receiving the hearsay of some one; his statement of the accident, or of the assault, etc. This statement is possibly elicited by a question; at all events[5] by the sympathetic attitude of some human listener. How can it be said that the narration which is an incident of the "litigated act" is undesigned.[6] It is purposed, for it is made.

The res gestae are a necessary incident of the litigated act. But in how many of the cases in which hearsay is admitted, as part of them, can it plausibly be said that it was a necessary incident of any thing? It might or might not have been uttered. The word necessary is interpreted to mean being part of the immediate preparation for the litigated act. But how would being a part of the preparation, make it necessary? Some other preparatory act might have served. And as the litigated act was freely done so was each preparatory act. But, the hearsay may be an emanation of the act. But, in a sense, every averment of a fact is an emanation of it. Nor does it matter where or how long after the fact, it is uttered. It would be foolish to admit hearsay, on the ground that it was uttered under compulsion. Examine the cases in which such statements have been received, and realize how baseless the hypothesis that they were involuntarily made.

Sometimes a distinction is drawn between a recital

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[5]Commonwealth vs. Puntario, 271 Pa. 501; Eby vs. Insurance Co., 258 Pa. 523.

[6]Smith vs. Stoner, 243 Pa. 57.

of an event, which is allowed to be evidence of its occurrence, and one that is disparaged as a "mere narrative."[7] The "mere narrative" is not admissible as evidence of the facts averred to have occurred in it. The word "mere" seems to allude to the absence of some sanction of the truth of the statement. What are the desiderated sanctions? A philosophic justice has suggested that they are the startling nature of the event, the fact that the utterance was under the stress of nervous excitement caused by it; that the making of it was "spontaneous and not due to reflection, premeditation or design. When produced under the excitement of the event, and so soon thereafter that the continuity is not broken, these circumstances preclude the idea of premeditation or design."[8] If the event is arresting and exciting, it probably monopolizes the consciousness, so that the imagination is stayed, the thought of legal or other effects which may be secured by coloring the account of the occurrence, is precluded. In the larger number of cases, the event has been an accident resulting in death,[9] a homicidal act, such as a cutting of the throat,[10] a shooting.[11] But it is not necessary that the transaction should be so tragic. In action for damages to goods and wagon, from a railroad collision, the declaration of the engineer, made at the time may be proven against the railroad company.[12] Admissions by painters, while a fire was in progress, that they, while working on the roof, had negligently caused it, were receivable to fasten liability for damages, upon their employer.[a]

The absorption of the thought in the event will be for a comparatively short period. Hence importance is attached to the proximity in time, of the utterance and the

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[7]Commonwealth vs. Brown, 264 Pa. 85; Commonwealth vs. Gardner, 282 Pa. 458.

[8]Commonwealth vs. Gardner, 282 Pa. 458.

[9]Razzio vs. R. R., 281 Pa. 96.

[10]Commonwealth vs. Van Horn, 188 Pa. 183.

[11]Commonwealth vs. Puntario, 271 Pa. 501.

[12]Hanover R. R. Co. vs. Coyle, 85 Pa. 396.

[a]Shafer vs. Lasock, 168 Pa. 487.

event described by it. If hours or days have elapsed, the chance that the imagination has made sundry sorties and that, consciously or unconsciously, its creations have been blended with the memory of the occurrence, is more or less considerable. If an injury has occurred, by a railroad, or machinery, which in truth could not be attributed to the owner's negligence, inventions of circumstances may assist the claimant, or the wife and children of the deceased injured, making use of his declaration in establishing the desiderated negligence. No maximum of the interval between the event and the history of it, has been established. Its length varies with the cases. "A lapse of time, more or less appreciable," is Wharton's statement.[13] The statement of a boy whose wagon had collided with a locomotive, made 10 minutes after the impact was received,[14] a statement made three quarters of an hour after such a collision was rejected.[15] Derailment of a train, conductor killed. In action by the widow, alleging rotten ties the cause, a declaration by the division foreman, a half hour after the accident, that the ties were in bad condition, was not receivable.[16] Says the court, "It is clear that such declarations were not a part of the res gestae. When they were made, the time which had elapsed since the accident was sufficient to convert them into a mere narrative of a past occurrence." Possibly if speech is impossible to the injured for a time after the accident, because of the injury, or because of the nonpresence of those who could hear, this time would not be considered, in determining whether the subsequently made declaration was a part of the res gestae. An injury in a mine resulting in death.[17] The injured man made statements to persons who after a delay, reached him,

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[13]Commonwealth vs. Gardner, 282 Pa. 458; Commonwealth vs. Puntario, 271 Pa. 501; Commonwealth vs. Werntz, 161 Pa. 591.
[14]Razzio vs. R. R. Co., 281 Pa. 96.
[15]Eline vs. R. R., 262 Pa. 33.
[16]Briggs vs. Coal Co., 206 Pa. 564.
[17]Smith vs. Stoner, 243 Pa. 57.

but within a half-hour after the accident. "These statements," said Justice Moschzisker, "were admissible under our cases, since there was no marked break in the continuity of events, to turn them into a mere narrative of the past. Here the declarations were made to the first persons who appeared upon the scene, and within a half hour after the accident, while Smith, who had been suffering intense pain from the time he was injured, was lying upon the spot where he was hurt; so it was reasonable to conclude that he had no opportunity to deliberate and design, that is, none such as to take from his utterances the impress of spontaneity." Collision between automobile and a truck, resulting in death of the driver of the automobile. Within three minutes after the accident, he stated "This wouldn't have happened if I hadn't been crowded off the road." In his widow's action against the owner of the truck, this was admissible because "sufficiently close in time to make it part of the res gestae[1] Three men attack for the purpose of robbing, A, B, and C who are in a shanty. One of the three shoots and kills A. As this one with the other robbers, was leaving the shanty, B said to his friend that Dennery, one of the robbers, was the one who shot A. This was admissible at the trial of Dennery for murder.[19]

The question being about X's accidental fall, which produced a fatal injury. A fall, thinks Potter, J., would be almost instantaneous. An offer to prove an exclamation or a cry of X during the act of falling, or an explanation, immediately on rising, and before sufficient time had elapsed to permit deliberation or design, would be admissible; but a declaration made after from 15 minutes to a half hour after the fall would not be.[20] Three quar-

[18]Backstrom vs. Kaufman D. Stores, 266 Pa. 489.

[19]Com. vs. Dennery, 259 Pa. 223.

[20]Keefer vs. Liife Ins. Co., 201 Pa. 448. The opinion speaks of "a break in the continuity of events," and thinks the break was quite sufficient to turn any explanation then made into a narrative of a past transaction," to permit of deliberation and design and "thus remove the impress of spontaneity."

ters of an hour after an explosion and injury to X, his statement at a hospital of what had happened, was not admissible.[21]

It is well to recall however, the cautions mentioned by Frazer, J., in Commonwealth vs. Stallone, 281 Pa. 41, 45. "Although," says the learned justice, "the question of time between the occurrence and the declarations is an important one, it is not conclusive. Under particular circumstances, the res gestae may extend over a considerable period of time, and the criterion is whether the declarations are made under such circumstances as will raise a reasonable presumption that they were spontaneous utterances created by the transaction itself, and so-soon thereafter as to exclude the presumption of premeditation and design. No fixed measure of time or distance from the main occurrence can be established as a rule to determine what shall be part of the res gestae. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transaction." The interval between the shooting and the statement of the victim, was not exactly ascertained but was between 15 minutes and half an hour. The statement wasreceivable as "the spontaneous utterances of the injured man." The interval of time was too short to admit the "presumption" of premeditation and design.[22]

Intense pain lasting from the infliction of the injury until the statement made by the sufferer, is conceived to be some warranty of its truthfulness. The explication of the underlying psychology is not abundant or entirely satisfactory. It is supposed that great pain lessens the

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[21]Greed vs. Light & Heat Co., 238 Pa. 248.

[22]Is "presumption" the acceptable word? If the court is in doubt whether there has been premeditation, what should it do? Admit, for the jury to decide what use it shall make of it, or reject it? If the court doubts whether it should be considered as evidence, and possibly believed by the jury, would that justify its abdication of its ordinary duty of deciding on the admissibleness of proffered testimony?

creative activity of the imagination and interferes with the exertion of the reasoning power.[23]

That the statement should be made at the place where the event occurred, or near it, is deemed of importance. A is on trial for the killing by gun shot of B. A declaration of B. that the shooting was not done by A. could not be accepted as part of the res gestae, because it was made neither at the time nor at the place of the shooting, but some hours after, in the hospital.[24] But as some time may elapse before the statement is made, which is nevertheless admissible, so there may be some change of place. Each case, we are often reminded, depends on its own circumstances. A stabbing occurs in a voting place. The injured man, while there, says, "the coon did it." He is borne out of the polling place across the street to another room, where he repeats the declaration. The change of place is not found by the court incompatible with the acceptableness of the proof of the declaration in the trial for the murder of one who is not the "coon."[25] How is this change of place supposed to affect the utterances of a person? The courts have not troubled themselves to discover or to express the relation between place and mental state. Certain changes would produce mental perturbations, originate new associations, beget suggestions of a situation variant from the actual.

The influence of others on the declarant, at the time of his making the statement, may tend to cause it to diverge from the facts. The bare fact that he is questioned about the occurrence and responds, does not require the rejection of the statement. But improper means may be used to induce a declaration, and the fact that it is or may be made in consequence thereof would require the rejection of it as mere hearsay. As leading questions are supposed to influence the witness to adopt the view sug-

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[23]Smith vs. Stoner, 243 Pa. 57.

[24]Kane vs. Commonwealth, 109 Pa. 541.

[25]Commonwealth vs. Werntz, 161 Pa. 591. A statement in the hospital was received in 281 Pa. 41.

gested by them, it is clear that they might be used to extract assertions from the subject of an accident, which he would not have made otherwise. The reason that forbids the use of the question in an ordinary trial in court would require the rejection of the declaration made out of court, in response to such question.

It is well, in conclusion, to emphasize the fact that the question is whether a certain hearsay, a statement not sworn to, nor subject to the cross-examination of the party who will be deleteriously affected by it, shall be received in departure from the rule which requires oath and liability to cross-examination. The oath simply increases the probability of the truth of the assertion. Other facts may sufficiently assure of the truth; proximity of death, etc. The swift sequence upon an event of a narrative of it, may make as great a probability of truth of the declaration, as oath and cross-examination would have done. In no correct sense, is the statement a part of the res gestae. It is simply testimony of one or more of the things done, the res gestae which are asserted to have been done, and proof of the doing of which must precede the judgment or decree of the court. It is always a narrative. If there is no sufficient warrant for the opinion that it was spontaneously made, that is, made because the things affirmed in it, in fact occurred, it may be branded as a "mere" narrative, but it is not to be scorned or repudiated, because it narrates, but only because the facts do not seem to give as ample a guaranty of its truth as would an interrogation in court, after swearing or affirming.

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[26]Com. vs. Van Horn, 188 Pa. 143. Cutting throat in cellar. Victim comes up, goes into the house and out. But the declaration followed the cutting "and, in point of distance, the declaration and the cutting were on the same premises."

(a)Shafer vs. Lacock, 168 Pa. 487.

# MOOT COURT

## X BANK VS. HOLLIDAY

**Banks and Banking—Checks—Signature—Forgery—Burden of Proof —Act of April 5, 1849, P. L., 424.**

### STATEMENT OF FACTS

A kept an account at the X Bank. An employee drew a check on the bank for $100, payable to himself and forged to it the signature of A. The employee obtained the money from Holliday, to whom he endorsed the check. Holliday subsequently presented the check to the X Bank on which it was drawn and X Bank payed the value of check, $100. A learned of the forgery, six weeks after it was committed. He objected to the bank's paying and the bank conceded his right to do so and restored the credit in A's account. The X Bank now sues Holliday for the money paid him on the check.

Casone, for Plaintiff.

Ettinger, for Defendant.

### OPINION OF THE COURT

Roth, J. The main question to be decided in this case is whether a bank can recover from a prior innocent holder, money paid him on a forged check after credit has been restored by the plaintiff bank to the depositor on whom forgery has been practised.

The counsel for the plaintiff contends by the Act of April 5, 1849, Section 10, P. L. 426, that the rule laid down by this act, over-rules the common law rule, that a bank is bound to know the signature of its depositors, and must exercise due diligence and care in discovering a forged signature. The act of 1849 holds the opposite view that if a bank has erroneously paid out money on a forged instrument, such as a check, etc., the bank can recover from the person previously holding the instrument.

The counsel for plaintiff in contending that the Act of April 5, 1849, will cover this case, cites 66 Pa. 435, which holds that the common law rule has been overruled by Act of 1849 and that the bank

could recover thereon. Also in 249 Pa. 374 Mr. Justice Moschzisker discusses the two rules very thoroughly, and holds that the common law rule is not now the law, but that the bank must use due diligence in discovering the forgery. But he further held that in case it is necessary that the bank should rely on funds held by forger on deposit, the Act of 1849 will apply; and in case of no funds to be relied upon, the common law rule will apply, and even five days was considered lack of care and diligence to discover forgery in 159 Pa. 46, a case cited by plaintiff to uphold the Act of 1849. So in 249 Pa. 375 the facts were different, as funds were on hand and rule of Act of 1849 could apply, but in case at bar, no funds were in evidence, and thus common law rule will be the law, as further stated by Mr. Justice Moschzisker. Plaintiff also argues that the right of a bank to compensate itself for risks it takes against forgery, is the only remedy it has, but in 168 Pa. 147, a case cited by neither counsel it stated the "bank must use due diligence and care in discovering forgery and notify bona fide purchaser, or other bank, and this would be a good defence against drawee bank, who had payed check," thus holding common law rule now the law in Pennsylvania.

The defendant's counsel's only defence; that of lack of due diligence seems to be upheld by all later cases, discovered by the Court in further research, although not cited by defendant counsel, for it was held in 271 Pa. 107 "a bank is still bound to know the signature of its depositors, and must exercise due diligence and care in paying checks, and discovering forgery, and give notice to innocent holder, and on failure to do either, cannot recover value payed." In Section 136-137 Negotiable Instruments Act, it holds "payee in sight draft is deemed to have accepted it, unless he returns it in 24 hours after presentment, and is bound to use utmost diligence and care, and promptness, and cannot recover value of check on failure to do so.

In 277 Pa. 401 the common law rule was again upheld in interpreting the Section 136-137 of Negotiable Instruments Act.

The Court upholds the contention of the defendant, that in view of recent authority stated the rule of common law is now the law in Pennsylvania in regard the power of a bank to recover money paid out on a forged check, and hence six weeks must be considered too long a time, and it is decided that the bank did not use due diligence and care in discovering forgery. Decision for defendant.

## OPINION OF SUPREME COURT

The bank paid $100 to defendant on a check purporting to be that of its depositor. More than six weeks after the payment, it has discovered that the signature to the check was forged. It has

agreed that the payment is invalid, as respects the depositor. The question is whether it can recover the money paid to Holliday, on this check.

We do not think that the mere payment precludes the subsequent recovery of the money from Holliday. He obtained the money from the bank, without giving anything of value.

But, the next question is, what is the effect of the delay of six weeks in the demand for repayment from Holliday? We think it fatal to the right of recovery. Holliday, if notified promptly, might have taken steps to recover the money, which would have been successful and success may have been made impossible by the delay. The bank had means of knowing whether the signature was genuine but omitted to use it. It is not necessary to defeat a recovery, that Holliday should show that he would be in fact damaged by the bank's delay were a recovery permitted. Cf. Union Nat. Bank, vs. Farmers' and Merchants' Nat. Bank, 271 Pa. 107.

The opinion of the learned court below is almost illegible. It cites several cases, by the number and page of a volume, without giving names of the parties. These are serious blemishes. The judgment of the learned court is affirmed.

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## SUMMERS VS. KREPS

**Land Held to Secure Debt—Option to Repurchase—Defeasance—Laches—Acts of April 22, 1856, P. L. 533; June 8, 1881, P. L. 84; April 23, 1909, P. L. 137.**

### STATEMENT OF FACTS

Summers, being indebted, conveyed his farm to Kreps, who was a creditor, and who agreed, in writing, that on the repayment to him of the money he expended in paying the debts and interest thereon, he would reconvey the land within two years. The debt amounted to $10,000. The farm was worth $16,000. Summers has allowed 10 years to pass before offering to repay Kreps, but he now demands a reconveyance, and files this bill to compel it.

Bateman, for Plaintiff.

Allman, for Defendant.

### OPINION OF THE COURT

Belin, C., J. Summers being heavily indebted conveyed his farm to Kreps by an absolute deed and simultaneous with it a written

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Bateman, for Plaintiff.

Allman, for Defendant.

### OPINION OF THE COURT

Belin, C., J. Summers being heavily indebted conveyed his farm to Kreps by an absolute deed and simultaneous with it a written

agreement was made in which Kreps promised to reconvey the farm in two years if Summers paid him the amount he expended plus interest. The facts plainly show the conveyance was to secure Kreps for the amount he paid out to Summers' creditors and for the amount Summers owed Kreps.

In Pennsylvania a contract which includes a stipulation as to a reconveyance, taking effect at the same time as the clause expressive of the transfer, is conclusively presumed to be a mortgage. The stipulation must be in writing, signed and delivered by the grantee to the grantor.

In Kerr vs. Gilmore, 6 Watts 405, Houston J. said, "Where the deed and defeasance are of separate and different dates they may amount to a mortgage and nothing more, where they are of the same date and executed at the same meeting of the parties they must be a mortgage or there will be no more mortgages."

Also see Harper's Appeal, 64 Pa. 315; Haines vs. Thompson, 70 Pa. 434. Following the above principle the transaction was a mortgage juris et de jure.

The defendant contends that the defeasance is void by the Act of June 8, 1881, P. L. 84 as the agreement was not sealed, acknowledged or recorded as required by this act; but this act was repealed by the act of April 23, 1909, P. L. 137 which only requires the defeasance to be in writing, signed, sealed, acknowledged, recorded and delivered to the grantor, as to subsequent purchasers and mortgagees. It only need be in writing, signed and delivered by the grantee to the grantor as between the parties to the transaction. The defeasance in this case was valid. See Rhodes vs. Good, 271 Pa. 117; Stewart vs. Stewart, 230 Pa. 475.

The defendant cited 271 Pa. 117, as affirming his contention that the defeasance was void; but that case decided all agreements prior to 1909 would be void if not sealed, acknowledged and recorded, and the court intimated that if the agreement had been made after the year of 1909 it would be a valid defeasance.

Since the transaction is a mortgage could Kreps limit the right of redeeming the mortgage to two years? Courts of equity applying the doctrine "Once a mortgage always a mortgage," refused to permit the parties to a transaction intended as a mortgage to give it any other character by a written agreement. Furthermore the mortgagor cannot by any agreement, simultaneous with the transfer of his property, however clear and forceful bind himself not to assert his right of redemption after a certain period. See Johnston vs. Gray, 16 S. & R. 361; Harper's Appeal, 64 Pa. 315.

Defendant contends that if the transaction is a mortgage the plaintiff is barred in asserting his right to redeem by the Act of

April 23, 1856, P. L. 533. This act limits the right of equity of redemption of five years; but it does not apply to the redemption of mortgages. Harper's Appeal, 64 Pa. 315.

The last question to decide is, did the ten years delay make the plaintiff guilty of laches? In cases of equitable titles to land equity requires relief to be sought within the period in which ejectment would lie, if nothing has taken place between the parties showing the original relation is not still kept up. An action of ejectment must be brought within 21 years in Pennsylvania; but this limitation may be shorter in equity cases than the statutory period when the inconvenience or evil is trifling and the neglect manifest, as when the money advanced on the faith of the mortgage is equal to the value of the property, then there must not be any unreasonable delay, Brock vs. Savage, 31 Pa. 410.

In this case the property was worth more than the price paid and there has been no great change in the position of the parties therefore the delay of 10 years was not unreasonable, Harper's Appeal 64 Pa. 315.

It is decreed that Kreps is to reconvey the farm to Summers on the receipt of $10,000 and interest for ten years.

## OPINION OF SUPREME COURT

There are, here, a conveyance in the usual form, from Summers to Kreps, of a piece of land, and a separate writing, delivered simultaneously with the deed providing for a reconveyance within two years, on repayment to Kreps, of the debt due him, and the other debts that he should pay. In the earlier cases, a deed with such agreement to reconvey, was deemed a mortgage.

The act of June 8th, 1881, forbad its being so treated, unless the defeasance was simultaneous with the deed, and unless it was written, signed, sealed and acknowledged, delivered to the grantor, and was recorded within 60 days. Such a provision was not unjust in favor of a purchaser or lien creditor of the grantee but, it was a striking absurdity, to make all those requirements in order to validate the defeasance against the grantee. In 28 years, the legislature discovered the vicious character of its requirement, as to the grantee, and now, by the act of 23rd April, 1909, all that is necessary, to make the defeasance valid, as against the grantee, is "that it be written, signed, and delivered by the grantee to the grantor." More is necessary only to affect subsequent grantees and mortgagees.

The court below has properly treated the deed and concurrent agreement as a mortgage.

The agreement to repay the debt in two years is ineffectual to alter the nature of the transaction. Ten years have been allowed to pass before the attempt to redeem is made. There may be a lapse of time so great, as to bar an enforcement of the defeasance. We cannot say that the interval of 10 years has such effect.

We approve of the decision of the learned court below, and the appeal from its decision is dismissed.

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## CULLEN VS. SCOTT

**Contracts—Sale of Real Estate—Agreement of Sale—Offer to Cancel —Failure of Vendee to Fulfill Agreement—Suit by Vendee to Recover Part of Purchase Price Paid.**

### STATEMENT OF FACTS

Scott agreed to convey to Cullen a house for $2500, within six weeks from Nov. 17, 1923. $250 were paid at once. The rest of the purchase money was to be paid when the deed was delivered. Scott did not have title to the land, but had a contract for its conveyance by X to him, before Dec. 15, 1923. X indicated a dispostion to refuse to carry out his contract, and Scott informed Cullen, and asked Cullen to induce X to make the conveyance. Later X changed his mind, and Scott informed him (Cullen), that he would be able to perform his (Scott's) contract. Cullen, ceasing to desire the conveyance, is now demanding the return of the $250. The court decides that he is entitled. Appeal.

L. Curtis, for Plaintiff.

J. Ernest, for Defendant.

### OPINION OF THE COURT

Davis, E., J. The court below erred in entering judgment for the plaintiff, because, from the facts as given, which are uncontroverted, it is apparent that the equity of the case is all with this defendant, the vendor.

From the facts stated, the defendant had an undisputed equity in the title of X, from the very beginning of his transaction with this plaintiff. After X's "indication of a disposition" to refuse to carry out his contract, the facts not being explicit on this point, we are justified in assuming that Cullen **did** interview X, at Scott's request, for the purpose of inducing X to convey the title to Scott. This in-

The agreement to repay the debt in two years is ineffectual to alter the nature of the transaction. Ten years have been allowed to pass before the attempt to redeem is made. There may be a lapse of time so great, as to bar an enforcement of the defeasance. We cannot say that the interval of 10 years has such effect.

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terview must have had some effect on X, because he "changed his mind," and assuming that after he "changed his mind" he did convey the title to Scott, Scott now has the title he had bound himself to convey, and is, at the time this suit is brought, fully capable of performing his contract with this purchaser plaintiff. Although the facts do not state, we must assume that all this procedure was **before** the time set for performance. The time for performance here, was made expressly of the essence of the contract by the parties: the deed to be delivered within six weeks from November 17, 1923, at which time the balance of the purchase price was to be paid. Scott was to have title from X before December 15, 1923, and thus it is apparent that he still would have approximately two weeks grace from that date to the date of the completion of this contract with Cullen, in which to hold or perfect title preliminary to the conveyance of it to Cullen. It is self evident that Scott had an equity in the contract with X, which was capable of specific enforcement, and thus the title which he was to convey to Cullen was something more than a mere possibility.

There are several questions which are raised from the pleadings of this case, which must be disposed of independently. In the first place counsel for the plaintiff contends that the effect of the defendant's notice to the plaintiff of X's disposition to refuse" to carry out his contract to defendant, is an admission on the part of the defendant that he is unable to give a clear and marketable title, and therefore constitutes a breach of the **covenant** of defendant to convey a title clear and free of incumbrances. A covenant is a clause or stipulation in a deed, and such covenants are usually contained in the deed, but here a deed had not yet entered into the transaction, but was to be given six weeks after November 17, 1923. Furthermore, the fact that the title was, at the time of the contract, in X, could not constitute an incumbrance on defendant's title, which he did not yet have, and therefore there can be no incumbrance on that which is not yet in existence. Such a contention on plaintiff's part is untenable.

The mere fact that the vendor here had not title at the time of making the contract is immaterial. A contract whereby the vendor binds himself to convey realty to which he has no title at the time he enters into the contract, is valid, and the subject matter thereof is lawful. As in contracts for the sale of mere possibilities, failure by the vendor to acquire an interest in the property of the kind specified by the contract **in time to convey it in compliance with the terms of the contract,** will constitute a case of breach, but will not affect the original validity of the contract, 39 Cyc 1213; Schuylkill County vs. Peterey, 120 Pa. 121.

The defendant here did not breach the contract, either by his announcement of the possibility of a breach or by any subsequent refusal to perform his part of the contract, and there was no breach by him either before time for performance or at the time this suit was brought, because the purchaser plaintiff never sought performance. The plaintiff himself, in this case, is in default, and cannot assert a right of action for breach of the contract, until there is an actual breach **at the time set for performance,** at which time he can, if there actually be a breach, recover back deposit money paid on the contract, on quasi-contractual grounds.

The question which confronts us throughout this entire case is this: Can a vendee in a contract for the conveyance of real estate, before the time for performance has arrived, demand the return of any purchase money which he has paid under the contract, when such demand literally amounts to a breach on his part?

A mere admission or assertion of inability to perform as required by the contract, where not followed by an abandonment thereof, affords no ground for rescission on the theory of anticipatory breach. The right to rescind a contract prior to the day fixed for its completion, for an anticipated breach thereof, because of inability to perform in accordance therewith, is only permitted in cases where the future breach is **conclusively** established, as by an express and absolute refusal to continue in the performance of the contract, together with the failure further to perform, or some voluntary act which renders it impossible to perform, 41 L. R. A. (N. S.) 60. Thus, since there was no **conclusive establishment** of a future breach on the part of the vendor, inasmuch as X did not **expressly and absolutely** refuse to convey to Scott, but indicated a mere present **disposition** to refuse, the vendee is not entitled to recovery on this theory.

When a party to a contract "ceases to desire" the object of the contract, without the other party to the contract having caused or encouraged that desire, such "ceasing to desire" literally amounts to a breach of the contract on the part of the first party, and he cannot then claim a recovery for money paid on the contract.

The general rule that a party to contract cannot breach, and thereby secure for himself some right or advantage to the detriment of the other party thereto, applies to contracts for the sale of real estate. In the application of this rule it is held that the vendee who, without breach on the part of the vendor, refuses to perform a contract for the purchase of real estate, cannot recover from the vendor either the amount paid on the purchase price, or a deposit by him as earnest money or as a forfeiture, L. R. A. 1918 (B) Page 541. El Paso Cattle Co. vs. Stafford, (1909), 176 Fed. 41, holding that, where the vendee, on the claim that the vendor was in default, undertook to

rescind the contract and recover the amount paid on the purchase price, if the vendor was not actually in default the vendee is not entitled to recover. Sanders vs. Brock, (1911), 230 Pa. 609, bears out the same idea, in holding that where the vendor tenders performance and the vendee refuses to carry out his part of the contract, and the former subsequently sells the land to another, the vendee cannot recover the amount he has paid on the purchase price. In this connection, (i. e., where the vendee himself is in default), see also L. R. A. 1918, B page 555, et seq.

Counsel for the plaintiff cites the case of Hocking vs. Hamilton, 158 Pa. 107, in support of his contention that he has a right to accept the admission of the defendant that he did not have the title to the property, as a breach on the vendor's part, and institute an action immediately for the recovery of his deposit money. That case has no bearing on the case at bar, because in that case there was an **express announcement** of an intention on the part of the vendor **not to perform,** while in the present case, Scott, the vendor, never had such an intention, much less expressing it. We feel that the authorities cited by counsel for plaintiff are irrelevant to the real issue, and do not support his claim to a right of recovery.

The authorities cited by defendant, e. g.—Shamlian vs. Waxman, 80 Super. 73, which is somewhat analagous to the present case; Barber Milling Co. vs. Leichammer Baking Co., 273 Pa. 90, and Sanders vs. Brock, 230 Pa. 609, ably bear out his contentions in resisting this claim, that there was no breach on the part of the defendant vendor at any time, and that the purchaser plaintiff has no right to refuse to carry out his contract as made, and these cases have been carefully reviewed by the court in rendering this decision.

Therefore, in view of the fact that the plaintiff is now suing on a quasi-contractual right that arises only on breach of the original contract, and since the defendant has always abided by his contract as made, we are obliged to sustain this appeal, and reverse the decision of the court below. Reversed accordingly, and judgment for defendant, Scott.

## OPINION OF SUPREME COURT

When Scott agreed to convey to Cullen, he had no title to the land. He had a contract with its owner X, however for its purchase. But, the want of title is not of material importance. A man may contract to sell that which he has not, in anticipation of becoming owner of it before the arrival of the time for conveying it.

That X showed, at times, a disposition not to convey to Scott, is unimportant. He subsequently changed his mind and would have

conveyed, (if he has not indeed conveyed) to Scott, thus enabling Scott to complete his engagement with Cullen. But Cullen is refusing to accept the conveyance. For this refusal there is no apparent excuse.

The question then is, may a vendee who has made a partial payment of the purchase money, on subsequently refusing to accept a conveyance, recover back the money he has paid. Some of the cases cited by the learned court below, e. g.—Shamlian vs. Waxman, 80 Super. 73, answers the question with a negative. Cf. also, Sanders vs. Brock, 230 Pa. 609. We cannot say that the answer is not fair. The learned court below has adopted their view. Its judgment is affirmed.

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## TROOP VS. DAVIDSON

**Sales in Bulk—Bulk Sales Act—Consummation of Sale—Action by Creditors to Set Aside Sale—Ninety-day Limitation—Act of May 23, 1919,P. L. 262.**

### STATEMENT OF FACTS

X kept a grocery. He sold the business for $4,000 to Davidson on February 17, 1924. He furnished no list of his creditors, nor were they notified of the sale. The creditors took no steps such as are prescribed by the Bulk Sales Act, May 23, 1919, P. L. 262, for the compelling of Davidson to hold the goods as a trustee for their debts. Six months after the consumation of the sale Troop sued X and obtained a judgment for $375. He has issued an execution and levied on the goods sold to Davidson, alleging that the sale was fraudulent as to him. No evidence of fraudulent intent on the part of X or of Dadivson is given, save the failure to comply with the Act of 1919. In a Sheriff's Interpleader the Court decides that the goods levied on are not subject to the execution.

Miss Rubin, for Plaintiff.

Belin, for Defendant.

### OPINION OF THE COURT

Miss Bogar, J. This is a Bill in Equity under the provisions of the Bulk Sales Act of May 23, 1919, P. L. 262, to review the proceedings of the court below, and to set aside the sale of goods made in bulk by X the vendor to Davidson the purchaser, and to have the

conveyed, (if he has not indeed conveyed) to Scott, thus enabling Scott to complete his engagement with Cullen. But Cullen is refusing to accept the conveyance. For this refusal there is no apparent excuse.

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purchaser declared trustee or receiver for the value thereof so that the plaintiff might obtain satisfaction of his claim.

The Bulk Sales Act of 1919, requires the purchaser of goods in bulk, to obtain from the vendor a sworn written statement containing the names and addresses of all persons to whom the vendor is indebted and the respective amounts due to each before paying the purchase price. He must also give notice, either personal or by registered mail, of the proposed sale, to each of the creditors of the vendor, showing the price to be paid, the terms of the sale, and containing a list of the other creditors, at least ten (10) days before the purchase price is paid.

By conforming to the requirements of this Act, the vendee is protected from the vendor's creditors.

The defendants did not follow the provisions of the Act, in any respect, but no further evidence of fraud or collusion appears.

In interpreting the Act under consideration, literally, a failure to comply with the provisions renders such sale void, and the purchaser liable to the creditors of the vendor as a receiver for the fair value of all the property involved in the sale. The Act further provides that no proceeding to invalidate such sale shall be brought against the purchaser after ninety (90) days from the consummation thereof.

This then must surely indicate that the word void, as used, must be interpreted as voidable only, for if it were absolutely void, no such proceeding would be necessary to declare the transaction to be one of this nature. The word void has been interpreted as voidable in Seylar vs. Carson, 69 Pa. 81, and Pearsoll vs. Chapin, 44 Pa. 9.

In construing the word consummation as used in this last provision the court in Gibbon vs. Aronson, 80 Super. 36, was of the opinion that a sale was consummated when the goods have been delivered and paid for, and open and notorious visible possession has been taken thereof by the purchaser, and this, regardless of whether there had been conformance with the Act or not.

This sale then was consummated and this suit is brought 6 months after such consummation. As the plaintiff has not chosen to avail himself of the provisions of the Act within the time prescribed, he has therefore lost the protection of the act.

The order of the court below is therefore affirmed.

## OPINION OF SUPREME COURT

The sale was not invalid because of actual fraud; and the title therefore of the vendee is not assailable for fraud.

In order to prevent fraud, the act of May 23, 1919, P. L. 262, has prescribed the doing of certain things, when a bulk sale is made, and indicates the results of non-compliance, but it requires the action of dissenting creditors to be taken within 90 days from the day of the consummation of the sale. If action is not taken within that time, the act of 1919 ceases to have any operation with respect to the particular sale. Here no steps have been taken for six months after the consummation of the sale. The language of the act is explicit. "No proceeding at law or equity shall be brought against the purchaser to invalidate any such sale, after the expiration of 90 days from the consummation thereof," Gibbon vs. Aronson et al, 80 Super. 36; West Shoe Co. vs. Lemisch, 279 Pa. 414.

The sale is not void because of actual fraud, nor because of ignoring the act of May 23, 1919. The judgment is affirmed.

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## MANUFACTURING CO. VS. SUDGEN

**Negotiable Instruments—Corporations—Prior Endorser's Liability—Ultra Vires Acts—N. I. A. Sec. 66**

### STATEMENT OF FACTS

X made a note for $500, payable to Y or order. Sudgen became endorser for X's accommodation as did also the plaintiff, a corporation, subsequently to Sudgen. The plaintiff has paid the note and sues the prior endorser. Defense is that plaintiff's endorsement imposed no liability; its payment of the note was therefore voluntary, hence it cannot recover.

Mendlesohn, for Plaintiff.

Sheaffer, for Defendant.

### OPINION OF THE COURT

Gluckman, J. Section 66 of the Uniform Negotiable Instruments Act (May 18, 1901, P. L. 194) provides, in part, as follows:

"Every endorser who endorses without qualification engages that he will pay the amount thereof to the holder, or to any subsequent endorser who may be compelled to pay it."

These are the words upon which the defendant relies for relief from liability. He claims that the plaintiff could not have been compelled to pay, as its act in becoming an accommodation endorser was ultra vires and therefore imposed no liability.

We are of the opinion that the contention of the defendant is well founded. It is difficult to see how the phrase "who may be

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We are of the opinion that the contention of the defendant is well founded. It is difficult to see how the phrase "who may be

compelled to pay," can be interpreted in any other way than just what the clear meaning of the words would indicate. In Parker vs. Thompson, 3 Pickering (Mass.) 429, it was held that "whatever he shall be legally compelled to pay, means, whatever by legal process he shall be obliged to pay." The act, of the plaintiff, in becoming an accommodation endorser was an ultra vires act, and was therefore illegal and could not be enforced, Cook on Corporations, Sec. 774. It is obvious, therefore, that the plaintiff could not be compelled to pay. The defendant is liable to the plaintiff corporation for what it was compelled to pay. It was compelled to pay nothing. It would seem, therefore, that the defendant is completely protected by the words of the statute.

We do not feel bound by the decision of the court in Hazelwood Brewing Co. vs. Siebert, 256 Pa. 9. It seems to us that the court in that case evaded entirely the important question of the interpretation of the words "be compelled to pay" and rested its decision on the ground that "the plea of vultra vires is not to be interposed by a stranger to the contract." We cannot assent to such a holding because we believe that the defendant would thus be deprived of the very protection which the words of the statute have sought to give him.

We concur in the views expressed by the learned counsel for the defendant who seems to have had the above mentioned Pennsylvania case in mind, although it was not cited. We therefore render judgment for the defendant.

## OPINION OF SUPREME COURT

We cannot adopt the conclusion to which the learned court below has come.

Ordinarily, the officers of a corporation have no right to involve it in liabilities for the accommodation of others. But, when no rights of creditors are involved and the stockholders have no objections, we cannot perceive why, should a corporation become endorser, it should not have the rights of a usual endorser against prior endorsers of, or parties to the instrument. The sentiment of Mr. Justice Potter, in Hazelwood Brewing Co., vs. Siebert, 256 Pa. 9, is, we think, reasonable, when, speaking of an accommodation endorsement by a corporation, he says, "The act may have been ultra vires but the stockholders, the state, and in some instances, the creditors are the parties entitled to raise the issue, and not a stranger to the transactions."

Sudgen has intended to make himself liable to later purchasers or endorsers of the note. It matters not to him whether the endorsement by the plaintiff could have been assailed by the corporation. He could not, we think, coerce the corporation into disavowing its

endorsement, by menacing it with the loss of his obligation to the corporation, in case it should refrain from denying its liability. We must not too literally interpret the words "any subsequent indorser who may be compelled to pay it." There may be defences available to an endorser which it would be ignoble to make. We cannot put it in power of a preceding endorser to compel him to make any of them.

The judgment is reversed, and judgment is entered for the plaintiff.

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## JONES VS. FARMERS' BANK

**Banks and Banking—Negotiable Instruments—Duty of Transmitting Bank—Agency—Responsibility of Agent**

### STATEMENT OF FACTS

Jones, having a note on which B was endorser, deposited it with his bank, the defendant, for collection. This bank forwarded the note to the A Bank, in the borough of X, which sent it to Bank Y, where the note was payable. At maturity, the note was presented to the Bank Y for payment, but there were no funds there. The notary protested the note, and made out notices to the parties interested, including B. This notice was not sent to B, but to the bank with which he dealt. This bank failed to forward the notice to B, or to inform Jones that A had the notice. The result was B's discharge. Without B the note was worthless. This is an action for the loss.

Crisman, for Plaintiff.

Davis, for Defendant.

### OPINION OF THE COURT

Jerko, J. The sole question for our determination is: Whether a bank with whom a note has been left to be transmitted for collection, is liable to the holder of the note, for the negligent failure of its correspondent bank to give notice of protest to the proper parties.

The plaintiff's contention, that the defendant bank is liable for such neglect, is not supported by his authorities. In West Branch Bank vs. Fuller, 3 Pa. 399, the defendant bank did not take the note for the purpose of transmission, as the note was not payable at any particular place. The bank in that case, expressly assumed the responsibility of collection. It further appears that that note was taken

endorsement, by menacing it with the loss of his obligation to the corporation, in case it should refrain from denying its liability. We must not too literally interpret the words "any subsequent indorser who may be compelled to pay it." There may be defences available to an endorser which it would be ignoble to make. We cannot put it in power of a preceding endorser to compel him to make any of them.

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as collateral, thus imposing on that bank the duty of collecting it, and giving the required notice of protest. Also, in Bradstreet vs. Everson, 72 Pa. 124, a case cited by plaintiff, the defendant in that case was not a bank, but a mere mercantile agency. The facts further disclosed an expressed contract by the individual agency, to duly collect the note. Therefore, the contention of the plaintiff here, Jones, that this defendant bank is liable to him for the loss of the note, and in support of which he cites the above two cases, is entirely untenable.

At present, it is well settled in Pennsylvania, that a bank with whom a note has been left to be transmitted for collection, is not liable for the negligence or default of its correspondents or agents, thru whom it is necessary to transmit the note, for collection, in the absence of an agreement to the contrary. Moreover, the sub-agent selected for that purpose, by the bank, is not the agent of the latter but is deemed the agent of the holder of the note, and is then liable to him, for any default in the collection thereof, Farmers' National Bank vs. Nelson, 255 Pa. 455. Consequently, the rules of agency advanced by the plaintiff, are not applicable between the home bank and its correspondents. The only duty assumed by the home bank, in the absence of an agreement to the contrary, is to transmit the note with proper instructions to its correspondent properly selected, thus it can be seen that after the home bank, such as this defendant, has performed its function of transmitting the note to its correspondent, such correspondent then becomes the agent of the owner of the note, and is liable to him only, for any default in the collection. Accordingly, the home bank is under no duty to give notice of protest to anyone, Farmers' National Bank vs. Peoples National Bank, 263 Pa. 266. The reason for this rule is obviously upon the ground that a contrary rule would impose too great a burden on banks who took such paper for collection.

Thus in view of the authorities cited, it clearly appears that the defendant's contentions, as supported by his authorities, are well taken, and must be upheld.

We accordingly render judgment for the defendant.

## OPINION OF SUPREME COURT

There is no ground on which liability of the defendant bank can be predicated. Its undertaking was discharged, when it forwarded the note to its correspondent. For any negligence of that correspondent, or of its correspondent, it cannot be liable. The sending of notice of non-payment of the note to the bank with which B dealt rather than to B was improper, but the effects of it cannot be charged to the defendant, Farmers' Nat. Bank vs. Peoples Nat.

Bank, 263 Pa. 266, Farmers' Nat. Bank vs. Nelson, 255 Pa. 455. The satisfactory opinion of the learned court below makes further discussion by us unnecessary. Affirmed.

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## ROPER'S ESTATE

**Decedents' Estates—Wills—Executors—Source of Authority of Executor—Valid Payment to Executor**

### STATEMENT OF FACTS

Roper appointed X his executor. Roper was mortgagee in a mortgage for $5000. Immediately after his death, and before the probate of the will and the grant of letters to X, the $5000 were paid to X and he gave a receipt. X declined to accept letters and an administrator d. b. n. c. t. a. was appointed. X died and the money received by him from the mortgagor has not been recovered. This is a scire facias on the mortgage; the defense being the payment to X.

Bobkowski, for Plaintiff.

Miller, for Defendant.

### OPINION OF THE COURT

Miss Rubin, J. The main question to be decided in this case is whether an executor receives his authority from the decedent's will or must it come from the Orphans' Court which has the power to probate wills and grant letters testamentary.

The counsel for the defendant contends that the defendant is relieved from the necessity of paying the mortgage a second time on the ground that he gave the money to X as the executor of Roper and it was, therefore, both a valid and binding payment on the testator's estate. However, it was the duty of the defendant to have ascertained whether or not the will had been probated and if letters testamentary had been issued to X. In Woodruff vs. Mutschler, 34 N. J. E. 33, it was specifically held that the mortgagor is under an obligation to ascertain the authority of those to whom he pays. It is the law of Pennsylvania that an estate cannot be settled until the will, if there be one, is probated and letters are granted to the person or persons entitled to them. In Shoenberger's Executors vs. Lancaster Savings Institution, 28 Pa. 459, Mr. Justice Lowrie well states the law, thus: "A man's estate really passes into the hands of the law for administration as much when he dies testate as when intestate, except that, in the former case, he fixes the law of its distribution after payment of debts, and usually ap-

Bank, 263 Pa. 266, Farmers' Nat. Bank vs. Nelson, 255 Pa. 455. The satisfactory opinion of the learned court below makes further discussion by us unnecessary. Affirmed.

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## ROPER'S ESTATE

**Decedents' Estates—Wills—Executors—Source of Authority of Executor—Valid Payment to Executor**

### STATEMENT OF FACTS

Roper appointed X his executor. Roper was mortgagee in a mortgage for $5000. Immediately after his death, and before the probate of the will and the grant of letters to X, the $5000 were paid to X and he gave a receipt. X declined to accept letters and an administrator d. b. n. c. t. a. was appointed. X died and the money received by him from the mortgagor has not been recovered. This is a scire facias on the mortgage; the defense being the payment to X.

Bobkowski, for Plaintiff.

Miller, for Defendant.

### OPINION OF THE COURT

Miss Rubin, J. The main question to be decided in this case is whether an executor receives his authority from the decedent's will or must it come from the Orphans' Court which has the power to probate wills and grant letters testamentary.

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points the persons who are to execute his will. But even this appointment is only provisional, and requires to be approved by the law before it is complete; and therefore the title to the office of executor is derived rather from the law than from the will." In the case before us not only did X fail to secure letters but he actually declined to receive them.

Though the courts of England hold that the title of the executor is derived from the will and while the office of executor in Pennsylvania is very analogous to the office of executor in England, yet it would be erroneous to take counsel from English analogies in total disregard of our own statutes.

In Lowrie vs. Dollar Savings and Trust Co., 266 Pa. 135, it was held, "An executor in Pennsylvania has no authority to collect the debts of his testator until the will has been duly probated and letters testamentary issued to him. A payment made to him after the death of the testator and before the issue of letters, is not a good payment to the estate."

The judgment is therefore for the plaintiff.

## OPINION OF SUPREME COURT

It is regretable that the mortgagor, having paid the mortgage, should be compelled to pay it again, because the executor, to whom payment was made, has, in refusing letters testamentary, failed to pay the money over to the administrator c. t. a. However, each state may adopt its own rule, as to the validity of payments to persons named in wills as executors, who subsequently decline to accept the office. The learned court below has well held that the payment to the person named executor, but who did not subsequently qualify as such, is no discharge of the debt. and that the administrator may compel payment from the mortgagor to him. The judgment of the learned court is hence affirmed.