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Clouds on Title to Real Estate and Remedies in Pennsylvania

A cloud on title has been defined as a semblance of title, either legal or equitable, or a claim of a right in lands, appearing in some legal form, but which is, in fact, invalid, or which it would be inequitable to enforce. 5 R. C. L. 634. See also remarks of Schaffer, J. in Octoraro Water Co. vs. Garrison, 271 Pa. at page 427 (1921).

The jurisdiction was originally by suit in equity to quiet title or to remove clouds, and these suits were denominated bills of peace and bills quia timet. Says the editor of 5 R. C. L. 634:

> "As the name indicates, bills of peace are bills filed to procure repose from perpetual litigation and constitute the earliest instances in which the court of chancery exercised its jurisdiction avowedly upon the ground of preventing a multiplicity of suits."

EQUITABLE JURISDICTION PRIOR TO 1836

As is well known, prior to 1836 there was no separate equity jurisdiction in Pennsylvania and as the principles of equity were considered as a part of the common law, it became the fashion to administer equitable relief through the medium of legal forms. Pollard vs. Shaeffer, 1 Dall. 210 (1787); Wikoff vs. Coxe, 1 Yeates 353 (1793); Murray vs. Wilkinson, 3 Binn. 135 (1810); Church vs. Ruland, 64 Pa. 432 (1870).

As early as 1824, in Funk vs. Voneida, 11 S. & R. 109, an action of covenant was considered as a substitute for a bill quia timet, and in Sims vs. Chew, 15 S. & R. 197 (1827), Gibson, J. applied the same equitable principle. However, no cases appear in the reported decisions prior to the Act of June 16, 1836, P. L. 1835-6, 785, wherein the holder of a legal title to the land and in possession thereof has been granted equitable relief from a cloud upon the title by a bill of quia timet.

EQUITABLE JURISDICTION SINCE 1836

The Act of June 16, 1836, P. L. 1835-6, 785, 790, section 13, provides that the several courts of common pleas shall have chancery powers to prevent or restrain "the commission or continuance of acts contrary to law, and prejudical to the interests of the community, or the rights of individuals." To adopt the language of Moschzisker, J., in Barnes Laundry Co. vs. Pittsburgh, 266 Pa. at page 41 (1920), "This broad grant of equity jurisdiction is sufficient to cover cases like the one now before us." See, however, Whyte vs. Faust, 281 Pa. 444 (1924).

The earliest reference, apparently, to this form of equitable relief is Kennedy vs. Kennedy, 43 Pa. 413 (1862), wherein Strong, J., for the Supreme Court, remarked:

> "This is not a bill for partition. On the contrary, it avers that partition has already been made by the agreement of the parties. Its object is

> rather to obtain a decree for the quiet enjoyment of the land which the complainant alleges became his in severalty by virtue of a former parol partition. Courts of equity have jurisdiction in cases of partition, and, possibly, where there has been long acquiescence and possession under a parol division of lands previously held in common or joint tenancy, equity will quiet the enjoyment of such estates. Such seems to have been the opinion of Lord Hardwicke in Ireland vs. Rittle, et al., 1 Atkyn's Cases 256. And there are very many cases analogous to bills of peace, in which a chancellor has interfered to quiet the enjoyment of a right, or to establish it by a decree, or to remove a cloud from the title. Indeed, this is one of the well-recognized branches of equitable jurisdiction, though its extent is not clearly defined."

In Eckman vs. Eckman, 55 Pa. 269 (1867), it was stated that a deed made in the course of a proposed family arrangement and delivered only as an escrow but by some means finding its way on the record, would be such a cloud upon the grantor's title, that the arrangement failing he would have the right to demand the cancellation of the deed. Woodward, C. J. remarked:

> "Bills for this purpose belong to the head of relief, which is technically called quia timet, and are very common in the equity jurisdiction."

In Stewart's Appeal, 78 Pa. 88 (1875), speaking of clouds on title, Sharswood, J. said:

> "The best expression of the rule, as it seems to me, is to be found in an opinion of the Supreme Court of Massachusetts, in Martin vs. Grover, 5 Allen 661, by Merrick, J., 'Whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party, after the evidence

> to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title, or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice or the rights of the parties may require'."

Eleven years later in Dull's Appeal, 113 Pa. 510 (1886), Green, J. quoted this same passage with approval.

This was a bill in equity to remove cloud from the title, the plaintiff being in possession. Defendant held a recorded, invalid tax deed for the same property and asserted his title but brought no action. The evidence of the invalidity of B's title rested entirely in parol. The lower court dismissed the bill and on appeal it was ordered reinstated and that the defendant should forthwith surrender and deliver up to the plaintiff for cancellation the deed which he held. Said Green, J.:

> "It is beyond question that the defendant's deed is a cloud, and a serious one, upon the plaintiff's title . . . . Our own cases show that we have adopted, and fully recognized, the equity jurisdiction to remove clouds upon title, as fully and as broadly as it is described in the equity textbooks and decisions . . . . In none of the cases have we been able to discover that this kind of relief has been withheld, unless there was a relation of trust or contract between the parties. The jurisdiction has been asserted and enforced as an independent source or head of jurisdiction, not requiring any accompaniment of fraud, accident, mistake, trust or account, or indeed any other basis of equitable intervention."

In Slegel vs. Lauer, 148 Pa. 236 (1892), a bill in equity was filed for cancellation of a deed which constituted a

cloud on plaintiff's title. The plaintiff was in possession of a strip of land eight feet wide and two hundred and thirty feet deep in the City of Reading, adjoining on the south a property which had formerly belonged to the County of Berks and had been the site of the old county jail. The jail property was sold by the County Commissioners in 1849 and a new prison was established more than a mile from the old location. The property through conveyance and descent became vested in the defendants. On December 1, 1772, plaintiff's predecessor in title had executed a deed to the County Commissioners for the land now held by plaintiff, the object of the deed being to provide against any building being erected upon this strip of land as long as the property adjoining was used for jail purposes, thus tending to prevent the escape of prisoners over the jail wall. The object of the present bill was to obtain a cancellation of this deed, the plaintiff being desirous of selling the property, but alleging his inability to do so for an adequate and proper price because defendants insisted upon and made public that they were entitled to the rights and privileges of the County Commissioners contained in the said deed. The lower court determined that the deed in question constituted a base fee and as the use had ceased, the title had reverted to the plaintiff, the successor in title to the original grantor. On one of the points of demurrer it was contended that the court had no jurisdiction to declare null and void the deed of December 1, 1772, because it conferred substantial rights upon the County of Berks and its grantee, and the title of the premises depended upon the same and the matters in controversy ought to be settled at law. Said Endlich, J.:

> "The particular form of equity jurisdiction here invoked is that which is exercised to remove clouds upon title, the relief in such cases being granted on the principle quia timet; that is, that the deed or other instrument constituting the cloud may be used injuriously or vexatiously embarass or affect

the plaintiff's title to real estate: 3 Pomeroy Eq. Jur. Sec. 1398. The existence of this as an independent source or head of jurisdiction the courts of this state, not requiring any accompaniment of fraud, accident, mistake, trust or account, or any other basis of equitable intervention, is abundantly established: Dull's Appeal, 113 Pa. 510; Stuart's Appeal, 78 Pa. 88; Wilson vs. Getty, 57 Pa. 266; Eckman vs. Eckman, 55 Pa. 269; Kennedy vs. Kennedy, 43 Pa. 413 . . . . It is objected, however, that the proper construction of a deed is not a subject of equitable jurisdiction: Grubb's Appeal, 90 Pa. 228. No doubt, there is not in this state, as there is in some others, any special jurisdiction conferred upon the courts of equity by reason of which they may be called upon to declare the construction of a deed, or will, or other instrument; nor, of course, will the mere fact that the proper construction of such is in dispute confer chancery jurisdiction in the absence of some other recognized basis of equitable intervention. But it will scarcely be pretended, that, where a party has no legal remedy whereby to protect his property against the assertion of an unfounded or expired claim, the established equity jurisdiction is ousted by the mere fact, that, incidentally, it will be necessary to put a construction upon a written instrument. Such a doctrine would practically amount to a denial of the jurisdiction itself.

Again it is urged upon us that a court of equity has no jurisdiction to settle a disputed legal right to land on a bill in equity filed by the party in possession averring that a multiplicity of suits at law may result to redress threatened trespasses: Washburn's Appeal, 105 Pa. 480. Of course not; but that is not this case."

In Sears vs. Scranton Trust Company, 228 Pa. 126

(1910), there was a bill in equity for an accounting of partnership assets and for the appointment of a receiver and a cross bill praying for an injunction and for cancellation of certain deeds and a partnership agreement. In affirming the decree of the lower court granting relief upon the cross bill, Moschzisker, J. commented upon equity jurisdiction as follows:

> "The fact that the ejectment might lie will not necessarily oust the jurisdiction of equity: Mortland vs. Mortland, 151 Pa. 593; Williams vs. Kerr, 152 Pa. 560; Clauer vs. Clauer, 22 Pa. Superior Ct. 395. Whatever may be the prayer of a bill, if the kernel of the controversy is the legal title to land, then equity cannot be invoked; but where the question of the legal title is incidental and subordinate to other elements which call for the exercise of equitable remedies, equity will take and retain jurisdiction. Penn Co. vs. Ohio River Junction R. R. Co., 204 Pa. 356; Ind. B. & L. Assn. vs. Real Estate Title Co., 156 Pa. 181; Wagner vs. Fehr, 211 Pa. 435; Clauer vs. Clauer, 22 Pa. Superior Ct. 395; Wilhelm's App., 79 Pa. 120. In the last of these cases, which was a bill for an accounting, Mr. Justice Sharswood says: 'Nor is there any doubt that though a question of title may be necessarily involved, it is within the jurisdiction, for, where there is jurisdiction of the subject-matter, that carries with it jurisdiction to decide every incidental question that is necessarily involved'."

In Octoraro Water Company vs. Garrison, 271 Pa. 421, (1921), there was a bill to cancel deeds alleged to be a cloud on the title. Decree was entered as prayed for and the defendants appealed. The facts embodied a deed conveying land described by metes and bounds and the question was for interpretation by the court as to just what the deed embraced. If one construction was adopted the plaintiffs would be sustained in their bill. On the other hand, if the

defendants' construction was adopted the result would be the contrary. The Supreme Court affirmed the decree of the court below, thus adopting the first construction. Said Schaffer, J.:

> "The only result of the deed to Garrison was to put a blot upon plaintiff's title, not to vest anything in him or those claiming from him. Nothing so certainly answers the definition of the term "cloud on title," as the placing on record of a deed for that which another owns, a grant which, although it assumes to convey something, in reality conveys nothing at all.
>
> The technical term "cloud on title," is thus defined: 'A cloud upon title is a title or encumbrance apparently valid but in fact invalid:' Words & Phrases, 1st Series, vol. 2, page 1233. 'A cloud on title has been defined as a semblance of title, either legal or equitable, or a claim of a right in lands, appearing in some legal form, which is, in fact, invalid, or which it would be inequitable to enforce:' 5 Ruling Case Law 634. 'The general rule is that, if the title against which relief is prayed is of such a character that, if asserted by action, and put in evidence, it would drive the true owner of the property to the production of his own title in order to establish a defense, it constitutes a cloud which he has a right to have removed. The rule is that relief will be granted in equity when the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid:' 5 Ruling Case Law 657. 'The jurisdiction of a court of equity to remove clouds from title is an independent source or head of jurisdiction, and whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over

his title or interest . . . . . a court of equity will afford relief by directing the instrument to be delivered up and cancelled:' Heppenstall vs. Leng, 217 Pa. 491; Dull's App., 113 Pa. 510; Sears vs. Scranton Trust Co., 228 Pa. 126."

See Onorato vs. Carlini, 272 Pa. 489 (1922), at page 493, jurisdiction of equity; Montgomery vs. Mahjubin, 3 D. & C. 833 (1923).

EQUITABLE JURISDICTION DENIED

In Haines' Appeal, 73 Pa. 169 (1873), Sharswood, J., in explaining the powers of equity, stated:

> "No case has been produced, and we think none can be, which goes the length which must be maintained here, that wherever there is an outstanding claim or encumbrance upon an estate which is barred by reason of lapse of time, and therefor cannot be enforced at law, but which nevertheless, is a cloud upon the title, and prevents it from being marketable, the possessor can invoke the aid of a court of equity to remove the cloud, and forever bar such claim or encumbrance by a perpetual injunction. If this could be done, there is not an ejectment in the common-law courts which by an inversion of parties could not be brought into a court of equity, and the question finally determined by one decree without a jury, instead of two verdicts and judgments. No doubt it is highly important to the parties, and, indeed, of public interest, that some mode should exist by law by which all such clouds may be removed, and thus valuable estates be brought into the market. We are very far from holding that the legislature cannot do this."

In Barclay's Appeal, 93 Pa. 50 (1880), there was a bill in equity praying, inter alia, that defendant "may be

decreed to make all his claim against the plaintiff as to the realty in this suit," and a further prayer "that it may be decreed that plaintiff has a good and valid title." In reversing the decree of the lower court, Gordon, J. said:

> "We know of no power in equity, or elsewhere, by which the owner of an adverse title can be called into court, by the party in possession, to assert and defend that title, on penalty of forfeiture should he refuse so to do. This might be a very convenient and speedy method of settling title, and much might be said in its favor; but as the statute interposes and allows such claimant twenty-one years within which to prosecute his claim, we do not see how he can be compelled to assert his right, or test his claim, within a time less than this statutory period."

Note also that Gordon, J. dissented in Dull's Appeal, 113 Pa. 510 (1886).

In Washburn's Appeal, 105 Pa. 480 (1884), a bill prayed for an injunction to restrain defendants from entering upon or passing over a certain lane and taking possession of a certain strip of land, in the possession of the plaintiffs, and further prayed for a decree to quiet the plaintiff's alleged title to the premises. A demurrer to the bill being overruled, the defendants in an answer set up title to the land in dispute and further denied the jurisdiction on the ground of there being an adequate remedy at law. In reversing the decree as entered by the lower court, Clark, J. said:

> "In the proofs, the parties conformed to the pleadings, and proceeded as if the action was at law, in ejectment, or trespass; the whole contention, as shown by both the pleadings and the proofs, was upon the legal rights and claims of the parties; no irreparable injury was shown, no clear right to the subjects in dispute established, no ground for equitable relief disclosed. Where rights which are

> legal are asserted on one side, and denied on the other, the remedies are at law. They cannot be settled under equity forms; this is undoubtedly the general rule. In actions respecting real property, therefore, if there be no equitable ground of relief involved, the rights of the parties must be determined at law; when thus determined, or when they are admitted in the pleadings, or otherwise clearly appear, an equity based upon that right, superinduced by the acts of the parties, may be asserted, and a decree for equitable relief made; thus equity is made the means, not of establishing the legal right, but of giving adequate protection in the enjoyment of it when thus established."

A long line of decisions in Pennsylvania holds that where the averments of a bill manifestly raise a question as to the title of real estate the equity court is without jurisdiction. Among the great array of cases, the following will be found in point:

> Rice vs. Ruckle, 255 P. 231 (1909); Wickham vs. Taylor, 225 Pa. 246 (1909); Chambersburg School Dist. vs. Hamilton School Dist., 228 Pa. 119 (1910); Goss vs. Spencer, 245 Pa. 12 (1914).

JURISDICTION BY STATUTE

At Common Law in Pennsylvania the remedy for the enforcement of a title to land by one out of possession is ejectment. When, however, a person was in possession claiming title but such title was controverted, there was no relief, as indicated by the cases already collated, except that afforded in the limited class of cases in equity by a bill quia timet. In the several cases as noted the courts referred to some possible legislative relief, but it was not until about fifty years ago that this subject claimed the attention of the Pennsylvania Legislature.

The various quieting acts pertaining to land titles are collated as follows:

The Act of April 3, 1872, P. L. 33.
The Act of June 11, 1879, P. L. 127.
The Act of May 21, 1881, P. L. 24.
The Act of June 24, 1885, P. L. 152.
The Act of March 8, 1889, P. L. 10.
The Act of May 25, 1893, P. L. 131.
The Act of June 10, 1893, P. L. 415.
The Act of April 16, 1903, P. L. 212.
The Act of April 18, 1905, P. L. 202.

Said Mestrezat, J. in Foster's Petition, 243 Pa. 92 (1914):

> "At common law an owner of real estate in possession could not have his disputed title adjudicated by an action at law nor compel the adverse claimant to bring ejectment. He could not 'bring on the battle,' but was compelled to await the action of his adversary to have the cloud removed from his title. Recognizing the manifest injury to the party in possession of real estate incident to the delay caused by the failure of the party out of possession to assert his claim, the assembly within recent years has enacted legislation to meet the hardships in such cases by passing the acts entitled 'An Act to settle title to real estate,' approved March 8, 1889, P. L. 10, and 'An Act to provide for the quieting of titles to land,' approved June 10, 1893, P. L. 415. This legislation enables the owner in possession to compel his adversary to assert his title within the prescribed time and failing to do so he is thereafter debarred from attacking his opponent's title by bringing an action for the premises. The legislation affords the owner in possession speedy and ample relief for quieting his title, and being remedial should be interpreted so as to

> accomplish the purpose without prejudice to the rights of either party to the controversy."

In Kariher's Petition (No. 1), 284 Pa. 465 (1925), Moschzisker, C. J., collating the quieting statutes and leading cases upon the same, declares:

> "Under our well established practice of ruling one out of possession of real estate to bring an action in ejectment, the petitioner asserts title to property and recites that the person named as defendant likewise claims title; if the final decision favors the petitioner, the court simply makes a declaration as to the legal relations of the parties, without any execution following and without the right to execution."

REMEDY BY STATUTE EXCLUSIVE

In Ullom vs. Hughes, 204 Pa. 305 (1903), Mitchell, J. stated that the quieting acts did not give a new right enforceable only in the prescribed way but merely a new remedy for a right always existing and that the new remedy was plainly intended to be cumulative only, leaving the old remedies unaffected. Hence, either party might go into equity in a proper case instead of proceeding under the statutes.

In Van Kirk vs. Patterson, 204 Pa. 317 (1903), Mitchell, J. further explains Ullom vs. Hughes to the effect that the quieting acts did not supersede or affect any of the former remedies but only supplied one that was cumulative or additional.

However, in Warrington vs. Brooklyn Trust Co., 274 Pa. 80 (1922), it was held that a bill in equity cannot be sustained where the plaintiff has a full, complete and adequate remedy at law as under the quieting acts. Said Simpson, J.:

> "In every aspect of the matter, therefore, the Acts of 1889 and 1903 give to appellant a 'full, complete and adequate remedy' at law, and hence equity has no jurisdiction to grant the relief sought: Metzger vs. McCoy, 105 F. R. 676."

This view is sustained in Heller vs. Fishman, 278 Pa. 328 (1924), wherein the facts were very similar to Dull's Appeal, 113 Pa. 510 (1886). Moschzisker, C. J., after citing Warrington vs. Brooklyn Trust Co., explains:

> "The rule just cited does not necessarily mean, as asserted by appellants, that the entire equitable jurisdiction to remove clouds from title to real estate, long vested in the courts of Pennsylvania, is swept away; it merely means that cases covered by the Act of 1903 must be brought thereunder, in accordance with the requirements of the first part of section 13 of the Act of March 21, 1806, 4 Smith's Laws 332, 1 Stewart's Purdon's Digest, 13th ed., 271 (Phelps' App. 98 Pa. 546; Meurer's App., 119 Pa. 115, 130; Bridge Co. v. Union and Northumberland Counties, 232 Pa. 255, 264; see also discussion and reference to authorities in Gans vs. Drum, 24 Pa. C. C. R. 481, 484), and in accordance with the rule as to the exclusiveness of an adequate remedy at law: Meurer's App., 119 Pa. 115, 130; Appeal of Pittsburgh & A. Drove Yard Co., 123 Pa. 250, 252; Metzgar vs. McCoy, 105 Fed. 678; 4 Pomeroy's Equity Jurisprudence, 4th ed., section 1399. Should cases arise presenting situations not covered by the class of legislation under consideration, or as to which it does not furnish a full and adequate remedy, the jurisdiction in equity still applies."

The cases already referred to and setting forth the view of Mitchell, J. are disposed of by the Chief Justice in these words:

"None of these judicial utterances were essential to the decisions in connection with which they were written, but, even if regarded as more than dicta, they are contrary to the later ruling of this court in Warrington vs. Brooklyn Trust Co., which controls."

DISCUSSION OF STATUTES

The several acts of assembly, already referred to, confer jurisdiction upon the courts of common pleas to grant, upon petitions presented by the proper parties and embracing the proper facts, rules upon respondents out of possession of land and claiming or having an apparent interest in the same to bring ejectment within a specified time, or to show cause therefore, or why an issue should not be framed between the parties to try the title. The Act of April 3, 1872, P. L. 33, and the Act of May 21, 1881, P. L. 24, have reference to rules to pursue appeals in ejectment suits and for the issuance of rules to show cause why second actions in ejectment should not be brought. It is unnecessary to consider these statutes further in this article in view of the Act of May 8, 1901, P. L. 142, section 1, providing that hereafter one verdit and judgment in ejectment shall be considered conclusive. The Act of June 11, 1879, P. L. 127, and its amendment, the Act of June 24, 1885, P. L. 152, provides for the issuance of rules upon purchasers at sheriff's, treasurer's or commissioner's sales, by those in possession of the premises as sold, to bring the action of ejectment within ninety days from the time the rule would be made absolute, or show cause why the same cannot be brought.

The important acts for consideration are the Act of March 8, 1889, P. L. 10, as amended by the Acts of May 25, 1893, P. L. 131, and April 16, 1903, P. L. 212, the Act of June 10, 1893, P . L. 415, and the Act of April 18, 1905, P. L. 202.

ACT OF MARCH 8, 1889, P. L. 10

This act is entitled "An Act to settle title to real estate," and provides, with the amendments referred to, for the application by any person in possession claiming title to the land for a rule upon any person out of possession claiming or having an apparent interest in the land, to bring ejectment within six months from the service of the rule, or show cause why the same cannot be brought. The rule may be made returnable as writs of summons are by law returnable and shall be entered of record and indexed as actions of ejectment are indexed. The amendments provide for service of the rule out of the county and also out of the state, by the sheriff of the county in which such rule has been granted in the former instances, and in the latter by "any person."

In Foster's Petition, 243 Pa. 92 (1914), under the Act of March 8, 1889, P. L. 10, it was held that when the rule is made absolute final judgment should be entered six months from the date of the order making the rule absolute within which to bring the action of ejectment.

ACT OF JUNE 10, 1893, P. L. 415

Section 2 of this Act provides as follows:

> "When any person or persons, natural or artificial, shall be in possession of any lands or tenements in this commonwealth, claiming to hold or own possession of the same by any right or title whatsoever, which right or title or right of possession shall be disputed or denied by any person or persons as aforesaid, it shall be lawful for any such person to apply by bill or petition to the court of common pleas of the county where such land is situate, setting forth the facts of such claim of title and right of possession and the denial thereof by the person or persons therein named, and thereupon the said court shall grant a rule upon such

> person or persons, so denying such right, title or right of possession, to appear at a time to be therein named and show cause why an issue shall not be framed to said court, between the parties, to settle and determine their respective rights and title in and to the said land."

In Mildren vs. Nye, 240 Pa. 72 (1913), Brown, J. observed:

> "The Act of March 8, 1889, P. L. 10, amended by the Act of April 16, 1903, P. L. 212, is for the settling of titles to real estate, and the Act of June 10, 1893, P. L. 415, provides 'for the quieting of titles to land.' Each act is for the same purpose, and though the methods of procedure under the one differ from those under the other, the provisions of neither can be invoked by anyone who is not in possession of the land."

Under the Act of 1889 there may be no response to the rule to bring an ejectment within six months. The consequence of this inaction is a decree or judgment in favor of the petitioner. There is, however, no liability upon the part of the respondent for any costs. On the other hand, if the rule is answered by the bringing of an ejectment, the respondent, of course, is the plaintiff in the suit. Under the Act of 1893 the rule as granted requires the respondent to show cause why an issue should not be framed to try the title. If there is response to the rule, a hearing is held and the court, if the facts set forth in the petition are true, shall thereupon frame an issue to try the right and title of the respective parties to the land, and if there is no response to the rule, the court may proceed to determine the rule and award and proceed with the issue in like manner as if the respondents had appeared. In either case, following the verdict of the jury or the determination of the court, a judgment may be entered in favor of the plaintiff. The act provides

for twenty days notice of the rule as granted and in case of non-resident respondents the act provides that the court "may make an order for service of said rule and a copy of said bill or petition upon such persons at their residence or place of business outside of the county or state where the land lies, in the same manner as service is made of a summons in a personal action, giving at least twenty days notice of such hearing." This provision is akin to that under the Act of March 8, 1889, P. L. 10, already referred to. There is no provision in the Act of June 10, 1893, respecting costs but it is opined that in case of no response to the rule and a subsequent issue granted but without any participation by respondent the costs would be disposed of as under similar circumstances provided in the Act of March 8, 1889.

ACT OF APRIL 18, 1905, P. L. 202

This is the last enactment on the subject of quieting titles and the provisions differ very materially from the Acts of March 8, 1889, and June 10, 1893, both in the facts covered and the procedure. The facts covered are possession by petitioner claiming title on the one hand, and persons claiming or having an apparent interest in the title but not having been in possession for a period of twenty-one years next prior to the date of the application for the rule. Furthermore, these claimants are either unknown or, if known, their residence cannot be ascertained. The person in possession files a petition setting forth the facts, supported by affidavit, praying that a rule be granted on the respondents to bring their action of ejectment within six months from the service of the rule, and there is a further prayer for authority to make service of the rule by publication. After investigation and testimony taken before the court and due proof of the allegations in the petition, the court may grant the rule and, if granted, shall order service by publication in one or more newspapers of the county in which the land is situate once a week for six

weeks. There may be, in the discretion of the court further advertisement in other papers published at or near the place where respondents appear to have last resided. There is a further provision for particular care of the interests of unknown persons, minors and lunatics by the appointment by the court of a trustee to represent them and to decide upon the expediency of an appearance and an answer in order that the interests may be properly protected. After the various steps are taken, as provided for minutely in the act, and there is no response, it shall be the duty of the court to make the rule absolute and six months thereafter to enter judgment which shall be final and conclusive between the parties, their heirs and assigns, and shall preclude any further action of ejectment for the recovery of the possession of the land involved, provided that the respondents who have failed to appear and show cause shall not in any event be liable for costs, which costs, in the discretion of the court, may include a reasonable compensation for any trustee appointed. The essential points of differences between this act and the Acts of March 8, 1889, and June 10, 1893, are (1), under the latter acts there are no provisions for service of the rule by publication, and (2), that under the Act of April 18, 1905, a necessary averment is that the persons named as respondents have not been in possession of the land for a period of twenty-one years next prior to the date of application for the rule.

The following cases may be consulted:

> Hoover V. Pontz, 271 Pa. 285 (1921); Olweiler v. Greenblat, 5 D. & C. 637 (1924); Barr v. Willison Heirs, 7 D. & C. 181 (1925).

POSSESSION REQUISITE

Under all of the acts referred to the averment and proof by the petitioner of possession of the land are essential. In Mildren v. Nye, 240 Pa. 72 (1913), Brown, J., referring to the Act of 1893, stated:

> "In the face of the plain words of this section, it was hardly necessary for us ever to have said that the person or persons seeking to avail themselves of it must be in possession of the land, the title to which may be quieted by the act; but we have repeatedly so said from Delaware and Hudson Canal Co. v. Genet, 169 Pa. 343, when the Act of 1893 was first passed upon down to Earhart v. Marshall, 233 Pa. 365."

The Cyclopedic Law Dictionary, recently published, quotes from 25 Iowa 177:

> "Possession of land is the holding of and exercise of exclusive dominion over it."

In discussing the matter further the learned editors have made this observation:

> "By the possession of a thing, we always conceive the condition in which not only one's own dealing with the thing is physically possible, but if other persons dealing with it is capable of being excluded."

The primary idea, therefore, is of actual possession where the thing is in the immediate occupancy of the possessor, but there may be also constructive possession which exists in contemplation of law without actual personal occupation; hence, in Laidley v. Rowe, 275 Pa. 389 (1923), a proceeding under the Act of June 10, 1893, it was stated that in the absence of evidence of an adverse occupancy by respondent, a prima facie legal title in the petitioner would draw to it such possession as would warrant the awarding of an issue.

On the other hand, in Mildren v. Nye, 240 Pa. 72 (1913), Brown, J. said:

> "As there must be possession to give the court its purely statutory jurisdiction, it cannot acquire

> jurisdiction where there is a mere contest, however substantial, as to the fact of possession in the petitioner. In such a case the remedy is still trespass or ejectment under the common law. If possession by the petitioner be denied by the respondent, the court must pass upon that fact, not, however, with the conclusiveness of the verdict of a jury, but as establishing the petitioner's right to the issue, for, though the Act of 1893 makes no express provision for a determination of this preliminary question by the court, it does so by clear implication, when it declares that the issue shall be granted 'if it shall appear to the court that the facts set forth in such petition are true.' The meaning of this is that, before the court can award an issue, it must find to be true the facts averred in the petition, if they are disputed."

In Hemphill v. Ralston, 278 Pa. 432 (1924), the matter is further explained by Sadler, J:

> "Here an answer was filed denying either ownership or possession to be in petitioner, and a hearing had at which testimony of the respective parties was heard. Later, an order was made in which it is declared 'there is a substantial dispute as to which of the parties, plaintiff or defendants, is in possession, (and) we are of the opinion, therefore, that an issue should be framed, under the Act of 1893.' No conclusion was reached as to the person who actually held the tract in controversy. If it was not the petitioner, then, as already stated, the application must be dismissed, for a preliminary finding in the affirmative is necessary to confer jurisdiction, regardless of the act on which the proceeding was based. If the defendants are in control, the proceeding falls, for it must be instituted by the 'person in possession,' and when both parties

> are out of possession, the legislation referred to does not apply: Heppenstall v. Lenk, 217 Pa. 491. Though the right to award an issue, in case of substantial dispute as to occupancy, might be gathered from certain expressions used in Fearl v. Johnstown, 216 Pa. 205, yet any such construction has been repudiated, and the ruling therein explained: Mildren v. Nye, supra. It is therefore clear that the present record must be remitted, so that the proper and necessary finding be made."

To the same effect, Riegel's Petition, 26 D. R. 63 (1916); Murray's Petition, 4 D. & C. 659 (1923).

FRAMING OF ISSUE.

In Pifer v. Berkey, 229 Pa. 394 (1911), Elkin, J. thus admonishes:

> "The statute clearly contemplates the framing of a formal definite issue setting forth the exact questions to be determined by the jury. Both sides should be required to file abstracts of title and the entire proceeding should conform as nearly as may be to an action of ejectment. The title to land is the question to be determined and the verdict of the jury in such an issue has the force and effect of a verdict in ejectment upon an equitable title. All of which indicate the necessity for formal pleadings and definite issues. We have called attention to this question because in several recent cases arising under the act of 1893, and brought before us on appeal, definite issues were not framed and the pleadings were as informal as those in the case at bar. While such records may not constitute reversible error they are not approved."

APPEALS

The Act of June 10, 1893, P. L. 415, provides "that the decree of the court in refusing the rule or issue . . . . and the judgment in such issue shall be subject to appeal." However, there is no provision in the act for an appeal where the issue is awarded. This point was raised in Robinson vs. Greiner, 63 Super. Ct. 172 (1916), on motion to quash the appeal of respondent on two grounds, (a) that the decree was interlocutory, (b) that there was no statutory provision for the appeal. The court concluded that the decree was interlocutory and furthermore the act did not provide for such appeal.

UNIFORM DECLARATORY JUDGMENTS ACT

One more topic will be discussed. In reviewing the cases wherein the remedy afforded by the Act of June 10, 1893, P. L. 415, has been invoked, a line of decisions has been noted wherein the act has been used to obtain a determination by the court of the validity of legal titles on a case stated by agreement of the parties. These cases have been tried by the court without a jury under the Act of April 22, 1874, P. L. 109, and have embraced questions of land titles under wills and the law of intestacy. The following cases are illustrative of this trend:

McDaniel vs. McDaniel, 219 Pa. 371 (1908),
Wetherill vs. Lefferts, 254 Pa. 484 (1916),
Miller vs. Grimes, 262 Pa. 226 (1918),
Hess vs. Riegel, 4 D. & C. 233 (1923).

The Uniform Declaratory Judgments Act of June 18, 1923, P. L. 840, provides in Section 2 for the construction by the proper court of, inter alia, "a deed, will, written contract, or other writings constituting a contract," and in Section 4 there are specific provisions for the determination of questions under a variety of situations arising in the settlement of a decedent's estate. Section 12, of the Act,

states that it is to be considered as remedial and "its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered." On the other hand, by the terms of Section 6 the court may refuse to render or enter a declaratory judgment or decree, where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

In Kariher's Petition (No. 1), 284 Pa. at page 471 (1925), Moschzisker, C. J. suggests, inter alia, that a proceeding to obtain a judgment under the Declaratory Act would not be entertained where another statutory remedy has been specifically provided for the character of case in hand . It would appear, however, that the class of cases illustrated by the last citations does not properly fall within the terms of the Act of June 10, 1893, but are more akin to the cases contemplated by the new legislation. It would appear possible, furthermore, that the Declaratory Judgments Act might be available to cover at least a portion of the limited class of cases left to equity in bills quia timet. There appears to be no good reason why this new legislation might not be invoked where no action was sought as by the issuance of execution or the enforcement of a decree, but simply a judicial determination that a right did or did not exist. It will be interesting and instructive to follow in the cases the further development of the declaratory judgments idea.

A. J. WHITE HUTTON

MOOT COURT

RAWLINS VS. MYERS

Deeds—Estates—Revision of Power to Revoke—Revocation—Recording—Consideration

STATEMENT OF FACTS

On January 1, 1920, Rawlins conveyed to Myers for an adequate consideration, his farm "Blackacre." In the deed, he reserved the power to revoke the fee granted in the deed. The deed was never recorded. On January 1, 1926, Rawlins conveyed the farm without consideration, to his son, expressly stating in the deed that he was thereby revoking the fee granted Myers in 1920. The son recorded the deed, and after his demand for possession was refused by Myers, he brought this action of ejectment for the farm.

Potamkin, for Plaintiff.

Greer, for Defendant.

OPINION OF THE COURT

Jerko, J. A careful reading of the facts in this case presents some interesting questions for our determination.

First, what was the effect of the reserved power of revocation in the deed to Myers? At common law, where a transfer was made by a feoffment of livery and seisin, any power of revocation reserved in the feoffment itself, was void on the ground that it was repugnant to the grant. It was said that the ceremony accompanying the conveyance would prove to be an empty form upon the exercise of the power reserved by the grantor. Tennant vs. John Tennant Memorial Home, 167 Cal. 570. Modern authorities, although not upon the same reasoning, have repeatedly followed this rule, stating that a reservation should not be as broad as the grant itself. Foster vs. Funk, 109 Pa., 291; Shoenberger vs. Lyon, 7 W. & S., 184.

A reservation to the grantor, of coal and minerals beneath the surface, together with the right to mine and remove them without incurring any liability for injury to the surface, or the buildings or im-

provements thereon, has been held not to be as broad as the grant itself, and therefore valid. Gordon vs. D. L. & W. R. R. Co., 253 Pa. 110.

A reservation, however, to be void because of its being as broad as the grant itself, need not necessarily be of an estate because it may also be a reservation of a power. Van Oheln's Appeal, 70 Pa. 57.

The next question for our determination is as to the recording of the deeds. It clearly appears that Myers paid a valuable consideration, but did not record his deed, and that the son of the grantor paid nothing, but did record his deed. Counsel for the plaintiff contends that since the son's deed was recorded, and Myers' deed was not, the former should prevail. He further contends that the relationship existing between parent and child is a good consideration, citing Ferguson's Appeal, 117 Pa. 426.

We concede that these are propositions of law in accord with his contentions. But, the question here is whether the valuable or the good consideration will prevail under the recording acts? These acts have been passed for the express purpose of protecting subsequent mortgagees and purchasers for value, and consequently the recording of a deed is not essential to its validity, as between the parties signing thereto, or as against subsequent donees of the grantor, or parties with actual notice. George vs. Morgan, 16 Pa. 95; Lutz vs. Matthews, 37 Super. 354.

It is not the recording that gives title, but the delivery of the deed properly executed by the grantor.

The son, in addition to being a donee, had actual notice of title in Myers, because of the recital in his deed from his father, to the effect that the latter was exercising the power of revocation reserved in the deed to myers.

Deeds made upon a good consideration only, are considered as voluntary. Although they may be valid at law, between the parties, they are not aided in equity, and are liable to be held void as against creditors and purchasers for value. 9 Cyc., 319-20.

We do not deem it necessary to consider the Rule against Perpetuities argued by counsel for defense, as the case may be disposed of on other grounds. We, accordingly, are of the opinion, that as the power reserved in the deed to Myers was void, and as the son paid nothing, in addition to having actual notice of actual ownership in Myers, the plaintiff cannot recover in this action.

Judgment for defendant.

OPINION OF SUPREME COURT

No Pennsylvania decision has been found on the issue presented by the instant case. We are therefore at liberty to decide it on principal and persuasive precedents.

Coke has said that such grants may be revoked by virtue of a power expressly reserved in the deed; Buther's Case, 3 Coke 25. Ricketts vs. Louisville Ry. Co., 91 Ky. 221, 155 W. 182 says that such a condition has always been known to the law of conveyancing. Bouton vs. Doty, 69 Conn. 531, 37 Atl. 1064, "under the Statute of Uses it is no objection to the validity of a power that its exercise may wholly defeat the estate conveyed to the grantee in the deed conferring it."

Nor do we see any objection to it on principle. Its effect is to create in the grantee an estate at the will of the grantor. Such interests are common although created in a different way. Nor does it work a hardship on creditors of the grantee. The deed gives ample notice that his interest is revocable at will.

We are therefore constrained to hold that the reservation of a power of reservation was valid.

It is not invalid as violating the rule against perpetuities. A general power is practically ownership and such cases are an exception to the application of the rule. The rule is applied to interests created by the power dating from the time of its exercise and not from the creation of the power. Power to revoke deeds of trust are invariably recognized although apparently not limited to a time allowed by the rule. In such a case as this there is no restraint on alienation by the grantor and hence the main purpose of the application of the rule is avoided. The power is valid.

The conveyance to his son is a revocation of the deed to Myers. The power being valid and having been properly executed, the question of recordation becomes immaterial. The rights of Myers could not be increased nor diminished by recordation or lack thereof. See also 8 R. C. L. p. 1120 par. 182, 2 L. R. A. 526 Royal vs. Aultman and Taylor Co., 116 Ind. 424, 19 N. E. 202.

Impressed as we were by the able opinion of the learned court below, we must nevertheless reverse the judgment and here enter judgment for the plaintiff.

MOSS VS. RICE

Contracts—Poral—Timber—Severance—Justice's Jurisdiction—Statute of Frauds

STATEMENT OF FACTS

Rice, by an oral conract; sold to Moss for $200, certain standing timber which was to be severed by Moss within a week. On Moss' endeavor to start work, Rice refused to allow him on the land claiming that the oral contract was void and of no effect. Moss sued Rice before a Justice of the Peace, who allowed a recovery of $50 damages. On appeal to the Common Pleas they upheld the Justice holding that the form of the contract was immaterial on the question of damages for its breach. Rice appeals.

Smith, for Plaintiff.

Cramer, for Defendant.

OPINION OF THE COURT

Perrella, J. Whether a sale of growing trees to be severed within a week is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts.

The courts of most American States however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in land, and within the 4th section of the English Statute of Frauds. The rule adopted by those courts is that sales of growing timber are as likely to become the subject of fraud and perjury as are the other integral parts of the land, and the question whether such a sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber is that of realty.

The better view is that if the trees are to be severed at once they are to be treated as chattels. 36 Cyc. 554, and 13 Col. Law Rev. 748. This is the doctrine promulgated by McClintock's Appeal, 71 Pa. 365, and followed by the cases of Robbins vs. Farwell, 193 Pa. 37, and Strause vs. Berger, 220 Pa. 367, decided that whether growing timber is to be regarded as personal property or an interest in real estate depends on the nature of the contract and the interest of the parties; that if the agreement does not contemplate immediate severance of the timber, it is a contract for the sale or reservation

of an interest in land; but that where the agreement is made with a view to an immediate severance and to be completed within a reasonable time, the timber is to be regarded as personal property.

These cases and other Pennsylvania authorities too numerous to cite seem to hold uniformly that, standing timber to be severed and removed immediately or within a reasonable specified time may be sold orally, as a sale of personalty. In the case at bar the parties contemplated a sale of personalty, not realty. This being the case the contract does not come within the 4th section of the Sales Act of 1915, as the contract price was less than $500 and therefore need not be in writing and is a valid parol contract.

The learned counsel for the defendant contends that Moss had merely a parol license and that such a license is revocable at any time. The court cannot sustain the defendant's contention because the sale of personal property upon the land of the seller gives the purchaser a license to enter upon the land for the purpose of removing it and this license cannot be revoked unless the licensee fails to act within a reasonable time. 37 C. J. 296. In the case of the sale of standing trees, or of their exception from conveyance of the land, their owner has an interest in the soil sufficient for their support and nourishment in the nature of an easement and also the right to enter on the land, in order to remove them. Applying this principle to the case at bar the license is coupled with a grant or interest, as where a person is given a license to hunt on another's land, and carry away the deer killed, or to cut down and remove trees thereon. In such a case the license is coupled with a grant or interest and is irrevocable. If the license is one which is merely a personal privilege, not coupled with an interest in the land, it may be revoked by the licensor at any time.

The contract being valid, and there being a breach by the defendant in refusing to allow the plaintiff on the land to remove the trees, the plaintiff has a right of action against the defendant for the breach of said contract. The measure of damages recoverable if the price has not been paid is the difference between the contract price or agreed price and the market price. Kountz, vs. Kirkpatrick, 72 Pa. 376; Theis vs. Weiss, 166 Pa. 9.

The holding of the Common Pleas Court was correct in saying that the form of the contract is immaterial on the question of damages for its breach. It matters not that it was an oral contract for the sale of personalty because the form of the contract is immaterial when the plaintiff is suing for damages. Even if the contract was a sale of real property, the fact that it is oral and not in writing will not preclude the plaintiff from suing for damages. Stephens vs. Barnes, 30 Super. 127.

The Justice of the Peace properly had jurisdiction in this case because the contract was for a sale of personal property and the amount involved was less than $300, and does not involve a question of title to land over which question he has no jurisdiction.

Judgment of the lower court is hereby affirmed.

OPINION OF SUPREME COURT

The learned court below was correct in deciding that this was a sale of personalty and, not being of the value of $500, did not have to be in writing. Severance within a week is such an immediate severance as to bring the case within the doctrine of Strause vs. Berger, 220 Pa. 367 which has been consistently followed. A sale of this character carries with it an irrevocable license to enter and cut the trees.

The recovery of damages for the breach was rightfully allowed. We cannot, however approve of the statement "the form of the contract was immaterial on the question of damages for its breach." If by this was meant that in this case no difference would have been made if a written contract had appeared, the lower court was correct. But if it meant that it is immaterial in an action for damages for breach of a contract to sell realty whether the contract is written, they were in error. In such a case where the contract was oral, loss of bargain may not be recovered. If the contract was written such loss of bargain is recoverable.

We must presume that the learned court below, i. e. Common Pleas, has applied the proper measure of damage notwithstanding this statement.

The judgment of the learned court below is affrimed.

BOOK REVIEW

Practice in the Courts of Common Pleas of Pennsylvania. By John W. Patton and Henry B. Patton. Second Edition, Revised and Enlarged by Robert L. Myers, Jr., and Fred S. Reese. Philadelphia: George T. Bisel Company. 1927. pp. 1, 749.

Since the publication of the first edition of this book in 1912, the details of practice in the Courts of Common Pleas have been greatly changed by statutes and decisions. These numerous changes made it essential that there be a revision of the first edition to enable it to retain its invaluableness as an aid to both practice and the teaching thereof. This need has been adequately met by the present work.

The most notable addition to the former work is the Practice Act of 1915, cases construing the Act and forms of pleading and practice thereunder. This portion of the book has received the revisors' special atetntions and is a valuable addition to our present treatises on that Act.

Other essentially new material is found in the chapters on Parties and Institution of Action—Service of Summons. A chapter on Judgments, not found in the first edition, has been added.

Throughout the book frequent allusions are made to the Uniform Rules of Court, approved by the Pennsylvania Bar Association, and the Rules form the appendix to the book. The former edition was extremely partial to the jurisdiction of the authors in its reference to rules of court and the wider scope of the present book, in this respect, represents a distinct addition to its value to the practitioner.

Measured by the rule that a law book is no better than its index, the present work must be rated high. The index covers fifty-five pages and its completeness and frequent cross-references make the contents of the book readily accessible without a detailed search for the point sought.

There is no dearth of authority for the phases of practice discussed for seventeen hundred and ninety-seven cases have been cited, most of which are cases of recent origin. These citations represent an increase of more than fifty per cent. over the first edition. Throughout the book, where discussed by the text, are found nearly all the forms needed in ordinary practice. It is felt that by placing a form with the text illustrating its use, the value of the form to the student and young practitioner is greatly enhanced.

An invaluable time saver to the practicing lawyer is found in the Table of Acts cited. References are made in parallel columns to Purdon's Digest of Pennsylvania Statutes, 13th Edition, making the Acts instantly available.

Both the increased clarity of language and completeness of its treatment of the essential elements of practice make the book a most excellent text for the teacher and student of this fundamental curricula of law school study.

Congratulations must be accorded both the revisers and publishers for making available the complex and difficult procedure of the Courts of Common Pleas up-to-date in such a well-written and well-published form.