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PENNSYLVANIA

COUNTY COURT REPORTS

CONTAINING

CASES DECIDED

IN THE

COURTS OF THE SEVERAL COUNTIES

OF THE

COMMONWEALTH OF PENNSYLVANIA

VOL. XLIV.

PHILADELPHIA:
T. & J. W. JOHNSON CO.
1917.

LIST OF JUDGES AND REPORTERS

SHOWING JUDGES PRESIDING OVER THE COUNTY COURTS DURING THE PUBLICATION OF THIS VOLUME AND REPORTERS ACTING FOR THE SAME PERIOD.

ALBERT B. WEIMER, 843 REAL ESTATE TRUST BLDG. PHILADELPHIA
GENERAL EDITOR.

ADAMS Co., Gettysburg, 51st Dist., with Fulton Co.
Donald P. McPherson, P. J.
Wm. Arch. McClean, Reporter.

ALLEGHENY Co., Pittsburg, 5th Dist.
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O. C. James W. Over, P. J.; J. J. Miller and Thomas P. Trimble, JJ.
Thomas Ewing, Jr., Reporter.

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S. R. Longenecker, Reporter.

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B. Kuykendall, Jr., Reporter.

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CENTRE Co., Bellefonte, 49th Dist.
Henry C. Quigley, P. J.
S. D. Gettig, Reporter.

CHESTER Co., West Chester, 15th Dist.
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James D. Roberts, Reporter.

CUMBERLAND Co., Carlisle, 9th Dist.
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DAUPHIN Co., Harrisburg, 12th Dist.
George Kunkel, P. J.; Samuel J. M. McCarrell, J.
Paul A. Kunkel and Guy H. Davies, Reporters.

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S. M. Williamson, Reporter.

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R. W. Williamson, Reporter.

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Geo. J. Feit, Reporter.

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Edward S. Gearhart, Reporter.

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POTTER Co., Coudersport, 55th Dist.
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SOMERSET Co., Somerset, 16th Dist.
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DECISIONS

OF

THE COUNTY COURTS

OF

PENNSYLVANIA.

VOLUME XLIV.

Byrne *v.* McCann.

Practice (C. P.)—Non pros—Laches in filing statement.

An action in trespass for personal injuries will not be non prossed because the plaintiff did not file a statement until fifteen months after the suit was entered, where it appears that plaintiff had suffered the loss of an arm, that he had been lulled into the belief that he would be permanently employed by the defendant, and that the delay resulted from attempts to determine whether the plaintiff would or would not be able to work with an artificial arm.

Rule to show cause why statement and rule to plead should not be stricken from the record and judgment of non pros entered. C. P. No. 5, Philadelphia Co. March T., 1914, No. 3962.

J. J. Rahilly, for plaintiff.
F. A. Sobernheimer, for defendant.

MARTIN, P. J., Sept. 29, 1915.—Plaintiff issued a summons in trespass, which was served on defendant April 30, 1914. A statement of claim and notice to plead was filed July 30, 1915. Aug. 9, 1915, upon presentation of a petition setting forth delay in the filing of the statement of claim, defendant obtained a rule to show cause why the statement and rule to plead should not be stricken from the record and judgment of non pros. entered, because the statement was not filed within one year after issuing the writ.

An answer was filed by plaintiff, averring that while in the employ of defendant he lost an arm through the negligence of defendant, and after the injury defendant continued to pay his

salary, thereby lulled him into a sense of security and induced him to believe that he would be permanently employed, but subsequently discharged him; and, owing to the loss of his arm, he was unable to secure employment at his trade, and that the filing of the statement of claim was delayed until it could be determined whether or not he would be able to work with an artificial arm.

Judgment of non pros. might have been entered by the prothonotary, upon motion of defendant, by reason of plaintiff's failure to file a statement of claim within one year after issuing the writ (Rule of Court, 142); but no such motion was made, and the statement and rule to plead are filed.

While it is within the discretion of the court to grant a nonsuit for wanton delay and flagrant dereliction on the part of plaintiff (Waring *v.* Penna. R. R. Co., 176 Pa. 172), in the present case it appears from the answer that it was not the intention of plaintiff to abandon the suit unless he continued in the defendant's employ, and that the delay, under the circumstances, was not unreasonable or for such length of time as to amount to laches and indicate an abandonment of the suit. Rule discharged.

Employment Agency.

Labor law—Combination of boarding house and employment agency—Act of June 7, 1915, P. L. 888.

A person who keeps a boarding house for sailors, and in connection therewith engages in the business of providing masters or owners of vessels with seamen, receiving no fee from the sailors so directed to such owners or masters, but receiving a consideration or fee from such owners or masters for each seaman so supplied, is an employment agent within the meaning of the act of June 7, 1915, P. L. 888.

To take such case from the provisions of the act, it must be clearly shown that the work of so assisting such employers to secure employés is strictly that of a bureau or department maintained by some person, firm, corporation or association for the purpose of obtaining help for themselves.

The business of an employment agent carried on in Pennsylvania by a non-resident is subject to said act equally with that of a resident.

Request of John Price Jackson, commissioner of labor and industry, for opinion.

COLLINS, Deputy Attorney-General, Dec. 7, 1915.—There has been referred to me your communication of Nov. 13, 1915, to Attorney-General Brown, requesting an opinion to a ques-

tion raised in a certain communication to you of Nov. 12, 1915, of Jacob Lightner, director of the bureau of employment, and transmitted with yours.

From this said communication of the director of the bureau of employment, it appears that the said bureau "obtained the names and addresses of several individuals in Philadelphia who keep boarding houses for sailors, and who provide masters, agents and owners of sailing vessels with seamen. It appears they do not receive or charge any fee to the sailors for directing them to such masters, agents or owners, but they do receive from the masters, agents and owners of such vessels, a certain consideration or fee for each man supplied," and there further appears in said communication, a request for "a ruling on this matter embracing non-residents of the state who keep boarding houses within our state limits; also a ruling on residents of our state, who keep boarding houses for sailors, and provide vessels with seamen, whether the boarding-house keeper runs a regular employment or not."

It further appears that the attorney of the said parties contends that they are not within the provisions of the hereinafter mentioned act and that they reside in New Jersey.

The question here arises under the act of June 7, 1915, P. L. 888. Section 2 thereof provides as follows: "The term 'employment agent,' as used in this act, shall mean every person, copartnership, association or corporation engaged in the business of assisting employers, to secure employés, and persons to secure employment, or of collecting and furnishing information regarding employers seeking employés, and persons seeking employment: Provided, that no provision of any section of this act shall be construed as applying to agents procuring employment for school teachers exclusively; nor to registries of any incorporated association of nurses; nor to departments or bureaus maintained by persons, firms, or corporations or associations, for the purpose of obtaining help for themselves, where no fee is charged the applicant for employment."

This act, by its second section, provides its own definition of the term "employment agent," and in its construction such legislative definition must govern. According to this definition, an employment agent includes every person, copartnership, association or corporation "engaged in the business of assisting employers to secure employés, and persons to secure employment, etc." This definition is very comprehensive. From the application of the act, however, under the proviso

of the second section thereof, three classes are excepted, namely:

First, agents procuring employment for school teachers exclusively; second, registries of any incorporated association of nurses, and third, "departments or bureaus maintained by persons, firms or corporations or associations, for the purpose of obtaining help for themselves, where no fee is charged the applicant for employment."

As a general proposition it would seem that under the provisions of the act, a party is an "employment agent" who keeps a boarding house for sailors, and further, in connection therewith, engages in the business of providing masters or owners of vessels with seamen, receiving no fee therefor from the sailors so directed to such masters or owners, but receiving some consideration or fee from the masters, agents or owners of the vessels for each seaman so supplied. Whether the sailors so directed to or provided with employers are boarders in the boarding house of the parties so directing them to the owners of vessels, is immaterial; whether the business of keeping the boarding house is incidental to that of providing owners of ships with seamen, or the latter incidental to the former, is also immaterial. In either case it is engaging in the business of assisting employers to secure employés, and persons to secure employment, and fulfils the definition of an "employment agent," as laid down in the act.

It is contended, however, that this present case falls within the said proviso, excepting from the application of the act "departments or bureaus maintained by persons, firms, corporations or associations, for the purpose of obtaining help for themselves, etc." The facts, so far as they appear, do not apparently warrant such conclusion, but they are not set forth in the above mentioned communication of the director of the bureau of employment with sufficient fullness to admit of a definite opinion.

The said proviso only extends to a department or bureau maintained by persons, firms, etc., for the purpose of obtaining help for themselves. This department or bureau is, in fact, a part of such party's business, maintained by and for himself. Its service in obtaining help is limited to that of the party maintaining it. If it undertook to assist employers generally to secure employés, it would not be within the proviso, but be the work of an employment agent and subject to the provisions of the act. Only in a clear case could the benefit of the said proviso exempting a person from the provisions of the

act, be extended. A proviso, engrafted upon a preceding enactment taking special cases out of the general enactment, is always to be strictly construed. It takes no case out of the enacting clause which is not fairly within the terms of the proviso. Folmer's Appeal, 87 Pa. 133.

In conclusion, would say that owing to the lack of a sufficiently full and detailed statement of the facts in the case mentioned in the said communication of the director of the bureau of employment, a definite opinion therein cannot be safely ventured.

Upon the general proposition, however, I am of the opinion that a person who keeps a boarding house for sailors and in connection therewith engages in the business of providing masters or owners of vessels with seamen, receiving no fee from the sailors so directed to such owners or masters, but receiving a consideration or fee from such owner or master for each seaman so supplied, is an "employment agent" within the meaning of the said act.

To take such case from the provisions of the act, it must be clearly shown that the said work of so assisting such employers to secure employés, is strictly that of a bureau or department maintained by some person, firm, corporation or association, for the purpose of obtaining help for themselves.

The business of an employment agent carried on in this state by a non-resident, is subject to said law equally with that of a resident.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Pfahler.

Sunday law—Sweeping off snow from railroad station platform.

Sweeping snow off of the platform of a railroad station and the approaches thereto is a work of necessity, and a foreman employed by the railroad company who does such work on Sunday, cannot be convicted of violating the Sunday laws.

Appeal by defendant from summary conviction before Justice Elmer E. Miller. Q. S. Juniata Co. Feb. T., 1915, No. 4.

M. M. McLaughlin, for commonwealth.
F. M. N. Pennell, for defendant.

SEIBERT, J., Dec. 21, 1915.—Written complaint was made

under oath by G. L. Wert before justice of the peace Elmer E. Miller, of Port Royal, Juniata county, Pa., charging Austin Pfhaler, the defendant, with "having done and performed worldly employment on the Lord's Day, commonly called Sunday," pursuant to which warrant was issued, defendant arrested, and on Feb. 3, 1915, at 7.30 a. m., the prosecutor and defendant appeared before the said justice with their respective counsel, the witnesses were heard and the justice entered the following judgment:

"Be it remembered that on the third day of February, 1915, Austin Pfahler, of the borough of Port Royal, was convicted before me, Elmer E. Miller, a justice of the peace, of the borough of Port Royal, for doing worldly employment on the Lord's Day, contrary to the act of assembly in such case provided, and that I, said J. P. do adjudge him guilty and to forfeit and pay a fine, the sum of $4 and costs of the case."

The transcript does not show wherein the alleged worldly employment consisted nor where it was performed, but the counsel for the defendant submitted a transcription of the notes taken by his private stenographer of the complaint or information and the testimony of the witnesses heard, which was not objected to by the counsel for the prosecutor. The complaint set forth "that on Sunday, Jan. 31, 1915, A. D., being the Lord's Day, commonly called Sunday, that while on his way to church services he" (the prosecutor) "saw Austin Pfahler, Samuel Koons, D. B. McCahan and Charles Stark, residing in the borough of Port Royal, said county and state, performing worldly employment for the Pennsylvania Railroad Company, contrary to the act of assembly in such case provided."

The testimony shows that on the morning of Sunday, Jan. 31, 1915, sleet and snow had fallen, the latter to the probable depth of an inch and that same was continuing to fall steadily; that Austin Pfahler, this defendant, was a foreman of Pennsylvania Railroad Company workmen, including the said Samuel Koons, D. B. McCahan and Charles Stark, whom he set to work that morning at sweeping the snow off the platforms of the east- and westbound passenger stations at Port Royal, their approaches, the several flights of steps (two flights on each side of the tracks) leading to and from the overhead bridge across the several railroad tracks (passengers being there prevented from crossing at grade) and the pathway on the overhead bridge used by passengers in going to and from the respective stations, as a measure of precaution for

the safety of passengers approaching, at and retiring from the said respective stations; that these workmen shoveled and swept the snow from these localities from eight o'clock in the morning until five o'clock in the evening; that it was one of the duties of the defendant and his coemployés to keep these places clean of snow and ice lest travelers slip, fall and sustain injuries.

The petition of this defendant (and that of each of the other three persons named in the hereinbefore mentioned complaint, against each of whom a like separate proceeding was instituted, similar judgment entered and likewise appealed from) for special allowance to appeal set forth, inter alia, "that at the hearing, it was developed that the alleged work or labor done by the defendant was clearly a work of necessity, but the said justice of the peace thought it was rather the province of the higher courts to say what was a work of necessity, and refused to discharge the defendant for that reason; he thought it might be a work of necessity, but because he believed it was not for him to so find, refused to do so, and thus disregarded the law and committed other errors in said proceedings."

This petition, duly verified by affidavit, having been filed with the transcript and not having been excepted to in any way we accept as a verity, and the controlling question to be passed upon by the court is as to whether or not the work admittedly done was one of necessity within the exception of the act of April 22, 1794, § 1, which provides:

"If any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday (works of necessity and charity only excepted) and being convicted thereof shall, for every such offense forfeit and pay $4, to be levied by distress."

At the argument the learned counsel for the prosecutor advances the view that the question here involved was properly one for a jury, under Art. 1, Sec. 6, of the Constitution, declaring that "trial by jury shall be as heretofore, and the right thereof remain inviolate"; this view is not tenable. This provision in the declaration of rights refers only to that class of cases which were entitled to trial by jury prior to the adoption of the Constitution of 1790, and summary convictions before magistrates were not among them. Van Swartew *v.* Com., 24 Pa. 131; Byers *v.* Com., 42 Pa. 89; Com. *v.* Waldman, 140 Pa. 89; and the question is one for the court. In Com. *v.* Nesbit, 34 Pa. 398, decided in 1859, the defendant

had been convicted of a violation of the act of 1794, he having driven his employer's family to church on the Lord's Day, in the employer's private carriage, which the magistrate held to be not a work of necessity, and convicted the defendant.

The Supreme Court reversed this judgment and in the opinion Justice Lowrie said: "Necessity itself is totally incapable of any sharp definition. Necessity, therefore, can itself be only proximately defined. The law regards that as necessary, which the common sense of the country, in its ordinary modes of doing business, regards as necessary." In the opinion of B. F. Junkin, then president judge of this judicial district, filed in October, 1878, in Com. *v.* Butt, to No. 119, April Term, 1878, Juniata county common pleas court, he held that the coaling of a locomotive at the railroad coal wharf at Patterson in said county, hauling provision and live stock trains, was an act of necessity and reversed the judgment of conviction. In the opinion Judge Junkin well said, "we conclude that the legalized business of railroading necessarily involves, to some extent, worldly employment on the Lord's Day, the performance of which is unavoidable, and hence within the statutory exception, and that this construction of the act of 1794 has been accepted as correct by the commonsense of the people for nearly half a century."

During the thirty-seven years that have elapsed since Judge Junkin's opinion was filed, the business of railroading has, as compared with then, increased to gigantic proportions; instead of two main line tracks as then, four are now meagerly sufficient to accommodate the traffic; the wooden car and coach of that day have given way to structures of steel; the then locomotives were pigmies as compared with the tremendous machines of the present; miles per hour passenger train speed has increased an hundred per cent.; the volume of human travel is overwhelmingly greater; human manipulation looking to maintenance of safety conditions has largely given way to automatic electrically operated safety devices of intricate and efficient character; in short, the business of railroading has been practically revolutionized, and with its progress the law has imposed upon the railroad company an increased measure of duty in providing for the safety of the traveler, which necessarily, along some lines, requires that railroad employés more and more exercise worldly employment on the Lord's Day in the performance of the duties of their employment.

As said by Judge Endlich in Com. *v.* Newcomet, 18 Pa. Super. Ct. 510, "The question whether a given act is a work of necessity or not, depends, not upon conditions and situations as they existed in 1794, or fifty or thirty-five years ago, but upon conditions as they presently exist."

It is the duty of a common carrier of passengers to keep its station houses, waiting rooms, platforms, and passageways to and from its stations and trains, and all other portions of the ground to which passengers would naturally resort in going upon or leaving the trains and stations, in a reasonably safe condition for the purpose intended, and for any violation of duty in this respect which entails injury upon a passenger without his own fault, the carrier will be answerable in damages. Thompson on Negligence, Vol. III, § 2678. A railroad company will be answerable in damages for injuries to passengers occasioned by snow and ice accumulated upon its station platform without taking the precaution of sanding it, or otherwise making it safe for passengers: Id. § 2688.

As the duty rested upon the Pennsylvania Railroad Company to remove ice and snow from such parts of its premises as were for the use of passengers to secure their safety, as the flights of steps to the overhead bridge to Port Royal were long and necessarily dangerous with any accumulation of ice or snow upon them, and as the snow fell continuously during Sunday, Jan. 31, 1915, we think the work of removing the same persistently during the day, was such work as the common sense of the country, in its ordinary modes of doing business in this day, regards as necessary, and we therefore hold that the said work then done by this defendant was within the exception of the act of April 22, 1794, § 1.

In a summary conviction for violation of the Sunday law of April 22, 1794, the complaint is the foundation of the proceedings and is in the nature of an indictment. Com. *v.* Gelbert, 170 Pa. 427; therefore the proceeding is a criminal one. The act of March 10, 1905, P. L. 35, prohibits separate proceedings against several persons charged with the commission of any criminal offense or offenses committed at one and the same time or growing out of one and the same transaction, and forbids the payment of costs incurred in proceedings violative of that statute. The complaint in this case included three additional persons to the defendant herein, and the justice having cognizance issued four separate warrants and severed the proceedings into four different ones, as evidenced by the transcripts of appeal of each party named in the one complaint

filed to numbers 4, 5, 6 and 7, February Sessions, 1915, in disregard of the provisions of the act of 1905.

And now, to wit, Dec. 21, 1915, we find under all the evidence in the case that the work done by Austin Pfahler, defendant, on Sunday, Jan. 31, 1915 was a work of necessity within the meaning of § 1 of the act of April 22, 1794, and the judgment of Justice Elmer E. Miller, convicting the defendant of a violation of that statute, is reversed.

From J. N. Keller, Esq., Mifflintown, Pa.

Getkin *v.* Pennsylvania Railroad Co.

Contracts—Certificate in relief department of Pennsylvania Railroad Company—Trespass—Claims for both damages and relief benefits—Employers' liability Act of Congress of 1908.

Contracts intended to protect from liability for negligence are void because against public policy.

Relief contracts, such as are contained in certificates in the relief fund of the Pennsylvania Railroad Company, do not impair the right to recover damages for negligence, but merely stipulate that, if damages are paid, relief benefits cannot be claimed, and, if benefits are accepted, damages cannot be recovered. This practically puts the employé and the employer in the position in which they are respectively placed by the federal act of April 22, 1908, known as the employers' liability act.

By said employers' liability federal act no contract or rule can relieve the employer from liability for damages, but when damages are demanded the amount paid on benefits or indemnity contracts may be deducted; the legislative intent is clear that both damages and benefits cannot be recovered.

The sole purpose of said act is to secure damages resulting from negligence, and to that end all contracts, rules and devices intended to exempt from liability are expressly declared void.

Where the plaintiff, a widow, recovered and received her damages on account of the death of her husband, said act does not permit the recovery of relief benefits.

The Supreme Court of Pennsylvania has decided that the regulations of such relief contract are valid, and the decisions accord to a plaintiff all the right such beneficiary is entitled to under the act of congress, and there is no real conflict between the federal and state authorities.

Motion for judgment for want of sufficient affidavit of defence. C. P. Dauphin Co. Jan. T., 1915, No. 631.

W. M. Hain and *J. H. Herman,* for plaintiff.
C. H. Bergner, for defendant.

McCARRELL, J., Dec. 30. 1915.—The plaintiff is the widow of David Getkin, who on Oct. 21, 1912, was employed as a passenger engineer by the defendant company, and was on said day while running an interstate train, killed by an accident near Newberry in Lycoming county, Pennsylvania. After his death his widow, the present plaintiff, brought an action in the United States court for the middle district of Pennsylvania, to recover damages because of his death, and on June 24, 1914, obtained a verdict in her favor for the sum of $7,161, which was paid on Aug. 5, 1914.

At the time of his death, David Getkin held a certificate of membership, No. 34,977, dated July 1, 1903, in the relief fund of said company, and his wife, the present plaintiff, was the beneficiary named therein. This action is brought for the purpose of recovering the sum of $2,250, alleged to be due her as beneficiary under said certificate. The action in the United States court was brought in pursuance of the provisions of the act of congress, approved April 22, 1908, known as "the employers' liability act." Sec. 5 of that act provides:

"That any contract, rule, regulation or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that extent be void; provided, that in any action brought against such common carrier under or by virtue of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance or relief benefits or indemnity that may have been paid to the injured employé or the person entitled thereto on account of the injury or death, for which said action was brought."

It seems clear from this section that under the act of congress it was not intended that an injured employé of a railroad company, or the person entitled to recover by reason of injury or death, should have both damages for the negligence resulting in the injury or death, and the insurance benefits or relief paid because of any insurance or membership in a relief department of the railroad company. The giving of the right to set off any indemnity so paid against damages recoverable, by necessary implication, excludes the right to recover both damages and benefits. In the present case no claim was made for set off by reason of David Getkin's membership, because no payment had then been made thereon, and this suit was brought Dec. 21, 1914, after the payment on Aug. 5, 1914, of the damages recovered in the federal court. The defendant denies liability under the certificate of member-

ship, and contends that under §§ 23, 58 and 65 of the regulations of the Pennsylvania Railroad Volunteer Relief Department, there can be no recovery. Sec. 23 prescribes the form of application for membership in the relief department. The application contains, inter alia, an agreement:

"That the acceptance of benefits from the said relief fund for injury or death shall operate as a release for all claims for damages against said company arising from such injury or death which could be made by or through the applicant for membership, and that said applicant or his legal representatives will execute such further instrument as may be necessary formally to evidence such acquittance."

By the terms of this agreement damages for injury or death cannot be recovered in addition to relief in pursuance of membership in the relief department.

By § 58 of the regulations it is provided that if a claim be presented or suit be brought against the company for damages on account of injury or death of a member, "payment of benefits from the relief fund on account of such injury or death shall not be made unless such claim shall be withdrawn or such suit be discontinued before trial or decision rendered therein; any compromise of such claim or suit or any verdict, judgment or decision rendered in favor of either plaintiff or defendant in such suit shall preclude any claim upon the relief fund for benefits on account of such injury or death, and the acceptance of benefits from the relief fund by a member or his beneficiary or beneficiaries on account of injury or death, shall operate as a release and satisfaction of all claims against the company and any and all of the corporations associated therewith in the administration of their relief department from damages arising from the injury or death."

Are these provisions of the contract on which this suit is based made void by the act of congress above referred to? The sole purpose of the act is to secure to employés of railroads engaged in interstate commerce the payment of damages caused by the negligence of their employers. Under the act it is uniformly held that the common law defences are no longer available. Mondeau *v.* Railroad Co., 223 U. S. (56 S. E. 327); Schubert *v.* Railroad Co., 224 U. S. 603 (56 S. E. 911). The act relates only to contracts, rules, regulations and devices intended to enable a common carrier to exempt itself from liability for injuries to or death of its employés in the course of their employment. The carrier must answer for its own negligence as also for the ordinary risks

of the business, and no contract or rule can exempt it from this liability. Congress intended to protect the human instrumentalities engaged in carrying on interstate commerce by rail, and made the corporations using these instrumentalities answerable in damages for injuries and death resulting from this employment. All risk is practically diverted from the employé to the carrier and all rules and regulations intended to exempt the carrier from this liability are declared void. Indeed such contracts had been uniformly held void as against public policy long before this statute was enacted. The contract sued upon here does not attempt to grant exemption from liability for the damages which the act declares must be borne by the carrier. It was not made for any such purpose. It is a contract for payment of benefits in case of the disability or death of a member of the department issuing the certificate. The cause of the disability or death is not limited. It may be entirely disconnected with the service as an employé of a carrier, or the service may have caused the disability or death. In either event the benefits are to be paid. Disability, sickness or injury resulting from any causes entitles the party to benefits. Such contracts are frequently, if not generally, entered into between common carriers and their employés, and have apparently been mutually beneficial and satisfactory. That congress had knowledge of these contracts and approved them is manifest from the proviso to § 5. This proviso permits the deduction from damages claimed of whatever has been paid by the carrier as relief, benefits, insurance or indemnity. Thus the contracts, rules or regulations under which such payments have been made are recognized as valid and are not contracts, rules or regulations made void by the terms of the act. Both federal and state legislation of this character have been frequently considered by the courts, and among cases of this character we refer to the following:

In Johnson *v.* Phila. & Reading Ry. Co., 163 Pa. 127, the whole subject of contracts attempting to exempt from liability for negligence and of beneficial contracts such as is sued upon here was considered. Justice Mitchell, in his opinion at page 133, referring to contracts intended to secure exemption from liability for negligence, uses the following language:

"It is further objected, and this is the only substantial question in the case, that the release was void as against public policy, and a number of cases are cited to show that a common carrier cannot make a valid contract against his own negligence. It was quite unnecessary to go out of our own state

for authority on that proposition; it is not questioned here any more than elsewhere, but it is wide of the point in this case. There is no provision exempting the company from liability for future negligence. The benefits, by the regulations of the relief association, become due to members whenever disabled by accident in the railroad company's service, or by sickness or injury other than in the company's service, without reference to the question of negligence at all. As these provisions include benefits in cases of accident pure and simple, of injury by the negligence of fellow workmen, and by the member's own contributory negligence, it is apparent that they cover a wide field in which there is no liability of the railroad company at all. Such cases are probably a large majority of those occurring to railroad employés, and the association therefore is of the highest order of beneficial societies. But even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract but the acceptance of benefits after the accident that constitute the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. He may as well accept it in installments as in a single sum, and from an appointed fund to which the company has contributed, as from the company's treasury as a result of litigation. The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former he cannot justly ask the latter in addition."

The validity and effect of a contract such as is sued upon here was considered in the case of Ringle *v.* Penna. R. R. Co., 164 Pa. 529. Justice Mitchell, at page 532, uses the following language, viz.:

"This case is ruled by Johnson *v.* Railroad Co., 163 Pa. 127. The essential principle therein established is that a contract between employer and employé which preserves to the latter all his rights of action, in case of negligence, until after the facts have occurred and are known to him, is not against public policy. 'There is no waiver of any right of action that the person injured may thereafter be entitled to. It is not

the signing of the contract but the acceptance of benefits after the accident that constitutes the release. The injured party therefore is not stipulating for the future, but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby.' The facts of that case and this are not materially different. In both the agreement is that the acceptance of benefits, of course after the accident, shall operate as a release. In the present case there is an additional agreement that the plaintiff shall 'execute such further instrument as may be necessary formally to evidence such acquittance,' and it is argued that no such release has been executed by plaintiff. But it is not necessary that it should be. The acceptance of benefits is the substance of the release, and the agreement for a further instrument is by its express terms a mere formality for convenience of evidence."

In Washington *v.* Atlantic Coast Line R. R. Co., 71 S. E. 1066, a statute of the state of Georgia in practically the same terms as the act of congress of April 22, 1908, was under consideration by the Supreme Court of that state. The Georgia act reads as follows:

"Any contract, rule, regulation or devise whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the three preceding sections, shall to that extent be void; provided, that in any action brought against any such common carrier under or by virtue of any of said sections, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit or indemnity that may have been paid to the insured employé, or in the event of death to the person or persons entitled thereto on account of the injury or death, for which such action is brought."

At page 1068, Judge Lumpkin uses the following language:

"By the act of 1895 it was declared, "All contracts between master and servant made in consideration of employment whereby the master is exempted from liability to the servant arising from the negligence of the master or his servants, as such liability is now fixed by law, shall be null and void, as against public policy.' Here, then, prior to the act of 1909, was a prohibition against contracts whereby the master was exempted from liability to the servant arising from the negligence of the master or his other servants. But a new arrangement was made, which was called a relief department. The employés of the railroad company who became members

had certain amounts deducted from their wages to go to the relief fund. The company had general charge of the department, paid amounts for the maintenance of the relief department, and guaranteed the payment of the benefits provided to be paid. There was no direct agreement to release the company from liability for negligance. But if an injured employé took the benefits arising in part from his own contributions and those of his cofellows, he forfeited any right to hold the company liable. If he sued the company he forfeited any claim for benefits or relief. It is unnecessary to discuss the merits or demerits of this system. Suffice it to say that under its operation the employé was put upon his election. Whichever way he elected he released or forfeited something. In this state of the law it was held that such an agreement was not illegal. There was no intimation that the legislature could not change the law. They did change and passed the act of 1909, quoted above. If that act was not intended to apply to the intent here involved, it is difficult to say what was intended. If it only dealt with a direct contract to relieve an employer from liability, it added nothing to the law as it already stood and was mere surplusage. If there were any doubt as to the effect of the general words in the beginning of the section, the statement as to setting off any sum contributed or paid by the common carrier to any insurance, relief, benefit or indemnity shows clearly that such arrangements were included in the legislative intent. The inquiry where any uncertainty exists always is as to what the legislature intended, and when that is ascertained it controls. The exemption of a particular thing from the operation of the general words of that statute shows that in the opinion of the law maker the thing excepted would be within the general words had not the exception been made. The act of 1909 applies to the present case; so that acceptance of benefits did not operate to release the defendant company, but entitled it to diminish any recovery which he had as in the act provided."

In Pittsburgh C. C. & St. L. Ry. Co. *v.* Moore, 53 N. E. 290, a similar statute of the state of Indiana was under consideration by the Supreme Court of that state. The statute provides that "all contracts made by railroads . . . with their employés, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employé having a right of action under the provisions of this act, are hereby declared null and void."

The defendant has a relief department and issued to its employés certificates of membership therein, containing substantially the same provisions as are found in the certificate upon which this present suit is based. It was held that the provisions of this certificate providing that the acceptance of benefits should bar an action for damages was valid. Judge Hadley, at page 294, uses the following language:

"As a general proposition it is unquestionably true that a railroad company cannot relieve itself from responsibility to an employé for an injury resulting from its own negligence by any contract entered into for that purpose before the happening of the injury; and if the contract under consideration is of that character, it must be held to be valid. But on a careful examination it will be seen that it contains no stipulation that the plaintiff should not be at liberty to bring an action for damages in case he sustains an injury through the negligence of the defendant. He still had as perfect a right to sue for his injury as though the contract had never been entered into. Before the contract was entered into his right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was given an election either to receive the benefits stipulated for or to waive his rights to the benefits and pursue his remedy at law. He voluntarily agreed that when an injury happened to him he would then determine whether he would accept the benefits secured by the contract or waive them and retain his right of action for damages. . . . The contract forbidden by the statute is the relieving the company from liability for the future negligence of itself and employés. The contract pleaded does not provide that the company shall be relieved from liability. It expressly recognizes that enforceable liability may arise, and only stipulates that if the employé shall prosecute a suit against the company to final judgment he shall thereby forfeit his right to the relief fund, and if he accepts compensation from the relief, he shall thereby forfeit his right of action against the company. It is nothing more or less than a contract for a choice between sources of compensation where but a single one exists, and it is the final choice, the acceptance of one as against the other, that gives validity to the transaction."

In B. & O. R. R. Co. *v.* Miller, 107 N. E. 545, a similar statute of the state of Indiana was considered by the Supreme Court of that state. The language of this statute we have

heretofore quoted. The suit was brought for benefits due an employé as a member of the defendant's relief department. The plaintiff had been injured, and pursuant to the regulations of the relief department had received certain benefits and afterwards brought suit against the railroad company to recover damages for the same injury and recovered judgment for $5,000, which was paid. The company contended that the plaintiff was not entitled to recover anything further under the beneficial certificate. Sections 52 and 53 of the regulations of the relief department in that case were substantially the same as the regulations in the present case, and the court considered these regulations in the light of the act of congress, approved April 22, 1908, and concluded that by § 5 of this act these regulations were made invalid, but held that the contract was indivisible, and that if part of it was rendered invalid by the act of congress, the whole contract was invalid and no recovery could be had under it. The language of Judge Morris, at page 546, is as follows:

"Counsel for appellee contend that the void provisions are properly severable from the other portions of the contract, and with such invalid provisions severed the remaining provisions are enforceable. The contract was valid in all its parts when executed. But a valid contract if indivisible may be rendered wholly void by subsequent legislation. Appellant contends that this contract is indivisible and that if § 53 be held abrogated by the act of congress or void for other reasons, the entire contract falls and no obligation remains for enforcement in appellee's favor. We are constrained to accept this view that the entire contract falls if it is indivisible and first determine whether the contract is severable, for otherwise the appellee has no cause of action. It was manifestly the intention of the parties when appellee became a member of the relief association that the pursuit of one remedy should operate as an abandonment of the other. Appellee had this choice of one of the two methods of relief but could not resort to both. The two remedies were interdependent. If appellee should be indemnified by the payment of a judgment in tort the satisfaction of the judgment would under the contract operate as an acquittance of all beneficial obligations on the part of the relief association, and on the other hand a resort to association benefits would operate as an abandonment of the right to sue in tort. The contract was indivisible, and if it be conceded, as appellee contends, that the act of congress invalidates § 53 of the regulations forming part of the contract, it

must be held that the entire contract falls and appellee is left without any cause of action thereon."

The case of Phila., Balti. & Wash. R. R. *v.* Schubert, 224 U. S., was one in which the defendant company undertook to prevent a recovery of damages by pleading that the plaintiff was a member of its relief department and had agreed in his certificate of membership by regulation No. 58 that the bringing of suit against the company for payment of benefits should not be made until the suit was withdrawn or discontinued, and that the acceptance of benefits should operate as a release for damages arising from the injury. This was an attempt to use the provisions of the relief contract as a defence against the recovery of damages, and Justice Hughes held that under § 5 of the act of 1908, this provision of the relief contract was invalid, and that it could not be used to prevent a recovery of damages. In that case the railroad company was attempting to use the provisions of the relief contract to prevent the recovery of damages by its employé, and it was naturally held that this could not be done under the terms of the act of congress. While this is true, § 5 of the act of congress which makes it impossible so to use the contract of relief, expressly provides that whatever has been paid for insurance benefits or indemnity under such contracts may be deducted from the damages allowed as compensation for the injury. This, as already stated, is an implied declaration that damages and benefits were not intended to be given an employé because of an injury. We have not been referred to any case, nor have we been able to find any in which it has been held that under the act of congress, approved April 22, 1908, there can be recovery of both damages and benefits.

Section 1 of the act of congress, approved April 22, 1909, makes every common carrier by railroad liable in damages to any person suffering injury where he is employed by such carrier in such commerce or in the case of death of such employé, to his or her personal representative for the benefit of the surviving widow or husband and children of such employé for such injury or death resulting in whole or in part from the negligence of any officer or employé of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, road bed, works, boats, wharves or other equipment.

Section 3 provides that the right to recover damages under the act is not forfeited by contributory negligence on the part

of the employé, but the amount of damages may be diminished if such contributory negligence existed.

Section 4 provides that the employé shall not be held to have assumed the risk of his employment in any case where the common carrier contributed to the injury or death of the employé by violating any statute enacted for the safety of employés.

Section 5, heretofore quoted, makes all contracts, rules, regulations or devices intended to enable any common carrier to exempt itself from liability created by the act void, but provides that in any action for damages the carrier may set off any sum it has contributed or paid to any insurance, relief, benefits or indemnity on account of the injury or death for which the action was brought, and as already stated, this provision by necessary implication makes it clear that it was not intended that there should be a recovery of damages and also a recovery under an insurance, relief or benefit contract. We have examined all the authorities to which we have been referred by either party and we have herein cited at some length the decisions which, in our opinion, bear most directly upon the question here to be decided.

Johnson *v.* Railroad Co., 163 Pa. 127, was an action of trespass to recover damages, and the court directed the entry of a verdict for defendant, for the reason that the defendant had accepted benefits under a relief contract, substantially the same as is sued upon here. It was held that this acceptance of benefits was, according to the terms of the contract, a release from payment of damages. The contract does not exempt the company from liability for negligence. Justice Mitchell, at page 134, thus interprets the contract:

"The substantial feature of the contract which distinguishes it from those held void as against public policy, is that the party retains whatever right of action he may have until after knowledge of all the facts and an opportunity to make his choice between the sure benefits of the association or the chance of litigation. Having accepted the former, he cannot justly ask the latter in addition. . . . There is no public policy which the contract can be said to transgress."

These provisions were recognized in Ringle *v.* Railroad Co., 164 Pa. 629, and in Reese *v.* Railroad Co., 229 Pa. 341. In the latter case the present chief justice, who delivered the opinion, uses the following language, to wit:

"Nothing in his contract of membership in the association barred his right to recover, but what he voluntarily did after

he was injured—the effect of which he declared in his application for membership should be a release to the company—is the release upon which, under our own cases and those in other jurisdictions, the defendant has a right to rely for protection from any liability."

To the same effect is Frank *v.* Newport Mining Co., 11 L. R. A. (N. S.) 182. Justice Montgomery, of the Michigan Supreme Court, at page 188, thus interprets the arrangement:

"The contract is not a contract relieving the defendant of the consequence of its own negligence, and notwithstanding this contract, the party is entitled under the death act to sue and recover in case of death, or the party indemnified himself, if living, can maintain an action for damages as though this contract were not in existence; but the effect of the contract is to give to the party injured, if living, or to those entitled to take an indemnity under the contract in case of his death, an election, and either may if he so elects bring an action for the damages, ignoring the contract, or he may, if he can comply with the conditions upon which the indemnity is payable, accept the indemnity, and upon doing so discharge wholly the right of action based upon the tort."

The Pennsylvania cases just cited hold that contracts intended to protect from liability for negligence are void, because against public policy; that relief contracts such as the one on which this suit is based do not impair the right to recover damages for negligence, but merely stipulate that if damages are paid, relief benefits cannot be claimed, and if benefits are accepted damages cannot be recovered. This is practically putting the employé and the employer in the position in which they are respectively placed by the federal act of April 22, 1908. By that act no contract or rule can relieve the employer from liability for damages, but when damages are demanded the amount paid on benefits or indemnity contracts may be deducted. The legislative intent is clear that both damages and benefits cannot be recovered under the act. The sole purpose of the act is to secure damages resulting from negligence, and to that end all contracts, rules and devices intended to exempt from liability are expressly declared void. In the present case the plaintiff has recovered and received her damages, and the act of congress does not permit the recovery of relief benefits. Our own court of last resort has decided that the regulations of the relief contract are valid, and that if damages are paid relief benefits cannot be lawfully demanded. Thus our own decisions accord to the

plaintiff all the right she is entitled to under the act of congress, and there is no real conflict between federal and state authorities. For this reason, as also for the reasons given in the cases above cited, where it is held that both damages and benefits cannot be recovered, we conclude that the affidavit of defence in this case is sufficient. We accordingly overrule the motion for judgment for want of a sufficient affidavit of defence. This conclusion makes it unnecessary to determine whether the remedy provided by the relief contract for recovery of benefits must be pursued in accordance with the regulations which are made part of the contract.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Overtime Occasions.

Labor law—Break down of plant—Overtime work by female employé—Act of July 25, 1913, P. L. 1024.

Where an establishment was necessarily shut down in consequence of the breakdown of an outside power plant, from which source such establishment obtained, and from which it was dependent for its power, the time lost in such establishment by reason thereof can be lawfully made up by overtime work by a female employé under § 3 of the act of July 25, 1913, P. L. 1024.

Request of Lew R. Palmer, chief of bureau of inspection, department of labor and industry, for opinion.

COLLINS, Deputy Attorney-General, Dec. 7, 1915.—There has been referred to me your communication of Nov. 19, 1915, to Attorney-General Brown, relative to the subject of "overtime" on account of break down of machinery, and requesting an opinion in said matter.

The question submitted is "where a concern obtained electric power from an outside source, and owing to a break down in the central power station, their power was shut off for something like five hours, which time they desired to make up by working overtime;" whether overtime work by female employés to make up lost time in such case, is lawful under the act of July 25, 1913, P. L. 1024.

Section 3 of said act, after fixing the maximum number of hours of labor per day and per week, and days per week, permitted to any female employé in any establishment, and permitting certain overtime work in weeks in which a holiday occurs, further provided for overtime employment "to make

up time lost in the same week in consequence of the alteration, repairs or accidents to machinery or plant upon which she was employed and dependent for employment."

The purpose of this proviso was to relieve in a measure the employer and employé from the loss that otherwise would be sustained from a shut down of a plant for alteration or repairs, or by reason of an accident to machinery or plant. It gives, upon the terms and within the limits prescribed by the act, an opportunity to make up time so lost by overtime work. It is manifestly in the interest of both parties, enabling the employer to regain in whole or in part some portion of the lost time of his operation and likewise affording to the employé the privilege of making up her lost hours of employment and wages therefor.

The act strictly guards against the abuse of this provision by limiting such overtime to the week in which the shut down occurred and the maximum hours of work permitted in such case.

The question here is whether the cause above stated as the occasion of the shut down in the present case, comes within the meaning of "accidents to machinery or plant," as this clause is used in the act. The shut down of the plant in the case stated was due to lack of power, which came from an outside power station which had broken down. In effect, the power plant was a part of the plant in question and necessary to the latter's operation. While the accident primarily befell the former, its results extended to and affected the latter. When the power that drives machinery fails, the machine stops. There has befallen it the loss of the force that drives it. Power is as vital to a machine as any of its parts, and its interruption as effectual in stopping the machine as would be the break down of the machine itself. While the power in such a case as the present one originated outside the plant, yet the electrical energy which drove its machinery was that which came into the plant, thereby becoming a part thereof and upon which its machinery depended, to run. When an accident deprived it of this power, such accident reached the plant. To hold where a machine breaks down that it would be an accident for which the lost time thereby occasioned may be made up by overtime work, but that an accident which deprived the machine of the power upon which it was dependent to operate, is not such an accident as permits overtime work to make up the lost time ensuing in such case, would be to give the portion of the act here under consideration an alto-

gether unreasonable construction. There is no apparent purpose to be effectuated by such a narrow interpretation. Such a case as the present one is both within the reason and purpose of the said provision of the act, and it is fair to presume that it was intended to apply in such a contingency.

I am therefore of the opinion that in the case mentioned, namely, Where an establishment was necessarily shut down in consequence of the break down of an outside power plant, from which source such establishment obtained and upon which it was dependent for its power, that the time lost in such establishment by reason thereof can be lawfully made up by overtime work by a female employé therein, in pursuance of and in accordance with the provisions of § 3 of the said act, which permits overtime work to make up lost time occasioned by "accidents to machinery or plant."

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Bloom *v.* Littman.

Foreign attachment—Change of domicile—Nihil habet.

A writ of foreign attachment served upon a garnishee but returned nihil habet as to the defendant will be quashed, where it appears that the defendant at the time the writ was issued had gone into another state to seek a new residence, but had not as yet obtained another place of abode with the intention of remaining in it.

Rule to quash foreign attachment. C. P. No. 5, Philadelphia Co. Sept. T., 1915, No. 9.

A. L. Moise, for rule; *Levi & Mandel,* contra.

MARTIN, P. J., Nov. 1, 1915.—A writ of foreign attachment was issued against defendants at one o'clock P. M. on June 29, 1915, as appears by the endorsement placed thereon in the sheriff's office. It was served upon the garnishees, but returned "nihil habet" as to defendant.

Upon presentation of a petition alleging that defendant at the time the writ issued was a resident of Philadelphia, and actually within the jurisdiction of the court, a rule was granted to show cause why the attachment should not be quashed. An answer was filed, in which it was averred, upon information and belief, that defendant did not reside in Pennsylvania, but was a resident of Atlantic City, in the state of New Jersey; and proof was demanded of the allegation that he was within the state of Pennsylvania at the time the writ issued.

From the depositions taken on behalf of both parties, it appears that defendant formerly resided at 1108 North 41st street, in the city of Philadelphia, and that he alleged illness of his children as a cause for taking his family to Atlantic City, where he occupied an apartment which he rented on a monthly lease. He also rents a room at 323 Spruce street, in the city of Philadelphia, which he has occupied four or five times a week for nearly two years; and alleges that he was engaged in business at 265 South Fourth street until a fire occurred, when he made a sale of his remaining stock, retaining a desk and fireproof safe in a room in the Fourth street building, which is rented by another man, and that he uses this room for the purpose of correspondence, his letterhead being printed with the number of the building as his office.

He testified that on the day the writ was issued he left the city of Reading at ten o'clock in the morning and arrived at an hour prior to the issuing of the writ in the city of Philadelphia, where he remained for the rest of the day. He stated that he is a resident of Philadelphia, is registered and has voted there, that his family are temporarily in Atlantic City, and he expects to bring them back to Philadelphia.

There was testimony offered on behalf of plaintiffs to the effect that defendant had stated that he moved his family to Atlantic City in the fall of 1914, and was living there; he goes to Atlantic City every evening and comes up in the morning, and wanted to live in Atlantic City permanently. He denied making this statement, but admitted that he might remain in Atlantic City for another year. There was also evidence that he was engaged in running a saloon or café in Atlantic City. He explained this by stating that it belonged to his brother, and at times he helped by rendering services without compensation, but stated that he had no interest in or connection with the business. He further testified that, after selling his business in Philadelphia, he asked permission of the purchaser to leave a desk and safe in the building, and after six weeks moved them to another floor in the same building at 265 South Fourth street, which he claims to be his office.

When in the case of foreign attachment it is shown that the defendant was within the jurisdiction of the court at the time the writ was issued, the attachment will be quashed, even though the return of the sheriff may be "non est inventus" as to the defendant. Kauffman *v.* Musin, 9 Pa. C. C. 414; Maule *v.* Cooper, 1 W. N. C. 109.

It is clear that defendant was a resident of Philadelphia prior

to the time that he and his family went to Atlantic City.

In Pfoutz *v.* Comfort, 36 Pa. 420, it was held that a debtor does not become a non-resident so as to subject him to a foreign attachment by leaving his place of abode in this state and going to another state to seek a new residence, but continues a resident of the state until he has obtained another place of abode with the intention of remaining in it.

In Reed's Appeal, 71 Pa. 378-383, Sharswood, J., said: "The domicile of origin is not abandoned until a new one has been intentionally and actually acquired; a domicile once acquired remains until a new one is acquired actually, facto et animo;" and in Price *v.* Price, 156 Pa. 617, it was held that domicile of origin must be presumed to continue until another sole domicile has been acquired by actual residence, coupled with the intention of abandoning the domicile of origin; that this change must be animo et facto, and the burden of proof is on the party who asserts the change.

There is not sufficient evidence in the depositions to overcome the statement made by defendant that it was his intention to retain his domicile in Philadelphia and return there with his family, nor to contradict his testimony that he was actually in Philadelphia at the time the writ of foreign attachment issued. The writ should be quashed. Rule absolute.

Bell *v.* Hallam.

Execution — Attachment-execution — Answer of garnishee, effect of—Dissolving attachment—Rule to dissolve.

The rights of the parties cannot be disposed of on a motion to dissolve the attachment after answer by the garnishee.

Lien of attachment—Proceeds of real estate—Master in partition.

A master was appointed, ordered to sell real estate for distribution, and the defendant's share therein was adjudicated. Afterwards, an attachment-execution was served upon the master. Held, that the attachment-execution became a lien upon the money realized from the sale of the real estate in the hands of the master.

Defendant's estate was allowed to substitute the name of the administrator as defendant to set up any superior right to that of the attaching creditor.

Public officers—Officer of the court—Master in partition.

[Bell v. Hallam.]

The fact that a master is an officer of the court does not in itself require the court to dissolve an attachment served upon him as garnishee.

Rule to dissolve attachment. C. P. Washington Co. May T., 1913, No. 263, D. S. B. and No. 522. Appearance Docket, Execution-attachment.

G. P. Baker, for the estate of Joseph Hallam, defendant, and rule.

R. W. Parkinson, Jr., for plaintiff, contra.

McIlvaine, P. J., Jan. 5, 1916.—On April 9, 1913, H. K. Bell had judgment entered upon a judgment note made by the defendants, Joseph Hallam and C. F. Hallam, to No. 263, May term, 1913, D. S. B. for $266, with interest from Feb. 18, 1907; and on May 9, 1913, he had issued on said judgment an execution attachment against said defendant and summoned J. M. McBurney, garnishee of Joseph Hallam and C. F. Hallam, the said J. M. McBurney being master in partition to sell certain real estate of which the said Joseph Hallam had a one half interest. The writ of attachment was duly served on May 9, 1913, upon J. M. McBurney, the garnishee, and upon Charles F. Hallam personally, and on May 17, 1913, was served personally upon Joseph Hallam. Joseph Hallam died on Sept. 28, 1913.

The partition proceedings in which J. M. McBurney was appointed master are docketed to No. 1424 on the equity side of this court and were instituted prior to the time that H. K. Bell entered judgment against Joseph Hallam and C. F. Hallam.

On June 2, 1913, James M. McBurney, the garnishee, filed an answer to the attachment-execution, in which answer he set forth "that to No. 1424 in equity he was appointed master in partition, and on March 27, 1906, as such master was ordered to make sale of a certain tract of land in Chartiers township, Washington county, Pennsylvania, at public or private sale as a whole or in purparts; that the defendant, Joseph Hallam, was entitled to receive one full equal one half of the proceeds of such sales as were made under the said order of court, until March 25, 1910, at which time the said Joseph Hallam assigned his right, title and interest in said tract of land to one W. T. Brownlee, as collateral security for the payment of a judgment note of $3,000, a copy of which assignment was duly served on the master on March 25, 1910,

and is hereto attached and made part of this answer. That subsequently thereto and prior to the service upon this defendant of the execution-attachment, the said Joseph Hallam made an assignment of all his right, title and interest in said tract of land to Robert H. Hallam as collateral security for the payment of a note or notes amounting to $1,160.50, with interest, a copy of which assignment was served on the master several months prior to the serving upon him of the execution attachment, a copy of which assignment is hereto attached and made a part of this answer. That at the time of the service upon him of the above execution attachment, this defendant had in his possession the sum of $1,108, which amount is still in the possession of this garnishee, held by him subject to the assignment to W. T. Brownlee and Robert H. Hallam above mentioned. That the garnishee is from time to time receiving various sums of money, proceeds of the sale of the tract of land in Chartiers township, the amount of which cannot be ascertained until the statement of the next account to be filed by the garnishee as master. That there still remain unsold quite a number of lots, part of the tract of land above mentioned."

On Oct. 6, 1913, the said James M. McBurney, garnishee, supplemented his answer as given above, as follows:

"That at the time of the service on him of said attachment, there were outstanding contracts for the sale of lots upon which there were instalments unpaid amounting to $2,320, which, less $120, the estimated cost of settlement, taxes, etc., would leave a balance of $2,200, the one half of which, or $1,100, will be applicable to the Joseph Hallam share in said partition, provided the purchasers of lots all pay according to the terms of their several agreements."

On Dec. 27, 1915, G. P. Baker, administrator c. t. a. of the estate of Joseph Hallam, filed his petition in this court, upon which a rule was granted on the said H. K. Bell to show cause why the said writ of attachment issued to the above number and term should not be dissolved. In that petition, as a basis for asking for said rule, he set forth:

"That on the above-recited judgment (No. 263, May term, 1913, D. S. B.) an attachment was issued in the court of common pleas of Washington county, to No. 522, May term, 1913, attaching all of the goods and chattels, rights, credits, moneys, etc., of the defendants in the hands of J. M. McBurney, master, and summoning him as garnishee.

"That the only funds of the defendants or either of them

in the hands of said master, were the proceeds of the sale of certain real estate in which the said Joseph Hallam, one of the above-named defendants, had an undivided interest, which said real estate was sold by the said master under order of your honorable court on Feb. 26, 1906, at No. 1424, in equity.

"That your petitioner is informed and believes that the said fund in the hands of the said master appointed by your honorable court to make partition of certain real estate in which the said defendant in the judgment had an undivided interest, is not attachable at the instance of the said judgment creditor."

Service of this rule was accepted by the attorney for H. K. Bell, and the case by consent of the parties was placed on the argument list and was forthwith argued; and the sole question now before us is, Should the writ of attachment be dissolved? We are of the opinion that it should not:

(1) Because the garnishee has filed his answer, and the rights of the parties interested cannot be disposed of in such summary manner. G. P. Baker, so far as the record shows, is a stranger thereto. The death of Joseph Hallam has not been suggested and he substituted in his stead, and until this is done we do not see how he has any standing in court. But if he should ask for a substitution and become a party to the record, then in our opinion he should raise the question which he wished adjudicated by a plea and not by a motion to dissolve. Lorenz *v.* Orlady, 87 Pa. 226.

(2) The death of a defendant after service of a writ of attachment will not abate the writ nor prevent the entry of judgment against the garnishee, that judgment, however, to be limited by the court when it enters it to only such funds in the hands of the garnishee as are applicable to the discharge of the debt.

In Bieber *v.* Weiser, 1 Woodward's Decisions 473, the court says in a similar case:

"The defendant in this attachment died after the service of the writ. The only question presented is whether the plaintiff is entitled to a judgment, or the assets attached must go into the hands of personal representatives for distribution. This proceeding was commenced under the provisions of the act of assembly of June 16, 1836, relating to executions, § 35 of which provides that in the case of a debt due to the defendant, the same may be attached and levied in the manner allowed in the case of a foreign attachment. Section 50 of the foreign attachment act of June 13, 1836, declares that the goods and effects of the defendant in the attachment, in the

hands of the garnishee, shall, after service of the writ, be bound by such writ, and be in the officer's power. The attachment of the debt fixes it there in favor of the attaching creditor, and the attaching creditor acquires a lien on the debt. While it was held in McCoombs *v.* Hudson, 2 Dall. 73, and in Bushel *v.* The Com. Ins. Co., 15 S. & R. 172, that an attachment will not lie against an executor as defendant for a debt due from the testator, it has been held also in Fitch *v.* Ross, 4 S. & R. 557, that the death of a defendant in a foreign attachment, after final judgment, does not dissolve the attachment.

"The effect of process of this kind on the fund pursued is settled by judgments of the Supreme Court in various recent cases. Among them Reed *v.* Penrose's Executrix, 36 Pa. 214, decided that an attachment-execution served, wherever it lies places the attaching creditor in the same relation to the garnishee as that occupied by the debtor before it was laid, and that an attachment is an equitable assignment of the thing attached—a substitution of the creditor for the debtor, and to the latter's right against the garnishee. In Baldwin's Est., 4 Pa. 248, it was held that the assignment of a debt, either actual or by operation of law—as by an attachment—carries with it the right to use all securities for its recovery. In Myers *v.* Baltzell, 37 Pa. 491, an execution attachment was held so far to change the relations with which it interferes, as to transfer the right of the defendant resulting therefrom. In Fessler *v.* Ellis, 40 Pa. 248, it was held that in an execution attachment, the plaintiff is placed in a position and acquires the right of his debtor, as regards the garnishee. And Straley's Appeal, 43 Pa. 89, decided that an attaching creditor whose attachment was served before the entry of other judgments against the defendant, upon which executions were issued, and the defendant's interest sold, was entitled to priority of payment out of the proceeds when brought into court for distribution. All these authorities recognize the right of the creditor as vested by the issue and service of his process, and all show that his general claim against the estate of his debtor becomes converted into a specific lien, which the debtor's subsequent death will not disturb.

"Such a principle accords with the general symmetry of the law. It is precisely analogous to the rule that the common law has always accepted and acted on, that an execution issued in a defendant's lifetime may be executed after his death."

In Etting *v.* Moses, 1 Phila. 399, which was a rule for

judgment against the garnishee, on bottom of page 399, the court said:

"The award of the auditor in the orphans' court, which confirmed, became the decree of that court, ascertained conclusively that the fund in the hands of the garnishees was due and payable to the original defendant, and precludes inquiry as to that question here.

"This attachment was sued out, and served in the defendant's lifetime. It is supposed that, the defendant having died pending the attachment, the proceeding must be revived by scire facias against his legal representatives, before judgment can be finally entered against the garnishee. The attachment is in substance an execution, as it was levied in the defendant's lifetime; analogy is opposed to the doctrine that the personal representative must be warned. As in the other case, if there is equitable ground, they will be let in to take defence."

Applying the doctrine of these cases to the case in hand, we find that the plaintiff obtained a judgment against Joseph Hallam in his lifetime. That judgment when entered became a lien upon any real estate of Joseph Hallam which remained unsold, and the attachment-execution when served became a lien upon the money that was realized from any of his land sold by the master, and if there were no other superior claims to the money in the hands of the garnishee realized from the sale of land of Joseph Hallam, it certainly would go to the payment of the plaintiff's claim. If G. P. Baker, as administrator of Joseph Hallam, believes that he has a superior claim to that of the judgment attaching creditor, his course in our opinion is to petition the court to be substituted, as administrator, for Joseph Hallam, the deceased defendant, and then make such defence as he sees fit, showing that the money in the hands of the garnishee, which would otherwise go to the plaintiff as a judgment creditor, should go to him on account of some superior right. Whether he has any such superior right, it is not the province of the court now to decide. That will be a matter for decision after the administrator has become a party to the record and after he has been heard.

The fact that James M. McBurney is an officer of this court does not of itself require the court to dissolve this attachment. This court on its law side has control of the process in question. On its equity side it has absolute control over the master. And it is the discretion of the court to say how the rights of the parties that are now before the court may be adjudicated, and we believe that the weight of the

authorities shows that the right of the plaintiff to the money in the hands of the master, as against the claim of the administrator of Joseph Hallam, can best be worked out by a trial of this attachment execution, and if the administrator has any defence to make against the payment of the plaintiff's claim out of the proceeds of the sale of Joseph Hallam's real estate under the facts as hereinbefore stated, he should be made a party to this proceeding and put in his defence. Piper *v.* Piper, 20 Pa. C. C. 372; Lorenz *v.* Orlady, 87 Pa. 226.

And now, Jan. 5, 1916, this rule came on to be heard and was argued by counsel, whereupon, upon due consideration, it is ordered, adjudged and decreed that the rule be discharged.

From R. W. Parkinson, Jr., Esq., Washington, Pa.

Logan *v.* Carnes.

Costs—Continuance of case—Amendment—Rules of court—Act of May 10, 1871, P. L. 265.

Where a plaintiff amends his statement of claim at the trial so as to require a different array of witnesses and proofs to sustain the allegations, as well as a different array of witnesses and proofs to meet them, and the defendant pleads surprise and secures a continuance, the plaintiff will be required to pay all the costs up to the time of the amendment.

Rule to show cause why continuance should not be at the cost of plaintiff. C. P. Crawford Co. Sept. T., 1912, No. 89.

Wesley B. Best and *E. W. McArthur,* for plaintiff.
O. Clare Kent, for defendant.

PRATHER, P. J., Jan. 3, 1916.—Said case was on the trial list for the week beginning Monday, Jan. 26, 1914, and on January 27, when said case was called for trial, plaintiff filed an amended statement of claim, at which time counsel for defence pleaded surprise, and upon defendant's application, the case was continued. On the same day said rule was procured.

The original declaration was filed Dec. 24, 1912, and complained of the trespass of Carnes, plaintiff's landlord, and S. A. Curry, constable, in making a distress for rent, when none was due; plaintiff's defence to such proceedings under the landlord's warrant being that he was virtually ousted from the premises by the conduct of his landlord in failing to put the premises in a tenantable condition, as undertaken in the

lease, together with a simultaneous oral agreement. In this declaration no claim was made for damages.

In the amended declaration, filed Jan. 27, 1914, plaintiff claims to recover from defendant $1,200 as damages for his landlord's breach of contract, through which breach plaintiff lost a large amount of repairs that he put upon the premises, as well as the use of the hotel.

A survey of these two declarations can lead to no other conclusion than that defendant's surprise was genuine. As amended, the pleadings required altogether a different array of witnesses and proofs to sustain the allegations, as well as a different array of witnesses and proofs to meet them.

Paragraph four or rule twelve of our rules of court, page 29, provides, "All continuances of causes on the trial list shall be at the cost of the party making the application, except where special reason exists to the contrary, and the court may make such orders as to the time when the costs shall be paid as may be just and reasonable," etc.

Paragraph seven, rule thirty, of our rules of court, page 59, provides, "If a cause be regularly on the trial list and continued by the court upon application of either party, and against the consent of the other, such continuance shall be at the cost of the party at whose instance or through whose default such case shall not be tried, unless special reason be shown to the contrary, when the court may impose special terms as to such continuance."

However, the act of May 10, 1871, P. L. 265, seems to directly rule the proposition before us in favor of the defendant. This act provides "that in all actions pending or hereafter to be brought in the several courts of this commonwealth, said courts shall have power in any stage of the proceedings to permit an amendment or change in the form of action, if the same shall be necessary for a proper decision of the cause upon its merits; the party applying to pay all costs up to the time of amendment, and the case to be continued to the next court if desired by the adverse party."

Under the peculiar facts of this case, our rule of court would suggest the propriety of this continuance being at plaintiff's costs, but if there should be any doubt concerning the interpretation of our rule, the act of assembly above quoted is larger than the rule and requires that the costs of such continuance be borne by the plaintiff. Now, Jan. 3, 1916, rule absolute.

From James D. Roberts, Esq., Meadville, Pa.

Commonwealth *v.* Dimegilo.

Automobiles—Driving car without license—Summary proceedings—Indictment—Act of July 7, 1913, P. L. 672—Justice of the peace.

A justice of the peace has no jurisdiction to require bail for the appearance of a defendant at court who is prosecuted under the act of July 7, 1913, P. L. 672, § 21, and to return the case to court. Such a return made by the justice of his own motion will not sustain an indictment. It is only when the defendant has waived the summary trial and elects to be tried by a jury that the case may be returned.

Rule for new trial. Q. S. Delaware Co. Dec. T., 1914, No. 82.

J. D. White, for motion.

J. B. Hamum, Jr., district attorney and *William Taylor,* assistant district attorney, contra.

JOHNSON, P. J., April 28, 1915.—James Dimegilo, one of the defendants, was indicted under § 7 of the act of assembly of July 7, 1913, P. L. 672.

After the trial he was found guilty. The other one pleaded non volo contendere.

They ask for a new trial on the ground that an indictment does not lie for a violation of this section, save in cases where the proceeding is for the collection of a penalty under § 21, and then only after the accused has waived a summary hearing and asks for a jury trial.

In this case a warrant was issued by a magistrate in Delaware county, charging defendants with "running automobile without a license." They were bound over to the next term of court, indicted and tried as above set forth.

The contention of defendant must prevail.

This is an act relating to and regulating motor vehicles, providing for registrations, prohibiting certain things, and providing penalties for their violation. There are two methods of proceeding.

Where the cases come within the provisions of §§ 16 and 17, the proceeding is by warrant and indictment.

All other cases are by a suit for penalty as provided in the first paragraph of § 21. There may be an indictment, possibly under this section, but it is only after the accused waives the hearing for a summary trial, and elects to be tried by a jury. The latter part of this section which provides for the issuing of a warrant, relates to the offenses set forth in §§ 16 and 17.

The defendants are entitled to a discharge.

Rider *v.* York Haven Water & Power Co.

Eminent domain—Right of water and power company to use of Susquehanna river—Taking by method other than that provided by law—Damages—Injunction.

To what extent possession of the right of eminent domain may affect the liability of a water and power company for damages done to a plaintiff's premises prior to the company proceeding in the usual way to exercise such right, can only be determined upon trial of action of trespass.

The defendant was incorporated as a water and power company, and was engaged in manufacturing electricity for sale to the public, and for that purpose by a dam practically monopolized, during certain months of the year, the water of the Susquehanna at York Haven. The plaintiff complained of a violation of his right as a riparian owner, and therefore brought an action to recover damages. Then defendant presented a bond to enable it to take said water, which bond was approved. Whereupon plaintiff filed bill in equity to prevent the diverting of the water, to which defendant filed an answer, and the question was raised whether the defendant had the right of eminent domain. Held, that the defendant possessed the right of eminent domain, and therefore a preliminary injunction should not be granted.

If a company possessing the right of eminent domain fails to exercise it and permanently takes property for its corporate use, the measure of damage is simply the difference in the market value of the land or property taken before and after the appropriation.

It may be that compensation or reparation for the failure to promptly exercise this right in a lawful manner may be recovered as damages either actual or punitive.

Water and water power companies possess the right of eminent domain subject to such control as the water supply commission and public service commission may lawfully exercise.

Bill for preliminary injunction. C. P. Dauphin Co. Equity Docket, No. 545.

Fox & Geyer, for plaintiff.
Wolfe & Bailey and *Reynolds D. Brown,* for defendant.

McCarrell, J., Jan. 6, 1916.—The plaintiff by his bill raises the question of defendant's right to exercise the power of eminent domain for the purpose of taking and diverting the water from the eastern channel of the Susquehanna river flowing in front of his farm and lands opposite Duffy's Island. The defendant company in 1902, 1903 and 1904 placed across the eastern channel of the Susquehanna river a dam or obstruction, extending from the head of Duffy's Island diagonally to the Dauphin county shore, thereby diverting at all times a large quantity of the water flowing down the Susquehanna river in front of plaintiff's premises and at times practically diverting all of the water of said channel. This was done with-

out the consent of the plaintiff and in violation of his rights as a riparian owner, as was finally settled by the Supreme Court of this state in the case of Rider *v.* York Haven W. & P. Co., 242 Pa. 141. After this decision the present plaintiff brought his action against the present defendant to recover damages for this unlawful diversion of the waters of the river. On the day the jury was called to hear this case the defendant made application for the approval of a bond to enable it to take the waters from this eastern channel of the river for its corporate purposes, which bond the court then declined to approve, but subsequently approved a bond in a larger amount. The trial proceeded, resulting in a verdict in favor of the plaintiff. Upon appeal from the judgment entered upon this verdict the same was reversed by the Supreme Court. Rider *v.* York Haven W. & P. Co., 251 Pa. 18. The present bill was filed upon the theory that the defendant company does not possess the right of eminent domain and possesses no right to divert the waters from the channel of the river in front of the plaintiff's premises. The defendant has filed its answer to the present bill, setting forth what it has done and claiming that all its acts have been within the authority of the law regulating water and power companies and public service corporations. Plaintiff asks a preliminary injunction to restrain the defendant company from diverting the water of the river from the channel through which the same would naturally flow in front of the premises of the plaintiff. In the case of Rider *v.* York Haven W. & P. Co., 242 Pa. 141, we granted an injunction after the diversion of the waters and ordered the removal of the dam which caused the diversion. This injunction and order are still in force and the defendant has not up to the present time complied with our order. In its opinion affirming our decree the court made reference to the alleged right of the defendant company to claim the privilege of eminent domain in the following language, to wit:

"This appellant seems to fear that its corporate rights and franchises may be affected or prejudiced in the future by these proceedings; as to this, it is sufficient to say that neither the decree nor the finding of the chancellor have, or justifiably can be given, the effect of depriving the defendant of any rights, powers or privileges to which it may be entitled under the mill dam act of March 8, 1803, 4 Sm. L. 20, or under the water commission acts of May 4, 1905, P. L. 385, and May 28, 1907, P. L. 299, or which it may enjoy as a public service corporation vested with the right of eminent domain."

This seems to leave the question of the defendant's right to exercise the privilege of eminent domain unsettled, and this is the question now before us. If the defendant company possesses this right, it is unfortunate that it did not seek to exercise it before it attempted to divert the waters of the river from the channel which carried them in front of the plaintiff's premises. If the right then existed it should have been exercised. This right is one of high privilege granted by the state for the supposed advantage of the public, and the individual or corporation possessing such privilege should be careful to exercise it strictly in accordance with the terms of the grant. It may be that compensation or reparation for the failure to promptly exercise this right in a lawful manner may be recovered as damages either actual or punitive. However this may be, it seems to be well settled by the decisions of our court of last resort that if a company possessing the right of eminent domain fails to exercise it and permanently takes property for its corporate use, the measure of damage is simply the difference in the market value of the land or property taken before and after the appropriation. Wagner *v.* Purity Water Co., 241 Pa. 328; Rider *v.* York Haven W. & P. Co., 251 Pa. 18. At page 23 of the case last cited, the court uses the following language:

"A water company vested with the power of eminent domain, but having entered the land or appropriated the water without exercising the power as the statutes require, is answerable in the same measure of damages to the land-owner as if the original entry or appropriation had been lawfully made. This means that the proper measure of damages in such cases is the difference in market value of the land affected before and after the injury."

The defendant company is incorporated as a water and water power company. Section 34 of the act of April 29, 1874, P. L. 94, as amended by act of May 16, 1889, P. L. 226, provides that companies incorporated for the supply of water to the public or for storing and transportation or supplying of water and water power for commercial and manufacturing purposes, "shall have power to provide, erect and maintain all works and machinery necessary or proper for raising and introducing into the town, borough, city or district where they may be located, a sufficient supply of pure water or water and water power as aforesaid, and for that purpose may provide, erect and maintain all proper buildings,

cisterns, reservoirs, pipes and conduits for the reception and conveyance of water or water power."

Under these acts it is held that corporations organized for these purposes have the right of eminent domain, and when an agreement cannot be made with the owner of the land necessary for the proper construction and operation of their works, may acquire it my condenmation. This is clearly settled by the case of Keller *v.* Riverton Water Co., 161 Pa. 422, and Jacobs *v.* Clearview Water Supply Co., 220 Pa. 388.

The powers of water and water power companies have been enlarged and the territorial limits for their operation extended by subsequent legislation. The act of July 2, 1895, P. L. 432, in order that water and water power may be supplied to the public to the best advantage for commercial and manufacturing purposes, grants almost unlimited power for the location, construction and maintenance of machinery, dams, buildings, cistern, canals, waterways, fixtures and appliances, with the right to mortgage all their property to any amount deemed necessary for corporate purposes. This is the act considered by the Supreme Court in Bly *v.* White Deer Mountain Water Co., 197 Pa. 80-100, and held not to extend the territorial limits of corporate activity. The act of same date, July 2, 1895, P. L. 425, grants the additional right to develop and distribute electric power to any place or places, provided municipal consent be obtained for entry upon streets or alleys. Thus the defendant company apparently has authority to develop and distribute electric current and power to any locality which may be reached by any known method of transmission. Its corporate activity is no longer limited to the territory described in its charter. Its proposes to take the water here in question for corporate purposes, and we are not satisfied that it should be enjoined from so doing. We are satisfied that under the law the defendant company possesses the right of eminent domain, subject to such control as the Water Supply Commission and the Public Service Commission may lawfully exercise. To what extent possession of this right of eminent domain may affect the liability of the defendant company for damages done to the plaintiff's premises prior to its proceeding in the usual way to exercise it, can only be determined upon the trial of the action of trespass now pending. All that is decided now is that we ought not at this time to grant the preliminary injunction prayed for in the pending bill, as the defendant company possesses the right of eminent domain.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Levick *v.* Boomin.

Landlord and tenant—Lessee of life tenant—Effect of death of life tenant—Tenancy by sufferance—Act of March 31, 1905, P. L. 87.

Where an owner of real estate for life leases the same for a term of years and dies before the expiration of the term, and the lessee pays rent to the remainderman for several months until the latter sells the real estate during the term and agrees to give possession to the purchaser, the lessee is a tenant by sufferance, until he pays the rent and thereafter is a tenant at will, and if he is served with thirty days' notice to quit, he will be bound under the act of March 31, 1905, P. L. 87, to deliver possession to the purchaser.

Case stated. C. P. No. 5, Philadelphia Co. June T., 1915, No. 2009.

R. T. McCracken, for plaintiffs.
H. W. Schorr, for defendant.

MARTIN, P. J., Oct. 18, 1915.—Elizabeth Ann Baizley, a tenant for life under the terms of the will of her husband, John Baizley, who in his lifetime was owner in fee of the premises northeast corner of Seventh street and Snyder avenue, in the city of Philadelphia, acting through her agent, Robert Briggs, leased the property to Abraham E. Boomin, the defendant, for a term of five years from Feb. 1, 1911, at the annual rental of $420, payable monthly in advance. On July 1, 1913, the lease was extended for five years from Feb. 1, 1916. The defendant entered upon the premises as tenant, and is still in possession. Elizabeth Ann Baizley, the life tenant, died on Dec. 5, 1914, and the title to the premises became vested in fee in John Randolph and Thomas Baizley, remaindermen under the terms of the will of John Baizley, deceased. During the lifetime of Elizabeth Ann Baizley, defendant paid the rent of the premises, in accordance with the terms of the lease, to Robert Briggs, her agent, including the rent which fell due on Dec. 1, 1914. He paid the rent which accrued on the first days of January, February and March, 1915, to the remaindermen, and on April 1 he paid plaintiffs rent for one month in advance. On Dec. 22, 1914, the remaindermen entered into a written agreement to sell the premises, and also some other properties, to Samuel Levick and Abraham H. Woldow, the plaintiffs. It was stipulated in the agreement of sale that possession of all the properties should be given by transfer of existing leases. On March 8, 1915, pursuant to the agreement of sale, the remaindermen

conveyed the premises to plaintiffs in fee, and Robert Briggs, the lessor named in the lease, executed an assignment in blank of his right, title and interest in the lease. Defendant tendered rent for the months of May and June to plaintiffs, who refused to accept the money. On April 1, 1915, plaintiffs caused to be served upon defendant a notice to vacate at the expiration of thirty days. Defendant refused to surrender the premises, and proceedings were instituted before a magistrate to obtain possession. A case stated was filed by agreement of the parties, upon which the magistrate entered judgment in favor of plaintiffs. An appeal was taken, and the record of the magistrate, including the case stated, with the accompanying copy of the lease and assignment endorsed thereon, was filed in this court.

Pleasants *v.* Claghorn, 2 Miles's Reps. 302, 307, 308, was a proceeding to determine the character of a tenancy. The question was presented for the consideration of the court upon a case stated. It was said by the judge of the district court who heard the argument, that "rent implies a reservation in a grant or demise, and is, therefore, evidence of privity of estate between the party paying and receiving. There are many cases in which the receipt of rent has been deemed a controlling fact. . . . But while this fact may be deemed conclusive upon the question as it respects the relation of privity of contract or estate between the parties, it is not competent for the court to infer from it a contract for the precise term of a year."

After the death of the life tenant, the defendant's continuance in possession was in subordination to the remaindermen's title, even though he had no personal contract with them securing its continuance. He had entered by right under the life tenant, and when the right ceased and he held over, he was at least a tenant by the sufferance. Bannon et al. *v.* Brandon, 34 Pa. 263, 266.

"Where the duration of the term is left uncertain, . . . the lessee hold ab initio as a tenant at will. And the mere payment of rent will not change the tenancy into one from year to year, unless there are other circumstances to show an intention to do so, as, for instance, an agreement to pay rent by the quarter, or some other aliquot part of the year. . . . But the mere payment of a periodical rent, however, will not necessarily have the effect of changing the tenancy at will into a periodical tenancy." Lyons *v.* Railway Co., 209 Pa. 550, 552.

Even between the parties to a lease for one year, "payment of rent after the expiration of the original term is not an

affirmance of the lease for a new year, but merely evidence of affirmance, which may be rebutted by proof that such was not the intention of the parties." Wilcox *v.* Montour Iron & Steel Co., 147 Pa. 540.

In Hollis *v.* Burns, 100 Pa. 206, it was held that "a letting by parol for a sum certain per month, without anything being said about a year, constitutes a lease from month to month and not a lease from year to year." The court said, page 209: "In case a tenant by the month holds over, it will not be claimed that he is entitled to three months' notice to quit. If the tenancy be by the month, a month's notice to quit is sufficient."

"In Bree *v.* Lees, 2 Bl. Reps. 1173, Lord Chief Justice De Grey says, 'All leases for uncertain terms are prima facie leases at will; it is the reservation of an annual rent that turns them into leases from year to year." Quotation from Lesley *v.* Randolph, 4 Rawle's Rep. 123, 125, 126.

"A tenant at sufferance is described to be one who comes to the possession of lands or tenements by a lawful title, but keeps them afterwards without any title at all. The examples of this kind of tenure usually given are a lessee for a term of years, or a tenant for the life of another person who holds the possession of the lands or tenements after his term or estate has expired. It is, in effect, nothing more than the continuance of a possession lawfully taken, after the title under which it was taken is ended.

"It is said in the books that a tenant at will, in the eye of the law, is of better assent than a tenant at sufferance. The reason given is, that a tenant at will hath his estate by the contract and free assent and consent of the lessor, and by the modern decisions, at least, he is entitled to a notice to quit before he can be ousted from the premises which he so occupies." Pleasants *v.* Claghorn, 2 Miles's Reps. 302, 304.

After the death of the life tenant, the defendant was a tenant by sufferance until payment of rent, and afterwards tenant at will.

It was said in Hollis *v.* Burns, 100 Pa. 206, 209, "It is true for some purposes the lessee for any certain time less than a year is recognized as a tenant for years," but in the cases which decide that one who holds over after the expiration of his lease becomes tenant from year to year, the relationship of landlord and tenant has been previously created by the parties entering into a contract, and after the expiration of the term, an implied renewal is presumed where there is no surrender of the prem-

ises, the tenant is in lawful possession, and the landlord recognizes his tenancy by acceptance of rent or other unequivocal act. Thus it was said in Hollis *v.* Burns, 100 Pa. 206, 209: "When, however, we are dealing with the question of an implied renewal of a tenancy, all the terms of the former lease must be considered. The purpose is not to make a new lease essentially different, but to continue the former, so far as its terms may be applicable. In its very nature the implied renewal of a lease assumes a continuation of its characteristic features. Hence, if a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. If that was a tenancy by the month, it will presumptively so continue. The landlord cannot impose a longer term, nor one radically different from the former."

The decisions that construe the letting to be from year to year display a tenderness for one who has come into possession of the land lawfully to afford him the right to notice to vacate, rather than be treated as an intruder liable to be ejected without warning.

The facts agreed upon in the case stated do not warrant the conclusion that plaintiffs, or those from whom they derive title, adopted the terms of the lease under which defendant entered as lessee of the life tenant, nor that they could enforce its provisions against him. Any inference that might be deduced from the payment and acceptance of rent during four consecutive months, by plaintiffs or their vendors, of an implied letting for a year, or an adoption of the lease, is neutralized by the thirty days' notice to quit, served upon the tenant on April 1, 1915, indicating an intention to treat the tenant as holding from month to month, and the desire to end the term.

The agreement between the vendors and plaintiffs, providing that possession of the premises should be given by transfer of existing leases, could not enlarge the defendant's tenure nor estop plaintiffs from recovering possession of the property, and is a matter of no consequence. The grantors may have wished to be relieved from ejecting defendant, and the plaintiffs may have been willing to assume that burden. Evans *v.* Hastings, 9 Pa. 273.

While the acceptance of rent from the tenant, and the agreement of plaintiffs with their vendors for transferring leases, may be relevant evidence for submission to a jury in support of the claim that defendant had been accepted as a tenant

under an implied contract for a year or longer, these circumstances, standing alone, are not of sufficient probative value to establish such claim.

The defendant entered as lessee of the life tenant; upon the expiration of the term by her death, remained as tenant by sufferance, and became a tenant for an indeterminate time from month to month by the implied contract arising from the acceptance of monthly rent. He was entitled by the terms of the act of assembly of March 31, 1905, P. L. 87, to thirty days' notice to deliver possession. Notice having been duly served and proof made, plaintiffs are entitled to possession of the property.

The judgment of the magistrate is affirmed.

Gregory *v.* **Grastie.**

Church law—Baptist denomination—Government.

Each individual church of the Baptist denomination is supreme in the control of its own affairs, its powers in that respect being limited only by the constitutions and laws of the land. There is no organized body of the Baptist denomination having the power of dictation to the individual church. All manuals or collections of Baptist laws or usages are but advisory in effect, and not constraining or mandatory. The individual Baptist church may adopt the practices and usages of other Baptist churches, or it may select and observe rules for the regulation of its own affairs entirely different from those in force among other churches of the denomination. The actions and proceedings of associations, conventions, or other organizations of the Baptist denomination, made up of representatives from the different churches within territorial limits, or otherwise, relative to the affairs of the local churches, have but the effect of recommendations, wrought often from wide experience and observation and fraught with mature wisdom, worthy and deserving of careful consideration, but not binding on the local church.

Bill for an injunction. C. P. Fayette Co. In Equity, No. 782.

Sterling, Higbee & Matthews, for plaintiffs.

John Duggan, Jr., for defendants.

VAN SWEARINGEN, P. J., Nov. 30, 1915.—The plaintiffs and defendants in this case all are members of the Highland Baptist Church of Connellsville township. The plaintiffs allege in their bill that on Sunday, July 25, 1915, the defendants, with force and violence, interfered with and prevented

the holding of public worship by the pastor of the church, going to the extent of forcibly removing said pastor from the church building and causing him to be imprisoned in the lock-up of the city of Connellsville. The plaintiffs allege that the defendants have threatened to repeat their forcible interference with the services of said church, and the bill prays for an injunction enjoining and restraining the defendants from so doing. Upon the filing of the bill a preliminary injunction was awarded as prayed for in the bill, and the matter now is before us on final hearing. From the evidence in the case we find the material facts to be as follows:

1. At a regular monthly business meeting of the Highland Baptist Church, fixed by the constitution and by-laws of the church, held on the evening of July 23, 1915, after previous notice thereof from the pulpit as required by the usages of the church, presided over, in accordance with the unanimous vote of all the members of the church who were present, by the Rev. P. H. Thompson, moderator of the Youghiogheny Western Baptist Association, of which association the said Highland Baptist Church is a member, the matter of electing a pastor of the church was brought before the meeting by the board of deacons, in pursuance of their duties in that respect, by a unanimous recommendation that the Rev. C. J. Wells be elected pastor.

2. The members of the church proceeded to the election of a pastor in pursuance of the recommendation of the board of deacons, and of the members of the church present and qualified to vote, twenty-six voted for Wells, and nine voted against him, and Wells was declared by the moderator of the meeting to be the duly elected pastor of the church, the by-laws of the church providing for the election of all church officers by a majority vote.

3. There were other members of the church present who desired to vote, but they were not eligible to vote under the constitution, by-laws and usages of the Highland Baptist Church, being then under discipline for having absented themselves from these services of the church for an extended period of time, or having failed to pay their dues to the church, or having neglected to commune with the church for a given period.

It is contended on behalf of the disciplined members that the constitution, by-laws and usages of the Highland church, in so far as they relate to the discipline of members and to the extent that they take away from members under discipline

the right to vote at any business meeting of the church, are contrary to Baptist usages and practices generally, and therefore are null and void. But with that contention we cannot agree. It matters not what the general usages and practices of the denomination may be.

Each individual church of the Baptist denomination is supreme in the control of its own affairs, its powers in that respect being limited only by the constitutions and laws of the land. There is no organized body of the Baptist denomination having the power of dictation to the individual church. All manuals or collections of Baptist laws or usages are but advisory in effect, and not constraining or mandatory. The individual Baptist church may adopt the practices and usages of other Baptist churches, or it may select and observe rules for the regulation of its own affairs entirely different from those in force among other churches of the denomination. The actions and proceedings of associations, conventions or other organizations of the Baptist denomination, made up of representatives from the different churches within territorial limits, or otherwise, relative to the affairs of the local churches, have but the effect of recommendations, wrought often from wide experience and observation, and fraught with mature wisdom, worthy and deserving of careful consideration, but not binding on the local church. Our conclusions of law, therefore, in the present case are as follows:

1. The Rev. C. J. Wells is the regularly and duly elected pastor of the Highland Baptist Church, having received the votes of a majority of all the members of said church, who were present and qualified to vote for a pastor, at a regular monthly business meeting of the church, duly convened and legally conducted.

2. The defendants, though dissatisfied with the election of the said C. J. Wells as pastor of said church, have no legal right to interfere with his holding of religious services as the pastor of said church.

3. The preliminary injunction heretofore awarded should be made permanent.

And now, Nov. 30, 1915, for the reasons appearing in the opinion herewith filed, the preliminary injunction heretofore awarded in this case is made permanent, and it is ordered that the costs of this proceeding be paid by the Highland Baptist Church; this decree to be entered nisi according to rule.

From D. W. McDonald, Esq., Uniontown, Pa.

Training School Employés.

Labor law—Minors at work and at school—Act of May 13, 1915, P. L. 286.

It is lawful under the act of May 13, 1915, P. L. 286, effective Jan. 1, 1916, for a minor between the ages of fourteen and sixteen years under employment in any establishment to work a week and attend school a week alternately, provided the hours of school attendance be not less than the minimum prescribed in § 3, namely, eight hours for every week of the entire period of employment, and the hours of work in no day or week exceeding the hours prescribed therefor under § 4.

Request of Hon. John Price Jackson, commissioner of labor and industry, for opinion.

BROWN, Attorney-General, Dec. 1, 1915.—I am writing in answer to your communication of recent date, "relative to the employment of minors at the Cambria Steel Company, Johnstown, Pa." Your inquiry is based upon certain correspondence accompanying your communication, wherein it appears that the Cambria Steel Company has in its employ a number of boys between the ages of fourteen and sixteen years who work one week and attend a manual training school a week, alternately, and that this company is willing to continue such program of work and school provided it will be legal to do so under the new child labor law.

An opinion applicable to this specific case cannot be ventured until the facts are disclosed in somewhat fuller detail than can be gathered from the above communication, such as the proposed hours of school attendance, the hours of work during the week of work, and whether such school meets the approval of the state superintendent of public instruction, etc.

I shall, however, state my opinion upon the general proposition raised by your inquiry, namely: Whether it will be lawful under the act of May 13, 1915, P. L. 286, for a minor between the ages of fourteen and sixteen years, employed in any establishment, to work a week and attend school a week, alternately? Section 3 of said act provides in part as follows:

"It shall be unlawful for any person to employ any minor between fourteen and sixteen years of age, unless such minor shall, during the period of such employment, attend, for a

period or periods, equivalent to not less than eight hours each week, a school approved by the state superintendent of public instruction."

The plain purpose of this legislation was to secure minors who are employed in any establishment in some gainful occupation, and advantages and the opportunity of continuing their education. The act is to be steadily interpreted in the informing light of that beneficent purpose and given that liberal construction as may best promote its salutary ends. In arriving at the intent of such a statute, the strict letter must always yield to such reasonable interpretation as will best conform to its spirit and effect the object to be accomplished. It might well be contended that even under a literal reading the above quoted portion of this act does not require that the eight hours of school prescribed for each week of employment shall necessarily fall within each week of work. It may fairly be read to mean that there must be eight hours of school attendance for each week, but not necessarily in each week, of the employment period. This construction wholly accords with the purpose and intent of the statute, and manifestly admits of many practical and substantial advantages to a child pursuing his school course.

To insist that the eight hours of schooling must always literally fall within each week of work might, and in many cases would, prevent the best possible educational results. Quite commonly, more fruitful schooling could be had by a minor who would be permitted to attend school an entire week and then return to work for a week, and so on alternately, than where the same number of school hours would be broken and scattered throughout two weeks. The sound administrative discretion and experience of the school authorities charged with the duty of supervising the proper schools to meet the requirements of this act should be trusted to work out and apply such flexible division of the hours of work and school as would most effectively promote the child's educational welfare.

It is unnecessary to say that the number of hours of school attendance under such an arrangement as is here proposed must be the full equivalent of the number prescribed by the act, namely, at least eight hours for every week of the entire period of employment. It is fair to presume, however, that where a minor could work one week and then attend school the next, and so on alternately, he would probably attend school during its usual and customary hours. He would thus gain

substantially in time of school attendance over the minimum amount prescribed in the act. To so construe this statute as to deny him this advantage in cases where his employer and the school authorities were willing that such division of the time of work and school should be allowed, and be practicable in operation, would be to defeat in a measure the purpose of the act. It may therefore confidently be contended that such is not its intent and that so narrow a construction should be rejected.

Furthermore, it appears that the liberal interpretation here urged is in harmony with that given to this act by the State Department of Education. There was recently issued a bulletin prepared by the Industrial Division of the Bureau of Vocational Education at the direction of the State Board of Education, being Bulletin No. 5, 1915. On page 14 thereof is the following relating to this subject:

"Each pupil attending a continuation school may attend for a period of eight hours on one day per week, or on two days of four hours each, or on four days of two hours each, or, if advisable, all of the schooling may be given continuously, provided the total number of hours' schooling received by each minor in the continuation school be equivalent to eight hours per week for the number of weeks which the common schools are in session."

In an opinion under date of Nov. 14, 1915, construing another phase of this same law, it was pointed out that legislation of this kind "should be interpreted and applied with the fullest measure of sound discretion and judgment, always mindful of basic principles and of the useful ends desired to be accomplished."

This rule may be invoked to guide us in reaching a conclusion upon the question here submitted.

You are therefore advised that it will be lawful under the act of May 13, 1915, P. L. 286, which is to become effective on Jan. 1, 1916, for a minor between the ages of fourteen and sixteen years, under employment in any establishment, to work a week and attend school a week, alternately, provided the hours of school attendance under such arrangement be not less than the minimum prescribed in § 3 of said act, namely, eight hours for every week of the entire period of employment, and that the hours of work shall in no day or week exceed the hours prescribed therefor under the provisions of § 4 of said act.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

State Highway Obligations.

Road law—County roads—Township roads—Borough highways—Construction of—Act of May 31, 1911, P. L. 468.

County roads which have been built and maintained, or at the passage of the act of May 31, 1911, P. L. 468, properly ought to have been maintained by the respective counties, are to be taken over by the state highway department in whole or in part, from time to time, as circumstances and conditions permit, but there is no fixed time making that obligatory.

Before taking over such highway notice in writing must be given to the proper officers of the county of such intention and of the date when the department will assume the maintenance and care of such roads; after that it is the duty of the department to maintain the roads so taken over.

The act of May 31, 1911, P. L. 468, provides that so far as conditions will allow the work of maintenance, repair and construction of state highways is to be commenced and carried on equally and uniformly in the several counties.

Under the act of May 31, 1911, all township roads and abandoned and condemned turnpikes were specifically directed to be taken over by the department before June 1, 1912; said act making a clear distinction between county roads and township roads.

Section 10 of the act of 1911, governs highway routes running through boroughs, and specifically provides against interference with highways in cities and incorporated towns.

When a highway within the limits of a borough forms a part of a state highway route, and has not been improved or reconstructed in a manner equal to the standards of the state highway department, said department by the consent of the borough council has authority to improve or reconstruct such unimproved section at the expense of the commonwealth (such action, however, is discretionary).

Such municipal consent may be evidenced either by an express ordinance or resolution, or it may be inferred from the failure of council to file objections in writing within sixty days after notice.

Request of R. J. Cunningham, state highway commissioner, for opinion.

KELLER, First Deputy Attorney-General, July 12, 1915.—I have your favor of the 7th inst. asking for an opinion as to whether or not it is obligatory on the part of the state highway department to take over at any fixed time those portions of state highway routes that have previously been built by county commissioners, and known as "county roads"; also whether or not it is obligatory on the state highway department to take over at any specified time those portions of highway routes running through boroughs.

Section 5 of the act of May 31, 1911, P. L. 468, which provides for the taking over by the state highway department from the several counties and townships of the highways embraced in the state highway routes described in said act, makes

a clear distinction between county roads and township roads. Under the act all township roads and abandoned and condemned turnpikes were specifically directed to be taken over by the state highway department before June 1, 1912. This provision did not apply, however, to county roads, which are governed by the preceding clause, "said highways are to be taken over in whole or in part, from time to time, as circumstances and conditions will permit."

You are therefore advised that as to county roads which have been built and maintained, or at the passage of the act of 1911, properly ought to have been maintained, by the respective counties, such highways are to be taken over by you, in whole or in part, from time to time, as circumstances and conditions will permit, and there is no fixed time that it is obligatory on the part of your department to take them over.

Before taking over any such highway you must, of course, give notice in writing, as required by the act, to the proper officers of the county of your intention so to do, and of the date when the department will assume the maintenance and care of such roads. After this has been done it is the duty of your department to maintain the roads so taken over.

The act does provide that, so far as conditions will allow, the work of maintenance, repair and construction of state highways is to be commenced and carried on equally and uniformly in the several counties.

With reference to the state highway routes running through boroughs you are governed by § 10 of the act of May 31, 1911.

That section specifically provides that the act shall not be construed as including or in any manner interfering with roads, streets and highways in the cities, boroughs or incorporated towns of the commonwealth. If such road, street or highway, within the limits of a borough or incorporated town, forms a part or section of a state highway route, and has not been improved or reconstructed in a manner equal to the standards of the state highway department, you are authorized, by and with the consent of the borough councils, to improve or reconstruct such unimproved section or sections at the expense of the commonwealth.

This consent may either be evidenced by an express ordinance or resolution of the council agreeing to such action, or it may be inferred under the act from the failure of councils to file objection, in writing, with your department within sixty days after you have notified, in writing, the proper authorities

of said borough of your intention to take over such road, street or highway, or any part thereof under the provisions of said act.

Unless and until you give the proper borough authorities notice in writing of your intention to take over for reconstruction and maintenance any such road, street or highway, or part thereof, within said borough under the provisions of said act, there is no obligation on you to reconstruct or maintain the same. Such action is to be taken by you, at your discretion, when the failure to take over such road, street or highway would leave an unimproved gap in a continuous improved state highway.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Sutton.

Criminal law—Cruelty to children—Act of June 11, 1879, P. L. 142—Constitutional law.

Section 1 of the act of June 11, 1879, P. L. 142, which provides that any person who shall cruelly ill-treat, abuse or inflict unnecessary cruel punishment upon any infant or minor child, shall be guilty of a misdemeanor, and upon conviction thereof before any justice of the peace, magistrate, or court of record, shall be fined by such justice, magistrate, or court of record, is not unconstitutional.

Certiorari to a justice of the peace. C. P. Fayette Co. Dec. T., 1914, No. 445.

Alfred E. Jones, for commonwealth.

L. B. Brownfield and *Elias Goodstein,* for defendant.

VAN SWEARINGEN, P. J., Dec. 31, 1915.—It is provided by § 1 of the act of June 11, 1879, P. L. 142, that any person who shall cruelly ill-treat, abuse or inflict unnecessary cruel punishment upon any infant or minor child, shall be guilty of a misdemeanor, and upon conviction thereof before any justice of the peace, magistrate or court of record, shall be fined by such justice, magistrate or court of record, not less than $10 nor more than $50 for each offense.

On Oct. 21, 1914, the defendant, Jacob Sutton, a school teacher of Georges township, in this county, whipped a daughter of the prosecutrix, a child seven years of age, who attended the Shoaf school, of which the defendant was the teacher,

whereupon the child's mother made an information against the defendant before a justice of the peace accusing him of "cruelty to children" under the section of the act cited. The defendant was tried before the justice in a summary way, and was convicted of the offense charged against him, and was fined $10 by the justice in accordance with the provisions of the act. On certiorari it is contended by defendant's counsel (1) that inasmuch as the act of assembly makes the offense charged a misdemeanor, it is triable only on indictment in the court of quarter sessions, and not in a summary way before a justice of the peace, and (2) that in so far as the act attempts to give jurisdiction to a justice of the peace to try and summarily dispose of such a case the act is unconstitutional, as in conflict with the defendant's right to trial by jury.

As noted in our opinion in Commissioner of Labor and Industry *v.* Laskey, 43 Pa. C. C. 299, a misdemeanor is any offense inferior to felony punishable by indictment or by particular prescribed proceedings. By the act of assembly before us it is particularly prescribed that the misdemeanor arising from a violation of its provisions may be punished by a fine imposed by a justice of the peace before whom the defendant has been convicted. And the act in that respect is not unconstitutional as being in conflict with Sec. 6, of Art. 1, of the Constitution of Pennsylvania, which provides that "trial by jury shall be as heretofore, and the right thereof remain inviolate."

The right to trial by jury is not guaranteed by the Constitution in every case. Generally speaking, the legislature may provide any system of trial without coming in conflict with the provisions of the Constitution, if trial by jury did not exist in such case theretofore. The purpose of the Constitution was to preserve trial by jury wherever the common law gave it, and, in all other cases, to let the legislature and the people do as their wisdom and experience might direct. There is nothing in the Constitution which prohibits the legislature from declaring new offenses and defining the mode by which the guilt of persons accused thereof may be determined. These principles have been established in a long line of cases, from Van Swartow *v.* Com., 24 Pa. 131, down to Duquesne Boro. School Dist. *v.* Pitts, 184 Pa. 156, and Com. *v.* Andrews, 211 Pa. 110. "Summary convictions were well known before the formation of the Constitution, and they are not expressly or impliedly prohibited by that instrument, except in so far as they are not to be substituted for a jury where the latter mode

of trial had been previously established." Van Swartow *v.* Com., 24 Pa. 131.

The summary proceeding under this statute is not made a substitute for the common law trial by jury for the offense of assault and battery, as contended by counsel for the defendant, but is a mode of trial prescribed by the legislature for the determination of the guilt of those accused of a new offense created by the act. We are of opinion that the proceeding in this case was regular and not in conflict with any constitutional right of the defendant.

And now, Dec. 31, 1915, for the reasons stated in the opinion herewith filed, the writ of certiorari is discharged.

From D. W. McDonald, Esq., Uniontown, Pa.

Hadeed *v.* Neuweiler.

Automobiles—License—Act of July 7, 1913, P. L. 672—Negligence.

The fact that a motorcycle is being operated by a person, without a license tag, will not prevent him from recovering damages for injuries to it sustained by the negligent operation of another automobile on a public highway. Such a person is not guilty of contributory negligence, nor a trespasser on the highway.

Trespass. Rule for new trial. C. P. Lehigh Co. June T., 1914, No. 57.

James B. Deshler and *Charles W. Webb,* for plaintiff.
Thomas F. Diefenderfer, for defendants.

GROMAN, P. J., Oct. 4, 1915.—The plaintiff operated a motorcycle on North Second street, Allentown, Pa., on April 28, 1914, without first having secured a license tag as required by the act of July 7, 1913, then in force. The plaintiff was running north on Second street, on the right side of the street; the defendant's employé operated a large motor truck and shortly after turning into Second street, running south and while on the left side of the street, collided with the plaintiff's motorcycle and damaged the same. Suit was brought; upon the trial, the defendant submitted among others, the following points: "An unregistered motorcycle, the owner or operator of which claims to recover damages for injuries to it, is a trespasser on the public highway, and not entitled to the same degree of care and protection as one complying with the act of April 27, 1909, and its supplements.

"The plaintiff driving a motorcycle, unlicensed and without tags, on the public highway, cannot recover in this case, in the absence of any evidence of reckless or wanton misconduct on the part of defendant's employé.

"There is no evidence in the case indicating intentional injury to the plaintiff, or that the accident was the result of any recklessness or wanton misconduct on the part of the defendant's employé in charge of the motor truck."

These points were refused. A verdict was rendered awarding damages to the plaintiff. The court charged the jury that the fact that plaintiff was on the public highway without a license could not be construed as contributory negligence on his part, and plaintiff was not a trespasser on the highway and thus precluded from the recovery for loss suffered by defendant's negligence. In Yeager *v.* Winton Motor Carriage Co., 53 Pa. Super. Ct. 202 (1913), in an opinion by Henderson, J., the court used the following language: "The argument is that the plaintiffs were on the road in violation of a statute regulating the use of automobiles, and that the defendant might, therefore, negligently drive its vehicle into that owned by the plaintiffs without legal responsibility. The authorities from this state cited in support of this proposition are all cases where the party injured was a trespasser on private property, but the principle there involved is entirely different from that controlling the relations of the plaintiffs and defendant here. This collision occurred on a public highway; it was not the property of the defendant nor had it the right of possession of any part of it except that as occupancy might be necessary in passing over it. It had the right of passage only. Moreover, the injury complained of had no relation to the fact that the operator of the plaintiffs'automobile did not have a license. It was not claimed that he was an inexperienced and incompetent person, and the evidence would have warranted the jury in finding that the defendant committed a reckless trespass in running into the plaintiffs' car. This principle is considered in Brown *v.* Lynn, 31 Pa. 510; Daltry *v.* Electric Light, Heat & Power Co., 208 Pa. 403; Mullen *v.* Wilkes-Barre Gas & Electric Co., 38 Pa. Super. Ct. 3, and the result of the discussion in these cases is that where the trespass of the plaintiff set up by the defendant does not affect the property rights of the latter, it does not excuse the defendants' trespass. This doctrine is applicable to the case under consideration. The defendants' employé disregarded the custom which has become the law of the commonwealth that it is the duty of drivers

of vehicles to keep to the right in passing others going in an opposite direction, forced the plaintiffs from their proper side of the road and caused the injury complained of. Exemption from liability for such a trespass is not found in the trespass on the highway attributed to the plaintiffs. Subsequent legislation has rendered a consideration of the terms of the act important only for the purposes of the case before us. Our conclusion is that the defendant has failed to present a defence which is good in law to overcome the verdict."

This court is not convinced that error was committed in the instructions to the jury or refusal of points submitted, and the rule for a new trial is therefore discharged.

Now, Oct. 4, 1915, rule discharged.

Dazugan *v.* Little Russian Union of America.

Practice (C. P.)—Pleadings—Statute of limitations—Limitation of action.

In an action against a beneficial association, the defendant cannot claim a judgment in its favor n. o. v. on the ground that the action had not been brought within six months as required by the by-laws, where it appears that such limitation had not been pleaded.

Rule for judgment n. o. v. C. P. Schuylkill Co. May T., 1915, No. 164.

Abner Smith, for plaintiff; *M. M. Burke,* for defendant.

BECHTEL, P. J., Jan. 3, 1916.—This case was tried before the court and submitted to the jury on a question of fact relative to the age of the husband of the plaintiff at the time plaintiff joined the defendant organization. The jury have found in favor of the plaintiff. The defendant contends that judgment should be entered for it non obstante veredicto, by reason of the fact that the by-laws of the defendant company provide that all actions against said company shall be brought within six months from the time the right of action accrued, and not thereafter. The plaintiff replies that it is the duty of the defendant, if it wishes to invoke this defence, to set forth the same by appropriate pleading. The plea filed in this case is as follows, "The defendant pleads non assumpsit, with leave, etc." The question before the court now is whether or not the defendant having failed to plead the statute of limi-

tations which it here seeks to invoke, can set it up to defeat the plaintiff's recovery.

In the "Law of Waiver," by Bowers, 1914 edition, at page 224, in considering this question the writer says that "the statute is an affirmative defence, and the right to take advantage of it is a personal one belonging solely to the defendant, which he may take advantage of or waive, as he may desire. When action is brought on a debt so barred, the defendant must set up the statute and his right to rely upon it in some appropriate pleading, or his privilege will be waived, and a judgment against him for the debt so barred will be binding. But the general rule requires the question in either event to be presented through the pleadings. It cannot be taken advantage of under the general issue or a general denial nor for the first time at the time of the trial nor on arrest of judgment nor at any time after judgment."

Our attention has been called to no case in our own jurisdiction in which this question has been decided or which contravenes the statement of the law as herein set forth. We are of the opinion that this statement of the law is a correct statement of the doctrine prevailing in this state.

And now, Jan. 3, 1916, the motion for a new trial is herewith overruled, and the motion for judgment non obstante veredicto is herewith denied, and the prothonotary is directed to enter judgment sur verdict.

Commonwealth *v.* Breth.

Criminal law—Manslaughter—Parent and child—Failure to provide medical attendance—Child seriously ill.

A father may be convicted of manslaughter for the death of his child five months old, where knowing that the child is dangerously ill, and having the ability to secure medicine and medical attendance, he fails to provide such medicine and attendance; and this is the case although he may have the belief that prayer was all that was needed under the circumstances, that medicine and medical attendance were unnecessary, and that he resorted to the use of prayer by himself and others for the recovery of the child.

Indictment for manslaughter. O. and T. Clearfield Co. Dec. T., 1915, No. 16.

BELL, J., Dec. 11, 1915.—The indictment charges Melvin Breth with the crime of involuntary manslaughter, which ordinarily occurs, as has been well stated in a point which has

been submitted, as being a killing which results from the doing of some unlawful act less than felony or the doing of a lawful act in an unlawful or negligent manner; that is to say, it arises in the doing of some unlawful act less than felony or the doing of a lawful act in an unlawful or negligent manner. The particular offense which is charged here is that the defendant neglected his infant son, Frank Ross Breth, so that by reason of such neglect the said son died, and the character of such neglect is specified as follows: "The said Melvin Breth was the father of Frank Ross Breth, aged about five months, and living in the county of Clearfield; the said Frank Ross Breth was in the charge and custody and parental care and under the direction and supervision of the said Melvin Breth, and member of the household and family of the said Melvin Breth; that the said Frank Ross Breth was unable to maintain and provide for himself, or supply himself with the necessaries of life; that the said Melvin Breth was legally bound to supply and furnish to the said Frank Ross Breth the necessaries of life, including medical attendance and medicine in time of sickness; that in the month of October, 1915, the said Frank Ross Breth was sick and required proper medical attendance and medicine to relieve him of said sickness and restore him to health; that notwithstanding the duty and obligation resting upon the said Melvin Breth to furnish to the said Frank Ross Breth such medical attendance and medicine, the said Melvin Breth not only neglected to furnish such medical attendance and medicine but refused to permit medical attendance to be given to the said Frank Ross Breth and medicine to be administered to him; that the said Frank Ross Breth was deprived of and denied, by the said Melvin Breth, his father, the proper medical attendance and medicines; that the said Frank Ross Breth was permitted to languish and die of and on account of said sickness by and through the criminal negligence of his father, Melvin Breth." And to that accusation the defendant has pleaded not guilty, which presents the issue which you are now trying.

The commonwealth does not claim that the defendant intended or desired the death of the child. Had death been intended, the crime, in case of guilt, would be of a much higher grade, and if the evidence showed that the father desired the death of the child, such desire would be evidence tending to show death was intended. The evidence in the case on the part of the commonwealth and of the defendant presents little substantial dispute. Where there is a conflict it is for you

to reconcile that evidence or to decide what the facts really are. As the defendant testifies that he knew the condition of the child was serious, and further testifies that he believes medicine and medical attendance valuable in cases of sickness to people generally; if the evidence went no further the conclusion would seem plain that he, having the ability to secure such medicine and medical attendance, and knowing that the child was seriously sick, and believing that medicine and medical attendance were of great value in such cases, and having under his charge and parental care this son who was but five months old and entirely helpless to aid himself, failed to discharge the legal duty imposed on him by the law of the commonwealth; and if by reason of such failure the child died, and if his failure was gross and culpable, he would be guilty as charged in this indictment.

The defendant, however, presents as a defence the claim that what he did was done because he believed that as to those who have faith, prayer is all that is needed, that medicine and medical attendance were unnecessary; that he resorted to the use of prayer by himself and others for the recovery of the child; that he believed God would answer their prayers and heal the child; that he honestly and in good faith did all that he thought was necessary and what he believed would result in its recovery. He claims that he did not act indifferently or negligently, that he was greatly interested, that he secured a knowledge of the facts and resorted to the means which in his judgment were for the best interests of his son. He quotes or refers to certain passages in the Bible as justifying his belief and testifies that such is the faith and practice of his church; also that he knows of instances among the brethren where, in case of sickness, prayer was resorted to and such persons recovered. He does not cite any scriptural passage forbidding the use of medicine or medical attendance; does not testify that the laws of his church prohibit the administration of medicine and does not claim that to have secured medical attendance, at least does not testify that to have secured medical attendance and administered medicine to his sick child would have been a sin on his part or have been a violation of his conscience, except that he does say that in this case to not permit the giving of medicines and relying on prayer was a matter of conscience with him. He does not indicate in what respect, but if we assume that he meant thereby to raise a question of conscientious belief, we say to you that wherever the law commands or prohibits the com-

mission of any act, no man can excuse his practices to the contrary because of his religious or conscientious convictions. The Supreme Court of Pennsylvania and the Supreme Court of the United States have said: "To permit this would be to make the professed doctrine of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." I am now reading from a decision of the Supreme Court of Pennsylvania which is but five years old, and our Supreme Court has also said in that connection, "It is impossible to see how civil government could exist, if the dictates of the individual conscience were in every instance where they come in conflict with the law of the land the paramount rule of action." And it has been laid down by the Supreme Court of Pennsylvania from an early date:

"Were the laws dispensed with, whenever they happened to be in collision with some supposed religious obligation, governments would be perpetually falling short of the exigence. There are few things, however simple, that stand indifferent in the view of all the sects into which the Christian world is divided." The court of appeals of New York, in a case which is regarded as one of the leading cases on the subject, has said: "We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required. There are others who believe that the Creator has supplied the earth, nature's store house, with everything that man may want for his support and maintenance, including the restoration and preservation of his health, and that he is left to work out his own salvation, under fixed natural laws. There are still others who believe that Christianity and science go hand in hand, both proceeding from the Creator; that science is but an agent of the Almighty through which he accomplishes results, and that science and Divine power may be invoked together to restore diseased and suffering humanity. But, sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the legislature." In fact to permit any man to set up an alleged religious or conscientious belief to override the laws of the land would be to create an ecclesiastical authority

which human experience has demonstrated to be the most oppressive tyranny under which mankind has ever groaned.

In order to convict it is not necessary that you shall find that the defendant desired or intended the death of his child or that his purpose was to do it any harm whatever. It is not the law that a man may not commit a misdemeanor unless he has the intent to do wrong. This has been repeatedly decided by the Supreme Court of this commonwealth. There are cases where the intent is an essential element of the crime, and where it is lacking there is no crime made out; where it is not an essential element of the crime, the absence of such intent is no defence. Neither is it the law that a man is always excused and cannot be convicted of crime because he was actually and honestly mistaken as to some essential fact. This has been so frequently decided by the courts of this and other states that it is not an open question, except by mere theorists. In some classes of cases an honest mistake of fact will excuse, but it is not a rule of universal application. Some testimony has been produced intended to show that medicine is not an exact science, that its learning is changing and subject to change; that medical practitioners do not agree as to what is the proper treatment of the sick, and that under medical care some patients die and some recover. There is no evidence in the case, however, that medical men have any substantial difference at this period in treating a child suffering from the disease which this child had and in the condition which it was. This case does not present the question which might be raised in a case where the defendant disbelieved in the use of medicine at all times and under all circumstances. The defendant here believes them to be generally valuable and does not pretend to say that he believes that medicine and medical attendance would not have been beneficial to his own sick child. He contents himself with saying that he believed it to not be essential.

"Q. Now why didn't you give the medicine that the doctor ordered?" I am now reading from his testimony. "A. Because I didn't think it essential. I believed that the Lord was going to heal the child. Q. Don't you believe in medicine? A. Yes, sir; I do. Q. In what way do you believe in it? A. I believe for those who trust in medicine it is a great good and it is able to cure." Another part of his testimony: "Q. You believe that medicine is a great good, don't you? A. I believe it will cure certain ills, yes, sir. Q. What did you say? A. I believe it will do good, yes, sir. Q. And you be-

lieve medicine will restore sick people to health, don't you? A. Sometimes; yes, sir." I think that fairly illustrates his position. It is reasonably clear from his testimony that except for his belief that prayer was all that was essential, he would have recognized and acted upon the necessity of providing competent medical attendance and proper medicines. That he wholly failed to furnish medical attendance and medicines to this child, and that this was intentional on his part is not in dispute, and it was his purpose that no one else should furnish them, and he so testifies on that subject:

"Q. Well, that was your purpose, not to permit anybody to give it medicine, wasn't it? A. Yes, sir." Nor is there any claim on his part that he was not of sufficient ability and had the opportunity to secure this treatment and medicine. Two doctors, according to the testimony, were ready to act, if desired. The testimony of the defendant makes it clear that in calling upon Doctor Brown and Doctor Lewis he had no intention of securing or permitting them to treat this child, his sole purpose was to save himself future trouble, and he tells us that his reason for complying with Doctor Lewis's directions as to the external treatment was to ward off criticism of himself, and that his whole connection with the doctors in the case was not to aid the child, but to aid himself. On that subject he testifies:

"By Mr. Woodward: Q. Now you have testified that you followed the doctor's advice in reference to Horlick's milk and the ice; why didn't you follow his advice as to medicine? A. I didn't think it was essential. Q. You didn't think that essential? A. Yes, sir. Q. Did you believe the other was essential? A. No, sir; I didn't, really. Q. Why did you follow one and not the other? A. Because I thought if I refused even to do that much for it, it would appear that I was only contentious and done it through contrariness instead of a good purpose."

In answer to a question of his counsel as to why he complied with the advice of Doctor Lewis as to this treatment, he gave the reason which has just been quoted. He gives no other reason for the use of this external treatment except shielding himself from criticism, although he admits that he believed at the time that this external treatment would be beneficial to the child.

"Q. Didn't you expect the change in food, the use of the ice cap and the bathing of the child to do it good? A. Yes, sir. Q. And you got that suggestion and that advice from a

medical man, didn't you? A. Yes, sir. Q. At the same time he advised you that the giving of medicine was essential to the recovery of the child, didn't he? A. Yes, sir. Q. You adopted the one part of his treatment without adopting the other? A. Yes, sir. And later: "Q. If those things were beneficial along with your prayers, why wasn't the giving of medicine beneficial if prescribed by one learned in the medical profession? A. It might have done the child good, I don't know."

This is the only answer as to his belief at the time as to what would have been the probable effects of the administration of medicine. If the claim of the defendant that he refused to provide medicine and medical attendance because he believed that God would answer his prayer and heal the sick were a mere sham or excuse not presented honestly and in good faith, it would not only be of no avail but would tend to show that he acted throughout with a bad heart. I will say to the jury, the court cannot see anything in the case which indicates that he did not entertain the belief which he testifies to.

It was said by Judge Woodward, in 1859: "There is no duty more clear and imperative than that of a father to support his children during their minority, and though we have no statute enforcing it, except in case of pauperism, I hold it to be a legal obligation he is absolutely bound to provide reasonably for their maintenance and education."

By the act of March 13, 1903, it is provided that any father who shall willfully neglect to maintain his wife or children, such wife or children being destitute, shall be guilty of a misdemeanor, and this under all the rules of construction amounts to an imposition upon the father of the duty of maintenance. The term "willfully," as used in any criminal statute, means no more than "intentionally," and if the acts are intentional, the result of which is a neglect to maintain, the legal duty is violated. A part of the maintenance which must be rendered by a parent to his dependent children is medical attendance and medicine. "A husband's liability for necessaries furnished to the wife and family, or that medical attendance is such a necessity, cannot be questioned, and he is liable, whether they are furnished with or without his knowledge." "Necessaries for an infant include support and maintenance, food, lodging and clothing, medicines and medical attendance furnished him when his health or physical condition required them." The parent who is responsible for the existence of the child as-

sumes the burden of its care and maintenance, which includes all those things which in that locality in the common understanding of reasonable and prudent men are necessaries; and, as has been said, this includes medicines and medical attention in cases where such are required. Primarily this duty rests upon the father under the law of this commonwealth, and he must discharge it whenever of sufficient ability and with opportunity so to do and cannot relieve himself of this legal duty because of some religious or conscientious belief. In no instance is this more true than in the case of a helpless infant unable to take any action for its own assistance or relief and incapable of exercising judgment as to what should be done. Within some limitations a man may decide, without violation of any positive mandate of law, what shall be the best course to pursue with reference to himself, and in some instances he may be relieved from the discharge of a duty owing to another, by the concurrence and assent of such other person; but the other person in such case must be of such age and mental condition as to be able to fairly understand and appreciate the situation, and this relaxation has no application where the duty is owed to an infant but five months old. If persons were permitted to plead as giving them immunity from acting contrary to the enactments of the law, their religious belief, their conscientious conviction, their want of criminal intent or their mistake of the facts, the whole policy of the state relative to health laws would be defeated. By repeated acts of assembly the state has declared it to be a part of its public policy to supervise the health of its citizens and to interfere with their individual freedom, control and management of the sick in a multitude of cases. In pursuance of this policy it regulates burials, quarantines, reports and many other phases of the subject; and if the matter which I have classified as religious or conscientious belief, want of criminal intent or honest mistake of fact would be a complete defence, it would be as complete to a prosecution where the ailment was small pox or scarlet fever as it would be in a matter of bowel trouble.

In 1893, the legislature of Pennsylvania declared as follows: "Whereas, the safety of the public is endangered by incompetent physicians and surgeons, and due regard for public health and the preservation of human life demands that none but competent and properly qualified physicians and surgeons shall be allowed to practice their profession," and they then proceed to enact an elaborate system of laws upon the subject, which, with further legislation extending or rendering

more stringent the requirements, is the law and policy of Pennsylvania.

There is not presented in this case any question of Christian faith or the efficacy of prayer; the commonwealth does not complain of anything the defendant did do for the child, but of what he did not do. Certainly no objection can be had to the resort to prayer by the defendant and his brethren, but the question you are trying is whether he did, without lawful excuse, omit and neglect what he should have done. The Supreme Court of Pennsylvania has said comparatively recently: "It is not a question as to how far prayer for the recovery of the sick may be efficacious. The common faith of mankind relies not only upon prayer, but upon the use of means which knowledge and experience have shown to be efficient. It may be said that the wisdom or folly of depending upon the power of inaudible prayer alone, in the cure of disease, is for the parties who invoke such a remedy. But this is not wholly true. For none of us liveth to himself and no man dieth to himself, and the consequence of leaving disease to run unchecked in the community is so serious that sound public policy forbids it. Neither the law, nor reason, has any objection to the offering of prayer for the recovery of the sick. But in many cases both law and common sense require the use of other means which have been given to us for the healing of sickness and the cure of disease. There is ample room for the office of prayer, in seeking for the blessing of restored health, even when we have faithfully and conscientiously used all the means known to the science and art of medicine."

During this trial we admitted testimony showing the attitude of the defendant and permitted him to state the reason which he had for acting as he did, overruling the objection of the commonwealth thereto, the court believing that he was entitled to have all the facts and circumstances submitted to you and to have the opportunity to state any excuse or reason which he gave for his failure to provide medical attendance and medicines. We say to you, as a matter of law, that this father was under a legal duty to provide necessaries for his child. We say further to you, as a matter of law, that necessaries embrace in time of sickness medical attendance and medicines, if the condition of the sick person reasonably requires it. We say further to you, that when the sick person is an infant five months old and the father is of sufficient ability and has the opportunity to procure medical attendance and medicines, it is his legal duty to furnish them whenever the

health or physical condition of the child reasonably required it. If the case of sickness is not merely slight but is of such a character that ordinary prudence would indicate that the services of a physician and the administration of medicine should be provided, and it is reasonably within the power of the parent to provide it, in the case of a helpless and dependent infant if the parent fails so to do, such failure is negligence upon his part, and if under all the circumstances it rises to gross and culpable negligence, and by reason of such neglect the death of the child ensues, he is guilty of involuntary manslaughter.

In determining whether or not the defendant was negligent you will be guided by the rules which ordinarily govern the judgment of mankind. Negligence is the absence of proper care under the circumstances. It has been more fully defined by a great jurist as "the failure to observe for the protection of the interest of another person that degree of care, precaution and diligence which the circumstances justly demand, whereby such other person suffers injury." You will note that I have said, that to justify a conviction in this case you will find that the defendant was guilty of gross or culpable negligence. As you recognize from the definition heretofore stated, and taken from the opinion of our Supreme Court, that negligence is the absence of proper care under the circumstances, the degree of negligence is dependent upon the degree of care which the circumstances require shall be exercised. The classification of negligence as gross, ordinary and slight, indicate that under some circumstances great care and caution are required, under others only ordinary care, and still under others only slight care. Where a child is only slightly ill the common caution of mankind provides only slight care, where the ailment is of more consequence ordinary care is furnished, and where its condition is serious and dangerous great care and caution are required. Whatever the care demanded may be, if it is not exercised, and the party upon whom the duty is cast has knowledge of the facts, the case is one of negligence; and whenever the case is one which requires great care and caution such intentional failure to provide it is gross or culpable negligence. In every case negligence is the omission of such steps as reasonably prudent persons, with like knowledge of the circumstances at the same time and place, would in the ordinary experience of mankind have taken, and as applied to the present case it would mean that the defendant was required to take such steps relative to the sickness

of his child as reasonably prudent men at that time and place would have taken, considering the common experience of mankind. If this involved the furnishing of medical treatment and the administration of medicine, and such treatment were within his ability and opportunity to procure, it was his duty to provide it; and if the sickness of the child was such as to suggest to a man of ordinary prudence that its condition was serious and dangerous, his failure to provide it would then be gross or culpable negligence.

It would not be a lawful excuse for the non-performance of this duty that he entertained some religious or conscientious belief that it was unnecessary or that he had no intent to do anything which would interfere with the recovery of the child nor that he was honestly mistaken as to the efficacy of the means which he did use. As a citizen of this commonwealth and the parent of this dependent child, the law of Pennsylvania, so long as he remains within its borders, put upon him the duty of doing those things for its protection which the ordinary judgment of prudent men at the time and place would dictate, and his failure so to do would be negligence, and if the circumstances indicated that the child's condition required great care, his failure to provide the means ordinarily used by prudent men and at his disposal would be gross or culpable negligence.

The commonwealth further contends that the defendant did not even carry out the scriptural injunction upon which he relied, but substituted for a part of the plain reading of the passage the assurance of one of his brethren. We do not regard this as of much consequence. The question is not whether he failed to provide the means according to the view which he presented, but whether he failed to furnish the medical attendance and medicine which the law required him to furnish whenever the health and physical condition of his child required it, without lawful excuse. In considering whether or not he acted without lawful excuse, we repeat again that no religious or conscientious conviction upon his part, no matter how entertained by him, is such lawful excuse, but you are to take all the facts and circumstances into consideration in determining whether or not under all these facts and circumstances there was gross or culpable negligence upon his part.

The defendant has produced evidence of his good character and many witnesses of high standing in the community testified to his excellent reputation, and it may be taken as a fact in the case that his standing in the community as a law abid-

ing citizen was good. This good character is substantive evidence, and may of itself, as our Supreme Court has said, raise a reasonable doubt of the guilt of a defendant. It is not to be considered separate and apart from the other evidence, but together with it; all of the evidence, including that of good character, is to be taken together, and if upon it, after having given consideration to every part of it the guilt of the defendant is not proven beyond a reasonable doubt your verdict is not guilty. The burden of proof rests upon the commonwealth to prove by the evidence all the essentials of its case beyond a reasonable doubt. You are entirely familiar, I take it, with what is a reasonable doubt; it is not a mere fancied, pretended or conjured up doubt, not some cavil which a man may raise to relieve himself from an unpleasant duty, but that state of mind after having considered all the evidence in the case and reflected upon it, you cannot say that the evidence raises an abiding conviction of the defendant's guilt. It is such a doubt as would make a man of ordinary prudence hesitate before coming to a conclusion on a matter of consequence to himself.

The defendant is presumed to be innocent until proven guilty. In the discussion of the case so far we have discussed the principles of the law, and we referred to the facts more by way of illustration and not because one fact or another is more or less prominent; the facts and testimony being referred to more by way of illustration of the issues and principles of law and you are not to take it that the court regarded one part of this testimony as of more consequence than another. The credibility of the witnesses and the weight to be given to the different parts of the testimony is entirely for the jury. This prosecution is for manslaughter, a form of homicide, and a part of the charge of the commonwealth is that by reason of the negligence alleged by the commonwealth this child died. That is purely a question of fact, it is one of the essential facts which the commonwealth must establish, and it is to be proven as any other fact in the case. It is one of those things which is incapable ordinarily of being proven by a demonstration, and the same may be said of most facts that are submitted for the consideration of the jury. The commonwealth is not bound to prove this fact or any other fact to an absolute certainty, but they must prove it and every other essential fact in their case by that degree of proof which satisfies your minds beyond a reasonable doubt. The commonwealth have never a right to ask for a conviction in any

case unless the proof of all the essential facts which must exist in order to convict are present and proven beyond a reasonable doubt to the satisfaction of the jury. If you find from the evidence beyond a reasonable doubt that the defendant had in his parental care an infant son, aged about five months, which child was taken ill and which illness was known to the defendant, and that the defendant became aware that the child was seriously and dangerously sick, and you find that the child's health and physical condition required medical attendance and the use of medicine, and you find that the father was of sufficient ability and had the opportunity to procure them, and you find that under the circumstances the child's condition was such that men of ordinary prudence at that time and place would have procured medical attendance, medical care and medicine, recognizing the necessity for such attendance, care and medicine, and you find that the death of this child resulted from the failure of the father to furnish medical attendance and find these several facts beyond a reasonable doubt, your verdict would be guilty. If the commonwealth has not proven the essential facts beyond a reasonable doubt, your verdict would be not guilty.

Verdict of guilty.

From Oscar Mitchell, Esq., Clearfield, Pa.

SOME DAY WILL BE A SUIT FOR EMPLOYING MED. ATTENTION INSTEAD OF GOD. THROW THE BIBLE AWAY; JESUS IS OUTLAWED.

Kolasky *v.* **Delaware & Hudson Co.**

Practice (C. P.)—Foreign corporation—Service of process—Summons in trespass—Act of June 8, 1911, P. L. 710.

Where a foreign corporation has its principal place of business in one county, process in trespass on a cause of action arising in such county, but issuing from the common pleas of another county, cannot be served upon the secretary of the commonwealth as agent of the corporation under the act of June 8, 1911, P. L. 710.

Rule to quash service of writ. C. P. No. 2, Philadelphia Co. Dec. T., 1914, No. 3374.

William A. Schnader and *John Lewis Evans,* for rule and defendant.

Samuel G. Stern and *John J. McDevitt, Jr.,* contra.

BARRATT, J., Dec. 9, 1915.—A summons in trespass issued

out of this court against the defendant, a foreign corporation. The writ was served upon the secretary of the commonwealth by the sheriff of Dauphin county.

The defendant moves for a rule to quash the service, for the reason that its principal place of business is in the county of Lackawanna, and that the right of action did not arise in the county of Philadelphia.

This raises an interesting question of practice. The rule at common law was that process cannot be served out of the district where the artificial body exists. Bailey *v.* Williamsport & North Branch R. R. Co., 174 Pa. 114. And a number of statutes have made certain modifications in this rule.

For a general review of legislation, see Jensen *v.* Phila., Morton and Swarthmore St. Ry. Co., 201 Pa. 603 (1902), Dean, J.; Park Bros. *v.* Oil City Boiler Works, 204 Pa. 453 (1903), Mitchell, J.; Bailey *v.* Williamsport & North Branch R. R. Co., 174 Pa. 114 (1896, Dean, J.; Newbert *v.* Armstrong Water Co., 211 Pa. 582 (1905), Elkin, J.; acts of March 22, 1817, § 1, 6 Sm. Laws, 438; June 13, 1836, § 42, P. L. 568, March 21, 1842, § 8, P. L. 144; March 21, 1849, § 3, P. L. 216; April 8, 1851, § 6 P. L. 353-354; April 21, 1858, § 1, P. L. 403; April 22, 1874, § 3, P. L. 108; June 8, 1893, § 1, P. L. 345; July 9, 1901, P. L. 614; March 19, 1903, § 1, P. L. 32, and June 8, 1911, § 2, P. L. 710.

Among the statutes is now the act of June 8, 1911, § 2, P. L. 710, which provides, inter alia, as follows: "Every such foreign corporation, before doing any business in this commonwealth, shall appoint, in writing, the secretary of the commonwealth and his successor in office to be its true and lawful attorney and authorized agent upon whom all lawful processes in any action or proceeding against it may be served; and service of process on the secretary of the commonwealth shall be of the same legal force and validity as if served on it. . . . Service of such process shall be made by the sheriff of Dauphin county by leaving two copies of the process and a fee of $2 in the hands or at the office of the secretary of the commonwealth; and he shall make due return of his service of said process to the court, magistrate or justice of the peace having jurisdiction of the subject-matter in controversy in any county of the commonwealth in which said corporation shall have its principal place of business, or in such county in which the right of action arose."

These provisions of the act of 1911 confine the issue of the writ to two counties, namely, that in which said corporation

shall have its principal place of business and that in which the right of action arose.

The defendant objects to the issuance of the writ out of the Philadelphia court, for the reason that the principal place of business of the defendant is in the county of Lackawanna and by inference not in Philadelphia. The plaintiff admits this, but contends that the right of action arose in Philadelphia. He urges that a "cause of action" and a "right of action" are not synonymous. The "cause of action" arose in Lackawanna county, according to the statement of claim, by reason of the fall of rock or stone while plaintiff was engaged in work preparatory to installing machinery in defendant's mine. The plaintiff contends that this gives him a "right of action," and that the "right" exists throughout the state; that the action for personal injuries is a transitory action and may be maintained in any county where the writ can be served.

The difficulty with this reasoning is that it is inconsistent with the true meaning, as used in the statute, of the words, "such county in which the right of action arose." These words refer to the county where the injury was caused.

The words "cause" and "right" are not always synonymous, but, nevertheless, they are frequently used interchangeably, and an instance may be seen by turning to a case in the federal court, Anglo-American Land, etc., Co. *v.* Lombard, 132 Fed. Rep. 721, at page 750. In that case Van Devanter, J., said: "The place where a cause of action arises is not determined by inquiring where it may be enforced. The two things are not the same. The right of action must arise, come into being, before it can be enforced anywhere."

The act of 1911 is a radical alteration from the common law requirement of personal service. The alteration is to extend no further than the purpose intended, which is certainty of service. This certainty does not exist where an issue of fact exists as to whether an agency upon which service might be made exists in Philadelphia. Under the law as it stood when the act of 1911 was passed, were such an issue raised by the defendant instead of, as here, by the plaintiff, it ought properly to be raised by plea in abatement, and could not be decided on motion to quash. "If the plea is determined in favor of the defendant, either upon an issue of fact or law, the judgment is that the writ or bill be quashed." Gould's Pl., ch. 5, § 159. "The judgment rendered upon a demurrer regularly follows the nature of the pleading demurred to. Thus, as we have before seen, the judgment on demurrer to a plea

in abatement, if for the defendant, is that the writ be quashed; and if for the plaintiff, that the defendant answer over." Gould's Pl., ch. 5, §§ 158-159. See remarks of Justice Mitchell in Park Bros. & Co. *v.* Oil City Boiler Works, 204 Pa. 453, at pages 457, 458.

The averment, however, is by the plaintiff in opposition to the motion to quash, and is one that would necessarily go to the jury were the writ sustained. Thus it is clear that the plaintiff urges a reason not within the purpose of the statute, which intended certainty of service.

It will be noticed, in passing, that the plea in abatement has now been abolished. The practice act, 1915, which goes into effect Jan. 1, 1916, P. L. 483, in § 3, provides: "Pleas in abatement, pleas of the general issue, payment, payment with leave, set-off, the bar of the statute of limitations and all other pleas are abolished. Defences heretofore raised by these pleas shall be made in the affidavit of defence."

A brief review of the foregoing may be added, to wit: The plaintiff can sue the defendant anywhere, the action being transitory. He must, however, obtain service on the defendant, otherwise he has no writ.

Service on the corporation can only be (1) At its principal place of business or where the injury occurred. (2) On the secretary of the commonwealth. The second service is conventional—a legal substitute for the first.

Actual service could be made only in Lackawanna county, where the injury occurred and where defendant's principal place of business is located.

A Philadelphia writ cannot be served in Lackawanna county, for the issue of the writ is confined by the act of 1911 to the county where the principal place of business is located or where the injury happened. Hence, as the service at Harrisburg on the secretary of the commonwealth is a mere substitute for the service in Lackawanna county, and service in Lackawanna county could not be made of the Philadelphia writ, the Harrisburg service was a substitute for nothing. There was a writ serviceable in Lackawanna county, and there the plaintiff will find his remedy, if entitled to one.

There is no dispute here that the principal office of the defendant is in Lackawanna county, nor is there dispute that the accident causing the injury happened in Lackawanna county. The writ, therefore, issued in Philadelphia could not be served on the secretary of the commonwealth, and the motion to quash the service of the writ is granted and made absolute.

Veterinary Regulation.

Animals—Practice of veterinary medicine—License to practice— Criminal prosecutions—Act of May 5, 1915, P. L. 248.

All the provisions of the act of May 5, 1915, P. L. 248, apply alike to the practice of veterinary medicine, veterinary surgery and veterinary dentistry.

The act of 1915 is a complete and comprehensive regulation of the entire subject-matter therein referred to, repealing all prior acts.

Any person, who was regularly engaged in the practice of castration of domestic animals at the time of the passage of the act of 1915, is entitled to receive a license to continue such practice upon making application to the state board of veterinary medical examiners, and paying the proper fee and conforming to its requirements.

Persons not heretofore engaged in such practice are subject to all the provisions of the act of May 5, 1915, P. L. 248.

The act of 1915 permits the board to appoint agents to carry on prosecutions in the various counties.

Request of J. W. Sallade, secretary of Pennsylvania state board of veterinary medical examiners, for opinion.

KUN, Deputy Attorney-General, Sept. 23, 1915.—This department is in receipt of your several inquiries relative to the act of May 5, 1915, P. L. 248, regulating the practice of veterinary medicine, etc.

In answer to your first inquiry, to wit, "How can the board regulate veterinary dentistry?" you are advised as follows: The title of the act is, "An act regulating the practice of veterinary medicine, including veterinary surgery and veterinary dentistry, or any branch thereof," etc. Section 2 of the act provides, "The term 'veterinary medicine' includes veterinary medicine, veterinary surgery, and veterinary dentistry or any branch thereof. And § 4 provides, " 'Veterinarian' includes a veterinary physician or veterinary surgeon or veterinary dentist."

You will note that the regulation of the practice of veterinary dentistry is specifically provided for by this act.

Section 26 of the act provides that the act shall go into effect on Sept. 1, 1915, and § 11 of the act provides that thereafter "no person shall practice veterinary medicine or assume to use the title of veterinarian or the title of doctor of veterinary medicine, unless he shall" comply with the provisions of the act as therein provided.

You are therefore advised that all the provisions of this act of assembly apply alike to the practice of veterinary medicine, veterinary surgery and veterinary dentistry.

Relative to your second inquiry, you are advised as follows: As already indicated, the act of assembly is one "regulating the practice of veterinary medicine, including veterinary surgery and veterinary dentistry, or any branch thereof." It is obvious that the practice of castration of animals is clearly a branch of veterinary surgery. Moreover, the act of 1915 seems to be a complete and comprehensive regulation of the entire subject-matter therein referred to, inasmuch as all the previous acts of assembly relating to the same subject-matter are therein repealed.

An examination of the repealed acts shows that the act of May 29, 1891, P. L. 36, in § 1 thereof, amended § 4 of the act of 1889, P. L. 28, as follows: "Provided, that nothing in this act shall apply or be taken or construed to apply to persons who practice castration of domestic animals and no other form of veterinary medicine or surgery."

The same exception was made by § 10 of the act of May 16, 1895, P. L. 79.

Inasmuch as these acts are repealed by the act of 1915 and the latter act does not include the same exemption or exception, the act of 1915 applies to persons who practice castration of domestic animals.

However, § 12 of the act provides that "any persons who, at the time of the passage of this act, shall be legally licensed to practice veterinary medicine shall be entitled to a license to continue such practice upon making application to the board and pay proper fee and conform to its requirements."

This provision, so far as it applies to persons who practiced castration of domestic animals heretofore, must not be construed literally. Inasmuch as such persons were specifically exempted from the requirement to register under the prior acts of assembly repealed, they had the legal right to engage in such practice without formal registration of any kind at the time of the passage of the act of 1915, and therefore any person who was legally engaged in the practice of castration of domestic animals at the time of the passage of the act of 1915, is entitled to receive a license to continue such practice under the act upon making application to the board and paying proper fee and conforming to its requirements. As to persons, however, not heretofore engaged in this practice, all the provisions of the act of 1915 apply for the reasons above set forth, and if it was not intended that this act should be so comprehensive it must be remedied by future legislation.

Answering your third inquiry as to whether or not the act

permits your board to appoint agents to carry on prosecutions in the various counties of the state, your attention is called to § 22 of the act, which provides that "the board or its legally authorized agent, acting for the commonwealth of Pennsylvania, shall be the prosecutor in all such cases."

You are advised that under this section your board may appoint agents to carry on prosecutions under the act.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Detrow *v.* Detrow.

Divorce—Practice—Impotency—Libel—Evidence.

Where the complaint is impotency the libelant must not only show that the respondent is "naturally impotent and incapable of procreation," but that he is incurably so, and the libel must state the incurability.

Libel in divorce. C. P. Franklin Co. April T., 1915, No. 168.

GILLAN, P. J., Feb. 7, 1916.—The master recommends a divorce. The grounds on which the application is made is that "at the time of the said marriage the said Leonard H. Detrow, her husband, was and still is naturally impotent and incapable of procreation." The respondent was personally served; he was served with the notice of the time and place of taking the testimony, and made acquainted with the allegation of the libel, stating the libelant's reasons in asking for a divorce. He did not appear in person or by counsel. The libelant was the only witness called. The master states very properly that a divorce may be granted on the uncorroborated evidence of the libelant. The authority which he cites, namely, Flattery *v.* Flattery, 88 Pa. 27, fully sustains that position. To this authority might be added, Baker *v.* Baker, 195 Pa. 407; English *v.* English, 19 Pa. Super. Ct. 586.

The testimony, however, must be convincing. We cannot say that the testimony of the libelant in this case carries to our mind the same conviction that it seems to carry to the mind of the master. If the libelant herself was capable of copulation she could have at least, without any humiliation, offered proof of that, as was done in Christman *v.* Christman, 7 Pa. C. C. 595.

However that may be, the libelant has failed in one very essential particular to make out her case. To entitle her to a divorce for the reasons set forth in the libel she must not only show that the respondent is "naturally impotent and incapable of procreation," but that he is incurably so, and the libel must state the incurability. A. C. *v.* B. C., 10 W. N. C. 569; Browne on divorce, page 185; Christman *v.* Christman, 7 Pa. C. C. 595. The reasoning of Judge Ewing in A. C. *v.* B. C., 10 W. N. C. 569, is to our mind so conclusive that, although not an opinion of the court of last resort, we will accept it as the law of this state until otherwise advised by an appellate court.

Now, Feb. 7, 1916, divorce refused, the parties, however, to have the right to apply within sixty days to have the decree opened and libel amended.

From Irvin C. Elder, Esq., Chambersburg, Pa.

Cooper's Estate.

Wills—Decedents' estates—Income—Residue—Time of calculation of interest on residue—Duty of auditor.

A will provided, inter alia, "my will is after all of the foregoing bequests have been complied with or arranged for properly, that my executor sell or turn into cash or turn into said bequests the entire balance of my estate, real, personal and mixed—shall be sold and the interest thereof be paid to my beloved wife C. so long as she may live." Three questions were raised: (a) whether the widow was entitled to receive the whole of the income of the estate in the hands of the executor; (b) whether the widow was entitled to receive interest accruing from the residuary estate, after the same has been definitely ascertained, from one year after the date of the death of testator instead of from the date of his death; and (c) whether the income accruing from the estate since the death of the testator should be added to the corpus of the estate, and distributed. Held: (a) that she is not so entitled; (b) that the widow is entitled to receive the interest on the residue when that residue has been finally determined, from the time of the death of the testator; but (c) that there should be no distribution of the income of the estate until after the amount of the actual residue has been ascertained.

Exceptions to auditor's report. O. C. Washington Co. Aug. T., 1915, No. 62. Administrator's accounts.

N. R. Criss, for widow.

Paul A. A. Core, for legatees.

H. D. Hamilton, for accountant.

[Cooper's Estate.]

IRWIN, J., Feb. 3, 1916.—Exceptions were filed to the report of the auditor by the widow, Carrie V. Cooper, and by William H. Cooper, John Cooper and McDonald Savings and Trust Company, guardian of Flossie Rayl and Fred Rayl, minor children of Mary E. Rayl, deceased, collateral heirs of Henry C. Cooper. These exceptions raise the following questions: First, whether the widow, Carrie V. Cooper, was entitled to receive the whole of the income of the estate now in the hands of the executor; second, that the auditor erred in not finding as a matter of law that the widow was only entitled to receive interest accruing from the residuary estate, after the same has been definitely ascertained, from one year after the date of the death of the testator and not from the date of his death, and third, that the auditor erred in not finding as a mattetr of law that the income accruing from said estate since the death of the testator should be added to the corpus of the estate and distributed among those entitled thereto, according to the tenor of the will.

By the third paragraph of the will the testator devised to his wife, Carrie V. Cooper, the sum of $14,000, either in mortgages or cash as she might elect to take, and by the fourth paragraph of the will he devised to his nephew, William H. Cooper, the sum of $7,000 in cash or the equivalent thereof in mortgages, as he may elect. Then followed a number of charitable bequests, which it is conceded must fall because of the fact that H. C. Cooper died within thirty days of the date of the will. Then follows the eighth paragraph, on the proper construction of which the questions here raised depend. It reads as follows:

"Then again my will is after all of the foregoing bequests have been complied with or arranged for properly, that my executor sell or turn into cash or turn into said bequests the entire balance of my estate, real, personal and mixed—shall be sold and the interest thereof be paid to my beloved wife Carrie V. Cooper so long as she may live, and at her death this said bequest shall be paid to Adrian College for use in establishing an endowment fund for said college."

This is inartificially drawn, but we do not think there is any doubt as to what the testator meant. His plain meaning was that after the foregoing bequests had been paid in full the executors were to sell and convert into cash all of the remainder of his estate, which had not already been converted into cash, and that the interest on this residue was to be paid to his wife for life and that at her death the corpus was

to be paid to Adrian College. Some question has been raised in the argument and in the briefs as to the meaning of the words "or turn into said bequests." We do not think that the testator's meaning here is doubtful. By the third and fourth paragraphs of his will he provided that his wife and his nephew, William H. Cooper, might receive their legacies either in cash or mortgages, as they might elect. The language of the eighth paragraph indicates that there was some confusion in the mind of the testator when he wrote it, but we think that when he used the words, "or turn into said bequests," he had reference to the mortgages which might be turned over by the executors in payment of those legacies. If that was not what was in his mind then the words are meaningless, and they can in no event affect the general scheme of distribution which the testator had in his mind.

It is claimed on behalf of the widow that she is entitled to receive the whole of the income of the estate now in the hands of the executor, and that she is entitled to receive that income now. This contention cannot be sustained in view of the plain provision of the will. The testator nowhere provided that she should have the income on the whole of his estate, for any length of time. What he did provide was that after the legacies had been paid and the remainder of the estate had been converted into cash that she was then to have the interest on that residue for life. While the widow and the nephew were given the right to select mortgages to the amount of their legacies, the interest bearing assets of the estate were not specifically devised to any one, and hence the income derived from the estate since the death of H. C. Cooper is a part of his estate, and if it became necessary to use that income in payment of the legacies it would have to be so applied.

The auditor reports that it was the general belief of the attorneys, and all parties in interest, that the remaining securities which had not yet been converted into cash were ample to pay the remainder of the legacies that would not be paid out of the principal of the estate embraced in this account. While that may be true, it cannot be judicially determined until the executor has filed another account, and consequently it cannot be judicially determined at this time that there will ever be any residue on final settlement of the estate. Until it has been judicially determined that there is a residue of the estate, the widow can have no claim to any interest thereon. Hence it follows that the auditor would have erred had he

awarded the income now in the hands of the executor to the widow. We might well stop here, but the claim of the widow has been pressed with so much zeal that it may not be out of place to consider it further.

The auditor has very ably discussed the authorities relied upon by counsel for the widow, and it would serve no good purpose to review them again in this opinion. They do establish the general principle that where a legacy consists of the income of a residue of an estate, unless there is something in the will to the contrary, the legatee is entitled to receive the income of that residue from the date of the testator's death, but there were no authorities cited by counsel for the widow, which sustained the position that a legatee, whose legacy consists of the income of the residue of an estate, is entitled to the income upon the whole estate which accrues during the period of administration. In Schouler on Wills, Executors and Administrators, Vol. 2, § 1479, the author says:

"Doubts may arise, however, in case of a legacy by way of annuity; for the testator might have intended it to commence from the end of the first year, instead of what is more rational, from the date of his own death. There has been great fluctuation of opinion in the English equity courts, moreover, concerning the effect of a bequest of use, income, or the interest in property, to a person for life, and then the principal over to others; but it is finally well established, that the beneficiary for life shall be entitled to the income in one shape or another from the death of the testator; and this, notwithstanding the life income is to be derived from a residuary fund which might not be ascertainable until two years or more had elapsed from the executor's appointment, and moreover, might have to be transferred by the executor himself to trustees designated in the will."

In Sargent *v.* Sargent, 103 Massachusetts, 297, the principle is laid down as follows: "In case of a bequest of a residue in trust to be sold as soon as may be and invested in a particular kind of security, and the income paid to one person for life, and then the principal to others, without any direction that such investment shall include intervening income by way of accumulation, it is now, after much variety and conflict of opinion, well settled in England, that the tenant for life is entitled to income from the death of the testator; that the conversion from one form of security to another, if not made sooner, is to be taken as if made at the end of one year from the testator's death; and that the tenant for life is

to receive the income computed accordingly from that time, and the income of the actual investment for the first year, if in public funds, or such other securities as a trustee might lawfully invest in. . . . In this court, the general rule is established, that the tenant for life is entitled to the income of a residue given in trust, from the time of the testator's death; because any other rule would take away the income from the tenant for life, and apply it to the increase of the capital for the benefit of the remainder-man."

In Lovering *v.* Minot and others, 9 Cushing 151, every question which is raised in the case at bar was passed upon. In that case the decedent, after making provision for a number of his children by bequests in trust, of which they were to receive the income provided as follows: "I give to said Minot and Wells, all the residue and remainder in trust to invest and pay over and distribute the net income to and among my five children, one fifth to each during their respective lives." The question raised was as to the income which they were entitled to receive, and Shaw, C. J., in disposing of the question said:

"Under this will, the court are of opinion that the plaintiff is entitled to one-fifth part of all the income which accrued upon the residuum of the fund, from the time of the decease of the testator.

"In the case as it exists upon the facts, it appears that there was an abundance of personal property to meet the debts and pecuniary legacies, and from the trust funds, to raise annuities or incomes in the nature of annuities; and the cestui que trusts, to whom the income of the residue is given, are entitled to the whole of that income from the decease of the testator.

"And, although it could not be immediately paid, because the executors could not know how much would be wanted, and what the residue would be, yet the accounts when afterwards made up, would show what part of the income accrued from capital, and what part from income accumulated, and then the income due to each would be ascertained.

"We think, therefore, that, when the funds were transferred from the executors to the trustees, the assets showing what was received from income and what from capital, it was the duty of the trustees to distribute that part of it which was composed of interest, and retain the amount of capital as it existed at the decease of the testator, as the capital sum, constituting the residue, to be invested and held under the trust.

"There has been some conflict of authorities on this subject. Some of the earlier cases seem opposed to this view, and tend to show, as a general rule, that interest upon a residue shall not commence till the expiration of the year. But the later cases have settled it the other way, as we think, quite decisively."

This case settles very clearly that where a legatee is given the income of a residuary fund no interest is payable until the amount of that residuary fund has been ascertained. The authorities already cited also show that the widow is entitled to receive the interest on the residue when that residue has been finally determined, from the time of the death of the testator, and not from one year after his death.

The learned auditor, in his report, made this finding: "The auditor is of opinion from his study of the will and examination of the authorities, that the widow is entitled only to so much of the income represented in the account as can be said to have accrued since testator's death on the actual or clear residue, as the same shall be finally ascertained." We do not now express any opinion as to the correctness of this ruling, for the reason that it is not essential to do so in order to dispose of the questions at issue, and we think that the question as to how much of the accumulated income the widow is entitled to receive, or whether she is entitled to receive it all, can better be determined on final settlement of the estate when the actual residue has been ascertained. We are only interested in what the auditor did and not in the reasons assigned therefor. We do not wish to be understood as dissenting from the position of the auditor, but simply that we do not now decide that point. The question before the court is whether the auditor was right in not distributing any of the income of the estate and permitting it to remain in the hands of the executor until the amount of the actual residue should be ascertained. We think the auditor was clearly right in this, and that his decision in so doing is fully sustained by the authorities. It follows, therefore, that the exceptions must be dismissed.

And now, Feb. 3, 1916, this cause came on to be heard, and was argued by counsel, whereupon, after due consideration thereof, it is ordered, adjudged and decreed that the exceptions to the report of the auditor be dismissed and the report is now confirmed absolutely.

From R. W. Parkinson, Jr., Esq., Washington, Pa.

Kunselman *v.* Kunselman.

Deeds—Parent and child—Maintenance—Cancellation of deed.

Where a father conveys a farm to his only child, a son, in consideration of the support and maintenance of the grantor and his wife by the son, and the deed contains covenants to be performed by both parties, and the father remains in continuous possession of the homestead on the farm for a number of years, while the son for a time lives in a separate house on the farm and cultivates the farm, but finally withdraws owing to his father's actions, and it appears that both parties have not performed their covenants contained in the deed, the court will not decree a reconveyance by the son, although it will hold that the father may retain possession of the land during the period of his natural life; nor in such a case will the court compel the son to account to the father.

Bill in equity for an accounting and cancellation of a deed. C. P. Schuylkill Co. May T., 1915, No. 2.

J. O. Ulrich, E. W. Doyle and *W. F. Sheperds,* for plaintiff.

E. W. Bechtel, J. F. Mahoney and *Burke & Burke,* for defendant.

KOCH, J., Jan. 3, 1916.—The plaintiff is the defendant's father, is over sixty years old, and is a widower. The defendant is now his only child. In 1895, the plaintiff and Lavina Kunselman, his wife, by deed, conveyed a certain farm to the said son, and at the same time the father and son made an agreement in writing, in which the son stipulated to "support, maintain and provide for his said father, Decatur Kunselman, and his mother, the said Lavina Kunselman, and their daughter, his sister, Emma Jane Kunselman, for and during their natural life or the lives or life of the survivors or survivor," etc. This bill is now filed for the purpose of compelling a reconveyance of the property, as well as to compel the defendant to account for and to pay to the plaintiff, certain sums of money, because the plaintiff claims failure on defendant's part to perform his written contract. The consideration for the deed was "one dollar and fulfilment of the agreement."

From the pleadings and the evidence I find the following:

FACTS.

1. That Decatur Kunselman, the plaintiff, is a resident and citizen of upper Mahantongo township, in this county.

2. That Wilson E. Kunselman, the defendant, was a resident and citizen of said township at the time this bill was filed, but has since then changed his residence.

3. That on the fourth day of June, in the year 1895, the plaintiff and his wife, by a deed recorded in this county in Deed Book No. 245, page 638, conveyed to the defendant sixty-two acres and thirty-four perches of farm land (which is described in the bill of complaint), situate in said township, in consideration of $1 and the fulfilment by the defendant of the terms of a certain written agreement entered into between the plaintiff and defendant, contemporaneously with the execution and delivery of said deed.

4. That in said written agreement it is, inter alia, thus set forth and provided:

"(a) Now it is hereby stated and declared that the full and complete performance and discharge of the terms, stipulations and articles hereinafter mentioned, constitute the consideration of the conveyance of said messuage, tenement and tract of land.

"(b) The said Wilson E. Kunselman for himself, his heirs, executors, administrators and assigns does hereby covenant, promise and agree to support, maintain and provide for his said father, Decatur Kunselman, and his mother, the said Lavina Kunselman and their daughter, his sister, Emma Jane Kunselman, for and during their natural life and the lives or life of the survivors or survivor of life and live in comfort: to provide and pay for all necessary medical attendance and medicine in case of their sickness or the sickness of either of them and to pay the necessary funeral expenses in case of the death of either or all of them, and to furnish them all with necessary and comfortable clothing as well as food and housing and lodging.

"(c) In case the said Wilson E. Kunselman, his heirs, executors, administrators and assigns shall at any time fail or refuse to perform and fulfill all and every one of the above stated covenants, stipulations and promises to the satisfaction of the above named Decatur Kunselman then the said Decatur Kunselman shall have the right to repossess and reoccupy the said messuage, tenement and tract of land and hold the same during his natural life, the same right to repossess and reoccupy to remain in the survivors or survivor of the said Decatur Kunselman, Lavina Kunselman and Emma Jane Kunselman."

5. When the said deed and agreement were made and ex-

ecuted the plaintiff lived in the homestead on said land, and the defendant lived three or four miles away. The father built an additional house on the land for the son and his family, and the son moved into the new house about October, 1896, and the father and his family continued to live in the old homestead. Mrs. Kunselman died in 1912 and Miss Kunselman died in 1913. The plaintiff still occupies the homestead.

6. The defendant continued to reside in the new house from 1896 to 1908, when he moved on to an adjoining farm which he had purchased in the meantime. He then quit farming the old homestead farm, but in 1910, 1911 and 1912 farmed it again. So that he, in fact, farmed the homestead farm between thirteen and fourteen years, after he got the title to it on June 4, in 1895. He finally quit farming the place in 1912.

7. Disagreements arose between father and son during the years that the son farmed the land, and it is evident that the son quit the farm on that account.

8. After the defendant moved on to the farm in question, the plaintiff suggested that they farm the place together as partners. He practically ignored certain provisions of his written agreement with the son, and ever after that he received half the net profits of the farm until the son finally left in 1912. He kept chickens, had a garden, and used from the farm for his family such produce as it furnished. When the son sold farm products he divided the net cash equally with his father. The mother received a dower interest of $120.59 yearly, from the owner of land which belonged to a former husband, and she used that money for herself and her daughter. The father's net cash income from the farm was perhaps $300 per annum.

9. The plaintiff paid the undertaker, for the funeral expenses of his wife and daughter, $130. It is not clearly shown that a specific demand was made on the son for those expenses before the father paid them, but the son said on the stand, when sworn as a witness in this case, that he would pay said expenses when this case is settled. There is no certain evidence of any amount of expense incurred or paid for medicine or medical attendance for the father, mother or sister, nor was there any evidence in this case of the cost of necessary clothing and food for the three persons in the father's family.

10. I find no evidence of fraud practiced by the defendant

on his parents, to induce the conveyance of said homestead farm to him in 1895.

11. The evidence in the case is not sufficient to show that the plaintiff hitherto demanded a reconveyance of the property, or an accounting from the defendant. It does show, however, that the plaintiff brought an action in assumpsit, against the defendant, to No. 247, of January Term, 1913, based upon alleged breaches of the terms of the aforesaid written agreement, and based also upon breaches of an alleged verbal agreement in regard to plaintiff and his wife helping to operate the farm on shares, and claiming for said breaches the sum of $6,000.

12. Since 1912, the plaintiff has had sole and exclusive possession of said farm, without hindrance from the defendant. The plaintiff has living with him a grandson.

13. I find that both parties to the written agreement ignored its terms. They made a different arrangement between themselves, under which neither of the parents nor the sister of the defendant seemed to be in want for support, maintenance, provisions, necessary medical attendance, comfortable clothing, food, housing and lodging, as provided for in the written agreement; but the defendant failed to pay the funeral expenses of his mother and sister, and has failed entirely for at least the last three years to concern himself about his father's welfare, or to operate the farm in any manner whatever, or to perform the terms of his agreements with his father.

14. The evidence in the case is far from sufficient to enable the chancellor to state an account between the parties to this case, so far as accounting from one to the other might arise out of a contract between them to operate the farm on shares.

DISCUSSION.

From the foregoing finding of facts, it does not appear to me to be necessary to discuss the principles of law that must control this case, and I therefore proceed, without further comment, to draw from the facts the following:

CONCLUSIONS OF LAW.

1. The plaintiff is entitled to receive from the defendant the sum of $130 for the funeral expenses of Mrs. Kunselman and Miss Kunselman; but the remedy for its recovery lies not in equity, and an action at law is already pending.

2. The plaintiff has failed to show any other definite sum that he is entitled to receive from the defendant.

3. The plaintiff is entitled to repossess, reoccupy, remain on and hold the said tract of land during the period of his natural life, to the exclusion of defendant, and without his let or hindrance.

4. The plaintiff is not entitled to a decree requiring the defendant to reconvey the premises to the plaintiff.

5. The evidence in the case does not warrant a decree, as prayed for, to order the defendant to account to the plaintiff for the sum of $180 for each of the three members of the plaintiff's family, for each year, beginning with 1895.

6. The evidence in the case does not warrant a decree, as prayed for, to order the defendant to account to the plaintiff for a specific sum for the necessary medical attendance and medicines for the said Lavina Kunselman and the said Emma Jane Kunselman. In fact, a remedy exists at law, if anything be due.

7. That the bill shall be dismissed and that the costs shall be equally divided between the two parties.

And now, Jan. 3, 1916, upon the filing of these findings and the answers to the requests of the respective parties for findings of fact and conclusions of law, the prothonotary will enter a decree nisi, and give notice to the respective parties, in accordance with the equity rules.

Water Company Pipes.

Road law—Relocation of water pipes—Power of state highway department.

The state highway commissioner has the right to require a water company to remove its pipes from under the improved portion of a road and relocate them under the unimproved portion in such manner and condition as not to injure the road, and the expense of such relocation must be borne by the water company.

Request of R. J. Cunningham, state highway commissioner, for opinion.

KELLER, First Deputy Attorney-General, Sept. 23, 1915.—I have your favor of the eighth instant requesting an opinion as to your right to require a water company to remove its pipes from under the improved portion of a state-aid highway

and relocate them in such portion of the highway as is not improved.

I note that the pipes now laid by the company are old and constructed of wood; that they leak and are subject to constant repair, which causes decomposition of the limestone placed on the road.

A similar question was presented to Attorney-General Bell by your predecessor in office, E. M. Bigelow, who requested advice as to whether the state, through the state highway department, has the power to compel the relocation or removal of water pipes, gas pipes or other structures in the surface or subsoil of any of the state highways where the present location of such structures, by reason of the change of grade or realignment of any of said highways, or other changed conditions, interferes with the safe or convenient construction or improvement of said highway, in accordance with the plans and specifications prepared by the state highway department under and pursuant to the provisions of the act of May 31, 1911, P. L. 468. He was advised that your department has the power to compel the relocation of water pipes, etc., in state highways when required for the proper construction of the road.

In his opinion the attorney-general said: "It results, from what has been said, that any franchise or privilege granted to lay gas pipes, water pipes, or other structures in the surface or subsoil of any of the state's highways, was at the time of the grant, is now and at all times will be subject to the state's exercise of her police power. This police power is a continuing power, hence the grantees of such franchises have no vested rights or continuous easement in respect to the location or use of such structures, but such easements are subject always to the superior right of the state to require a change in the location or in the mode and manner of the enjoyment of the easement or privilege, at any time as changed circumstances or conditions may make necessary or proper in the interest of the public safety, convenience or general welfare." Citing decisions of the Supreme Court of Pennsylvania and of the United States, in support of such statement. Attorney-General's Report, 1911-12, page 228 (Highway Occupancy, 40 Pa. C. C. 562).

And, as pointed out in the opinion, the company can recover no compensation for the expenses incurred or injuries sustained in and about such relocation.

The same principles have been recognized in the recent

cases of Keystone Tel. Co. *v.* Phila. & Reading R. R. Co., 56 Pa. Super. Ct. 384, and Grand Trunk Western R. R. Co. *v.* South Bend, 227 U. S. 554.

By the act of May 31, 1911, P. L. 468, §§ 21-36, inclusive, provision is made for the construction, maintenance and repair of state-aid highways. In § 22 of said act it is provided: "Such roads to be at all times under the authority and supervision of the state highway department."

I am, therefore, of opinion that the ruling of Attorney-General Bell with reference to state highways, is also applicable to state-aid highways and that upon proper occasion you have the right to require a water company to remove its pipes from under the improved portion of the road and relocate them under the unimproved portion in such manner and condition as not to injure the road, and that the expense of such relocation must be borne by the water company.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Scranton City *v.* Scranton Hosiery Mills.

Practice (C. P.)—Sci. fa. sur municipal lien—Service—Acts of June 4, 1901, P. L. 364; May 6, 1909, P. L. 452, and June 20, 1911, P. L. 1076—Interpretation of statutes.

A scire facias to revive a municipal lien must be served as required by law in order to continue a lien. Service must conform to the requirements of the acts of June 4, 1901, P. L. 364 and May 6, 1909, P. L. 452.

The act of June 20, 1911, P. L. 1076, did not change the requirements as to service as established in the above recited two acts.

A statute derogatory of the common law and private right will not be interpreted in such a way as to extend its effect beyond what is expressed.

Motion to quash alias sci. fa. C. P. Lackawanna Co. Jan. T., 1915, No. 526.

J. G. Sanderson, for the motion.

D. J. Davis, city solicitor, contra.

NEWCOMB, J., Nov. 8, 1915.—The writ is an alias sci. fa. sur municipal claim issued Aug. 24, 1915, following an order setting aside the sheriff's return of service on the original. As in that instance the present motion is on behalf of the present

owner of the property who was added by the sheriff as a party defendant. The facts are very simple.

Jan. 3, 1910, the claim was filed to secure a sewer assessment. Dec. 15, 1914, sci. fa. was issued but it proved abortive—as above noted—for want of service as required by act of June 4, 1901, P. L. 364, as amended by that of May 6, 1909, P. L. 452, § 18. See 16 Lackawanna Jurist 191. It was not disputed that by the act of 1901 the life of the lien is limited to five years, so that if there were nothing else in the case it would now be wholly lost. Scranton City *v.* Genet, 232 Pa. 272. The question is whether its duration was indefinitely extended by operation of the amendment of June 20, 1911, P. L. 1076; and that, under the facts of this case, is one of interpretation of the provisions that the claim "if filed within the period aforesaid, shall remain a lien upon said properties until fully paid and satisfied: provided, however, that . . . a writ of sci. fa., in the form herein provided, be issued to revive the same within each period of five years following . . . (b) the date on which a sci. fa. was issued thereon," etc.

Thus the proposition, of which the city takes the affirmative, is that the mere timely exit of the writ at intervals not exceeding five years is enough to keep the lien of the claim alive, regardless of any service, good or bad, or what becomes of the antecedent writ.

This is contrary to all analogy, and rather repugnant to one's sense of elementary conception of the function of such process. That is not all: it is against distinct authority on the subject as the law had been theretofore declared upon grounds so inherent in the nature of the proceeding that it is believed nothing short of the most unequivocal legislation can serve to change it. Phila. *v.* Cooper, 212 Pa. 306.

It cannot be overlooked that the basis of the proceeding must be found in the act of 1901. That provides a complete system not only for the creation of municipal liens, but also for the procedure thereon to final enforcement. Inter alia it made a marked change in and about the service of the sci. fa. In effect it abolished the return of nihil habet and provided for service in some form in every possible contingency so that for want of an answer within fifteen days as called for by the mandate of the writ the claim could be put in judgment. Evidently it was farthest from the legislative purpose to leave the procedure exposed to unnecessary delay. The writ was not made to conform to any term or return day.

It goes out without limitation on that score; and while defendant is required to take defence within fifteen days, the sheriff is required to serve it at the earliest possible date, in no event to exceed three months, if need be, subject to plaintiff's right to compel him to return it at any time short of that.

On their face, all and singular, these provisions are mandatory and there is nothing either in the subject-matter or the context to suggest an inference or construction to the contrary. They are found in §§ 17 and 18, which are left untouched by the act of 1911. In terms the amendment is restricted to §§ 10 and 32, and concededly the latter has nothing to do with the present question. It is not claimed that the procedure on the sci. fa. is modified; nor that there is any suggestion of dispensing with the necessity of service if the claim is to be put in judgment. The argument does assume, however, that so far as the preservation of the lien is concerned, service of the writ is unnecessary, because it is not expressly mentioned in the terms of that clause of the proviso upon which the city relies. In other words, that the alias having issued "within the period of five years following . . . the date on which" its predecessor was issued, the condition prescribed by the act of 1911 for the continuity of the lien is satisfied, notwithstanding the void service of the earlier writ.

But bearing in mind that the case has to do with a purely statutory proceeding in derogation of the common law and of private right, an interpretation resting upon doubtful and uncertain intendment would not be favored. And the theory of the city seems to be open to that objection in view of another equally obvious and more consistent meaning entirely free from prejudice to either party.

It could, and not infrequently does, happen that either because of protracted litigation or of unforeseen difficulties five years will elapse before final judgment; and to prevent the loss of the claim in such case this provision is entirely apt and proper, always taking it for granted, however, that the law will have been complied with regarding the service, and thus leaving the writ, together with the underlying claim, to its fate as in other cases if the law be disregarded and service omitted.

That the return of service on the original was fatally defective, is not questioned. If that doesn't nullify the writ for all purposes, it becomes a more or less idle formality to have any service whatever, and, as above noted, the logical outcome would be that the lien would be kept alive indefinitely by merely

suing out the writ, leaving service to be had only at the city's option.

I cannot assent to a theory that would thus enlarge the scope of the amendment and make it operate to amend in important particulars those sections of the principal act to which it doesn't pretend to refer. The more rational view is that in providing for keeping the lien alive by operation of an alias within five years after "a sci. fa. was issued," an effective sci. fa. was intended; that is to say, one which had been served as required by law. That being so it would follow that there is nothing in the amendment to take the case out of the ruling of Phila. *v.* Cooper, supra; and the rule to show cause is therefore made absolute and the alias writ is quashed.

From William Jenkins Wilcox, Esq., Scranton, Pa.

Reimel's Estate.

Will—Partial intestacy—Precatory words.

Where testator gave an absolute estate in one clause of a will to his wife, and in another clause said: "And if it can be so arranged. The one third interest of which my wife is entitled shall be placed in a bank at interest for her use and benefit. Instead of retaining dower rights in my real estate"; the latter words are merely precatory, and will not defeat the estate previously granted.

Exceptions to auditor's report. O. C. Northampton Co.

Smith, Paff & Laub and *William P. Bray,* for the exceptants.
H. M. Hagerman, for the widow.

STEWART, P. J., Nov. 1, 1915.—Exceptions were filed to the report of the auditor in this estate. After carefully reading his report and reviewing the positions taken for the exceptants and examining the authorities cited, we do not deem it necessary to discuss this case at length; for the auditor's conclusions are correct. In the first clause of the will the testator appoints his executors, and directs the payment of all debts, funeral expenses and legacies. The second clause of the will is as follows: "Second, after the payment of my said debts and funeral expenses, I give to my wife Anna Marie, the house and lot now occupied by her and myself, together with such furniture and household goods as she may desire in addition to one third interest in my estate."

The fifth clause is as follows: "Fifth. All property is to be

sold and the estate settled in two years from the date of my death. And if it can be so arranged. The one third interest of which my wife is entitled shall be placed in a bank at interest for her use and benefit. Instead of retaining dower rights in my real estate." It is contended that the fifth clause reduces the one third interest given to the wife absolutely, to a life estate. It will be perceived by that same clause, all his property is to be sold and the estate is to be settled in two years from the date of his death. If the exceptants' position were correct, where would the one third interest go after the death of the widow? There is no direction as to where the principal of that third should go after her death. Such a construction would result in a partial intestacy. The plainest thing about this will is that he intended to dispose of his whole estate, and he limited the time for its settlement to two years. No construction should be followed which would produce an intestacy, if it can be avoided.

In Caslow *v.* Strausbaugh, 233 Pa. 69, it was held: "Where a testator gives to his wife 'all real estate and all personal property of whatever kind and nature they may be, to have and to hold or sell and convey the same at her own will and accord, and to pass title for the same and have the use of the proceeds thereof during her natural life,' without a gift to any other person, and without any disposition of the remainder, the will vests in the wife an absolute fee in the testator's real estate." By the second clause he gave his wife the house and lot and the furniture and in addition, the third interest in his estate. The children were to share alike, the grandchildren taking their deceased parents' shares. The words of the fifth clause are clearly precatory in character. Heck's Est., 170 Pa. 232, is relied on by the learned auditor.

Perhaps a better discussion of the matter is contained in the late case of Miller *v.* Stubbs, 244 Pa. 482. The syllabus is as follows: "After an absolute bequest or devise has been made, no precatory words of the testator to his legatee or devisee can defeat the estate previously granted, nor can a clearly expressed purpose of a testator be overborne by modifying directions that are ambiguous and equivocal." Mr. Justice Brown goes over all the cases in that opinion, and he shows conclusively that in a case where there is an absolute gift, such as we have here, it cannot be destroyed by the ambiguous directions of the fifth clause. The first exception relates to the auditor's compensation. No testimony was taken as to the number of days on which the auditor was neces-

sarily engaged in this matter. We follow Knecht's Est., 14 North Co. 407, and dismiss this exception. The second, third and fourth exceptions refer to the main question involved.

The fifth exception is as follows "Exception is taken to failure of allowance of deduction on legacy of note of $512.73." We assume that this refers to some claim of the executors against one of the legatees. The only reference that we can find to these figures, $512.73, is on the debit side of the account, where the executors charge themselves with "principal and interest on note of Jos. E. and J. E. Miller." Any assignment of claim can be adjusted between the executors and the parties without correcting this report.

And now, Nov. 1, 1915, all the exceptions to the auditor's report are dismissed, and the same is confirmed absolutely, and distribution is directed to be made accordingly.

From H. D. Maxwell, Esq., Easton, Pa.

Houck *v.* Beaver Valley Coal Co.

Waters—Diversion of waters from stream—Mines and mining—Coal mining—Mill property.

Where a coal mining company puts back more water into a stream from its mines than it diverts for steam and other purposes it cannot be held liable for damages to a lower riparian owner for alleged injuries to a mill property.

Rule for new trial. C. P. Columbia Co. Sept. T., 1913, No. 267.

W. H. Rhawn and *J. O. Moon,* for plaintiff.

C. Clyde Yetter and *M. M. Burke,* for defendant.

EVANS, J., Jan. 3, 1916.—The plaintiff at the time of bringing this suit and for a number of years prior thereto owned a mill property in Scotch valley, in Main township, this county. The mill and the land appurtenant thereto, three and a half acres, is located along Scotch run, which flows through said valley. The mill is equipped for the grinding of flour and feed and the cutting and sawing of lumber and shingles and the making of cider; generally, the mill was driven by water power, the power coming from Scotch run.

On the trial the plaintiff claimed that since September, 1912, the defendant, without right or authority of law, had

taken and diverted part of the water flowing in Scotch run, and used the same for steam purposes at its coal mining operations on McCauley mountain, thereby depriving him of the use of the water for power at his mill, and as a consequence his mill property was permanently injured and damaged to the extent of more than half its market value.

On the other hand the defendant, while conceding and admitting that since 1911 it had taken and diverted some water from Scotch run, five or six miles above plaintiff's mill, and had used the same for steam purposes at its McCauley mountain coal mining operation, claimed, that it had not injured or permanently damaged his mill property or water power, because it caused a great deal more water, many times more water, to flow into Scotch run than it pumped out of Scotch run during the time in question; that the large volume of water which it caused to flow into Scotch run, because of its coal mining operation, would never have found its way into Scotch run except for said coal mining operation.

The main question therefore involved in the case was, whether or not the defendant caused more water to flow into Scotch run than it pumped out of Scotch run, during the time in question. This question was fairly submitted to the jury. In the charge we said:

"Does the defendant company cause more gallons of water to flow into Scotch run, because of its coal mining operations, per day, than it pumps out or diverts from Scotch run per day? As we view the matter, that is the main question in this case.

"If the defendant company, because of its coal mining operation, increases the flow of the water in Scotch run above the plaintiff's mill property, rather than decreases the flow, the plaintiff would not be entitled to recover, because his mill property would not have been injured; and if you find this question, that is, that the defendant causes more water to flow into Scotch run than it diverts therefrom, you would be warranted in returning a verdict in favor of the defendant. In fact, we say to you frankly, it would be your duty to return a verdict in favor of the defendant if you find that fact to be true, viz.: that the defendant company causes more water to flow into Scotch run, because of its coal mining operation than it diverts therefrom. But, on the other hand, if you should find as a fact that the defendant company diverts or pumps more water out of Scotch run than it causes to flow into Scotch run, and that as a consequence the plaintiff's mill property has been injured and damaged by cutting off part of

his water power, he would be entitled to recover. Has the defendant company, on the whole, because of its coal mining operation, decreased the flow of water in Scotch run, or has it increased the flow of the water in Scotch run because of its coal mining operation?

"The theory or claim of the plaintiff is, that the defendant diverts or pumps out of Scotch run approximately sixty thousand gallons of water per day. That is, when the operation works, and the theory or claim of the defendant is, that it causes to flow into Scotch run a very much greater quantity of water every day in the year than it pumps or diverts therefrom on the working days of the operation, and as a consequence the plaintiff's water power is enhanced in value rather than decreased in value."

The jury, at the request of both plaintiff and defendant, and before the testimony was heard in court, viewed the premises in charge of the sheriff, accompanied by showers. They examined plaintiff's mill property and observed the stream and water flowing therein above the mill, defendant's dam and intake pipe, pumping station, and coal mining operation at McCauley mountain, and the stream of water the defendant caused to be discharged and flow into Scotch run from the mine workings.

The jury failed to credit the plaintiff's theory that his mill property had been permanently injured and damaged. They returned a verdict of $1 for the plaintiff, either as nominal damages, or the jury did not want to impose the costs on the plaintiff.

Plaintiff's counsel have filed the following reasons for the granting of a new trial:

1. The verdict is against the evidence.
2. The verdict is against the law.
3. The court erred in charging the jury, that if the defendant company, put back more water, from its mines and works, than it took out of Scotch run, the plaintiff was not entitled to recover.
4. The court erred in charging the jury that the measure of damages was the rule before and after.
5. The court erred in charging the jury as to the rights of the defendant as a non-riparian owner.
6. The court erred in sustaining the objection to the competency of Jeremiah Cherington and other witnesses called by the plaintiff to prove value before and after.

It appears from a careful reading of the plaintiff's amended

statement that damages are claimed for a permanent injury. The averment is "the defendant wrongfully, injuriously and unlawfully located permanent pumping station, or maintained and operated said pumping station, lines of pipe, tanks, and other receptacles for the storage of water, and other works upon, along, in and nearby said Scotch run and dammed back and obstructed the flow of said stream and diverted it from its natural channel. In consequence of which wrongful acts the water of Scotch run, sufficient for supplying said mills with water, for operation of the same and other purposes could not and did not run and flow through said (plaintiff's) lands, as the same ought to have done and otherwise would have done, and the waters of Scotch run has been permanently diverted, hindered, stopped and turned aside so that they do not now run and flow to and through the same sufficient for the purposes aforesaid."

We are not convinced that the verdict is against the law or the evidence, or that we erred in charging the jury that if the defendant put back more water from its mines and works than it took out of Scotch run the plaintiff was not entitled to recover. That was the real question involved in the case, and many witnesses were called and testified with respect to the different contentions concerning this matter.

The case was tried upon the theory that there had been a permanent injury of the plaintiff's property because of the diversion of part of the water which supplied the power to his mill.

The sixth reason assigned for the granting a new trial indicates this: "The court erred in sustaining the objection to the competency of Jeremiah Cherington and other witnesses called by the plaintiff to prove value before and after." Cherington testified in chief, that the market value of plaintiff's mill property before the diversion was $5,000 and afterward $2,000. On cross-examination he testified that he based his estimates of value before and after upon the taking of all the water, upon a total destruction of the water power. On motion his testimony with reference to values before and after was stricken out, and rightly too. The plaintiff's claim was only for a partial destruction or taking of the water power, not a total destruction or taking.

In Fuoss *v.* The Tipton Water Co., 251 Pa. 68, at page 72, Justice Potter says: "We are impressed with the thought that in a case such as this where the real estate is untouched, and the interference is only with the water power, the proper meas-

ure of damages should be the value of the water power which was taken. The present case was, however, tried by both parties on the theory that the proper measure of damages was the difference in the marked value of plaintiff's property before and after the injury alleged to have been caused by the loss of water power through defendant's appropriation."

In the case at bar the claim is for a permanent injury, a permanent appropriation and loss of water power, because of diversion of water from Scotch run which supplied plaintiff's mill with power—"the defendant wrongfully, injuriously and unlawfully located permanent pumping station, and the waters of Scotch run has been permanently diverted, hindered, stopped and turned aside so that they do not now run and flow through the same (plaintiff's) land sufficiently for the purposes aforesaid."

In the light of the verdict it must be assumed that the jury reached the conclusion that the defendant put more water into the stream, than it pumped out, than it diverted. With this fact established the conclusion is irresistible, that the claim of the plaintiff is without merit, that the plaintiff's water power has not been interfered with or depreciated to any appreciable extent. The jury did not credit the evidence on the part of the plaintiff.

In Wagner *v.* Purity Water Co., 241 Pa. 328, it is held: "An action of trespass will lie to recover damages for injuries sustained by a riparian owner, in consequence of the unlawful diversion of the waters of a stream by an upper riparian owner. If the original taking was a lawful appropriation of the water, under the power of eminent domain, the action would have to be under the statute, and trespass would not lie. But until there has been an original lawful taking, or until the damages have been recovered on the basis of a permanent unlawful taking, the diversion of the water may be treated as a continuing trespass, for which damages may be recovered in an action at law."

Immediately upon the rendering of the verdict rules were granted on part of the defendant for a new trial and for judgment for the defendant non obstante veredicto. Subsequently at request of defendant's counsel both were discharged.

This case was fairly tried upon the merits. The jury was unable to see merit in the plaintiff's case. In the opinion of the court the verdict ought not to be disturbed.

Now, Jan. 3, 1916, rule is discharged. The reasons for a new trial are overruled and a new trial is refused.

Rainey *v.* Johnson.

Mines and mining—Upper and lower veins—Drilling—Injunction.

Where two coal mines, in different veins of coal, are located vertically one above the other, the owners of the upper mine will be restrained by injunction from drilling a hole through the intervening strata between their mine and the lower mine for the purpose of carrying accumulations of water out of the upper mine into the lower one in order to get rid of it.

Bill for an injunction. C. P. Fayette Co. In equity, No. 763.

J. G. Carroll and *Sterling, Higbee & Matthews,* for plaintiffs.

Sturgis & Morrow, for defendants.

VAN SWEARINGEN, P. J., Dec. 31, 1915.—A preliminary injunction was awarded restraining the defendants, their agents and employés, from drilling, boring or otherwise making any hole, well or opening through the strata lying between the five foot vein of coal and the nine foot vein of coal, over the mine of the plaintiffs, by means of which any water now accumulated or which may hereafter accumulate in the mine of the defendants will be drained, conducted or carried into the mine of the plaintiffs, and from doing any other act, matter or thing by which water not flowing naturally into the mine of the plaintiffs will be conducted, or carried or caused to flow into the same, and the matter is before us now on final hearing. From the bill and answer, and the testimony and exhibits offered, we find the material facts to be as follows:

1. The plaintiffs are the owners of a large coke plant, situate in North Union township, Fayette county, consisting of a large number of coke ovens, an extensive coal mine in the nine foot vein of coal, with numerous and varied workings, completely and fully equipped for the mining of coal and the manufacture of coke, and are engaged in the daily operation of the same, employing a great number of workmen, many of whom are engaged in labor under ground in the various workings of the mine.

2. The defendants are the owners of the five foot vein of coal overlying a part of the mine of plaintiffs, the five foot vein of coal being about eighty-five feet above the nine foot vein, and have opened and are working a mine in said five foot vein, these workings overlying a part of the mine of plaintiffs

from which the said nine foot vein of coal, wholly or in part, has been removed.

3. Water in various quantities at times accumulates in said mine of the defendants.

4. The defendants, at the time of the filing of the bill, were engaged in drilling a hole through the intervening strata between their mine and the lower mine of the plaintiffs, for the purpose of carrying accumulations of water out of the mine of the defendants into the cavity in the mine of the plaintiffs from which the coal has been removed, which cavity is filled partly with gob and fallen strata.

5. If the defendants be permitted to complete the drilling of said hole, and thereafter to carry or drain water from their mine into the abandoned portion of the mine of plaintiffs, said water, or portions thereof, will flow therefrom into the present working places in plaintiffs' mine, greatly interfering with the workings and operations of said mine.

6. The amount of water so to be carried through said hole will greatly exceed the amount of water that otherwise would flow naturally into the mine of plaintiffs from the mine of the defendants.

"When water, following the law of gravitation, after the removal of the coal in a careful and proper manner, finds its way by percolation or through fissures unforeseen and unknown, into the lower mine, its owner cannot complain of it as an injury done by the owner of the upper mine." Locust Mountain Coal & Iron Co. *v.* Gorrell, 9 Phila. 247. But the right of an upper land owner to discharge water on the lower lands of his neighbor is in general a right of flowage only in the natural ways and in natural quantities. If he alters the natural conditions so as to change the course of the water, or concentrates it at a particular point, or by artificial means increases its volume, he becomes liable for any injury caused thereby. It is not to be lost sight of that one man's right to injure another's land is an exception, as in Penna. Coal Co. *v.* Sanderson, 113 Pa. 126, and this exception is founded on necessity, because otherwise he would himself be deprived of the beneficial use and enjoyment of his own land; and unless that would be the substantial result of forbidding his action, he is not within the immunity of any of the cases. Pfeiffer *v.* Brown, 165 Pa. 267.

"While land on a lower level is under a natural servitude to that located above it, to receive the water flowing down to it naturally, and therefore injuries to the lower proprietor

caused by the natural flow of the water from higher land is damnum absque injuria, when one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes it to flow at different times and in greater quantities than it would naturally flow, by the breaking down or removal of a barrier, natural or otherwise, he is liable for the ensuing damages." 27 Cyc. 784. The owner of a mine has a right to mine his coal in any ordinary and reasonable way, so long as that does no injury more than that which necessarily arises by removal of the coal, and such incidents as flow directly from such use, as in the case of subterranean water percolating through the coal, or in cases of subterranean springs where the mere removal of the coal may cause the water to collect and flow toward or upon lower mines which might or would not otherwise do so. But it is otherwise where the mining is done in such a manner as to introduce foreign water from the surface or higher level, by reason of the roof falling in, and thus introducing water from the surface which would not have flowed in if the roof of the mine had remained undisturbed and compact after the coal was removed.

In other words the owner of the upper mine is not liable for water which flows in from percolation or gravitation, simply by reason of the excavation or removal of the coal. But whatever water arises from the breaking in of the roof and the consequent sinking or disturbance of the surface, thus occasioning an additional flow from above which otherwise would not have run in or upon the lower owner. This is the general rule without reference to actual negligence or want of skill on the part of the higher owner. Horner *v.* Watson, 79 Pa. 242. Surely, then, an upper mine owner has no legal right to drill a hole through an intervening natural barrier for the very purpose of draining the water out of his mine into the mine of a lower owner in order to get rid of it. And in this respect it can make no difference whether the one mine is vertically above the other or merely on a higher level beside or near it. We therefore reach the following conclusions of law:

1. The acts of the defendants sought to be restrained, if permitted, would constitute a continuous trespass.

2. The proposed acts of the defendants should be restrained by injunction.

And now, Dec. 31, 1915, for the reasons stated in the opinion herewith filed, the preliminary injunction heretofore

awarded is made permanent, and it is ordered that the defendants pay the costs of this proceeding; this decree to be entered nisi according to rule.

From D. W. McDonald, Esq., Uniontown, Pa.

Female Labor.

Labor law—Work done at home by female employé for establishment—Act of July 25, 1913, P. L. 1024.

It is contrary to the spirit as well as to the letter of the act of July 25, 1913, P. L. 1024, for any establishment to give to its female employés (who have worked in such establishment for the full time permitted by the act) work to be taken home and done at night and delivered next morning.

Such work is work done in connection with the establishment, and is therefore unlawful within the meaning of the act of 1913.

Request of John Price Jackson, commissioner of labor and industry, for opinion.

KELLER, First Deputy Attorney-General, Oct. 27, 1915.—I have your favor of the sixteenth instance, enclosing letter from Henry C. Thompson, Jr., of Philadelphia, requesting an opinion as to whether it is a violation of the act of July 25, 1913, P. L. 1024, for female employés, who are paid by the piece, after working nine hours in an establishment, to take home work with them to do in the evening and deliver at the establishment the next morning.

The purpose of the act of July 25, 1913, was to protect the public health and welfare by regulating the employment of females in certain establishments with respect to their hours of labor and the conditions of their employment. The term "establishment" is defined to mean "any place within this commonwealth where work is done for compensation of any sort to whomever payable," providing that it shall not apply to work in private homes and farming. Section 3 of the act provides that no female shall be employed or permitted to work in, or in connection with, any establishment for more than six days in any one week, or more than fifty-four hours in any one week, or more than ten hours in any one day. The purpose of the law evidently was to put such safeguards around the employment of women in establishments as to prevent their being exhausted by their labor, and thereby injured in health, to the consequent injury of the race.

Under the provisions of the act a woman may be employed for six days in the week for nine hours each day. This is all the work she may do in, or in connection with, any establishment. In addition to the work in such establishment she may do household work or other work in her own home, provided it is not in connection with the establishment in which she is employed during the week, and provided that when she is employed or permitted to work in or in connection with more than one establishment, the aggregate number of hours during which she shall be employed or permitted to work in or in connection with such establishments shall not exceed the number of hours prescribed for any one week or any one day.

The act not only forbids her employment in an establishment for more than six days in any one week, or more than fifty-four hours in any one week, or more than ten hours in any one day, but forbids her being permitted to work in connection with any establishment beyond the time limited above.

I am, therefore, of the opinion that it is contrary to the spirit, as well as to the letter of the act for any establishment to give its female employés, who have worked in such establishment for the full time permitted by the act, work to be taken home and done at night and delivered at the establishment the next morning. I advise you that such work is work done in connection with the establishment and is, therefore, unlawful.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Leith *v.* Schaadt.

Judgment — Opening judgment — Affidavit after twenty years.

The use plaintiff in a judgment entered against an obligor prior to the latter's death and more than twenty years after the date of the judgment, will not be entitled to have the judgment opened on the ground that a rule to show cause had not been served upon the defendant as required by a rule of court.

Petition by Lizzie Metzgar, use plaintiff, to strike off judgment erroneously entered against defendant. And answer: C. P. Lehigh Co. April T., 1910, No. 273. Fi. fa., June T., 1910, No. 29.

On Oct. 26, 1914, Lizzie Metzgar, the use plaintiff, represented that on a bond with warrant of attorney, dated Nov.

30, 1888, she entered judgment on June 4, 1910, more than twenty-one years after its date, without making the affidavit required by § 4, court rule No. 22, which provides that where a warrant of attorney is above ten years old and under twenty, judgment can only be entered by leave of court after filing an affidavit that the warrant was duly executed, the money unpaid, and the party living: and that where the warrant is above twenty years old, the judgment can be entered only after a rule to show cause has been served on the defendant if he can be found within the county.

The plaintiff further represented that the judgment was improvidently entered and that its entry was an oversight on the part of the attorney for the plaintiff and the prothonotary, that the sheriff sold the defendant real estate on Sept. 9, 1910, but no deed has been delivered and recorded for the property by the sheriff, whose term of office expired on Jan. 1, 1912, and that therefore the purchaser did not and cannot acquire a valid and legal title for the premises by reason of the above mistakes. The petitioner asked that the judgment be stricken off and the sale set aside.

Answer to the petition was made on behalf of the defendant that her real estate was sold by the sheriff to the plaintiff on Sept. 9, 1910, upon the fi. fa. issued upon the judgment above referred to, that the use plaintiff has paid the down money, ten per cent., but has not paid the balance of her bid; that the defendant, Lovina Metzgar, is the only person who can take advantage of the omission of the affidavit and rule required under § 4, of court rule No. 22: that her refusal to move to strike off judgment in her lifetime and her acquiescence in the execution and subsequent proceedings, amounted to a new confession of the amount stated by the use plaintiff to be due upon her judgment: and that a deed given by the present sheriff to the petitioner for the defendant's real estate under the proceedings, upon payment by her of the balance of her bid, will convey to her the entire right, title and interest of the defendant in the real estate.

George R. Booth and *Harry A. Cyphers,* for the petition.
Chas. W. Kaeppel and *Jas. L. Schaadt,* for the defendant.

GROMAN, P. J., Jan. 11, 1915.—The defendant, Lovina Metzgar, on Nov. 30, 1888, executed a bond and mortgage in favor of Reuben B. Leith, to secure the payment of the sum of $1,000, with interest, one year after the date thereof; the bond being secured by a mortgage upon real estate situ-

ate in the borough of Fountain Hill, county of Lehigh and state of Pennsylvania, and the mortgage entered of record in the office for the recording of deeds for Lehigh county, in mortgage book, volume 48, page 77; payments on account of the principal reduced the same to $600.

On June 3, 1910, the mortgagee assigned the bond and mortgage to Lizzie Metzgar, who, on the following day, entered judgment on the bond for $600, with interest from April 1, 1910, as of April Term, 1910, No. 273, court of common pleas of Lehigh county. The same day a fi. fa. issued, and on Sept. 9, 1910, the sheriff sold the property at public sale to Lizzie Metzgar, the use plaintiff, for $4,001, ten per cent. of which, amounting to $400, was paid to the sheriff as required by the conditions of sale.

On Oct. 26, 1914, the use plaintiff presented a petition praying for a rule to show cause why the entry of the judgment should not be stricken off the record on the ground that the judgment was entered of record more than twenty-one years after the date of the bond and warrant without leave of court and without first issuing a rule to be served on the defendant if found within the county, as required by court rule 22, § 4, reading as follows:

"If a warrant of attorney to enter judgment be above ten years old and under twenty, the court, or a judge thereof in vacation, must be moved for leave to enter judgment, which motion must be grounded on an affidavit that the warrant was duly executed, that the money is unpaid and the party living. Where the warrant is above twenty years old, there must be a rule to show cause served on the defendant, if he can be found within the county."

While this case has been before our courts in various aspects for a number of years, the only question now before us is whether or not the judgment should be stricken off upon the petition of the plaintiff. That a judgment may be stricken off by the court in the exercise of its sound discretion, where the defendant is the petitioner, is well established. Herman *v.* Rinker, 106 Pa. 121 (1884); Bates *v.* Cullum, 163 Pa. 234 (1894), where Justice Green, in the opinion, refers to a number of authorities.

Should the judgment be stricken off where the court rules require that when the warrant is above twenty years old a rule to show cause should first be served on the defendant if found in the county? In Emery *v.* Smith, 12 Pa. C. C. 281 (1892), Judge Dreher, in disposing of a matter where a similar rule

in Carbon county was in question, used the following language:

"The object of the rule is to prevent the annoyance and injustice to the party in the use of a warrant so old that there is some reason to suppose the defendant may have been satisfied or that the purpose for which it was given has been accomplished or served; as for instance, in a case where it was given as collateral security or indemnity; but the rule is certainly not intended to work injustice to the creditor before requiring a judgment to be stricken from the record, though the affidavit was not made before the entry of the same where the execution of the warrant and existence of the debt was admitted and the parties are living. If we should strike the judgment off the plaintiff could immediately on motion have judgment entered upon filing the affidavit. This would be a little ceremony excepting that the effect might be to jeopardize the plaintiff's claim now secured by lien, and the discharge of the rule to strike off the judgment will work no injustice to the defendant who acknowledges the debt."

In the case just cited the defendant asked to have the judgment stricken off the record, he being the person most vitally interested and the rule being for his benefit and protection. In the matter before us the defendant is not asking to have the judgment stricken off, even though her real estate was sold during her lifetime on a fi. fa. issued by the use plaintiff and bought by the use plaintiff. It appears from the record that the use plaintiff has not yet fully complied with the conditions of the sheriff's sale by paying the balance of the purchase money, less possibly the amount of her judgment and interest, so that if this judgment were stricken off, even if we had the unquestioned authority to do so, the use plaintiff would be relieved from the payment of the amount still unpaid.

The use plaintiff further alleges that she was required to pay too much for this property at the sheriff sale, and should now be relieved by the court, and this without regard to other interests that may have since intervened and after a delay of over four years in making her application.

It is also urged that the entry of the judgment being irregular the execution was irregular, and that, therefore, the judgment should be stricken off and the whole proceeding set aside. This proposition would possibly be correct if the defendant in the execution asked to have the proceeding set aside, but the plaintiff is not in a position to take advantage of the irregularity, if the defendant fails to do so. The defendant failing

to do so stands as consenting to the proceeding. Wilkinson's Appeal, 65 Pa. 189 (1870).

The use plaintiff further questions the title which she is to acquire by the sheriff's sale, claiming that it is defective because the judgment was not entered as provided for by the rule of court. In order to relieve the use plaintiff of that doubt, the court, under authority of Woods *v.* Woods, 126 Pa. 396 (1889), allows the use plaintiff to file the affidavit required by the rules of court, nunc pro tunc.

Now, Jan. 11, 1915, rule to strike off judgment discharged.

From Jas. L. Schaadt, Esq., Allentown, Pa.

Tractor Licenses.

Automobiles—Licenses from traction engines—Licenses from automobiles—Separate funds for separate uses—Acts of July 7, 1913, P. L. 672, and June 6, 1915, P. L. 926.

Receipts from licensed fees of traction engines and tractors must be paid into the state treasury, and cannot be withdrawn except as specifically appropriated by the legislature for the purpose of building and maintaining the roads of the commonwealth.

License fees received from all other classes of automobiles are governed by § 10, of act of 1913, and constitute a separate fund which is to be paid out for the purposes specified in said act on warrant drawn by the auditor-general upon requisition from the state highway commissioner.

Request of Martin G. Brumbaugh, governor of Pennsylvania, for opinion.

BROWN, Attorney-General, Nov. 19, 1915.—I have received your favor of even date, inclosing letter from the state highway commissioner, dated Nov. 10, 1915, inquiring whether receipts from automobile licenses, since June 1, 1915, are to be turned into the treasury as general revenue, to be redistributed and appropriated as directed by the general assembly, or whether they constitute a separate fund available for the use of the state highway department upon requisition of the state highway commissioner.

I beg to advise you that this very question was passed upon and decided by the Supreme Court in the case of Com. ex rel. Bell *v.* Powell, 249 Pa. 144. Section 10 of the act of July 7, 1913, P. L. 672, which was construed by the Supreme Court in that case, reads as follows: "The moneys derived from registrations and from license fees under the provisions of this

act shall be paid by the state highway department into the state treasury, for safekeeping; and shall by the state treasurer be placed in a separate fund, to be available for the use of the state highway department upon requisition of the state highway commissioner. All such moneys hereafter paid into the state treasury are hereby specifically appropriated to the state highway department, for the purpose of assisting in the construction, maintenance, improvement, and repair of state highways and state-aid highways, as described in the act creating the state highway department, approved May 31, 1911, A. D. The auditor-general shall upon requisition, from time to time, of the state highway commissioner, draw his warrant upon the state treasurer for the amount specified in such requisition, not exceeding, however, the amount in such fund at the time of making such requisition.

The Supreme Court in passing upon this section, said: "In this instance the legislature directed that after the collection by the state highway department, the fees should be paid into the state treasury for safekeeping, and should be placed in a separate fund, to be available for the use of the state highway department upon requisition of the state highway commissioner."

In answer to the suggestion that the act offended against Sec. 15, of the Constitution, which provides that "all other appropriations shall be made by separate bills, each embracing but one subject." The Supreme Court said: "It has no application to a fund created for a special purpose and dedicated by the act under which such fund is to be created, to a particular use. The appropriation of the fund so created continues as long as the act which dedicates it to a particular use, remains in force.

The court further said: "The statute does not provide that the money derived from registration and license fees shall be paid into the state treasury generally so as to become part of the general revenues of the commonwealth. The state treasury is merely made a depository for such fees. They are to be paid into it 'for safekeeping' and are to be 'placed in a separate fund,' available for the use of the state highway department. The act then expressly appropriates or dedicates the fund to be thus created to the construction, maintenance, improvement and repair of the highways."

The act of July 7, 1913, is a general act, which continues in force until repealed. The act contemplates the payment of annual license fees and appropriates the funds so received in

accordance with the provisions of § 10. The appropriation was not limited to the license fees paid under the act up to June 1, 1915, but embraced all license fees received under the act as long as it was in force, and as stated in the opinion of the Supreme Court, "The appropriation of the fund so created continues as long as the act which dedicates it to a particular use, remains in force."

I therefore beg to advise you that the moneys paid for automobile licenses which were received after June 1, 1915, no less than those received prior thereto, are to be paid by the state highway department into the state treasury for safekeeping, and shall by the state treasurer be placed in a separate fund, to be available for the use of the state highway department upon requisition of the state highway commissioner and are to be expended for the purpose of assisting in the construction, maintenance, improvement and repair of state highways and state-aid highways, and that upon requisition from time to time of the state highway commissioner, the auditor-general is required to draw his warrant upon the state treasurer for the amount specified in such requisition, not exceeding, however, the amount in such fund at the time of making such requisition.

I desire to call your attention, however, to the fact that fees received from licenses for traction engines and tractors, which were formerly included under the act of July 7, 1913, are now provided for by the act of June 8, 1915, P. L. 926. The language in this act is different from that relating to automobiles generally. Section 12 provides as follows: "The moneys derived from registrations and from license fees under the provisions of this act shall be paid by the state highway department into the state treasury, for the purpose of building and maintaining the roads of the commonwealth, and to be used as appropriated by the legislature from time to time."

I beg to advise you therefore, that receipts from license fees of traction engines and tractors must be paid into the state treasury and cannot be withdrawn except as specifically appropriated by the legislature for the purpose of building and maintaining the roads of the commonwealth. License fees received from all other classes of automobiles are governed by § 10, of the act of July 7, 1913, above, and constitute a separate fund which is to be paid out for the purposes specified in said act on warrant drawn by the auditor-general upon requisition from the state highway commissioner.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Spielman *v.* Spielman.

Divorce—Adultery—Evidence—Condonation.

In a divorce proceeding on the ground of adultery, libelant must prove a stronger case than suspicion, and in admissions by respondent there must be sufficient evidence to find that the respondent was guilty of the offense charged. Living together after a knowledge of facts depended upon for getting a divorce is a condonation of any offense of which libelant had evidence.

In divorce. C. P. Allegheny Co. July T., 1915. No. 1623.

Joseph Schutzman, for libelant; *Charles Gulentz,* master.

EVANS, J., Oct. 8, 1915.—I have examined the testimony in this case carefully, and while there is lots of suspicion as to the husband's conduct, and it is entirely possible that he was guilty of adultery, yet outside of the wife's testimony as to his admissions of guilt, there is no evidence other than suspicion; and it will be observed that the libelant testified that Mrs. Dora Kinskey had heard her husband admit his intimacy with other women, but Mrs. Kinskey's testimony did not bear that out; she testified that she heard Mrs. Spielman charge her husband, and that his reply was "he couldn't blame her for being angry at him." That is certainly not an admission of adultery. But even if there were sufficient evidence from which to find the respondent was guilty of adultery, the libelant had all the information in the summer of 1904 that she had at the time she gave her testimony in the case, and yet she lived and cohabited with her husband until May 25, 1915. That was certainly condonation of any offense of which she had the evidence.

We thoroughly agree with the master in this case that a divorce ought not to be granted.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Darlington *v.* Darlington.

Divorce—Desertion—Living in another state at the time—Reasonable cause.

Respondent in a divorce proceeding was served personally, but failed to appear. The evidence before the master showed that respondent had deserted his wife while they were living at their summer home in New York. Immediately after the desertion, respondent returned to Pittsburgh, closed their residence, changed the locks and ordered that his wife be not admitted. The wife later came to Pittsburgh and has been living there since.

[Darlington v. Darlington.]

Held, that it was immaterial that the desertion took place in another state while the parties were located there temporarily and the fact that they had lived in Allegheny county since the desertion gave the court jurisdiction. Decree granted.

In divorce. C. P. Allegheny Co. April T., 1915, No. 557.

Patterson, Crawford, Miller & Arensberg and *Jerome, Rand & Kresel,* for plaintiff.

No appearance for defendant.

FORD, J., Nov. 17, 1915.—This is a libel in divorce filed by Lefreda Weir Darlington, wife of Harry Darlington, Jr. The libel charges that the said Harry Darlington, Jr., has been guilty of wilful, malicious and continued desertion from the habitation of the petitioner, without reasonable cause, for and during the term and space of more than two years; to wit, from July 18, 1913, to the present time.

On Jan. 25, 1915, the subpœna granted thereon was personally served on the respondent, Harry Darlington, Jr., who neither appeared nor filed an answer. Thereafter on July 19, 1915, D. C. Dillon was appointed master. Notice of the time and place of the hearing to be held before the master was personally served upon respondent.

On Oct. 22, 1915, the master filed his report, wherein he stated his opinion as to the sufficiency and legality of the libel, the legality of the service, and recommended that a divorce be granted as prayed for, and gave his reasons therefor. After the lapse of ten days, the cause was placed upon the general argument list. No exceptions to the report or to the findings of fact and recommendations of the master were taken or filed by the respondent.

As is required in proceedings in divorce, we have reviewed and carefully considered the testimony and all the facts in the case.

From the evidence it appears that the parties, libelant and respondent, were lawfully married on Sept. 22, 1908. They have one child who has been and now is in the care of and custody of the libelant. From November, 1908, until July 18, 1913, the parties resided in the city of Pittsburgh. In the summer of 1913, Harry Darlington, Jr., the respondent, accompanied by his wife and child visited Locust Valley in the state of New York, for the purpose of there passing the summer months. This was their usual method of taking summer vacations. While at this place, the respondent, without any explanation, left his wife and has not since communicated

with her nor has he offered to resume marital relations. Since July 18, 1913, the respondent has resided in the city of Pittsburgh. The libelant remained in the summer residence at Locust Valley until the expiration of the lease in the following fall, when she was necessitated to take a temporary home with her mother, who resided in Locust Valley. The parties, libelant and respondent, have not co-habited together as husband and wife since July 18, 1913.

In leaving his wife, the respondent was without a reasonable cause, there was no quarrel or misunderstanding between them, and that his leaving and his continued absence was contrary to the desire and wish of the libelant, is manifest from the evidence. Subsequent to leaving, the respondent communicated with employés and requested certain personal effects by him left at the summer home; her letters, one relating to the christening of their child, one respecting a certain printed statement respecting her, and other communications including telegrams sent by her to him were not answered. Shortly after his return to Pittsburgh, he closed the house in which they had formerly resided, changed the locks, and gave directions not to admit the wife. Personally and through the medium of counsel the libelant endeavored to effect a reconciliation, but the respondent made no reply and continued in his wilful desertion.

At the time of the desertion, the parties resided in the city of Pittsburgh. The fact that the desertion took place in Locust Valley is immaterial. Neither of the parties contemplated taking up Locust Valley as a place of residence. It was their temporary home, the lease for the house by its terms terminated in the fall, and, as theretofore had been their custom, it was the intention of the parties to return to their place of residence in the city of Pittsburgh. The husband returned to Pittsburgh and, thereafter until the hearing before the master, he continuously resided in said city.

We therefore conclude that the libelant is undoubtedly a resident of the state of Pennsylvania, and that her domicile and residence has been in the city of Pittsburgh, county of Allegheny, state of Pennsylvania, for more than a year prior to the filing of the libel in divorce, which satisfied the requirements of the act of assembly giving jurisdiction in such cases. That the respondent, Harry Darlington, Jr., wilfully and maliciously deserted his wife, the libelant, and absented himself from her habitation without a reasonable cause for and during the space of two years, and upwards.

It follows, therefore, that a decree should be entered dissolving the bonds of matrimony between these parties and giving to the libelant a divorce from the respondent, upon the grounds of desertion, in accordance with the act of assembly, and that the respondent should pay the costs of this proceeding, which is so ordered.

From Thomas Ewing, Esq., Pittsburgh, Pa.

McIntyre's Estate.

Decedents' estates — Widow's exemption — Husband and wife—Acts of April 14, 1851, P. L. 612, and July 21, 1913, P. L. 875.

A widow is entitled to the exemption of $300 from her husband's estate under the acts of April 14, 1851, P. L. 612 and July 21, 1913, P. L. 875, where although maintaining the relation of husband and wife, they never lived in a common household, because of the husband's poverty.

A widow's exemption takes priority of debts, but not of costs of administration.

Petition to set aside widow's exemption, answer and proofs. O. C. Philadelphia Co. April T., 1915, No. 301.

Wescott, Wescott & McManus, for petitioner;
W. H. Twibill, contra.

GUMMEY, J., Jan. 26, 1916.—The petitioner, who is the widow of the testator, having elected to retain out of the real estate of which he died seized property to the value of $300, and the executor having refused to appraise the real estate in accordance with the acts of assembly in such case made and provided, files this petition for relief; and the answer of the executor, while admitting that the petitioner is the testator's widow, denies her right to relief, alleging that she deserted him in 1906 and continued such desertion until the time of his death.

An examination of the testimony taken before the examiner shows that the testator and the petitioner were lawfully married in Philadelphia in the year 1893; both had been married before, and at the time of their marriage to each other, he was a widower and lived with his children at No. 1629 Bainbridge street, and she was a widow and lived with her daughters at No. 1519 Federal street. They never established a common household, but after their marriage continued to reside as be-

fore, he with his children and she with hers; but that they consummated the marriage cannot be doubted, as until about the year 1906 he was a constant visitor at her home, spending many nights there—her testimony being to the effect that he came to her house every night, would remain all night and would go back to his children's home in the morning; while the testimony of the testator's children, whose interests are adverse to those of his widow, was to the effect that until the year 1906 he spent one night a week at her home. That the testator did not visit his wife so frequently after the year 1906 (or, as testified by one witness, 1908) may be conceded, but that he continued to visit her after that date and with reasonable frequency is established by the evidence. The petitioner testified that, after 1906, the only difference in the relationship they maintained toward each other was that when the testator visited her, he did not expect to spend the night at her house; that in August, 1909, testator went with her to Atlantic City, where they stayed about ten days, and that on her return from Ireland in November, 1911, testator visited her three or four days later. The testimony of the widow is corroborated by that of her two daughters, one of whom testified that she was present when the testator visited her mother at No. 1519 Federal street in the year 1913. There is, therefore, no evidence whatever of a desertion on the part of the widow; on the contrary, there is more ground for charging desertion against her husband, for, notwithstanding her request that he make a home and some provision for her, he declined to do so, evidently for lack of funds. In the language of the witness, "he could not do it"; and while at one time he agreed to give her $16 a month, he paid her but one month's allowance in full (and this in two installments of $8 each), gave her $7 the second month, $7 the third month and then ceased his payments altogether; and if, as contended, there was an interruption in the family relation, caused by the refusal of the petitioner to entertain the testator at her home as frequently as theretofore, it is clear from a reading of the testimony that the provoking cause was the failure of the testator to make for his wife a proper provision; besides which the petitioner's refusal "to take him back" and her declaration that "he had me long enough for him to make a home for me now" occurred about 1910, subsequent to which he visited her on her return from Ireland in 1911, and continued to visit her as late as 1913.

It has been held that the reasonable cause which would

justify a wife in the abandonment of her husband without forfeiting her right to appropriate $300 out of his estate must be such as would entitle her to a divorce (see Myer's Est., 24 Pa. Super. Ct. 142; Creighton's Est., 21 Pa. C. C. 83; Nye's Appeal, 126 Pa. 341); and, conversely, it may be argued that a husband, by deserting his wife, may not cause her to lose her right to the exemption when he abandons her for reasons which would not entitle him to a divorce; measured by this standard, we find nothing in the record before us to justify us in refusing the petitioner's claim. As we said in Wright's Est., 5 Pa. C. C. 228, "In legal contemplation the family relation may be in full force when no outward indication marks its existence"; and in Terry's Appeal, 55 Pa. 344, it was held that the conjugal relation may continue to exist although cohabitation may be suspended; and the averment by the testator in his will, that he made no mention of his wife because of her cruel, inhuman and unwifely treatment of him culminating in her base desertion of him nine years ago, is of little weight in the light of the evidence. Finding, therefore, as we do, that the petitioner, as the widow of the testator, is entitled to receive the exemption of $300 allowed her by the act of April 14, 1851, P. L. 612, and its supplements, it necessarily follows that it is the duty of the executor to have the property she has selected appraised and set aside for her use "by the appraisers appointed to appraise the other personal estate of the decedent," in accordance with the provisions of the supplement of July 21, 1913, P. L. 875, and this he should do forthwith; in the event of his failure to do so leave is given to apply for such order in the premises as the circumstances may require.

We also have before us in these proceedings a petition by the examiner for the payment of his fee and expenses, aggregating $115, to the amount of which no objection is made by either of the contending parties; but it is submitted by the executor that they should be paid by the petitioner, while she on her part contends that they should be paid by the executor personally. A widow's exemption takes priority of debts, including undertaker's expenses (Luke's Est., 17 Phila. 517; Spencer's Appeal, 27 Pa. 218), but, of necessity, costs of administration are payable in advance of all other claims, including the widow's exemption, because, as we pointed out in Weir's Est., 20 Phila. 146, they are incurred in the ascertainment of the amount of the estate, without which the estate itself can scarcely be said to have a legal existence. In the

present instance, however, it appears that the executor has in his hands but $130.50 out of which to pay the cost of filing an account, a fee to his counsel, and perhaps other necessary expenses; so that, under the particular facts of this case, we have reached the conclusion that it will be well to leave the question of the payment of the examiner's fees and expenses to the judge who audits the executor's account, at which time the testator's creditors (whose claims, it was represented, amount to about $400) will have an opportunity to be heard.

Snyder County *v.* Wagenseller.

Public officers—Compensation—County treasurer—Commissions on liquor license fees.

A county treasurer is not entitled to retain commissions on liquor license fees collected by him.

Constitutional law—Title of act—Act of June 9, 1891, P. L. 248—Liquor laws—Collection of license fees.

The act of June 9, 1891, P. L. 248, amending § 8 of the act of May 13, 1887, P. L. 108, is not defective in title, and is constitutional.

Case stated. C. P. Snyder Co. Dec. T., 1915, No. 17.

Charles P. Ulrich, for plaintiff.
E. E. Pawling and *H. M. McClure,* for defendants.

JOHNSON, P. J., Feb. 12, 1916.—The facts agreed upon in this case and submitted to the court show that George C. Wagenseller, treasurer of Snyder county, received $480 liquor license fees for the borough of Selinsgrove in April, 1892, and paid over to the treasurer of said borough $456 and retained $24 as commissions, being five per cent. of said $480. That as said treasurer he received $480 liquor license fees for the borough of Selinsgrove in April, 1893, and paid over to the treasurer of said borough $456, and retained $24 as commissions, being five per cent. of said $480, and that he still retains $24 for each of said years, or in all $48. The question is therefore submitted for the determination of the court whether the said George C. Wagenseller, as treasurer of Snyder county for the years 1892 and 1893, had a legal right to retain $48 as aforesaid.

If the court shall be of the opinion that the said George C. Wagenseller as treasurer aforesaid had no legal right to retain said commissions, then judgment is to be entered in favor of

the plaintiff in the sum of $48 with interest from July 26, 1915. If the court shall be of the opinion that the said George C. Wagenseller as treasurer aforesaid had a legal right to retain said commissions, then judgment is to be entered in favor of the defendant.

It has been clearly decided by our courts that a borough has the right to receive its proportion of the money collected for liquor licenses under the act of June 9, 1891, P. L. 248, without abatement for commissions to the county treasurer.

The main contention of the defendant is that the act of June 9, 1891, P. L. 248, amending § 8 of the act of May 13, 1887, P. L. 108, is unconstitutional so far as it deprives the county treasurer of the compensation allowed by the act of 1887, for the reason that this provision is not clearly expressed in the title of the amending act. But the act of June 9, 1891, has been decided to be constitutional, as will be noted in the cases herein cited.

It was held by Judge Metzger, in Fowler *v.* Columbia County, 18 Pa. C. C. 653, that "§ 8 of the act of May 13, 1887, relating to license fees, was repealed by the act of 1891, P. L. 248, in so far as it was not reënacted by the later act." In Schuylkill Haven Boro. *v.* Schuylkill County, 10 D. R. 494, it was held by Judge Shay that "the county treasurer has no authority to charge and retain for the use of the county a commission on money received for liquor licenses. The borough is entitled to receive its full share, with no deduction for commission." In Kittanning Boro. *v.* Mast, 15 Pa. Super. Ct. 51, it was held that money collected by a county treasurer for the use of a borough which represents liquor license fees must be paid over by such treasurer to said borough without any deduction of fees for services rendered. On page 54, Judge Orlady, delivering the opinion of the court, said:

"Section 8 of the act of May 13, 1887, P. L. 108, provided 'that all persons licensed to sell at retail any spirituous, vinous, malt or brewed liquors, or any admixture thereof . . . shall be classified and required to pay to the city or county treasurer annually for such privilege, certain specified sums for the use of the commonwealth, counties, cities, boroughs and townships. Provided that counties, cities, boroughs and townships, receiving part of said license, shall bear their proportionate share of the expenses attending the collection of the same.' The distribution of the money received from this source was changed by the act of June 9, 1891, P. L. 248, . . . the whole of § 8 being dealt with, and it is amended so as to read as follows:

'The money to be required to be paid annually for the privilege of selling liquors and admixtures thereof at retail is directed to be paid to the treasurers of the respective counties, and a designated proportion thereof for the use of the cities, counties, boroughs and townships.' No reference is made to the proviso of the act of 1887, above stated, and its omission from the latter act is conclusive evidence of the legislative intention to exempt cities, counties, boroughs and townships from their 'proportionate share of the expenses attending the collection of the same.'" And further, on page 56, "The amount to which the borough is entitled to receive is definitely stated in the act of 1891 to be 'one fifth of the amount of the license', and this is not to be abated by the per centum of the county treasurer or any other expense incident to its collection. In Schuylkill County *v.* Pepper, 182 Pa. 13, the question before the court was as to the right of a salaried county treasurer, in a county containing over one hundred and fifty thousand inhabitants, to retain in his settlement with the county auditors commissions for services rendered such boroughs and townships which were in no way connected with his official duty to the county, and it was therein held that he could not do so. While the Supreme Court says in that case that 'the plain letter of the law and public policy demand that the commissions retained by the treasurer out of the boroughs,' townships' and counties' portion should be turned into the county treasury, because he received them as a county treasurer', we do not interpret it as deciding that the county treasurer is authorized, after deducting one fifth of the amount of the license for the use of the county, to make any further deduction from the balance which by the act of 1891 is directed to be paid 'to the treasurer of the respective borough for its use.'"

In Allentown *v.* Hartman, 22 Pa. Super. Ct. 400, it was held that moneys collected by a county treasurer for the use of a city which represent liquor license fees, must be paid over by the treasurer to the city without any deduction of fees for services rendered. This question has been flatly decided in Stroudsburg Boro. *v.* Shick, 24 Pa. Super. Ct. 442, where it was held that a borough has a right to receive its proportion of the money collected for retail liquor license under the act of June 9, 1891, P. L. 248, without abatement for commissions of the county treasurer. On page 444, Judge Smith, delivering the opinion of the court, said: "The main contention of the appellant, however, is that the act of June 9, 1891, P. L.

248, amending § 8 of the act of May 13, 1887, P. L. 108, is unconstitutional, so far as it deprives the county treasurer of the compensation allowed by the act of 1887, for the reason that this provision is not clearly expressed in the title of the amending act. In the cases heretofore decided by this court, involving the treasurer's right to these commissions this question does not appear to have been considered.

"The purpose of the constitutional provision on this subject does not require that the courts should be astute in searching out reasons for pronouncing an act of assembly unconstitutional. 'It will not do to impale the legislation of the state upon the sharp point of criticism, but we must give each title a reasonable interpretation. If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary.' Appeal of Allegheny County Home, 77 Pa. 77. A still more liberal construction is given to the titles of supplemental and amendatory acts. 'In the case of a supplement, where the subject of the original act is sufficiently expressed in its title, and where the provisions of the supplement are germane to the subject of the original, the true rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, and declares it to be a supplement thereto.' Appeal of State Line & Juniata R. R. Co., 77 Pa. 429. In re Pottstown Boro., 117 Pa. 538; Downingtown Gas & Water Co. *v.* Downingtown Boro., 193 Pa. 255. When the subject of the original act is clearly expressed in its title, 'an act entitled a supplement thereto has a sufficient title to cover any matter within the purview of the original, and which might properly have been embraced therein.' In re Pottstown Boro., supra.

The title of the act of 1887 is, "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixtures thereof." The act contains nineteen sections, all obviously germane to the title. Section 8 fixes the sums to be paid for licenses; and the disposition to be made of the moneys; and commissions are claimed by the defendant here under the following clause: "Provided, that counties, cities, boroughs and townships, receiving parts of said license, shall bear their proportionate share of the expense attending the collection of the same." The act of 1891 is entitled, "An act to amend § 8 of the act entitled, 'An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors, or any admixture thereof,' approved May 13, 1887,

providing that the license money shall be paid into the treasury of the city, county, borough and township wherever the licensed places are situated, and increasing the amount of license to be paid in cities of the first and second class." The act itself, after citing for amendment § 8 of the act of 1887, amends it by reënacting the section, with an increase of the license taxes in cities of the first and second classes; changes in the proportion payable to the local beneficiaries, without giving any part to the state; and omitting the clause providing for payment by the local beneficiaries of proportionate shares of the expense of collection, thus leaving no provisions for commissions to the treasurer. The question raised here is whether this omission is expressed in the title, within the meaning of the constitutional provision on the subject.

Every amendatory act is in its nature a supplement to the original act, whether so described or not, and in the construction of its title must be deemed such. Had the act of 1891 been described in its title as a supplement to the act of 1887, without more, it would have been sufficient, the provisions of the supplement being germane to the title and subject of the original act. Whether a description in its title as an act to amend § 8 of the act of 1887, without more, would have been sufficient, we need not here inquire, since a clause is added relating to the character of the amendment. It is not necessary that such a clause should be an index to the amendment. When the title describes an act as a supplement or an amendment, and follows with a reference to the scope of its provisions, the chief constitutional requirement is that such reference shall not be misleading; it must be such as will by a reasonable construction fairly give notice of the subject of the act. The title of the act of 1891 substantially satisfies these conditions. Not only has it no tendency to mislead, but its reference to license taxes as its subject is reasonably sufficient to challenge the attention of all who may be interested in such taxes, whether as licensees, collectors or beneficiaries; and its reference to the act as one providing that the license money shall be paid into the treasury of the city, county, borough or township wherever the licensed places are situated, reasonably indicates an intention to provide that the whole amount of license money shall be thus paid, without requiring the beneficiaries to bear their proportionate shares of the expense of collection as under the act of 1887. It points to this with such directness as reasonably to lead to inquiry into the body of the bill by all who may be in any way interested in

the disposition of the license money. And its title, describing the act as an amendment of § 8 of the act of 1887, is sufficient to cover anything within the purview of that section that might have been embraced therein, its further reference to the scope of the amendment containing nothing calculated to mislead. The clause respecting the expense of collecting could have been omitted from § 8 without affecting the constitutionality of the act; and the language of the act of 1891 might properly have been substituted for § 8 of the act of 1887. This section and the act of 1891, are alike germane to the title and the subject of the act of 1887, and the subject of the supplement is expressed in its title with sufficient clearness to reasonably lead to inquiry into its purpose through an examination of the bill.

In Pittsburgh *v.* Anderson, 194 Pa. 172, it was held that the proportion of liquor license fees given by the act of 1887, P. L. 108, and of 1891, P. L. 248, to cities, is not a gift by the state, but an acknowledgment of the cities' equitable claim and a positive relinquishment of the commonwealth's legal right thereto. County treasurers receive it for, and pay it over to, not the state, but the cities.

In Krzykwa *v.* Croninger, 200 Pa. 359, on page 362, it was said by Justice Brown: "By the act of June 9, 1891, P. L. 248, amending the act of May 13, 1887, P. L. 108, regulating the sale of liquors, four fifths of the license fees paid for licenses in townships are to be paid to the township treasurers, to be applied to keeping the roads in good repair."

There is no reflection whatever on the several treasurers of Snyder county for retaining commissions on license fees collected in the borough of Selinsgrove. They no doubt retained these commissions honestly, believing that the law allowed them to do so. But under the facts agreed upon and the decisions of the courts we are obliged to hold that the borough of Selinsgrove is entitled to the full amount of license fees collected without any deductions of commissions for services rendered.

And now, Feb. 12, 1916, judgment is entered on the case stated in favor of the plaintiff and against the defendant for $48 with interest from July 26, 1915, and costs.

It is also agreed by the parties that if judgment is entered for the plaintiff and against George C. Wagenseller, that the court shall, at the same time, enter judgment for the plaintiff and against the following named parties in the several sums mentioned; and therefore:

Judgment is entered for the plaintiff and against Charles C. Seebold in the sum of $72 with interest from July 26, 1915, and costs.

Judgment is also entered for the plaintiff and against Benneville Smith in the sum of $72 with interest from July 26, 1915, and costs.

Judgment is also entered for the plaintiff and against D. N. App in the sum of $72 with interest from July 26, 1915, and costs.

Judgment is also entered for the plaintiff and against H. W. Boyer in the sum of $54 with interest from July 26, 1915, and costs.

Judgment is also entered for the plaintiff and against W. A. Napp in the sum of $48 with interest from July 26, 1915, and costs.

From M. I. Potter, Esq., Middleburg, Pa.

Commonwealth v. Skirball.

Criminal law—Summary conviction—Moving pictures—Uncensored reels—Term "reel" defined—Act of May 15, 1915, P. L. 534.

The word "reel" used in § 2, act of May 15, 1915, P. L. 534, means one reel; a subject comprising five reels cannot be a single reel.

S. was convicted before the alderman of leasing a certain motion picture subject comprised of five reels without having been approved by the state board of censors. The alderman imposed a fine of $125, which was the minimum fine of $25 for each reel. The defendant appealed from the judgment on the ground that the leasing of the five uncensored reels constituted but one offense. Held, that the leasing of each uncensored reel constituted a separate and distinct offense, and therefore dismissed the appeal.

Appeal from summary conviction. C. C. Allegheny Co. No. 1285.

Horace W. Davis, deputy attorney-general, for commonwealth.

James E. Hindman, for defendant.

DREW, J., Dec. 22, 1915.—This case arose under the act of May 15, 1915, P. L. 534, which is entitled, "An act relating to motion picture films, reels, or stereopticon views or slides, providing a system of examination, approval and regulation thereof, and of the banners, posters and other like advertising matter used in connection therewith; creating the board

of censors; and providing penalties for the violation of this act."

The defendant was convicted of violating § 2 of this act, which reads as follows: "It shall be unlawful to sell, lease, lend, exhibit or use, any motion picture film, reel or view, in Pennsylvania, unless the said film, reel or view has been submitted by the exchange, owner or lessee of the film, reel or view and duly approved by the Pennsylvania State Board of Censors, hereinafter in this act called the board."

The defendant was convicted before Alderman Louis Alpern of leasing a certain motion picture subject, entitled "Second in Command." This subject comprised five reels and was leased by defendant without it having been approved by the state board of censors.

The act further provides, in § 27: "Any person who violates any of the provisions of this act, and is convicted thereof summarily before any alderman, magistrate or justice of the peace, shall be sentenced to pay a fine of not less than $25, nor more than $50, for the first offense."

Alderman Alpern imposed a fine of $125 upon defendant, which was the minimum fine of $25 for each reel so leased and exhibited.

From this judgment the defendant appealed on the ground that the leasing of the five uncensored reels constitutes but one offense, and that the maximum fine which can be imposed under the act is $50. The commonwealth contends that the leasing of each uncensored reel constitutes a separate and distinct offense.

This act is a penal statute and must be construed strictly, and according to its letter. It is to be interpreted according to its language, and not extended beyond its obvious meaning by strained inferences.

With these general principles in mind, how shall we interpret the law under consideration? A reference to different sections of the act will give some help.

Section 1. Be it enacted, etc., that the word "film" used in this act means what is usually known as a motion-picture film.

The word "view" used in this act means what is usually known as a stereopticon view or slide.

The word "person" includes an association, copartnership, or a corporation.

Section 6. The board shall examine all films, reels or views and shall approve such films, reels or views which are moral and proper.

Section 7. Upon each film, reel or view approved, there shall be stamped a seal.

Section 8. The board shall keep a record of all examinations; noting on the record all films, reels or views which shall have been disapproved.

Section 17. For the examination of each film, reel or set of views of one thousand two hundred lineal feet, or less, the board shall receive a fee.

Section 24. Every person intending to sell, lease or use any film, reel or view, shall furnish the board a description of the film, reel or view and the purpose thereof; and shall submit the film, reel or view for examination.

Section 26. If any elimination of a film or view is ordered, the persons submitting such film, reel or view shall receive immediate notice thereof.

The expression "reel or reels" is not used in the act. The singular word is used, except in §§ 6 and 29, and in all other sections is prefaced by the words "any," "all," "each," "such" or "the."

The Century Dictionary and Cyclopedia says: "In affirmative sentences, any, being indeterminate in application, in effect has reference to every unit of the sort mentioned, and thus may be nearly equivalent to every."

In "Words and Phrases," Vol. I, page 412, is found the following legal definition of the word "any": "Johnson says the word 'every' means each one of all, and the same great lexicographer defines 'any' to mean 'every,' and says it is, in all its senses, applied indifferently to persons or things."

We are satisfied that the word "reel" as used in § 2 means one reel. The word is singular and is prefaced by the word "any." The use of the same word in other sections of the act, where there is no room for doubt, helps to this conclusion. If the legislature had wished any number of reels to be considered a reel they would have said so. It would be placing a very forced interpretation upon the meaning of the word "reel" to say it means more than one reel.

We are convinced that the defendant was guilty as charged and was liable to a fine of $25 for each of the five reels he leased. The leasing of each uncensored reel constituted a separate and distinct offense.

We have carefully examined the law as expressed in the case of Buckwalter *v.* United States, 11 S. & R. 192; Com. *v.* Shirley, 152 Pa. 170, and Com. *v.* Cooke, 50 Pa. 201, and are in full accord with these decisions.

The judgment of the alderman, Louis Alpern, in this case, is now affirmed, and the appeal taken from that judgment is dismissed. The defendant to pay the costs.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Thompson *v.* Blaisdell

Interpleader—Sheriff's interpleader—Possession.

Where a claimant in a sheriff's interpleader has possession of the property under a bill of sale, and also by purchase at a constable's sale for rent, he is not affected by the fact that there was no change of possession when he took title, if it appears that there was no controversy between the claimant and the original owner, and that no title of any sort had been in the execution defendant.

Motion for judgment non obstante veredicto. C. P. No. 3, Philadelphia Co. March T., 1914, No. 2514.

Carr, Beggs & Steinmetz, for plaintiff.

FERGUSON, J., Nov. 27, 1915.—This is an interpleader to test the ownership of personal property. A verdict was rendered for the claimant, and we have before us a motion for judgment for the Blaisdell Machinery Company, plaintiff in the execution, non obstante veredicto.

It appears from the evidence that Calvin C. Williams was the owner of certain real estate, and Wyn D. Williams occupied the same. Wyn D. Williams had in the building a large amount of machinery belonging to and operated by him in his business. Being indebted to Thomas M. Thompson, the claimant in this case, Wyn D. Williams, in the year 1909, by a bill of sale, sold the machinery, boilers and engines, etc., located in the premises to the said Thompson in part payment of the indebtedness due. Immediately thereafter Thompson leased the machinery to Williams. No change of possession took place, and the machinery was operated by Williams as it had been before. Subsequently, that is, on or about May 3, 1914, because of failure to pay the rent, Thompson caused a distress to be levied upon the machinery which had been previously sold to him and bought the same in at the constable's sale. In addition, he bought a few articles of office furniture which probably were not included in the bill of sale. The machinery remained in the building and Williams continued in possession thereof with Thompson's consent.

Calvin C. Williams purchased the real estate on July 5,

1912, and after placing a mortgage thereon conveyed the title to the Victor Vacuum Cleaning Company, the defendant, subject to the mortgage. In 1914 foreclosure proceedings were had on that mortgage, and the real estate was sold by the sheriff and bought in by the plaintiff Thompson. During all this period of time Wyn D. Williams was an occupant of the building and was operating the machinery previously sold to Thompson.

Execution was issued by the Blaisdell Machinery Company against the Victor Vacuum Cleaning Company, and one piece of machinery, which had never been owned by either Williams or Thompson, was sold. The other machinery seized in execution was claimed by Thompson. Interpleader proceedings followed, and the issue tried before the jury was the ownership of that personal property.

It is contended that judgment should be entered for the Blaisdell Machinery Company, the plaintiff in the execution, notwithstanding the verdict. It is urged that the original sale of machinery from Williams to Thompson was fraudulent, in that, though there was a bill of sale, the possession still remained in Williams, citing Clow *v.* Woods, 5 S. & R. 275; Young *v.* McClure, 2 W. & S. 147; Dewart *v.* Clement, 48 Pa. 413. It is also urged that there can be no distress under a lease of personal property, citing Com. *v.* Contner, 18 Pa. 439, and that the sale by Thompson of that personal property under his distress for rent conveyed no title.

We cannot concur in either of these views. If Williams was the defendant in the execution, these matters would be vital. The authorities cited might support the contentions made, if the plaintiff in the execution had levied upon personal property upon a judgment against Williams; but the judgment is not against Williams, and as between Williams and Thompson there is no controversy. Thompson claims that he obtained title from Williams, first, by bill of sale, and, second, as a result of the constable's sale for rent. Williams concedes Thompson's ownership. There is not a word of evidence showing that the machinery was at any time in the possession of the Victor Vacuum Cleaning Company, or that the plaintiff, by any acts or omissions, misled the plaintiff in the execution to believe the Victor Vacuum Cleaning Company was the owner. This applies as well to the machinery, the subject-matter of the sale and distress, and the office furniture sold to Thompson by the constable.

There was no attempt to show that Williams was in any

way identified with the Victor Vacuum Cleaning Company, or that the personal property in question was used by the last-named company or was at any time in its possession. The only persons shown to have any interest in this property were Thompson and Williams. Had title of any sort been in the defendant in the execution and it had attempted to sell the same to Thompson while retaining possession thereof, the execution creditor might be in a position to urge the principles of law invoked in its behalf.

In our opinion there was error in directing a money verdict. The claimant was in possession of the personal property at the time of the execution, and is still in possession by himself or his lessee, Williams. Under these circumstances we think a verdict for him was proper without any value being placed upon his property. Had the verdict been for the plaintiff in the execution, while the goods remained in the possession of Thompson, the money verdict would have been necessary. This is a matter, however, which we can correct by a modification of the verdict.

The motion for judgment is overruled.

Telephone Labor Cases.

Labor law—Female labor act of July 25, 1913, P. L. 1024, applied to the telephone industry—Creation of telephone Sundays.

So long as a telephone employé is not required nor permitted to work more than six days in any one calendar week beginning with Sunday, and is not required or permitted to work more than fifty-four hours in any one calendar week beginning with Sunday, and is not required or permitted to work more than ten hours in any one day (of twenty-four hours), the female labor act of July 25, 1913, P. L. 1024, is sufficiently complied with in object, purpose and spirit.

Request of John Price Jackson, commissioner of labor and industry, for opinion.

BROWN, Attorney-General, Aug. 9, 1915.—Answering your communication of recent date, in which you refer to the communication from the Bell Telephone Company in which an opinion is requested as to the validity of certain schedules of employment therein proposed, I beg to advise as follows:

The female labor act of July 25, 1913, provides for one day of rest in every seven consecutive days. The existing regulations of the telephone company, as stated, provides that

under no conditions are female employés required to work more than six days, or more than fifty-four hours in any calendar week, or more than ten hours in any one day. It is also stated that the normal duty for telephone operators does not exceed eight hours, and in some cases seven hours, depending upon the period of the day the duty commences.

It must be borne in mind that the telephone industry differs somewhat from other industries in that its operations must go on without cessation, night and day, and seven days per week. The work to be performed is a matter over which the company has no control, and it is in duty bound to provide at all times an adequate operating force to handle whatever volume of traffic the public may originate at any given period.

It is further stated that the volume of traffic on Sundays is seldom more than one half of the traffic on week days, and this makes it feasible for the company to so plan its affairs as to ask Sunday duty of any given individual operator not more frequently than every other Sunday, and quite often not more frequently than one Sunday in three, or one Sunday in four. Accordingly, different sets of employés work on different Sundays.

Apparently the only feasible plan under which telephone operators could work no more than six consecutive days in any seven, as literally required by the act, and could have a seventh day entirely free from duty, would be the condition under which one set of employés, consisting quite often of half the force, would work all the Sundays and each individual operator of this portion of the force would get the same week day off duty each week. The remainder of the force would never, or seldom, work Sundays, and would therefore practically have Sunday as their day off duty each week.

It is true that if the humane feature of the act were alone to be considered, one would be obliged to conclude that the act ought to be literally followed, and that it made no difference on what day of the week the day of rest fell, that the only object sought to be accomplished was that each female employé should have one day of rest in every seven consecutive days. However, I feel that there is a human element, as well as a humane element, involved. In other words, one cannot disregard the fact that Sundays mean much to these young women, and that it is a day on which they look after their social and religious activities, as they very properly should.

Undoubtedly, the legitimate object and purpose of the act of assembly is to provide for the health, comfort and happi-

ness of women employés. While, however, the act in words requires one day of rest in seven consecutive days, the schedule proposed by the telephone company provides for one day of rest in each calendar week, so that the operators may have a maximum number of Sundays off duty.

So long as an employé is not required nor permitted to work more than six days in any one calendar week, beginning with Sunday, and is not required or permitted to work more than fifty-four hours in any one calendar week, beginning with Sunday, and is not required or permitted to work more than ten hours in any one day (of twenty-four hours), the female labor act of July 25, 1913, P. L. 1024, is sufficiently complied with in object, purpose and spirit, and so all legislation of this character must be considered and the questions arising thereunder determined.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Bowman.

Public officers—Appointment—Removal—Vacancy—Mercantile appraiser—County commissioners.

County commissioners have no power to appoint one of their own number to the office of mercantile appraiser where the person appointed participates in the election and votes for himself.

County commissioners having the power to appoint a mercantile appraiser, have the constitutional power to remove him.

The appointment of a mercantile appraiser by the county commissioners operates as a removal of a person in the office, although such person had not actually resigned or been removed by any formal action of the board.

Quo warranto. C. P. Clearfield Co. Feb. T., 1916, No. 269.

Cole & Hartswick, for commonwealth.
A. O. Smith, Liveright & Krebs, for H. L. Bowman.

BELL, J., Jan. 21, 1916.—In this proceeding James Hall, alleging that he has been legally appointed mercantile appraiser of Clearfield county, brings this proceeding by writ of quo warranto against H. L. Bowman, averring that H. L. Bowman has possession of the books, papers and data belonging to the office of mercantile appraiser and refuses to deliver up the same, and has usurped the office of mercantile

appraiser and is using the franchises, rights and privileges of said office. The writ being issued and answer filed, hearing was had on Feb. 16, 1916, at which the following facts appear, inter alia:

The county commissioners of Clearfield county, for the term ending Monday, Jan. 1, 1916, were W. C. Langsford, J. S. Richards and H. L. Bowman, and Mr. Bowman remained in said office and exercised the duties and powers thereof until the expiration of his term. That on Dec. 29, 1915, a meeting of the board of county commissioners was had, all of said commissioners being present, at which the following action was taken, as appears by the minutes of said board: "Mr. Richards moves that the board appoint a mercantile appraiser for the coming year, motion seconded by Mr. Bowman. A vote being taken, motion carried. Mr. Richards moved that H. L. Bowman be nominated; Mr. Langsford nominated John H. Martin. Mr. Richards moved the nomination close, seconded by Mr. Bowman. Motion carried. A vote being taken, Mr. Bowman received two votes, John H. Martin received one vote. Mr. Langsford moved that the election of Mr. Bowman be made unanimous, seconded by Mr. Richards. Motion carried unanimously."

That on Jan. 7, 1916, H. L. Bowman began to exercise the powers and duties of the office of mercantile appraiser of Clearfield county, received the stationery and equipment, and began the work connected with said office. That the board of county commissioners for the term beginning the first Monday of January, 1916, were J. E. Dale, H. H. Spencer and Austin Haney, and at a meeting of said board, at which all were present, on Jan. 17, 1916, the question of mercantile appraiser for the year 1916 was discussed and the following resolution passed: "Resolved, That H. L. Bowman is hereby removed from the office of mercantile appraiser, to which he assumes to have been appointed by the board of county commissioners in December, 1915, for the reason that said H. L. Bowman was at the time of his appointment a member of said board of county commissioners and for other good and sufficient reasons to this board appearing." At the same meeting the Board proceeded to elect a mercantile appraiser, and S. M. Wilson was declared to be elected, and the following resolution passed: "Resolved, That S. M. Wilson be and hereby is appointed mercantile appraiser for the year 1916, to fill the vacancy caused by the removal of H. L. Bowman." At a subsequent meeting, at which all the commissioners were

present, held Feb. 3, 1916, the said board had before it the written resignation of S. M. Wilson, which resignation was accepted by unanimous vote, and thereupon a vote being taken James Hall was unanimously elected to fill the office of mercantile appraiser for the year 1916.

Several questions are involved in this proceeding. It is alleged on behalf of the relator, and also as the moral ground for the action taken by the present board, that the appointment of H. L. Bowman was illegal because he was a member of the board making the appointment. "It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint." Cyc., Vol. XXIX, page 1381. In Com. *v.* Douglass, et al., 1 Binney 77, decided in 1803, the Supreme Court said: "One having a discretionary authority to appoint a fit person to a public office appointing himself seems a solecism in terms; and it cannot be deemed the fulfillment of his duty."

Apart from this line of authority, the relator relies upon Sec. 4, Art. VI, of the Constitution of Pennsylvania, which contains the following provision: "Appointed officers, other than judges of the courts of record, and the superintendent of public instruction, may be removed, at the pleasure of the power by which they shall have been appointed." The power which appoints mercantile appraiser for Clearfield county is the board of county commissioners, under § 3 of the act of May 2, 1899, P. L. 184, which is, in part, as follows: "For the purpose of carrying into effect the provisions of this act, the appointment of mercantile appraisers shall be made annually on or before December 30 of each year by the county commissioners." This act received consideration in Houseman *v.* Com., 100 Pa. 222, in an elaborate opinion, which fully covers two propositions: First, that the mercantile appraiser is an officer within the meaning of the Constitution; and, second, that the removal may be made by the successor in office of the officers who made the appointment. In that case, Donohugh was appointed by Roberts, the receiver of taxes, and two years later John Hunter, the then receiver of taxes, removed Donohugh from office, which removal was sustained by the Supreme Court. It is contended, however, that the provision of the act of 1899 limits the power of the commissioners to making one appointment a year, but it is

entirely clear that the provision of the act directing that the appointment shall be made annually simply fixes the term of office in all counties, except cities of the first class, as a term for one year, while the office of the appraisers in cities of the first class shall be for three years.

This proceeding is not brought on behalf of the state in a public capacity, attacking the incumbency of Bowman on the ground of his ineligibility, but is a proceeding in which the name of the state is used by a private relator, who must therefore establish his own title. Com. ex rel. *v.* Cluley, 56 Pa. 270; Com. ex rel. *v.* McCarter, 98 Pa. 607. It is conceded, upon the argument, that the writ of quo warranto is the proper procedure, and no question has been raised as to the authority of the court of common pleas to determine this question, the argument at bar apparently conceding this point. The respondent contends, however, that the evidence does not show that James Hall has any title to the office, for two reasons: First, that it does not appear that he has been properly appointed by the board of county commissioners; and, second, that said board have no power to appoint at the time when said appointment was made. The first reason is based upon the allegation that the board, on January 17, appointed S. M. Wilson, and that it does not sufficiently appear that he had resigned and also does not appear that he was removed, so that there was no vacancy to which an appointment could be made on February 3. "Where the appointing power has the arbitrary power of removal, the appointment of a successor of the present incumbent operates as a removal of the latter." Cyc., Vol. XXIX, page 1374. The power of the board of county commissioners was as complete on February 3 as it was on January 17, and if they possessed the power of removal and appointment arbitrarily under the Constitution, the mere appointment of James Hall operated as the removal of S. M. Wilson, even though the resignation be disregarded, though the court is entirely satisfied with the evidence in the case being sufficient to establish the fact of the resignation.

The other reason assigned is that the board is without power to fill a vacancy. The legislation of Pennsylvania, in nearly all instances, has provided by statutory enactment the means by which vacancies in public office shall be filled, and has designated the appointing power. Counsel have not been able to furnish nor has the court found any statute in force in Pennsylvania which provides for the filling of a vacancy in the office of mercantile appraiser, so that if the power to fill

vacancy exists it must be independent of statute. The rule which we think is recognized is this: "In the absence of any constitutional or statutory provision, power to elect or appoint to office is to be regarded as including the power to fill vacancies." Cyc., Vol. XXIX, page 1401.

It must be kept in mind that the position of mercantile appraiser is one which is indispensable to the carrying out of the defined public policy of the state, and if by reason of a vacancy in said office, after the appointee had qualified and begun his work, the performance of the official duties must be suspended, the policy of the commonwealth would be thereby defeated. I cannot think that any such result would occur. Were there no recognized rules on the subject, such reasonable construction should be given as will carry into effect the policy of the state, and in this case such construction is in accord with the general rule quoted.

Now, Jan. 21, 1916, it is adjudged and decreed that H. L. Bowman is unlawfully exercising the office of mercantile appraiser in the county of Clearfield, and judgment of ouster is entered against said H. L. Bowman as to the said office. And it is ordered that said H. L. Bowman deliver to James Hall the various books, papers and other property of the said office. And it is further directed that the costs of this proceeding be paid by the respondent. Exception noted and bill sealed to the respondent.

From Oscar Mitchell, Esq., Clearfield, Pa.

Child-Labor Law.

Labor law—Employment of children—Working certificates—School attendance—Discretionary enforcement of Act of May 13, 1915, P. L. 286.

Children's working certificates obtained under acts of 1909 and 1911 are valid after Jan. 1, 1916, subject to all the other provisions of the act of 1915, such as compulsory attendance of continuation schools and the prohibition against employment of more than fifty-one hours per week, including school attendance, etc.

Legislation, like the act of May 13, 1915, P. L. 286, relating to the employment of children, cannot always be enforced strictly according to the letter, but should be interpreted and applied with the fullest measure of sound discretion and judgment, always mindful of basic principles and of the useful ends desired to be accomplished.

Request of John Price Jackson, commissioner of labor and industry, for opinion.

BROWN, Attorney-General, Nov. 4, 1915.—Supplementing and in enlargement of my opinion of Oct. 26, 1915, answering your inquiry of Sept. 29, 1915, whether children's working certificates which were obtained before Jan. 1, 1916, would be valid after that date, I beg to advise you:

The act of May 13, 1915, P. L. 286, relating to the employment of children is to take effect Jan. 1, 1916, and repeals all prior laws inconsistent therewith. It provides for a different form of certificate and for two classes of certificates and different method and requirements for the obtaining thereof. Section 8 of the act provides:

"Before any minor under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with, any establishment or in any occupation, the person employing such minor shall procure and keep on file, and accessible to any attendance officer, deputy factory inspector or other authorized inspector or officer charged with the enforcement of this act, an employment certificate as hereinafter provided, issued for said minor."

A strict construction of this provision would undoubtedly make it apply to children who have obtained certificates under the acts of 1909 and 1911.

This act of 1915 was passed in line with other advanced legislation seeking to safeguard and develop the youth of the state in their health, comfort and intelligence, and should not be so construed as to produce a result to the injury and disadvantage of many of those intended to be so benefited. Legislation of this kind cannot always be enforced strictly according to the letter thereof, but should be interpreted and applied with the fullest measure of sound discretion and judgment, always mindful of basic principles and of the useful ends desired to be accomplished.

Many thousands (approximately fifty thousand) of minors throughout the state in conformity with the acts of 1909 and 1911 have obtained working certificates thereunder and are now engaged in useful occupations and are learning useful trades. These children quit school and took up new courses of practical labor and study, in full reliance on the law as it then was and in the reasonable belief that it would so continue until their attainment of the age of sixteen, and many of them, doubtless, were forced by their economic condition so to do. All of these minors will, during the course of the next year or two, have attained the age where they will have passed beyond the operation of the act of 1915. It is obvious that to require

these minors to return to the regular schools, in many cases but for short periods, little if any advantage would result to them intellectually, and less practically, inasmuch as by reason of their absence from school they could do little more than review without advancement some of the studies they have already covered, and at the same time they would lose, because of the interruption, the benefit of their work in their chosen trades or vocations.

Then again, the families of these minors in the same full reliance on the then law of the state, and in the expectation that it would so continue, have arranged and shaped their affairs in accordance with their new conditions. Many have moved into new industrial centers, and many have bought homes under the beneficent building and loan association instalment plan, or have otherwise incurred continuing obligations, partly at least, in reliance upon the continual employment of their children.

The true legislative intent was not to bring about sudden chaos in the lives of these children and their parents, and it is unwise to so apply the law as to produce such an undesirable condition.

Furthermore, while the impelling influence in determining the proper application of this legislation must always be the sincere regard for the welfare of the children affected, I am not unmindful of the fact that many industries of the commonwealth have based their business upon the continuation of the employment of these children who were properly employed under the then law of the state, and the sudden withdrawal of many thousands of such children from industrial service would work a hardship which should be avoided if it can be done without positive harm to the children, and this can be easily accomplished by the proper coöperation of all having to do therewith.

One of the distinguishing features of the new act is the provision for the compulsory attendance of children employés in so-called continuation schools, the purpose underlying this legislation being to continue the education of children already in industry and to provide for the further instruction of those leaving school after Jan. 1, 1916, and entering industrial life.

This situation, as already indicated, calls for the application of a broad, administrative discretion, and having due regard for the general policy of the state and for the interest and welfare of all concerned, you may, as I have heretofore advised you, consider children's working certificates obtained under

acts of 1909 and 1911, valid after Jan. 1, 1916, provided, of course, that the minors holding them are to be subject to all the other provisions of the act of 1915, such as the compulsory attendance of continuation schools and the prohibition against employment of more than fifty-one hours per week, including school attendance, etc.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Wagner *v.* Pullman Motor Car Co.

Automobiles—Personal injury to pedestrian—Presumption—Negligence.

While the presumption is that an automobile bearing a dealer's license is operated by an agent of the dealer for business purposes, where the plaintiff's evidence is an action for damages for personal injury shows the contrary, this presumption is rebutted, and there can be no recovery against the owner in the absence of explanatory proof to show that the person in charge of the automobile at the time of the accident was using it in the course of his employment.

In an action for damages for personal injury it appeared that the plaintiff was injured by being struck on a city public square by an automobile bearing the dealer's license of the defendant, which gave no signal of its approach, and was being run at excessive speed by a clerk of the defendant, who was himself a licensed driver, but had nothing to do with the defendant's automobile and was not shown to have been using the machine on his employer's business, but under circumstances pointing to a contrary conclusion. Held, that a non-suit was properly entered.

It was not encumbent on the plaintiff to show affirmatively that he stopped, looked and listened. He is presumed to have done so in the absence of testimony, and where the evidence to the contrary is conclusive the question is for the court.

Rule to strike off judgment of non-suit. C. P. Lancaster Co. Dec. T., 1913, No. 32.

Isaac R. Herr and *B. F. Davis,* for rule.

John A. Nauman, George B. Schmidt and *H. C. Niles,* contra.

Landis, P. J., Jan. 1, 1916.—The plaintiff was injured by an automobile on Aug. 30, 1913, at Centre Square in the city of Lancaster. He was, at the time, on a street crossing between the store of Watt & Shand and the office of the Western Telegraph Company, and was intending to board a Coatesville trolley car in order to go to his work. There was evidence that the automobile was running at an excessive rate of speed,

and that it gave no signal of its approach. The number of the car was X2428, and the records of the highway department show that this car was registered as a dealer's car in the name of the Pullman Motor Car Company of York. It was also shown that a man by the name of Spencer Freedman, who was employed by the Pullman Motor Car Company in the draughting department, and had only clerical duties to perform, was running the car. He was in company with a woman, whose name was not given at the trial. Freedman was a licensed driver holding a license No. 16,289 and was registered from 139 East Market street, York, care of Dr. Hill Crawford. There is no evidence that the location referred to in Freedman's license was in any way connected with the Pullman Motor Car Company. Under this state of facts we entered a judgment of non-suit, which we are now asked to take off.

In Lotz *v.* Hanlon, 217 Pa. 339, Justice Stewart, delivering the opinion of the court, said: "It was essential to a recovery in this case that it be made to appear that the accident from which plaintiff's injury resulted occurred while the person in charge of the automobile was using it in the course of his employment and on his master's business. Plaintiff offered no direct evidence as to this, but having shown the ownership of the machine to be in the defendant, sought to derive from this circumstance, and this alone, not only the fact that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's errand. . . . Ownership of the machine in cases of this character is at best but a scant basis for the inference that was here sought to be derived from it. It is allowed as adequate only when the attending circumstances point to no different conclusion. In itself it is but one of a series of circumstances, and its significance depends on the extent of the general concurrence of these. If they indicate something different, the scant basis that this single fact otherwise might afford is reduced below the point of sufficiency. Because its value as a probatory fact so entirely depends upon attending circumstances it is always the duty of the party seeking to establish through it a prima facie case, to develop the whole situation, so that its significance may be correctly measured."

In that case the plaintiff's testimony disclosed that the plaintiff had been run down by an automobile in a frequented street in the city of Philadelphia after nightfall; that the machine was, at the time, occupied by four persons, one being the

driver, whose identity was established; and that the machine was registered in the name of the defendant as owner. It was admitted that the driver was the chauffeur of the defendant, but the proof presented by the defendant was that at the time of the accident, he was using the car for the amusement of himself and his friends. The court gave binding instructions for the defendant, and this judgment was affirmed on appeal. In this case, however, the license held by the defendant was a general automobile license.

The full effect of this decision has, however, been modified in Haring *v.* Connell, 244 Pa. 439. There it appeared that the plaintiff was in the evening, while waiting for a trolley car, sitting on a wooden wing or approach to a public bridge which crossed a canal. A public road north of the approach ran nearly parallel to the canal, and at the bridge it turned at right angles and crossed the canal. An automobile, coming down this road, ran into the frame approach at the point where the plaintiff was sitting, and he was injured. There was no evidence that the automobile was operated at the time by the defendants or any one for them, and the only evidence on this point was the number of the license tag, which represented a license which had been issued to them. The court below entered a judgment of non-suit, which the Supreme Court, on appeal, reversed. The distinction is made between a general license and a dealer's license. Justice Brown, in delivering the opinion of the court said:

"If the license which had been issued to them was the ordinary one issued to the owner of an automobile, the burden might have been upon the appellant to show more. . . . But this is a question which we need not now decide, in view of the kind of license tag that was upon the automobile which injured the appellant. It was 'X3176' and was for what the statute defines as a dealer's license, issued at a lower rate than is charged for the ordinary license issued to an automobile owner. This tag was issued to and accepted by the appellees upon condition that it should 'not be used for any other purposes than testing or demonstrating the vehicle to a prospective purchaser, or in removing the same from place to place for the purpose of sale.' . . . One of these was on the car which ran into the appellant, and as it was issued upon the express condition stated, the presumption is that the appellees had complied with the act of assembly, and that the tag was on a car operated by them, or by some one for them, for the purpose of demonstrating it to a prospective purchaser or in taking it

to some place for the purpose of sale. The tag was, therefore, prima facie evidence that, at the time of the collision, the appellees, or some one acting under their authority, were operating the car, and the burden was shifted to them of showing that it was not so operated."

It must be conceded that, in the present case, the defendant company held a dealer's license, and the tag upon it contained the same conditions as were presented in Haring *v.* Connell, supra. Therefore, without more, the same prima facies arose, and, if the plaintiff had depended upon it, the burden would have been cast upon the defendant to show that the car was not operated by Freedman with its knowledge, authority or consent, and that it was, for this reason, not responsible for the accident. The plaintiff did not, however, rest upon this presumption. He distinctly proved that Spencer Freedman was in the draughting department of the defendant company, and performed besides only clerical duties, and that he had nothing to do with the automobile. It was in his possession when he, in company with a woman, at midnight, and in another city, nearly twenty-five miles from his home and the location of the company, ran down the plaintiff; but how he secured it did not appear. A witness called by the plaintiff, however, testified that he had no right, duty nor permission to operate the car. (See pages 23 and 24, notes of testimony.) In the face of this testimony, does the presumption nevertheless continue that, under these circumstances, he was operating the car for the defendant? The question may be a close one, but I am of the opinion that the facts thus disclosed rebutted the presumption, and there being an absence of some explanatory proof on the plaintiff's part, he was thereby prevented from recovering damages from the defendant.

It is settled that although it is the duty of a traveler to stop, look and listen before crossing a railroad, yet it is not incumbent upon him to show this affirmatively. The common law presumption is that every one does his duty, and in the absence of all evidence on the subject, the presumption is that a decedent observed the precautions which the law prescribes before he attempted to cross the railroad. Penna. R. R. Co. *v.* Weber, 76 Pa. 157; Schum *v.* Penna. R. R. Co., 107 Pa. 8, and many other cases. But in Reading & Columbia R. R. Co. *v.* Ritchie, 102 Pa. 425, Justice Green said: "Of course, where there is no direct testimony on the subject, the presumption is sufficient and will prevail. But where there is affirmative, direct and credible testimony, that the person injured went

upon the track without stopping to look and listen, the presumption is rebutted." Nor is this question always one of fact; though it must be confessed that it is generally for the jury to find whether such presumption has been rebutted. But if the evidence to the contrary is clear, positive and credible, and either uncontradicted or so indisputable in weight and amount as to justify the court in holding that a verdict against it must be set aside as a matter of law it should be determined as matter of law by binding instructions. Patterson *v.* Pittsburgh, Etc., Ry. Co., 210 Pa. 47; Kreamer *v.* Perkiomen R. R. Co., 214 Pa. 219; Doner's Adm'n'x *v.* Penna. R. R. Co., 25 Lanc. L. R. 121. In the latter case many of the authorities are collated.

On the whole, I think the non-suit was properly entered, and the rule to take it off is, therefore, now discharged.

Rule discharged.

From William N. Appel, Esq., Lancaster, Pa.

Simler *v.* Cronover.

Real estate—Adverse possession—Deed—Ejectment.

In an action of ejectment brought by the plaintiffs against their sister to recover an undivided interest in real estate devised subject to the widow's life estate to the plaintiffs and the defendant by their father, the plaintiffs are entitled to recover where the defendant's title is based only on a deed from the mother to herself and twenty years' possession with improvements made upon the property, such possession not having been adverse under the father.

Rule for new trial, and for judgment non obstante veredicto, in an action of ejectment. C. P. Centre Co. Feb. T., 1915, No. 49.

Gettig, Bower & Zerby and *A. C. Simler,* for plaintiffs.
C. & A. A. Dale, for defendants.

Orvis, P. J., Jan. 1, 1916.—The above-stated action is brought by the plaintiffs against their sister and her husband to recover their undivided interest to a certain house and lot situate in the borough of Philipsburg, in this county, the plaintiffs being the heirs at law and legatees of George B. Simler. During the lifetime of the said decedent and prior to his death the title to the locus in quo was admittedly vested in the said George B. Simler, who devised the use and enjoy-

ment of the said lot for life to his wife, the mother of the parties plaintiff and defendant. During the lifetime of the widow, for a consideration, she made a conveyance of said house and lot to Susan Cronover, the defendant, which deed was set up at the trial for the purpose of preventing plaintiffs' recovery.

Parole testimony showed that the defendants have been in possession of the property for over twenty years, and have made valuable improvements, and showed such facts as under some circumstances might have been construed as evidence of adverse possession and which might have even ripened into a complete title in her, but at the time of the trial it was admitted by her that she was not in adverse possession under her father, and that her sole claim to the exclusive ownership of the property was under the deed from her mother. There is no doubt but that the mother could convey only such title as she had, which was an estate for life, and that the defendants, therefore, developed nothing in their defence which could prevent a recovery by the plaintiffs.

Our sympathy in this case has been largely with the defendant. We would like to have seen some family settlement or adjustment. It seems quite clear to us that a considerable part of the present value of the property is the work and expenditures of the defendants, and it may be true, as claimed by the defendant, that it was the intention of the father and mother that their daughter Susan Cronover should have the property. Nevertheless, we are forced under the pleadings and the evidence to decide in favor of the plaintiffs.

And now, to wit, Jan. 1, 1916, motion for new trial is overruled and judgment is hereby directed to be entered on the verdict in favor of the plaintiffs and against the defendant.

Howells *v.* Morris.

Public officers—Boroughs—Board of health—Constitutional law—Legislative offices.

The members of a board of health of a borough appointed in accordance with the provisions of the act of May 11, 1893, P. L. 44, specifically repealed by § 14 of the act of June 12, 1913, P. L. 471, are legislative officers only and not constitutional officers, and they may be removed by the president of the borough council and others appointed in their place by him, inasmuch as he is vested with the sole power of appointing and removing such members.

Bill in equity for an injunction. C. P. Schuylkill Co. March T., 1916, No. 1.

A. L. Shay and *Joseph J. Brown,* for complainants.
C. E. Berger and *J. M. Boone,* for defendants.

Koch, J., Jan. 31, 1916.—The caption in this case indicates that this is a proceeding to determine who lawfully constitute the board of health in the borough of Saint Clair. From the pleadings and evidence I find the following

FACTS.

1. The borough of Saint Clair is incorporated as such.

2. The town council of Saint Clair, by an ordinance approved May 11, 1893, divided the borough into five districts and provided for the appointment of one person from each district to constitute the board of health for the borough. But the provisions of said ordinance were later ignored, and as a consequence the board stood as follows for sometime prior to Jan. 3, 1916, to wit: District No. 1 was represented by one person; District No. 2 by two persons; District Nos. 3 and 5 had no representatives and District No. 4 was represented by two persons.

3. On Sept. 4, 1914, J. W. Cæsar was appointed for one year, Dr. R. F. Weaver, Jr., for two years, James Marshall for three years, A. J. Schaff for four years and Nicholas Honicker for five years; but Schaff declined, and J. J. Brown was appointed in his stead on Oct. 5, 1914.

4. On Oct. 5, 1915, Cæsar's term having expired and Brown and Marshall having resigned, Charles Howells was appointed to succeed J. W. Cæsar; Charles Ferrebee was appointed to succeed J. J. Brown, and Dr. J. P. Morris was appointed to succeed Dr. R. F. Weaver.

5. At a meeting of the town council, held Jan. 3, 1916, the president of the town council declared all the seats in the board of health vacant, excepting the seat of Robert Plummer, who represented District No. 1, and thereupon appointed George Alton for District No. 2, to succeed Charles Howells; Dr. J. P. Morris for District No. 3, to succeed Dr. R. F. Weaver; Thomas Gregory for District No. 4, to succeed Charles Ferrebee, and Harvey Harrison for District No. 5, to succeed Nicholas Honicker; and the clerk of the council was directed to notify all parties concerned accordingly.

6. The members of the board of health as newly constituted

took the oath of office and duly organized by the election of a president, a secretary and a health officer, on Jan. 3, 1916. The old board of health subsequently filed the bill of complaint in this case, averring that the appointment of the new board "was without warrant or authority in law, is wholly void and that 'the old board still remains the "legally qualified and duly constituted board of health of the borough of Saint Clair,"'" and obtained a restraining order against the new board.

7. The defendant filed no answer, but presented certain testimony at the hearing, and counsel on both sides agreed that said hearing shall be considered as final.

DISCUSSION.

Boards of health in boroughs in this state owe their origin to the provisions of an act entitled, "An act to enable borough councils to establish boards of health," approved May 11, 1893, P. L. 44. According to its provisions the board consisted of five persons appointed from as many districts in boroughs. One person was to be appointed to serve one year, one to serve two years, one to serve three years and one to serve four years and one to serve five years, and thereafter one person was to be appointed annually to serve for a term of five years. But the said act of 1893 was specifically repealed by § 14 of act No. 316, approved June 12, 1913, P. L. 471. The latter act provides for the appointment of a board of health in each borough and first class township in this commonwealth, the board to consist of five members, one of whom shall be appointed for one year, one for two years, one for three years, one for four years and one for five years, and thereafter one is to be appointed each year to serve five years. No provision is made in this act requiring appointments to be made by districts to be fixed by the town council representing as equally as may be all portions of the borough as was provided in the act of 1893.

Section 1 of the act of 1913 provides "that a board of health shall be established and maintained in each borough and township of the first class in this commonwealth within three months after the passage of this act." As an entire board of health was appointed for the borough of Saint Clair on Sept. 4, 1914, I am inclined to think that § 1 of the act of 1913 was not strictly complied with, and that the appointments made in 1914 were intended as a delayed compliance with the section just quoted. Under the act of 1913 members of the board of health "shall severally take and subscribe to the oath pro-

vided for borough or township officers." They organized by electing a president, a secretary and health officer. The secretary and health officer must take the oath required of members of the board and must give bond for the faithful discharge of their duties. Minutes must be kept, as well as accurate accounts of expenditures of the board. The board may cause orders to be drawn on the treasurer of the borough for the payment of moneys on account of the board of health. The secretary of the board is required to make certain reports weekly to the state department of health, and also an annual report. It is the duty of the board of health to enforce the laws of the commonwealth and make regulations of its own for the control of communicable diseases and the prevention of infections therefrom. The health officer must placard and quarantine all premises upon which communicable disease exists, and disinfect such premises upon the expiration of the quarantine period. The board has large powers to inspect properties and to abate nuisances which menace health. In fact, the act of 1913 reposes in the board of health the duty of safeguarding the people of the borough against the spreading of any and all communicable diseases, and its provisions make possible all the machinery requisite in the premises. The fact that the board of health may make and enforce "such regulations as the board may see fit to adopt for the control of communicable disease and the prevention of infections therefrom," vests the board with more than a mere ministerial duty. Like a town council or a school board, it possesses the power of exercising its discretion in the performance of its highly important public duties, duties that immediately concern every person in the community.

The members of a board of health are public officers upon whom grave and important duties are imposed for a fixed term, and who, for the purpose of the same, have, during the term of their election or appointment, delegated to them some of the functions of government. The words "office," "officers" and "any public officer," mentioned in Sec. 13, Art. III, of the Constitution, are used with a generality of expression, which plainly includes those of the state, county or municipality, and it is to be regarded as settled that an office is a public one within the meaning of the Constitution, if the holder of it exercises grave public functions, and is clothed, at the time being, with the powers of sovereignty. Richie *v.* Philadelphia, 225 Pa. 511. Members of a board of health are public officers; their offices are, however, non-constitutional. The office is

wholly legislative and is created or abolished at the legislative will.

As to offices which are legislative only and not constitutional, the power which created them may abolish or change them at pleasure without impinging upon any constitutional right of the possessor of the office, and without violating any duty of the legislative body. Com. *v.* Weir, 165 Pa. 284-288; Com. *v.* McCombs, 56 Pa. 436.

That "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment" (Sec. 13, Art. III, Constitution), does not prevent the abridgment or abrogation of the office by the legislature. Richie *v.* Philadelphia, 225 Pa. 511-517; Com. *v.* Weir, 165 Pa. 284; Donohugh *v.* Roberts, 11 W. N. C. 186.

The act of 1913, therefore, abolished the boards of health which existed by virtue of the act of 1893; and the ordinance of the borough of Saint Clair, dividing the town into districts, which was passed in pursuance of the requirements of the act of 1893, is now of no binding force upon the right of the president of the borough council of Saint Clair to appoint the members of the board of health.

Now the question arises whether, since the term of service of members of the board of health is fixed by the act of 1913, the president of the town council may abridge the term of any member by removing him and appointing another person in his place. In Sec. 4, of Art. VI, of the Constitution, it is provided that "appointed officers, other than judges of the courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed." That the members of the board of health in Saint Clair are officers within the meaning of the word "officers" as used in the part of the Constitution just quoted I have no doubt. The language of the Constitution seems to me clear enough to be its own interpreter once the meaning of officer is ascertained, and it must follow that since members of a board of health are appointive public officers, they are removable at the pleasure of the power appointing them, notwithstanding the fact that the act of assembly fixes a definite term of service.

An act, approved April 25, 1907, P. L. 103, provides for the election of borough solicitors for a term of three years. The borough of Coaldale elected a solicitor for a period of three years, but at the end of one year ignored their election

and selected another solicitor, and it was held that notwithstanding the fact that the first solicitor was elected for three years, the town council could remove him and elect another one without incurring any liability for salary for the balance of the term of the removed solicitor. Ulrich *v.* Coaldale Boro., 53 Pa. Super. Ct. 246.

"Where an office is held during the pleasure of the appointing power, a removal may be either express, or implied, by the appointment of another person to the same office. But it has been decided that, in either case, a removal is not completely effected until notice is actually received by the person removed. Com. ex rel. Bowman *v.* Sleifer, 25 Pa. 23." Jenkins *v.* Scranton, 205 Pa. 598.

The testimony does not show whether notice was actually given to the parties removed from office, but if not, then the filing of the bill in this case admits the best kind of knowledge of the fact of removal.

So far as the remedy invoked is concerned, there is neither answer nor demurrer to the bill to raise the question of jurisdiction properly, as required by the act of June 7, 1907, P. L. 440. This question was touched upon at the argument, but I do not consider it necessary to decide the question here because I think the defendant board of health is the lawfully constituted one, and that the writ of injunction should not issue.

From the foregoing I draw the following

CONCLUSIONS OF LAW.

1. That the president of the town council of the borough of Saint Clair is vested with the sole power of appointing and removing members of the board of health in said borough.

2. That the appointment of the defendants who constitute the present board of health was within the discretion of the president of the town council of said borough.

3. That the bill of complaint shall be dismissed.

4. That the plaintiffs shall pay the costs.

And now, Jan. 31, 1916, upon the filing of these findings of fact and conclusions of law, and the answers to the requests for findings presented by counsel for the plaintiffs, the prothonotary will enter a decree nisi in accordance with said findings and conclusions of law, and will give notice of said decree to the respective parties or their counsel, in accordance with the equity rules.

From M. M. Burke, Esq., Shenandoah, Pa.

Fulton *v.* Lilley.

Promissory notes—Evidence—Parol evidence—Contract—Performance by parties.

The cases in this state in which parol evidence has been allowed to contradict or vary written instruments may be classed under two heads: 1. Where there was fraud, accident or mistake in the creation of the instrument itself. 2. Where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed.

A distinction is to be drawn between an attempt to impeach the written instrument by showing a parol contemporaneous agreement varying and contradicting it, and a defence on a broken promise which induced the defendant to execute the obligation, and without which he would not have signed it. In the former case it must be pleaded and proved that there was a parol agreement which was omitted from the written instrument through fraud, accident or mistake. In the latter case it must be pleaded and proved that there was an oral contemporaneous promise, without which the writing would not have been signed, in violation of which promise a fraudulent use of the instrument is being attempted.

In either case, because of the significance of the writing in defining with certainty the engagements of the parties, the making of the oral promise or agreement must be shown by evidence that is clear, precise and indubitable; that is, it must be found that the witnesses are credible, that they distinctly remember the facts to which they testify, that they narrate the details exactly, and that their statements are true. The evidence must satisfy the court and jury, not beyond every doubt, for that is impossible, yet not by a mere preponderance, for that is not sufficient, but beyond a reasonable doubt, as thoroughly as oral testimony can satisfy the mind of the truth of an allegation. The evidence need not be indubitable in the sense that there must be no opposing testimony, but in the sense that it must carry a clear conviction of its truth, and be sufficient to move the conscience of a chancellor to reform the instrument.

The written instrument itself is the strong evidence to be overcome, and it can be overcome only by the testimony of two witnesses, or one witness corroborated by circumstances equivalent to another. A chancellor invariably refuses to reform a written instrument on the uncorroborated testimony of a single witness.

A judge should not submit the case to the jury unless the evidence is such that he would feel himself bound as a chancellor to reform the instrument.

Where a note, payable fifteen months after date, contained a condition that within said fifteen months the payee should secure and deliver to the makers a certain field of coal, together with full and complete mining rights thereto so as to make the coal salable and marketable, and thereafter a deed was delivered for the coal, with certain mining rights, to the makers of the note, who voluntarily accepted and retained the property for nearly sixteen years, without offer to return the same; held, in an action to recover on the note, that there had been such a substantial part performance of the contract by the plaintiff, and such an acceptance of the benefits thereof by the defendants, as to estop and preclude the defendants from insisting on further performance of the contract by the plaintiff as a condition precedent to the liability of the defendants, and to compel

the defendants to rely on their claim for damages in respect of the defective performance or to have pleaded their cross-claim by way of recoupment. Held, also, that what will constitute "full and complete mining rights so as to make coal salable and marketable" in a particular case is a question of fact; that the words have no well-defined legal meaning, but must be construed by experts having practical knowledge of the subject; and that if the case under consideration were one in which damages should have been recouped in the action, the burden was on the defendants to have shown that the mining rights conveyed with the coal were not so full and complete as to make the coal salable and marketable, and the extent of the damages sustained.

It is error to join the personal representatives of a deceased maker of a note with a surviving maker as defendants, in an action on the note, but the record may be amended after verdict and before judgment by striking out the names of such personal representatives wherever they occur.

Motion for judgment non obstante veredicto. C. P. Fayette Co. June T., 1914, No. 472.

H. S. Dumbauld and *McDonald & Cray,* for plaintiff.
Sturgis & Morrow, for defendants.

VAN SWEARINGEN, P. J., Feb. 22, 1916.—This action is founded on a promissory note. The trial was had before a former member of the court, who gave binding instructions for the plaintiff, reserving certain questions of law, and the jury returned a verdict for the plaintiff for the sum of $5,789.75. The case is before the court now on a motion for judgment for the defendants non obstante veredicto. Following is a copy of the note on which suit was brought:

March 31, 1900.

Fifteen months after date we promise to pay to the order of E. D. Fulton the sum of $5,462.03, with interest from April 1, 1900, without defalcation value received.

The payment of this note is conditioned upon the securing and delivery to the undersigned, their heirs or assigns, within the said fifteen months, the nine-foot vein of coal under what is known as the W. H. Murray farm, and a portion of the R. M. & W. J. Andrews farm, together containing two hundred and fifty-eight acres, more or less, situate in Washington county, Pennsylvania, together with full and complete mining rights thereto, so as to make the said coal salable and marketable. No interest to be paid after March 31, 1901. Witness our hands and seals.

Attest: L. S. MILLER. [SEAL]
J. C. WORK. E. M. LILLEY. [SEAL]

The plaintiff's statement of claim alleges that the plaintiff complied with the conditions of the note by causing to be made and delivered to the said L. S. Miller and E. M. Lilley the deed of R. M. Andrews and W. J. Andrews, dated April 3, 1900, conveying the coal specified in the note, which deed was accepted by the said L. S. Miller and E. M. Lilley, with the mining rights as therein contained; whereupon, it is alleged, the note became due and payable to the plaintiff. The deed, a copy of which is attached to and made part of the plaintiff's statement of claim, shows the mining rights conveyed thereby to have been as follows: "With the right to dig, mine and carry away said coal, and to dig, mine and carry away other coal under the surface of said land through the openings made by digging, mining and carrying away the coal hereby conveyed, also with such privileges on the surface of said land as may be necessary for the purpose of sinking air shafts and ventilating the mines and successfully mining and carrying away said coal, and all operations necessarily connected therewith. But all surface occupied by the owners of said coal, or their lessees, to be paid for at a fair market price, and all damage to the surface of said land, or to the fences, improvements, timber or crops thereon, to be paid for by the owners of said coal, or their lessees, to the owner of the surface thereof, or his heirs or assigns." The deed includes the conveyance of other coal, with other and different mining rights.

The affidavit of defence made by E. M. Lilley alleges that the note was made "in anticipation that the said Miller and Lilley would accept temporarily a deed from R. M. and W. J. Andrews for the Murray coal with the incomplete mining rights which they then held as appurtenant thereto, which said deed was executed, acknowledged and delivered on or about April 3, 1900, the said Fulton then and there agreeing that he would procure and have conveyed to the said Miller and Lilley full and complete mining rights, including release of damage to the surface, so as to make the coal salable and marketable, within a period of fifteen months thereafter, and upon the performance of the said condition on the part of the said Fulton the said note was then to be due and payable." It is alleged further in the affidavit of defence that Fulton recognized such to be the contract, that on June 13, 1901, he applied by letter to the said Miller and Lilley for an extension of the time within which to procure said mining rights, and that on other occasions he wrote letters to Miller and Lilley

in which he admitted his obligation to procure said mining rights and have them conveyed to the said Miller and Lilley, but that the said Fulton has not complied with his said contract, and that therefore the said note is not due and payable.

The questions of law reserved by the trial judge were these: "(1) The deed of April 3, 1900, being subsequent to the date of the note or bond in question, did the plaintiff extend to the grantees in the deed, who were the makers of the note or bond, substantial compliance with the conditions attached to such obligation? (2) When the grantees in the deed and the makers of the note or bond accepted the deed, did they thereby waive further performance by the plaintiff of the conditions in the note or bond regarding full and complete mining rights, beyond such mining rights as are expressed in said deed? (3) Are the defendants estopped from claiming or insisting on further performance by the plaintiff of the conditions expressed in the note or bond as to full and complete mining rights, and as a legal consequence relegated to their right of action for damages against the plaintiff for failure on his part of full performance?" Of course, under the act of April 22, 1905, P. L. 286, a point requesting binding instructions for the defendants having been refused at the trial, the question now is whether or not on the whole record judgment should be entered for the defendants non obstante veredicto.

The note appears to express plainly the deliberate intent of the parties, without uncertainty, and thus indicates the whole engagement. The cases in this state in which parol evidence has been allowed to contradict or vary written instruments, may be classed under two heads: 1. Where there was fraud, accident or mistake in the creation of the instrument itself. 2. Where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed. Phillips *v.* Meily, 106 Pa. 536. A distinction is to be drawn between an attempt to impeach the written instrument by showing a parol contemporaneous agreement varying and contradicting it, and a defence on a broken promise which induced the defendant to execute the obligation, and without which he would not have signed it. In the former case it must be pleaded and proved that there was a parol agreement which was omitted from the written instrument through fraud, accident or mistake. In the

latter case it must be pleaded and proved that there was an oral contemporaneous promise, without which the writing would not have been signed, in violation of which promise a fraudulent use of the written instrument is being attempted. Gandy *v.* Weckerly, 220 Pa. 285. In either case, because of the significance of the writing in defining with certainty the engagements of the parties, the making of the oral promise or agreement must be shown by evidence that is clear, precise and indubitable; that is, it must be found that the witnesses are credible, that they distinctly remember the facts to which they testify, that they narrate the details exactly, and that their statements are true. The evidence must satisfy the court and jury, not beyond every doubt, for that is impossible, yet not by a mere preponderance, for that is not sufficient, but beyond a reasonable doubt, as thoroughly as oral testimony can satisfy the mind of the truth of an allegation. Hoffman *v.* Bloomsburg & Sullivan R. R., 157 Pa. 174; Thomas *v.* Loose, 114 Pa. 35; Boyertown National Bank *v.* Hartman, 147 Pa. 558. The evidence must be clear, precise and indubitable—not indubitable in the sense that there must be no opposing testimony, but in the sense that it must carry a clear conviction of its truth, and be sufficient to move the conscience of a chancellor to reform the instrument. Honesdale Glass Co. *v.* Storms, 125 Pa. 268. The written instrument itself is the strong evidence to be overcome, and it can be overcome only by the testimony of two witnesses, or one witness corroborated by circumstances equivalent to another. A chancellor invariably refuses to reform a written instrument on the uncorroborated testimony of a single witness. Sutch's Est., 201 Pa. 305. A judge should not submit the case to the jury unless the evidence is such that he would feel himself bound as a chancellor to reform the instrument. Phillips *v.* Meily, 106 Pa. 536; Sylvius *v.* Kosek, 117 Pa. 67; Dorris *v.* Morrisdale Coal Co., 215 Pa. 638. Where a chancellor would not reform or ought not to reform a written instrument because of the doubtfulness of the parol evidence to set it aside, he should not permit twelve chancellors in a jury box to nullify it. Ogden *v.* Phila, & West Chester Traction Co., 202 Pa. 480.

The affidavit of defence in the present case contains no allegation of fraud, accident or mistake in the creation of the note. Neither does it allege an attempt to make a fraudulent use of the note in violation of a promise or agreement made at the time the note was signed and without which it would

not have been executed. Therefore all the evidence in support of any contemporaneous oral agreement, having been objected to as incompetent, was inadmissible at the trial, and we might well stop there without further consideration of such an agreement. But to go further. It is alleged in the affidavit of defence that the note was executed "in anticipation that the said Miller and Lilley would accept temporarily a deed from R. M. and W. J. Andrews for the Murray coal with the incomplete mining rights which they then held as appurtenant thereto, which said deed was executed, acknowledged and delivered on or about April 3, 1900, the said Fulton then and there agreeing that he would procure and have conveyed to the said Miller and Lilley full and complete mining rights, including release of damage to the surface, so as to make the coal salable and marketable, within a period of fifteen months thereafter." The question is not what was anticipated by the parties, but what the contract between them was. Faux *v.* Fitler, 232 Pa. 33. There is not a particle of evidence in the case to support the allegation that the plaintiff agreed to procure and have conveyed to the makers of the note, in connection with the mining rights, a release of damage to the surface. There was no attempt whatever to prove that anything was left out of the note through fraud, accident or mistake. There was no specific offer to prove that the plaintiff was attempting to make a fraudulent use of the note in violation of an oral promise or agreement made at the time the note was signed and without which it would not have been executed. There was no clear, precise and indubitable evidence that at the time of the execution of the note Miller and Lilley agreed to accept temporarily a deed from R. M. and W. J. Andrews for the Murray coal, with the alleged incomplete mining rights which they then held as appurtenant thereto, and that Fulton then agreed to procure and have conveyed to them by later deed additional mining rights, and that without that agreement on Fulton's part the note would not have been executed.

The note was prepared under the direction of J. C. Work, then a practicing attorney at this bar, now the president judge of the orphans' court of this county, who dictated the note to a stenographer and afterwards became the subscribing witness to its execution, and Judge Work, on the material points of the case, testified in chief as follows: "Q. Was there anything said in the conversation between the parties about the question of the sufficiency of the mining rights which the Andrews were

then able to convey? A. Yes, I think that was talked over. Q. What, if anything, was said about it? A. It very soon appeared that a part of this coal did not have full and complete mining rights, and the understanding or agreement was, as I recall it, that these purchasers, Miller and Lilley, were to have full and complete mining rights to all this coal—that is what started the controversy. Q. Was there any conversation there about the manner in which they would close the transaction? A. Well, it is my recollection—of course, fifteen years is a good long while, and it is remarkable the number of things you can forget in that time—but my best recollection is that the manner of closing the transaction was talked over fully with Mr. Fulton, and that these parties were to take deeds for this coal with the mining rights that the owners of the coal had to convey with the coal, and that these additional mining rights would be cared for afterwards. Q. Now, Judge, I will ask you what the conditions in the note related to? A. They related to full and complete mining rights to about two hundred and fifty-eight acres of that coal which they had optioned from Mr. Fulton, in addition to the mining rights that the owners of the coal had at that time. As I recall it and remember it now, the coal and surface, for at least a part of this, had been separated before that time, one party owned the coal and another party the surface; that is my recollection."

On cross-examination Judge Work testified on the material points as follows:

"Q. Judge, as I recall your testimony, you say all these discussions were before the making and delivery of this note? A. Well, I think they were, yes; some of them may have been afterwards while we were taking up the coal, I don't recall that because we had a great many talks. Q. Then your dictation of the conditions for the payment of the note correctly represented the agreement that had been made between the parties at that time? A. Well, I was trying to get down there what I intended to be the agreement, that he was to furnish these additional mining rights before that note was to be paid —that is what I was trying to do. Q. But you were fresh at that time, and you think you put on there what the agreement was? A. I say I tried to. Q. And it does not say anything about additional mining rights? A. That is what we were aiming at, those complete mining rights to those two hundred and fifty-eight acres of coal that the owners at that time did not have. Q. You did not say anything in this paper

about additional mining rights, did you, Judge? A. Well, I don't remember now what it does state in the paper. It does not mention additional mining rights, it says 'together with full and complete mining rights.' Q. You would say that you got on that paper what you intended the agreement of the parties to be at that time? A. Well, I suppose I did, I was trying to. Q. You incorporated into the note the condition as to the mining rights? A. That is what I tried to do, that he was to furnish complete mining rights for that coal within fifteen months. And in the meantime we were to go on and take up the coal and pay the price the farmer was to get for it and he was to furnish the complete mining rights within fifteen months—that is my recollection of it."

Nobody doubts the intention of Judge Work to be truthful in all of his statements. But his testimony comes far short of what the law requires in order to warrant the reformation of this written instrument. Judge Work does not claim to distinctly remember the facts relative to which he testifies. On the contrary, he expressly says in his testimony: "Well, it is my recollection—of course, fifteen years is a good long while —and it is remarkable the number of things you can forget in that time," and then goes on to state the matters that occurred according to his "best recollection," with the further qualification, "as I recall it and remember it now." He does not pretend to be narrating the details exactly. He does not allege that the agreement to which he refers—if loose discussions can be termed an agreement—was made at the time of the execution of the note. His testimony on that point on cross-examination was this:

"Q. Judge, as I recall your testimony, you say all these discussions were before the making and delivery of this note? A. Well, I think they were, yes, some of them may have been afterwards while we were taking up the coal, I don't recall that because we had a great many talks." There is not a word in his testimony indicating an oral promise or agreement made at the time of the execution of the note different from what was contained in that instrument of writing, and without which the note would not have been executed. On the contrary, before Judge Work left the witness stand he practically affirmed the real contract between the parties to have been just that stated in the note. On his cross-examination occurred these questions and answers:

"Q. You would say that you got on that paper what you

intended the agreement of the parties to be at that time? A. Well, I suppose I did, I was trying to. Q. You incorporated into the note the condition as to the mining rights? A. That is what I tried to do, that he was to furnish complete mining rights for that coal within fifteen months."

No other witness in addition to Judge Work testified on that aspect of the case. Certain letters of the plaintiff to Miller and Lilley were admitted in evidence. Two of them were written prior to the execution of the note, and contain nothing at variance with its terms. Another one, under date of June 13, 1901, requested "an extension of time in which to secure mining rights in Andrews' coal." In another, under date of July 24, 1901, the plaintiff stated that he had received a letter from "Brother Murray," in which Murray quoted prices on his farm and on mining rights, which price on mining rights the plaintiff pronounced to be "absurd." The last of the letters, under date of Jan. 14, 1907, referred to "the mining rights you seem to want." The letters written by the plaintiff subsequent to the execution of the note to indicate to some extent that the contention of the defendants might be correct. But it is not what the evidence indicates, but what it proves, clearly precisely and indubitably, beyond a reasonable doubt, as thoroughly as testimony can satisfy the mind, that moves the court to reform a written instrument. We are of opinion that the case must be decided on the note as it stands. The note on its face is not ambiguous, and the question for determination is whether or not the thing that the note required the plaintiff to do was done.

The condition of the note was that Fulton was to secure and deliver (1) two hundred and fifty-eight acres of coal, and (2) full and complete mining rights so as to make the coal salable and marketable. Within a few days after the execution and delivery of the note, Fulton secured and caused to be delivered to the makers of the note a deed containing clauses of general warranty for the coal specified, together with certain mining rights therein fully set forth. The makers of the note accepted the deed, placed the same on record, and still retain the property, and it now is nearly sixteen years since the deed was delivered. All the coal required by the note to be delivered was delivered, and mining rights undoubtedly of some value were delivered therewith. On the date of the recording of the deed, there was placed on record a mortgage by the grantees in the deed to the grantors therein, for half of the purchase money of the conveyance, payable in two equal

instalments, one in one year from April 1, 1900, and the other in two years from that date. Both of these instalments afterwards were paid. What will constitute "full and complete mining rights so as to make coal salable and marketable" in a particular case is a question of fact. Ford *v.* Buchanan, 111 Pa. 31. The words have no well defined legal meaning, but must be construed by experts having practical knowledge of the subject. We have some knowledge of the subject of mining rights in connection with the development of bituminous coal mines, and of the kind of mining rights that usually are demanded in connection with coal purchases, but that knowledge on our part is not to be interjected into this case. There was not a word of testimony offered at the trial to show whether the mining rights contained in this deed were such as to make the coal salable and marketable or not. But inasmuch as the makers of the note accepted the deed, and have retained the property for a period now of nearly sixteen years, it must be held, in our opinion, that there was at least such a substantial performance of the contract on the part of the plaintiff, and such an acceptance of the benefits of part performance on the part of the makers of the note, as to estop and preclude the makers of the note from insisting upon further performance of the contract by the plaintiff as a condition precedent to their liability and to compel the makers of the note either to rely on their claim for damages in respect of the defective performance or to have pleaded their cross-claim by way of recoupment. As to which of these remedies was available to the defendants under the circumstances of this case, or whether it was optional with the defendants as to which of the remedies they would invoke, we are not called upon now to decide.

"A part performance or a defective performance of a condition precedent is generally not sufficient. But after one party has performed the contract in a substantial part, and the other party has accepted and had the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability. In such case he must perform the contract on his part, and must rely upon his claim for damages in respect of the defective performance." 9 Cyc. 645.

"Although conditions precedent must be performed, and a partial performance is not sufficient, yet, when a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefits of the part performance, knowing that the contract was not being fully per-

formed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received and may be compelled to rely upon his claim for damages in respect of the defective performance. The foundation of this rule undoubtedly is that it would be unfair that a party should receive and keep a part of what he has bargained for and pay nothing for it, because he has not received the whole. The technical reason given is that a covenantee or promisee must be held to have dispensed with the performance of a condition precedent, as such, if, with knowledge that the condition was not being fully performed, he treats the contract as continuing and takes the benefit of the part performance. There are difficulties in the application of the rule, particularly in determining what constitutes such a part performance as will change the condition precedent into an independent agreement. It seems that the performance must be of a substantial part of the contract, and that the acceptance must be under such circumstances as to show that the party accepting knew or ought to have known that the contract was not being fully performed. But the difficulty of determining the measure of damages for failure fully to comply with the terms of a particular contract will not prevent the acceptance of a substantial part performance from changing a warranty which constitutes a condition precedent into an independent covenant." 6 R. C. L. 991.

"Conditions precedent must be performed in order to make the conditional promise absolute. But after the one party has performed the contract in a substantial part, and the other party has accepted and had the benefit of the part performance, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability; in such case he must perform the contract on his part, and must rely upon his claim for damages in respect of the defective performance. It is remarkable that according to this rule the construction of the instrument may be varied by matter ex post facto; and that which is a condition precedent when a deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less. This is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been paid by the defendant. That residue must be the

substantial part of the contract." I Beach on Contracts, § 107.

"A condition precedent may, in the course of the performance of the contract, change its character, and in effect cease to be a condition. Acquiescence in its breach may turn it into a mere warranty. In other words, a breach of condition, which would discharge a party if at once treated by him as a discharge, will not have this effect if he goes on with the contract instead of repudiating it, and takes a benefit under it; but in such a case he can only recover his damages. If a party wishes to exercise his right to rescind the contract because of the other's failure to comply with the contract in some substantial particular, he must give the latter clear notice of his intention, unless there are circumstances rendering notice unnecessary; and, where he can do so, he must return, or offer to return, what he has received. An illustration of such a change in the effect of a condition is afforded by a leading English case (Pust *v.* Dowie, Law J. 32 Q. B. 179), in which it appeared that the defendant had chartered the plaintiff's vessel for a certain voyage, and promised to pay a certain sum in full for her use on condition of her taking a cargo of not less than one thousand tons. The defendant had the use of the vessel as agreed upon, but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action brought for non-payment of the freight, the defendant pleaded a breach of this condition. The term in the contract which has been described was held to have amounted in its inception, to a condition, and it was said that the defendant, while the contract was still executory, might have been rescinded, and refused to put any goods on board, but as the contract had been executed, and the defendant had received a substantial part of the consideration, he could not rescind the contract, but must be left to his cross action for damages." Clark on Contracts, p. 676.

In addition to the case cited by Clark, which, in principle, in our opinion, is very close to the case now under consideration, may be noted the case of Wiley *v.* Athol, in the Supreme Judicial Court of Massachusetts, 150 Mass. 426, 23 N. E. Repr. 311, 6 L. R. A. 342. In that case the plaintiff's company had entered into a contract to furnish the defendant town at all times with a full and ample supply of water from eight hydrants, and from each and all of them, for the purpose of extinguishing fires, at a certain price per hydrant per year, for a period of twenty-five years, and the contract contained a guaranty on the part of the company to supply sufficient water

at all times to run all of the eight hydrants at the same time and to throw eight full streams of water over the highest building in the town. In an action by the plaintiff to recover water rents, covering a period of two years, it was proved that during the period covered by the claim the company had furnished the town at all times with a full and ample supply of water from the hydrants, and from each and all of them, for the extinguishment of fires, which was accepted by the town without any intimation that the provision as to the eight hydrants had not been complied with. There was evidence on the part of the defendant that the hydrants would not at any time during the period covered by the claim comply with the provision of the contract as to throwing eight streams of water at the same time over the highest building in the town. The lower court refused to rule that in order to recover the plaintiff was bound to prove, as a condition precedent, that during all the time covered by the declaration a sufficient supply of water had been furnished to run all of the eight hydrants at the same time and to throw eight full streams of water over the highest building in the town. In sustaining the position of the court below, the Supreme Court said:

"The furnishing of the water was the principal thing, to which everything else was subordinate. We agree, therefore, with defendant's counsel in his contention that the guaranty was in its nature a continuing condition precedent, the performance of which was necessary to enable the plaintiff to recover, semi-annually, the price agreed to be paid for the use of the hydrants. But, although conditions precedent must be performed, and a partial performance is not sufficient, yet, when a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received and may be compelled to rely upon his claim for damages in respect of the defective performance."

The ruling in that case, it seems to us, is on all fours with the case now under consideration. Here the plaintiff was to deliver certain coal, with full and complete mining rights so as to make the coal salable and marketable. He delivered the coal, with mining rights, which constituted at least a substantial part of the contract, and the makers of the note voluntarily accepted the same and received and retained the benefit of the

part performance, knowing, if that be a fact, that the contract was not being fully performed, and they are precluded now from relying upon the performance of the residue of the contract as a condition precedent to their liability on the note. It will be noticed that in the Massachusetts case the plaintiff was not required to prove, in order to entitle him to recover, that the guaranty provision of the contract had been fully complied with, the acceptance of the benefits of the substantial part performance by the other party rendering such proof by the plaintiff unnecessary. So here, when the plaintiff proved that he had delivered the coal, with mining rights, and that the other parties accepted the same, and received and retained the benefits of such substantial part performance, he made out a prima facie case, and was not bound to go further with his proof. If the case be one in which damages should have been recouped in the action, the burden was on the defendants to show that the mining rights conveyed with the coal were not so full and complete as to make the coal salable and marketable, and the extent of the damages sustained. In the Massachusetts case the furnishing of a sufficient supply of water at all times from all of the hydrants for the purpose of extinguishing fires constituted a substantial performance of the contract.

In the present case the plaintiff's obligation was to deliver two hundred and fifty-eight acres of the nine-foot vein of coal, which, of itself, was a large and substantial part of the contract, and also such full and complete mining rights as would make the coal salable and marketable. The amount of the note in suit evidently represented the plaintiff's profit in his connection with the coal transaction, over and above the amounts paid the owners of the coal. It was a profit on the delivery both of coal and mining rights. The coal was the principal thing, and the mining rights were but incidental thereto, although of great value. If the statements contained in the plaintiff's letter of Jan. 14, 1907, offered in evidence by the defendants, are to be believed, the coal with the mining rights contained in this deed, was then salable and marketable at a price far in advance of what the makers of the note paid for it. We are of opinion that the plaintiff performed at least a very substantial part of his contract when he procured and caused to be delivered to the makers of the note the property described in this deed. See also Ashland Coal & Coke Co. *v.* Hull Coal & Coke Co., in the Supreme Court of Appeals of West Virginia, 68 S. E. Repr. 124.

There is one other question in the case demanding attention. After the note in suit had been executed, and after the deed for the coal and mining rights had been delivered, L. S. Miller, one of the makers of the note, died, and when this action was instituted, the executor and the executrix of L. S. Miller were joined with E. M. Lilley, the other maker of the note, as defendants. It was error to join the executor and the executrix of the deceased with the surviving maker of the note. Hoskinson *v.* Eliot, 62 Pa. 393; Githers *v.* Clarke, 158 Pa. 616; Chambers to Use *v.* Reinhold, 33 Pa. Super. Ct. 266; Johnson *v.* Weller, 54 Pa. Super. Ct. 481. But in the first of these cases it was said by Justice Williams: "If objection had been made, the plaintiffs, under the act of May 4, 1852, P. L. 574, would have been permitted to amend the record by striking out the names of the administrators of the deceased partner. As the objection is made here for the first time, we will permit the amendment with the same effect as if it had been made in the court below." And in the last of the cases cited it was said by Judge Head: "Nor can the appellant escape the liability incident to the partnership relation on account of the alleged misjoiner in the present action of the personal representative of his deceased partner with himself. Had such objection been promptly made, by plea in abatement, or otherwise, an amendment of the record would have readily disposed of the objection. The appellant suffers no harm by reason of the joinder, and it would be an abuse of the rules of pleading to reverse the judgment now on such grounds."

At the argument of the present case defending counsel raised the question of the misjoinder of defendants, whereupon plaintiff's counsel stated their willingness to amend, and requested the court to make an order permitting such amendment to be made.

And now, Feb. 22, 1916, for the reasons stated in the opinion herewith filed, it is ordered that judgment be entered for the defendants non obstante veredicto, unless, within twenty days from this date, amendment of the record be made by the plaintiff by striking out the names of the executor and the executrix of the deceased maker of the note, L. S. Miller, wherever the same occur, but that upon such amendment being made, within the time specified, the motion for judgment non obstante veredicto shall be considered as having been refused, and thereupon judgment shall be entered on the verdict upon payment of the jury fee.

From D. W. McDonald, Esq., Uniontown, Pa.

Benscreek Water Company.

Corporations—Supply of water—Extent of adjoining territory—Act of May 21, 1901, P. L. 270.

The act of May 21, 1901, P. L. 270, was not intended to cover a case of a corporation (chartered to supply water to one municipal division) securing merely by petition the right to supply the whole of another municipal division.

The Benscreek Water Company was created for the purpose of supplying water to the people in the township of Portage, in Cambria county. The citizens of the borough of Cassandra (being a majority of land-owners), originally a part of Washington township, the borough line adjoining Portage township, petitioned the attorney-general under the act of 1901 to secure a supply of water from said water company. Held, that the right of the water company to supply said borough could not be secured in such proceeding.

The term "tract or district" in said act does not mean another municipality.

Request of Cyrus E. Woods, secretary of the commonwealth, for opinion.

HARGEST, Deputy Attorney-General, Nov. 18, 1915.—We have your letter of recent date, addressed to the attorney-general, transmitting a petition of citizens of the borough of Cassandra, Cambria county, purporting to be filed under the act of May 21, 1901, P. L. 270, for the purpose of securing the supply of water from the Benscreek Water Company.

As I understand the facts to be, the borough of Cassandra was originally a part of Washington township, Cambria county, and its present borough line adjoins the township of Portage. The Benscreek Water Company is a corporation of the state of Pennsylvania, created for the purpose of supplying water to the people in the township of Portage.

The act of assembly under which this petition is filed, provides "that any company heretofore incorporated or hereafter to be incorporated for the purpose of supplying water to the public in any town, borough or city, may, upon written request of the owners of a majority of the lots of land in any tract or district adjacent to such town, borough or city, have power and authority to extend its plant or works for the supply of water into such tract or district, with such rights and subject to such duties within such district as may have been conferred and imposed by its charter within the town, borough and city therein designated."

The petition sets out that the petitioners are a majority of the owners of lots of land in the borough of Cassandra, and

otherwise complies with the requirements of the act of assembly.

But does this act of assembly apply to this situation?

In Bly *v.* White Deer Mountain Water Co., 197 Pa. 80, it is held: "Section 34 of the act of April 29, 1874, which grants to water companies the power to supply water in 'the town, borough, city or district where they may be located,' limits the authority of a water company to the municipal or quasi-municipal division in which it is located. Neither the power of eminent domain granted by the act of 1874, nor any other provision of the act of 1874, nor any provision of the acts of May 16, 1889, and July 2, 1895, give to water companies the power to supply water in territory adjacent to the municipal or quasi-municipal division in which they are located. A provision in the certificate of incorporation granting power to supply water in adjacent territory is wholly inoperative, and such a certificate should not have been approved by the governor.

"As a water company has no right to supply water in territory adjacent to the place in which it is located, it has no authority under its right of eminent domain to condemn and appropriate waters for such purposes; and if it attempts to do so, a land-owner who is threatened with injury has a standing under the act of June 19, 1871, P. L. 1360, in equity for an injunction to restrain such act."

It is true that the act of 1901 was passed after this case was decided, but it is apparent that the act of 1901 is not intended to cover a case of a corporation chartered to supply one municipal division securing, merely by petition, the right to supply the whole of another municipal division. The language of the act is that the corporation may extend its lines to supply a "tract or district." This does not mean another municipality. To put this construction on the act would be to authorize the corporation, by merely filing a petition, to do that which it cannot secure the right to do by an original charter, that is, to supply two municipal or quasi-municipal divisions.

I therefore advise you that the right of Benscreek Water Company to supply the borough of Cassandra cannot be secured in this proceeding.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Campbell *v.* Campbell.

Divorce—Master—Appointment—Rules of court—Carelessness.

When a master in a divorce proceeding is prematurely appointed, twenty days not having elapsed from the return-day, a divorce will be refused.

An order of court returning the record to the master with instructions to give notice of a hearing and proceed with the case is equivalent to a reappointment of the master as of that date.

The court will not tolerate mistakes and inaccuracies in a report of a master due to carelessness.

In divorce. C. P. Allegheny Co. July T., 1915, No. 149.

H. Fred Mercer, for libelant. No appearance for respondent.

EVANS, J., Dec. 11, 1915.—Rule 95 of this court reads as follows: "If the subpœna has been served or notice given as hereinbefore provided, and respondent does not appear within twenty days after the return-day, the libelant may apply for the appointment of a master or set the cause down for trial as hereinafter provided."

The subpœna in this case was returnable to the first Monday of July, 1915, which was July 5, and on July 17, on motion of counsel for the libelant, the court appointed E. A. Lawrence master. Twenty days not having elapsed from the return-day, this appointment was premature. If this were all, the divorce at the present time would have to be refused, but I find on examination of the record that this case was before Judge Davis at the September argument list, and for another defect in the record, on September 3, he made an order returning the record to E. A. Lawrence, master, directing him to give notice of the hearing and proceed to hear the case anew. I take it that this order of Judge Davis was equivalent to the reappointment of the master at that date, to wit, September 23. That being the case, that appointment was not premature and the subsequent acts of the master were regular. The master specifically reported in this case that the appointment of the master was regular and according to law.

I think I am justified at this time in calling attention to those members of the bar who accept appointments as master that they are expected to know of the accuracy of the statements they make in their reports. I do not make this observation with special reference to the master in this case, for I have found, and I have no doubt the other judges have also found, numerous mistakes in the reports of the master that was only

the result of carelessness. For instance, in a master's report he states that the respondent deserted the libelant in July of 1915, and an examination of the testimony disclosed that the desertion occurred in July, 1913. Such mistakes as that are frequent and are purely the result of carelessness.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Commonwealth *v.* Pritchard.

Divorce—Children—Custody of—Written agreement.

The parents of two children obtained a divorce. By agreement the mother was given the custody of the children as follows: "The right of said possession shall not be interfered with by party of the first part (the relator) so long as they are properly cared for by their mother." Six years later the husband petitioned the court to be awarded the custody of the son, alleging that the mother was not a fit person to have custody of him. Held, that the evidence did not show that she was not a fit person nor that the son was not being cared for properly, and son awarded to custody of mother in accordance with the terms of the written agreement.

Habeas corpus. C. P. Allegheny Co. Jan. T., 1916, No. 655.

A. Devoe P. Miller, for petitioner.
Robert M. Ewing and *Thomas L. Kane,* for respondents.

MACFARLANE, J., Nov. 10, 1915.—The respondent obtained a divorce from the relator on July 31, 1913, on the ground of cruel and barbarous treatment. For the past six years she has had entire care of their son, having been separated from her husband during that period. They agreed in writing that their two children should remain with her. "The right of said possession shall not be interfered with by party of the first part (the relator) so long as they are properly cared for by their said mother."

It is alleged that the mother has not been taking good care of the boy, and that she is not a fit person to have control and custody of him. The fact is the contrary. She has taken proper care of him and is a fit person to continue in custody of him. No attempt was made to show that the institution, where he is now, is not a proper place and the relator has not been denied the privilege of seeing his son.

The child should remain in the care and custody of the respondent, not only in compliance with the agreement but because it is to his best interests. This custody should be actual

and not in an institution and as soon as reasonably possible the mother should make arrangements to have the child at home.

Now, Nov. 10, 1915, after hearing, it is ordered that the child be remanded to the custody of the respondent, the relator to pay the costs.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Walker *v.* Commonwealth.

Justice of the peace—Certiorari—Criminal action—Jurisdiction of common pleas.

A certiorari cannot issue out of the common pleas to take up the record of a justice of the peace in a criminal action.

Certiorari. C. P. Centre Co. Sept. T., 1915, No. 245.

J. C. Furst, for plaintiffs in error.
D. F. Fortney and *D. P. Fortney,* for defendants in error.

ORVIS, P. J., Nov. 29, 1915.—The record presents a most novel situation—a certiorari out of the common pleas, to the record of a justice of the peace involving a criminal action. It seems from the record, as well as the admission of counsel, that Mary Elder Walker, the plaintiff in error, was arrested and brought before the justice of the peace upon a charge of assault and battery, in which some of the evidence would indicate aggravated assault and battery or even mayhem. The record further shows that though requested, the justice of the peace refused or declined to hear the defendant and her witnesses, but upon the hearing of the witnesses of the commonwealth committed the plaintiff in error. Whereupon she entered into a proper recognizance for her appearance at court and instituted the above stated proceedings.

No authorities have been given us to explain how the common pleas can interfere with the process of criminal procedure in the quarter sessions or how a certiorari under any circumstances would lie to such a proceeding as the mere commitment and return of the record in a criminal action to the quarter sessions. We cannot conceive of any authority to sustain the above action. For evident lack of jurisdiction we overrule all the reasons and dismiss the whole proceedings at the costs of the plaintiff in error.

Arrigo Company *v.* Sposato.

Appeal from judgment of justice—Entering of judgment on a judgment note in the same case.

Where plaintiff brought suit before a justice of the peace and produced as evidence of its claim a judgment note, secures judgment against the defendants, and there was an appeal by them, and plaintiff enters judgment, d. s. b., on the judgment note, on petition, the court will not strike off the judgment if the plaintiff takes a non-suit and pays the costs in the appeal.

Petition of Joe Sposato, one of the defendants, to strike off judgment. C. P. Washington Co. Feb. T., 1916, No. 7, D. S. B.

Vernon Hazzard, for rule; *D. M. McCloskey,* contra.

McIlvaine, P. J., Jan. 8, 1916.—The plaintiff in this case brought suit against the two defendants before a justice of the peace in an action of assumpsit for a sum not above $300. At the trial of the case the plaintiff produced before the justice, as evidence of its claim (so the record shows), a judgment note and claimed that $90.12 thereof remained unpaid, and the justice entered judgment against the two defendants in favor of the plaintiff for that sum. An appeal was taken by the defendant and that appeal is now pending in this court to November term, 1915, No. 396. Judgment was entered before the justice of the peace on Oct. 9, 1915. On Nov. 9, 1915, the same plaintiff entered judgment in this court against the same defendants for $90.26 on a judgment note and an execution was issued to collect the amount of said judgment.

On Nov. 15, 1915, the petitioner, Joseph Sposato, one of the above-named defendants, presented his petition alleging the facts that we have just stated, and asked for a rule on the plaintiff to show cause why the judgment entered on the warrant of attorney to February term, 1916, No. 7, D. S. B., should not be stricken from the record. An examination of the judgment entered on the D. S. B. docket shows no irregularity. Anyone examining the record and the papers on file would be led to say that the judgment was regular and valid. This being the case, can this court on a petition of one of the defendants strike off the judgment by reason of facts that do not appear on the face of the record and that could only be proved by the production of some other record identified by the testimony of some living witness? In other words, can this court on the petition that was presented and the rule that was granted, of its own motion refer to the record in our

courts where an appeal is docketed and see that the judgment note upon which judgment was entered to February term, 1916, No. 7, is the same judgment note that was produced before the justice of the peace in the other case? There is nothing whatever in either record to identify the judgment note that was introduced before the justice as the one that was presented to the prothonotary and upon which he entered judgment to February term, 1916, No. 7, and it will be recollected further that this case was set down for argument on petition and answer. But granting that this court was able to find that the note introduced in evidence before the justice was the same as that upon which judgment was entered by the prothonotary, does that fact alone give the court power to strike off the judgment? We think not. The defendants elected to take an appeal from the judgment of the justice, and that appeal was filed in this court, and under our rules it became a suit pending, and the legal controversy between the plaintiff and the defendants became an issue to be tried de novo. This being the case, the plaintiff was put in a position to elect whether or not it would prosecute its case against the defendants on the appeal or whether it would enter judgment by virtue of the warrant of attorney attached to the judgment note. To do this it would necessarily require the plaintiff to pay the costs in the appealed case, and perhaps it would have been more regular for it to have entered a voluntary non-suit in the appeal and then entered its judgment. But that can yet be done.

It has been decided in Township of Moreland *v.* Gordner, 109 Pa. 116, that a plaintiff in an appeal from a justice of the peace taken by a defendant, can enter a voluntary non-suit in that appeal, and if he does so that leaves no judgment before the justice, and having done this and paid the costs he clearly has a right to use the judgment note as a basis for the entry of a judgment in court upon a warrant of attorney.

If both of the defendants in this case had joined in a bill asking that the plaintiff be enjoined from proceeding further under the judgment entered on the warrant of attorney until the appeal case was disposed of, or if they had presented a petition asking that the judgment entered upon the warrant of attorney be opened, stating facts which would show that they had a good defence, then they might have been entitled to relief against the execution which has been issued. But only one of the defendants having asked for a rule simply to strike off the judgment, we are clearly of the opinion that the rule must be discharged, for it is decided in Lawrence *v.* Smith,

215 Pa. 534; Breden *v.* Gilliland, 67 Pa. 34, and Hall *v.* West Chester Publishing Co., 180 Pa. 561, that opening a judgment and striking it off are two entirely different things, and that a judgment will not be stricken off if there be no averment in the petition, and proof to sustain that averment, that there was irregularity or an invalidity in the judgment appearing upon the face of the record. To do equity, however, between the parties in this case, in view of the facts developed at the hearing, and to protect the prothonotary, we feel that the plaintiff in this case should take a voluntary nonsuit in the appeal case and pay the costs of that case, and on condition that it does this this rule will be discharged.

And now, Jan. 8, 1916, this rule came on to be heard upon petition and answer and was argued by counsel, whereupon, upon due consideration, it is ordered, adjudged and decreed that the rule be discharged on condition that the plaintiff take a non-suit and pay the costs in the appeal docketed to November term, 1915, No. 396.

(See Brumbaugh *v.* Price, 36 Pa. C. C. 497.)

Jenner Township Bridge.

Bridges—County bridge—Reference to second grand jury.

The court of quarter sessions has the power to refer to a second grand jury the question as to the necessity for a county bridge, although a previous grand jury had refused to concur with viewers as to such necessity.

Petition to refer back to a grand jury the question of the propriety for a county bridge. Q. S. Somerset Co. Dec. T., 1915, No. 1.

E. E. Kiernan, for petitioners.

RUPPEL, P. J., March 11, 1916.—Upon petition of citizens of Jenner township, viewers were appointed to examine and report as to the necessity for a bridge to be erected as a county bridge. The viewers reported in favor of the bridge at December sessions, 1915, and their report was referred to the grand jury at February sessions, 1916. The grand jury refused to concur with the viewers and we now have this petition asking that the matter be sent to the grand jury at May session next. There is no appearance in opposition to the motion; perhaps persons who would or might be opposed have

no knowledge of this proceeding. The only persons upon whom a rule could be served to show cause, etc., would be the county commissioners, but as these officers will act judicially on the matter after the grand jury has concurred, it is of no consequence to bring them into court by rule at this stage of the proceeding, because under the act of assembly there can be no such county bridge until there is a concurrence by viewers, grand jury, the commissioners and the court. The only question is whether the court has power to refer the matter to a second grand jury. In case of irregularity, misconduct on part of a grand juror, or matters of that character, there is no doubt but that the court has control of the matter and can refer to a subsequent grand jury. Pottstown Bridge, 5 Pa. C. C. 334.

No such allegations, however, are contained in this petition. In fact the petition alleges no reasons whatever for the second inquiry except the mere fact that the last grand jury refused to concur. In presenting the petition, however, counsel for the petitioners has stated certain facts which probably it would not be wise to incorporate in the petition, but which he thinks sufficient to induce the court to act favorably in the matter.

This proceeding is under the act of June 13, 1836, P. L. 560, § 35 of which provides for the building of a bridge by the county, "if on the report of viewers, it shall appear to the court, grand jury and commissioners of the county, that such bridge is necessary and would be too expensive for such township or townships, it shall be entered on record as a county bridge." I have looked in vain for any ruling as to the power of the court to send a report of this kind to a second grand jury after a failure to secure an approval from the first grand jury.

In Pequea Creek Bridge, 68 Pa. 427, Mr. Justice Sharswood, after quoting from the act of 1836 above, says:

"It is evident that the legislature intended that these three bodies should act as checks upon each other in the unnecessary expenditure of a public money in the erection of county bridges. When either of them therefore have put their disapprobation on record, the proceedings falls. If it were not so taxpayers and others interested in opposing a county bridge might be kept dancing attendance upon the court from session to session until some one grand jury may be induced to approve it."

But in Meyers *v.* Com., 110 Pa. 217, in answer to a peti-

tion for mandamus, the county commissioners aver, inter alia:

"That viewers were appointed as prayed for, and their report favoring the building of a bridge was referred to the grand jury at November sessions, A. D. 1867, and disapproved by that body. That the same report without any further proceedings was subsequently presented to the grand jury at the January sessions, A. D. 1868, and was then approved by that body and the report was confirmed by the court."

And Mr. Chief Justice Mercur, in commenting upon the case of Pequea Creek Bridge, supra, says:

"We do not question the correctness of that opinion on the facts of the case. There objection was made to submitting the same report to a second grand jury before it was done. It is an irregularity which may very well not be approved of if objection be made in time. Here, however, it was not only laid before the second grand jury without any obejction, but the action of that jury was ratified and confirmed by the court and the commissioners of the county."

Evidently the irregularity spoken of was the submission of the grand jury without a special order of the court. There is nothing in any of these cases or others that I have been able to find which prevents the court from making a special order in a proper case; and as strengthening this view we have the act of Feb. 17, 1860, P. L. 61, § 13 of which reads:

"That in all cases where the action of the court or grand jury shall be adverse to the grant of a new road or bridge, no new petition to view the same site, or one substantially the same, shall be granted by the court until after the expiration of two years from the final decree of the court on the former application; nor shall any report, recommending the erection of a new bridge, be presented to a subsequent grand jury after two grand juries have refused to approve the same."

This act of assembly applied only to York county, but the act of May 25, 1907, P. L. 233, extended the act to the other counties of the state.

Is it not reasonable to infer that the legislature had in mind the power of the court to refer the same report to a second grand jury whether the action of the first grand jury be favorable or unfavorable to the building of a bridge? Without such inference the provision in the act would be meaningless. It would not be a reasonable construction to hold that this would apply to the proceedings as a whole; that is that after a second proceeding instituted more than two years after the failure of the first view should be a finality, that that view would pre-

vent the appointment of viewers even though thirty or forty years had elapsed after the second unsuccessful petition had been acted upon. I am, therefore, inclined to think that the legislature contemplated the right of the court to refer to as many grand juries as the court thought proper, and for that reason to curb that power, the acts of 1860 and 1907 were passed restricting the power to the presentation to two grand juries. At any rate as the commissioners and the court must pass upon this matter even after a favorable report by the grand jury, before the bridge can be entered as a county bridge, I think if there be any doubt it should be resolved in favor of the petitioners and allow the commissioners to exercise their authority if another grand jury should report favorable to the petitioners.

And now, to wit, March 11, 1916, upon due consideration, it is ordered that the report of viewers in the above case be referred to the grand jury at May sessions, 1916.

Chambersburg *v.* Slaughenhaup.

Borough ordinance—Traffic rules—Reasonableness.

A borough ordinance providing that "a vehicle crossing from one side of the street to the other on paved or macadamized streets shall do so by turning to the left, and shall head in the general direction of traffic on that side of the street," is not an unreasonable exercise of the police power of the borough.

Appeal from the judgment of a justice of the peace. C. P. Franklin Co. Sept. T., 1915, No. 7.

Charles Walter, for plaintiff; *O. C. Bowers,* for defendant.

GILLAN, P. J., March 28, 1916.—The defendant does not deny his violation of the ordinance. There is no dispute as to the facts. No evidence was submitted to this court and we are to pass upon the matter as it appears in the record of the appeal. The ordinance under consideration is entitled, "An ordinance to regulate the use of the streets, alleys, public places, sidewalks and highways of the borough of Chambersburg." The sixth rule of § 1 provides as follows: "A vehicle crossing from one side of the street to the other on paved or macadamized streets, shall do so by turning to the left, and shall head in the general direction of traffic on that side of the street." This is the clause of the ordinance which was vio-

lated by the defendant. Section 2 of the ordinance provides a penalty of not less than $1 nor more than $25.

The defendant in his petition asking that an appeal be allowed set forth that the "ordinance is an unreasonable exercise of the police power of the borough," and they have so pressed on us in the argument. "The essential qualification of the police power, as a governmental agency, is that it imposes upon persons and property burdens designated to promote the safety and welfare of the general public." C. B. & Q. R. R. Co. *v.* Nebraska, 41 L. R. A. 484. The police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state. Thorn *v.* R. R. Co., 27 Vt. 149. Likewise the police power of the borough extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the borough.

The borough of Chambersburg is subject to the general law of the commonwealth. It is provided by the first clause of § 2, that is the act of April 3, 1851, in which the powers of a corporation are defined, that the corporate officers of a borough shall have the power "to make such laws, ordinances, by-laws and regulations, not inconsistent with the laws of this commonwealth, as they shall deem necessary for the good order and government of the borough." This is sometimes designated the "general welfare clause." By the fourth clause of said section it is provided that the corporate officers of a borough shall have the power "to regulate roads, streets, lanes, alleys, common sewers, public squares, common grounds, footwalks, pavements, gutters, culverts and drains, and the heights, grades, width, slopes and forms thereof; and they shall have all other needful jurisdiction over the same." Either one of these clauses warrants the corporate officers of the borough of Chambersburg passing the ordinance in question, and indeed they may have this power under the common law without the aid of a statute.

The question then is: Is it an unreasonable regulation? Is it such a regulation as is prompted by reason and good judgment? We must remember and we are justified in taking notice of the fact that the borough of Chambersburg is a rapidly growing town. The travel on the streets is much greater than it was a few years ago. Cars driven by electricity, numerous drays propelled by motor power, automobiles and other vehicles are constantly passing over the streets. The defendant admits that the ordinance, in so far as it relates to requiring vehicles

to keep to the right side of the street is proper and reasonable. We quote from defendant's brief: "The wisdom of requiring teams or vehicles to keep to the right of the roadway needs no vindication." How then can moving teams or vehicles be kept to the right side of the street if persons wishing to cross the street do not turn to the left? Not to require this would result in great confusion to travelers. Nor is it hard to see how confusion would arise from teams and vehicles standing on the street headed in the direction opposite to that of the general direction of travel.

The council is composed of the chosen representatives of the people. It is the duty of the court to set aside any invalid ordinance they may pass, but the courts are very slow to interfere with their judgment and discretion. "Where the municipal legislature has authority to act it must be governed not by our, but by its own discretion, and we should not be hasty in convicting them of being unreasonable in the exercise of it." Fisher *v.* Harrisburg, 2 Grant 291; Wilkes-Barre *v.* Garabed, 11 Pa. Super. Ct. 355 Phila. *v.* Barabender, 17 Pa. Super. Ct. 339. We are thoroughly convinced that there has been no abuse in the passage of the ordinance in question.

Therefore, now, March 28, 1916, judgment is entered on this appeal in favor of the plaintiff and against the defendant for the sum of $1 and costs.

From Irvin C. Elder, Esq., Chambersburg, Pa.

Indian Brewing Company's License.

Liquor laws—Brewers—Classification—Fees—Act of June 30, 1897, P. L. 464.

Where a brewing company which held no license for the years 1914 and 1915, but had held licenses prior to 1914 for a number of years, applies for a license for 1916, the court in granting a license for 1916 will not rate the company under the act of June 30, 1897, P. L. 464, providing for the classification of brewers, as a new brewery calling for a fee of $1,000, but as an old one with a fee of $250.

Application to fix amount of license fee. Q. S. Indiana Co. Dec. T., 1915, No. 4.

LANGHAM, P. J., Feb. 15, 1916.—And now, Feb. 14, 1916, the Indian Brewing Company, by its attorney, Geo. J. Feit, having moved the court to fix the license fee payable by said licensee under the brewer's classification act of 1897; and there

having appeared before the court the said Geo. J. Feit, attorney for the Indian Brewing Company, and Samuel Cunningham, attorney for F. M. Smith, treasurer of Indiana county; and after argument on the said motion the said Samuel Cunningham having requested the court to find all facts that are or may be pertinent to fixing said license fee, which facts are shown by the records of the court of quarter sessions of Indiana county and are not in dispute, the court find the facts to be as follows:

FINDINGS OF FACT.

1. During the year preceding its application at December sessions, 1915, No. 4, the Indian Brewing Company brewed no malt or brewed liquors, and its certificate of production accompanying the application shows this fact.

2. The Indian Brewing Company held no license for the year 1915.

3. For the year preceding the filing of its application for a license for the year 1915, the Indian Brewing Company brewed not to exceed sixty-nine hundred barrels of malt or brewed liquors, as shown by the certificate of production filed with the application for the year 1915. Of the year covered by this production, the brewing company had a license only from Dec. 10, 1913, to Feb. 16, 1914, and the greater part of that production was during this license period.

4. The Indian Brewing Company held no license for the year 1914.

5. For the year preceding the filing of its application for a license for the year 1914, the Indian Brewing Company brewed not to exceed forty-five thousand one hundred and forty-one barrels of malt or brewed liquors, as shown by its sworn certificate of production.

6. Said corporation held a license for the year 1913.

7. The Indian Brewing Company held a license and operated its plant during a number of years prior to the year 1913, and at the time it was first licensed paid the sum of $1,000 as a license fee for a new brewery.

DECREE.

And now, Feb. 15, 1916, it appearing to the court as shown by the certificate of production filed by the licensee at the time of filing its application that no malt or brewed liquors were manufactured or produced by the licensee during the year immediately preceding its application, and it further being within

the knowledge of the court and shown by the records of Indiana county that said licensee held a license for a number of years and is not a new brewery, the court do now fix the license fee payable by the licensee under the brewer's classification act of 1897 at $250.

Wilson *v.* Fonner.

Bankruptcy—Judgment—Exemption—Execution.

A judgment creditor of a bankrupt, who holds a waiver by him of the benefit of the state exemption laws, may have the sheriff levy upon and sell the exempt goods of the bankrupt at any time before the final discharge.

His right to do so is not lost by the fact that he has proven his claim before the referee in bankruptcy, and, without objection from other creditors, received his dividend thereon.

Rule to show cause why alias fi. fa. should not be set aside. C. P. Greene Co. Sept. T., 1915, No. 89.

Challen W. Waychoff and *Roy J. Waychoff*, for plaintiff.
Frank J. Fonner and *James J. Purman*, for defendant.

July 15, 1915, above judgment entered on a note containing a waiver of the state exemption laws and same day fi. fa. issued and levy made by sheriff.

July 26, 1915, Charles Fonner, defendant, adjudicated a bankrupt, and on Sept. 17, 1915, property valued at $300 set aside by bankruptcy court to him and same day alias fi. fa. issued and levy made by sheriff on exempt property.

Plaintiff proved his claim before referee, and, without objection from other creditors, received his dividend thereon.

Sept. 30, 1915, rule granted on plaintiff to show cause why the alias fi. fa. should not be set aside, all proceedings being stayed until the determination of rule, the lien to remain.

Application for discharge now pending.

RAY, P. J.—Under these facts the defendant contends (1) that the personal property appraised and set apart to the bankrupt, the defendant in this case, in the bankruptcy proceedings, is not subject to levy and sale on the alias writ of fi. fa., although the judgment waives the bankrupt's right to the benefit of all exemption laws; (2) that the presentation and proof, by the plaintiff, of the claim on which the judgment was entered, in the bankruptcy court, and the receiving of a dividend thereon, bars his right to levy upon and sell the exempt property on a writ issued out of a state court.

The first contention of the defendant, that the exempt property set apart to him by the court of bankruptcy is not subject to levy and sale on the alias writ of fi. fa. in this case, does not seem to be well founded. Section 6 of the national bankruptcy act of 1898 provides: "This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of filing the petition in the state wherein they have had their domicil for the six months or the greater part thereof immediately preceding the filing of the petition." In this state the defendant on execution of his property is entitled, upon demand, to have exemption of the same to the value of $300, to be duly appraised and set apart to him for his use. The property so appraised and set apart, whether in a proceeding in the bankruptcy court or in a state court, is the property of the defendant. In this state the law permits anyone who gives a note, or similar instrument, to waive the benefit of all exemption laws; and, if he does so, and judgment is obtained against him on such writing, and execution issued, his property, that would otherwise be exempt, is subject to levy and sale.

In Lockwood *v.* Exchange Bank, 190 U. S. 294, it was held that exempt property, set apart in bankruptcy proceedings to a bankrupt, constitutes no part of the assets of the bankrupt estate, but that it remains the property of the bankrupt. The court in its opinion uses this language: "The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside and thus exclude it from the assets of the bankrupt estate, to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute as included in the assets of the estate the very property which the act, in unambiguous language, declares shall not pass from the bankrupt or become part of the bankruptcy assets."

Should the writ of alias fi. fa. be set aside because of defendant's second contention, that because plaintiff has proved his claim in the court of bankruptcy, and has received a dividend thereon, he is now estopped from proceeding against defendant's exempt property? In Lockwood *v.* Exchange Bank, supra, the court held: "As in the case at bar, the entire property which the bankrupt owned is within the exemption of the state law, it becomes unnecessary to consider what, if any, remedy might be available in the court of bankruptcy for the benefit of general creditors, in order to prevent the creditor holding the waiver as to general assets, and, thereafter, avail-

ing himself of the right resulting from the waiver to proceed against exempt property."

The plaintiff in this case has the right to proceed against two funds, the estate of the defendant in bankruptcy and the exempt property set apart for him by the bankruptcy court. The general creditors of the bankrupt estate, who had access to but the one fund, might have compelled the plaintiff, perhaps, to withdraw his claim from before the referee in bankruptcy. However, not having done so, we see no reason why he should be forbidden to proceed against the exempt property of the bankrupt. But he should credit his judgment with the amount of the dividend he has received from the bankrupt estate.

Other cases commented upon: Wagenseller *v.* Gemberling, 29 Pa. C. C. 285; Gilmore *v.* Smith, 31 Pa. C. C. 113 Sharp *v.* Woolslare, 25 Pa. Super. Ct. 251.

Rule to show cause, etc., discharged.

First National Bank of New Salem *v.* Rush.

Promissory notes—Endorsement—Renewals—Banks and banking.

Where a bank has discounted a note endorsed by the payee thereof and another person, and afterwards without the knowledge of the payee accepts renewals of the note endorsed by the payee alone, an affidavit of defence is insufficient to prevent judgment in an action against the payee as endorser which merely alleges that the original endorsement by the two endorsers was a joint undertaking, and was known by the bank to have been such, but does not allege that the officers of the bank knew the omission of the second endorsement was without the knowledge and consent of the payee, and does not allege that the officers of the bank were not acting in good faith when they accepted said renewals.

In such a case the burden is on the payee of the note when he endorses it to secure the endorsement of the other party, if the undertaking of endorsement is to continue a joint one between them, rather than on the bank to reject the renewals until the second endorsement has been secured, if the bank is satisfied with the endorsement of the payee alone, and acts in good faith in the transaction.

Rule for judgment for want of a sufficient affidavit of defence. C. P. Fayette Co. June T., 1915, No. 510.

Umbel, Robinson, McKean & Williams, for plaintiff.
Sturgis & Morrow, for defendant.

Van Swearingen, P. J., Dec. 7, 1915.—This action was brought by the plaintiff to recover from the defendant the

amount of two promissory notes. An affidavit of defence was filed as to one of the notes, but none as to the other. The plaintiff, alleging that the affidavit of defence was not sufficient to prevent judgment, took a rule on the defendant to show cause why judgment should not be entered for the plaintiff for the whole amount of its claim.

It is alleged in the plaintiff's statement of claim that on Dec. 21, 1914, George F. Titlow executed a promissory note for the sum of $1,600, payable to the order of the defendant at the First National Bank of New Salem in sixty days from the date thereof, and that the defendant endorsed the note, and, for full value, before maturity, delivered it to the plaintiff bank, which thereupon became the holder and owner thereof in due course. The plaintiff alleges that at the maturity of the note it was presented for payment and payment was demanded, at the First National Bank of New Salem, the place designated in the note for the payment thereof, but that payment was refused; whereupon on the same day, notice of non-payment and protest thereof was duly given to and made against the defendant as endorser and the said George F. Titlow as maker of the note, at a cost to the plaintiff of $1.99 in notary's fees. The other note included in the plaintiff's statement of claim was for the sum of $700, made by the defendant under date of Nov. 23, 1914, payable to the order of R. D. Warman at the First National Bank of New Salem in ninety days from the date thereof, which note, it is alleged, was endorsed by the said R. D. Warman, and was delivered by him for full value, before maturity, to the plaintiff bank, which thereupon became the holder and owner thereof. The plaintiff alleges that at the maturity of the note it was presented by the plaintiff for payment and payment was demanded, at the First National Bank of New Salem, the place designated in the note for payment thereof, but that payment was refused; whereupon, on the same day, notice of non-payment and protest thereof were duly given to and made against the defendant and the endorser of the note, at a cost to the plaintiff of $1.99 in notary's fees.

As to the $1,600 note, it is alleged in the affidavit of defence that "said note is a renewal note, the original indebtedness for which was evidenced by a note for $3,000, dated July 22, 1912, made by George F. Titlow to the order of Logan Rush, and by him endorsed, and also endorsed by J. V. Thompson, which was renewed on Sept. 20, 1912, with a like note, and thereafter the said bank accepted a note made by said

Titlow to the order of this affiant and endorsed by affiant without the same having been endorsed by the said Thompson, of which the defendant had no knowledge and to which he did not consent, it being understood when he endorsed the said note which was originally for the accommodation of the said Titlow, that the undertaking of endorsement between the said Rush and Thompson was a joint undertaking, and that the bank had knowledge thereof, and accepted renewals from time to time without the said Thompson's name being thereon and without affiant knowing that his name was not thereon;" wherefore the defendant denies that he is liable as sole endorser of the note.

We are of opinion that the affidavit of defence is insufficient to prevent judgment. Conceding the facts to be as stated by the defendant, that the original undertaking of endorsement between Rush and Thompson was a joint undertaking, and known by the plaintiff bank to have been such, there is no allegation in the affidavit of defence that when the plaintiff bank from time to time accepted the renewals of the note endorsed by the defendant alone the officers of the bank knew that the omission of Thompson's endorsement was without the knowledge and consent of the defendant. If Rush and Thompson had been joint payees of the note a different case would have been presented, but Rush was the sole payee, the note was payable to his order, and when he endorsed it the transaction became complete on delivery. The burden was on the defendant to see that Thompson endorsed the renewals, if the undertaking of endorsement was to continue a joint one between Rush and Thompson, rather than on the bank to reject the renewals until Thompson's endorsement had been secured, if the bank was satisfied with the endorsement of the defendant alone, and acted in good faith in the transaction, and there is no allegation in the affidavit of defence that the bank was not acting in good faith when it accepted the renewals bearing the endorsement of the defendant alone. Even if Rush and Thompson had been joint payees and both had endorsed the note, the plaintiff could have sustained an action against the defendant alone, under § 68 of the negotiable instrument act of May 16, 1901, P. L. 194, which provides that joint payees or joint endorsees who endorse are deemed to endorse jointly and severally. The preëxisting debt in this case constituted a valuable consideration, under § 25 of the act cited, and we are of opinion that when the defendant permitted the several renewals of the note to leave his hands and

reach the bank with only his endorsement thereon, and that endorsement was accepted by the bank officials in good faith, the defendant was bound thereby and liable thereon. No authorities whatever have been cited in support of the defendant's contention.

And now, Dec. 7, 1915, for the reasons presented in the opinion herewith filed, the rule for judgment for want of a sufficient affidavit of defence is made absolute, and it is ordered that judgment be entered in favor of the plaintiff and against the defendant for the sum of $2,414.11, being the amount of the two notes included in the plaintiff's statement of claim, together with protest fees and interest to this date.

From D. W. McDonald, Esq., Uniontown, Pa.

Commonwealth v. Erb.

Criminal law — Former conviction — Indecent exposure — Rape.

A judgment on a verdict of guilty on a trial of an indictment for rape cannot be sustained, where it appears that the defendant had been previously convicted on an indictment for indecent exposure, and that both charges grew out of the same facts.

Rule for arrest of judgment and why sentence should not be imposed. Q. S. Centre Co. Dec. Sess., 1913, No. 16.

D. P. Fortney, district attorney, for commonwealth.
N. B. Spangler, for defendant.

ORVIS, P. J., Jan. 1, 1916.—On Sept. 30, 1914, the jury returned a verdict against the defendant of guilty of an attempt to commit a rape. At the trial record evidence was produced to show that the same defendant was arrested and plead guilty to an indictment drawn to December sessions, 1913, No. 35, charging indecent exposure, and that after said plea, upon motion of the district attorney, the court imposed sentence upon the defendant. It further was shown that both charges grew out of the same facts. That the prosecutor in his information only charged indecent exposure, and that the indictment was based upon the said information. If there was any mistake made, it was either by the prosecutor or by his counsel or by the justice of the peace. After the imposition of the sentence and the payment of a considerable fine, prosecutor showed his dissatisfaction by beginning a second proceeding. Counsel for the defendant at the time of the trial

raised many questions, some of which seem to have considerable merit. These were largely technical, however, and we might be driven to support some of the respective contentions on the part of the defendant, but it seems so clear to us that the second conviction is a contravention of the constitutional provision, both federal and state, protecting the citizen from being put twice in jeopardy for the same offense. We are compelled to sustain the motion for this reason alone without considering the others. We do this with reluctance, because we believed the evidence clearly showed that the defendant was guilty of a serious offense and merited severe punishment, but through the blunder or mistake of the prosecutor, or his agents, the defendant was put in jeopardy once and paid the penalty.

And now, to wit, Dec. 31, 1915, the rule for arrest of judgment is made absolute, and it is hereby ordered, adjudged and decreed that sentence cannot be imposed upon the defendant for the reasons set forth in our general opinion; costs to be paid by the county of Centre.

From S. D. Gettig, Esq., Bellefonte, Pa.

Catsup Bottles.

Food law—Sale of catsup—Enforcement of Pennsylvania statute when shipped from another state—Federal act of 1906.

After purchase and analysis of a bottle of catsup from the shelves of a store of a retail merchant in Pennsylvania, when such catsup is found to violate the pure food laws of Pennsylvania, such laws may be enforced even though the catsup has been shipped from another state and is sealed and labeled in conformity with the national food and drugs act of June 30, 1906.

Request of Hon. James Foust, dairy and food commissioner, for opinion.

HARGEST, Deputy Attorney-General, Nov. 19, 1915.—Your favor of recent date was received. You propound the following question: "If a box containing two or more dozen bottles of catsup, properly sealed and labeled in conformity with the national food and drugs act of June 30, 1906, and shipped from another state to a retail merchant in Pennsylvania, is opened and the bottles placed upon the shelves of the store for sale, and upon purchase by an agent of this department and an analysis, the catsup is found to violate the pure food laws of this state, can the Pennsylvania laws be enforced?"

With your request you submit a copy of a letter of the state

food and drug commissioner of Indianapolis and an opinion of the attorney-general of Indiana, all to the effect that there can be no interference with a grocer who sells to his customer a single bottle of catsup, if it complies with the national food and drugs act, even though it violates the laws of the state, when such bottle of catsup was a part of a shipment from another state and originally packed in a larger case or box.

Your inquiry and the correspondence submitted are the result of a misconstruction of the case of McDermott *v.* Wisconsin, 228 U. S. 115 (57 Lawyers Ed. 754). The impression prevails since the opinion in that case, that a state cannot enforce its pure food laws against single, sealed packages of food misbranded or adulterated according to state laws, if such single packages comply with the provisions of the national food and drugs act of June 30, 1906. 34 St. at Large, 768, ch. 3915, U. S. Comp. Statt. Supp. 1911, page 1354. This impression is not justified by the decision itself. The precise questions in that case were:

First. Whether the word "package" as used in the food and drugs act was limited to "original package" as understood in interstate commerce, or whether it included the goods upon the shelves of a local merchant for sale?

Second. Whether the Wisconsin law, which required the goods to contain the exclusive labels provided by that statute, and, in effect, prohibited the labels required under the national food and drugs act, was beyond the power of the state to enforce?

The plaintiff in error, a retail merchant in Oregon, Wis., was convicted of violating the Wisconsin statute because he had in his possession with intent to sell and offered for sale, "Karo Corn Syrup," which was not labeled according to the Wisconsin law providing that "the mixture or syrups designated in this section shall have no other designation or brand than herein required," etc. He had purchased from wholesale grocers in Chicago twelve half-gallon tin cans of Karo Corn Syrup, the shipment being made in wooden boxes containing the cans, and when the goods were received at the store, the cans were taken from the original boxes and placed on the shelves for sale at retail. The cans were labeled in accordance with the national pure food and drugs act. That act provides, as stated in the opinion of McDermott *v.* Wisconsin, 228 U. S. 115:

"And as to food, if it shall be labeled or branded so as to deceive or mislead a purchaser, or purport to be a foreign

product when not so, or, if the contents of the package as originally put up shall have been removed in whole or in part, and other contents placed in such package; or, if the package fail to bear a statement of the label as required, or, if in package form and the contents are stated in terms of weight or measure, and they are not plainly and correctly stated on the outside of the package; or, if the package containing it or its label contain any design or device regarding the ingredients or the substances contained therein which are false or misleading in character, the food shall be deemed misbranded."

The court, speaking through Mr. Justice Day, said:

"That the word 'package' or its equivalent expression, as used by congress in §§ 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient, for the decision of these cases, that we consider the extent of the word 'package' as thus used only, and we therefore have no occasion, and do not attempt, to decide what congress included in the terms 'original unbroken package,' as used in §§ 2 and 10, and 'unbroken package' in § 3. Within the limitations of its right to regulate interstate commerce, congress is manifestly aiming at the contents of the package as it shall reach the customer, for whose protection the act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed."

The court also said, page 135:

"In the view, however, which we take of this case, it is unnecessary to enter upon any extended consideration of the nature and scope of the principles involved in determining what is an original package. For, as we have said, keeping within its constitutional limitations of authority, congress may determine for itself the character of the means necessary to make its purpose effectual in preventing the shipment in interstate commerce of articles of a harmful character, and to this

end may provide the means of inspection, examination, and seizure necessary to enforce the prohibitions of the act."

And on page 136:

"To determine the time when an article passes out of interstate into state jurisdiction for the purpose of taxation is entirely different from deciding when an article which has violated a federal prohibition becomes immune. The doctrine (of original package) was not intended to limit the right of congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end. The legislative means provided in the federal law for its own enforcement may not be thwarted by state legislation having a direct effect to impair the effectual exercise of such means."

The court held that congress could employ the means to keep interstate commerce free from misbranded articles, even to an inspection on the shelves of a retail grocer after the goods had been removed from the "original package," as known in interstate commerce.

The court also held that a state statute which interfered with such supervisory power over the avenues of commerce was an excessive and illegal exercise of the state's power.

This is the full extent to which the case of McDermott *v.* Wisconsin goes.

There is no Pennsylvania pure food statute which excludes, or requires the obliteration of, any labels placed on foods under the United States food and drugs act, nor is there any Pennsylvania statute which interferes with the inspection by the federal authorities of goods either in original packages, or upon the shelves of retail merchants.

The precise question, then, is whether a Pennsylvania statute may be enforced even if its provisions go farther than the federal law, but do not interfere with the operation of the federal statute.

Referring again to the much-discussed case of McDermott *v.* Wisconsin, it is seen that the court was careful to say in terms that the regulations of congress would not prevent enforcement of similar regulations by a state for the protection of its people.

Mr. Justice Day said, page 131:

"While these regulations are within the power of congress, it by no means follows that the state is not permitted to make regulations, with a view to the protection of its people against fraud or imposition by impure food or drugs. This subject

was fully considered by this court in Savage *v.* Jones, 225 U. S. 501; 56 L. Ed. 1182; 32 Sup. Ct. Rep. 715, in which the power of the state to make regulations concerning the same subject-matter, reasonable in their terms, and not in conflict with the act of congress, was recognized and stated, and certain regulations of the state of Indiana were held not to be inconsistent with the food and drugs act of congress."

Again, on pages 133, 134:

"Conceding to the state the authority to make regulations consistent with the federal law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate federal regulations of interstate commerce, to destroy rights arising out of the federal statute which have accrued both to the government and the shipper, and to impair the effect of a federal law which has been enacted under the constitutional power of congress over the subject."

The essence of the decision is found in these words, pages 132-134:

"To require the removal or destruction before the goods are sold of the evidence which congress has by the food and drugs act, as we shall see, provided may be examined to determine the compliance or noncompliance with the regulations of the federal law, is beyond the power of the state. The Wisconsin act which permits the sale of articles subject to the regulations of interstate commerce only upon condition that they contain the exclusive labels required by the statute is an act in excess of its legitimate power."

The question you propound is practically settled by the case of Savage *v.* Jones, 225 U. S. 501 (56 L. Ed. 1182).

That was a suit to restrain the state chemist of Indiana from enforcing an act of that state relating to concentrated commercial feeding stuffs. It was alleged that the Indiana act which required certain labels to be affixed to the package, disclosing in part the ingredients and also required certain stamps purchased from the state chemist should be attached as an inspection fee, interfered with interstate commerce and also because congress had legislated upon the subject by the national food and drugs act, its jurisdiction was exclusive, and therefore the Indiana act could not be enforced as to packages received from outside the state and sold by the importing purchaser in the same packages.

The court held that the act was not an unconstitutional regu-

lation of interstate commerce, and also, as stated in the syllabus in 56 Law. Ed. 1183, that:

"Congress did not by the passage of the food and drugs act of June 30, 1906, for the prevention of adulteration and misbranding of foods and drugs when the subject of interstate commerce, preclude the enactment of the Indiana act prohibiting sales of concentrated commercial feeding stuffs in the original packages, unless there be a compliance as to inspection and analysis and the disclosure of ingredients . . . and with its incidental provisions for the filing of a certificate, for registration, and for labels and stamps."

Mr. Justice Hughes, writing the opinion of the court, said, page 524:

"The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce." (Citing many authorities.)

"But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by congress pursuant to its constitutional authority." (Citing many authorities.)

And on page 526, quoting from Plumley *v.* Com. of Mass., 155 U. S. 461, he said:

"Such legislation may, indeed, directly, or incidentally affect trade in such products transported from one state to another state. But that circumstances does not show that laws of the character alluded to are inconsistent with the power of congress to regulate commerce among the several states."

Again, on page 529:

"The object of the food and drugs act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any state from any other state 'of any article of food or drugs which is adulterated or misbranded, within the meaning of this act.' The purpose is to keep such articles 'out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold, or in original unbroken packages.' "

And on page 532:

"Can it be said that congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the

state otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express declaration to that effect. Undoubtedly congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare."

In the case of Simpson *v.* Shepard, 230 U. S. 352 (57 L. Ed. 1511), the court said:

"State inspection laws and statutes designed to safeguard the inhabitants of a state from fraud and imposition are valid when reasonable in their requirement, and not in conflict with federal rules, although they may affect interstate commerce in their relation to articles prepared for export, or by including incidentally those brought into the state and held for sale in the original imported packages."

If the state can, as decided in Savage *v.* Jones, require an additional label disclosing ingredients and also stamps covering cost of inspection to be attached to the original package, without unconstitutional interference with interstate commerce, or with the operation of the national food and drugs act, it certainly can enforce its own laws when food in violation thereof is offered for sale by a citizen of the state to other citizens of the state, even though the food was imported from another state.

It is therefore clear that the pure food statutes of the State of Pennsylvania which do not interfere with the labeling provided by the national food and drugs act, or with the inspection of the federal authority under that act, do not even incidentally interfere with interstate commerce.

There is another consideration. The enforcement of the pure food laws of the state practically begins where the federal control ends.

In the case of McDermott *v.* Wisconsin, it is said in the opinion, page 136:

"To make the provisions of the act effectual, congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but has also provided for such seizure after such transportation and while the goods remain 'unloaded, unsold or in original and unbroken packages.' The opportunity of inspection en route may be very inadequate. The real opportunity of government inspec-

tion may only arise when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the articles are unsold, whether in original packages or not."

The Pennsylvania statutes usually contain the language making it illegal to "sell, offer for sale, expose for sale or have in possession with intent to sell," any adulterated or misbranded article of food.

The federal statute follows the goods from another state into Pennsylvania and on to the shelves of the retail merchant. When the goods get upon the shelves of the retail merchant the state inspection begins. There is no conflict of authority. The enforcement of Pennsylvania laws against goods on shelves of a retail merchant, is not even an incidental control of interstate commerce, nor is it any interference with federal inspection.

I am aware that this opinion does not appear to be in harmony with the case of Corn Products Refining Co. *v.* Weigle, 221 Fed. Rep. 898, and the decree entered in that case which is before me, but not reported, certainly is not in harmony with this opinion, but there is no case in the United States Supreme Court which has gone to the length of the case just quoted, and, as I understand the decisions of that court, the case of Corn Products Refining Co. *v.* Weigle has gone further than any other case in that it completely ousts state inspection of goods that were once in interstate commerce, if such goods happen to be labeled in conformity with the national food and drugs act, and prevents the operation of any state statute upon such goods, even as between the retail resident dealer and the resident consumer of the state. I cannot agree that the passage of the national food and drugs act has such sweeping effect in destroying the police power of the state.

Therefore, specifically answering your inquiry, I am of opinion that after purchase and analysis of a bottle of catsup from the shelves of a store of a retail merchant in Pennsylvania, such catsup is found to violate the pure food laws of this state, such laws may be enforced, even though the catsup has been shipped from another state and is sealed and labeled in conformity with the national food and drugs act of June 30, 1906.

I return herewith the correspondence submitted with your request.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Vernon Township *v.* United Natural Gas Company.

Townships—Supervisors—Contracts.

A township is not bound by a contract which has not been ratified or accepted by the supervisors as a board.

Townships—Contract—Gas company—Consideration.

A contract between a township and a natural gas company is void for lack of consideration and for want of a subject-matter to support it, where, by its terms, the township consents to the gas company laying pipe along a highway in consideration of an agreement to furnish free of charge a number of street lights in the township and gas for lighting and heating certain schoolhouses. As the gas company has the right of eminent domain it is not dependent upon the consent of the supervisors as a condition precedent to the laying of pipes along the public roads.

Bill in equity for an injunction. C. P. Crawford Co. May T., 1895, No. 1.

Albert L. Thomas, Otto A. Stolz and *W. B. Best,* for plaintiffs.

Geo. F. Davenport and *P. N. Speer,* for defendants.

PRATHER, P. J., Jan. 22, 1916.—The United Natural Gas Company is successor in title to the rights and franchises of the Meadville Fuel Gas Company, organized in January, 1886.

The said Meadville Fuel Gas Company, for the purpose of supplying Meadville with fuel and illuminating gas, found it necessary to lay its pipes upon a public road through Kerrtown, an unincorporated village within Vernon township.

In the spring of 1886, the officers entered into negotiations with the supervisors of Vernon township relative to the laying of said pipe along or upon said highway. It appears that the parties so negotiating were acting upon the assumption that the consent of the supervisors was necessary before the line could be laid. As a result of these negotiations, the gas company acceded to the supervisors' demands and agreed to furnish free of charge ten street lights in said township and gas for lighting and heating two schoolhouses.

All of this was evidenced at the time by a certain writing signed by the supervisors and the officers of the Meadville Gas Company, but said writing is now lost. No witness called had any knowledge whether the board of supervisors ever took any action thereon, or ever made the so-called agreement a matter of record.

Pursuant to this undertaking, said company laid its pipes along and upon said highway, and from that time to the pres-

ent, through itself and its successors, has furnished free of charge the fuel and a number of the street lights above mentioned.

Shortly before the filing of this bill, defendant company threatened to disconnect the pipes and discontinue this free gas; hence, this bill and injunction.

There is little dispute as to the facts. The defence rests upon two legal propositions: (a) No properly executed contract was proved; and (b) even if so, it was nudum pactum.

It is doubtful if the proofs would sustain a conclusion that the supervisors of Vernon township ever took action as a board, granting to the Meadville Fuel Gas Company the privilege of laying its pipes upon the public highway. The rule of law is familiar and well established, that the assent of all the supervisors, procured separately, is not an action of the board. American Machine Co. *v.* Washington Twp. 9 Pa. Super. Ct. 105.

However, if this were the only question interposed by defendant company, its long acquiescence might, under certain circumstances, operate as an estoppel; but, if the company gained no rights under the supposed franchise, and the township was in no way disadvantaged by the long acquiescence, then the essential characteristics of estoppel are wanting.

Assuming that the contract possessed the proper formalities, we are of the opinion that the kernel of the controversy is whether there was any subject-matter and consideration to support the contract. This proposition hinges upon the inquiry: What privileges or concessions did the Meadville Gas Company require of the township of Vernon, in order that it might lay its pipes along this public highway. If no concession was precedently necessary to the laying of its pipes, and it received no privilege not already vested in it by law, then there was no consideration to support such a contract. And if the law had already taken from the township what its supervisors relied upon as the basis of its exactions from the company, the township granted no concession or privilege to the company. Hence, whatever gas the township has freely received from the company has been a gratuity, which may be cut off at the pleasure of the company.

In the city of Meadville, telephone companies, by virtue of law and ordinance are authorized to erect poles and stretch wires along and upon its streets. Suppose when they reach my property, I say to the company; you cannot put up any poles or stretch any wires along the street in front of my prem-

ises, unless you give me free telephone service; and, suppose that the company accedes to my demands, agrees to give me the free service, completes its line, and for years, or any indefinite term, furnishes me the free services, until it has either discovered its rights or become tired of its burden, and then threatens to disconnect my telephone, unless I pay the regular rates. Could it be seriously urged that I had any legal standing to enjoin the threatened cutting of the wire and discontinuance of the service? No question of estoppel could arise under these supposed facts.

Estoppel cannot be successfully urged, unless the one invoking its aid can show that he has been misled and deceived to his disadvantage by the conduct of another, who in the pending action and issue joined, is seeking to take advantage of his own former deception.

Turning to the case at bar, we may now inquire what were the rights of the Meadville Fuel Gas Company with reference to the laying of this gas main.

The act of assembly in operation at the time these pipes were laid was the act of May 29, 1885, P. L. 29. This act gave to natural gas companies the right of emnient domain, except § 13 provides that such companies "shall not enter upon or lay down pipes or conduits on any street or highway of any borough or city of this commonwealth without the assent of the councils of such borough or city," etc.

Section 11 provides: "The right to enter upon any public lane, street, alley or highway for the purpose of laying down pipes, altering, inspecting and repairing the same, shall be exercised in such way as to do as little damage as possible to such highways, and to impair as little as possible the free use thereof, subject to such regulations as the councils of any city may by ordinance adopt."

Section 12 provides: "In all cases where any dispute shall arise between such corporations and the authorities of any borough, city, township or county, through, over or upon whose highways, or between it and any land owner or corporation, through, over or upon whose property or easement, pipes are to be laid, as to the manner of laying the pipes and the character thereof, with respect to safety and public convenience, it shall be the duty of the court of common pleas of the proper county upon the petition of either party to the dispute, upon a hearing to be had to define by its decree what precautions, if any, shall be taken in the laying of pipes, and, by injunction, to restrain their being laid in any other way than as decreed."

In the absence of controlling decisions upon the particular provisions of the act of 1885 requiring our attention, we may profitably consider the decisions upon other acts of assembly containing similar provisions with reference to public service corporations.

Section 34 of the act of April 29, 1874, P. L. 93, grants to certain gas and water companies "the right to enter upon any public street, lane, alley or highway, for the purpose of laying down pipes, altering, inspecting and repairing the same, doing as little damage to said streets, lanes, alleys and highways, and impairing the free use thereof, as little as possible, and subject to such regulations as the councils of said borough, town, city or district may adopt in regard to grades, or for the protection and convenience of public travel over the same."

In Phila. Steam Supply Co. *v.* Phila., 15 W. N. C. 57, it was held that a gas company incorporated under this act has the right to use the streets of a city, subject only to such regulations as councils may adopt as to grades, etc., for the protection and convenience of the public.

In Springfield Twp. *v.* North Springfield Water Co., 29 Pa. C. C. 614, under the same act and its supplement of May 16, 1889, P. L. 226, which does not change the wording of the act of 1874 in this respect, it was held, as expressed in the syllabi:

"A township of the first class cannot compel a water company to furnish free fire plugs and free water for use in case of fire.

"In making regulations the township is confined to the matters specified in the act of May 16, 1889, P. L. 226, and in the exercise of its police powers it cannot legislate and impose conditions which have no connection with the safety and protection of the highways. Free fire plugs do not add any protection or convenience to public travel on the highway."

On page 616 of the opinion we find the following language:

"In making regulations the township is confined to the matters entrusted to it by the act of 1889, and in the exercise of its police power it cannot legislate and impose conditions which have no connection with the protection and safety of the highways. Free fire plugs will not add to the safety of a public road, nor will they give protection or convenience to public travel.

"The assent of the township was not necessary to give the water company the right to enter upon the public roads. If

such assent were requisite, still the township would have no right to couple with it any condition or restriction not imposed by the acts under which the defendant was chartered. Appeal of the City of Pittsburgh, 115 Pa. 24. As already shown, the act of 1874 and its amendments do not confer upon the township any rights except such as relate to the protection and convenience of public travel on streets occupied by the water company. What right has the township to determine that free water shall be supplied by the defendant company? In speaking of the rights of a water company, in Brymer *v.* Butler Water Co., 179 Pa. 331, the Supreme Court say: 'The ownership of a corporation is as absolute and comprehensive as that of a private citizen. It includes the right to put a value upon its property and to determine on what terms it will part with it or supply its customers with the commodity in which it deals in the same manner that an individual or partnership could do.' . . . The township has no right to collect toll from the water company for the privilege of doing business within the township. The right to furnish water and charge a reasonable rate for the service was conferred by the legislature. The right to use the public highways for that purpose was conferred by the same authority. Where the right to occupy streets without the consent of the municipality is given by the legislature, the municipality is not in a position to impose terms. It has no power to do so. We must in such case look to the legislation incorporating the company and defining its powers and privileges for the right which the municipality may exercise over the corporation. Phila. *v.* Empire Pass. Ry. Co., 177 Pa. 382. In the case before us, the township is specifically limited to the matter of grades and to regulations pertaining to the protection and convenience of public travel over the highways occupied by the water company."

In the case of Forty Fort Bor. *v.* Forty Fort Water Co. et al., 9 Kulp 241 (court of common pleas of Luzerne county), the court held, as expressed in the syllabus:

"Such a company has, under the act of May 16, 1889, the right to enter upon municipal streets and public highways to lay pipes, etc.

"Municipalities cannot prohibit or prevent such entry upon streets, etc., but may only regulate the work with regard to grades and convenience of public travel. . . .

"A municipal permit to a water company that has the right under statute to enter upon streets, is unreasonable if granted

on condition that the company shall supply the borough with water and twenty-five water plugs free of charge for all time."

In the case last cited the borough refused to allow the water company to enter upon the streets unless it would agree to furnish the water free for the borough water plugs as above stated. The company refused to do this and began laying its pipes when the borough tried to restrain it. The bill was dismissed.

In the Appeal of the City of Pittsburgh, 115 Pa. 4, an injunction on the part of the gas company was made perpetual to restrain the city from exercising the legislative and judicial privileges it had usurped and reserved to itself under an ordinance granting the company the right to lay its pipes in the streets.

The question involved and the reason upon which the court's conclusion is based is clearly expressed by the lower court in a single paragraph:

"The powers of cities and boroughs over the subject, I think, are limited to two things, which are reserved to them in the act of assembly: First, giving or refusing assent to any corporation entering with natural gas, and, second, ordaining reasonable regulations as to the manner of using the streets, the manner of laying pipes, the character of the same, and other matters touching the public safety and convenience. If the assent is given, it must be without conditions or qualifications. The regulations must be legal and reasonable and in harmony with the act of assembly. If they are not, if they are in conflict with the act of assembly, the courts have undoubted power to declare them illegal and restrain the city from enforcing them.

Counsel for plaintiffs cites Allegheny *v.* People's Nat., etc., Gas & Pipage Co., 172 Pa. 632, wherein the court held:

"The act of May 29, 1885, §§ 11 and 13, P. L. 34, 35, required the consent of councils, and the ordinance made an acceptance of its provisions by the company a condition precedent to the opening of its streets. The company cannot get consent by an apparent acceptance, and then repudiate part of the terms, under cover of a reservation. The acceptance which was required as a condition to the consent was an unqualified acceptance of 'all the terms, conditions and provisions' of the ordinance, and nothing less than that would satisfy the condition. The company filed a nominal and apparent acceptance with the comptroller, and having obtained and enjoyed the privileges cannot now escape the obligations. It did not obtain the consent of councils to its qualified acceptance, or get anything from them which can now be set up as a compromise,

or waiver of the city's claim under the ordinance. If the terms prescribed were not acceptable to the company, or not such as it conceived itself bound in law to submit to, it had its remedy in the courts by the assertion of its rights under the statute, but having got its privilege by apparently agreeing to the terms it cannot now refuse to perform them."

This decision does not refer to the Appeal of the City of Pittsburgh, supra, and at first seems to be right in the teeth of it, but in Phila. *v.* Ridge Ave. Pass. Ry. Co., 143 Pa. 444 (467), Sterret, J., who wrote both opinions, speaking of Pittsburgh's appeal, said:

"Among other things, councils in that case (Pittsburgh's appeal) undertook, as a condition of their assent, to deprive gas companies of the right of appeal expressly given them by the act under which they were incorporated. That was attempted by making councils themselves a court of last resort, and exacting a bond in large amount binding them to submit to that self-constituted tribunal. The animus of this and other conditions, clearly violative of the corporate rights of the companies and ultra vires, was so apparent that the companies affected thereby refused to submit. They declined to recognize any such usurpation of authority, and entered into no agreement. Referring to the unreasonable and unlawful character of the conditions imposed in that case, we held that councils had no right to couple their assent with any condition or restriction not imposed by the act, unless the gas company agreed to accept the same and be bound thereby; and even then the conditions or restrictions so accepted by the company must harmonize and in nowise conflict with the provisions of the act incorporating such companies."

It will be observed in Pittsburgh's appeal, and Allegheny City *v.* Gas & Pipage Co., supra, that in each case the consent of the municipality was a condition precedent to the right of the companies to lay their pipes. In the former, the consent was coupled with usurped legislative and judicial functions, clearly provided for in the act. Hence, as to such part of the ordinance, it was declared invalid and inoperative. In the latter case, the whole ordinance was held valid and not objectionable.

Many cases might be cited in support of the proposition that such contracts are enforceable.

In the case of Carlisle & N. St. Ry. Co.'s Appeal, reported and affirmed in 245 Pa. 561, the Superior Court, speaking of the effect of a contract made by ordinance between a borough

and a street railway company incorporated under the provisions of the act of May 14, 1889, P. L. 211, and its supplements said:

"The municipality, having the absolute power to give or withhold consent, has the matter in its own hands, and may protect its interests by giving its consent upon condition. When the consent is given upon conditions clearly expressed, and the street railway company accepts the terms, a contract relation arises, and the rights of the parties are to be determined in accordance with their agreement." See also cases cited.

In Sandy Lake Bor. *v.* Gas Co., 16 Pa. Super. Ct. 234, the Superior Court, in discussing such contracts, said:

"In case the borough granted such a license and imposed conditions and duties upon the right to exercise the same, an acceptance of the grant by the licensees constitutes a contract that, while they operated under the license, the conditions would be observed and the duties performed. Allegheny *v.* People's Natural Gas & Pipage Co., 172 Pa. 632. Where such licensees enter under the grant and continue to enjoy the fruits thereof, they cannot set up as a defence to the performance of the conditions, that the contract was ultra vires. The law never sustains the defence of ultra vires out of regard for the defendant, but only when an imperative rule of public policy requires it. Wright *v.* The Antwerp Pipe Line Co., 101 Pa. 204. 'A man who has enjoyed a privilege has no right to say that, because he ought not to have enjoyed it, he will not pay for it.' Northampton County's Appeal, 30 Pa. 305. Those who succeed to the rights of the original grantees of the license and continue to exercise such rights are equally bound to perform the conditions."

In the School District of Freeport Bor. *v.* Enterprise Natural Gas Co., 18 Pa. Super. Ct. 73, the Superior Court held, as expressed in the syllabus:

"Where a borough by ordinance grants to an individual and his successor or assigns the privilege of laying pipes for natural gas in the streets of the borough, and it is stipulated that the grantee shall furnish free to the borough gas for lighting certain buildings, including a public schoolhouse, as long as the grantee, his successors or assigns should exercise the rights granted by the ordinance, and it is stipulated that the grantee should give a bond, and should execute a written acceptance of the ordinance within ninety days, a corporation which succeeded to the rights of the grantee is bound to furnish free gas to light the schoolhouse, and it cannot in a suit

in equity by the school directors to compel it to do so, set up as a defence that the grantee had not filed a proper bond, or that he had not executed a written acceptance within the ninety days, or that the school directors, not being parties to the original contract, had no standing in equity to compel the performance of it."

Counsel for plaintiff cite Wright *v.* Pipe Line Co., 101 Pa. 204; Northampton County's Appeal, 30 Pa. 305; Sandy Lake Bor. *v.* Gas Co., supra Boyd *v.* American Carbon Black Co., 182 Pa. 206 Oil Creek & Allegheny R. R. Co. *v.* Penna. Trans. Co., 83 Pa. 160; Pittsburgh, etc., R. R. Co. *v.* Altoona R. R. Co., 196 Pa. 452; Phelps *v.* Townsend, 25 Mass. 392, and Silvis *v.* Ely, 3 W. & S. 420, in support of the proposition that a corporation cannot set up the defence of ultra vires to its own contract.

The decisions to that effect in every case cited are all based upon the hypothesis that the party pleading ultra vires had already derived some benefit from an executed contract.

The gas company, possessing as to the highways of Vernon township, the right of eminent domain, was not dependent upon the consent of the supervisors as a condition precedent to the laying of the pipes.

The supposed grant which formed the foundation and consideration to support the undertaking of the company to furnish street lights and fuel for schoolhouses, was purely imaginary and did not exist. The company received no grant or concession from the supervisors; hence, no benefits; and, therefore, the agreement was nudum pactum, and the company is not bound by it.

CONCLUSIONS OF LAW.

1. The agreement relied upon lacks the formal and esesntial requisites of a contract, viz., its ratification or acceptance by the supervisors as a board.

2. There was no subject-matter to support a contract.

3. The contract was void and without consideration.

4. The bill should be dismissed and the injunction dissolved at plaintiffs' costs.

Now, Jan. 22, 1916, it is ordered that a decre nisi be entered in accordance with the foregoing; and unless exceptions thereto are filed within ten days after service of the same upon the parties or their attorneys of record, the same shall become final, sec. reg.

From James D. Roberts, Esq., Meadville, Pa.

Little Schuylkill Nav., R. R. & Coal Co. *v.* Phila. & Reading Ry. Co.

Taxation—Federal income tax—Railroad lease—Covenant to pay taxes—Income tax on rental.

Where a railroad lease provides that the lessee shall "pay all taxes, charges and assessments . . . impossed under any existing or future law on the demised premises, or any part thereof, or on the business there carried on, or on the receipts gross or net derived therefrom, or upon the capital stock of" the lessor "or the dividends thereon, or upon the franchises of the said company, for the payment or collection of any of which said taxes the" lessor "may otherwise be or become liable" the lessee will not be required to pay the federal income tax on the rental received by the lessor.

Rule for judgment. C. P. No. 2, Philadelphia Co. June T., 1915, No. 3580.

James W. Bayard and *John G. Johnson,* for rule.
A. M. Beitler, contra.

WESSEL, J., Feb. 3, 1916.—This is a rule for judgment for the sum of $1,085.07, with interest from June 30, 1914. Plaintiff claims this sum because it has paid that amount to the government of the United States as an income tax, which was levied and assessed against it (under the provisions of the act of congress approved Oct. 3, 1913, c. 16, 38 U. S. Stat. 114, 3 Compiled Statutes, p. 2832) for the term beginning March 1, 1913, and ending Dec. 31, 1913, and that defendant is bound to repay it under an agreement between the parties of Jan. 4, 1897, under which plaintiff leased to defendant certain railroad properties, together with sidings, tracks, bridges, etc., for the term of nine hundred and ninety-nine years from Dec. 1, 1896.

The sum paid is computed as follows:

Plaintiff received from defendant under the terms of the lease	$129,392.50
And from other sources	5,969.51
	$135,362.01
Sundry deductions	5,152.56
Leaving a balance of taxable income of	$130,209.45

One per cent. of which, $1,302.09, was paid by plaintiff to the federal authorities.

The proportion of the tax for the term mentioned is five-sixths, of which $1,085.07 is the amount involved in this rule.

If the plaintiff is entitled to recover under the present rule the computation of five-sixths of 1 per cent. must be based

upon the sum of $129,392.50, and not upon the sum of $130,-209.45. But we will consider the rule as though it was taken to recover the lesser sum.

Plaintiff does not contend that the relation of landlord and tenant establishes the liability, nor that in leases ordinarily executed between a lessor and lessee, there is an imposition of such obligation. It does urge that defendant is in duty bound to pay by reason of the second clause of that lease, which provides as follows:

"2. The railway company shall and will also punctually and faithfully pay all taxes, charges and assessments which, during the continuance of the term hereby demised, shall be assessed or imposed under any existing or future law on the demised premises or any part thereof, or on the business there carried on, or on the receipts, gross or net, derived therefrom, or upon the capital stock of the Little Schuylkill Company or the dividends thereon, or upon the franchises of the said company, for the payment or collection of any of which said taxes the Little Schuylkill Company may otherwise be or become liable or accountable under any lawful authority whatever."

The question, therefore, is whether the defendant by its agreement obligated itself to pay that tax or to save plaintiff harmless by reason of any legal obligation on its part to make such payment.

In the disposition of this rule we are called upon to construe only the pleadings. Nothing other than that which has been presented by the record may properly be considered, and the facts as averred in the affidavit of defence must be taken to be true. The intent of the parties must be ascertained by the language used in the instrument, and extraneous matters may not, at this time, be read into it. If by fraud, accident or mistake something has been omitted from the lease, or if other facts are pleaded at a subsequent stage in this or some other proceeding, different questions may be presented.

The lease stipulates that the lessee is to pay to the lessor annually "during the said term, as rent for the said demised premises," the sum of $124,392.50, $5,000 to defray the expenses of maintaining its corporate organization, and, in addition thereto, the taxes, charges and assessments already specificaly enumerated.

The income tax law, as is aptly designated by its title, is a tax upon incomes derived from various sources and not a tax upon property as such. Black on Income Taxes (2nd ed.), chap. iv, §§ 187, 188, 189; Foster's Income Tax (ed. 1915),

161, 196; Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1; Drexel & Co. *v.* Com., 46 Pa. 31-40 (1863). It was passed pursuant to an amendment to the federal Constitution, which provides that "the congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Previous to the passage of that amendment "various acts taxing incomes derived from property of every kind and nature . . . were enacted, beginning in 1861 and lasting during what may be termed the Civil War period. It is not disputable that these latter taxing laws were classed under the head of excises, duties and imposts, because it was assumed that they were of that character, inasmuch as, although putting a tax burden on income of every kind, including that derived from property, real or personal, they were not taxes directly on property because of its ownership. And this practical construction came in theory to be the accepted one. . . . 1 Kent Com., 254, 256; 1 Story Const., § 955; Cooley Const. Lim. (5 ed.), 480; Miller on the Constitution, 237; Pomeroy's Constitutional Law, § 281; 1 Hare Const. Law, 249, 250; Burroughs on Taxation, 502; Ordronaux, Constitutional Legislation, 225." Chief Justice White, In re Brushaber Case, supra.

It is a tax upon net income, and the word "income" is thus defined in the act:

"B. That, subject only to such exceptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from, but not the value of, property acquired by gift, bequest, devise or descent."

Sub-division G of the act provides:

"That the normal tax" (i. e., the 1 per cent. referred to in § 11, sub-division A) "hereinbefore imposed upon individuals likewise shall be levied, assessed and paid annually upon the entire net income arising or accruing from all sources dur-

ing the preceding calendar year to every corporation," etc.

The income tax imposed under the act of 1913 was, as to the year 1913, to begin March 1, 1913. Corporations had been subject to an excise tax since 1909, termed in the act of congress of Aug. 5, 1909, as "a special excise tax with respect to the carrying on or doing of business of such corporations." As to this the income tax act provided that:

"A special excise tax with respect to the carrying on or doing of business, equivalent to 1 per centum upon their entire net income, shall be levied, assessed and collected upon corporations . . . for the period from Jan. 1 to Feb. 28, 1913, both dates inclusive, which said tax shall be computed upon one-sixth of the entire net income of said corporations . . . for said year, said net income to be ascertained in accordance with the provisions of sub-section G of § 2 of this act. Provided, further, that the provisions of said § 38 . . . shall remain in force for the collection of the excise tax herein provided, but for the year 1913 it shall not be necessary to make more than one return and assessment for all the taxes imposed herein, . . . either by way of income or excise." . . .

Under clause 2 of the lease above referred to, defendant was obligated to pay all taxes, charges and assessments which should be assessed or imposed upon (a) the demised premises or any part thereof; (b) the business there carried on; (c) the receipts, gross or net, derived therefrom; (d) the capital stock of the Little Schuylkill Company or the dividends thereon; (e) franchises of the plaintiff company.

The income tax is not a tax upon "the demised premises or any part thereof." That language includes taxes ordinarily known as real estate taxes and such as were in contemplation of the parties at the time of the execution of the lease as being levied or assessed against the lands, depots, telegraph lines, etc., specifically referred to in the lease.

In Robinson *v.* Allegheny County, 7 Pa. 161 (1847), Robinson conveyed three pieces of land, reserving ground rents, the grantee covenanting "forever hereafter to pay and discharge all public taxes of whatever kind or denomination that may be assessed upon the premises hereby demised, without any deduction from the yearly rent before mentioned." Held, that the tax referred to was upon "the fee simple interest vested by the deed in the grantee and not the ground rent reserved."

In Erie & Pittsburgh R. R. Co. *v.* Penna. R. R. Co., 208 Pa. 506 (1904), the lessee in a railroad lease covenanted "to pay all taxes now or hereafter imposed by law upon the prop-

erty hereby demised and the earnings from or business thereof." Held, this could not be construed to cover payments made to the commonwealth for taxes upon capital stock, although it was admitted "that the taxation of the capital stock was a taxation of the property and its assets." Wiltbank, J. (whose opinion was affirmed by the Supreme Court), said: "The operation of the lease was to substitute as property and assets . . . a fixed return in rental and a reversion for the real and personal property and the franchises described in the demise." See, also, Pettibone *v.* Smith, 150 Pa. 118 (1892).

In Haight *v.* Railroad, 6 Wall 15 (1868), a case arising under the internal revenue act of 1864, the mortgage contained a provision obligating the mortgagor to pay the principal and interest "without any deduction, defalcation or abatement to be made of anything for or in respect to any taxes, charges or assessments whatsoever." Held, that the moneys payable thereunder were "income—the annual profit upon money safely invested;" that this clause referred to taxes upon real estate, and that there was no special contract to pay government taxes upon interest. If the clause were otherwise construed it would be casting an obligation upon the mortgagor "to pay, not only his own taxes, but those of the mortgagee." The tax was properly payable by the mortgagee and deductible by the mortgagor from the interest by it paid.

The cases of McCoach *v.* Mine Hill R. R. Co., 228 U. S. 295, and Zonne *v.* Minneapolis Syndicate, 220 U. S. 187, establish that the plaintiff was not "with respect to the railroad engaged in business within the meaning of the federal corporation tax act." It is, therefore, not a tax upon the business carried on by the plaintiff, and it is conceded that the plaintiff is not in receipt of this money by reason of such business.

The capital stock tax and franchise tax referred to in clause 2 of the lease have definite meanings under the law entirely different from the income tax under consideration.

Neither is the income tax, assessed against and paid by the plaintiff, under the facts pleaded in this case, a tax upon its dividends.

The treasury department has directed (art. 80 of regulations) that "a railway or other corporation which has leased its properties in consideration of a rental equivalent to a certain rate of dividends on its outstanding capital stock and the interest on the bonded indebtedness, and such rental is paid by the lessee directly to the stock and bondholders, should nevertheless make a return of annual net income showing the

rental so paid as having been received by the corporation. Foster's Income Tax, 204, 357 and 1391.

Plaintiff's return to the federal authorities shows that, under its own construction, it was obligated to pay, not a tax upon its dividends, but rather a tax upon its receipts, including the rental received under this lease; not a tax upon its distributions among its stockholders, but a tax upon its net income, as already defined. It may, after the receipt of the rentals, appropriate the moneys so received in such manner as its board of directors, under the law, deems for its best interests. If it declares and pays dividends, such payments must be out of its earnings or its surplus. Of this latter fund the rentals then already received may form a part. Such disbursements or dividends might be subject to deductions and the plaintiff, under the federal law, may be obliged to withhold at its source a tax which is assessed upon the recipient of the dividend by reason of his ownership of the stock. In that event the tax would be assessed upon the owner of the stock by reason of his being the recipient of a definite dividend, not a tax upon the rental paid.

Under the provisions of the federal act it may have been obligatory upon the defendant to withhold at its source the tax upon the rental which it had agreed under the terms of the said lease to pay to the plaintiff. If the tax had been so withheld this sum of money would have represented a tax upon the rental, not a tax upon a dividend which had then not yet been and which might never have been declared by the plaintiff company. If a tax had been assessed upon the dividend which plaintiff had declared, or if it had been obliged (having in view the exemptions allowed by law) to withhold at its source from its stockholders certain portions of such dividend, a different issue would have been presented.

A question similar to the one raised by this rule was before this court in Van Beil *v.* Brogan, 23 D. R. 1055 (1914). In that case it appeared that the plaintiff was the owner of a yearly ground rent of $10,000. The defendant was the owner in fee of the premises in question. One of the covenants of the ground rent deed was that the covenantor, his heirs and assigns, should cause the ground rent to be paid "without any deduction, defalcation or abatement for any taxes, charges or assessments whatsoever, . . . it being the express agreement of the said parties that the said covenantor, his heirs and assigns, shall pay all taxes whatsoever that shall hereafter be laid, levied or assessed by virtue of any law whatever, as well

on the said hereby granted lot and buildings thereon erected or to be erected as on the said yearly rent now charged thereon." In his usual lucid and masterly manner Sulzberger, president judge, considers the provisions of the income tax law, its application to the facts of that case, and concludes that that covenant did not impose an obligation upon the covenantor to pay the federal income tax. He said:

"In view of the collocation of terms in the covenant—land, buildings, the yearly ground rent charged thereon—there would seem to be little doubt that the parties to the covenant were contemplating a tax measured by accumulated surplus or property.

"As the income tax is clearly not a tax so measured, it is obvious that if we hold the words to mean the corpus of the rent, the plaintiff has no case.

"She is, therefore, driven to the contention that the words should be interpreted to mean the periodical payments of the rent as they accrue. While we do not think such a construction is allowable, we do not see that, if accepted, it would help her case.

"To give it value, we would have to hold that the income tax payable by the plaintiff is levied or assessed on these periodical payments. We think that it has been shown that it is not levied or assessed on this or on any other specific item whatsoever. The income tax which the plaintiff is called upon to pay is not a tax either on the corpus of the rent or on its periodical payments."

Our attention has been directed to the case of North Penna. R. R. Co. *v.* Phila. & Reading Ry. Co., 43 Pa. C. C. 150, affirmed in 249 Pa. 326 (1915). In that case it appeared that the lease provided that the lessee should "pay all taxes and assessments—upon the yearly payments herein agreed to be made by the party of the second part to the party of the first part—for the payment or collection of which taxes or assessments the said party of the first part would otherwise be liable or accountable under any lawful authority whatever;" that the lessee "should pay all taxes, charges, levies, claims, liens and assessments of any and every kind, which, during the continuance of the term hereby demised, shall, in pursuance of any lawful authority, be assessed or imposed upon the demised premises, or any part thereof—all payments required to be made by the party of the first part during the term of this indenture—shall be assumed and discharged by the party of the second part as if the party of the second part were pri-

marily liable for the same." The lessor having paid the income tax was permitted to recover from the lessee.

Mr. Justice Frazer, in delivering the opinion of the Supreme Court, said: ". . . The real question to be considered is the meaning of the parties in view of the language used by them, there being no doubt if defendant agreed in appropriate terms to pay the income tax or any other tax to which the plaintiff might be subjected, such agreement would be binding, regardless of whether the income tax be technically viewed as a tax on rent or on the net income from rent. By the provisions of § 3 of the lease defendant agreed to assume the payment of all taxes and assessments upon the 'yearly payments herein agreed to be made by the party of the second part to the party of the first part . . . for the payment or collection of which . . . the said party of the first part would otherwise be liable or accountable under any lawful authority whatever.' This clause is certainly quite broad enough to cover the income tax, payable out of and assessed upon the 'yearly payments agreed to be made.' The same paragraph provides that defendant shall also pay the tax on dividends declared by plaintiff out of the yearly rent, as well as the taxes and assessments on the capital stock of plaintiff. It was the apparent intention of the parties that plaintiff should receive the amounts stipulated without deduction by reason of any tax, charge or assessment of any kind. At the time the lease was made there was no such thing as a federal income tax, but the words 'taxes and assessments' are sufficiently broad to cover such tax. This construction is further supported by the subsequent provision in paragraph 4 of the lease to the effect that 'all payments required to be made by the party of the first part during the term of this indenture, and not herein otherwise specifically provided for, for or on account of any matter in this indenture contained,' shall be assumed and discharged by defendant as if primarily liable for the same."

As will be seen, there is a broad distinction between the case at bar and the case just cited. The lease presently under consideration contains no such obligations as that imposed upon the lessee in the North Pennsylvania case. The meaning of the parties in that case, as evidenced by "the language used by them," was that "all payments required to be made" by the lessor for or on account of "all taxes, charges, levies, claims, liens and assessments of any and every kind" should be paid and were assumed and to be discharged by the lessees as if it was primarily liable for the same. There is no such

assumption of liability on the part of the defendant. It did not assume to pay taxes upon the "yearly payments" which it was to make, nor did it assume or agree to discharge all liability for taxes, etc., of every kind for which the lessor should become primarily liable.

It is argued by plaintiff that the true intent and meaning of the parties in the case at bar, by the agreement referred to, was that "it was the duty of the defendant company to pay any taxes levied" or assessed against the plaintiff or its property covered by the lease, so that it could apply the sum equal to 5 per cent. on the capital stock . . . free and clear of any deductions with respect to such taxes. We decline so to hold. Our duty in this regard is to construe agreements as they have been made by the parties, not by judicial construction to extend or diminish the obligations or benefits of either party. We have no more right to impose upon the lessee a liability not included within the "four corners" of the agreement than we have to deprive it of the use of any of the property specifically conveyed by the lease. The lessee is not obligated to pay "any tax" which may be levied or assessed, but only those taxes the payment of which it has expressly assumed. If it had been the intention of the parties to assure to the stockholders of the plaintiff company a dividend of 5 per cent. upon all of its capital stock for the term mentioned in the lease, appropriate covenants insuring such results might easily have been inserted in this lease. This was not done, but, on the contrary, certain sums were to be paid and the lessor relieved from obligation for the payment of specific taxes therein designated. The application of such moneys (whether distributable by the lessor as and for dividends in connection with its other property or otherwise) being left to lessor company.

The rule for the construction of leases has been quoted from the opinion in the North Pennsylvania case, to which we may add the following thought expressed by Rogers, J., in Robinson *v.* Allegheny County, 7 Pa. 161 (1847): "It is possible, as is argued, this may not have been the intention of the grantor; but, if so, he has been most unfortunate in the language used to express his meaning. But we cannot deal in conjecture, but must decide cases according to the legal import of the terms used."

It has been held that a covenant to pay "taxes, duties and imposts" does not include a municipal assessment to defray the cost of building a sewer or grading a street. Pettibone *v.* Smith, 150 Pa. 118 (1892); Longmore *v.* Tiernan, 3 Pitts.

L. J. 62 (1867); Pray *v.* Northern Liberties, 31 Pa. 69 (1850). While a covenant to pay "all taxes and assessments" has been held to impose such liability. Griffen *v.* Pottery Co., 14 W. N. C. 266 (1884).

We are of opinion (under the pleadings in this case) that the moneys received by the plaintiff from the defendant have been paid to it as and for rental of the property leased; that the tax imposed by the government of the United States was levied and paid by plaintiff by reason of its receipt of such rentals and not by reason of any of the items or conditions specified in or covered by the second clause of the said lease.

The rule for judgment is, therefore, discharged.

Staab *v.* Baltimore & Ohio Railroad Co.

Negligence—Railroads—Running down a black cow—Non-suit.

Where the owner of trespassing cattle seeks to recover damages from a railroad company for the destruction of his stock while on its tracks, he must show that the killing was done wantonly and by gross negligence.

In an action to recover for the killing of a black cow in the daytime, a non-suit is properly granted where it appears that the engineer saw the cow at a distance of two hundred and fifty feet and gave the proper signal, inasmuch as the engineer could asssume that the trespassing cattle would not remain on the track after the signal was given.

Trespass. Motion to take off compulsory non-suit. C. P. Clarion Co. Dec. T., 1914, No. 168.

J. T. Reinsel and *J. S. Shirley,* for plaintiff.
Maffett & Rimer, for defendant.

Sloan, P. J., Aug. 24, 1915.—The plaintiff filed his declaration or statement of claim averring that on or about Oct. 28, 1913, the defendant company, by its employés or servants, "so carelessly and negligently operated a certain locomotive engine with baggage and passenger cars attached, that it ran into and against a certain black cow, etc., of the value of $75." On the trial of the case, at the close of the plaintiff's testimony, the defendant company moved for a compulsory non-suit, which was granted by the court. The plaintiff has filed his motion praying the court to take off the non-suit.

The law is well settled in Pennsylvania that where the owner of trespassing cattle seeks to recover damages from a railroad company for the destruction of his stock while on its tracks,

he must show that the killing was done wantonly or by gross negligence. The statement in this case avers ordinary negligence by the employés or servants of the defendant company.

The plaintiff cannot recover damage for the destruction of his stock from the company for such an injury as is set forth in his statement. He was in fault for permitting his cattle to be trespassing on defendant's property, or, in other words, if both plaintiff and defendant are alike negligent it is a case that the law says neither party can recover for the consequences. The plaintiff in his statement does not allege that the injury was wantonly done, or that there was gross carelessness on the part of the defendant's employés.

Turning then from the defective statement to the equally defective proof offered to sustain it, we find that there was nothing in the evidence to warrant this charge. There was scarcely ordinary negligence. How, then, can the plaintiff recover? The only witness offered by plaintiff who saw the accident, or any part of it, was one Lenhart, who testified in substance that he heard the whistle blow, which attracted his attention, and looking he saw the train slowing down just as fast as possible, and he saw what he thought was cattle about thirty feet ahead of it; that the train stopped very quickly after he had seen it. The plaintiff's contention is that the engineer had a clear view of the roadbed for a distance of two hundred and fifty feet, and that he might have seen the cattle in time to stop the train, and in failing to do so it was negligence on his part.

Assuming, as the witness testified, that the cattle might have been seen at a distance of two hundred and fifty feet, and conceding that the train might have been stopped within the distance, yet we know of no law that would require the engineer to stop his train, nor was he bound to do so. He had no reason to apprehend that the cattle would remain on the track after the necessary signaling, which the evidence shows was done in this case. It was said in Railroad *v.* Skinner, 19 Pa. 298: "That a railroad company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest attainable speed, with which neither the person nor property of another may interfere. The company on the one hand, and the people of the vicinage on the other, attend respectively to their particular concerns, with this restriction of their acts that no needless damage be done." . . . "A train must make the time neces-

sary to fulfill its engagements with the post office and the passengers; and it must be allowed to fulfill them at the sacrifice of secondary interests put in its way; else it could not fulfill them at all." The burden at all times to recover for an injury of this character is placed upon the plaintiff to show by evidence that the accident was caused by the employés of the company in a wanton manner, or by such gross neglect as to amount to the same.

In the case of North Penna. R. R. Co. *v.* Rehman, 49 Pa. 101, in a lengthy opinion by Thompson, he concludes with the following language: "In conclusion we hold that the owner of the cattle is bound at his peril to keep his cattle off the railroad, and if he did not the law treats him as negligent and not entitled to recover, excepting only in case of wanton injury or by gross carelessness."

We might say more on this question, but it is not necessary; the law is so well settled that no one can be mistaken. We therefore, refuse to take off the non-suit as prayed for.

Beaver Township Poor District *v.* Adams Township Poor District.

Poor law—Order of removal—Evidence.

An order of removal in a poor law case will be refused where it appears that a man fifty years old with a sickly wife, a son twenty years of age, a daughter seventeen years of age, and two other daughters eleven and thirteen years of age, had recently removed from another township and settled on a twenty-four-acre farm, which the father had bought for $350, and on which he had paid more than half the purchase price, where it appears that the father became ill and helpless from lumbago, that the family had a certain amount of provisions on hand, and that the father, the mother, and the son swore that they did not need township help, and that they could make their own living.

Citation for an order of removal. Q. S. Snyder Co. Dec. T., 1915, No. 1.

C. P. Ulrich, for petitioners.
M. I. Potter and *H. H. Grimm,* for respondents.

JOHNSON, P. J., March 25, 1916.—The evidence showed the following:

That Henry Ettinger had resided in Adams township all his life. That he was about fifty years old, was married, and that his wife and four children were living. That the oldest child was a son of about twenty years of age, the next was a daughter about seventeen years old, and the other two were

girls about eleven and thirteen years of age. That about a year ago Ettinger had bought a tract of land of about twenty-four acres in Beaver township for $350 and had paid more than half of the purchase price, and had given a judgment to secure the balance, which was $142.50. That he and his family had moved into a shanty that stood on another's land, about twelve or fifteen feet from his own, the shanty having no cellar, being built on posts, and had two rooms, one of which was plastered.

That they planted twenty or twenty-five fruit trees on this land, had drained one field, which was wet, and had raised a few strawberries and raspberries on the land, about twelve acres of which was young growing timber land.

That Ettinger was a good worker, and had worked his whole lifetime whenever he had work; that his son was at home, was well and worked whenever he had work. That Ettinger had an attack of grippe which brought on lumbago, and that he could not now do any work. That they had a barrel of flour in the house and nearly one hundred bushels of potatoes. Ettinger, his wife and their son swore they did not need township help, did not want any, and that they could make their own living.

That Mrs. Ettinger was sickly. That the land which they owned was not fertile land.

March 25, 1916, order of removal refused and the citation dismissed, the petitioners to pay the costs.

From M. I. Potter, Esq., Middleburg, Pa.

Symonds' Adoption.

Parent and child—Adoption—Suppression of material facts—Acts of May 4, 1855, P. L. 430; May 19, 1887, P. L. 125, and April 22, 1905, P. L. 297.

Where a decree has been entered for the adoption of a minor child, without informing the court that the child was in the custody of the Children's Aid Society, and without notice to the society, the decree will be vacated upon such facts being made known to the court.

Rule to show cause why decree of adoption should not be vacated. C. P. No. 3, Philadelphia Co. March T., 1915, No. 1262.

Kenneth B. Crawford, for rule; *M. L. Nicholas,* contra.

DAVIS, J., Dec. 31, 1915.—And now, Dec. 7, 1915, the

above matter came on for hearing before Davis, J., on petition and answer for a rule to show cause why the decree of adoption entered by this court on March 12, 1915, should not be vacated.

The petitioner, the House of the Holy Child, represents that it is a charitable institution duly incorporated under the laws of the state of Pennsylvania and located in the city of Philadelphia; that on May 18, 1915, the said Lillian Symonds was committed to the custody of the petitioner by the Hon. James E. Gorman, sitting in the juvenile division of the municipal court of the city of Philadelphia, and that the said Lillian Symonds has remained in the custody of petitioner ever since; that prior to May 18, 1915, to wit, Feb. 10, 1915, Lillian Symonds was committed to the custody of the Children's Aid Society, a charitable institution incorporated under the laws of the state of Pennsylvania and located in the city of Philadelphia, by the Hon. James E. Gorman, sitting in the juvenile division of the municipal court of the city of Philadelphia; that the said Lillian Symonds remained in the custody of the Children's Aid Society until she was committed to the custody of the petitioner; that on March 12, 1915, John D. Johnson presented his petition to the court of common pleas No. 3, praying for the adoption of Lillian Symonds, and on the same day, in accordance with said petition, the said court ordered and decreed that the said Lillian Symonds should assume the name of Johnson and should have all the rights of a child and heir of the said John D. Johnson and be subject to the duties of such child; that the petition for adoption contained the consent of the mother of said Lillian Symonds, although the said Lillian Symonds at the time the said petition was presented was not living with or in the custody of her mother, and had not been living with her or in the custody of the mother for some time prior thereto; that the petition did not contain the consent of the Children's Aid Society, which had the custody of said Lillian Symonds at the time the petition was presented; and that the petitioner is informed and believes that John D. Johnson, in presenting the said petition for adoption, misrepresented the facts necessary for the proper determination of the aforesaid petition, in that he omitted to inform the court that said Lillian Symonds had been judicially committed to the custody of the said Children's Aid Society, and was in the custody of the said Children's Aid Society on the date on which the aforesaid petition was presented.

The petitioner further averred that John D. Johnson is not

of good moral character, and that the welfare of the said Lillian Symonds will not be promoted by her adoption by the said John D. Johnson; that on Nov. 10, 1914, a petition having been presented to the municipal court of the city of Philadelphia to have the said Lillian Symonds committed to the custody of Lena Wyman, a resident of the city of Philadelphia, said John D. Johnson requested the court to place Lillian Symonds in his custody, but the court, after hearing evidence in regard to the advisability of so placing the said Lillian Symonds, refused the request of the said John D. Johnson.

The prayer of the petitioner for rule to show cause why the order and decree of the court of common pleas of March 12, 1915, should not be vacated and revoked was granted and made returnable on Aug. 9, 1915.

On Aug. 17, 1915, Lillian Symonds, the mother of the relator, filed a demurrer to the petition of the House of the Holy Child, averring that on March 12, the date of decree of adoption, the House of the Holy Child was a stranger to the issue and had no status to present said petition for rule at that time. On Dec. 6, 1915, the demurrer was overruled.

It appears from the records of the juvenile division of the municipal court offered in evidence at the hearing of this petition that, upon petition filed on Nov. 2, 1914, the mother of Lillian Symonds represented to the said court that the minor child was without support and care of parents; that the father and mother of Lillian Symonds, the said child, were not living together, and that the child was then with a Mrs. Williams, 3337 Filbert street. It was further averred that the said Mrs. Williams was an unfit guardian. The petitioner prayed that the court commit the child to the custody of Mrs. Lena Wyman, 7905 Norwood avenue, Chestnut Hill. As a result of the hearing on that petition, the home of Mrs. Wyman was investigated and found not to be a proper place to commit the child. The child was then committed to the care of Mr. and Mrs. Clinton, with whom John D. Johnson boarded. It further appears from the record of the municipal court that on Feb. 20, 1915, the child was removed from the custody of Mr. and Mrs. Clinton and committed to the Children's Aid Society. The child remained in the custody of the Children's Aid Society until May 18, 1915, when, by order of the municipal court, the child was committed to the House of the Holy Child.

It is not denied that at the time the petition for adoption was presented to this court on March 12, 1915, the child was

in the custody of the Children's Aid Society under an order of the municipal court. Upon an examination of the petition for adoption presented to this court by John D. Johnson, it does not appear that the court was informed that the child was in the custody of the Children's Aid Society, nor that the Children's Aid Society had any notice whatever of the presentation of that petition. The court, therefore, entered the decree of adoption without full knowledge of the facts.

The affidavit of the mother of the child was attached to the petition, averring that since June, 1910, and until March, 1915, Walter Symonds, her husband, had deserted the deponent, neglected and refused to provide for the said minor child, and that his whereabouts were unknown. The deponent did not inform the court that the child was then in the custody of the Children's Aid Society. This fact being within the knowledge of the petitioner, it is apparent that the failure to aver that fact and to give notice to the society was due either to carelessness or a willful intention to mislead the court. The act of April 22, 1905, P. L. 297, amended the act of May 4, 1855, P. L. 430, and the act of May 19, 1887, P. L. 125, as follows: "That it shall be lawful for any person desirous of adopting any child as his or her heir, or as one of his or her heirs, to present his or her petition to such court in the county where he or she may be resident and declare such desire, and that he or she will perform all the duties of a parent to such child, and such court, if satisfied that the welfare of such child will be promoted by such adoption may, with the consent of the parents, or the surviving parent, of such child, or, if such child shall have been judicially committed to the care of any person or corporation as being destitute, homeless, abandoned or dependent on the public or having no parental care, . . . then with the consent of such person or corporation having the custody and control of such child, and that of the non-neglecting or innocent parent alone, if one be living, decree that such a child shall assume the name of the adopting parents and have all the rights of a child and heir of such adopting parents and be subject to the duties of such child, of which the record of the court shall be sufficient evidence."

It is not necessary here to discuss the right of the petitioner, of the House of the Holy Child, to intervene, as that question is res adjudicata under the order of the court overruling the demurrer; nor is it at this time necessary to consider the question as to whether the petitioner for adoption, John D. Johnson, is a proper person to have the custody of the child.

Proceedings for adoption are of purely statutory origin, and the statute must be strictly followed, and every requirement of the law under which the right is claimed must be fulfilled. If the statutory conditions do not exist the court has no jurisdiction to make a decree of adoption. Bastin's Adoption, 10 Pa. Super. Ct. 570; Luccareni's Adoption, 30 Pa. C. C. 592; Smith's Adoption, 14 D. R. 769.

And such decree will be revoked. Sleep's Adoption, 6 D. R. 256.

In the absence of consent of parent, or if imposition be practiced, the decree will be set aside. Booth *v.* Van Allen, 7 Phila. 401.

In Keeler's Adoption, 52 Pa. Super. Ct. 516, it was said: "This proceeding was intended to be instituted in accordance with the provision of the act of 1887, and being statutory, its requirements must be followed in order to give the court jurisdiction. The act contemplates a proceeding in court after all parties interested have had due notice, and who are to satisfy the court that the welfare of the child will be promoted by such adoption. The assent of the parties mentioned in the act in giving or waiving a right should affirmatively appear. Statutes authorizing adoption are in derogation of the common law, yet their construction should not be narrowed so close as to defeat the legislative intent. Brown's Adoption, 25 Pa. Super. Ct. 259. No court of justice will set aside or even be led to look into a solemn judgment on light or trivial ground, but when it is alleged upon adequate proofs that a judgment in whole or in part has been obtained by a suppression of truth, which it was the duty of the party to disclose, or by the suggestion of a falsehood or by any of the infinite and, therefore, indefinable means by which fraud may be practiced, no court will allow itself, its records and the process of law to be used as instruments of fraud. Cochran *v.* Eldridge, 49 Pa. 365."

It is uncontradicted that on March 12, 1915, when the petition for adoption was presented to this court, the minor was in the custody of the Children's Aid Society, and that the act under which this proceeding is brought requires that the custodian of the child shall have notice of the presentation of the petition. We are, therefore, of opinion that it was clearly error on the part of the petitioner to suppress this fact; for that reason the decree of adoption was entered by the court under a misapprehension and without full knowledge of the necessary facts.

The rule to show cause why the order and decree of adoption entered on March 12, 1915, should not be vacated and revoked is made absolute, and the decree of adoption dated March 12, 1915, is vacated.

Forest-Reserve Hunters.

Game laws—License to hunt on state forestry reservations—Exceptions in act of April 17, 1913, P. L. 85.

The commissioner of forestry cannot permit any person to hunt upon the state forest reservation without a license.

The hunters' license act of April 17, 1913, P. L. 85, makes it necessary for every person to procure a license except such as are expressly excepted in the act.

Section 5 of said act excepts from its provisions any owner or lessee of cultivated land or any member of his family who resides on such land. No exception is made for any employee of such owner or lessee.

The forest rangers and other employees of the forestry department have no right to hunt without a license.

Request of Dr. Joseph Kalbfus, secretary of the game commission, for opinion.

DAVIS, Deputy Attorney-General, Sept. 29, 1915.—I have your favor of Sept. 10, 1915, directed to the attorney-general, asking:

First. Whether the commissioner of forestry has a right, under § 5 of the act of April 17, 1913, P. L. 85, to permit the owners or lessees of land immediately adjacent to and connected with the state forest reserves to hunt upon the latter.

Second. Whether forestry rangers and other employés of the forestry department have the right to hunt upon forestry lands without securing a license, under the act of April 17, 1913.

The powers and duties of the commissioner of forestry are conferred by § 3 of the act of February 25, 1901, P. L. 11, as stated by Hon. John P. Elkin, attorney-general, in opinion dated Oct. 15, 1901. 26 Pa. C. C. 16. This act confers upon the forest reservation commission very general powers in reference to the management and control of lands purchased by the state for forestry purposes. However, in this opinion, while concluding that the commission has the right to grant temporary permission to use the water on the reserves he states: "I doubt whether it would be within the power of

the commission to grant any permanent water rights to persons or corporations."

There is no question but that the commissioner of forestry and the forest reservation commission do not have the powers of an owner or lessee over the state forest reserves, but that they are rather officers in control and in control only to the extent expressly designated by statute or necessarily implied therefrom.

The section of the act of 1901, above quoted, states that the commissioner of forestry "shall have immediate control and management, under the direction of the forest reservation commission, of all forest lands already acquired, or which may hereafter be acquired by the commonwealth, but the power so conferred upon said commissioner of forestry shall not extend to the enforcement of the laws relating to public health or the protection of fish and game."

In looking at the power thus conferred we find an expressed reservation in which there is taken away from the commissioner of forestry the enforcement of the laws pertaining to public health and those pertaining to fish and game. While the meaning of the word "enforcement" would naturally be considered as that of enforcing the laws, the reading of the whole section gives it a broader significance. The enforcement of laws would be a duty which the commissioner of forestry would share equally with any private citizen, in so far as the institution of any prosecution under them is concerned. The proviso, however, is directed to a limitation upon his powers so that it would appear that in conferring powers upon him there is a limitation as to any power which has to do with either the public health or fish and game.

If this is a proper construction of this portion of the section mentioned, he has not the power to grant exemptions from any of the provisions of the game laws such as an owner, mentioned in § 5 of the act of 1915, would have, and it is to such a construction as this that the direct meaning of the section of the act of 1901 quoted would conduce.

In further support of this position, I would refer you to § 5 of the act of 1913, in which is set forth the limitations upon which the right to hunt without a license is based. In the first place no person is exempt from such license, except the bone fide owner or lessee of cultivated lands, who resides thereon. The right to hunt on such lands is a necessary incident to the protection of the cultivated portions of such lands from game which might damage them, and it is but reason-

able and proper that such owner or lessee could go upon lands immediately adjacent where the game sought by him lived or sought refuge after feeding upon or destroying his crops.

While state forest reserves are, of course, connected with privately owned land, yet the extent of the former does not make all portions of them immediately adjacent. The ownership or control of a tract of land is not the only element necessary in permitting the owner or lessee of land connected therewith to hunt upon it. It means not only being connected therewith but "immediately adjacent." While the expression "immediately adjacent" is somewhat relative and indefinite, yet it would be obvious that land owned by a single individual and say several miles in width, would not all be "immediately adjacent" to the land of some person abutting upon one side of it.

The commissioner of forestry, if possessed of any rights to grant permission to an abutting owner to hunt upon the state forest reserves, could give permission for that portion only of the state forest reservation "immediately adjacent" to such person's property and in applying this term to the conditions as presented in your letter, it is doubtful whether land as far away as a half mile from such privately owned land would be considered immediately adjacent.

However, following the construction of the first sentence of § 3 of the act of Feb. 25, 1901, as outlined above, the reservation contained in it takes away from the commissioner of forestry the power to grant any immunity or privilege connected with the game laws of this state and that, therefore, he could not permit any person to hunt upon the state forest reservation without a license.

Answering your second inquiry, would state that the act of April 17, 1913, P. L. 85, in §§1 and 2 makes the act applicable to "any person" and under the express phraseology of this act, the necessity of procuring a license applies to every person, except such as are expressly excepted in the act.

Section 5 of this act excepts from its provisions any owner or lessee of cultivated land or any member of his family, who resides on such land. No exemption is made for any employé of such owner or lessee and in the absence of any such exemption, the forest rangers and other employés of the foresty department have no more right to hunt without a license than would the officers of the game commission, which are admittedly not exempt.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

St. Clair Election Contest.

Election law—Duties of election officers—Fraud—Motion to throw out entire vote.

The entire vote at a poll will not be rejected where there is no evidence of actual fraud or an illegal count or return; such fraud will not be presumed.

In re contest of election of G. A. Lewis as high constable of borough of St. Clair. Q. S. Schuylkill Co. Motion to reject entire vote of South ward poll.

Jas. J. Moran, for motion; *C. E. Berger,* contra.

BECHTEL, P. J., March 6, 1916.—In this case a petition was filed in the usual form, accompanied by a bond, and the case was so proceeded with; the ballot box was impounded, brought into court, opened by the court and a recount had. The return of the election board showed Daniel Cannon to have received one hundred and ninety-eight votes, and George A. Lewis, two hundred and thirty-six votes. The petition averred that there had been but four hundred and two votes cast for the office of high constable at said election, of which number Daniel Cannon received one hundred and ninety-eight and George A. Lewis two hundred and four, and that there were thirty-two more votes counted at the said poll for the office of high constable than were polled for said office. The recount disclosed the fact that there were in the ballot box two hundred and thirty ballots marked for George A. Lewis, and two hundred and six for Danniel Cannon. This failed to change the result of the election.

The motion before us now is to reject the entire vote of the South ward of St. Clair, by reason of irregularities that occurred in the election room during said count. It is true that there were a number of irregularities, which consisted principally of the permitting of persons who had no authority to mingle with the election officers, and in one instance, at least, to inspect the ballots. It has also been testified to that one of the watchers, who challenged the correctness of the first count, was permitted to read off a number of the ballots to the clerks in making the second count. It is hardly necessary for us to say that this was highly improper. The election officers are charged with the duty of counting and returning the votes cast at the election, and to permit those who have no authority to do so to assist in the count, opens opportunities for fraud that should not be tolerated.

In this particular case, however, it has been testified to by the election officers that while the watcher was calling the votes the judge of election stood by him and saw that they were called correctly. There is absolutely no evidence in the case of any fraud or any illegal count or return. The presumptions in the case should certainly not be that fraud was committed. We do not think the evidence is sufficient to justify us in rejecting the vote of this entire poll. Conroy's Election Case, 2 L. J. R. 28; Kirckbaum's Contested Election, 221 Pa. 521; Contested Election Edwin R. Wheelock, 82 Pa. 297.

And now, March 6, 1916, the motion to reject the vote of the entire poll of the South Ward of St. Clair is denied, the proceedings in this case are dismissed at the costs of the petitioners, and it is directed that the costs of recounting the ballots be included as part of the costs in this case.

Barton *v.* Cramer.

Mortgage—Judgment upon bond—Sale—Liens—Advertisement—Stay of execution.

Pieces of land, subject to a common incumbrance, when sold consecutively by the owner, are liable for the incumbrance in the adverse order of alienation; and if the holder of the incumbrance releases from the lien thereof certain pieces of land which have been sold, the lien of the incumbrance on pieces previously sold will be discharged if the pieces released are of sufficient value to meet the debt, provided the holder of the incumbrance knew of the previous sales, or of facts that fairly put him upon notice.

It is the object of a description of real estate in an advertisement of sale to give full notice to the public so as to arrest the attention and excite the inquiries of all who are able and disposed to purchase. It must be appropriate to the premises to be sold. Whatever, therefore, constitutes a peculiar and valuable feature of the property ought to be specified in order to make the description a proper one, since the omission always may be considered as injurious by the consequent failure of a general attendance and a fair sale.

The court will require a sale to be made in such manner as to produce the most money, and at the same time protect the rights and equities of prior purchasers, and an execution will be stayed until the description of the land, the advertisement thereof, and the manner of sale, shall be such as to bring about that result.

Rules to stay execution on a judgment sur mortgage bond. C. P. Fayette Co. Sept. T., 1915, No. 84, E. D.

John L. Robinson, for receiver in bankruptcy of execution defendant.

A. E. Jones and *D. M. Hertzog,* for lot purchasers.

R. F. Hopwood and *W. J. Sturgis,* for execution plaintiff.

[Barton v. Cramer.]

VAN SWEARINGEN, P. J., Sept. 6, 1915.—Two rules to stay execution on a judgment sur mortgage bond are before us. The basis for the rules is an alleged insufficiency in the description and advertisement of the real estate to be sold and an improper method of procedure in making sale. The first rule was granted on a petition of the receiver in bankruptcy of the estate of the execution defendant, and the second one was granted on the petition of counsel for certain purchasers of parts of the land bound by the mortgage. We are of opinion that for either and consequently for both of the reasons assigned the execution should be stayed.

In October, 1907,, William R. Barton sold and conveyed to Charles H. Cramer about twenty-two acres of land in South Union township, Fayette county, for the sum of $63,000, taking from Cramer a judgment bond and mortgage on the premises for $40,000 of the purchase money. Cramer laid out a plan of lots on a portion of the land, bounding the lots by appropriate streets and alleys, which plan was duly recorded in the recorder's office of the county. Certain payments on the mortgage were made by Cramer, reducing the amount remaining unpaid to $33,140, for which sum judgment was entered on the bond, and on which judgment the present execution was issued. Prior to the execution Cramer sold lots to different persons on articles of agreement, portions of the purchase money for which were paid, and in about sixteen cases the whole purchase money was paid and deeds were made by Cramer to the purchasers and the lien of the mortgage on such lots was released by Barton. Some lots had been sold previously on which the lien of the mortgage had not been released, and others were sold afterwards without releases being given. It was only in cases where Cramer paid the purchase money for the lots to Barton on account of the mortgage that Barton released the lien of the mortgage from the lots sold.

Under the execution issued the entire tract of land covered by the mortgage, excepting the lots sold by Cramer for which deeds were made and from which the lien of the mortgage was released, has been advertised for sale as a whole, including a number of lots sold by Cramer on articles of agreement for which portions of the purchase money have been paid to Cramer. It is alleged that the portion of the land remaining unsold by Cramer is of sufficient value to pay the amount yet due on the mortgage, and therefore that that portion of the land should be sold and the proceeds thereof applied to the

payment of the remainder of the mortgage debt before any of the lots sold by Cramer should be sold. On the contrary it is denied that the portion of the land remaining unsold by Cramer is of sufficient value to pay the balance of the mortgage debt. There is no evidence before the court on that subject. The law is well settled that pieces of land, subject to a common incumbrance, when sold consecutively by the owner, are liable for the incumbrance in the adverse order of alienation; and that if the holder of an incumbrance releases from the lien thereof certain pieces of land which have been sold, that will operate to discharge the lien of the incumbrance on pieces previously sold, if the pieces released are of sufficient value to meet the debt, provided the holder of the incumbrance knew of the previous sales, or of facts that fairly put him upon notice. Turner *v.* Flenniken, 164 Pa. 469. In the present case Barton had actual knowledge that Cramer was making sales of lots as he could. Two public lot sales had been held by Cramer, and the facts and circumstances were such as to put Barton on notice.

Counsel for the purchasers of lots from Cramer are willing that the sale on the present execution shall proceed as to all that portion of the land not including their purchases. But there is no sufficient separate designation of that portion of the land in the advertisement; and even if there was, it is alleged that the description of that portion of the land in the advertisement is otherwise insufficient. It is the object of a description of real estate in an advertisement of sale to give full notice to the public so as to arrest the attention and excite the inquiries of all who are able and disposed to purchase. It must be appropriate to the premises to be sold. Whatever therefore, constitutes a peculiar and valuable feature of the property ought to be specified in order to make the description a proper one, since the omission may always be considered as injurious by the consequent failure of a general attendance and a fair sale. Yundt *v.* Yundt, 9 Lanc. Bar, 57. It is averred in the petition of the receiver in bankruptcy that "the said description and advertisement fails to name another valuable asset of the tract, to wit, that there is in connection with the greenhouse on said premises a certain right and asset in the nature of a right or easement to use from a steam pipe belonging to the H. C. Frick Coke Company and crossing the said premises so much steam as is necessary for the use of the greenhouse aforesaid, which right has been variously estimated as

worth from $300 to $700 per year, as it does away altogether with any necessity for maintaining a heating plant for said greenhouse, which said valuable right is not mentioned or referred to in the aforesaid advertisement." It has not been made to appear just what right to use steam from said pipe was acquired by Cramer by his purchase of this land from Barton, but it does appear that steam from the pipe has been used in connection with the premises ever since the purchase by Cramer in 1907, from which a fair presumption may arise that the use may inure to the purchaser of the property at sheriff's sale; and being as valuable as the right is alleged to be, it ought in some way to be mentioned in connection with the description of the property, so that prospective purchasers at least may take cognizance thereof and make inquiry relative thereto. It is alleged by the receiver of Cramer's estate that "the said advertisement and description does not set forth that there is upon the premises to be sold a certain eight-room dwelling house, with slate roof, which said dwelling house is reasonably worth $2,000, and is as a matter of fact located on said premises." It appears, however, that this dwelling house was built by Bridget Scully on a lot purchased by her from Cramer, for which she paid Cramer the entire purchase money and for which Cramer executed and delivered to her a deed. Cramer's estate, therefore, no longer has any interest in that particular property and the receiver is not in position to raise the question of defective description in that respect. The matter is not pressed by other lot purchasers and it need not be given further consideration.

In a case like this the court should require a sale in such manner as to produce the most money, and at the same time protect the rights and equities of the lot purchasers. Mevey's Appeal, 4 Pa. 80. We are of opinion that the land covered by this mortgage should be described in the manner made necessary by this ruling, and be readvertised accordingly, and that the sale be, first, of that portion of the land remaining unsold by Cramer, and, second, of the lots sold by Cramer, separately and in the adverse order of alienation, except as the matter may be affected by the releases of the lien of the mortgage by the execution plaintiff, until, and only until, the proceeds of sale shall be sufficient to pay the plaintiff's judgment, debt, interest and costs.

And now, Sept. 6, 1915, the rules to stay execution are made absolute to the extent that execution is stayed until the description of the land, the advertisement thereof, and the

manner of sale, shall be in accordance with the requirements of the law as indicated in the opinion of the court herewith filed.

From D. W. McDonald, Esq., Uniontown, Pa.

Adams Township Poor District *v.* East Buffalo Township Poor District.

Poor law—Order of removal—Costs—Counsel fees.

Where proceedings in a poor law case for an order of removal has been quashed because of lack of notice, and the costs, including an attorney's fee of $20, have been paid, and a citation is then taken out in court and the case is decided adversely to the practitioner, a second attorney fee of $20 will not be allowed.

Appeal from taxation of costs disallowing an attorney fee. Q. S. Snyder Co. June T., 1915, No. 8.

M. I. Potter, for Adams township.
Cloyd Steininger, for East Buffalo township.

JOHNSON, P. J., March 25, 1916.—The facts are as follows:

In the first instance the overseers of Adams township sued out an order of removal before two justices, but failed to give the respondent notice of it. The respondent appealed to the court of quarter sessions, where it was agreed between counsel for the contending parties that the proceedings had before the justices was void because of the lack of notice, and the proceedings had before the justices were quashed.

All costs incurred in these proceedings were paid by the petitioners, this including an attorney fee of $20, as is allowed by rule of court on cases appealed from the justices to court.

A citation was then taken out in court, testimony was heard, and the case was decided adversely to the petitioners.

Respondent's attorney then filed another bill of costs and included in it another attorney fee of $20.

Exceptions were filed to the allowance of this second attorney fee, the matter was decided by the prothonotary disallowing the fee, when the counsel for respondents took an appeal to court. After argument the court made the following order:

And now, March 25, 1916, the appeal from the retaxation of the costs disallowing an attorney fee of $20 is dismissed.

From M. I. Potter, Esq., Middleburg, Pa.

Schuylkill County *v.* Wiest.

Public officers — County treasurer — Compensation — Fees from hunters' licenses—Acts of April 17, 1913, P. L. 85.

Where a county treasurer is paid a salary, he must turn over to the county the ten cents allowed by the commonwealth to be retained by him for his services for collecting hunters' licenses under the act of April 17, 1913, P. L. 85.

Amicable action in assumpsit. Case stated. C. P. Schuylkill Co. March T., 1916, No. 318.

C. A. Snyder and *E. D. Smith,* for the county.
J. B. McGurl, for defendant.

BECHTEL, P. J., March 6, 1916.—This case comes before us upon a case stated, and arises in the following manner:

The defendant was duly elected and properly qualified treasurer of the county of Schuylkill for the years 1912 to 1915, inclusive. Under the provisions of the act of April 17, 1913, P. L. 85, resident hunters' licenses were issued by the defendant in 1913, 1914 and 1915, to the total of twenty-five thousand five hundred and fifty-eight. For each of these licenses the said defendant collected from the licensee the sum of $1.00. Of this amount he has remitted to the state treasurer the sum of $23,002.20, retaining the sum of $2,555.80, the same being equivalent to ten cents on each license. On the defendant's special deposit of the above sum retained by him, the interest to Jan. 1, 1916, amounts to $93.27. The amount thus retained is claimed by the defendant as belonging to him under the provisions of the above act, whereas the plaintiff maintains that it belongs to the county of Schuylkill and must be accounted for by the treasurer. According to the terms of the case stated, if the court be of the opinion that the county is entitled to this money, judgment is to be entered for the county in the sum of $2,649.07; if the court be of the opinion that the county is not entitled to the money, judgment shall be entered for the defendant.

Section 8 of the act of 1913, supra, provides, inter alia, "Said county treasurers are herewith authorized to retain for services rendered the sum of ten cents from the amount paid by each licensee, which amount shall be full compensation for services rendered by him in each case under the provisions of this act, and shall remit all balances arising from this source, at least once a month, to the state treasurer, for the purposes otherwise provided for in this act."

It is claimed by the defendant that under these provisions, in the light of the decisions of Phila. *v.* Martin, 125 Pa. 583, and Allegheny County *v.* Stengel, 213 Pa. 493, he is entitled to retain these commissions.

Article XIV, Sec. 5, of the Constitution of Pennsylvania, provides: "The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried shall pay all fees which they may be authorized to receive, into the treasury of the county or state, as may be directed by law. In counties containing over one hundred and fifty thousand inhabitants all county officers shall be paid by salary."

The act of March 31, 1876, P. L. 13, provides, inter alia: "In all counties in this commonwealth, containing over one hundred and fifty thousand inhabitants, all fees limited and appointed by law to be received by each and every county officers therein elected by the qualified voters of their respective counties or appointed according to law, or which they shall legally be authorized, required or entitled to charge or receive shall belong to the county in and for which they are severally elected or appointed; and it shall be the duty of each of said officers to exact, collect and receive all such fees to and for the use of their respective counties, except such taxes and fees as are levied for the state, which shall be to and for the use of the state; and none of said officers shall receive for his own use, or for any use or purpose whatever except for the use of the proper county or for the state, as the case may be, any fees for any official services whatsoever."

We do not think that the case of Phila. *v.* Martin, supra, is conclusive of the case at bar, as the scope of the authority of that decision has been expressly defined and to a considerable extent limited by later decisions of the Supreme Court.

In Phila. *v.* McMichael, 208 Pa. 297, the Supreme Court say:

"Had it not been for the mere inadvertence of the court below shared in by this court, in Phila. *v.* Martin, 125 Pa. 583, it is probable, that this attempt to give a strained interpretation to the Constitution would not have been made. . . .

"It is obvious that the opinion of the court below in that case, its affirmance by this court as well as the argument of counsel, had in view just one point, viz.: whether the county treasurer under Art. XIV, Sec. 5, could lawfully receive from the state a separate and distinct compensation, for separate and distinct duties imposed upon him by the state and performed for the state. . . . We have in several cases pointed

out, as has the court below, what Phila. *v.* Martin does and what it does not decide; we hope this is the last time it will be urged upon our attention as holding that the fees of county officers can have any other destination than the county treasury. . . . In no instance has this court permitted any equivocal or even doubtful construction of this plain provision, except in the one case which escaped its notice in Phila. *v.* Martin, supra. It is well known that at the date of the adoption of the Constitution the aggregate of fees, in counties containing within their boundaries large cities, was enormous; the fees of a single term of office were equivalent to a fortune. The purpose of the fundamental law was to so reduce this extravagant and burdensome compensation, that it would in some degree be measured by the capacity, work and responsibility of the officer."

The case of Allegheny County *v.* Stengel, supra, as we understand it, turns upon an entirely different question. In that case, by the provisions of the act of May 6, 1887, the register of wills was specifically appointed to be the agent of the commonwealth for the collection of the collateral inheritance tax, and for such services was authorized to retain for his own use a certain percentage of his collections. The court below, in a lengthy opinion, affirmed by the Supreme Court, held that the act of 1887 could not be construed in harmony with the provisions of § 9 of the act of 1876, and, therefore, the latter is repealed by the former; and the legislature having power under the Constitution to give to the county officer who may, for the time being, collect the collateral inheritance tax for the state, a compensation for such collection, that the act of 1887 was so enacted, and the register is entitled to retain the compensation received by him.

The act which we are construing here is not nearly so broad in its scope as the act of 1887 just quoted. It will be noted that the county treasurers are not appointed the agents of the commonwealth under the provisions of § 8, supra, nor are they authorized to retain the money for their own use, the act simply providing that the county treasurers are herewith authorized to retain for services rendered the sum of ten cents out of the moneys collected for the issuance of hunters' licenses. We do not think that this section repeals the act of 1876, but believe that each can be read in harmony with the other, and we are convinced that it is our duty so to do if it is at all possible.

We feel, rather, that this case is controlled by the case of

Schuylkill County *v.* Reese, 249 Pa. 281. In that case, by an act of congress, the clerk of every court exercising jurisdiction in naturalization cases was directed to charge and collect and account for certain fees. The act also contained a provision that the clerk of any court collecting such fees is authorized to retain one half the fees collected by him in such naturalization proceedings. The remaining one half of the naturalization fees in each case shall be accounted for in the quarterly account of the said clerk. It was contended there, as here, that these fees were not collected in the official capacity of the officer making the collection. It was strongly urged upon us that Reese was the agent of the government of the United States; that that government had no authority to impose any official duties upon him, and that the bond which he gave could not be held responsible for the moneys so collected and retained. This court agreed with that contention, and upon an appeal to the Supreme Court, the case was reversed.

We feel that this case was even stronger in favor of the defendant than the case at bar. The Supreme Court, in vindication of its position, speaking by Mr. Justice Stewart, filed an exhaustive opinion, and we feel that the argument and statements of law therein contained fully answer all the contentions of defendant's counsel in this case.

And now, March 6, 1916, the court being of the opinion that the county is entitled to the money in controversy in this case, judgment is hereby directed to be entered for the county and against the defendant, Fred J. Wiest, for the sum of $2,649.07.

Blank *v.* American Brick Co.

Corporations—Foreign corporations—Service of process—Acts of July 9, 1901, P. L. 616; April 3, 1903, P. L. 139; and June 8, 1911, P. L. 710.

The act of June 8, 1911, P. L. 710, relating to service of process upon foreign corporations repeals so much of the act of July 9, 1901, P. L. 616, as amended by act of April 3, 1903, P. L. 139, as requires the summons to be issued to the sheriff of the county in which the case is commenced. The summons must now be issued directly to the sheriff of Dauphin county.

Assumpsit for services. C. P. Susquehanna Co. April T., 1916, No. 100.

Rule for judgment for want of a sufficient affidavit of defence.

John Ferguson, for plaintiff.
Lewis Wademan, for defendant.

LITTLE, P. J., May 1, 1916.—This is an action in assumpsit. The defendant company is a foreign corporation having its principal place of business in Susquehenna county. The summons was issued on March 4, 1916, addressed to the sheriff of Susquehenna county, who deputized the sheriff of Dauphin county to serve the process. Duplicate copies of the process, and plaintiff's statement were served upon the secretary of the commonwealth by the sheriff of Dauphin county, which service was duly returned to this court.

On March 24, 1916, the defendant company filed an affidavit of defence raising questions of law as is provided by § 20 of the act of May 14, 1915. On March 27, 1916, plaintiff obtained a rule to show cause why judgment should not be entered against defendant for want of a sufficient affidavit of defence.

In the affidavit of defence two reasons are assigned as sufficient to relieve the defendant company from filing an affidavit of defence upon the merits, as follows: First, that the service of the process was not made according to law; and, second, the plaintiff's statement of claim is incomplete and insufficient to enable to respond to the merits by an affidavit of defence.

Each of these complaints must be sustained.

The summons and copies of plaintiff's statement were served upon the secretary of the commonwealth in accordance with § 5 of the act of July 9, 1901. In so far as the service of process upon foreign corporations is concerned, this act has been repealed by the act of June 8, 1911, which provides, in § 2, as follows:

"Service of such process shall be made by the sheriff of Dauphin county, by leaving two copies of the process and a fee of $2 in the hands or at the office of the secretary of the commonwealth; and he shall make due return of his service of said process to the court, magistrate or justice of the peace issuing the same. Such process may be issued by any court or magistrate or justice of the peace having jurisdiction of the subject-matter in controversy, in any county of the commonwealth in which said corporation shall have its principal place of business, or in such county in which the right of action arose."

The title to the act clearly indicates that a change in the service of process was contemplated; it reads, "To regulate

the doing of business in this commonwealth by foreign corporations: the registration thereof, and the service of process thereon; and providing punishment and penalties for the violation of its provisions, and repealing previous legislation on the subject." It provides that all processes issued against any foreign corporation by any court of record, magistrate or justice of the peace in any county of the commonwealth, having jurisdiction of the subject-matter in controversy, shall be served by the sheriff of Dauphin county upon the secretary of the commonwealth, who by the provisions of the act shall be appointed its true and lawful attorney and authorized agent, upon whom all lawful processes in any action or proceeding against it may be served.

The act of 1901, as amended by the act of April 3, 1903, makes provision for the service of all processes in actions pending against foreign and domestic corporations, joint stock companies and limited partnerships, upon its officers, members of boards of directors, or duly authorized registered attorneys, by the sheriff of the county wherein they are located, who shall be deputized for this purpose by the sheriff of the county in which the writ issues. These acts, in so far as they refer to foreign corporations, are repealed by the act of 1911. This act specifically declares by whom and upon whom such processes shall be served. No deputization of the sheriff of Dauphin county is required, and all writs must be directed to him by the courts out of which they are issued. In my opinion, this is the clear intendment of the act. Had the legislature intended otherwise such intent undoubtedly would have been expressed as in the act of 1903. The act of 1911 particularly appoints and designates the sheriff of Dauphin county as the proper officer to serve the processes. His authority is derived from the act itself, and is not to be obtained from the sheriff of another county. If this interpretation of the act is not accepted, in what manner could service of summons issued by a justice of the peace be obtained? A justice is not authorized to direct his process to the sheriff of the county, who is not an officer of his court. If this is true, and assuming that it is also true that the sheriff of the county where the process issues, shall be required to deputize the sheriff of Dauphin county, how could service be obtained upon a foreign corporation in actions within the jurisdiction of a justice of the peace to be prosecuted there as the act permits? Provision is expressly made for the issuing of processes by magistrates and justices of the peace, and that the sheriff of

Dauphin county shall make returns of his service to them as well as to the courts.

The service of all processes is provided for by legislation; and it is a well-established principle that in serving the same, the method adopted by the acts of the legislature must be strictly pursued. Therefore, if the conclusions we have reached in the interpretation of the act of 1911 are to be followed, the summons or the service of the summons in this case must be set aside, under the pleadings in this case.

Section 20 of the act of 1915, known as the "practice act," reads as follows: "The defendant in the affidavit of defence may raise any question of law, without answering the averments of fact in the statement of claim; and any question of law so raised may be set down for hearing and disposed of by the court. If in the opinion of the court the decision of such question of law disposes of the whole or any part of the claims, the court may enter judgment for the defendant, or make such other order as may be just. If the court shall decide the question of law, so raised, against the defendant, he may file a supplemental affidavit of defence to the averments of fact of the statement within fifteen days." The affidavit of defence filed in the case at bar, as before suggested, raises purely legal questions, which is permissible by the terms of this section of the act in lieu of pleas in abatement or demurrer, without answering the averments of fact as set forth in plaintiff's statement. Upon filing an affidavit of this character the court may, after hearing, enter judgment for the defendant; or if the legal questions are decided against the defendant, he may file a supplemental affidavit of defence within fifteen days; or the court may make such other order as may seem just. Therefore it is within the province of the court to set aside an irregularly served summons when properly raised by an affidavit of defence raising only legal questions.

After a diligent search I am unable to find any decision of any of our courts wherein this question has been decided. As bearing upon the subject generally may be cited the case of Wick *v.* Alworth, 62 Pa. Super Ct. 34, wherein it was held: "A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute, although it contains no express words to that effect, must on the principles of law, as well as in reason and common sense, operate to repeal the former." It may be said that the act of 1911 evidently is intended as a substitute of the act of 1903 regarding the service of process upon foreign corporations, and by

necessary implication repeals all provisions of the former act inconsistent therewith. Com. ex rel. *v.* Brown, 210 Pa. 29.

Plaintiff's statement we will indicate in what respect in plaintiff's statement. First, the name of the officer of the defendant, with whom plaintiff entered into the contract, should be given. Second, in the sixth paragraph of plaintiff's statement, it is averred that the sum of $901 is left unpaid after deducting the amount of the two notes, but it is not stated for what portion the time for which wages is sought, this amount represents. Third, the seventh paragraph sets forth various payments made by defendant company to apply on plaintiff's claim. The amounts of the payments and dates should be designated. If another statement is filed these suggestions should be followed.

For the reasons stated, the summons, service of summons, and all subsequent proceedings thereon, are set aside. The rule for judgment for want of a sufficient affidavit of defence is discharged. Costs to be paid by plaintiff.

From E. R. W. Searle, Esq., Montrose, Pa.

Beneficiary Limitation.

Poor law—Indigents—Beneficiaries under mother's pension amendment act of June 18, 1915, P. L. 1038.

The beneficiaries under the mothers' pension act of April 29, 1913, P. L. 118, are now limited to the beneficiaries specifically described in the amendment act of June 18, 1915, P. L. 1038.

Request of Hon. A. W. Powell, auditor-general, for opinion.

Kun, Deputy Attorney-General, Aug. 10, 1915.—Replying to your inquiry of recent date, relative to the act of June 18, 1915, P. L. 1038, which is an amendment to the act of April 29, 1913, P. L. 118, commonly referred to as the "mothers' pension act," I beg to advise you as follows:

The act of 1913 provides that the beneficiaries thereunder shall be "indigent, widowed or abandoned mothers, for partial support of their children in their own homes." The amending act of 1915 provides that the beneficiaries thereunder shall be "women who have children under sixteen years of age, and whose husbands are dead or permanently confined in institutions for the insane, when such women are of good repute, but poor and dependent on their own efforts for support, as aid in supporting their children in their own homes."

You ask to be advised:

First. Whether you may lawfully continue payments to indigent mothers whose husbands are disabled, to indigent mothers whose husabnds have abandoned them, or to unfortunates who are mothers without any lawful husbands, if they were on the pension roll prior to the adoption of the act of 1915.

Second. Whether or not you are authorized to strike off from recommendations made by boards of trustees for new pensions since the adoption of the said act, those who come within the classes cited in the first inquiry.

The real purpose of this legislation was undoubtedly to alleviate the condition of want and dependence of families which have permanently lost the usual and natural support furnished by the father and husband. It is rather difficult, therefore, to understand how the situation is affected by the cause of the condition.

A real case of abandonment by a father, for instance, has the same affect, so far as the ability of the mother to support her children is concerned, as the death of the father. And what if a husband is permanently confined in some other institution than an insane asylum?

It must be assumed, however, that there were good and sufficient reasons for making the limitation in the act of 1915, and it is, of course, our duty to interpret legislative acts in accordance with the intention as expressed therein—in this case clearly expressed—and it is your duty to administer the law as so passed and interpreted.

If there could be any possible doubt as to the intention and purpose of the legislature it is removed by the title of the act of 1915, which declares that it is an act amending the act of 1913, "by limiting the provisions of said act to women whose husbands are dead or permanently insane, and who have children under sixteen years of age, etc."

You are therefore advised:

First. That you may not lawfully continue payments to indigent mothers whose husbands are disabled, to indigent mothers whose husbands have abandond them, or to unfortunates who are mothers without any lawful husband, notwithstanding they were on the pension roll prior to the adoption of the act of 1915.

Second. You are authorized, and it is your duty, to strike off from recommendations made by boards of trustees for new pensions, since the adoption of the act of 1915, all those

who come within the classes mentioned in your first inquiry.

In other words, the provisions of the act of June 18, 1915, P. L. 1038, are limited in terms to "women who have children under sixteen years of age, and whose husbands are dead or permanently confined in institutions for the insane, when such women are of good repute, but poor and dependent on their own efforts for support, as aid in supporting their children in their own homes," and others may not lawfully be designated as beneficiaries thereunder.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Clever's Estate.

Practice (O. C.)—Reopening audit—Claim of surety company for second year's premium.

An audit will not be reopened to permit proof of a claim which on its face cannot be allowed as a charge against a decedent's estate. This rule applies to a claim by a surety company for a premium charged for the second year on a bond given by an executor who has sold real estate under an order of the orphans' court.

Exceptions to auditor's report. O. C. Cumberland Co.

H. M. Leidigh, for exceptions; *W. R. Johnson,* for estate.

SADLER, P. J., March 13, 1916.—Exceptions have been filed in this case to the report of the auditor appointed to make distribution of the balance in the hands of the executor of the estate of Joseph Clever, which balance is made up, in part, from the proceeds of sale of certain real estate disposed of under order of the orphans' court. To secure the faithful application of the purchase money, a bond was given in which the United States Fidelity & Guaranty Company of Baltimore became the surety. The premium for the first year was paid, and the accountant claimed and received credit therefor.

The auditor appointed to make distribution, after due and legal notice, held his first meeting on June 18, 1914, which meeting was "adjourned to meet at the call of the parties for further evidence." No subsequent meeting was held, and the minutes show no further proceedings before the auditor, except the receipt by him by mail of a bill from the United States Fidelity & Guaranty Company of Baltimore, for $32, the premium charged for the second year on the bond given by the accountant at the time of the sale of the real estate. The re-

port of the auditor, with the exception to the disallowance of this claim, was filed in open court on Feb. 3, 1916.

It does not appear that any formal objection to the allowance of the claim was presented before the auditor. Had such been entered, it would have been incumbent on the claimant to properly prove his account. Jeffries *v.* Uniontown Rys. Co., 61 Pa. Super. Ct. 438. But the auditor, without hearing, refused the claim because "nothing appeared to show the continued liability of the said company." If it was intended by this statement to hold that the company was precluded from collecting the premium on the bond for the second year because of the fact that an account, charging the accountant with the proceeds of sale, had been filed and confirmed, we could not agree. The liability upon the bond continues until the actual distribution is made, and the company is entitled to recompense from the accountant until that time for the responsibility incurred, in accordance with the terms of its contract. Mutchmore's Est., 31 Pa. C. C. 353.

But it may be that the liability no longer continued by reason of payment, release, or otherwise. As to this, the record is silent. If we were of the opinion that the charge could be allowed against the estate, we would recommit the report to the auditor to pass upon the claim, after hearing the parties. Sutton's Est., 15 York 176. This would be the right of the claimant, in view of the fact that his account was properly presented—it was not due until after the first meeting—and he had every reason to believe that a subsequent meeting would be held, where his proof could be presented, if the claim was objected to by the accountant, creditors or distributees. Though reports will not be recommitted where there has been a negligence in the presentation of claim, Winters *v.* Schmitz, 24 York 112; yet where the parties have been misled, or may have been misled, as in this case, a re-reference will be granted. Strohm's Est., 8 Lanc. L. R. 273; Coates's Est., 2 Pars. 258.

But an audit will not be reopened to permit proof of a claim which on its face cannot be allowed as a charge against the estate. Drysdale's Appeal, 14 Pa. 531. In the case at bar, we gather from the rather meager record presented that the surety company asks for payment of a premium upon the bond of the accountant, given to insure the faithful application of proceeds of real estate. The fact that it is the premium for the second year, or that the accountant has charged himself with the proceeds of sale in his account, is immaterial, since the liability of the surety continues until actual payment. Mutchmore's Est.,

supra. But the premium is chargeable to the accountant, and not primarily to the estate. Prior to the act of June 24, 1895, P. L. 248, the estate could in no way have been held liable for such an expense. Eby's Est., 164 Pa. 249.

By that act it was provided that an executor "may include as a part of the lawful expense for executing his trust such reasonable sum paid a company, authorized under the laws of this state so to do, for becoming his surety on such bond as may be allowed by the court in which he is required to account, not exceeding, however, one per centum per annum on the amount of such bond." This is the only statute imposing liability upon the estate in cases where theretofore no such liability existed.

The accountant may now pay the premium himself from his own funds, as was always the case prior to 1895, or may make payment and seek reimbursement from the estate. The contract with the surety company is an individual contract, and the responsibility to pay the agreed compensation rests upon him. The legislation referred to gave the surety company no claim or lien against the estate itself, though the accountant who paid a sum not in excess of the maximum fixed by the act could insist on repayment to him by the estate. In discussing the question as to whether or not this act creates a special lien in favor of the surety company, the Supreme Court said: "Apart from the common law liens of artisans and vendors dependent on possession, liens must rest on clear statutory authority. There is none here. The act does not give a lien, or even a claim of any kind to the surety company against the estate. The trustee is allowed a credit not for what he owes or has agreed to pay, but for what he has paid. Payment by the trustee is a necessary prerequisite to any claim against the estate, and even then it does not come in as a new lien, but on the footing of an ordinary item of expense in the administration of the trust." Clark's Est., 195 Pa. 520, 528.

It is, therefore, clear that the claim of the surety company in this case is against the accountant, and cannot be allowed from the funds in the hands of the accountant now for distribution. It would, therefore, be useless to recommit the report to the auditor.

And now, March 13, 1916, the exception filed is overruled, and the report of the auditor is confirmed, and the accountant is directed to make distribution in accordance with the schedule submitted.

From Jasper Alexander, Esq., Carlisle, Pa.

Williamsport *v.* Ferber.

Municipalities—Street traffic—Regulation of traffic—Violation of ordinance—Summary conviction—Automobiles.

Where a municipal ordinance provides that "all vehicles shall stop or move when signaled by a police officer," and that "the signal to stop will be the uplifted hand; to start, a wave of the hand," a summary conviction will be sustained where the evidence supports an information which avers that the defendant stopped on the signal of a police officer, but that when the officer by wave of the hand signaled him to start, and he refused so to do, and persisted in such refusal until taken into custody by the officer.

Certiorari. C. P. Lycoming Co. June T., 1914, No. 364.

F. P. Cummings, for plaintiff.
S. T. McCormick, for defendant.

WHITEHEAD, P. J., Nov. 6, 1914.—The exceptions filed in this case raise three questions. viz.:

First. The findings of the alderman are too indefinite.

Second. There was not sufficient evidence upon which to found a conviction.

Third. Insufficiency of the record.

The information in this case charges as follows: That on or about Aug. 13, A. D. 1914, one Clarence D. Ferber, did violate Clause I, Art. II, of an ordinance of the city of Williamsport, approved Feb. 10, 1912, which clause reads as follows:

"Article 2, Signals, Clause 1: All vehicles shall stop or move when signaled by a police officer. The signal to stop will be the uplifted hand; to start a wave of the hand."

"That said Clarence D. Ferber, having at the time aforesaid, stopped an automobile which he was driving on a congested part of Market street was signaled by Eugene Calvert, a police officer of the city of Williamsport, by wave of the hand and by words to move said automobile, refused so to do and persisted in such refusal until taken into custody by said officer."

The ordinance, the terms of which it is claimed the defendant violated, contains as follows:

"Article 2, Signals, Clause 1: All vehicles shall stop or move when signaled by a police officer. The signal to stop will be the uplifted hand, to start a wave of the hand."

Neither the information nor the findings of the alderman are as clear as they might have been, yet the information charges, and the alderman finds that the defendant did vio-

late the terms of the ordinance enacted by the plaintiff for the regulation of traffic upon the streets of the city.

Stripped of all useless verbiage, the information simply charges that the defendant stopped his automobile on a congested part of Market street and refused to move said car when ordered so to do by a police officer.

This information charges but one offense, viz.: That the defendant refused to move his car when signaled by an officer.

The alderman's finding is that the defendant is guilty of the premises charged and is accordingly convicted.

This finding of the alderman could be construed in no other way than that the defendant is guilty in manner and form as he stands charged.

To sustain this certiorari, counsel for defendant relies upon the following cases: Com. *v.* C. Davison, 11 Pa. Super. Ct. 130; Com. *v.* Cannon, 32 Pa. Super. Ct. 78; Shryock *v.* North Braddock Boro., 43 Pa. Super Ct. 508; Com. *v.* Moller, 50 Pa. Super. Ct. 366-372; Com. *v.* Nesbit, 34 Pa. 398; Com. *v.* Supt. House of Correction, 41 Pa. C. C. 108; Com. *v.* Breitinger, 40 Pa. C. C. 617.

In the case of Com. *v.* Davison, supra, the principal relied upon by counsel for defendant is clearly enunciated, viz.: "In an action which, in its true nature and effect, is a proceeding for the punishment of a criminal offense, although in form an action of debt, it is still essential that the record shall contain a finding set forth in express terms, or to be implied with certainty, that a special act has been performed by the defendant and that it shall describe or define it in such a way as to individuate it, and show that it falls within the unlawful class of acts."

In the case at bar, the information clearly individuates the act of the defendant, and confines it to the one act forbidden by the ordinance.

In Com. *v.* Davison, supra, the court said: "Not every article of food manufactured out of an oleaginous substance other than milk and cream is, . . . designed to take the place of butter and cheese, . . . 'or of any imitation or adulterated butter or cheese,' and unless this latter fact be alleged and proved, an essential ingredient of the offense prohibited by the act of 1885 is lacking."

This differs materially from the case at bar. In that case the act charged could have fallen outside of the things set forth in the act of assembly. In this case, the act charged is specifically and singly set forth in the ordinance.

In the case of Com. *v.* Cannon, 32 Pa. Super. Ct. 78, the information simply charged that the defendant being a non-resident of this commonwealth, did unlawfully hunt without his procuring a license from the county treasurer of said county in which he hunted, whereas, the defendant might have secured a license from some other county treasurer which would have allowed the defendant to hunt in the county in which it was alleged he had failed to secure a license.

In the case of Shryock *v.* North Braddock Boro., 43 Super. Ct. 508, the defendant was charged with having opened a street without having obtained a permit so to do.

The ordinance in Braddock borough allowed permits to be issued for three purposes, but the information did not show that the street was opened for either of these three purposes.

In Com. *v.* Divoskein, 49 Pa. Super. Ct. 614, the defendant was arrested upon information charging assault and battery, but the alderman found her guilty, not of assault and battery, but of being an idle and disorderly person.

In Com. *v.* Moller, 50 Pa. Super. Ct. 366, it was alleged that the defendant did unlawfully operate and run a motor vehicle recklessly and at greater rate of speed than one mile in five minutes contrary to the act of assembly, and the alderman found that the defendant "after a full hearing is convicted of violating the act of assembly regulating the running and the speed of motor vehicles on the streets of the borough."

The act of assembly governing the operation of automobiles imposes a variety of obligations upon persons owning and driving automobiles on the streets of a borough, and violations under said act are punished by fines differing in amount.

It was, therefore, decided in that case that the information charged no offense, and that, therefore, the conviction of the magistrate should be set aside.

The case at bar differs from all the above cases for the reason that the particular clause of the ordinance which it is alleged the defendant violated is set out in the information, and that under this clause of the ordinance but one act is defined and no person could be mistaken as to the charge set out in this information. This information, therefore, clearly charges an offense.

Counsel for defendant argues that even though the information does charge an offense, yet there was not sufficient evidence upon which to found a conviction.

The evidence was for the alderman, and as there was suffi-

cient evidence, if believed, to convict, the court should not dispute the alderman's findings.

It is also argued by counsel for defendant that the findings of the alderman are too indefinite.

If the information is good, then the findings of the alderman would be good.

In Com. *v.* Moller, 50 Pa. Super. Ct. 366, on page 371, the court said: "Pursuing the record of the magistrate one step farther, we observe that he does not convict the defendant of the offense charged in the information, which would be a good record if the information charged an offense."

The findings of the alderman are "that the said Clarence D. Ferber is guilty of the premises charged upon him by the said information, it is therefore adjudged by me, the said alderman, that the said Clarence D. Ferber, according to the form of the city ordinance aforesaid, be convicted, and he is accordingly convicted of the offense charged upon him by said information."

There is but one offense charged in the information, and the alderman's findings could be construed in no other way than that the defendant is guilty in manner and form as he stands charged.

And now, Nov. 6, 1914, all the exceptions filed in above case are dismissed, and the judgment of the alderman affirmed.

From Wm. Russell Deemer, Esq., Williamsport, Pa.

Brindle's Estate.

Lunacy—Weak-minded persons—Support and maintenance—Liability of husband—Power of court.

A husband is primarily liable during his life for the maintenance of his wife and for the expenses occasioned by her sickness, whether that sickness be insanity or one of the other more frequent and less serious forms of disease; and after his death his estate is liable for such expenses theretofore incurred.

The court will not make an order directing the guardian of a weak-minded person to pay such expenses out of the funds of her estate until the claim has first been established in a court of law and it has been shown that the husband has no estate.

Petition for allowance for maintenance. C. P. Franklin Co. Vol. H. page 136.

Thomas K. Scheller, for petition.

Gillan, J., March 28, 1916.—But a moment's reflection will convince any one learned in the law that we have not the

power in this summary way to order the guardian to pay this claim. We have power, and it is always recognized by the courts, to order payment from the fund of any legitimate claim or expenses arising in the administration of the trust. We have power, and it is our duty, to order an allowance for the support and maintenance of a weak-minded person after the adjudication of the weak mindedness. We may, where debts are legally established against a cestui que trust, order the trustee to raise money to pay the debts. We have no right, especially where the amount of the claim arising for adjudication is not admitted, to order the payment, and we doubt very much indeed the right of the guardian to admit such indebtedness without a very thorough investigation. We certainly are decidedly of the opinion that such an admission would be of very doubtful propriety. To order payment here would be to enter judgment and issue execution in the same proceeding. We have no knowledge as to whether or not there might be other claims.

The counsel have cited many authorities in support of the proposition that the estate of a lunatic is responsible for the support and maintenance of such lunatic. There is no doubt about that proposition. Nor is there any doubt that an estate acquired after adjudication of lunacy is responsible for the debts created before the adjudication. The estate of a lunatic is not, however, under all circumstances primarily liable. "A husband is liable for the maintenance of his wife and for the expenses occasioned by her sickness, whether that sickness be insanity or one of the other more frequent and less serious forms of disease, for insanity is only a disease affecting the mind as other diseases affect the body. The husband is, therefore, primarily responsible during his life, and after his death his estate is liable, for such expenses theretofore incurred." Ward's Est., 41 Pa. C. C. 207.

This weak-minded person was committed to the almshouse on June 3, 1901, and on Jan. 4, 1907, she was transferred to the insane department of the almshouse; on July 24, 1914, her husband died, and on Sept. 23, 1914, she was adjudged a person of weak mind and a guardian appointed.

We are told by the written brief of counsel that the widow received $5,300 of her husband's estate, $300 of this by virtue of the act of 1833, and, there being no children, she received $5,000 by virtue of the act of Sept. 3, 1909, P. L. 87. Had her husband any other estate? As to this we are not informed. If there was no other estate the widow was not

entitled to this $5,000 until after the payment of the debts. Gilbert's Est., 227 Pa. 648. Is the estate entirely settled? Has it been wholly distributed? If not, then the claim should be preferred against the husband's estate. It may be that, if there are no debts of the husband's estate but this one, the fund now in the hands of the guardian is answerable for this claim, but it must first be established in a court of law, as was done in every case cited by the learned counsel for the petitioner. It cannot now be ordered paid in this summary way. Citation of authority for so plain a proposition ought not to be required; Rogers' Appeal, 119 Pa. 178, however, clearly so decides.

Now, March 28, 1916, petition dismissed at the cost of the petitioner. From Irvin C. Elder, Esq., Chambersburg, Pa.

Northampton County Liquor Licenses, 1916.

Liquor law — Applications for licenses — Remonstrances — Bill of particulars.

Under § 243 of the court rules affidavits of remonstrants must state facts. It is, therefore, unnecessary to compel remonstrants to file bills of particulars when the evidence is to be heard by the court. The affidavits must be as full as a bill of particulars.

Applications for bills of particulars. Q. S. Northampton Co.

Robert A. Stotz and *Asher Seip,* for applications.
Kirkpatrick & Maxwell and *E. J. & J. W. Fox,* contra.

STEWART, P. J. and MCKEEN, J., March 15, 1916.— This is an application for a bill of particulars to the remonstrances to each of the above applications, and also that matter may be heard in open court. We grant the latter application, and order that witnesses must appear in support of the remonstrances, and testimony will be heard contra, subject to usual rules as to examination and cross-examination; this to apply only to the several charges against the applicants (the matter of necessity will be confined to affidavits as provided by § 243, court rules). This order is not to relieve the remonstrants from filing affidavits as provided in said section. That section provides "the affidavits must state facts," and takes the place of a "bill of particulars." Com. *v.* Muckley, 42 Pa. C. C. 93. The applications for bills of particulars are refused. Cases will be heard as provided by rule at license court, immediately after general list is called and passed on.

From H. D. Maxwll, Esq., Easton, Pa.

Delegate's Statement.

Election law—Statement of delegate on ballot—Act of July 12, 1913, P. L. 719.

There is nothing in the act of July 12, 1913, P. L. 719, which requires the secretary of the commonwealth to give the candidate for delegate advance information with regard to his statement or to furnish such candidate a copy of statement contained in the act; if the secretary sees fit, he may call the delegate's attention to the matter.

If a candidate for delegate files the statement provided by the act, there must appear on the primary ballot following his name the words "promises to support popular choice of party in the state for president." If such candidate fails to include in his affidavit such statement, his nomination petition cannot be rejected, but following his name on the ballot must appear the statement that he does not promise to support the party's popular choice.

In all cases where the candidate has included with his affidavit the statement provided for in subdivision (c), § 6, it is the duty of the secretary of the commonwealth to certify to the county commissioners that the candidate has included with his affidavit such statement.

If the candidate has not included with his affidavit such statement that fact must be certified.

Request of Cyrus E. Woods, secretary of the commonwealth, for opinion.

KELLER, First Deputy Attorney General, March 22, 1916. —I have your favor of the 20th inst. with reference to the uniform primary law of July 12, 1913, P. L. 719. You ask to be advised whether you should furnish to each candidate who files a petition for nomination as delegate or alternate delegate to a national party convention, a copy of the statement set forth in paragraph (c) of § 6 of the act, in order to give him an opportunity to make the statement suggested by the act, if he so desires. The clause of the act referred to is as follows:

"Each candidate for election as delegate or alternate delegate to a national party convention may include, with his affidavit, the statement hereinafter set forth in this section; but his failure to include such statement shall not be a valid ground, on the part of the secretary of the commonwealth, for refusal to receive and file his nomination petition. Such statement, if any be made, shall be in substantially the following form:

DELEGATE'S STATEMENT.

"I hereby declare to the voters of my political party in the (here insert 'state of Pennsylvania' if a delegate or alternate

delegate at large; otherwise, insert '.....district') that if elected and in attendance as a delegate to the national convention of the party; I shall with all fidelity, to the best of my judgment and ability, in all matters coming before the convention, support that candidate for president of the United States who shall have received the highest number of votes cast in the (here insert 'state' if a delegate or alternate delegate at large; otherwise, insert '.....district') by the voters of my party for said office at the ensuing primary, and shall use all honorable means within my power to aid in securing the nomination for such candidate for president."

.....

(Signature of candidate for delegate or alternate delegate).

"On the ballot used at a primary, after or under the name of each candidate for delegate or alternate delegate to a national party convention, shall appear the words, "Promises to support popular choice of party in the (here insert "state" if a delegate or alternate delegate at large; otherwise, insert ".....district") for president,' or 'Does not promise to support popular choice of party in the (here insert "state" if a delegate or alternate delegate at large; otherwise, insert ".....district") for president' according as if the candidate included, or failed to include, the above statement with his affidavit."

There is nothing in the act that requires you to give a candidate for delegate any advance information with regard to this subject, or to furnish to such candidate a copy of the statement contained in the act, but on the other hand if you see fit to do so there is nothing in the act which prohibits your calling the matter to his attention. If he files the statement above referred to there must appear on the ballot used at the primary, following his name, the words, "Promises to support popular choice of party in the state (or.....district) for president." If he fails to include with his affidavit such statement you cannot refuse to receive and file his nomination petition, but in such case, following his name on the ballot, there must appear the words, "Does not promise to support popular choice of party in the state (or..... district) for president." That is, a failure to file such a statement is deemed by the act to be a refusal on the part of the

candidate to promise to support the popular choice of the party in the state (or district) for president.

You also ask to be advised what action the law requires you to take "in certifying to the commissioners where the candidate for delegate makes no statement."

Section 9 of the act provides, inter alia: "In the case of each candidate for delegate or alternate delegate to a national party convention, the secretary of the commonwealth shall certify as to whether such candidate has included with his affidavit the statement provided for in subdivision (c) of § 6 of this act."

In all cases where the candidate has included with his affidavit the statement provided for in subdivision (c) of § 6 of the act, it is your duty to certify to the county commissioners that the candidate has included with his affidavit said statement. On the other hand, if the candidate has not included with his affidavit the statement provided for in subdivision (c) of § 6 of the act, it is your duty to certify to the county commissioners that he has not included with his affidavit said statement. You can do so in the following form: I certify that.....has (or has not) included with his affidavit the statement provided for in subdivision (c) of § 6 of the act of July 12, 1913, P. L. 719.

In each case the ballot must be printed in accordance with the directions before given. All candidates who have filed said statement will have printed following their names, as shown on page 725, of the Pamphlet Laws of 1913: "Promises to support popular choice of party in the state (or..... district) for president," and those who have not filed such statement will have printed following their names, as shown on said page of the Pamphlet Laws, "Does not promise to support popular choice of party in the state (or..... district) for president."

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Boyd's Nomination.

Election law—Primary nomination petition—Defects not on face—Admission of inability to amend.

Where a nominating petition is not properly vouched and the dates of signing are not properly stated, and counsel for respondent admits inability to amend, such petition must be declared invalid.

[Boyd's Nomination.]

Objections to the primary nomination petition of Thomas C. Boyd, Republican candidate for congress in the thirty-first district. C. P. Dauphin Co. June T., 1916, No. 429.

Zacharias and *Bergner & Cunningham,* for objections.
J. A. Stranahan, contra.

PER CURIAM, April 28, 1916.—It appearing upon the hearing of this case that the petition has not been properly vouched as required by law, and that the dates of the signing of the petition are not properly stated therein, and it being admitted by counsel for the petitioners that they are unable to amend, the nominating petition is declared to be invalid and the prothonotary is directed to certify this judgment to the secretary of the commonwealth.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Cronin's Nomination.

Election law — Nomination petition — Signer's residence omitted—Permission to amend.

Where a nomination petition is defective because the signers have failed to give their residence as required by law, the court will permit amendment.

Objections to primary nomination petition of John P. Cronin, candidate for representative for general assembly from the second district in Allegheny county. C. P. Dauphin Co. June T., 1916, No. 440.

W. J. Brennen and *B. B. McGinness,* for objections.
Bergner & Cunningham, contra.

MCCARRELL, J., May 3, 1916.—Due proof of service upon the candidate having been made as required by our order, we find the nomination petition to be defective, because the signers have failed to give their residence as required by law, and permission is now given to amend the petition in the particulars stated on or before Friday, May 5, 1916, at 12 o'clock M. If such amendment be not filed with the secretary of the commonwealth by that time the nomination petition is set aside. And the prothonotary is directed to certify this order to the secretary of the commonwealth.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Garner's Nomination.

Election law—Primary nomination petition—Alterations and additions apparent on face—Fraudulent affidavit—Discretionary power to amend.

Where the alterations and additions appearing on a nomination petition are abbreviations of county and state, the caption, however, showing the county and state, such alteration of the sheets of the petition can scarcely be regarded as material. It is only putting in abbreviated form that which already appeared upon sheets with respect to each elector who signed.

Where the evidence clearly shows that the affiant did not secure signatures to any sheet; that he saw none of the signatures affixed; that he did not know whether the signers had full knowledge of the contents of the petition or not, and that he himself did not have personal knowledge of all the facts stated in the petition and affidavits; and further, that he did not make any proper or intelligent effort to get information from any one who knew the facts, such affidavit cannot be regarded as of any validity.

The sheets of such petition are in worse condition than if no affidavit had appeared upon any sheet.

The defect consisting of the absence of an affidavit might be cured by permitting an affidavit to be made by some one qualified to make it.

Where such affidavits apparently have been filled up by the candidate himself who knew or should have known that the affiant did not possess the knowledge necessary to enable him truthfully to make the required affidavits, and yet procured or permitted him to make them, the court will not permit amendment or permit the filing of an entirely new affidavit.

An amendment necessarily implies the existence of something which can be changed or altered so as to conform with necessary legal requirements, but affidavits by an affiant, who had no proper knowledge of the matters to which he deposed, have no real vitality or legal existence.

In such case the only remedy is an entirely new affidavit on each sheet by some person other than the existing affiant; and this cannot be permitted in the interest of the candidate who procured or permitted the making of false affidavits.

Amendments are permissible where the affiant testifies to his personal knowledge of nearly every signature and designates the signatures to which he made affidavit upon information of others, and names the persons who gave him the information, which persons are called and corroborate the testimony of the affiant.

Where the evidence indicates that the affiant did not act willfully or corruptly, an amendment will be permitted; where no such evidence is furnished the court will not exercise their discretion to permit an amendment.

Objections to the primary nomination petition of Alfred B. Garner, Republican candidate for senator in the twenty-ninth senatorial district, Schuylkill county. C. P. Dauphin Co. June T., 1916. No. 449.

A. L. Shay and *Beidleman & Hull,* for objectors.
W. L. Kilker, for respondent.

McCARRELL, J., May 4, 1916.—The objection that fifty of the two hundred and thirty-four signers are enrolled as members of political parties other than Republican, has not been sustained by the evidence. Not more than twenty have been shown to be so enrolled, and it is insufficient to reduce the number of signers below the statutory requirement.

It is alleged that the sheets show upon their face that many names are in the same handwriting and were therefore not written by the petitioners severally, and that they also show alterations and additions in different handwriting from the signatures and made after the signatures were affixed. There is much similarity in the handwriting of the names, and yet a careful examination shows such differences as to make it somewhat doubtful whether they were signed by the same hand. Alterations and additions have been made in many instances in different handwriting from the signatures and in different colored ink. Apparently the handwriting of the candidate and the green ink admittedly used by him appear upon every page of sheets No. 1 and No. 2, and if these alterations and additions are material, these sheets should be regarded as defective. The alterations and additions, however, are of the abbreviations for "Schkl Co." and "Pa.," and as the caption to the petitions allege that the signers are electors of Schuylkill county, Pennsylvania, the alteration of these sheets by the addition of the abbreviation for this county and state can scarcely be regarded as a material one. It is only putting in abbreviated form that which already appeared upon sheets with respect to each elector who signed.

It is also objected that the petition is defective and void for want of a proper affidavit attached to the several sheets as required by the act of assembly. Peter Kripplebaugh, Jr., is the affiant to each of the three sheets. The evidence is clear that he did not secure signatures to any of the sheets; that he saw none of the signatures affixed; that he did not know whether the signers had full knowledge of the contents of the petition or not, and that he himself did not have personal knowledge of all the facts stated in the petition and affidavits. It does not appear that he made any proper or intelligent effort to get information from any one who knew the facts as to whether they were correctly stated or not. Without knowledge on his part or inquiry from those who could have correctly informed him, he does not hesitate to make his solemn oath that various matters about which he had no knowledge were true. A more careless, willful and reckless disregard of

the sanctity and obligation of an oath can scarcely be imagined. Surely such an oath should not be regarded as of any validity. The three sheets constituting the petition in this case are in worse condition than if no affidavit had appeared upon either. In the absence of any affidavit the defect might be cured by permitting an affidavit to be made now to each sheet by some one qualified to make it, but here we have three affidavits by one who clearly had no knowledge of the matters sworn to, made presumably in the presence and with the knowledge of the candidate who seeks to be the beneficiary of the affidavits of the affiant. The affidavit of the candidate appears on the same page of the sheets written and signed with the same green ink, which the candidate testified he used in his fountain pen. The candidate appears to have been personally very active in securing signatures and preparing the papers. The affidavits apparently have been filled up by the candidate himself. He knew, or should have known, that Kripplebaugh did not possess the necessary knowledge to enable him to truthfully make the required affidavits, and yet he procured or permitted him to make them. His conduct does not appear to be any less careless, willful and reckless than that of the affiant himself. He seems to have been moved solely by his desire to secure for himself the benefit of these nomination papers, whether they were made in conformity with legal requirements or not. The only power we have is to permit an amendment if we see proper so to do. An amendment necessarily implies the existence of something which can be changed or altered so as to conform with necessary legal requirements. Here we have three affidavits by an affiant who had no proper knowledge of the matters to which he deposed, and which, therefore, have no real vitality or legal existence. The only remedy would be on each sheet an entirely new affidavit by some other person than the existing affiant. Should this be permitted in the interest of a candidate who procured or permitted the making of these false affidavits? It is true we have permitted amendments in some of these contests over nominating petitions, but in every case the affiant testified to his personal knowledge of nearly every signature and designated the signatures to which he made affidavit upon information of others, and named the persons who gave him the information. These persons were called and corroborated the testimony of the affiant. We permitted amendments in accordance with the evidence thus produced by the affiant, which indicated that they had not acted willfully or corruptly. Here the affiant has not

furnished any such evidence. We are not satisfied that we would be justified in exercising our discretion in favor of the candidate by permitting an amendment or by permitting the filing of an entirely new affidavit. Under all the circumstances of this case we are constrained to set aside the nomination petition, and the prothonotary is directed to certify this order to the secretary of the commonwealth.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Lauler's Nomination.

Election law—Nomination petition—Material error in affidavit uncovered by proof—Power to permit amendment.

Where the affidavit to a nomination petition is not defective on its face, but the evidence shows that the affiants had personal knowledge of all the facts set forth in the affidavit except as to a few signers, there is material error.

And where the court are not convinced that the affiants willfully or corruptly vouched for the signers, amendment will be permitted in accordance with the evidence submitted.

Objections to primary nomination petition of John Lauler, candidate for representative in the general assembly in third district of Allegheny county. C. P. Dauphin Co. June T., 1916, No. 443.

The objections filed were, inter alia:

"6. That twenty-two persons signed the said petition as qualified electors and members of the Democratic party, a list of which is attached hereto, made part hereof and marked "Exhibit B," who were not and are not members of the Democratic party, and who, at the time they signed the said petition were enrolled members of the Republican party.

"7. That the affiants to the said petition, James J. Rooney and John A. Collins, did not secure the names of the signers to the said petition, and with the exception of a very small number thereof, and did not know or have information as to whether the one hundred and twenty-three signers to the said petition had full knowledge of the contents thereof; nor did he know that they all resided in the said district and county; nor did he know that each signed on the date set opposite his name; nor did he know or have any reliable knowledge or belief, or ground for having any reliable knowledge or belief that the signers were qualified electors of the Democratic party in said district and county.

"8. That upon the face of the said petition appears that the city where the signers are alleged to reside was not written in by the elector, but was subsequently inserted in the same hand writing, without the consent of the signers."

W. J. Brennen and *B. B. McGinness,* for objections.
Bergner & Cunningham, contra.

PER CURIAM, May 3, 1916.—Numbers 6, 7 and 8 are the only objections in support of which evidence was offered. No. 6 avers that twenty-two persons were not and are not members of the Democratic party, and were at the time of signing the petition enrolled members of the Republican party. The proof does not sustain this objection. No. 7 avers that affiants to petition did not secure the names of the signers, nor have personal knowledge of all the facts. The evidence shows that the affiants had personal knowledge of all the facts set forth in the affidavit except as to a few signers. In this respect there is material error. As we are not convinced that the affiants willfully or corruptly vouched for the signers we permit the nomination petition to be amended in accordance with the evidence submitted, the amended petition to be filed with the secretary of the commonwealth not later than Friday, May 5, 1916, at 12 M. If it be not so amended the petition is set aside. The prothonotary is directed to certify this order to the secretary of the commonwealth.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Morin's Nomination.

Electon law—Objections to nomination petition—Material error defined—Evidence of defects not apparent on the face—Act of 1913, § 8, construed.

In subdivision (a), § 8, act of 1913, "material error" means error generally, and is not limited to error apparent on the face of the petition or accompanying affidavits.

Material error not apparent on the face of the petition or affidavits may be proved by evidence in support of objections filed.

If material error were limited in meaning to merely error apparent on the face, the court under § 8 would have no power to pass on objections which did not attack the face, but which required evidence to prove error concealed under an unobjectionable surface.

Where the affiants to a nomination petition have not willfully or corruptly vouched for the signers, the nomination petition may be permitted to be amended.

[Morin's Nomination.]

Where on the fact of M.'s congressional nomination petition (requiring two hundred signers), it appeared that the requisite number of signers were vouched for, but the evidence showed that only sixty signers had actually been vouched for, the affiants having erroneously vouched for the others, the objectors claimed that such case did not come under either subdivision (b) or (c), but came under (a). Held, that the court had no power to set aside the nomination petition whether subdivision (a) should be construed to mean only error apparent on the face or error generally; that subdivision (a) meant the latter; and that, therefore, the matters objected to were open to amendment.

Objections to nomination petition of John M. Morin, candidate for congress from the thirty-first congressional district. C. P. Dauphin Co. June T., 1916, No. 437.

W. J. Brennen and *B. B. McGinness,* for objections.
Bergner & Cunningham, contra.

PER CURIAM, May 3, 1916.—Whether the objections filed and urged in this case are such as are in our power to pass upon depends upon the construction given subdivision (a) of § 8 of the act of July 12, 1913. It is not claimed that they fall under subdivision (b) or (c) of said section. Subdivision (a) provides for objections on account of "material error or defects apparent on the face thereof (that is, the nomination petition), or on the face of the appended or accompanying affidavits." If this means material error apparent on the face of the petition or accompanying affidavits we have no power to pass upon the objections, for the reason that the nomination petition on its face does not appear either erroneous or defective. If material error means material error generally, and not error limited to errors apparent on the face of the petition or affidavits, then the proof in support of the objections may be considered. Howsoever we may construe subdivision (a), we have no power to set aside the nomination petition. If we adopt the latter construction mentioned and sustain the objections, the matters objected to are open to amendment. After careful consideration we are inclined to adopt the latter construction. Not more than sixty signers to the nomination petition appear not to have been vouched for by an affiant who personally knew all the facts required to be stated in the affidavit. To that extent then there is material error. All the other objections have been considered and are overruled.

Inasmuch as it was shown at the hearing that the affiants to the nomination petition did not willfully or corruptly vouch for the signers, we permit the nomination petition to be amended in accordance with the evidence submitted, this

amendment to be filed with the secretary of the commonwealth by Friday, May 5, 1916, at 12 o'clock M. If it be not so amended the nomination petition is set aside. And the prothonotary is directed to certify this order to the secretary of the commonwealth.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Martin's Nomination.

Election law—Primary nomination petition—Material error not apparent on face—Evidence rule—Party membership.

The assessor's enrollment book deposited in the county commissioner's office, under act of July 25, 1913, P. L. 1043, is prima facie evidence of an elector's political party membership, which may be overcome by the testimony of the elector himself. Quære, whether the signing of a Republican primary nomination petition by members of another party constitutes material error under subdivision (a), or want of a sufficient number of genuine signatures of persons qualified, with respect to age, sex, residence and citizenship, to be electors, under subdivision (c), § 8, act of 1913.

The primary act of 1913 does not require, as a qualification of a signer to a nomination petition, that he shall be enrolled.

The objections set forth that the petition which required one hundred signers was signed by not more than ninety-six qualified electors of the Republican party, and that, therefore, it was lacking in a sufficient number of genuine signers. Upon the hearing the objectors offered in evidence the enrollment books, which disclosed the fact that two of the signers objected to were Republicans, the others not being enrolled in any party, thus bringing the number to ninety-eight. The respondent thereupon called as witnesses two of the signers objected to, who testified that they were Republicans; whereupon the court overruled the objections at the cost of the objectors.

Objections to the primary nomination petition of Joseph B. Martin, Republican candidate for the house of representatives from second district of Dauphin county. C. P. Dauphin Co. June T., 1916, No. 454.

The objectors set forth the names of seventeen signers to the petition, who they alleged were not Republican, but members of the non-partisan political party, and that the petition thereby lacked sufficient signers.

The objectors offered in evidence the assessor's enrollment books through the clerk in the county commissioner's office. The contention of respondent, that such books were only secondary evidence, and that the best evidence was the testimony of the signer himself to show party membership, was overruled by the court. The objectors having made out a prima facie

case by means of the enrollment books to the extent of showing that the petition lacked two Republican signers, the respondent thereupon showed by the testimony of two of the signers objected to, and who were shown by the enrollment book not to have declared their party preference, that they were members of the Republican party. This made the required number of signers to the petition complete.

O. G. Wickersham, Bergner & Cunningham, for objectors. *Paul A. Kunkel* and *A. R. Rupley,* for respondent.

McCARRELL, J., May 3, 1915.—Upon due hearing, the objections filed to this nomination petition are overruled, and the petition to set aside the nomination petition is dismissed at the costs of the objectors.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Reid's Nomination.

Election law—Primary nomination petition—Disqualification of candidate—Acts of June 8, 1901, P. L. 535, and July 12, 1913, P. L. 719.

The objection that the condidate is disqualified upon the face of his petition obviously cannot fall within subdivision (a), of § 8, of act of July 12, 1913, P. L. 719.

Such objection if sustained manifestly could not be cured by amendment; in such case § 8, of said act of 1913, expressly providing for amendments under subdivision (a) is inoperative.

There is no requirement in the act of June 8, 1901, P. L. 535, providing for the qualifications of mine inspector, that the candidate shall be a resident of the district in which the office is to be filled in order to be eligible; such office is a state office.

Objections to the primary nomination petition of William Reid, Republican candidate for mine inspector in the sixth anthracite district, Columbia county. C. P. Dauphin Co. June T., 1916, No. 417.

The objection set forth that the face of the petition showed William Reid to be a resident of Scranton, Lackawanna county, which is the second inspection district, and that he sought to be a candidate for the sixth inspection district, comprising Columbia county.

E. D. Smith, for objections; *M. L. Kilker,* contra.

[Reid's Nomination.]

KUNKEL, P. J., May 1, 1916.—The only objection urged upon us at the hearing goes to the qualification of the candidate for the office for which he was named. It may well be doubted if we have power in this proceeding to pass upon such a question. It is contended, however, that the disqualification of the candidate appears on the face of the petition, and that therefore the objection relating thereto falls within subdivision (a), § 8, of the act of July 12, 1913, P. L. 719. It is obvious that this objection is not covered by subdivision (a). The statute expressly provides that matters of objections made under that subdivision shall be amendable. Section 8, act of July 12, 1913, P. L. 719. The present objection, if sustained, is manifestly not one that could be met by amendment. Consequently it is not such as was intended to be covered by the subdivision referred to.

Besides, it may be said, the office of mine inspector, for which the candidate has been named, is a state office, the qualifications of which are expressly stated in § 6 of the act of June 8, 1901, P. L. 535, which provides, inter alia, that the person so elected must be a citizen of the state. There is no requirement that the candidate shall be a resident of the district in which the office is to be filled in order to be eligible to the office. Wherefore the objections to this nomination petition must fall.

All the objections are overruled, the petition to set aside the nomination petition is dismissed at the costs of the objectors, and the prothonotary is directed to certify this order to the secretary of the commonwealth.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Wagner's Nomination.

Election law—Primary nomination petition—Defect on face—Omission of residence—Amendment.

A nomination petition which is defective, because one hundred and forty of the signers failed to give their residence, may be amended,

Obejctions to the primary nomination petition of William C. Wagner, candidate for representative in the general assembly from the eleventh district, Allegheny county. C. P. Dauphin Co. June T., 1916. No. 446.

W. J. Brennen and *B. B. McGinness,* for objections.
Bergner & Cunningham, contra.

McCARRELL, J., May 3, 1916.—Due proof of service upon the candidate having been made as required by our order, we find the nomination petition to be defective, because one hundred and forty of the signers have failed to give their residence, as required by law, and permission is now given to amend the petition in the particulars stated on or before Friday, May 5, 1916, at 12 o'clock M. If such amendment be not filed with the secretary of the commonwealth by that time the nomination petition is set aside. And the prothonotary is directed to certify this order to the secretary of the commonwealth.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Martin *v.* Woods, Secretary of Commonwealth.

Election law—Primary election—Delegate to national convention—Declaration regarding choice for president—Declaration on ballot—Act of July 12, 1913, P. L. 719.

The act of July 12, 1913, P. L. 719, provides that a delegate may include in his affidavit to a nomination petition the declaration that he will support the popular choice in his district, and that such declaration shall be printed on the official ballot.

A declaration promising or offering to support a particular person for president, whether he be the popular choice or not, amounts to a refusal to support the popular choice, and does not come within the statute.

M. offered to file with the secretary of the commonwealth with his petition a sworn statement that he will support Theodore Roosevelt for president, which statement the secretary of the commonwealth refused to file or certify for printing on the primary ballot. On petition for peremptory mandamus, the same was refused.

Mandamus. C. P. Dauphin Co. Com. Docket, 1916, No. 31.

M. P. Miller and *A. R. Rupley,* for plaintiff.
Francis Shunk Brown, attorney-general, and *W. H. Keller,* first deputy attorney-general, for respondent.

KUNKEL, P. J., May 4, 1916.—The right of the plaintiff in the premises is purely a statutory one. If he is entitled to have his declaration that he will support Theodore Roosevelt

for president certified and printed on the official ballot, it is because the act of July 12, 1913, P. L. 719, authorizes it to be done. That statute provides that a delegate may include in his affidavit to the nomination petition the declaration that he will support the popular choice for president in his district, and that such declaration shall be printed on the official ballot. It is clear that what the plaintiff seeks to have done is not authorized by the statute. The declaration which he makes is not a promise to support the popular choice. It is impossible to know in advance of the election who the popular choice will be. He may be some one other than the person the plaintiff names. In that event his pledge would amount to a refusal to support the popular choice. The promise he offers is to support Theodore Roosevelt for president, whether he be the popular choice or not. The manifest purpose of the statutory provision is to assure the electors that their choice will receive the delegate's support. Plaintiff's declaration gives the electors no such assurance. On the other hand, it is a pledge to support a particular candidate without regard to the fact to be determined by the election that he is the popular choice.

The writ of peremptory mandamus is refused.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Conn's Estate.

Wills—Provision for after-born daughter—After-born son—Intestacy—Act of April 8, 1833, P. L. 249.

Where a testatrix anticipating the birth of a child provides that "should the coming heir be a daughter" she is to have a certain legacy, but makes no provision for a son, and the child proves to be a son, he will be entitled to take the share of his mother's estate which he would have taken under the act of April 8, 1833, §15, P. L. 249, if testatrix had died intestate.

Exceptions to adjudication. O. C. Philadelphia Co. April T., 1915, No. 96.

Thomas S. Lamard, for exceptions.

LAMORELLE, J., Nov. 26, 1915.—The exceptions involve a consideration of our statutes and of the authorities construing them, and, for that reason, cases in other jurisdictions which seem analogous are of little value.

The act of April 8, 1833, § 15, P. L. 249, with slight verbal changes, following that of April 19, 1794, § 23, 3 Sm. L. 143, enacted that when a person should make his will "and afterwards . . . have a child not provided for in such will, . . ." and shall die leaving such child, such person "shall be deemed and construed to die intestate" so far as the child is concerned.

In a leading case on this subject, Fidelity Co.'s Appeal, 121 Pa. 1, Justice Paxson says, page 15: "It may be observed just here that, by the terms of the act, the birth of a child after the making of a will has no effect upon such will, unless such child is unprovided for therein, and the amount of such provision is not important."

Two things follow: The after-born child must be provided for, i. e., the mention of the fact that testator has such child in mind is not sufficient; and, if any provision is made, its character and amount are of no moment.

True it is that Chief Justice Mitchell says, in Newlin's Est., 209 Pa. 456, at page 465, "All that it (the act) does require is that he shall have the child in mind and shall make clear his intention that the will shall apply to it," but the context shows that the meaning of the expression "the will shall apply to it," means making some provision for such child. In that case the real question was as to the sufficiency of the provision, and it was held that the fact of provision and not the sufficiency thereof was the test. "The statute makes no requirement of adequacy, and gives courts no authority over that subject." And in Randall *v.* Dunlop, 218 Pa. 210, this interpretation was reiterated, in which case, the children, if any, took only on condition that the husband failed to survive the wife, and the will stated in terms that the provision—which, in fact and effect, turned out to be none at all, as the husband did survive—was intended to cover the case of after-born children.

Now let us apply the principle of these cases to the will now before us for construction.

Testatrix, Lucy W. Conn, provided that "should the coming heir be a daughter," she was to have certain jewelry and the sum of $250. No provision was made in event that the child should be a son, and the child is a boy.

Testatrix had in mind the fact that there would be a child, but the legacy was conditioned on that child's being a girl. The auditing judge held there was an intestacy as to thus much of the estate, and, in so doing, he was clearly right. The exceptions are dismissed.

Commonwealth *v.* Tole.

Criminal law—Involuntary manslaughter—Killing of child by automobile—Driver without license and intoxicated.

One who runs over and kills a child on a public street while driving an automobile without a license and in an intoxicated condition is properly convicted of involuntary manslaughter.

In such case the question whether or not the defendant was driving while intoxicated and without a license are proper subjects for proof and elements for the jury to consider in making up their verdict.

In such case it is not material whether or not the defendant exercised his best judgment to avoid hitting the child and was not negligent, if he was engaged at the time in the performance of an unlawful act, such as driving recklessly, while intoxicated or without a license.

Indictment No. 180 for involuntary manslaughter. Rule for new trial. O. and T. Lancaster Co. Sept. Sess., 1915, No. 9.

John E. Malone and *B. F. Davis,* for defendant and rule. *John M. Groff,* district attorney, and *John A. Coyle,* contra.

LANDIS, P. J., Jan. 15, 1916.—The first, second, seventh and eighth reasons filed in this case demand, in my judgment, no discussion. They are general in character, and, if they had merit, would have required the court to direct a verdict of not guilty. Such action would have been, under the facts and the law of this case, wholly unwarranted.

The third reason complains that the court erred in admitting evidence that the defendant was driving the automobile without having a license from the state. He himself admitted that he had no license, and there was, therefore, no doubt that he was violating § 9 of the act of July 7, 1913, P. L. 672. I fail to see why that evidence was not properly introduced.

The fourth and fifth reasons assert error in the admission of evidence of the intoxication of the defendant at the time the accident occurred. I can see no reason why that was not a relevant fact in the case. Section 16 of the act of 1913 declares that "any person operating a motor vehicle when intoxicated shall be deemed guilty of a misdemeanor." Now, seven witnesses called by the commonwealth testified that the defendant was intoxicated when the automobile stopped and he got out of it a few hundred feet beyond the place where the child was killed. Of course, he and his witnesses denied that he was in any such condition; but he did admit that he had been drinking that day. The jury had all these facts before them for consideration, and they have determined against

him on that question. They have found that he was running the machine without a license, was running it while intoxicated, and was running it in a reckless manner on the city streets. All of these charges are violations of the law, and he killed the child while he was engaged in them. I think it follows, then, that he has been properly convicted of involuntary manslaughter.

In 4 Blackstone's Commentaries, 192, it is said: "Involuntary manslaughter differs also from homicide excusable by misadventure in this: that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As, if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. So, where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter or murder, according to the circumstances under which the original act was done: If it were in a country village where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing and gives no warning at all, for then it is malice against all mankind. And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it."

In 21 Amer. & Eng. Encycl. of Law, p. 189, involuntary manslaughter is defined as the "unintentional killing of another, either in the doing of an unlawful act, not felonious, nor tending to great bodily harm, or in the doing of a lawful act without proper caution or requisite skill"; and on page 190 it is said: "Hence, a death resulting inadvertently from the commission of any misdemeanor will ordinarily constitute manslaughter." On page 191 it is also said: "But besides these acts which are unlawful because offenses against the public welfare, there are many others which are unlawful because they jeopardize the personal safety of individuals. The law, in its solicitous regard for human life, considers as unlawful all acts which are dangerous to the person against whom they

are directed, and not justified by the occasion, no matter how innocently they may be performed, and hence will not permit a person to do an act imperiling the safety of another and then on the plea of accident escape liability for a homicide of which his reckless conduct was the occasional though involuntary cause. Some of these acts, especially when committed in a public place, are also misdemeanors, but the essence of their unlawfulness consists in their recklessness and the danger they breed."

In Babbit on the Law Applied to Motor Vehicles, § 848 (p. 628), the text-writer says: "Involuntary manslaughter is to be distinguished from misadventure, the element of distinction being the unlawfulness of the act of which the death is the unexpected result."

A number of cases on this subject have appeared in the lower courts of this state.

In Com. *v.* Kuhn, 1 Pitts. 13, an engineer was indicted for involuntary manslaughter in causing the death of a person by alleged carelessness in running his engine through a city street. The court charged that he was guilty of involuntary manslaughter, if the death resulted from the doing of an unlawful act, not amounting to a felony, or a lawful act in an unlawful manner, and whether or not his conduct was marked by due care and caution under the circumstances was for the jury.

In Com. *v.* Bilderback, 2 Parsons, 447, the offense attempted to be sustained by the evidence consisted in the persons charged having run a steamer down upon a batteau, while passing in the river Delaware, and throwing out of it one Thomas Clifton, thereby causing his death. Parsons, J., in the charge to the jury, said: "Involuntary manslaughter arises where it plainly appears that neither death nor any great bodily harm was intended, but death is accidentally caused by some unlawful act, or an act lawful in itself, but done in an unlawful manner, without due caution and circumspection."

In Com. *v.* Mellert et al., 2 Woodward, 288, the defendants, in carrying on their business as machinists, placed a large casting upon a public street in such a manner as to endanger the lives of passersby, and, as a result, a child was killed. It was held that they were properly indicted for involuntary manslaughter.

In Com. *v.* Troop, 4 Berks Co. 300, the defendant, who was a chauffeur, was indicted for involuntary manslaughter in running down a boy about sixteen or seventeen years of age on

a public street, about midday, and thereby so badly injuring him that the boy shortly afterwards died. The case was submitted to a jury and a conviction followed. Among other questions arose one as to the contributory negligence of the boy. Wagner, J., who tried the case, held that the negligence of the injured would not, in itself, be sufficient to excuse the defendant for the killing of the boy, if the jury should find that the defendant was guilty of gross negligence; that in a civil case for damages, contributory negligence was a defense, but not so in a criminal case. He said: "We fail to see how the negligence of the boy, except as it bore upon the gross negligence of the defendant, or how his being a trespasser upon the street, placed him in any different position than that of the pedestrian as to the care required to be exercised towards him by this defendant in a case of manslaughter. A general care must be exercised in all cases by drivers of vehicles at the usual places of crossing. 'The greater the risk, the greater the caution required.' Wharton on Criminal Law (Crimes), Vol. 2, § 1002. If they fail to exercise care and recklessly run down and injure a person, the fact that the deceased person may have been negligent or may have been a trespasser upon the street would be a defence in a civil suit for damages. This we cannot conceive to apply to a criminal suit. Even in the case of a person trespassing upon individual property, if the trespasser, through recklessness of the owner of the property, is killed, the fact of the trespass is no defence against the charge of manslaughter. State *v.* Vance, 17 Iowa, 138, 144; Com. *v.* Drew & Quinby, 4 Mass. 391; Com. *v.* Daley, 2 Pa. L. J. 153, 158."

In Com. *v.* Hoskins, 23 D. R. 528, Sulzberger, J., has also discussed this question at considerable length. The facts were, that about ten o'clock at night a young girl left a York road transit-car at a well-known and much-used transfer crossing, namely, Chelten Avenue. The defendant drove his automobile at that point at a gait variously described, but, according to the weight of the evidence, about twelve miles an hour. He did not stop, nor did he have his machine under instantaneous control. Suddenly he found the decedent, on her way to the Chelten Avenue car, in front of his machine. He promptly swerved to the left, in order that his car might pass behind her; but, unfortunately, the decedent, at the same moment, stepped back, to avoid it, and thus stepped in the new track taken by the automobile, and her death resulted. Under this state of facts he was convicted of involuntary manslaughter.

I cite the above cases, not only on account of the general principles laid down in them, but also because of the alleged error contained in the sixth reason. Counsel for the defendant submitted a point, as follows: "If the jury believe that the defendant exercised his best judgment in the effort to avoid hitting the dead child, and that the death of the child occurred through an accident, and not because of any negligence of the defendant, the verdict of the jury must be one of not guilty." The point was refused, and I am convinced rightfully refused. I conceive it to be a misstatement of the law. No matter whether he exercised his best judgment or not, if he was engaged in the performance of any of the unlawful acts proven against him on the trial, and, while so doing, killed this child, even though it was unintentional, and he did what he deemed best under the emergency which arose, he was guilty of manslaughter. If he had thus intentionally run her down, it would have been murder. The jury to whom the facts were submitted have found against him upon this vital point, and why that proper result should now be changed, I cannot see.

As no valid reason has been advanced why a new trial should be granted in this case, the rule is now discharged.

Rule discharged.

Bauer's License.

Detectives—License—Incitement to crime.

A private detective licensed under the act of May 23, 1887, P. L. 173, who has lured or attempted to lure a married woman, at the instance of her husband, to commit an act of infidelity, in order that the husband may procure a divorce, will be refused a renewal of his license.

Petition for a detective license. Q. S. Philadelphia Co.

William W. Mentzinger, Jr., for application.

J. R. K. Scott and *Joseph H. Toulane,* assistant district attorney, for commonwealth.

SULZBERGER, P. J., Nov. 27, 1915.—The petition prays for a license to conduct the business of a detective within this county for the next three years.

Although the act of May 23, 1887, P. L. 173, calls this a business for hire or reward, the same act confers upon the holder of the license the power to serve warrants in criminal

cases within this commonwealth, and subjects him to the supervision of the court of quarter sessions, which may, on cause shown, revoke the license.

The holder of such a license is, therefore, in a sense, a depositary of the police function of the commonwealth, and is bound to exercise his business with a due regard to the legal right of all.

The petitioner is the holder of a license about to expire. A remonstrance is filed against the granting of a new license, wherein it is charged that he has been guilty of conduct unbecoming a person charged with his duties, in this, that during the past year he entered into an agreement with one of his agents or employés to ensnare the remonstrant, who was a person guiltless of crime, either into committing a crime or into a position which might, of itself, be evidence that she had committed a crime, all with the purpose of enabling one of his customers, the husband of the remonstrant, to obtain a divorce from her without just or legal cause.

The evidence clearly establishes that one Harry S. Henry was desirous of obtaining a divorce from his wife, the remonstrant, Sadie A. Henry. Whether he suspected her of infidelity or was for some other reason desirous of terminating the marriage relation does not appear from the evidence. At all events, he employed the petitioner to procure evidence. The petitioner and the husband thereupon agreed that one of the petitioner's female employés should apply to the remonstrant for board and lodging in her house. As the Henry's had never had such a boarder, the remonstrant, when applied to, told the female detective that she would have to consult her husband. The latter was consulted, gave his consent, and thus the detective became an inmate of the household.

This was a favorable position for observing the remonstrant, and gave to the petitioner every reasonable opportunity for obtaining evidence as to her conduct.

Apparently there was no result. The petitioner's detective thereupon subtly insinuated herself into the companionship of the remonstrant and introduced her into a side of life to which the remonstrant had theretofore been a stranger. So-called "flirtations" were arranged by the detective, which led to the remonstrant's being induced to drink intoxicating liquors, a practice which had theretofore been unknown to her. While in the unnatural condition resulting from this indulgence, the detective, with her accomplices, led the remonstrant into a house whose reputation is usually classed as "doubtful," though

apparently the detective had no doubt whatever on the subject.

This done, the petitioner, with a proper number of witnesses, promptly appeared and noted the accomplishment of their purpose. Divorce proceedings were, of course, at once instituted by the husband. With the merits of that case we are not concerned, and we do not wish to be understood as intimating any opinion thereon.

The question before us is whether conduct like that which has been pursued by the petitioner is a legitimate exercise of the function conferred by the license.

In determining this question, we must keep in mind that the police officials have the duty of arresting criminals in order that legal punishment may be meted out to them. Theirs also is the further duty of preventing the accomplishment of a crime about to be or begun to be committed.

The petitioner was, in this case, not exercising either of these duties. On the contrary, he was, by his agent, plumbing the moral qualities of the remonstrant in order to ascertain whether, by temptation duly spread before her, she might be induced to commit a crime whereby the petitioner's customer might profit.

In doing this he was abandoning his function as a detective and assuming a rôle difficult to distinguish from criminality. If a crime was really committed by the remonstrant, the petitioner was an accessory before the fact. His brain it was which purposed it from the beginning, his were the allurements which led to it.

In mitigation of his fault we are urged to remember that others do the like, that even official heads of police practice similar wiles in order to convert the degrading passions of the weak into overt acts of crime under the eyes of a vigilant policeman, who immediately arrests the criminal and feels happy in the consciousness that he has averted the far graver crimes which the delinquent, if left to himself, might have committed.

We do not regard this view with favor. That men have evil passions we know. That their translation into crime should be punished by the commonwealth we know.

We do not think, however, that the police have the function of testing the weakness of the moral nature of a particular citizen by alluring him or her to crime. On the contrary, we hold that, instead of being an exercise of police power, it is the perpetration of a criminal act.

We think that the petitioner's conduct in the case considered was in violation of law and that he is not a proper person to hold the license applied for.

The prayer of the petition is denied.

Bevilhimer's Case.

Criminal procedure—Release on parole—Commutation under first and second sentences—Acts of June 19, 1911, P. L. 1055, and June 3, 1915, P. L. 788.

Under the act of June 3, 1915, a convict sentenced to any place of confinement other than a penitentiary, shall serve the remainder of his first term after the expiration of the term of imprisonment imposed for the offense committed during the period of parole.

But a convict, however, under said act, sentenced to a penitentiary, shall first serve the remainder of the term originally imposed before beginning the sentence imposed during the period of parole.

The word "penalty" used in the act of 1915 means the period of imprisonment and not the maximum sentence.

B. was sentenced Sept. 25, 1911, under the indeterminate sentence and parole act of 1911 to undergo imprisonment of not less than six months nor more than three years for larceny. June 1, 1912, after serving eight months and six days, he was released on parole for two years, three months and twenty-four days. During the parole period he was convicted of larceny and sentenced to the Western Penitentiary for not less than five nor more than nine years. Held, that the prisoner was within the provision of § 10, of act of 1911, P. L. 1055, and not within the provision of the amendment of 1915, and was compelled to serve out the period of parole on the first sentence after the expiration of the period of imprisonment imposed by the second sentence.

There is nothing in the parole act of 1911 which prohibits the granting of a parole upon second sentence; that is left to the discretion of the board of inspectors of the penitentiary.

In case B., in the judgment of the board of inspectors, after he has served five years, or any further period of his second sentence, should be recommended to be released on parole, he must before he is thus released be compelled "by detainer and remand" to serve the two years, three months and twenty-four days forfeited commutation of his original sentence.

Request of John M. Egan, parole officer of Western Penitentiary, for opinion.

HARGEST, Deputy Attorney-General, Sept. 10, 1915.—Your favor of the 4th instant, requesting an opinion is at hand. The facts I understand to be as follows:

Harry Bevilhimer was sentenced Sept. 25, 1911, under the indeterminate sentence and parole act of June 19, 1911, P. L.

1055, to undergo an imprisonment of not less than six months, nor more than three years, for larceny and receiving stolen goods.

On June 1, 1912, after serving eight months and six days, he was released on parole, for two years, three months and twenty-four days. However, on Sept. 16, 1912, during the period of parole, he was convicted of larceny and sentenced to imprisonment in the Western Penitentiary, for not less than five nor more than nine years.

On June 3, 1915, § 10 of the parole act of June 19, 1911, was amended.

You ask to be advised.

1. Whether Bevilhimer shall first serve the full maximum sentence imposed while he was on parole, or be compelled to first serve the two years, three months and twenty-four days of his original sentence.

2. Whether he is eligible to parole after he has served the minimum five years of his subsequent sentence plus the two years, three months and twenty-four days forfeited commutation of his original sentence.

The act of June 3, 1915, amending § 10 of the parole act of June 19, 1911, was passed after the second sentence of Bevilhimer. It is apparent that that act cannot apply to him, because he was already serving some sentence at the time the act was approved, and as to him it would probably be regarded as an ex post facto law and its application would be unconstitutional. Com. *v.* Kalck, 239 Pa. 533.

Section 10 of the act of June 19, 1911, P. L. 1055, provides: "If any convict released on parole, as provided for in this act, shall during the period of parole, be convicted of any crime punishable by imprisonment under the laws of this commonwealth, such convict shall, in addition to the penalty imposed for such crime committed during the said period, and after the expiration of the same, be compelled, by detainer and remand as for an escape, to serve in the penitentiary to which said convict had been originally committed, the remainder of the term (without commutation) which such convict would have been compelled to serve but for the commutation authorizing said parole, and if not in conflict with the terms and conditions of the same, as granted by the governor."

Under this act of assembly it is apparent that a convict originally sentenced to the penitentiary must, when sentenced thereto, during the period of his parole and after the expiration of the second sentence be compelled "to serve in the peni-

tentiary to which said convict had been originally committed the remainder of the term."

However, the act of 1915 makes two classifications and provides:

(a) A convict sentenced to any place of confinement other than a penitentiary shall serve the remainder of his first term after the expiration of the term of imprisonment imposed for the offense committed during the period of parole.

(b) But a convict sentenced to a penitentiary shall first serve the remainder of the term originally imposed before beginning the sentence imposed during the period of parole.

This act has been the subject of much discussion because, if the term "penalty" should be construed to mean the "maximum sentence" it would lead to the absurd result that after a prisoner has served the period of imprisonment for the second offense, he should be released on parole until the expiration of the whole sentence and then be returned to serve out the forfeited commutation of the first sentence.

The language of the act is that "in addition to the penalty" for the second offense, the convict shall "by detainer and remand" be compelled to serve the remainder of the term. Obviously he is to be detained at the end of the period of imprisonment. He would not be compelled by detainer when he was at large on parole.

It is hardly possible that the legislature intended that a prisoner should serve the period of parole and then return to the penitentiary to serve the forfeited commutation on a former sentence. It might easily happen that a prisoner would be discharged on parole with five years' commutation and live during that time an upright life but be compelled at the expiration of five years to return to prison. Moreover, the fact that the prisoner would be required to return would tend to prevent the reformation at which the law aimed. It cannot therefore be possible that such a construction is within the reason and spirit of the law, even if the word "penalty" were construed to mean maximum sentence.

As was said by Justice Brewer in the church of the Holy Trinity *v.* United States, 143 U. S. 457: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."

I am, therefore, of opinion that the word "penalty" used in the act means the period of imprisonment and not the maximum sentence.

Therefore, answering the first question, I advise you that Bevilhimer is within the provision of § 10 of the act of June 19, 1911, and not within the provisions of the amendment thereof, approved June 3, 1915, and is compelled to serve out the period of parole on the first sentence after the expiration of the period of imprisonment imposed by the sentence of Sept. 16, 1912.

There is nothing in the parole act of 1911 which prohibits the granting of a parole upon the second sentence. That matter is left to the discretion of the board of inspectors of the penitentiary.

Specifically answering the second inquiry, I am of opinion that if Bevilhimer, in the judgment of the board of inspectors, after he has served five years, or any further period of his second sentence, should be recommended to be released on parole, before he is released on that parole, must be "by detainer and remand" compelled to serve the two years, three months and twenty-four days forfeited commutation of his original sentence.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Limestone Township Road.

Road law—Changing or vacating a public road laid out and partially opened—Act of May 3, 1855, P. L. 422.

The inadvertent entertainment of a viewer by a petitioner for a public road is not of itself sufficient ground for setting aside a report of viewers.

It is the legal duty of persons desirous of being heard by viewers of a public road to attend the meeting fixed for such purpose within such hours as the circumstances reasonably warrant.

No damages or benefits are to be assessed or allowed in proceedings to change or vacate a public road laid out and partially opened under the act of May 3, 1855, P. L. 422.

Petition to change or vacate a public road laid out but only partially opened in Limestone township, Montour county. Q. S. Montour Co. June Sess., 1914, No. 1.

Exceptions to report of viewers.

The opinion of the court clearly states the essential facts of the case.

H. M. Hinckley, for exceptants.

R. S. Ammerman, for report of viewers.

[Limestone Township Road.]

EVANS, P. J., April 8, 1916.—This is an application to vacate a public road regularly laid out and but partially opened. A report of viewers filed to No. 1 of January term, 1908, vacated a part of the public road in Limestone township leading from Limestoneville to Ottawa and laid out in the place and stead thereof the public road which is sought to be vacated in this proceeding. The stretch of land thus vacated on paper has never been closed up but has been continuously since its vacation and is now being used by the traveling public. It is the public road used in traveling from Limestoneville to Ottawa in said township. The report to No. 1 of January term, 1908, was confirmed absolutely Jan. 11, 1909.

In the case at bar, the report of the viewers was confirmed ni si Oct. 19, 1914, and the viewers report that the road proposed to be vacated is located on such bad ground that it is practically impossible to complete it, that is, would be if opened, inconvenient, burdensome and expensive, and that the same should be vacated.

Of the fifteen exceptions filed to the confirmation of the report, the first three have been withdrawn, because the allegations made therein could not be proved. Depositions were taken before the court. All the other exceptions may be considered together. Due and legal notice was given of the time and place fixed for the holding of the view. The hour fixed was eleven o'clock in the forenoon. Just precisely at what time the viewers were sworn and begun the performance of their duties cannot be determined to the minute. Manifestly there was considerable interest about vacating this partially opened road. There were a number present. Some had come early, and becoming impatient, had gone home. Others remained. The viewers testify that they were sworn between eleven and twelve o'clock. There was some delay in beginning the view. Just how it occurred or whose fault it was does not definitely appear. Perhaps part of the delay was due to the fact that the order to the viewers had been wrongfully mailed by the clerk of the court to J. C. Benfield. It should have been mailed or delivered to one of the viewers. An opportunity was afforded during the view for all parties to be heard. The evidence does not disclose that the viewers refused to hear sworn evidence. It is true that one of the viewers, Thomas Vansant, took dinner with one of the petitioners the day of the view. Generally it is not good form or practice and is ground for setting aside a report for viewers to be furnished meals or entertainment by those who are interested in the

result of the view. Road in Greenfield Twp., 23 D. R. 102. Neither is it proper practice for anyone interested in a proceeding to lay out or vacate a public road to interview the viewers prior to the time of holding the view. In the case at bar no particular harm was done because of Mr. Vansant's taking dinner with Ralph Stamm, one of the petitioners for the vacation of the road. The latter lived near the road proposed to be vacated. Mr. Vansant happened to stop there by chance. He had brought his horse feed along and was looking for a place to feed his horse. He did not know prior to his stopping that he was acquainted with Mr. Stamm, or that he was one of the petitioners. Stamm was not at home when he stopped, but came soon thereafter. It was then discovered that they had some slight acquaintance with each other, and Stamm invited him to stay for dinner and the invitation was accepted. We scarcely think Mr. Vansant should be criticised for doing so under the circumstances, or that the report should be set aside for that reason. This case is clearly distinguishable from Road in Greenfield Twp., supra. There all the viewers were entertained by the man who perhaps was most interested in having the road laid out, and further in that case, one of the viewers, the surveyor in the case, had the year before been in the employ of the man who furnished the entertainment and had made a survey and draft of the proposed road for him. On the day of the view the viewers merely walked over the ground and in their report adopted the proposed road surveyed for their host the year before.

The viewers were appointed for the purpose of determining, but the single question, whether or not the partially opened road should be changed or vacated. They determined it should be vacated and relocated the portion of the road vacated at the time this partially opened road was laid out. That part of the report may be regarded as surplusage. They were only appointed to change or vacate, not to relocate the portion of the road which had been vacated. There was no occasion for their doing it, and it is of no consequence that they did it, for the old road the part vacated when the partially opened road was laid out remained until a new road was actually opened and permanently established.

Section 24 of the act of June 13, 1836, P. L. 555, provides that "whenever the whole or any part of a road shall be changed or supplied, the same shall not be shut up or stopped until the road laid out to supply the place thereof shall be actually

opened and made." Trickett on Penna. Road Law, page 253.

Complaint is made that the report is not in compliance with § 9 of the act of June 23, 1911, P. L. 1123, in that it does not contain a statement of the amount of damages or benefits assessed. In this proceeding there were no damages or benefits to be assessed, none were contemplated by the parties. The application was to change or vacate a public road laid out and partially opened because it was located on such bad ground that it was practically impossible to complete it. The proceeding is under the act of May 3, 1855. Section 9 of the act of June 23, 1911, is without application.

And now, April 8, 1916, the exceptions are overruled and dismissed and the report of the viewers is confirmed absolutely.

From Edward Sayre Gearhart, Esq., Danville, Pa.

Sayers *v.* Redbank Telephone Co.

Landlord and tenant—Judgment entered on warrant—Striking off judgment—Parol evidence.

A judgment entered by virtue of a power of attorney contained in a lease, which requires parol evidence to determine the amount of the judgment is void, and will be stricken off.

Motion to strike off judgment. C. P. Clarion Co. Dec. T., 1912, No. 36.

Corbett & Rugh, for plaintiff.
Maffett & Rimer, for defendant.

SLOAN, P. J., March 18, 1916.—On Jan. 1, 1906, the plaintiff and the defendant corporation entered into a written agreement for the rental of a certain room in the borough of Hawthorn, to be used by the defendant as a central office and public pay station, for the term of five years from the above date, at a rental of $30.00 per year, payable $2.50 per month.

The lease provided that in case the defendant should lawfully continue on the leased premises after the termination of the same, then the agreement to continue in full force for another period of five years, etc., the rental to be subject to the conditions of the contract of lease. The defendant company admits that it occupied the premises after the expiration of the lease, but avers that this was done in pursuance of a parol contract or agreement entered into with the plaintiff, to occupy and

hold the premises at a rental of $5 per month for such period of time as defendant desired to use the same.

The plaintiff admits that the yearly rental was increased from $30 to $60 per year, or $5 per month, but denies that the time or period of the lease was changed to that of a lease at will.

The lease contains a clause whereby a power of attorney is given to confess judgment in case of default in the payment of rent at the time agreed upon, or in case of a removal from the premises before the expiration of the lease, then, "in that case the whole rent for the entire term shall fall due and collectible at once."

On Aug. 30, 1912, the defendant company removed all of its goods and chattels from the premises and surrendered possession to the plaintiff, by returning to him the key to the entrance of the building. On Sept. 4, 1912, the plaintiff caused a judgment to be entered against defendant company for the sum of $220.50, being the balance of rent alleged to be due for the entire term of the lease beginning Jan. 1, 1911, for a period of five years, along with attorney's commission of five per cent for collection.

The defendant company presented its petition to court on Oct. 22, 1912, praying for a rule to open the judgment and permit it to enter into its defense. On Aug. 9, 1915, the defendant company filed a motion to strike off the judgment for reasons appearing on the record and want of authority to enter the same. If this point is well taken it is the end of the case so far as these proceedings are concerned. The question then for our consideration first is: Is the judgment void for irregularity appearing upon the face of the record? We think it is. The terms of the lease provide, inter alia, that as often as default is made in the payment of rent (which is set forth in the lease as $30 per annum), or in case of a removal from the premises, then the power of attorney authorizes the confession of judgment for the entire sum of rent for the full term. No where in the lease does it appear that authority is given to confess a judgment for the rent in a sum or amount other than that which is specified in the lease. It no where appears in the lease that any provision is made permitting an increase in the amount of rent, or a change in any other condition of the lease.

It is not even contended that this lease within itself contains the authority for the entry of this judgment, and if it stands it must rest upon the parol proof offered in connection with the lease.

The case of Yano *v.* Leizerwitz, reported in 8 Del., 107, does not sustain the plaintiff's position, but, on the contrary, we think the principle therein stated rules the present case against him. In that case there was a reduction of the rent from the amount specified in the lease. The court held "that the production of the instrument itself affords proof of the right of judgment, and until the prima facies of the instrument are overcome by proof the judgment entered must stand." In other words, the judgment was entered for the amount of rent specified in the lease, and this was held to be done strictly in pursuance of the contract, and the burden rested upon the defendant to prove payments or that the rent had been reduced.

Cobb Bros. *v.* Yetter, 4 Pa. C. C. 293, Archbald, J., is a case directly in point. It is there said that the entry of the judgment by virtue of a power of attorney which requires parol evidence to determine the amount of the judgment is void and will be stricken off.

"A warrant of attorney must contain within itself full authority for the acts which are claimed to be done under and by virtue of it. I do not mean to say that there may not be a reference to things without itself, as a standard of action, but in such case the reference must be unambiguous and the standard clearly defined. A warrant of attorney to confess judgment forms no exception to these well established principles. When produced for inspection or filed in the case the judgment confessed by virtue of it must be found to be within the scope of the authority therein conferred." Chase *v.* Dana, 44 Ill. 262.

There is no authority in this lease or contract to warrant the acts done by virtue of the same, nor is it contended that there is. It is only when the parol proof is offered in connection with the lease that the judgment can stand. We think the principle is well established that the instrument on its face must show the authority for the acts done under and by virtue of the same.

Where a judgment appears irregular on the face of the record the remedy is to strike off the same, and not a motion to open. Spiese *v.* Shee, 250 Pa. 399.

It follows that defendant's motion to strike off the judgment must be allowed, and accordingly the judgment is set aside and stricken from the record, and the prothonotary is directed to note same as stricken off on the record proper and on the indices thereof.

Hackney *v.* Gorley.

Practice (C. P.)—Pleadings—Statement—Act of May 14, 1915, P. L. 483.

The new practice act of May 14, 1915, P. L. 483, which requires every pleading to be divided into paragraphs numbered consecutively, does not prohibit, or require to be numbered, a brief introductory sentence in a plaintiff's statement of claim, setting forth in most general terms merely what the case is about, so that the formal parts of the statement may better be understood, and followed immediately by succinct and consecutively numbered paragraphs covering every substantial feature of the plaintiff's claim.

Promissory Notes—Pleadings—Statement of Claim.

In an action on a promissory note, under the negotiable instrument act of May 16, 1901, P. L. 194, an averment in the plaintiff's statement of claim that the plaintiff is the owner and holder of the note in due course, covers and renders unnecessary the separate averments that the note was executed and delivered by the defendant, and that the plaintiff became the holder of the note before it was overdue, in good faith and for value, and without notice of any infirmity in the instrument or defect in the title of the person negotiating or assigning it.

Motion for judgment for defendant on questions of law raised by the affidavit of defence, and to strike from the record the plaintiff's statement of claim, under act of May 14, 1915, P. L. 483. C. P. Fayette Co. March T., 1916, No. 301.

H. S. Dumbauld, for plaintiff.
Lackey, Spurgeon & Lackey, for defendant.

VAN SWEARINGEN, P. J., Feb. 29, 1916.—The plaintiff instituted this action of assumpsit on Jan. 6, 1916. It therefore comes under the provisions of the new practice act of May 14, 1915, P. L. 483. That act provides that "every pleading shall contain, and contain only, a statement in a concise and summary form of the material facts on which the party pleading relies for his claim, or defence, as the case may be, but not the evidence by which they are to be proved, or inferences, or conclusions of law, and shall be divided into paragraphs numbered consecutively, each of which shall contain but one material allegation," and that "the court upon motion may strike from the record a pleading which does not conform to the provisions of this act." The plaintiff's statement of claim is as follows:

Plaintiff, E. S. Hackney, claims of defendant, Thomas S. Gorley, alias T. S. Gorley, the sum of $17,000, with interest from Dec. 5, 1914, upon a cause of action whereof the following is a statement:

I. Plaintiff, E. S. Hackney, is the owner and holder in due course of a certain promissory note, dated at Uniontown, Pennsylvania, Dec. 5, 1914, wherein the defendant, Thomas S. Gorley, alias T. S. Gorley, is the maker.

II. The said note is payable to the order of J. V. Thompson, at the First National Bank of Uniontown, due six months after date, in the sum of $17,000.

III. At maturity, demand for payment of said note was made, and payment thereof refused.

IV. A copy of the said note, with the endorsements thereon is hereto attached and made a part hereof.

V. The amount unpaid and justly due to plaintiff from defendant is $17,000 dollars, with interest thereon from Dec. 5, 1914, to recover said sum this suit is brought.

The defendant, in an affidavit of defence, as he is permitted to do by § 20 of the act cited, raised certain questions of law, without answering the averments of fact contained in the statement of claim. These questions of law were set down for hearing, as provided by the act, and were argued, and there is before us a motion by which we are asked to enter judgment for the defendant on the questions of law raised by the affidavit of defence, as allowed by the act cited, and to strike from the record the plaintiff's statement of claim on the ground that it does not conform to the provisions of said act. The questions of law raised by the affidavit of defense are in substance (1) that the statement of claim does not allege the execution or delivery by the defendant of the note upon which suit was brought, (2) that the statement does not set forth that the plaintiff took the note in good faith and for value, (3) that the statement does not set forth that the plaintiff became the holder of the note before it was overdue, (4) that the statement does not set forth that at the time the note was negotiated or assigned to the plaintiff he had no notice of any infirmity in the instrument or defect in the title of the person negotiating or assigning it, and (5) that the first paragraph of the statement of claim is not numbered, and for that reason the statement does not comply with the requirements of the act of 1915.

It is alleged in the statement of claim that the plaintiff is the owner and holder of the note in due course. It is provided by § 16 of the negotiable instrument act of May 16, 1901, P. L. 194, that "Where the instrument is in the hands of a holder in due course a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed, and where the instrument is no longer in the possession of a

party whose signature appears thereon a valid and intentional delivery by him is presumed until the contrary is proved;" and it is provided by § 52 of that act that "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The negotiable instrument act itself, therefore, disposes of all the questions of law raised by the defendant relative to the alleged insufficient averments of the plaintiff's statement. The alleged insufficiencies all are covered by the allegation that the plaintiff is the owner and holder of the note in due course.

As to the alleged improper and insufficient numbering of the paragraphs in the plaintiff's statement of claim we think the question raised by the defendant is without substantial merit. It is true the practice act cited requires every pleading to be divided into paragraphs numbered consecutively. But the act does not prohibit, or require to be numbered, a brief introductory sentence in a plaintiff's statement of claim, setting forth in most general terms merely what the case is about, so that the formal parts of the statement may be better understood, and followed immediately by succinct and consecutively numbered paragraphs covering every substantial feature of the plaintiff's claim. In the present case the plaintiff's statement would have been complete without the introductory paragraph, the substance thereof being contained in the fifth numbered paragraph. The plaintiff does not rely on the introductory paragraph as a substantial part of his statement of claim. It was inserted in the pleading doubtless simply to prevent what otherwise might seem to be an abrupt beginning, and to cause the statement to read a little more smoothly than it otherwise would read. The plaintiff expressly designates the numbered paragraphs as constituting the statement of his cause of action. Our equity rules require a bill in equity to be divided into paragraphs consecutively numbered, yet, as suggested by plaintiff's counsel in his brief, the plaintiff in a bill in equity never has been required to number as the first paragraph in his bill the formal language "your orator complains and says." The new practice act must be given a reasonable construction.

And now, Feb. 29, 1916, for the reasons stated in the opinion

herewith filed, the motion for judgment for the defendant on the questions of law raised by the affidavit of defence and to have stricken from the record the plaintiff's statement of claim is overruled and dismissed.

From D. W. McDonald, Esq., Uniontown, Pa.

Madden's Estate.

Decedents' estates—Husband and wife—Lunatic widow—Election to take against will.

Where a husband provides by his will that suitable provision should be made by his executors for the proper maintenance and support of his wife, who was a lunatic, and at the audit of the executor's account a small amount out of a large estate is awarded to the executors as trustees for the support of the widow, and the residue to the sons of the testator, who are his executors, and thirteen years afterwards a committee is appointed for the widow by a proceeding in lunacy, such committee may elect to take against the will of the husband notwithstanding the expiration of the long period of time from the date of the audit.

Petition of committee of lunatic widow for leave to file election against deceased husband's will. C. P. No. 3, Philadelphia Co. June T., 1915, No. 4303.

Frederick J. Shoyer, for petition.

Ferguson, J., Jan. 31, 1916.—Margaret J. Madden is the widow of James Madden, who died in the year 1902. By his will he provided that suitable provision be made by his executors for the proper maintenance and support of his wife, then "an inmate and paid patient in the State Asylum at Norristown, Pa." The residue of his estate was given to his three sons absolutely, who were made executors. Subsequently the executors filed an account, which was audited in the orphans' court on Feb. 2, 1903. The widow was not represented at the audit. The account showed a balance of personal property of approximately $60,000, and out of this balance $9,650 was awarded to the executors as trustees for the support of the widow, and the residue to the sons of the testator. The testator possessed at the time of his death considerable real estate.

Proceedings in lunacy were instituted in this court, and by the inquisition filed Nov. 1, 1915, it was found that Margaret J. Madden had been a lunatic since Oct. 14, 1881, without lucid intervals. Subsequently the Hamilton Trust Company was appointed committee of her estate.

A petition has been presented by the committee asking for

leave to file an election to take against the will of the husband. Testimony was taken in support of the petition, and it appeared that the fund set apart by the adjudication of the orphans' court for the support of the widow has been dissipated by the executors. It also appeared that all of the real estate of which the husband died seized had been sold or mortgaged, the signature of the widow in each case having been in some manner secured while she was at the insane asylum, and in each case title insurance companies passing the title or mortgagees had required special insurance and a bond of indemnity to protect them against loss occurring by reason of the fact that Margaret J. Madden was insane.

This application should be considered without regard to the fact that the sum set apart by the orphans' court for the care of the widow has been dissipated. The primary inquiry in such matters is her welfare (In re Bringhurst, 250 Pa. 9), and the court must arrive at its conclusion upon the application as if it were made immediately after the death of the testator.

Had Margaret J. Madden been of sound mind at the time of her husband's death she could have accepted the indefinite provision made for her in the will, or not, as she pleased. If insane, and a committee had been appointed for her estate, there can be little doubt that, upon application by the committee, if then made, the court would have felt it to be its duty to authorize the committee to elect to take against the will in order to secure an adequate share of the estate for the widow's support, comfort and maintenance. The value of the estate is a proper subject for consideration. The financial position of the husband at the time of his death is a guide as to the degree of expenditure proper under the circumstances for his invalid wife. In view of the amount and character of the estate the part the widow would have been entitled to receive, had she elected to take against the will by her own act, would seem to be no more than necessary for her proper care and comfort.

We are of opinion the adjudication of the account of the executors in the orphans' court is not a determination of the widow's rights. She was mentally incapable of exercising an election at the time of the audit. Moreover, she was not before the court, and whatever was done by that court was merely the carrying out of the terms of the will, which the widow had a right to refuse to accept.

For these reasons we are of opinion the petition should be allowed.

Antram *v.* Tower Hill, Connellsville, Coal & Coke Co., Receivers.

Taxation—Tax lien—Real estate—Receivers.

On a petition of a tax collector for an order on the receivers of a corporation to pay to the petitioner certain taxes, which are claimed to be a first lien on the real estate of the company, and of which, it is claimed, the petitioner is entitled to priority of payment over the claims of other creditors, the court, in a doubtful case, will not and ought not to decide whether the taxes claimed by the petitioner do or do not constitute a valid and subsisting first lien on the real estate on which they were assessed, in a proceeding to which the other creditors are not parties, and in which they have not had an opportunity to be heard, and will discharge a rule on the receivers taken by the petitioner.

Rule for order on receivers for payment of taxes. C. P. Fayette Co. In Equity, No. 747.

Sterling, Higbee & Matthews, for rule.
Sturgis & Morrow, for respondents.

VAN SWEARINGEN, P. J., Feb. 29, 1916.—We are asked by a petition of the tax collector of Luzerne township to make an order directing the receivers of the Tower Hill, Connellsville, Coal & Coke Company, who were appointed by this court on Jan. 21, 1915, to pay to the petitioner the sum of $7,880.20, covering county taxes and school taxes, with added penalties, and an unpaid penalty on paid road taxes, for the year 1913, on property of said company in said township, out of the first money that shall come into the hands of the receivers over and above a sufficient amount to cover the expenses of conducting the business of the company, the contention of the petitioner being that the taxes constitute a first lien on the real estate of the company and that he is entitled to priority of payment thereof over the claims of other creditors. When the petition was presented we granted a rule on the receivers to show cause why the order prayed for should not be made, and to that rule an answer has been filed in which it is alleged that the only money coming into the hands of the receivers is derived from the mining of coal, and the manufacture of the same into coke, and the sale thereof, the coal mined being part of the real estate on which the taxes were assessed.

It is conceded by the parties that the property on which the taxes were assessed was seated lands. No return, certificate or registration of the taxes of any kind for the purpose of maintaining a lien on the real estate ever was made, and no formal lien of any kind ever was filed. It is alleged by the petitioner,

and is not denied by the receivers, that there was on the assessed property during the year 1913, and prior to Feb. 1, 1914, sufficient personal property to pay the taxes. That being true, the question arises whether it was not he duty of the tax collector to have seized the personal property, or to have proceeded against the owners of the land, for the payment of the taxes, and, he not having done so, whether the land has not been relieved from the charge.

It is contended by counsel for the petitioner that the taxes constitute a first lien on the land under the provisions of the act of June 4, 1901, P. L. 364, § 2 of which provides that "All taxes which may hereafter be lawfully imposed or assessed on any property in this commonwealth, in the manner and to the extent hereinafter set forth, shall be and they are hereby declared to be a first lien on said property, together with all charges, expenses and fees added thereto for failure to pay promptly, and such liens shall have priority to, and be fully paid and satisfied out of the proceeds of any judicial sale of said property, before any other obligation, judgment, claim, lien or estate with which the said property may become charged, or for which it may become liable, save and except only the costs of the sale and of the writ upon which it is made," as that act is amended as to time for filing the claim by the act of May 1, 1907, P. L. 130. The act of 1901 was held in Long *v.* Phillips, 241 Pa. 246, to apply only to taxes assessed on seated lands, and it was expressly amended to that effect by the act of March 26, 1903, P. L. 63. Then came the act of May 21, 1913, P. L. 285, which was held in Bradford County *v.* Beardsley, 60 Pa. Super. Ct. 478, to effect a complete repeal of the act of 1901 in so far as that act relates to the question of procedure in enforcing collection of delinquent taxes, and to provide a new procedure for that purpose. The act of 1913, therefore, leaves as an open question the validity of the lien for these taxes claimed to have accrued under the act of 1901, and the amendment thereof of 1903. There might be doubt even under the language of the act of 1901 whether or not the taxes would be payable as a first lien except out of the proceeds of a judicial sale of the property. See Pramuk's Appeal, 250 Pa. 45, relative to the payment of wage claims. We do not decide now whether the taxes claimed by the petitioner do or do not constitute a valid and subsisting first lien on the real estate on which they were assessed, that question, in our opinion, under the circumstances appearing here, being one which ought not to be decided in a proceeding like this,

to which the other creditors are not parties and in which they have not had an opportunity to be heard.

And now, Feb. 29, 1916, for the reasons stated in the opinion herewith filed, the rule to show cause is discharged.

From D. W. McDonald, Esq., Uniontown, Pa.

Lycoming County Fair Association *v.* Lycoming County.

Constitutional law—Agricultural fairs—Title of act of June 18, 1915, P. L. 1035.

The act of June 18, 1915, P. L. 1035, entitled "An act for the encouragement of agriculture and the holding of agricultural exhibitions; providing state aid for certain agricultural associations, and regulating the payment thereof," is unconstitutional in so far as it imposes any liability upon a county to pay the premiums mentioned in the act.

It seems that § 4 of the act of June 18, 1915, P. L. 1035, relates exclusively to associations incorporated after the passage of the act.

Case stated. C. P. Lycoming Co. Dec. T., 1915, No. 89.

Carl A. Schug, for plaintiff, *W. E. Ritter,* for defendant.

WHITEHEAD, P. J., March 31, 1916.—This action was brought by the plaintiff to recover from the defendant the sum of $1,021.75, being the amount of premiums paid by the plaintiff on exhibits in the interest of agriculture at a fair held by the plaintiff, in the county of Lycoming, on Oct. 12, 13, 14 and 15, 1915.

The action was brought to recover said sum under an act of assembly, approved June 18, 1915, P. L. 1035.

From the facts agreed upon two questions have been left to the court to determine:

First. Is the act of June 18, 1915, P. L. 1035, constitutional?

Second. Has the plaintiff fulfilled the conditions set out in said act so as to entitle it to the amount claimed?

Under this submission the first question for the court to determine is the constitutionality of said act. Under this question the only part of the act to be considered is its title.

Does this title give any notice to the county commissioners or other persons interested that the county would be called upon to pay any part of the premiums mentioned in said act?

Is not the language of this title absolutely misleading?

The title is as follows: "An act for the encouragement of

agriculture and the holding of agricultural exhibitions; providing state aid for certain agricultural associations, and regulating the payment thereof."

Would not any person of ordinary intelligence, upon reading this title, immediately conclude that the commonwealth alone would be called upon to pay premiums?

If the appropriation was sufficiently large to enable the state to repay the county the money advanced the county would not be seriously affected, but we are informed that the appropriation will not admit of the state repaying more than one half of the amount of this claim.

We are aware, however, that this alone would not defeat the act, but we only mention this in order to show why the county refused to pay this claim.

In Sharpless *v.* Mayor, 21 Pa. 147, the court say: "We can declare an act of assembly void only when it violates the Constitution clearly, palpably, plainly and in such manner as to leave no doubt or hesitance in our mind."

In Millvale Borough *v.* Evergreen Ry. Co., 131 Pa. 1, the court say: "If the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary."

In Read *v.* Clearfield County, 12 Pa. Super. Ct. 419, the court, on page 425, say: "As has been frequently said there is no fixed, well-defined rule by which every act can be tested. It is clear, however, under the authorities, that the title need not be a complete index of the contents of the act. Its purpose is to give notice to all persons concerned of a legislative intent to legislate upon a particular subject, and if it does this, in a manner that clearly invites all persons interested to examine into the body of the statute, it is sufficient."

While the authorities hold that in deciding questions of constitutionality we are not bound by any strict technical rule, that all doubts are to be resolved in favor of the constitutionality of legislation, and that no case has laid down a general rule that the title must, in all cases, where the burden is to be borne by the county, explicitly so stated in words that cannot be misunderstood, yet we believe that when a title not only does not use such language as would put parties upon notice, but in addition thereto is clearly and plainly misleading, it fails to meet the requisites of the Constitution and should be declared unconstitutional.

I am aware that acts of assembly providing for payments of the costs by the county, the title of which do not so state

in words, have been declared constitutional, but in none of such acts was the title clearly misleading.

In Hayes *v.* Cumberland County, 5 Pa. Super. Ct. 159, the act of May 8, 1876, P. L. 154, was declared constitutional, although the title did not in words state that the costs should be paid by the county.

In Overseers of the Poor of Bogg Twp. *v.* County of Armstrong, 11 Pa. Super. Ct. 175, the act of June 6, 1893, P. L. 328, was declared constitutional, although the title gave no notice in words that the county would be liable for costs.

In Read *v.* Clearfield County, 12 Pa. Super. Ct. 419, the act of May 15, 1893, P. L. 52, was declared constitutional, although the title gave no notice to the county that it might be called upon to pay costs.

In Com. *v.* Darmska, 16 D. R. 892, Judge Moschzisker declared the act of March 22, 1907, P. L. 31, constitutional, although nothing was said in the title of said act that the county would be called upon to pay counsel fees. This decision was affirmed in 35 Pa. Super. Ct. 580, and in 229 Pa. 314.

In Brink *v.* Marsh, 53 Pa. Super. Ct. 293, the court held the act of April 10, 1907, P. L. 60, constitutional, even though a sufficient appropriation to meet the demands under said act had not been made by the state.

In all of these cases the compensation clause was germane to the subject-matter announced in the act, and sufficient, perhaps, to put those interested in the subject upon inquiry, but in none of said acts was the language of the title misleading.

In the act now under consideration we are of the opinion that the language used in the title is positively misleading. After the subject of the act is mentioned, the title proceeds: "Providing state aid and regulating the payment thereof."

This language would surely cause every person interested in the matter to conclude that the encouragement of agricultural associations, the subject-matter of the act, was to be entirely and alone at the expense of the state.

The language in this title is materially different from the language of the title to the bounty act of April 10, 1907, supra.

In the title to the act, under which this case is brought, there is not only an absence of any words that would cause an interested party to investigate the body of the act to see who would be primarily liable, but the words used clearly announce

that the aid given is from the state, and nothing is said to cause one to conclude that the sum allowed is to be primarily paid by the county.

In Dailey *v.* Potter County, 203 Pa. 593, the court, on page 597, say: "While it is true that the title to an act need not be a complete index to its contents, it must not, on the other hand, mislead."

In Com. ex rel. *v.* Broad Street Rapid Transit Ry. Co., 219 Pa. 11, the court on page 16 say: "Titles which mislead are even worse than those which merely fail to inform, and the enumeration of many details always incurs the danger that thereby others which would have seemed cognate and germane may have been meant to be excluded."

If the word "state," as used in the title of the act under consideration, would have been omitted there would be sufficient in the title, under the decisions, to put counties upon inquiry, but this word as used would surely justify county commissioners in concluding that the county was not an interested party.

Because of the misleading language in the title we decide that the act in question is unconstitutional.

In order, however, that another hearing will not be necessary if, upon appeal, we are not sustained in our conclusion upon the first question, we will briefly consider the second question.

The plaintiff was incorporated on March 9, 1915, under the act of assembly of April 29, 1874, and its supplements, thus antedating the passage of the act of June 18, 1915, P. L. 1035, and was incorporated for the purpose of the encouraging of agriculture and the holding of agricultural exhibitions and is the only association holding such exhibitions in this county.

It has conformed with and met the requirements of all of said act of June 18, 1915, unless § 4 of said act relates to and prevents it from receiving from the defendants the amount of premium paid out by it for the year 1915.

Prior to the incorporation of the plaintiff there existed for many years what was known as the Muncy Valley Farmers' Club, and for many years, and up until 1915, said club held its annual exhibitions or county fairs and received from the county of Lycoming the sum of $1,000 annually under prior acts of assembly.

Some time prior to Oct. 12, 1915, the plaintiff corporation took over all the holdings of the Muncy Valley Farmers' Club,

and on Oct. 12, 13, 14 and 15, 1915, held an exhibition or county fair at Hughesville, on the same grounds and in the same buildings as were formerly used by the said Muncy Valley Farmers' Club.

It is claimed by the defendant that § 4 of said act relates to the plaintiff in this case and prevents it from claiming from the county any of the premiums expended by it during the year 1915.

With this contention we cannot agree. Section 4 of said act related exclusively to associations incorporated after the passage of said act. A part of said section reads as follows: "This section shall not apply to a county agricultural association heretofore incorporated, owning their own buildings and grounds, which shall hold annual exhibitions of the character designated in § 3."

This plaintiff was incorporated prior to the passage of said act and owns its own ground and buildings.

So far as this feature of the case stated is concerned, judgment should be entered in favor of the plaintiff, the Lycoming County Fair Association, and against the defendant, Lycoming county, in the sum of $1,021.75.

However, as the question of the constitutionality of the act of June 18, 1915, has been decided against the plaintiff, judgment should be entered for the defendant.

And now, March 31, 1916, upon due consideration of the case stated, and in pursuance of the above and foregoing opinion, judgment is hereby entered in favor of the defendant.

From William Russell Deemer, Esq., Williamsport, Pa.

Commonwealth v. Barr.

Criminal law — Cruelty to animals — Act of employés — Proper food for chickens—Act of March 29, 1869, P. L. 22.

There should be no conviction for cruelty to animals under the act of March 29, 1869, P. L. 22, unless the result of the defendant's action was clearly foreseen and not "accidental or involuntary," and there was "a reckless disregard of the rights and feelings of the brute creation."

The owner or custodian is not criminally liable for cruelty, active or passive, done or caused by his agents or servants with respect to animals owned by him or in his charge unless knowledge and approval are brought home to him.

In a prosecution against the owner of a chicken farm for cruelty to animals, it appeared that during his absence from the farm for about two weeks the defendant's employés had by his order ceased

feeding grain to the chickens and fed nothing but mangels, sour milk and refuse, and that a large number of the chickens had died and many were in a weak and dying condition. There was no post-mortem examination of any of the chickens, nor was knowledge of their condition at the time shown in the defendant. The defendant, his manager and an expert witness testified that mangels were a proper food, which was contradicted by witnesses for the commonwealth. Held, that a conviction should be set aside.

Even if mangels were not a proper food for the chickens, there could be no conviction if the defendant honestly believed that they were.

Indictment for cruelty to animals. Rule for a new trial. Q. S. Lancaster Co. Nov. Sess., 1915, No. 23.

J. W. Brown and *John E. Malone,* for rule.

S. V. Hosterman and *Chas. W. Eaby,* assistant district attorney, contra.

LANDIS, P. J., Jan. 15, 1916.—The act of March 29, 1869, P. L. 22, provides that "any person who shall within this commonwealth wantonly or cruelly ill-treat, overload, beat or otherwise abuse any animal, whether belonging to himself or otherwise . . . shall be deemed guilty of a misdemeanor." Under this act, the present indictment against the defendant was framed, and it charges that on Oct. 13, 1915, and at divers times before, within two years last past, he did "unlawfully, wantonly and cruelly ill-treat and abuse a large number of Buff Orpington, Rhode Island Red and Lakenvelder chickens, approximating twenty-five hundred, and nine head of Holstein cattle. . . ." So far as the cattle were concerned, no evidence was presented by the commonwealth, and the case turned upon the question as to whether or not the chickens had been cruelly treated. The jury, upon the trial, convicted the defendant, and we are now asked to review that finding.

Cruelty to animals may consist of active cruelty, which is willful or wanton abuse or ill-treatment, or unnecessary or unreasonable acts or conduct, which cause pain and suffering, or in passive cruelty, which may consist of acts of omission, neglect and the like, whereby the same kind of suffering is caused or permitted. Where, however, "it is expressly or impliedly required that the prohibited act should have been done willfully or wantonly, or with an intent to ill-use the animal, or subject it to unnecessary pain and suffering, it must appear that the act was intentional as distinguished from accidental or involuntary, or that the accused was actuated with a malevolent purpose or reckless disregard of the conse-

quences." 2 Cyc. 344. In Hunt *v.* State, 29 N. E. R. 933, a cruelty to animal case arising under a statute of the state of Indiana, it was held that, "to justify a conviction, there must be present a malevolent purpose or a spirit of wickedness or cruel wantonness, or a reckless disregard of the rights and feelings of the brute creation." In 2 Cyc. 345, it is also laid down as a principle of law that "the owner or custodian is not criminally liable for cruelty, active or passive, done or caused by his agents or servants with respect to animals owned by him or in his charge, unless knowledge and approval are in some way brought home to him." We think the jury was charged in accordance with these principles, and there seems to be no complaint concerning the instructions given. The sole contention arising is, whether or not, under the testimony, a conviction ought to be sustained.

It was admitted that the defendant was the owner of a farm of about eighty-five acres, located near Narvon, in this county, on which he raised chickens. The buildings were commodious, and the investment amounted to about $40,000. He did not tend to the chickens himself, but had two or more men employed for that purpose. Some time before October 13—presumably shortly before that date—William H. Roland and William H. Kready, both of whom were called as witnesses for the commonwealth, were automobiling in that part of the county. It seems that they had heard something of this place, and they went up to see it. They testified that they there saw chickens that were dead, and chickens that could not stand up and were falling over each other, and Mr. Roland said that he thought they were "in a frightful condition." He had never been there before, and did not testify how long he remained. However, when they returned to the city, it appears they "told some people" what they had seen, and, on Oct. 13, 1915, Frank McGrann, in company with his poultryman, Hiram Demmy, Frederick C. Carter, an agent of the Pennsylvania Society for the Prevention of Cruelty to Animals, and Arthur B. Coleman, a member of the state police, went down to the Barr place. None of them had ever been there before, and they only then were there, as stated by one of the witnesses, between nine and ten o'clock in the morning. We think all of them testified, in effect, that, at that time, there was no grain on the place for the chickens; that some of the chickens were dead (the highest number fixed by any was forty); and that many or all of them were droopy and weak. They saw mangels, which are a species of German beet,

around about the place, and it is not disputed that these mangels were fed to the chickens. The defendant was not there at the time, and it was testified that he had not been there from about October 1.

George Al. Lollar testified that he was at the place on October 14, and saw weak chickens, and fifteen or twenty dead ones burning in a hole; and the only other witness called for the commonwealth was Elmer E. Blocher, who had been employed at the farm, but was discharged from that employment. Blocher testified that he had charge of the chickens in September and October, and that, while, at that time, they were not in extra good shape, they "were good enough," and that they started to get bad "from the time that we cut out the grain entirely; that is, well, from October 1 to the 13th." He said that, during that time, the chickens had nothing but mangels (of which there were plenty), sour milk and refuse—no grain and no solid foods. He does not pretend that he could not have given them the range of the farm; for Barr gave no orders, so far as the testimony discloses, for the keeping of them in the pens. It was the business of those having them in charge to turn them out. It was denied by Frederick H. Weigle that Blocher had charge of the chickens. He stated that he himself was the manager, and that Blocher looked after only a section of them. This would seem to be true, because Weigle discharged Blocher on October 14, before he knew of this prosecution, for the reason, as he alleged, Blocher did not keep the pens clean.

The defendant asserted that the chickens had been falling off during the summer, although they had been fed plenty of grain, and that the cause, in his judgment, was intestinal trouble; that, therefore, after consultation with his manager, about October 1, it was agreed that the grain should be cut, and that they should be fed mangels, which he and his manager both testified were a proper diet for them. The manager said that some of the chickens were good, some were fair, and very few were poor; that they were properly fed, but were not properly tended to by Blocher. There never was any post-mortem examination performed by any one on any of the chickens to ascertain whether or not they were affected with disease; and it was merely from outside appearances that the respective witnesses made up their judgments.

The main question, therefore, which arose, was, whether or not mangels were a proper diet for the chickens. It was testified by the defendant and his manager, and also by Dr. Wil-

liam S. Gimper, that, under the circumstances, they were: and it was also urged that the chickens, with a range of eighty-five acres, could pick up sufficient food to preserve life. On the part of the commonwealth, it was alleged that mangels of themselves were not a proper diet, and that grain should have been fed besides. Now, it is not denied that quite a number of the chickens died. Dead chickens, however, were the defendant's loss, and as he was their owner, the natural inference would arise that he would not deliberately or with gross carelessness bring about a result which was disastrous to himself.

Was there, then, sufficient evidence to show that such a condition existed, and that he deliberately starved his own property, and thus caused many of the chickens to die? It seems to be taken for granted that, if mangels were not proper food for the chickens, then the defendant is guilty, because he fed them to the chickens. This proposition, however, is not a correct one. Even conceding that grain also should have been fed, if the defendant and his manager, after consultation together, honestly believed that mangels were proper food for the chickens, at least for a time, and, in pursuance of that determination, they tried the experiment, he cannot be convicted. Even assuming that their judgment was wrong, that the testimony of the commonwealth's witnesses is correct, and that mangels should not have been fed alone to the chickens, yet nevertheless the exercise of that judgment in this respect would not constitute cruelty for which such an indictment as this will lie, and this appears to us to be the real situation as it presents itself. We so instructed the jury in our charge, and perhaps ought to have gone farther and taken the case away from their consideration. Barr was away on business, and left his men to look after his chickens. Unless he clearly foresaw that this result would happen if grain were not fed with the mangels to the chickens, unless the result was not "accidental or involuntary," he is not guilty of this offense; that is, there must have been, as is set down in the authorities above quoted, "a reckless disregard of the rights and feelings of the brute creation," and where he is absent at the time, knowledge and approval must in some way be brought home to him. A careful review of all the testimony fails to show such a situation, and we have therefore, determined to make the rule for a new trial absolute.

Rule made absolute.

William N. Appel, Esq., Lancaster, Pa.

Masitis *v.* St. Vincent B. & P. Society.

Practice (C. P.)—Act of May 14, 1915, P. L. 483—Judgment for want of affidavit of defence—Assumpsit—Account render.

The practice act of May 14, 1915, P. L. 483, applies only to actions of assumpsit and actions of trespass. Where the pleadings declare an action of account render, and defendant enters a plea ne unques bailiff plene computavit, but does not file an affidavit of defence, judgment for want of the same will not be entered by the court, but the case will go at issue as account render.

There is clearly a distinction between an action for an account render and an action of assumpsit to recover a balance upon an account rendered or to be rendered. Sections 11, 19, 3 and 4 construed.

Rule for judgment for want of affidavit of defence under act of May 14, 1915, P. L. 483. C. P. Washington Co. May T., 1916, No. 10.

Vernon Hazzard, for plaintiff.
McIlvaine, Williams & McCreight, for defendant.

McIlvaine, P. J., April 7, 1916.—This action was commenced on Feb. 14, 1916, and the plaintiff claims that the rule before us must be disposed of under the practice act of May 14, 1915, P. L. 483. The defendant claims that that act only applies to actions of assumpsit and actions of trespass, and that the action brought by the plaintiff in this case is, as specified in the præcipe and as shown by the writ issued, an action of account render. An examination of the file papers convinces us that the contention of the defendant's counsel must be sustained.

There is clearly a distinction between an action for an account render and an action of assumpsit to recover a balance upon an account rendered or to be rendered. The plaintiff's statement in its concluding paragraph is as follows: "Wherefore the said plaintiff asks for an account and claims of the said defendant $120, damages, to recover which this suit is brought;" and in his statement which precedes this conclusion he specifically avers that the defendant has never rendered a reasonable account to the plaintiff of the profits arising from money which he paid to the defendant for the common benefit of the plaintiff and the defendant, and that it still neglects so to do, and that he, the plaintiff, is unable to state the exact amount due him by the defendant by reason of the defendant's failure to so account. In other words, the suit as brought

is not for a balance that would be due to the plaintiff upon a proper account stated and an implied promise growing out of the relations of the parties to pay the same, but it is to compel the rendering of an account or for damages for not so doing. This being the case, we are clearly of the opinion that the defendant was justified in entering the common law pleas in account render and treating this action as not coming under the practice act of 1915. Under the act of 1871, P. L. 265, the plaintiff can, if he desires to change his action from account render to an action of assumpsit to recover a balance due upon an account rendered or to be rendered, file a proper affidavit of claims and then rule the defendant to file an affidavit of defence under the practice act of 1915.

A reference to § 19 of the practice act of 1915 in our opinion will show that the plaintiff is not entitled to the judgment which he asks in this rule, for in that section if this is to be treated as an action of assumpsit, all the court could do in this case would be to enter a judgment against the defendant ordering an account, and if that account was not filed, then to enforce the order by attachment or otherwise, because we could not enter a judgment in favor of the plaintiff for a specific sum unless the statement shows the amount to be due the plaintiff from the defendant, or in other words, unless the affidavit of claim or statement shows the balance due the plaintiff upon the account between the parties, which is not done in the case before us. If the plaintiff in this case in his statement had alleged that he had paid fifty cents per month during the months intervening between Jan. 15, 1905, and Feb. 6, 1916, and that he was entitled to an accounting for these payments and the issues and profits received by the defendant for the common benefit of himself and the defendant, and that upon the proper rendering of said account between the parties the defendant would be indebted to the plaintiff in a sum which the plaintiff is unable to state, but which would amount to at least the sum of $120, and that the defendant was legally bound and under promise to pay said balance to him and had failed and neglected to do so, then he would be in a position to claim that the provisions of the practice act of 1915 applied to this case and that the defendant should file an affidavit of defence, but as the record stands the court would be unable to enter a judgment such as provided for in the practice act of 1915.

And now, April 7, 1916, this rule for judgment for want of an affidavit of defence came on to be heard and was argued

by counsel, whereupon, upon due consideration, it is ordered and adjudged that the same be discharged at the cost of the plaintiff, and that the case be placed upon the issue docket for trial upon the pleas by the defendant as an account render, unless the plaintiff seeks for an amendment under the act of 1871 changing the action to one of assumpsit.

Blakslee's Estate.

Wills—Election to take against will—After-acquired property.

A died testate leaving the income of his estate to his wife, and after her death to his children, his widow elected to take against his will, his executors made distribution of the estate with the exception of a small amount. During A.'s lifetime B. made a will, and after A.'s death added a codicil to the effect that as she had given A. in her will $10,000, and as A. had died, her executors were directed to pay the sum given to A.'s executors for the use of his estate. Payment was made to A.'s executors and they filed their account. The widow claimed one third of the fund received after A.'s death. Held, that she was entitled to the same.

Exceptions to the report of auditor. O. C. Carbon Co.

Jacob C. Loose, for the exceptants.
Freyman, Thomas & Branch, for the widow.

STEWART, P. J., specially presiding, Oct. 28, 1915.—An auditor was appointed to audit and make distribution of the balance in the hands of the executors of the will of W. W. Blakslee, deceased. Exceptions were filed to his report, and these are now before the court. From the testimony before the auditor, it appeared that W. W. Blakslee died Sept. 26, 1904, testate. By his will he left the income of the residue of his estate to his wife, and after her death to residuary legatees, who are the exceptants herein. On Feb. 6, 1905, the widow elected to take against the will. Subsequently on March 6, 1915, she filed another election to take against the will in conformity with the act of April 21, 1911, P. L. 79. The estate of W. W. Blakslee has been distributed by the executors with the exception of a comparatively small sum which was retained for contingent purposes.

Mary Packer Cummings died Oct. 29, 1912, testate. Her will was dated April 22, 1904, and in a codicil attached thereto, dated July 29, 1908, provided as follows: "In the third paragraph of my said will, I give and bequeath to my uncle,

$10,000 and to my cousin, Eugene H. Blakslee, $20,000. They have both died since the execution of my said will. I now give and bequeath said legacies to the respective estates, that is to say, I give and bequeath to the estate of Eugene H. Blakslee, $20,000, and to the estate of W. W. Blakslee, $10,000, and direct my executors to pay said legacies to the executors or administrators of said original named legatees, for the use of their respective estates."

The fund before the court consists of one fourth of the bequest of Mrs. Cummings, paid to the executors of W. W. Blakslee. The learned auditor awarded one third of the fund to the widow of W. W. Blakslee. It is manifest that the distribution of the fund is to be governed by the will of Mrs. Cummings. The payment of the fund by her executors to the executors of W. W. Blakslee discharges the former executors, but the distribution must be made according to the terms of Mrs. Cummings' will. The money is given "to the respective estates . . . for the use of their respective estates." Primarily "estates" does not mean persons. It means effects real and personal left by the decedent, but such a meaning would be absurd when applied to the present case. Here the word "estates" means such persons as would be entitled to take his real and personal estate under the intestate laws. Where the widow elects to take against her husband's will, she becomes entitled to her share of the personal estate under the intestate laws. The learned counsel for the residuary legatees insists that under the act of April 8, 1833, P. L. 249, and the act of April 11, 1848, P. L. 537, the widow is not to be considered as an heir, but that her interest must be governed by the common law principles relating to dower, and that W. W. Blakslee not having been seised of the fund for distribution at the time of his death, the widow is not entitled to her thirds. As to the effect of these acts, see Cunningham's Est., 137 Pa. 621, at page 628. He cited Paul's Executors *v.* Paul, 36 Pa. 270; Pritts *v.* Ritchey, 29 Pa. 71, and McMasters *v.* Negley, 152 Pa. 303. In all these cases the subject of the controversy was real estate, and the discussions by the courts are applicable to questions of dower and courtesy.

Huddy's Est., 236 Pa. 276, also cited, decides but one thing, and that is that there was no appointment by the granddaughter under her grandmother's will, and that the husband, electing to take against the will of his wife, could not share in a trust estate because the estate never was the "real and personal estate" of his wife.

DeWitt *v.* DeWitt, 202 Pa. 255, also cited, was a widow's bill for an account of rents, issues and profits of the real estate of her husband and for the assignment of dower. The learned counsel for the exceptants admits that the property out of which the rents were demanded, was not at any time in the seisin of the husband, but the property which had been exchanged for it had been. His conclusion is that if the real estate had been a mere gift, the widow could not have recovered the rents. It is useless to speculate whether that conclusion would be correct or not.

The DeWitt case was decided on the common law rule, applicable to the exchange of lands. We think it clear that the present fund must be considered solely as personal property. Little light is thrown on the real question involved by the various cases cited by the learned counsel for the widow as to the meaning of the word "heirs" in a will; to the effect that where the fund is personal property, the husband is to be considered as the "heir" of his wife, or vice versa. Eby's Appeal, 84 Pa. 241; Dodge's Appeal, 106 Pa. 216; Lesieur's Est., 205 Pa. 119, and Raleigh's Est., 206 Pa. 451, contain illuminating discussions of various phases of this question. By § 11 of the act of 1848, supra, where the widow elects not to take under the last will and testament of her husband, she shall receive her share of the personal estate of her husband under the intestate laws of this commonwealth.

It is, however, argued that this fund, having been received years after Mr. Blakslee's death, never was and is not now part of his estate. The answer to that is that Mrs. Cummings' will explicitly makes it a part of the estate. The acceptance of a gift is always presumed. Take the ordinary case of a life insurance policy. The policy is made payable to a man's estate. There is never any difficulty in distributing that first to the creditors and then to the widow and children. Of course that fund accrues by virtue of a contract entered into with the decedent, but that can make no difference. Money paid by virtue of a bequest or a gift is just as much money of the estate as if it was paid by virtue of a contract.

Some little light may be thrown on this subject by reading Deginther's Appeal, 83 Pa. 337, the syllabus of which is as follows: "A married woman took out a policy of insurance upon the life of her husband, which was made payable to her, her executors, administrators or assigns, and died intestate during the lifetime of her husband, leaving two children. After

the husband's death, upon the distribution of the proceeds of the policy, the representative of the husband claimed one third thereof, which claim was rejected by the court below. Held, that this was error, and that the estate of the husband should have been awarded the one third of the fund." On page 339 Mr. Justice Sharswood said: "The contention of the appellee is, that as John Haas, the husband, survived his wife, the estate vested in the administrator of Christianna, at the moment of his death, and that having then ceased to exist, he could have had no claim upon Christianna's estate which could pass to his personal representative. The argument appears to be too refined. If it be a sound universal position, that a man's representatives are not entitled to anything not vested in him at the time of his death, though coming to his estate on the happening of a subsequent contingency, neither could Christianna's representatives be entitled, under this construction of the law, for she was not possessed of this property at the time of her death." Again, on the same page, he said: "It is not stretching the construction of the statute beyond what is legitimate to hold that her estate includes for purposes of distribution, not only what was then her estate, but what might have become so, on contingencies happening afterwards."

It is well settled that a person can transmit by will mere contingencies or possibilities or expectancies. If the events do not happen, the devisees take nothing, but if they do happen, the executor must make distribution in accordance with the will, even though the testator at no time, had legal claim to the things devised. We are unable to turn to any Pennsylvania case on this subject, nor has any been cited to us, but we think the case of Basye *v.* Adams, 81 Ky. 368, has a strong bearing. There the court said: "He designated his 'estate' as his beneficiary, by which he clearly meant that the amount payable at his death should become assets of his estate, to be paid over to his personal representative, and by him disposed of according to the laws providing for the distribution of estates of deceased persons, and payment of debts against them." The learned auditor was clearly right in his decision of this matter.

And now, Oct. 28, 1915, it is ordered, adjudged and decreed that all the exceptions to the report and supplemental report of the auditor in above estate are dismissed, and the report is confirmed absolutely, and distribution is directed to be made as therein reported.

McMichael *v.* McMichael.

Divorce—Cruel and barbarous treatment—Uncorroborated testimony of the libelant—Refusal of decree.

Where the testimony of a wife who has filed a libel for divorce on the ground of cruel and barbarous treatment is very brief in character, is wholly uncorroborated, but discloses the fact that corroborating testimony might have readily been obtained, the court will refuse a decree.

Libel in divorce. C. P. Crawford Co. Nov. T., 1915, No. 20.

Frank A. Thomas, for libelant.

PRATHER, P. J., March 17, 1916.—The cause of complaint alleged in libel is cruel and intolerable treatment. The testimony was taken before an examiner and consists of the uncorroborated testimony of libelant, covering less than two pages. Her testimony pertinent to her complaint is all contained in thirteen lines, as follows:

"He would call me a bitch, a son-of-a-bitch and would frequently take hold of me and pinch me until my body would be black and blue as the result of such pinching. By reason of his excessive sexual demands against my protest he did not give me any rest at night and ruined my health. I always had good health before this, but because of his conduct as above stated and because of his constant nagging and swearing at me and his perpetual intoxication I became very nervous and sick. I was unable to do anything and was so worried by him and became so nervous of his conduct towards me that my health was so impaired that I could not stand it any longer and was obliged to leave his father's home, which was the only home he ever provided for me, and went to the home of my parents in Randolph township, Crawford county, Pa., at Christmas time, 1914."

The particular conduct and acts complained of all left physical marks or visible effects upon her body and health. The entire absence of corroboration is a circumstance of suspicion that leaves her case in doubt, as unproved.

In concluding that this testimony is neither clear nor convincing and that a divorce under the circumstances should not be decreed, we are not holding that a divorce may not be decreed upon the uncorroborated testimony of a libelant. Our position is that when the testimony is merely taken by an examiner and filed in court, and it consists of libelant's uncorroborated testimony, which, if true, discloses the fact that cor-

roborating testimony is readily obtainable, the absence of such corroboration, considered with the meagerness of the testimony presented, is a circumstance of suspicion justifying the conclusion that such uncorroborated testimony is insufficient to sustain a decree.

Besides, the testimony is entirely barren of any proof that the libelant discharged her marital duties in a faithful manner, and did not provoke the conduct complained of.

The strongest case in favor of petitioner's prayer as presented that we have found is Baker *v.* Baker, 195 Pa. 407. It may be urged the court there held that a divorce may be granted upon the uncorroborated testimony of the libelant. But the real facts should not be overlooked: (a) The wife was not uncorroborated; (b) Mrs. Triebel, her mother by adoption, corroborated her; (c) the doctor testified he treated respondent for gonorrhea; (d) libelant's testimony showed that she was not derelict as a wife.

It is observable that the master in recommending a refusal of the decree, simply said, as remarked by the Supreme Court, that he was "of opinion that the allegations in said libel as ground for divorce have not been proven." And the Supreme Court continues: "He does not discuss the question whether the facts given in evidence were sufficient to authorize a decree of divorce, but says they were not proven."

In Crawford *v.* Crawford, 54 Pa. Super. Ct. 304, the Superior Court, considering the effect of uncorroborated testimony in divorce, said: "Although he (respondent) was represented by counsel at the hearing before the examiner, he did not see fit to avail himself of his right to take the witness stand and deny in any respect the testimony offered by his wife in support of the averment of her libel. Her own testimony, if believed, even though it were in no way corroborated, is legally sufficient to establish the facts she avers. Flattery *v.* Flattery, 88 Pa. 27; Baker *v.* Baker, 195 Pa. 407; Krug *v.* Krug, 22 Pa. Super. Ct. 572; Reed *v.* Reed, 30 Pa. Super. Ct. 229."

From these and other cases that might be cited, we take the true rule of law to be that a divorce should be decreed upon libelant's uncorroborated testimony when such testimony sustains the pleadings and proves the facts alleged, and is or should be believed, but when the witness does not appear in court, but offers her proof by deposition, which is filed in the case, then the sufficiency of her proof does not consist alone in the sufficiency of deposing facts and her deductions there-

from in support of the allegations in the libel, but rather in the credibility of the deposing witness, which is to be determined by the circumstances of the case.

It would then become the duty of the court to inquire whether corroborating witnesses were reasonably obtainable. If this be answered in the affirmative, then to inquire would such witnesses corroborate the testimony of the libelant? Finally, if the court is in doubt about this last inquiry, then it ought to be in doubt about the sufficiency of libelant's proofs and deductions. In which event, the circumstances of omitted proofs and corroboration would give rise to such suspicion of libelant's testimony that it should not, standing alone, be believed. Such is libelant's case. We do not know the libelant. She did not appear before the court. The strength or weakness of her case lies not in her appearance as a witness, but in the appearance of her case as disclosed by the circumstances, together with her deposition filed.

It follows that the prayer of petitioner should be refused.

March 17, 1916, the prayer of petitioner is refused, without prejudice to offer additional proofs in support of the allegations in libel.

From James D. Roberts, Esq., Meadville, Pa.

MacPherson *v.* **MacPherson.**

Divorce—Jury trial—Public morals.

A jury trial will not be granted in a divorce proceeding where the libel charges adultery, and it appears that the parties had two children, a daughter thirteen years of age, and a son fifteen years of age, and that the alleged act was committed in the presence of several witnesses.

Divorce. C. P. Lehigh Co. June T., 1915, No. 29. Petition by respondent for jury trial.

M. P. Schantz and *Frank Jacobs,* for libelant.
A. G. Dewalt and *James M. Breslin,* for respondent.

GROMAN, P. J., Feb. 21, 1916.—The respondent in the above proceeding in divorce on June 7, 1915, presented her petition praying for a rule on the libelant to show cause why the issues of fact involved in the proceeding should not be submitted to a jury. The libel charges adultery. From the petition and answer filed it appears the parties to this proceeding have two children—a daughter thirteen years of age,

and a son fifteen years of age; it also appears that the alleged act or acts of adultery were committed in a Philadelphia hotel in the presence of several witnesses. We have nothing before us but the proceedings herein, and, therefore, we conclude for the purpose of determining this rule that the libelant can substantiate the allegations by competent testimony.

The act of April 20, 1911, P. L. 71, provides that such a rule "shall not be made absolute when, in the opinion of the court, a trial by a jury cannot be had without prejudice to public morals"; jury trials in cases of this character are the exception and not the rule. If the facts alleged would be established in a jury trial, it would attract the morbid minded public, tend to bring the innocent children of the parties into unpleasant notoriety, unnecessary scandal and annoyance. The tendencies of such a trial would be baneful to say the least to the innocent children as well as the public in general; and the exposures, apt to corrupt and prejudice public morals. Relative to the questions herein involved we can do no more than adopt the views so well and forcibly expressed by Judge Irwin of Washington county in Espey *v.* Espey, 42 Pa. C. C. 107; and in the opinion of Judge Swartz of Montgomery county, Pennsylvania, in Cunningham *v.* Cunningham, March term, 1914, No. 113, common pleas of said county, not yet reported.

In Cunningham *v.* Cunningham, above referred to, Judge Swartz, Nov. 27, 1914, upon an application by the wife, the respondent, asking for a jury trial, filed the following opinion:

"The husband asks the court to grant him a divorce on the ground of adultery on the part of the wife. The libel alleges that the wife committed adultery in the Congress Square Hotel, at Portland, Maine, and also at libelant's cottage at Chebague Island, Maine. The wife filed her answer in which she denies all these charges of infidelity. She also prays that the issue raised by her answer may be tried before a jury.

"Whether the respondent committed adultery with one John S. McClurg is the issue of fact in the cause.

"The act of April 20, 1911, P. L. 71, provides that the rule for a jury trial 'shall not be made absolute when, in the opinion of the court, a trial by a jury cannot be had without prejudice to public morals.'

"How the court is to ascertain the facts or information upon which such opinion should be based, is not disclosed by the said act.

"Before a jury trial can be awarded, one of the parties to the record must ask for such trial, and before the court can allow the same, the other party is entitled to a hearing. Where no application is made the act requires, that the hearing be had before the court or a master. The act contemplates that ordinarily hearings must take place before the court or before a master, and that trial before a jury shall be the exception.

"In this case we have before us the application of the wife for a jury trial, the answer of the husband, that such trial cannot be had without prejudice to public morals, and this is followed by a reply of the wife, that there are no facts or circumstances bearing on the cause that are injurious and prejudicial to public morals.

"The husband alleges that the acts of infidelity were repeated and constant, for several weeks, in his cottage, when he was away, and that his daughter, eleven years old, was at home, but too young to comprehend the nature of the mother's conduct. The wife alleges that the charges of misconduct are false, and that she was compelled to separate from her husband because of his exhibitions of jealousy and his indignities and unnatural conduct toward her. She also charges that the husband, as she is informed, will attempt to make use of subsidized domestic servants and hired detectives to sustain his cause for divorce. She also introduces into the case the fact that Mrs. Mary S. McClurg has brought her action for a divorce from her husband, the said John S. McClurg, on the ground of his adultery with the said respondent.

"The libelant and respondent both declare that they have good family connections and move in good social circles.

"In the argument of the rule for a jury trial, counsel for libelant stated that witnesses would be called who saw the respondent in the bed room of the said John S. McClurg for hours at a time when he was visiting at her cottage in Maine, and that these witnesses would describe the character of the clothing worn by the parties at such times.

"Counsel, in making these statements, does so under his obligation of due fidelity to the court. When we must determine whether a jury trial can be had without prejudice to public morals, we have the right to expect the aid of counsel who are supposed to be informed as to the character of the testimony that will be presented at the trial. We cannot at this time, call the witnesses before us to ascertain their evidence and its bearing upon public morals.

"The threatened exposure before a jury of the domestic troubles in two families of good social standing, where the infidelity of the wife in the one and of the husband in the other is the issue involved, will be sure to attract the attendance of persons of morbid taste and curiosity. The innocent child may be exposed to unnecessary annoyance if a jury trial is allowed. When domestic servants are called to relate the alleged misconduct as to the infidelity of the wife, the exposures are apt to corrupt public morals.

"We do not mean to hold that in every case where adultery is charged a jury trial cannot be allowed under this act of 1911. But if the charges can be sustained that are alleged in this case, then, under the facts and circumstances, as they appear to us, it is not a proper case for a jury trial.

"Much of the evidence that would be submitted to the jury would likely be taken under a commission, so that the respondent could not avoid the examination of witnesses out of court. She fears that her case might be prejudiced by the examination of witnesses before a master, at a distant locality from her home, because of the husband's financial ability and his readiness to pay expenses and counsel fees, and because of her own limited means to protect herself. We are always careful to compel a husband to furnish the funds to enable the wife to defend herself from the charges preferred against her in his application for a divorce.

[MacPherson v. MacPherson.]

"It is contended that trial by jury, in a divorce case, is a matter of right under our Constitution that cannot be taken away by any act of the legislature. We are of opinion that the said act of April 20, 1911, is constitutional. We cannot add anything of profit upon this question so well considered by Judge Irwin of Washington county, in the case of Espey *v.* Espey, 42 Pa. C. C. 107. Rule discharged, jury trial refused."

Now, Feb. 21, 1916, the within case came to be heard upon the rule taken by respondent to show cause why a jury trial should not be allowed, after argument of counsel and due consideration of the case, the court is of the opinion that a jury trial in this case cannot be had without prejudice to public morals, and, therefore, the rule is discharged and jury trial refused.

From James L. Schaadt, Esq., Allentown, Pa.

McCarroll's Estate.

Decedents' estates — Claim for boarding — Contract — Evidence—Demand.

The testimony in support of a claim for board and care of decedent is sufficient, when the son of claimant testifies, "I have heard my father and mother say, and decedent talk, that he was to pay $3 per week, and decedent has told me that we should keep track of his board and care, and we would get pay for it, when he was through with it, that is my mother would; notwithstanding the fact that there was some testimony of declarations of the claimant "that she had no contract with the decedent, though the witness so testifying admitted that she had a bill against decedent."

Exceptions to report of H. S. Harding, auditor. O. C. Wyoming Co.

Asa S. Keeler, for exceptant, cited, as to claims against decedents' estates: Bradshaw Est., 243 Pa. 114; Mueller's Est., 159 Pa. 590. Weaver's Est., 182 Pa. 349. As to demand: Burke's Est., 15 D. R. 206; Hill's Est., 18 D. R. 736; McGreever's Est., 9 Kulp 399. As to presumption of payment: Cummiskey's Est., 224 Pa. 509; Osborn *v.* McKay, Exrs., 42 Pa. C. C. 44; Albright's Est., 10 Schuyl. 317; Winfield *v.* Beaver T. Co., 229 Pa. 530. As to contract: Haines's Est., 17 D. R. 420; Maguire's Est., 22 D. R. 539; Applegren's Est., 59 Pa. Super. Ct. 289; Bittenbender's Est., 1 Berks 349; Kelley's Est., 24 D. R. 651.

O. S. Kinner, contra, cited no cases.

TERRY, P. J. April 3, 1916.—This case is before us upon exceptions to the report of the auditor, appointed to pass upon exceptions to the final account of the executor of the deceased and to distribute the balance of the funds shown by said account. The decedent, Joseph McCarroll, a bachelor, died testate, Sept. 5, 1914, at the home of Mrs. Laura Hulbrit in North Branch township, this county, in whose home he had lived about twenty years. In his will, found among the papers submitted to us and referred to in the argument, though apparently not formally offered, but presumably considered in evidence under an offer of "all files in the estate" the testator, after providing for the payment of his debts and funeral expenses, and making a conditional devise of four acres of land to Frank Hulbrit, and a bequest of $150 to testator's sister, Permelia Tresouthlic, gave the residue of his estate to his two sisters, Mrs. Tresouthlic and Mrs. Mary Kintner.

The final account of the executor showed a fund of $3,786.11 for distribution.

The principal contention at the audit was over the claim of Mrs. Laura Hulbrit for board and care of the decedent for six years preceding his death, which claim was disputed by his sisters. Concerning the claim the auditor says: "It appears that about the year 1897, Joseph McCarroll, the decedent, who was then about fifty-one years old and unmarried, came to live at the home of the claimant, Laura Hulbrit, who was then living with her husband, Harrison Hulbrit, in North Branch township, Wyoming county, Penna. The parties were not related in any way. Harrison Hulbrit died in February, 1901, and McCarroll continued to live with Mrs. Hulbrit after that time and up to the time of his death, on Sept. 5, 1914. The place where they lived was a farm, and after the death of Harrison Hulbrit, was worked by Frank Hulbrit, a son of claimant and Harrison Hulbrit, who also lived upon the farm, but in another house close by the house occupied by claimant and decedent. Claimant received from her son Frank, on account of her interest in the farm, one third of the product therefrom, and also had a pension of $12 per month. It also appears that she kept, at different times on her own account, some stock, such as cows, pigs, sheep and several swarms of bees. She had no income or estate other than this. It also appears that decedent, at such times as he was able, did some work around the place, such as looking after the stock and the bees, carrying water, chopping wood, etc., and also that he worked on the farm, presumably for Frank Hulbrit. As to just how

much work was done by decedent and the value thereof, there is a conflict of testimony which we will discuss later. The claimant is eighty-four years old and, as stated by her son, Frank Hulbrit, she was not able to be present at the hearings. Shortly after the death of the decedent, claimant presented her account to the executor of the estate, wherein she claimed for board, washing, mending, etc., for the five years ending Sept. 5, 1913, at the rate of $3 per week and for board, washing, mending and care for the year ending Sept. 5, 1914, and in addition thereto for incidental expenses of funeral, etc., at the rate of $6 per week, or a total of $1,092."

The auditor making an allowance for services of the deceased, to which we will presently refer, awarded the claimant $565.50, confining the rate per week for board to $3, and finding that no money payments on the account were made by decedent. The sisters of the deceased have excepted to such award, contending that the testimony in support of it is sufficient and assuming a liability shown, that there is a presumption of payment not rebutted.

Authorities need not be cited for the proposition that an official charged with the duty of ascertaining facts from testimony, whether he be judge or auditor, having seen the witnesses while testifying is in consequence better able to determine their credibility and the weight to be given their testimony than in a tribunal sitting in review upon his findings.

Bearing this in mind, we observe that Frank Hulbrit testified positively that the decedent came to his father's house to board, and stayed there under an agreement to pay $3 per week. The witness stated, "I have heard my father and mother say, and Mr. McCarroll talk, that he was to pay $3 per week." The same witness also said: "Mr. McCarroll has told me that we should keep track of his board and care and we would get pay for it when he was through with it. That is my mother would." It is true there was some testimony of declarations of the claimant that she had no contract with the decedent, though the witnesses so testifying admitted she said she had a bill against the estate. The claimant, of course, could not testify in support of her claim, and while she would have been competent to testify in contradiction of the alleged conversations with her, the auditor has reported that she was not able to be present at the hearings. After discussing what was testified to concerning the said declarations of the claimant, the auditor says, "We have given this testimony due considera-

tion and we do not find it sufficient, in view of all the other circumstances existing to defeat this claim."

We do not feel warranted in reversing the auditor in his conclusion that contract was proven. In such finding he not only gave credit to the testimony of Frank Hulbrit, but also applied the presumption arising from the fact of the board being furnished and accepted, the parties not being related. See Shoch *v.* Garrett, 69 Pa. 144; Leidy's Appeal, 3 Pennypacker 195. These cases are also cited on the sufficiency of the testimony to establish the contract. In numerous cases such claims, accruing for several years, have been sustained notwithstanding no payments were shown. Miller's Appeal, 100 Pa. 568; Ranninger's Appeal, 118 Pa. 20; Eichelberger's Est., 170 Penna. 242; Gerz's Exrs. *v.* Demarra's Exrs., 162 Pa. 530; Rosencrance *v.* Johnson, 191 Pa. 520; Schrader *v.* Beatty, 19 Pa. Super. Ct. 212, affirmed in 206 Pa. 184.

The exceptions alleging error in the auditor's finding that a contract to pay for board was established are overruled.

The exceptants introduced testimony showing what services the decedent performed for the claimant, and the auditor making an allowance therefore, reduced, by one half, the amount of decedent's liability to the claimant up to date of his illness in May, 1913, subsequent to which time the deceased did little if anything, the auditor states. Much of that testimony was taken without objection, and the claimant has not excepted to the ruling of the auditor in this respect. We do not therefore give it further attention.

As to the contention that there is a presumption of payment of the amount claimed to be due for board of the decedent, it must be remembered that Frank Hulbrit testified that his mother, the claimant, received nothing from the decedent during six years preceding decedent's death; also as before observed that the deceased told him his mother would get pay for his board when he was "through with it." There was no cross-examination on this point, and the auditor says: "The witness lived only a short distance, ten rods, from his mother's house, saw both claimant and decedent frequently, had every opportunity to keep in touch with their matters. His testimony is uncontradicted and cannot be disregarded." Banes' Est., 4 Pa. C. C. 495. The exceptions raising that point are overruled.

The auditor, in awarding collateral inheritance tax to the commonwealth, overlooked the payment thereon to William Connell, register, of $126.66. The amount of such tax awarded

is therefore reduced and the proper balance unpaid will be calculated and allowed.

The auditor also overlooked the bequest, in said will, of $150 to decedent's sister, Mrs. Tresouthlic. This should have been awarded to her, and the balance of the fund then remaining for distribution to the two sisters of the deceased divided between them equally. This correction we will also make.

While we have not separately passed upon the numerous exceptions filed, many of which are but different modes of stating the ground of complaint what we have said sufficiently shows the view we have taken of them and our disposition thereof. All exceptions not thus sustained, and specifically eighth, tenth, fourteenth, seventeenth and twenty-first, which, we think embrace the alleged errors complained of, are overruled.

In accordance with the foregoing opinion we make the following corrected distribution:

Balance shown by final account.....		$3,786.11
To auditor for advertising.....	$6.00	
" auditor for fees.....	75.00	
" clerk O. C. this report.....	5.00	
		86.00
		$3,700.11
To Frank Hulbrit, account.....	$2.74	
" Dr. T. G. Merritt, account.....	200.00	
" Laura Hulbrit account.....	565.50	
		768.24
Balance.....		$2,931.87
On this balance the commonwealth was entitled to collateral inheritance tax at the rate of five per cent., amounting to.	$146.59	
Heretofore paid	126.66	
Balance due and awarded the commonwealth		19.93
Balance.....		$2,911.94
To Mrs. Permelia Tresouthlic, bequest..		150.00
Balance.....		$2,761.94
To Mrs. Mary Kintner.....$1,380.97		
" Mrs. Permelia Tresouthlic..... 1,380.97		
		$2,761.94

Commonwealth *v.* Moore.

Criminal law—Rape—Act of March 31, 1860, P. L. 443, § 54—"Two term rule."

Where a defendant, charged with statutory rape and bastardy, waives a hearing before a justice of the peace, enters into a recognizance for his appearance at the next or March sessions of court, and the child not having been born prior to the March sessions, and the bill of indictment not having been laid before the grand jury until the following or June sessions, at which time a "true bill" was returned on both counts and the case was continued to September sessions following, the record not disclosing at whose instance it was continued, but the record showing that at September sessions following, the case was continued by consent of defendant's counsel, to the following December sessions, at which sessions, the record showing that the case was continued to the following March sessions on motion of the district attorney, the defendant, not having at any time been imprisoned because of said charge, but continually under recognizance for his appearance, is not entitled to be discharged under § 54, of the act of March 31, 1860, P. L. 443, commonly known as the "two term rule."

A defendant is not entitled to a discharge under said rule, if he or his counsel have contributed in any way, or assented to, the delay. He must have been vigilant at all times and willing to have his case tried.

Section 54 of said act is available only for a defendant actually imprisoned and not for a defendant who is under a recognizance for his appearance at a future term of court, and where the defendant has not been imprisoned but has been continually released on bail a rule for his release under § 54 of said act will be discharged.

Rule to discharge a defendant under the "two term rule." Q. S. Green Co. June Sess., 1915, No. 5.

David R. Huss, district attorney, for the commonwealth.
T. H. Wilkinson and *C. J. Crawford,* for defendant.

RAY, P. J., Jan. 20, 1916.—Mabel Ward, the prosecutrix in this case, made complaint before a justice of the peace, charging Charles Moore, the defendant, with the crime of statutory rape and bastardy. The defendant waived a hearing before the justice and entered into recognizance for his appearance at the next, or March sessions, of the said court. The child not having been born prior to the March sessions, 1916, the bill of indictment was not laid before the grand jury until at the following, or June sessions, 1916. It was returned "a true bill" by the grand jury on both counts—statutory rape and bastardy—June 8, 1915. The record shows that on June 11, 1915, the trial of the case was continued to September sessions, 1915, but does not show at whose instance the continuance was had. At September sessions the court made the

following order: "Now, Sept. 8, 1915, on motion of the district attorney and agreement of defendant's counsel, above case continued until next term," and the next term was December term, 1915. At said December term, 1915, the record shows the following: "Dec. 8, 1915, upon motion of district attorney, trial of case continued to next term," which was March term, 1916.

The defendant obtained the rule in this matter Feb. 8, 1916. The district attorney filed an answer thereto Feb. 19, 1916. Relying on these facts the defendant asks to be discharged under § 54, of the act of March 31, 1860, P. L. 443. That section of the act reads as follows:

"If any person shall be committed for treason or felony, or other indictable offense, and shall not be indicted and tried sometime in the next term, session of oyer and terminer, general jail delivery, or other court where the offense is properly cognizable, after such commitment, it shall and may be lawful for the judges or justices thereof, and they are hereby required, on the last day of the term, sessions or court, to set at liberty the said prisoner upon bail unless it shall appear to them, upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried the second term, session or court after his or her commitment, unless the delay happen on the application or with the assent of the defendant, or upon the trial he shall be acquitted, he shall be discharged from imprisonment; provided always, that nothing in this act shall extend to discharge out of prison any person guilty of, or charged with treason, felony, or other high misdemeanor in any other state, and who, by the Constitution of the United States, ought to be delivered up to the executive power of such state, nor any person guilty of, or charged with a breach or violation of the laws of nations."

The defendant is not now, and has not been at any time, in prison as a result of this charge and indictment. He is now, however, and has been continually under recognizance for his appearance. The question is whether or not, under all the facts and circumstances, as disclosed by the record, and as hereinbefore set forth, the defendant is entitled to a discharge under and by virtue of that section of said act above quoted. That apparently there has been unnecessary delay in the trial of this case, delay not accounted for in the record, there can be little doubt. All the authorities cited, however, by counsel in the oral argument, as well as in their respective briefs, seem to

be uniform to the effect that the defendant is not entitled to a discharge if he, or his counsel, have contributed in any way, or assented, to the delay. He must have been vigilant at all times, ready and willing to have his case tried. The following cases support this doctrine: Rex *v.* Haas, 1 Dallas 9; Respublica *v.* Arnold, 3 Yeates 263; Com. *v.* Sheriff, 16 S. & R. 304; Ex parte Walton, 2 Wharton 500; Com. *v.* Pulte, 14 Phila. 398; Com. *v.* Superintendent of Philadelphia Prison, 4 Brewst. 320; Com. *v.* Jailer of Allegheny County, 7 Watts 366; Com. *v.* Kaufman, 9 Pa. Super. Ct. 310; Com. *v.* Fisher, 226 Pa. 189.

On the argument of the case it developed that there was a difference of recollection on the part of the district attorney and one of the attorneys for the defendant as to the order of the court made Sept. 8, 1915, continuing the trial to the next sessions. According to the recollection of the district attorney the attorney for defendant agreed and consented to such continuance, whereas according to the recollection of the attorney for defendant there was no such agreement and consent on his part. We cannot, however, pass upon the accuracy of recollection as between the two, but must take the record to be correct as we find it, and it shows a continuance on agreement of defendant's counsel, whether he did actually so agree or otherwise.

It has also been questioned as to whether § 54 of the act of 1860 can avail the defendant in this case. It is contended by the district attorney that it is available only for a defendant actually imprisoned, and not for a defendant who is under recognizance for his appearance at a future term of the court, as in this case. Neither the authorities cited, however, by counsel in their briefs, nor any we have been able to find, seem to settle conclusively the point raised. Counsel for defendant contend that the act referred to is as much for the benefit of a defendant under recognizance, as for one actually imprisoned. In support of this contention they rely especially on the case of Com. ex rel. Jack *v.* Jailer, etc., 7 Watts 366. But that case, in our opinion, does not rule this case. The facts in the two cases are very dissimilar. In that case the relator, on a writ of habeas corpus, had been bound over by the court of quarter sessions, during its session, to answer a charge of misdemeanor at that session. The Supreme Court held that the case came under § 6 of the act of Feb. 9, 1785, and that the writ, if returnable at all, was to the court of quarter sessions, who alone have jurisdiction. Sergeant, J., in his opinion says:

"It is a case, therefore, properly recognizable before the court of quarter sessions now sitting, and before no other tribunal, and the writ of habeas corpus is superfluous. It is the case contemplated by the act of assembly for which the habeas corpus is for this reason not provided, but on the contrary impliedly excluded. It was on the same general principles held by this court in ex parte Walton, 2 Wharton 501, that the power of discharging a prisoner under this act when he has not been tried at the second term, is confined to the court in which he is indicted; and this court will not interfere by habeas corpus for the mere purpose of granting the relief provided by § 3. For these reasons I am of the opinion that I have no jurisdiction upon the case arising under this habeas corpus, and that, if returnable at all, it can only be to the judges of the court of quarter sessions."

It will thus be seen that the analogy between this case and the one at bar is very slight, if, indeed, there be any analogy at all. Sadler in his Criminal Procedure, discussing the "two term rule," pages 260-262, after having referred to § 54, of the criminal code, and cited many adjudications thereunder, says:

"It would seem that all these acts referred to, providing for a discharge, were intended for the protection only of those imprisoned, and not for the defendant released on bail."

In support of this position he cites Respublica *v.* Arnold, 3 Yeates 263; Wentzel's Appeal, 160 Pa. 252. In the first of these two cases, which was a proceeding under the habeas corpus act of 1785, Yeates, J., says:

"Section 3 of the act directs that the justices of oyer and terminer shall, on the last day of the term, next after the commitment of the party, who shall not be indicted and tried, set at liberty the said prisoner, upon bail, etc. This clearly shows that the legislature did not contemplate a party admitted to bail, as a prisoner under commitment, besides confining the authority and requisition so to act, solely to the court, before whom the prisoner is to receive his trial. Would not a habeas corpus, directed to the bail of a supposed offender, be perfectly novel? Could we or either of us do an act, which would amount to a legal discharge of the recognizance in the court of oyer and terminer?"

In the same case, Smith, J., said "that the inclination of his mind was, that the habeas corpus would not lie to the bail; but declined giving any decided opinion on the point."

In Com. *v.* Fisher, 226 Pa. 189, Justice Mestrezat, delivering the opinion of the court, says:

"We may suggest, however, that the right of the defendant to be discharged under the "two term rule" is essentially a habeas corpus proceeding under § 54 of the act of March 31, 1860, P. L. 427, which is a reënactment of the act of Feb. 18, 1785, 2 Sm. L. 275, § 3. This proceeding is separate and distinct from the trial of the cause and is not reviewable on this appeal. Clark *v.* Com., 29 Pa. 129. If, however, the assignment is considered it must be overruled, because the continuance was caused by the condition or conduct of the defendant himself. He is therefore not in a position to take advantage of the statute."

We are of opinion that, under the facts of this case, and the authorities hereinbefore cited, the defendant is not entitled to a discharge under the "two term rule," and that the rule in this case, therefore, should be discharged.

And now, March 1, 1916, it is ordered and directed that the rule in this case, to show cause why the defendant, Charles Moore, should not be discharged from the custody of the sheriff, and from the custody of John J. Koebert and Jesse L. Ross, bondsmen on his recognizance, and that the said recognizances be cancelled, be and the same hereby is discharged.

From S. M. Williamson, Esq., Waynesburg, Pa.

Hallman's Assigned Estate.

Debtor's exemption—Assignment for the benefit of creditors —Acts June 4, 1901, P. L. 404, and June 19, 1911, P. L. 1069.

Under the act of June 19, 1911, P. L. 1069, amending § 31 of the insolvent act of June 4, 1901, P. L. 404, an assignor is not entitled to $300 exemption.

Rule to show cause why assignor should not deliver up to assignee personal property appraised and set aside as his exemption. C. P. Dauphin Co. Sept. T., 1915, No. 653.

Certain creditors entered certain judgments against the assignor, containing waivers of exemption, on certain of which executions were issued; whereupon assignment was made for benefit of creditors and executions were stayed.

September 13, 1915, the court appointed two appraisers, and the assignor claiming the $300 exemption as provided in

the act of 1901, personal property to the value of $300 was set aside and delivered to the assignor; whereupon the assignee petitioned the court to direct the assignor to turn over the said property thus set aside to the assignee for the creditors, contending that under the act of 1911 the assignor was not entitled to exemption.

Mark T. Milnor, for rule; *E. E. Beidleman,* contra.

McCarrell, J., April 27, 1916.—The within rule to show cause having been heard by the court, it is hereby ordered and decreed that the same be made absolute, and that the exempted property be returned to the assignee for the benefit of all the creditors of the assignee.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Littlewood & Sons.

Taxation — Manufacturing limited partnership — Dyeing woolen—Idle money in bank—Claim of exemption.

The fact that the accounting officers have heretofore regarded a defendant company as exempt from tax on capital stock is not conclusive.

A company, which does nothing more than dye the raw material, whether it be cotton or wool, subjecting it to the necessary processes to enable it to absorb the coloring matter and produce the desired color in the material, and does not weave the yarns into finished cloth, nor make garments from the cloth, is engaged in the business of manufacturing, and is exempt from taxation. Com. *v.* Quaker City Dye Works, 5 Pa. C. C. 94 followed.

Exemption cannot be claimed by such company for the money the company has allowed to accumulate in bank merely because of a disagreement between partners preventing distribution.

Such company, however, is permitted to have in bank so much cash as is reasonably necessary for the conduct of its business.

Appeals from settlements for tax on capital stock. C. P. Dauphin Co. Com. Docket, 1913, Nos. 142 and 143.

J. C. Bell, attorney-general, *W. M. Hargest,* second deputy attorney-general, for commonwealth.
F. W. Fleitz and *Cantrell & Cantrell,* for defendant.

McCarrell, J., May 26, 1916.—In each of the above cases trial by jury has been waived in pursuance of the act of assembly in such case made and provided. The appeals were

heard together and will be similarly disposed of. The defendant is a limited partnership, organized Sept. 11, 1898, under the laws of Pennsylvania. It claims that it is a manufacturing company, and that its capital so far as engaged in manufacturing is exempt from the payment of any capital stock tax. It further claims that it is not liable for capital stock tax upon balance of money held in bank during the years in question derived entirely from and claimed to be necessary to the business so conducted.

FINDINGS OF FACT.

The defendant is engaged in the business of dyeing cottons and woolens, scrubbing and washing the raw materials by chemicals, separating from the raw material oil and other substances so as to put the raw material in condition to absorb the colors used in dyeing. The testimony submitted shows that although engaged in business for many years, the accounting officers of the state have regarded it as a manufacturing company and as exempt from capital stock tax.

DISCUSSION.

The fact that the accounting officers have heretofore regarded the defendant company as exempt from tax upon its capital stock is not conclusive. The question still remains: Is the settlement of the accounting officers in accordance with the law imposing the tax? The defendant company does nothing more than dye the raw material, whether it be cotton or wool, subjecting it to the necessary processes and treatment to enable it to take and absorb the coloring matter and produce the desired color in the material or the yarns made therefrom. It does not weave the yarns into finished cloth, or make garments from the cloth. In Com. *v.* Quaker City Dye Works, 5 Pa. C. C. 94, this court considered and decided the identical question raised here. Judge McPherson thus concludes:

"It (the defendant) carries on the business of dyeing and finishing woolen and cotton goods and yarn, either belonging to itself or others. The woolen and cotton goods are sent to it in a rough and unfinished condition. They are passed through several processes, which cleanse and dry them, compact and arrange their fibers, give them varying appearance and consistency, dress their surface, and fully prepare them for market. Yarns are sent to it in a greasy condition and of a uniform gray color. They are scoured by machinery, washed

with a solution of alkali and soap, dyed whatever color is desired, and dried by rapidly revolving machinery, when they are ready either for the market or to be woven into carpet and other fabrics. . . . The defendant is a manufacturing corporation."

This case has been uniformly recognized by this court and we see no reason why we should not continue to follow it. The commonwealth, however, contends that all of the capital of the defendant company is not employed exclusively in the business of manufacturing. The testimony shows that many skilled men are necessarily employed in the conduct of the business of the defendant; that some of them by reason of long service are indispensable in the mixing of dyes and the producing of the desired colors, and that frequently much time is necessarily spent in securing the desired results. The testimony shows that it requires at least $15,000 a month to meet the ordinary expenses of its business without any allowance for contingencies; that the company started with $32,000 and increased it a little from year to year until for several years it carried an average balance in bank of about $50,000. In 1911, the balance was about $75,000, and in 1912, about $104,000, which the testimony shows was the result of two very successful years of business. A disagreement between the partners prevented the distribution of what ordinarily would have been paid out in dividends and partners' salaries. The exemption cannot be claimed for the money defendant allowed to accumulate in bank because of this disagreement. This accumulation was not employed in manufacturing and was not retained in bank because believed to be necessary for manufacturing purposes. It remained there solely because the partners who had the right to control it were unable to agree as to its disposition. It was therefore money belonging to the defendant company not actually and necessarily used in the manufacturing business, or reserved to meet the reasonable necessities of conducting the business. In Com. *v.* Altoona Foundry & Machine Co., 18 Dauphin 569, where the money of a manufacturing corporation was invested in its plant and machinery and the plant was not operated for a year because of business depression, we held that the defendant company was liable to tax on the value of its plant for that year. In this case the money, as already stated, accumulated in the bank because of a disagreement between the partners. The statutory condition for the allowance of the exemption therefore did not exist. The testimony of the treasurer shows that the amount deemed

necessary for the conduct of the business for several years prior to 1911, was $50,000, and we are of opinion that that amount in each of the tax years can properly be regarded as exempt from taxation. The defendant company being engaged in manufacturing is entitled to claim exemption for so much of its capital as is actually and exclusively engaged in manufacturing. The defendant company is permitted also to have in bank so much cash as is reasonably necessary for the conduct of its business. In Com. *v.* Dilworth, Porter & Co., Ltd., 242 Pa. 194, it is held that "when a corporation is created, or a partnership is formed, for the express purpose of engaging in the manufacturing business, it has the prima facie right to claim the exemption, and if any part of the capital is not entitled to exemption, such facts must be established as to warrant a finding by the court that it was not actually and exclusively employed in manufacturing."

In the present case the testimony shows that the tangible property of the company in 1911, was $5,192.52, and that the value of said tangible property in 1912, $5,324.28. The testimony of the treasurer shows that for several years the company had been in the habit of carrying a bank balance of $50,000, and that this sum was necessary to meet the reasonable contingencies of conducting the business. The tangible property on hand in each of the tax years and the money in bank reasonably necessary for the conduct of the business are, in our opinion, exempt from taxation. The total value of the capital stock according to the settlement for the year 1911, is $83,999. Deduct from this the value of the tangible property and the money in bank necessary for conducting the business and the balance of the capital stock liable to taxation is $28,806.48. The value of the capital stock as fixed by the settlement for 1912, is $110,999. Deduct from this the value of the tangible property and the money in bank necessary for the proper conduct of the manufacturing business, and we have the value of the capital stock for that year not engaged in manufacturing, $55,674.72.

CONCLUSIONS.

We accordingly find as follows:

Value of capital stock liable to tax for 1911.....	$28,806.48
Value of capital stock liable to tax for 1912.....	55,674.72
Total value liable to taxation for 1911 and 1912...	$84,481.20

The five-mill tax upon this value is.....	$422.40
Less amount paid to state treasurer, June 2, 1913..	80.00
Balance	$342.40
Interest Sept. 18, 1913, to May 18, 1916.....	54.78
Total tax and interest.....	$397.18
Attorney-general's commission five per cent.....	19.86
Total due commonwealth.....	$417.04

We therefore direct that judgment be entered in favor of the commonwealth and against the defendant for the said sum of $417.04, if exceptions be not filed within the time limited by law. From Paul A. Kunkel, Esq., Harrisburg, Pa.

Faust *v* Faust.

Divorce—Desertion—Marriage between first cousins—Incompatible causes.

A libel in divorce which charges desertion and that the libelant and respondent were first cousins, does not charge two incompatible causes for divorce, and a demurrer to the libel will not be sustained.

Demurrer to libel in divorce, brought to annul a marriage between first cousins. C. P. Centre Co. Feb. T., 1916, No. 52.

C. Dale, for libelant.

S. D. Gettig, John J. Bower and *W. D. Zerby,* for respondent.

ORVIS, P. J., July 24, 1915.—The plaintiff in her petition for a subpœna averred two grounds for her action, averring desertion by the respondent for a period exceeding six months prior to the date of the petition, and the fact that the marriage ceremony was had on Dec. 26, 1910, in violation of the provisions of the act of June 24, 1901, in so far as the plaintiff and respondent were first cousins, their respective mothers being full sisters.

The respondent has caused an appearance to be entered and on Feb. 23, 1915, a plea to be filed, averring a misjoinder, on the ground that the causes alleged are incompatible.

We do not see our way clear to sustain this plea. The two causes for divorce alleged in the plaintiff's libel are not incompatible. It is true she avers a desertion or separation by her reputed husband, but that very desertion or separation may be because the respondent has been advised that the marriage heretofore held by him to have been good or legal was and is

in fact not only voidable but absolutely void, and in the light of such knowledge their prior relationship, illegal and immoral. It is in fact the plain legal as well as a moral duty of either side after their knowledge of incestuous relationship to have the court set aside the marriage relationship so that it may appear of record that they no longer claim to be husband and wife. It is to the credit of the parties to the record that they have separated and do not persist in their incestuous relation.

Unfortunately, the respondent does not admit the relationship, and we cannot assume the ex parte statements of the plaintiff to be true, but if they are true the marital relationship should be dissolved of record as soon as possible, and in our opinion should not be delayed by legal quibble. The Superior Court has ruled in the case of McClain *v.* McClain, 40 Pa. Super. Ct. 248, that the marriage between first cousins is incestuous, and that either party is not only entitled to but should have the marriage annulled in divorce proceedings. As we have stated before, the allegation of separation prior to the institution of the proceedings is only not incompatible with such a situation, but is absolutely and morally the only course to be pursued by the parties. We therefore feel compelled to overrule the demurrer and direct the plaintiff to proceed to make her proof.

Commonwealth *v.* Grosscup.

Criminal law — Arrest of judgment — Plea of "autrefois acquit" — Indictment.

Where it does not appear from the record submitted under the plea of "autrefois acquit," what the facts were, and there is a controversy as to them, whether the plea is a good one or not must be decided by a jury.

Where the defendant moves for his discharge after producing a former record of acquittal in evidence, and after the witnesses have been heard for the commonwealth and for the defendant, and the court denies his motion and submits the matter to a jury, and the jury finds for the commonwealth upon the plea of "autrefois acquit," the defendant is not injured because the decision of the court on the motion is equivalent to a direction to find for the commonwealth, and the error in submitting the matter to the jury, if any, would be a harmless one.

Where an indictment contains two counts, but each count describes the same matter from two different points of view, and the jurisdiction as to each transaction was in this county, the mere fact that there was no specific reference to the offense described in the second count in the charge did not prejudice the defendant, as the punishment for the two offenses is the same, and if the defendant had desired fuller instructions, as to the second count, he should have presented a point.

[Commonwealth v. Grosscup.]

Motion in arrest of judgment. Q. S. Northampton Co. Dec. T., 1915, No. 23.

Frank B. McCluskey, district attorney, *Robert E. James,* assistant district attorney, and *Fred. B. Gernerd,* for the commonwealth.

Floyd B. McAlee and *Dallas Dillinger, Jr.,* for the defendant.

STEWART, P. J., March 6, 1916.—This is a motion in arrest of judgment. The defendant was tried at February sessions, and pleaded "autrefois acquit" and "not guilty." The jury were sworn to try each plea separately, and returned two verdicts, first on the plea of "autrefois acquit," a verdict for the commonwealth, and on the general plea, a verdict of "guilty." We instructed the jury that these two pleas were separate and distinct, and they were submitted as indicated in Com. *v.* Demuth et al., 12 S. & R. 389, and Solliday *v.* Com., 28 Pa. 13. No requests to charge were presented by the defendant. The defendant has filed seven reasons in support of his motion. They are all confined to the plea of "autrefois acquit." In support of that plea the defendant offered in evidence a certified copy of the record of a case, No. 42, January sessions, 1916, of the county of Lehigh, wherein it appeared that after a trial, Judge Groman had directed the jury to acquit the defendant for want of jurisdiction to try the offense. The defendant's counsel then proved the identity of the parties, and moved for the discharge of the defendant on the ground that he had been acquitted of the same offenses in Lehigh county. We denied that motion, and submitted certain questions of fact to the jury. The complaint is now made that we should have ended the matter in defendant's favor, as a matter of law. It must necessarily be that the defendant could only have been injured by the decision that the plea was not a good one. It surely made no difference to the defendant whether the plea was decided against him by the court or by the jury. He is interested in results, and not in methods. Our denial of his motion for a discharge was a decision in favor of the commonwealth. The error in submitting the matter to the jury, if there was any, was a harmless error.

In Trust Co. *v.* Motheral, 8 Pa. Super. Ct. 433, is was held: "To justify a reversal of a judgment after a trial, it must be made apparent from the record, not only that error has been committed but that it materially prejudiced the rights of the party complaining." See also Cox. *v.* Wilson, 25 Pa. Super.

Ct. 635. In referring to the same principle in a criminal case, Com. *v.* Railroad Co., 23 Pa. Super. Ct. 235, President Judge Rice said: "It is too well settled to require citation of authorities that an error which did the appellant no harm is not ground for reversal." See also Com. *v.* Kay, 14 Pa. Super. Ct. 376, and Com. *v.* Duffy, 49 Pa. Super. Ct. 344, at page 355.

Let us now consider whether the adverse decision upon the plea of "autrefois acquit" was justified by the law. To do this we must examine the nature of the plea. In Com. *v.* Railway Co., 14 Pa. Super. Ct. 336, we find the best statement of the rule first referred to in Heikes *v.* Com., 26 Pa. 513, as follows: "One test to ascertain whether a plea of autrefois acquit be a good bar, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Whether a former acquittal was for the same offense depends on the record pleaded and not on the argument or inference deduced therefrom. If that record shows that the evidence necessary to support a conviction on the present indictment would have been insufficient to procure a legal conviction on the former, the plea of autrefois acquit is not sustained."

In Com. *v.* Brown, 28 Pa. Super. Ct. 296, the above rule was referred to and Judge Henderson said: "The objection to the action of the court in directing a verdict for the commonwealth on the issue under the plea of former acquittal is not sustained. The burden of proving a prior acquittal is on the defendant and must be supported by the preponderance of evidence. The pleading involves matters of record and matters of fact. As already observed, the only evidence offered was the record of the former trial. There was no disputed questions of fact, and the defendant wholly failed to introduce evidence tending to show an identity of offenses. The evidence was clear that the offenses charged in the two indictments were distinct and separate. Where the facts are not controverted, the court has authority to direct a verdict for or against the commonwealth, as the case may require. Com. *v.* Tadricke, 1 Pa. Super. Ct. 555; Wharton Cr. Pl. & Pr., § 812. It does not appear from the record that an exception was taken to the direction of the court embraced in the last paragraph of the first assignment. Taking the whole charge, however, it is in substance an instruction to the jury that the defendant failed to offer any evidence in support of the plea of former acquittal, and the verdict must therefore be in favor of the commonwealth." It must be admitted that if the court in Lehigh county

had no jurisdiction, the verdict of acquittal directed by the court there is not a bar to this case, and that the defendant could not have been convicted in Lehigh county on the evidence which was produced at this trial. If the court had jurisdiction and made a mistake as to the law, and directed a verdict, that would be a bar, but absence of jurisdiction would not place him in jeopardy, when he pled in Lehigh county. Whether the court had jurisdiction could not be determined by an inspection of the record, and where the commonwealth by its witnesses, supported the contention that all the facts to make out the offense, took place in Northampton county, and where the defendant by his testimony supported the contention that all the facts took place in Lehigh county, the only way the matter could be decided was by referring the disputed questions of fact to a jury.

The case is not like Dinkey *v.* Com., 17 Pa. 126, or Com. *v.* Evans, 45 Pa. Super. Ct. 174, where it is apparent from the record that there was the same unlawful act underlying two separate charges; or like Com. *v.* Lloyd, 141 Pa. 28, where the defendant was punished for the act in one county and the attempt was made to punish him for the result in another. In most of those cases the matter can be determined as a matter of law, but in a case like the present the question of jurisdiction depends upon the jury's finding as to where the offense was committed. We think we were correct in submitting this question to the jury, but whether we were or not has not in any way injured the defendant, because our subsequent examination has convinced us that Northampton county has jurisdiction of this offense and Lehigh county did not have. We cannot sustain the first, second and seventh reasons. The third, fourth, fifth and sixth reasons refer to the second count of the indictment, and much stress is laid upon the alleged difference between the subject of the first count and the subject of the second count as to jurisdiction. The statute provides, "If any person shall, by any false pretense, obtain the signature of any person to any written instrument, or shall obtain from any other person, any chattel, money or valuable security, with intent to cheat and defraud any person of the same," etc. The first count is drawn upon the second clause, and the second count upon the first clause of the act. In each clause the same word "obtain" is used, and the same "intent to cheat and defraud any person of the same" applies not only to chattels, money or valuable securities, but also applies to any written instrument. The gist of the offense is not the mere signing

of Mrs. Bray's name, but it is the obtaining her signature to a deed with intent to cheat and defraud her of the deed to her property. The transaction set forth in the second count refers to the same property of Mrs. Bray mentioned in the first count, and the property of the defendant in the second count, located at Portland, is the same as his property referred to in the first count, and the amount of money which Mrs. Bray was defrauded of, is the same in both counts.

We believe the law as to false pretense is firmly settled by the case of Com. *v.* Schmunk, 22 Pa. Super. Ct. 348. The syllabus of that case is as follows: "In order to bring a case within the statute making it a misdemeanor to obtain goods under false pretense, the following things are alone requisite: (1) a false pretense; (2) an obtaining property by it; (3) an intent to defraud; and the correct way to determine whether any particular case falls within it, is, not to consider each of these things separately, but to look at them altogether; for no case is within the statute unless all of them coexist in it. 'To obtain from another any chattel or valuable security with intent to cheat and defraud any person of the same,' within the meaning of the statute, means and refers to the final step in the succession of rights and events by which the defendant gets, secures and obtains the chattel, money, or valuable security so as to complete the offense and consummate his purpose." Judge Orlady, in concluding that case, said, page 352, as follows: "We construe our statute to mean that the defendant shall be responsible for his deliberate acts in the jurisdiction where he planned to have and did in fact receive the fruits of his crime. However ingenious a fraud may be, it is none the less a fraud, and should not be held otherwise by giving his acts a legal effect which he did not intend. His purpose was to obtain and receive the goods in Pittsburgh." That case was affirmed in 207 Pa. 544, and Judge Brown expressly endorses the meaning of the word "obtain" given it by Judge Orlady. We do not agree with the contention that Justice Brown, in his definition of the word "obtain" has read anything into the act which was not fairly included in it. It would have been a useless thing to have made any distinction in our charge to the jury, between the two phases of the same matter, set forth in the counts separately. In our judgment the jurisdiction for each offense was in this county. It is, perhaps, true, as contended by the learned counsel for the defendant, that if they are right in their contention that the jurisdiction under the second count was in Lehigh county, that under Com. *v.* Tad-

rick, 1 Pa. Super. Ct. 555, and other cases cited, the verdict in Lehigh county would be a bar to both counts when tried in this county, because if the court in Lehigh county had jurisdiction over one of the two aspects of the same act, their action must necessarily have included the other. The finding of the jury was right as to both offenses, and as there is no difference in the punishment for either of the offenses, a general verdict has not prejudiced the defendant in any way.

In Com. *v.* Stern, 58 Pa. Super. Ct. 591, Judge Trexler said: "The defendant was found guilty on two counts of the indictment, each one presenting different phases of the same offense. He could not have been sentenced on each count. They did not charge separate offenses. They were only convenient divisions of the false testimony which the defendant was charged to have given under the one oath which was administered to him. A general sentence was imposed, as but one crime was committed. This sentence was supported by the verdict of guilty on the fourth and sixth counts, and were we to hold that he was not properly convicted on the sixth count, it would not affect in any manner the sentence, as the fourth count would still remain to support it. Johnston *v.* Com., 85 Pa. 54." If the defendant had desired any additional or fuller instructions as to the second count, he should have presented a point. In Com. *v.* Zappe et al., 153 Pa. 498, it was held: "If the trial judge fails to charge upon some point which counsel regard as essential, the judge's attention should be called to it before the jury leave the bar, in order that he may correct any omission." In Com. *v.* Boschino, 176 Pa. 103, it was held: "The court cannot be convicted of error in not giving instructions that were not requested by the party." See also Com. *v.* Merrison, 193 Pa. 613; Cooper *v.* Altoona C. C. & S. Co., 53 Pa. Super. Ct. 141; and Thompson *v.* Lumber Co., 55 Pa. Super. Ct. 302. As a matter of fact, upon a motion in arrest of judgment, the court is confined to the record. If the record shows that the verdict was right as to the first count, it is sufficient. See Hazen et al. *v.* Com., 23 Pa. 355; Com. *v.* Barge, 11 Pa. Super. Ct. 164. A careful consideration of the legal questions involved and of the evidence has entirely satisfied us that the verdict in this case is correct.

And now, March 6, 1916, motion of defendant in arrest of judgment is denied. Judgment is entered on the record, and defendant is directed to present himself forthwith for sentence.

From H. D. Maxwell, Esq., Easton, Pa.

Hawck *v.* Scranton Real Estate Co.

Practice (C. P.)—Amendment—Parties—Costs.

One who holds an order, from his debtor on another for wages, cannot sue the third party, in his own name, on the unaccepted order. A verdict recovered in such a suit will be set aside and judgment n. o. v. entered for defendant.

After a verdict and motion for judgment n. o. v. and new trial, plaintiff may amend, upon motion, and verdict is then not impeachable.

The costs incurred prior to amendment will be put upon the plaintiff because of his error.

Motions for judgment n. o. v., new trial and costs. C. P. Lackawanna Co. June T., 1912, No. 509.

A. G. Rutherford, for plaintiff.
Frank E. Donnelly, for defendant.

EDWARDS, P. J., April 19, 1916.—The last trial of this case was in the month of March, 1916. The verdict was for the plaintiff. We are now asked to enter judgment in favor of the defendant notwithstanding the verdict; or, to grant a new trial. We discharge both rules. The record will not sustain a judgment n. o. v. for defendant, and we cannot find adequate grounds for a new trial.

After the trial in November, 1915, which also resulted in a verdict for the plaintiff, we granted a rule for judgment n. o. v., and a rule for a new trial. Before these rules were disposed of, the plaintiff moved to amend the name of the plaintiff, so that it should read "A. W. Hawck to the use of Stephen Longo," instead of "Stephen Longo." The motion to amend was not made until after the trial was over and a verdict rendered. We allowed the motion to amend. Had this motion not been made and allowed, the rule for judgment n. o. v. would have been made absolute. The result of the amendment was to prepare the way for a trial on a correct basis. It appears that plaintiff's cause of action rested on an order given by A. W. Hawck to Stephen Longo directing the Scranton Real Estate Company to "pay to bearer the sum of $97.80 in full for labor on job," etc. Hawck was a contractor engaged in constructing a building for the defendant, and Longo was a laborer. Longo presented the order, but there was no written acceptance of the order. The acceptance would have to be in writing in order to bind the defendant, the suit having been brought by Longo in his own name. At the last trial, and after the amendment had been

allowed, the plaintiff's claim came before the court as an equitable assignment of money due from the defendant to Hawck, if any was due; and the right of Longo to recover, in such a case, depended necessarily on the state of the accounts between the defendant and Hawck. This opened the door to a wide inquiry and consumed much time at the trial.

The suit was undoubtedly started in the wrong way. This was the fault of the plaintiff. The error ran through the whole proceedings, beginning with the hearing before the alderman and continuing through the trial before the arbitrators, and, afterwards, in court. One of the results was the accumulation of costs. We have decided that the plaintiff shall be liable for all costs accruing up to Dec. 21, 1915, when the amendment was allowed. Defendant has made a motion to this effect, and it is allowed; and the amount of these costs may be deducted from the amount of the verdict on settlement of the case.

Recapitulating, we make the following orders: The rules for judgment n. o. v. and for new trial are discharged; and the motion as to costs is allowed.

From William Jenkins Wilcox, Esq., Scranton, Pa.

Commonwealth v. O'Brien.

Criminal law—Statutory burglary—Act of March 13, 1901, P. L. 49—Larceny—Separate indictments—Former acquittal.

Defendants were indicted under the act of March 13, 1901, P. L. 49, for breaking into and entering a beer warehouse, with intent to steal therefrom a lot of beer, etc. Upon this indictment the court directed a verdict for defendants. To a second indictment based upon the same return and charging larceny, defendants pleaded former acquittal. Held, that acquittal on the first indictment did not work an acquittal of the larceny charge.

Larceny is not an essential element in the crime of burglary; it is not necessarily included in it.

Larceny. Q. S. Schuylkill Co. March Sess., 1916, No. 359.

C. A. Whitehouse, district attorney, *Le Roy Enterline,* with him, for commonwealth.

James F. Minogne and *M. A. Kilker,* for defendants.

KOCH, J., April 24, 1916.—The defendants were indicted to March session, 1916, No. 359, the indictment being founded

upon the same information and return as the indictment now before us is founded. In the former indictment it is charged that the defendants on March 6, 1916, "did unlawfully, willfully, maliciously and feloniously break and enter the certain building or beer saloon of William Hulshoes . . . with intent to steal a lot of whisky, beer and cigars, the goods and chattels, money and property of him, the said William Hulshoes, in the said building or saloon then and there being found, then and there feloniously there to steal, take and carry away," etc. The defendants were tried on that indictment and acquitted by direction of the court. In the indictment now before us the charge is that the defendants on March 6, 1916, "stole a lot of whisky, beer and cigars of the value of $5, of the goods and chattels, money and property of William Hulshoes then and there being found, then and there feloniously did steal, take and carry away," etc. The special plea of autrefois acquit and the demurrer thereto raise the question whether the defendants' acquittal under the first indictment presents an impassable bar to their prosecution for larceny under the second indictment.

We assume the first indictment was drawn over the § 1 of the act of March 13, 1901, P. L. 49, which denounces as a serious crime the willful or malicious entry, either by day or night, of any house, shop, warehouse, store, mill, barn, stable, outhouse or other building with or without breaking, with intent to commit any felony whatever therein. Now there are a great many felonies, and we shall assume that reference to the particular felony intended should be made in the indictment, notwithstanding the fact that the syllabus in Com. *v.* Brown, 3 Rawle 207, says: "In an indictment for burglary it is not necessary to charge the prisoner with having broken and entered the prosecutor's house with an intent to commit a felony therein." The special plea says "that the prosecutor in both of said indictments as well as the defendants are the same identical persons; that the property referred to in both of said indictments are the same identical goods and chattels; that the criminal acts charged in both indictments arise out of the same transaction and were committed or charged to have been committed at the same identical time and place; that both of said indictments are based on the same information and return," etc.; and the district attorney's demurrer must be taken as admitting the facts thus set out in the plea.

The first indictment charges what is sometimes called statutory burglary. The crime is not made out unless there be proof

of an unlawful or malicious entry with intent to commit a felony. The entry and the intent must be coexistent. The absence of either must work the acquittal of the accused. The intended felony need not be larceny. It may be felony such as rape, arson, murder, assault and battery with intent to kill, or any other felony. Therefore, larceny is not an essential element in the crime; it is not necessarily included in it.

In Tadrick's Appeal, 1 Super. Ct. 555-565, speaking of the crime defined in said act of 1901, the court said: "It is complete the moment one willfully and maliciously crosses the threshhold with intent to steal and before any further attempt has been made to commit the larceny." The defendants claim that larceny is included in the crime charged in the first indictment; that it is a lesser crime included in a greater. If the position of the defendants be correct, it becomes evident that, were the expressed intent to commit murder, murder would necessarily have to be regarded as a smaller crime than an entry with an intent to commit murder, which is absurd. Illustrations of lesser crimes included in the crime charged are assault and battery in charges of assault and battery with intent to kill or in rape; fornication in charges of seduction, adultery and rape; manslaughter in the charge of murder, because these lesser crimes are respectively included necessarily in the greater crimes. They are essential constituents thereof or ingredients therein. Now it cannot be said that larceny or even an attempt at larceny is an ingredient or essential constituent of burglary or of the crime defined in the act of 1901, supra. The essentials of the crime defined by the act of 1901 are an unlawful or malicious entry and an intent to commit a felony, irrespective of what that felony may be, whether it be larceny, arson, rape, murder, or any other felony.

"The general rule is well settled that upon an indictment charging a particular crime the defendant may be convicted of a lesser crime included within it." Com. *v.* Adams, 2 Pa. Super. Ct. 46; Dinkey *v.* Com., 17 Pa. 126; Hunter *v.* Com., 79 Pa. 503; Com. *v.* Arner, 149 Pa. 35. And an acquittal or conviction on such an indictment is a bar to further prosecution. In Dinkey *v.* Com., 17 Pa. 126, where one was tried and acquitted of seduction, the court sustained a plea of autrefois acquit on a charge of fornication and bastardy. Chief Justice Black said "the general rule is that where an indictment charges an offense which includes within it another and less offense the party may be convicted of the latter if he is guilty, and acquitted of the former, if the evidence makes it proper. For instance,

on an indictment for murder, there being no sufficient proof of malice, the jury may find a verdict for manslaughter. A person charged with burglary and stealing may be convicted of larceny, if the proof fail of the breaking and entering." In support of his statement in reference to burglary and larceny the chief justice refers to Shouse *v.* Com., 5 Pa. 83, where Justice Burnside said: "When a count in an indictment contains a divisible averment, it is the province of the petit jury to discriminate and find the divisible offense; and this distinction runs through the whole criminal law. It is enough to prove so much of the indictment as shows that the defendants, or anyone of them, has committed a substantial crime therein specified; 2 Camp. 585; Roscoe, Crim. Ev., 76 (92); as upon an indictment for murder, a person may be convicted of manslaughter; or, on an indictment for burglary and larceny, the jury may find him guilty of the simple felony, and acquit him of the burglary. 2 Hale P. C., 302."

When the case of Hunter *v.* Com., 79 Pa. 503, came to be considered by the Supreme Court, they said, on page 506: "The general rule is well settled that upon an indictment charging a particular crime, the defendant may be convicted of a lesser offense included within it. Thus, upon an indictment for murder, the prisoner may be convicted of manslaughter; a person charged with burglary may be convicted of larceny, if the proof fail of breaking and entering; a person charged with seduction may be convicted of fornication; Dinkey *v.* Com., 17 Pa. 127; when persons are indicted for riotous assault and battery they may be convicted of assault and battery only; Shouse *v.* Com., 5 Pa. 83; when the charge is assault and battery, a conviction may be had for assault. Instances of this kind might be multiplied indefinitely if necessary." Now a comparison of the three quotations just made shows that the Hunter case overlooked the fact that in the Shouse case the court said, "On an indictment for burglary and larceny the jury may find him guilty of simple felony and acquit him of the burglary," and that in the Dinkey case the court had said, "A person charged with burglary and stealing may be convicted of larceny, if the proof fail of the breaking and entering."

In Tadrick's Appeal, 1 Pa. Super. Ct. 555, the Superior Court quotes apparently with approval from 1 Bishop Crim. Law, § 1062, and Wharton's Crim. Evi., § 580, as follows: "An acquittal of burglary with intent to commit a larceny is

no bar to subsequent prosecution for the larceny charged to have been actually committed, and a conviction for the larceny is not a bar to a subsequent indictment for breaking and entering with intent to commit a larceny."

In Hollister *v.* Com., 60 Pa. 103, we are told that "without defining the certainty that is required in an indictment for felony, it must certainly be so precise in all cases as to furnish the accused with 'the nature and cause of the accusation against him.'" The indictment charged burglary and larceny, and the defendant was convicted generally and sentenced accordingly. The judgment was reversed because the facts did not warrant an indictment for burglary, but the Supreme Court said, "Had the jury returned a verdict of 'not guilty of burglary' but 'guilty of larceny,' we do not say but that even under this indictment the conviction might have been sustained."

The defendants argue that though the facts in the case did not warrant a conviction for breaking and entering with intent to steal, they might have been convicted of an attempt at larceny if the facts warranted it. There is a vast difference between intent and attempt. An intention to do a thing and an attempt to do it are surely not identical. An intent can exist only in the mind; it requires no physical effort or overt act to support it. An intent is passive; an attempt is active. Intent is the purpose or design of thought; attempt is, so far as criminal law is concerned, the effort to effectuate that purpose or design. A mere intent is not indictable. It simply serves to show criminality in some overt act. To enter a store with an intent to purchase goods is not indictable, but entering the same with intent to steal goods is criminal because the act of 1901, supra, makes it so. An intent to enter a store with intent to steal goods there is not indictable without an actual entry or attempt of entry. Suppose A. intended to enter B.'s store with intent to steal goods there and was apprehended and thereby prevented as he was about to enter the store; if A. were indicted under the act of 1901 he could not be convicted of the felony, but he could be convicted of an attempt to commit the same. Act March 31, 1861, P. L. 442, § 50. He could not, however, be convicted of an attempt to commit larceny, because the attempt was not to commit larceny; the attempt was to enter the store with intent to commit larceny. Suppose now that B. had previously removed all his goods from the store; A. could, nevertheless, be convicted of an attempt to enter with intent to steal, but he could not be convicted of an attempt to steal because there would be nothing

that he could possibly attempt to steal, although he could attempt to enter with intent to steal.

"Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first, the plea of autrefois acquit is generally good, but not otherwise." Com. *v.* Trimmer, 84 Pa. 69; Heikes *v.* Com., 26 Pa. 513; Hilands *v.* Com., 114 Pa. 372.

In the Hilands case just cited, Hilands was tried for murder and escaped legal conviction. He was then indicted for involuntary manslaughter and his conviction was sustained. Justice Paxson, speaking for the Supreme Court, said: "The failure of the commonwealth to convict of the higher crime does not preclude her from establishing a lesser crime even though arising from the same state of facts. The evidence necessary to establish involuntary manslaughter is essentially different from that required to support an indictment for murder." In the case before us the evidence necessary to support the charge of larceny is obviously not sufficient to procure a legal conviction on the indictment charging breaking and entering with intent to commit a felony.

"The criterion is: does the result of the first prosecution negative the facts charged in the second? If it does, the acquittal of the first pronounces him guiltless of the facts necessary to establish the second and admits the plea of jeopardy." Com. *v.* Cuff, 34 Pa. C. C. 454 (Schuylkill county).

How does the acquittal of an unlawful, willful, malicious and felonious breaking and entering with intent to commit larceny negative the facts necessary to prove larceny or an attempt to commit larceny? If the first indictment had contained a charge of larceny, and the defendants had been acquitted the case would be ended. It seems clear that the plea of autrefois acquit cannot prevail.

The demurrer is sustained.

Kroshinsky *v.* School District.

School law—Contract for building—Requirements of advertisements—Practice.

The school code, act of May 18, 1911, P. L. 309, requires advertisement for bids on building contracts, and the advertisement must include information as to when the building must be completed. When the advertisement is defective in this particular, if a contract is awarded, the erection of a building will be enjoined.

Rule for preliminary injunction. C. P. Lackawanna Co. Jan. T., 1916, in equity, No. 6.

George Morrow, for plaintiff.
Taylor & Lewis and *M. J. Martin*, for defendant.

EDWARDS, P. J., Dec. 22, 1915.—The injunction prayed for in this case is for the purpose of restraining the Dickson City borough school district from erecting a certain school building. The contractor and the architects are joined as defendants. Three grounds for relief are assigned:

1. The contract price for the erection of the school building increases the indebtedness of the district to an amount in excess of two per cent. of the assessed valuation of the district, no election having been held authorizing such an increase of indebtedness.

2. The plans and specifications prepared by the architects were not equally and freely accessible to all who desired to compete for the contract.

3. The specifications failed to indicate a time when the building was to be completed.

As to the increase of indebtedness, the evidence is not clear, and, on the present showing, an injunction should not be awarded on that ground. The second proposition is well established by the evidence. The advertisement for bids stated that plans and specifications could be "secured" from the architects; but it is clear that at least one of the intending bidders could not get the plans, etc., when he applied for them.

There can be no dispute as to the third proposition. The bidders, so far as the record shows, had no information as to when the building was to be completed. The specifications are silent on this point. In the case of Edmundson *v.* Pittsburgh School Dist., 248 Pa. 559, it is held that "where the specifications for the erection of a public school building let under the provisions of the act of May 18, 1911, P. L. 309, contain no notice as to the time for completing the contract, and each bidder specified his own time, there was no common basis upon which the bids could be computed"; and therefore the "letting was illegal, and upon bill in equity by a taxpayer, the erection of the building was restrained."

In view of the evidence the rule in this case is made absolute.

Now, Dec. 22, 1915, a preliminary injunction is awarded as prayed for in plaintiff's bill; bond required in the sum of $1,500. From William Jenkins Wilcox, Esq., Scranton, Pa.

Commonwealth *v.* Myton.

Criminal law—Automobiles—Violation of danger signal—Act of July 7, 1913, P. L. 672.

In order to convict a defendant of violating that part of § 13 of the act of July 7, 1913, P. L. 672, requiring every operator of a motor vehicle to sound his horn where the proper authorities have erected danger signs, it is necessary to show that the danger sign was erected by the proper authorities.

In the case of a borough, the proper authorities are not the constables, but the council and burgess who comprise the legislative body; constables have no authority to erect such signs unless duly authorized.

Motion in arrest of judgment. Q. S. Dauphin Co. Sept. Sess., 1914, No. 174.

Fox & Geyer and *J. F. Weiss,* for motion.

M. E. Stroup, district attorney, and *Wickersham & Metzger,* contra.

JOHNSON, P. J. (17th judicial district, specially presiding), July 19, 1915.—The defendant was indicted and tried on a charge of violating that part of § 13 of the act of July 7, 1913, P. L. 672, which reads as follows: "Every operator of a motor vehicle shall sound his horn, bell or signal device, giving reasonable warning of his approach, whenever necessary to insure the safety of other users of the highways, and also when approaching a street or road crossing, dangerous curve, in any of the cities, boroughs, or townships of this commonwealth, where the proper authorities shall have erected signs, easily readable from the highways and at right angles thereto, bearing thereon, in letters at least five (5) inches in height, the words, 'Danger: blow your horn.'"

At the trial the jury rendered a verdict of guilty, whereupon the defendant moved for judgment notwithstanding the verdict, in arrest of judgment, and for a new trial.

Two constables of the borough of Middletown of their own motion and without any direction from the borough council, erected at a curve in West Main street the sign, "Danger: blow your horn," as provided by § 13 of the act of July 7, 1913, P. L. 672. At the curve, the middle line in the street forms the division line between the borough of Middletown and Lower township, and the borough has control over that part of the street lying within its limits and the state highway department has control over that part of the street without the

limits of the borough and within the township. The sign was erected on the township side of the street.

The defendant contends, first, that the borough council and not the borough constables are the "proper authorities" intended by § 13 of the act of July 7, 1913, P. L. 672; secondly, that the borough authorities had no right to erect the sign outside the limits of the borough, though the curve in the street is partly within the limits of the borough; and, thirdly, that at the place in question the state highway department has exclusive jurisdiction to erect danger signs.

We are of the opinion that the proper authorities of the borough of Middletown had jurisdiction to erect the sign, "Danger: blow your horn," in accordance with provisions of § 13, of the act of July 7, 1913, P. L. 672. It was the duty of the borough authorities to maintain the part of the street lying within the borough in a reasonably safe condition, and it was the duty of the state highway department to maintain that part of the street lying within the township in a reasonably safe condition. And the defendant is not in a position to complain, if the proper authorities of the borough of Middletown, in endeavoring to provide for the safety of the street at the curve in question, and especially that part of the street within the jurisdiction of the borough, erected the proper sign on the township side of the street.

But the more serious question here is the power or authority of the constables of the borough of Middletown to erect such signs. Section 13 of the act of July 7, 1913, P. L. 672, requires every operator of a motor vehicle to sound his horn, bell or signal device, giving reasonable warning, "when approaching a street or road crossing, dangerous curve, in any of the streets, boroughs or townships of this commonwealth, where the proper authorities shall have erected signs easily readable from the highway, and at right angles thereto, bearing thereon in letters at least five (5) inches in height, the words, 'Danger: blow your horn.'"

To convict the defendant in this case it is necessary to show that the danger sign was erected by the "proper authorities" of the borough of Middletown. The question here is, who are intended as the "proper authorities" to erect the danger sign, the borough council and burgess, or the constables? The act to be performed by the "proper authorities" is an important one. It is in the nature of a legislative act. The safety, as well as the liberty of all who travel the streets and highways, is involved. Failure to give the proper signal on approaching a

curve where the proper danger sign is erected subjects the operator of the motor vehicle to a fine, and upon failure to pay same, to an imprisonment.

Section 6 of the act of Feb. 19, 1828, P. L. 96, incorporating the borough of Middletown, provides that "the town council so chosen, or the majority of them, shall have full power and authority to make and enact such ordinances, rules and regulations as may be necessary for improving and keeping in order the streets, lanes, alleys, public squares and common ground belonging to said township with the said borough and removing nuisances or obstructions therefrom and the same to annul, alter or make new as occasion may require, and shall have all powers necessary for the well ordering and better government of the said borough."

Section 1 of the act of April 3, 1851, P. L. 320, commonly known as the general borough act, authorizes the burgess and town council of boroughs to "make such laws, ordinances, by-laws and regulations, not inconsistent with the laws of this commonwealth, as they shall deem necessary for the good order and government of the borough."

As to constables, "their first duty is that of keeping the king's peace. In addition, they are to serve warrants, return lists of jurors, and perform various other services enumerated in Coke, 4th Inst. 267; 3 Steph. Com. 47; Jacob Law Dict." I Bouv. Law Dict. 410. "The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts." 1 Bla. Com. 356.

The borough council and burgess are the legislative body of a borough. They are the "proper authorities" intended in § 13 of the act of July 7, 1913, P. L. 672. By their resolution or ordinance duly enacted the erection of the danger sign in question must be authorized, and the constables have no authority to erect such signs unless duly authorized by the burgess and town council.

It follows, therefore, that the defendant was not guilty in failing on June 7, 1914, to heed the sign, "Danger: blow your horn," erected without authority by the constables of the borough of Middletown, and the jury should have been directed by the court to render a verdict of not guilty. The verdict of guilty must therefore be set aside.

And now, July 17, 1915, the verdict of guilty of the jury is set aside.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Engle *v.* Brotherhood of Locomotive Engineers.

Beneficial associations—Brotherhood of Locomotive Engineers—Membership—Expulsion of member—Illegal corporation.

Where it appears that the statutes of the Brotherhood of Locomotive Engineers provide that no member of the brotherhood shall be allowed to join any other labor organization, and also provide that any member feeling aggrieved by the decision of his division, may appeal to the grand chief engineer from whom whose decision an appeal may be taken to the grand international division convention, a member who has been expelled from his division and who has unsuccessfully appealed in turn to the grand chief engineer, and to the grand international division convention, cannot complain that he was injured, by the fact that the grand chief engineer decided before any action was taken that an association to which the member belonged was another labor organization, and directed the division to expel the member because he had joined such other organization.

Where a bill in equity is filed by a member of a beneficial association to secure his reinstatement to membership, and he avers in his bill that there is a vicious and unlawful principle and purpose contained and manifested in the constitution, statutes and rules of the said association, and a demurrer is filed to the bill, the court will be bound to sustain the demurrer which admits the truth of the charge, as equity will not lend its assistance to reinstate a member within the fold of such an association.

Bill in equity for an injunction. C. P. Schuylkill Co. Jan. T., 1916, No. 4.

John G. Johnson, George M. Roads and *Cyrus G. Derr,* for plaintiff.

Oscar J. Horn and *C. E. Berger,* for defendants.

BECHTEL, P. J., March 6, 1916.—This case comes before us on a bill in equity, to which a demurrer has been filed. We do not deem it necessary to recite the bill at length, it being very lengthy and exhaustive, but we will refer simply to those allegations which we deem necessary in disposing of the question before us.

The plaintiff in the case became a member of the defendant organization in the year 1910, being affiliated with Pottsville Division No. 90; that on Feb. 23, 1914, the plaintiff joined the Mutual Beneficial Association of Pennsylvania Railroad Employés, Incorporated; that by § 39 of the statutes of the said Brotherhood of Locomotive Engineers it is provided that no member of the said brotherhood, who is in active service, shall be allowed to join any other labor organization, excepting the Order of Steam Engineers, under penalty of expulsion by his division. That by § 37 of the statutes of the said

brotherhood it is provided that any member feeling that injustice has been done by the decision of his division, may appeal to the grand chief engineer of the brotherhood, whose decision shall be final, unless reversed by the grand international division convention. That on or about March 25, 1914, W. S. Stone, grand chief engineer of the said brotherhood, in a letter to P. J. Hayes, chief engineer, and H. E. Wilson, secretary-treasurer of the said Pottsville Division No. 90, announced his decision that the said the Mutual Beneficial Association of Pennsylvania Railroad Employés, Incorporated, is a labor organization, and therein ordered that a charge, under § 39 of the statutes of the brotherhood, be preferred against any member who had joined the said beneficial association. That pursuant to the said decision and order of the grand chief engineer, the said P. J. Hayes, chief engineer, preferred a charge against the plaintiff for a violation of § 39, and the plaintiff was furnished with a copy of said charge, and notified to appear and did appear for trial. At a meeting of the said division held at Pottsville, June 22, 1914, when the plaintiff's case was taken up, plaintiff admitted that he had joined the said the Mutual Beneficial Association of Pennsylvania Railroad Employés, but declared that the said association was not a labor organization within the meaning of § 39 aforesaid. That after plaintiff had spoken, the chief engineer of said division presiding over the meeting, declared to the members that the grand chief engineer had decided that the said beneficial association is a labor organization; that he would not have so decided without good legal authority, and that he had ordered the expulsion of the plaintiff, and that the division must obey him or lose its charter. A vote of the members present was then taken and the plaintiff was declared guilty of having violated § 39, and thereupon another vote was taken whereby plaintiff was expelled from the said Pottsville Division No. 90.

That on July 21, 1914, plaintiff forwarded to the said W. S. Stone, grand chief engineer, his appeal to him from the decision of the Pottsville Division as aforesaid; and the said grand chief engineer, Aug. 31, 1914, made a decision that the said Pottsville Division had complied with the law in dealing with plaintiff's case; and that the said ruling would stand unless reversed by the next convention of the Grand International Division. That Feb. 20, 1915, the plaintiff appealed from the said decision of the grand chief engineer to the Grand International Division, which body, on May 22, 1915, having appointed a committee to investigate and the said committee hav-

ing made a report that it could find nothing to sustain the contention that the Mutual Beneficial Association of Pennsylvania Railroad Employés, Incorporated, was not a labor organization, as well as a beneficial association, recommended that the said action and decision of the grand chief engineer be sustained, and the convention accordingly adopted the said committee's report.

The plaintiff contends that the decision of the said grand chief engineer, that the said the Mutual Beneficial Association is a labor organization, before any controversy had arisen and before any charge had been preferred against plaintiff, was irregular and illegal, and constituted a prejudging of the case without any hearing given, and that, therefore, all the proceedings had thereunder were null and void. The plaintiff further avers that there is a vicious and unlawful principle and purpose contained and manifested in the constitution, statutes and rules of the said brotherhood, and that said § 39 of the statutes has, in the case of plaintiff, been made to do service in furtherance of such unlawful purpose and principle, whereby the said action of Pottsville Division No. 90, and the said action of the grand chief engineer and of the Grand International Division, taken thereunder, is rendered void.

The plaintiff further avers that the defendants and other officers and members of the said brotherhood, acting in harmony with them, unlawfully combined and conspired, by means of the constitution, statutes and rules of the said brotherhood, and the system of coercion and strikes established thereby, and by the unreasonable and unlawful subjecting and keeping subjected of the members of the said brotherhood to the general committees of adjustment and the chairman thereof, or of a two thirds majority of the members affected, to expel the plaintiff. And the bill concludes with a prayer that it be adjudged that the action of Pottsville Division No. 90, expelling the plaintiff from membership was and is void and of no effect, and that the officers and members of the said Pottsville Division No. 90 be commanded to recognize the plaintiff as a member thereof and to take such action as shall be necessary to entitle the plaintiff to all the rights of membership of the said division and brotherhood.

The defendants' demurrer to this bill is, first, that upon the face of the said bill, plaintiff is not entitled to the relief claimed; second, that upon the face of the bill it appears that the plaintiff does not come into court with clean hands; third, that upon the face of the bill it appears that the plaintiff seeks rein-

statement in an unincorporated association, which he alleges is founded upon a vicious and unlawful principle contained and manifested in its constitution, statutes and rules; fourth, that upon the face of the bill it appears that the plaintiff seeks reinstatement in an unincorporated association of which he alleges that the defendants and other officers and members of the said unincorporated association have unlawfully combined and conspired, by means of the constitution, statutes and rules of the said association, to interfere with the transportation of the United States mails, and to impair the constitutional right of the United States to regulate commerce with foreign nations and among the several states; fifth, that upon the face of the bill it appears that the plaintiff seeks reinstatement in an unincorporated association, which he alleges to be by virtue of its constitution, statutes and rules, an association existing contrary to the statutes and laws of the United States, and in violation of the policy thereof.

It will be noted that these contentions can be narrowed down to practically two questions, first, Should the court declare that the proceedings relative to the expulsion of the plaintiff were irregular and null and void? Secondly, Does the plaintiff come into court in such a position as that the chancellor should lend him his aid? We will consider these questions in the order in which they have been herein set forth.

Section 39 of the statutes of the International Brotherhood of Locomotive Engineers, provides: "No member of this organization who is in active service shall be allowed to join any other labor organization, except the order of steam engineers, under penalty of expulsion by his division."

There is no denial of the fact that plaintiff did join another organization, and that the grand chief of the locomotive engineers declared this organization to be a labor organization. It is contended that this was a prejudging of the case, and that that being so, the plaintiff did not secure or was not given a fair trial by his local division. Our attention has not been directed to any by-law or provision of the constitution of the defendant brotherhood which gives to any particular organization or officer within it the right to determine whether or not the Mutual Beneficial Association is a labor organization. Section eight, of the constitution, in defining the duties of the grand chief engineer, provides, inter alia: "He shall be the official head of the order and have the general directions of the assistant grand chiefs in their work, and shall exercise full control over the grand office and the order in general."

Section 3 of the constitution, in defining the duties of the grand international division, provides, inter alia: "It shall have exclusive jurisdiction over all subjects pertaining to the brotherhood, and its enactments and decisions upon all questions are the supreme law of the brotherhood, and all divisions and members of the order shall render true obedience thereto."

It will be noted that there were but two questions involved at the trial of the plaintiff; the one was whether or not the Mutual Beneficial Association was a labor organization, the other whether or not plaintiff had joined it. The plaintiff admitted that he had joined it, thus leaving for consideration but the one question, as to the character of the organization he had joined.

It is contended that this having been decided by the grand chief engineer in advance, there was nothing left for the local division to decide, and that the local division should have been permitted to decide for itself the character of the organization with which plaintiff had affiliated himself. We do not agree with this contention. It may be easily understood that the permitting of a local division to decide this question might result in many different decisions, in accordance with the views of the different local divisions acting upon the subject-matter, and it is too plain for argument that this would result in confusion in the order. But granting for the sake of argument that the grand chief engineer exceeded his authority in declaring the Mutual Beneficial Association to be a labor organization, in advance of the trial of the plaintiff for joining it, the plaintiff appealed to the same grand chief engineer, in accordance with the method prescribed in the by-laws, for a reversal of that decision. The grand chief engineer sustained the decision, and thereupon an appeal was taken to the grand international division on the sole question, as to whether or not the Mutual Beneficial Association was a labor organization. The grand international division decided that it was. There can be no successful attack made upon its authority so to do; it is the supreme and final arbiter of all questions arising in the order.

It is not contended that the grand international division exceeded its authority in its decision, nor is it contended that the appeal was not given the consideration due it, but simply that the plaintiff was prejudiced by the action of the grand chief engineer. As this was the only question left to be decided in his case, and as it has been decided finally by the grand international division, whose duty it was to pass upon it, we

are of the opinion that the plaintiff has no cause of complaint of the action of the grand chief engineer.

The second question, however, we consider of far more importance to the plaintiff than the one we have just discussed. In reply to the demurrer, counsel in their brief say that the plaintiff alleges not that the brotherhood is founded on a vicious and unlawful principle, but that its laws contain a vicious and unlawful principle. The allegation in the bill is that there is a vicious and unlawful principle and purpose contained and manifested in the constitution, statutes and rules of the said brotherhood. The demurrer admits the truth of this allegation. It must necessarily do so. It is very difficult for us to understand the distinction made by counsel for the plaintiff. This is an unincorporated association and it is admitted that there is a vicious and unlawful principle and purpose contained in its constitution, statutes and rules. How can we divorce the organization from its constitution and statutes? If they contain vicious principles, is not the organization vicious? If the organization is vicious, shall equity lend its assistance to reinstate a member within its fold?

In Greer, Mills & Co. *v.* Stoller et al., 77 Fed. Rep. 1, the court said:

"So that the complainant occupies in this controversy the anomalous attitude of claiming the privileges and benefits attaching to and ensuing from the association, while denouncing as illegal and inoperative that portion of the articles designed to make the combination effective and obligatory on the associates. It may be conceded that in respect of a certain character of contracts they may be good in part and bad in part, so that the court may enforce that which is valid and reject that which is vicious; but that is not this case. The rights of the complainant being bottomed on its having become a member of the association by subscribing to its articles and its body of by-laws, can it, under such a compact, ask a court of equity to restore it to fellowship, while rejecting a part of the creed of the order? As said by Chief Justice Coleridge, in Steamship Co. *v.* McGregor, 21 Q. B. Div. 544: 'It is a bargain which persons in the position of the defendant here have a right to make, and those who are parties to the bargain must take it or leave it as a whole.'

"So, waiving any question of whether or not certain provisions of the articles of agreement and by-laws are contrary to public policy, the fact remains that, had the complainant declined, when it applied for admission into the association, to

subscribe to and accept the articles and by-laws as a whole, it would not have been admitted to membership. In such contingency, it would hardly need the citation of authorities to command the assent of the learned counsel representing this complainant to the proposition that no court would issue a mandatory injunction compelling the admission of such an applicant to membership, for the palpable reason that it is entirely a matter of contract, and it takes two parties to make a contract; and courts ought never to undertake to make a contract between two free, responsible persons. It does seem to me that this complainant must choose to be either in or out of this association. It cannot be half in and half out. If a member, and the contract of membership be what is sometimes inaptly termed 'illegal,' but is simply one in contravention of a sound public policy, it is one which the courts do 'not prohibit the making of,' but which they will simply 'not enforce.' And the converse of the proposition must hold good—that, if he be outside of such an association, he cannot appeal to a court of equity to reinstate him after expulsion; nor can he base any right of action on the alleged illegal character of part of the articles of association of the exchange or its by-laws so long as he insists upon the rights of a member. A member is entitled to the privileges and rights inhering in a membership so long only as he keeps his part of the contract, expressed in his subscribing to the articles and by-laws of the association."

In Nester et al. *v.* Continental Brewing Co., 161 Pa. 473, Justice Stewart, in speaking for the Supreme Court, said:

"The test question, in every case like the present, is whether or not a contract in restraint of trade exists which is injurious to the public interests. If injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious. . . . No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to rise ex turpi causa, or the transgression of the law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and if the defendant were to bring his action against the plaintiff, the latter would have the advantage of it, for where both are equally at fault, potior est conditio defendentis."

In Reynolds *v.* Boland, 202 Pa. 642, the Supreme Court said:

"From the lips of this complainant, who sues for grace, along with his prayer for a decree that the defendant specifically perform his agreement, there comes a confession that its purpose was to deceive, and the ear of the chancellor will not hear the prayer. Into hands soiled by a contract, equity will not place her decree for its enforcement. The doors are shut against one, who, in his prior conduct in the very subject-matter at issue, has violated good conscience, good faith or fair dealing."

We might multiply authorities upon this subject, but do not see that any good purpose could be served by the lengthening of this opinion. We are impelled, in the light of the authorities hereinbefore cited and the views which we entertain relative to the admitted facts of this case, to sustain the demurrer.

And now, March 6, 1916, the demurrer is herewith sustained, and the bill dismissed, at the costs of the plaintiff.

Harrisburg *v.* Dare.

Automobiles—License tax on garage companies—Violation of ordinance defined.

One who simply rents space or stalls in his building to others, who have the exclusive use of them and right of occupying them with their automobiles, and for which use of the building he receives stipulated rentals, is not included in the term "keepers of automobiles for hire or pay."

Such person cannot be adjudged guilty of violating an ordinance authorizing and regulating the assessment and collection of a license tax on trades, occupations and various kinds of business.

Appeal from summary conviction before alderman. C. P. Dauphin Co. Jan. T., 1915, No. 534.

D. S. Seitz, city solicitor, for plaintiff.
C. H. Backenstoe, for defendant.

KUNKEL, P. J., May 28, 1915.—On the facts agreed upon by the parties to this proceeding, we think it is clear that the defendant does not fall within the terms of the ordinance. It purports to authorize and regulate the assessment and collection of a license tax on trades, occupations and various kinds of business within the city. "Garage companies" plainly mean companies engaged in the business of hiring automobiles for pay or caring for automobiles for pay, and the term "keepers

of automobiles for hire or pay" was evidently intended to embrace individuals engaged in carrying on a similar business. To keep automobiles for hire or pay involves the elements of custody and care. The defendant does not keep automobiles in this sense. He does not hire automobiles for pay, nor does he keep and care for the automobiles of others for pay. He is not engaged in such business. What he does is to rent space or stalls in his building to others, who have the exclusive use of them and right of occupying them with their automobiles. For the use of the building in this manner he receives stipulated rentals.

Wherefore the defendant is adjudged not guilty of violating the ordinance, and is not liable to the penalty therein prescribed.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Witmayer *v.* Lebanon.

Road law—City streets—Original paving—Assessment.

A city of the third class may assess the cost of paving of a street with wooden blocks on abutting property owners according to the foot front rule, where it appears that the street in question was a very old one originally in the condition of a country road, but later improved with new stone rolled down, but without any actual repaving or rebuilding of the roadway.

Bill in equity for an injunction. C. P. Lebanon Co.

A. Harry Ehrgood, for complainant.
Walter C. Graeff, city solicitor, for the city of Lebanon.

HENRY, P. J., March 20, 1916.—This bill in equity was brought to enjoin the city of Lebanon from collecting an improvement tax for the paving of Eighth street, in said city, with wood block, assessed on the foot front plan against abutting property owners; and raises the singly important question of fact whether said Eighth street, at plaintiff's property has been paved, or adopted as a paved city street by the municipality, and the legal conclusion which must follow. If the street was paved or adopted as paved street by the city of Lebanon, then the injunction must be granted and the city be restrained from collecting the tax, if not the tax is legally assessed and the bill must be dismissed. The act of June 27, 1913, P. L. 568, § 10, gives to cities of the third class, of which Lebanon is one, the right to grade, pave and macadamize its streets and provide for the payment of the costs either by the

city or by the owners of the real estate bounding and abutting thereon, the cost and expense upon the abutting real estate to be assessed according to the foot front rule, or according to benefits, as councils shall by ordinance determine. This act is very similar in its provisions to the act relating to the government of third class cities approved May 23, 1889, and acts prior thereto, under which it has uniformly held that the abutting property-owners can only be held liable for such improvements where they are of an original character. These improvements, while in some sense a convenience to the whole community and the general traveling public, are peculiarly beneficial to the abutting land-owner in the comfort and convenience they afford, and in the enhancement of property values which are almost certain to follow.

Lebanon was incorporated as a city of the third class in 1885, prior to which it had been incorporated as a borough. On the borough and city map, said Eighth street is shown as one of the streets of the municipality, and from time to time ordinances were passed making appropriations for macadamizing Eighth street. But an inspection of these ordinances indicates that the word was used in the sense of repair and not in that of a rebuilding of the street in question. The appropriation for this macadamizing in one instance was as low as $50, in a number of cases was $100 and the highest amount for any one year was $425 for the year ending March 31, 1904. The street runs from the northern to the southern boundary of the city, other than this there is nothing to show any municipal adoption of said Eighth street as a paved city street. The evidence discloses that as far back as 1865 the said highway was a piked roadway, that is, it was a limestone road and repaired from time to time with crushed or broken stone. In this respect it did not differ from the ordinary country roads of the townships adjoining the city, both city and surrounding country being underlaid with limestone, and that being the material customarily used in building of roads. With the growth of travel and the greater wear upon highways by improved means of travel and conveyance, the attention of this highway seems to have been greater, the road was crowned or arched, different sizes of stone were used in filling depressions in repairing the roadway and a road roller was used in making it compact and more durable; but here again the country districts kept pace with the city by adopting the same methods of repairing, and even using road rollers in some instances. There is no evidence showing that the roadway of said Eighth street

was ever rebuilt. One witness said he had been instructed by a member of council to make a "new street." But what he did was to spike up a part of the street by running over it with spikes inserted in the rear wheels of a road roller, thereby loosening the surface and then harrowing and resurfacing it with one or more layers of crushed limestone and rolling it. The spiking and harrowing were for the purpose of getting an even surface, and there was no change in the character of this old, worn-out material of the street. Moreover, this work was done upon part of said street, other than that upon which the plaintiff's property abuts. But irrespective of this fact, this work could not be called a repaving or a rebuilding of the roadway; at most it was a substantial repairing, and this conclusion is strengthened by the fact that this work lasted only about a year when it was again necessary to renew it by scraping and removing the mud and dirt and resurfacing with crushed stone.

The ordinance of the city provided for the grading of the streets, for the placing of curbing and gutters and fixing the width of pavements or sidewalks.

The general rule as to the authority of a municipality to impose the cost of paving upon abutting property-owners, as laid down by our courts of last appeal, seems to be that "a first payment in the legal sense which exempts the abutting property-owner from liability for any substantial improvement, may be defined generally as one that is put down originally or adopted or acquiesced in subsequently by the municipal authorities for the purpose and with the intent of changing an ordinary road into a street. It may be of a macadam or anything else. This is a matter of evidence only. If the purpose and intent are wanting, a mere surfacing of the road, however careful or expensively done, will not be a paving, but if the intent and purpose are present, or to be fairly inferred, then there is a paving, whatever the material may be. "The entire absence of formal municipal action is strong presumptive evidence of lack of municipal intent to adopt the road as a street."

The governing facts in this case under the above well-settled rule, are that the abutting property-owners on Eighth street in the city of Lebanon, have never paid for the cost of paving or macadamizing said street; that neither the borough of Lebanon nor the city of Lebanon, has ever paved, nor by formal municipal action, has adopted the said Eighth street as a paved street. Nor has either of said municipalities, prior to the paving which is the basis of this suit, by formal action, ever

changed the character of the roadway of said street, or made it what might be termed permanent, substantial city street.

The plaintiff relies upon several decisions which we think do not control the case at bar. In Harrisburg *v.* Segelbaum, the street had been rebuilt in 1832 by the city and again sixteen years later by putting down what was called a macadamized pavement. In Boyer *v.* Reading City, the street had been turnpiked in 1805, and after abandonment by the turnpike company, kept in order and repaired by the city and later torn up and reconstructed.

In Leake *v.* Philadelphia, the highway was constructed by "placing upon the natural dirt road large broken stones for a foundation, and upon them in turn were placed smaller stones for top dressing, in size such as would pass through a three-inch mesh," showing that there was substantial rebuilding of the road. In Chester City *v.* Evans, the facts show a change in the character of the street by a rebuilding of the highway.

Councils provided for a macadamizing of the street under which a contract was made for the work and at the same time all property-owners were required to curb and pave the sidewalks in front of their respective property.

These authorities and the recent municipal action of the city of Lebanon must be viewed, to some extent, in the light of present-day conditions, in the use and the construction of roads and city streets. The increase in business and commercial affairs with the advent of automobiles, auto trucks, traction engines and heavy vehicles, propelled at high speed, have made a modern city street fit for present use, something essentially different from what might have been considered sufficient before the days of these improved means of locomotion on the streets. The word paving, as used in acts of assembly, conveys the thought of permanence, and this must be permanence for the intended use under modern conditions.

From the evidence submitted we find the following facts:

1. The plaintiff is a citizen and taxpayer of the city of Lebanon and is the owner of real estate fronting and abutting on Eighth street, between Chestnut street and the right of way of the Philadelphia & Reading Railway Company in said city, that the said real estate has never heretofore been made the subject of assessment of paving said Eighth street.

2. The city of Lebanon, the defendant, is a municipal corporation of the third class under the laws of Pennsylvania, incorporated 1885, prior to which time it was a borough.

3. Said Eighth street is an old and much used highway, with

natural surface of clay and stone, upon which the borough authorities as far back as 1865 placed stone from time to time as needed to keep it in proper repair; and in recent years a road roller has been used upon it by the city. The road was not at the location of the plaintiff's property, however, at times being cut up by means of spikes in the rear wheels of a road roller. The surface being leveled with a harrow, the work material not being removed, and being surfaced with one or more coats of crushed stone of different sizes and rolled until it became compact, presenting an even surface for travel, which lasted for a year, or possibly a little longer, when it was necessary to repeat the process if the road was to be kept in a proper condition for the use to which it was put. This method differed but slightly from that in use upon the country roads adjoining and in the vicinity of the city of Lebanon.

4. The official map of the borough of Lebanon and the city of Lebanon shows the location of the streets and alleys whereon said Eighth street is mentioned as a street, and ordinances passed from time to time by the city of Lebanon have denominated the said highway as a street.

5. The council of the city of Lebanon on March 12, 1914, by ordinance provided for and authorized the paving of the said Eighth street and curbing where necessary from Chestnut street to the right of way of the Philadelphia & Reading Railway Company, and directed that the cost thereof be paid by an assessment by the foot front rule upon abutting property-owners, and further providing for the laying of an assessment and collection, a tax to defray the cost of such paving.

6. Pursuant to the said ordinance said Eighth street was paved with wood block along the property of the plaintiff, and he was assessed with his proportionate share of the cost thereof.

7. That the said city of Lebanon by ordinances passed from time to time provided for the grading of said Eighth street, fixing its width, the width of the sidewalks, providing for curbs and gutters and made appropriations for "macadamizing" said Eighth street, in amounts ranging from $50 to $425 per year. The work done in pursuance of these ordinances is in the nature of repairs and for the purpose of keeping the road fit for its customary use. The roadway of Eighth street was never rebuilt but reached its present state from a gradual course of development, and which differed in no essential particular from the ordinary country roads in the vicinity of Lebanon.

We also state the following conclusions of law:

1. Neither the borough of Lebanon nor the city of Lebanon

have ever paved the said Eighth street to the passage of the ordinance of March 12, 1914.

2. Neither the borough of Lebanon nor the city of Lebanon have ever paved the said Eighth street as paved street.

3. The assessment levied against the plaintiff for his proportionate cost of the paving of said Eighth street under the foot front rule is valid.

4. This bill must be dismissed at the cost of the plaintiff. The requests for conclusions of law submitted by the plaintiff are declined.

And now, to wit, March 20, 1916, under the aforesaid findings and conclusions, the bill of the plaintiff is hereby dismissed at his cost by the court.

From H. Rank Bickel, Esq., Lebanon, Pa.

Monroe Township Poor Directors *v.* Union Township School Directors.

Poor laws—Order of removal—Counsel fee.

A rule of court adopted prior to the act of April 6, 1905, P. L. 112, providing for a counsel fee of $20 to be taxed against the losing party on an appeal from an order of relief or removal, is not affected by this act.

Appeal from taxation of attorney's fees on an order of removal. Q. S. Snyder Co. Oct. T., 1912.

JOHNSON, P. J., Dec. 27, 1913.—The question here to be determined is whether there is authority for taxing an attorney's fee of $20 in favor of the successful party in the proceeding had to remove Ollie Adams, a pauper, from Monroe township, Snyder county, to Union township, Union county. Ollie Adams was removed by order of court from Monroe township to Union township on a citation under the act of April 6, 1905, P. L. 112, and in taxing the costs the prothonotary of Snyder county included an attorney's fee of $20 for the attorney of Monroe township. From the taxation of this attorney's fee Union township has appealed.

"A counsel fee for the winning party in a poor case may, under the act of June 13, 1836, P. L. 545, be imposed on the losing party, where the court deems it to be a proper case and the amount of the fee is reasonable and just." Davidson Twp. Overseers *v.* Overseers, 11 Pa. Super. Ct. 215. Section 3 of the act of April 6, 1905, P. L. 112, under which the pro-

ceedings in this case were had, provides for costs as follows: "In case an order of removal is granted by any court of quarter sessions of the peace, under the provisions of this act, the court, in the same order, shall require the directors or poor law officers of the place of settlement to pay the petitioners the cost of the proceedings, the expense of removing, and the proper charges for the relief of the poor person from the date of the notice first above provided for; all of which expenses, costs and charges shall be ascertained and allowed by the court." Under this section of the act of 1905 it would seem that in a proper case, the court, exercising a sound discretion, has the right to include a reasonable allowance for the necessary professional service.

Rule No. 242 of our rules of court provides that "in all appeals from orders of relief and removal, the clerk shall tax an attorney fee of $20 to be paid by the losing party as part of the costs." It is argued by counsel for Union township that this rule was adopted prior to the act of April 6, 1905, and that the proceeding under the act of April 6, 1905, is not an appeal such as was contemplated by our rule No. 242, but we think the rule of court will include the present case. Under the act of April 6, 1905, pauper cases do not come strictly into the quarter sessions by an appeal, as under the earlier laws, yet the citation is not awarded until notice has been given to the overseers of an order of relief and the refusal or neglect to receive the pauper.

It is quite clear that prior to the act of April 6, 1905, the attorney for the successful party was entitled to a fee of $20 in all cases of appeal from orders of relief in pauper cases to the quarter sessions. Under the act of 1905 the procedure is somewhat changed, but the purpose and results of the law and the work and skill of counsel required are practically the same. Why should it be necessary to have a new rule of court since the passage of the act of April 6, 1905? We think it would be violating neither the spirit nor the letter of our rule of court in holding that it applies when the proceeding is had under the act of April 6, 1905.

And now, Dec. 27, 1913, the appeal from the taxation of an attorney's fee of $20 in favor of Monroe township and against Union township, the losing party, as part of the costs in the proceeding to remove Ollie Adams from Monroe township, Snyder county, to Union township, Union county, is dismissed at the costs of the appellant.

From M. I. Potter, Esq., Middleburg, Pa.

New York & Pennsylvania Co. *v.* Shenandoah Borough.

Practice (C. P.)—Change of venue—Petition, answer and replication—Omission of testimony—Acts of March 30, 1875, P. L. 35, and of March 18, 1909, P. L. 37—Discretion of court—Municipality as defendant.

Plaintiff, a resident of Columbia county, brought suit in Schuylkill county, against defendant borough for loss of power to a paper mill situate in former county, arising out of the appropriation of certain streams that had supplied this mill. Plaintiff petitioned for change of venue, alleging she could not have a fair and impartial trial because of widespread sympathy in Schuylkill county for defendant. The petition was fully traversed and issued joined; no testimony was taken in support of the petition. Held, discharging rule: it was not shown that, under the act of 1909, P. L. 37, local prejudice exists and that a fair trial could not be had.

Petition and rule by plaintiff for change of venue. C. P. Schuylkill Co. Sept. T., 1910, No. 300.

George M. Roads, W. H. Rhawn and A. W. Duy, for plaintiff.

This suit was brought by the New York & Pennsylvania Company against the borough of Shenandoah, to September term, 1910, No. 300, common pleas of Schuylkill county, to recover damages in the sum of $30,000, for injuries sustained by the plaintiff to its pulp and paper mill property, situate in the borough of Catawissa, in Columbia county, for the unlawful and wrongful diversion by the defendant, above the said property of the plaintiff, of the flow of certain tributaries of a stream of water called Catawissa creek, flowing through the said property of the plaintiff.

In addition to the water diverted by the defendant, the Girard Water Company, a public service corporation, operating throughout the upper end of Schuylkill county, is also diverting the flow of waters of Catawissa creek and supplying a large number of consumers, as set forth in the fourth paragraph of the petition, and not denied by the answer.

As appears by the records of this court, the Girard Water Company have instituted condemnation proceedings for the diversion of the waters aforesaid, the existence of which said condemnation proceedings as admitted by the fourth paragraph of the defendant's answer.

The borough of Shenandoah is a city of some twenty-five to thirty thousand inhabitants, all of whom, as citizens, property-owners and taxpayers are vitally interested in the question involved in this law suit.

All of the persons, firms and corporations served by the Girard Water Company, are directly or indirectly interested in the question involved in this law suit.

An examination of the jury panel for the March term of the common pleas court of Schuylkill county, 1916, discloses the fact that a very large percentage of the jurors empanelled were residents of the borough of Shenandoah and the townships and municipalities adjacent thereto, and of the townships and boroughs, the residents whereof are served by the Girard Water Company; and employés of the various railway and mining corporations named in the fourth paragraph of said petition.

This application is addressed to the sound discretion of the court, and the petition and answer, supplemented by the facts relating to the various municipalities, with which the court is familiar, and of which it will take judicial notice, impels us to rest the matter in the hands of the court upon petition and answer.

Under the provisions of the act of March 30, 1875, P. L. 35, § 1 (4), whenever the county, any municipality therein or the officials of any such county or any municipality therein, were parties to a suit, the other party thereto, desiring a change of venue, had simply to make an application, upon oath, stating that local prejudice existed, and that a fair trial could not be had in such county, whereupon it became the duty of the court, to grant the change of venue, regardless of the size of the municipality or the number of citizens adversely, interested, the change of venue was predicated upon the fact that one of the parties to the suit was a part of the political division of the commonwealth that was to administer justice, and that the other party made an oath that prejudice existed, etc.

"When a county is a party to an action, and it appears by the affidavit of the other party that local prejudice exists and that a fair trial cannot be had in the county, it is mandatory on the court to change the venue." Little *v.* Wyoming County, 214 Pa. 596 (1906); Brittain *v.* Monroe County, 214 Pa. 648 (1906).

"An applicant is entitled of right, to a change of venue where his petition alleges that a large number of the inhabitants of the county have an interest in the question involved in the action, adverse to the applicant, and this is supplemented by the oath of the applicant that he verily believes that local prejudice exists and that a fair trial cannot be had in the county, and

the evidence is sufficient to support the averments." Willoughby *v.* Boff, R. & P., 203 Pa. 243 (1902).

Since the above decisions were rendered by the Supreme Court, the legislature has eliminated the mandatory feature of the act of 1875, by the passage of the act of March 18, 1909, P. L. 37, and the granting of a change of venue is now wholly within the discretionary powers of the court, and to that discretion we appeal in the case at bar.

The court will bear in mind that the party defendant in this suit is one of the larger and more important boroughs of the county from which the jurors will be drawn, and that the plaintiff is a nonresident of the county.

That by virtue of the fact that the defendant is a municipality a verdict rendered against it, must of necessity increase the taxes of the citizens, who, in themselves, constitute a large number of the inhabitants of the county in which the case is pending, and this fact brings us clearly within paragraph 5, of § 1, of the act of March 18, 1909, supra.

The conservation of the waters and water powers of Pennsylvania in this generation has become one of vital importance, to such an extent indeed, that the commonwealth of Pennsylvania maintains, at great expense, a water supply commission for the purpose of safeguarding and protecting the interests of the citizens of the state in this regard.

In the case at bar we have two parties, both vitally interested in the waters of Catawissa creek; the one, a great municipality which is absolutely dependent upon the flow of the tributaries of this creek for a pure and unpoluted supply of fresh water for its citizens; the other party, the owner of a paper mill property upon which, at the time of the taking, vast sums of money had been expended in development, and which required, and as a lower riparian owner is entitled to receive, free from polution and diminution of flow, the waters of the creek.

The headwaters of Catawissa creek form the common source of supply of pure water for the whole upper tier of townships of Schuylkill county, Mahanoy City, Frackville and all the vast enterprises supplied by the Girard Water Company, derive their supply from this source, and all these interests tend to a prejudice in the minds of the citizens of that territory, against adequate compensation to lower riparian owners, non-residents of the county, for the waters so taken and diverted.

It is evident that the legislature, by vesting in our courts, the discretionary power to grant a change of venue, intended

to provide for just such a condition as is here presented; otherwise it would have stricken from the statute books entirely, the provisions mentioned in §§ 4 and 5 of the act of 1909, and it is hard to conceive of a case more entitled to the benefit of a liberal exercise of the judicial discretion.

We respectfully submit that the rule should be made absolute, and the change of venue granted, to the common pleas court of a suitable and convenient county where the conditions complained of do not exist, and where the various corporations named in the fourth paragraph of the plaintiff's petition do not operate.

M. M. and *P. H. Burke,* for defendant.

Plaintiff's application to have this case tried in another jurisdiction is made under the acts of March 30, 1875, P. L. 35, and of March 18, 1909, P. L. 37, this latter act being an amendment of the former.

Section 4 of the amending act says, citing the fourth instance in which a change of venue may be allowed: "Whenever the county in which such cause is pending, or any municipality therein, or the officials of any such county or municipality, are parties thereto, and it shall appear to the court that local prejudice exists and that a fair trial cannot be had in such county."

This suit was instituted to Sept. term, 1910, No. 300; plaintiff's statement of claim was filed on Aug. 31, 1910; an amendment to this statement was later filed. A plea was then filed and the case put at issue. On Feb. 7, 1916, or about five and one half years after commencement of suit and after the case had been on the trial list many times, plaintiff makes this application.

Aside from other matters of defence we submit that in this application, plaintiff is guilty of laches—that she is too late and that the rule should be discharged for this reason.

The material allegations contained in the petition, and on which the rule issued, are traversed in the answer; and nothing in the way of deposition or testimony has been offered in support of the rule. This, therefore, presents a situation, in which, upon rule and answer, the court's duty is to discharge the rule.

But aside from these two grounds for discharge of this rule there is nothing, outside the petition itself, that in the language

of the act of 1909, makes it "appear to the court that local prejudice exists and that a fair trial cannot be had in such county." On the contrary, there is every reason to believe that plaintiff can and will have an absolutely fair trial. Under her right of challenge plaintiff can exclude from the jury all jurors interested in the result of the case. And since water rates are now regulated by the public service commission the question of water charges or profits arising therefrom to the defendant municipality can have no weight. And we fail to understand how the action of the Girard Water Company in taking over its water shed along streams tributary to the Catawissa creek, under condemnation proceedings, can at all enter into consideration of this case.

Therefore we submit, under the provisions of said act of 1909, plaintiff's case is not made out.

In Presbyterian Church *v.* P., B. & Trenton St. Ry. Co., 217 Pa. 399 (1907), an application was made for a change of venue under said act of 1875. The language of the complaint is much like that in the case at bar. The court below refused the application; this was sustained by the appellate court, who said, inter alia: "In the present case the learned judge below went fully and carefully into the inquiry. It would not be desirable to encumber the report with the details, but the result may be summed up substantially in his finding that the interest in the matter in its widest aspect was confined to a portion of the borough of Bristol, and the population of the borough is less than one tenth that of the county. He was, therefore, 'quite satisfied that there will be no difficulty in obtaining a disinterested and impartial jury, jurors who have never even heard of the case.' With his local knowledge of the places and the people, the judge's opinion is much more likely to be correct than ours could be, and we certainly have not been shown any reason to interfere with it."

Pittsburgh, Etc., Bridge Co. *v.* Allegheny County, 239 Pa. 67 (1913), arising under said act of 1909, is decisive of the case at bar. The suit was against the county; a change of venue was refused. Judge Frazer, now of our Supreme Court, heard the case. The upper court affirmed on Jan. 6, 1913, in a per curiam, saying, inter alia: "The determination of the question whether a change of venue should be ordered in such a case is a judicial and not a ministerial act, and no appeal having been given by statute none will lie, except for an abuse of power. Felts *v.* Del., L. & W. R. R. Co., 160 Pa. 503; Jessop *v.* Ivory, 172 Pa. 44."

The case at bar affords better reasons against a change in jurisdiction than cases cited above.

KOCH, J., April 24, 1916.—This suit was brought to recover from the defendant damages to the plaintiff's pulp and paper mill at Catawissa, Columbia county, caused by the appropriation of certain tributaries to the Catawissa creek. The defendant uses the water of said tributaries and thereby diminishes the flow to the plaintiff's property. The plaintiff prays for a change of venue, alleging "that a large number of inhabitants of Schuylkill county have an interest in the question involved in said action adverse to the applicant," and that the plaintiff "by reason thereof cannot have a fair and impartial trial in" this county. The "large number of inhabitants," according to the petitioner, live in the defendant borough and in a number of localities in Schuylkill county supplied with water by the Girard Water Company, against whom a similar suit is also pending for the appropriation and diversion of other tributaries of said Catawissa creek.

The answer of the defendant avers that the people of Shenandoah are the only persons interested in this case, and denies that a large number of other persons resident in this county are interested in the trial. The defendant's answer is that the "plaintiff can have an absolutely fair and impartial trial in" this court. We have only the petition and answer to consider, as no testimony has been introduced by either party.

It is provided by the act of March 18, 1909, P. L. 37, that a change of venue shall be made in any civil case "whenever the county in which such case is pending, or any municipality therein, or the officials of any such county or municipality, are parties thereto, and it shall appear to the court that local prejudice exists and that a fair trial cannot be had in such county." Also "whenever a large number of the inhabitants of the county in which such case is pending, have an interest in the question involved therein, adverse to the applicant, and it shall appear to the court that he cannot have a fair and impartial trial."

Under all that is before us it does not appear "that local prejudice exists and that a fair trial cannot be had" here; or that a fair and impartial trial is impossible because of any interest in the question involved, adverse to the applicant, existing in the minds of "a large number of the inhabitants of the county." We entertain no doubt whatever of as fair a trial here as elsewhere.

April 24, 1916, the rule for a change of venue is discharged.

Reese, Sheriff *v.* Tioga County.

Constitutional law—Title of act—Sheriff's fees—Local legislation relating to counties—Act of June 20, 1911, P. L. 1072.

The act of June 20, 1911, P. L. 1072, entitled "An act to regulate and establish the fees to be charged by sheriffs in counties having a population of less than one hundred and thirty thousand in this commonwealth, and to provide for the taxation and collection of the same," is a local or special law regulating the affairs of counties, and is unconstitutional as violating Art. 3, Sec. 7, of the Constitution of Pennsylvania.

The sheriff of Tioga county is entitled to compensation for his services under the fee bill of 1901.

A sheriff is entitled to receive only the fees and compensation as fixed by law for constables on writs issued by justices of the peace and directed to the sheriff.

A sheriff who is not compensated by salary is entitled to receive from the defendant a fee in every criminal case on the docket of the oyer and terminer and quarter sessions.

Case stated. C. P. Tioga Co. May T., 1914, No. 161.

E. H. Owlett, for plaintiff.
Merrick, Young & Crichton, for defendant.

CAMERON, P. J., Sept. 28, 1914.—There are three questions submitted for the opinion of the court:

First. Is the plaintiff entitled to charge for services as sheriff for executing writs, process and subpœnas issued out of the court of quarter sessions of Tioga county in accordance with the fee bill of 1901, or must he charge in accordance with the fee bill of 1911?

Second. Is he entitled to charge sheriff's fees on writs issued by justices of the peace directed to him, or is he only entitled to constable's fees on such writs?

Third. Is he entitled to a fee in every criminal case on the docket of the courts of oyer and terminer and quarter sessions, or is he only entitled to a fee where an indictment is presented and returned?

The answer to the first question submitted depends on the constitutionality of the act of the general assembly of Pennsylvania, approved June 20, 1911, P. L. 1072. The title to that act is as follows:

"To regulate and establish the fees to be charged by sheriffs in counties having a population of less than one hundred and thirty thousand in this commonwealth, and to provide for the taxation and collection of the same."

The plaintiff contends, that that act violates Sec. 7 of Art.

III of the Constitution of Pennsylvania. The pertinent part of that section is as follows: "The general assembly shall not pass any local or special law regulating the affairs of counties, cities, townships, wards, boroughs or school districts."

Prior to the adoption of the present Constitution of Pennsylvania, all sheriffs, and some other county officers were paid for their services by fees. In large counties this system gave the officers an enormous income far beyond a reasonable compensation for their services. To remedy that evil, Sec. 5 of Art. XIV of the Constitution provided, inter alia, that in counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary, and further provides for the collection by these officers of the fees allowed by law, and the payment of the same into the county treasury. As sheriffs and other county officers in all the counties of the commonwealth were paid by fees, this provision of the Constitution put the counties into two classes. One class composed of counties having over one hundred and fifty thousand inhabitants in which the officers were salaried, and the other class composed of counties having less than one hundred and fifty thousand inhabitants, to be paid by fees.

A constitutional provision is an expression of the sovereignty of the people, while an act of assembly is but the expressed judgment of the representatives of the people. While the people may in their sovereign capacity classify counties in fixing the compensation of county officers, it does not follow that the legislature can do the same thing.

Section 1 above quoted was adopted to remedy an abuse that had increased enormously during a number of years preceding its adoption. That was the passage of local or special bills regulating and very often increasing the fees of county officers in the county referred to in the bill.

In Morrison *v.* Bachert, 112 Pa. 322, Justice Paxton, in discussing that question, made use of the following language: "Prior to the adoption of the present Constitution there was hardly an approach to uniformity in the fees of public officers throughout the state. Local acts had been procured for many of the counties. In some instances through the influence of the officers themselves, fixing the fees more in harmony with their own greed, than the interests of the people, who may fairly be presumed to have known nothing of it until they came to pay the fees. It was to cut this system up root and branch, with other evils of like nature that the clause in question was inserted in the Constitution."

In the same case he also held that an act regulating the fees of county officers was regulating the affairs of counties, and that a local or special law regulating the fees of officers was within the inhibition of the clause of the Constitution mentioned.

The same rule was laid down by Justice Paxton in Frost *v.* Cherry, 122 Pa. 417.

The act in question applies only to counties having a less population than one hundred and thirty thousand. There are four counties having a population between one hundred and thirty thousand and one hundred and fifty thousand. Neither this act nor Sec. 5 of Art. XIV, already quoted, would apply to these counties.

The people, by Sec. 5 of Art. XIV of the Constitution, have classified the counties of the commonwealth as to the payment of the fees of county officers, including sheriffs. Can the legislature make a further classification in the face of Sec. 7 of Art. III of the Constitution, already quoted? The legislature undertook so to do by the act approved June 22, 1883, P. L. 139. That was an act fixing the salaries of county officers in counties containing over one hundred thousand, and less than one hundred and fifty thousand inhabitants, making them salaried officers and fixing the amount of the salaries. The legislature could not interfere with counties containing over one hundred and fifty thousand, as the Constitution had already made officers in those counties salaried. We must assume there were counties containing between one hundred and fifty thousand, and one hundred thousand, or no such act of assembly would have been passed.

In construing that act in McCarthy *v.* Com., 110 Pa. 243, Justice Gordon, said: "We have no doubt the act under consideration falls within the inhibition of Sec. 7 of Art. III of the Constitution. It attempts to regulate in certain and very important particulars the affairs of counties, the population of which exceeds one hundred thousand, and is less than one hundred and fifty thousand. If such legislation were to be recognized as legitimate, vain would be the constitutional prohibition of local or special laws. But little ingenuity in the way of so-called classification would be necessary in order to isolate every single county, borough, ward, township and school district in the state, and provide for each its own local code. Moreover, as by the Constitution itself the counties with reference to the fees of their officers have been classified, we think a further attempt in that direction not permissible."

The act of 1911 makes a further attempt in that direction. If it is upheld, the counties, with reference to the fees of their officers, will be further classified into counties having between one hundred and fifty thousand and one hundred and thirty thousand and counties having less than the latter number.

There is another objection to the act of 1911. If it is upheld, the act of 1901 would still be in force only as to counties having between one hundred and fifty thousand and one hundred and thirty thousand inhabitants. An examination of those two acts will show that for the same service, a sheriff in the counties where the act of 1901 is still in force, will receive a higher fee than would a sheriff in counties containing less than one hundred and thirty thousand for the same service. All these inconsistencies can be avoided by declaring the act of 1911 unconstitutional. We feel justified in so doing by what we have already referred to, and further because so many common pleas judges in whose opinions we have great confidence have so held. We will mention the following: Jones *v.* Chester County, 21 D. R. 742; Hochard *v.* Somerset County, 22 D. R. 751; Glass *v.* Northumberland County, 22 D. R. 753; Myers *v.* Northampton County, 22 D. R. 757.

We therefore conclude that the plaintiff is entitled to demand and receive from the defendant compensation under the act approved July 11, 1901.

As to the fee of $1.25 in every criminal case, the object of the act of 1901, as expressed by its title, is an act to regulate and establish the fees to be charged by sheriffs. Section 1 sets forth: "Be it enacted, etc., that from and after the passage of this act the fees to be received by sheriffs in this commonwealth shall be as follows:" Then follows two pages of items in which the word fee is not used, but in which is given the fee or compensation for each service mentioned. Then follows the statement under which the dispute arises as to the fees in criminal cases. That statement is as follows: "For fee on indictment on every capital case $3; in every other criminal case $1.25."

The defendant's counsel contend that there should be read into the second clause the words, "for fee on indictment" so that it would read, "for fee on indictment in every other criminal case $1.25, to be paid by the county," and that no fee is due the sheriff unless an indictment has been returned.

There is nothing that needs explanation in the statute as it stands. Nothing ambiguous or indefinite. The fact that it is plain, and unambiguous is a strong reason against interpola-

tion. That can only be resorted to when the meaning is uncertain or the language ambiguous.

"The business of the interpreter is not to improve the statute, it is to interpret it. The question for him is not what the legislature meant, but what its language means. The intention of the legislature is to be ascertained by means of the words which it has used." Endlich on the Interpretation of Statutes, pars. 7 and 8.

Under the wholesome rule it would seem to be our duty to apply that statute as it reads, and not as it might be made to read, by an alleged improvement. But we are not without authority as to the true interpretation of a similar clause in the act of 1868, P. L. 4. In that act was the following: "Fee on indictment in every capital case $2.50; fee in every other criminal case $1." Those clauses were construed by Judge Sitser in Com. *v.* Taylor, 5 Pa. C. C. 510. That case was settled by the parties out of court. The defendant's counsel paid all the costs, except the $1.25 sheriff fee, and moved the defendant's discharge. The district attorney opposed the discharge because the sheriff's fee was not paid. Plaintiff's counsel insisted that the sheriff was not entitled to any fee, there having been no indictment found. In disposing of the question raised, his honor said: "It is insisted that a fee cannot be allowed in any case except upon an indictment. The statute does not so read. It says fee in every other criminal case $1.25. It is not made to depend upon an indictment, as in a capital case, but upon the question whether a criminal case be pending. In the case in hand the transcript has been filed in the quarter sessions, the commonwealth and the defendant could take subpœnas and compel the attendance of witnesses served, the cause was pending, and the sheriff is entitled to his fee."

In disposing of a like question in Rhoads *v.* County of Luzerne, 1 Kulp 431, Justice Woodward said: "The act of assembly of April 2, 1868, in § 2 provides that the sheriffs of the commonwealth shall be entitled among other things to a 'fee in every other criminal case.' The word other is intended to mean all cases not of a capital nature as will appear from the context. We are of the opinion that the plaintiff is entitled to the statutory fee in every case upon the dockets of the quarter sessions and oyer and terminer."

Is the sheriff entitled to sheriff's fees on writs issued by Justices of the peace, directed to him, or is he only entitled to constable's fees on such writs?

Both the act of 1901 and the act of 1911, provides as follows: "For all services performed by the sheriff, but more properly belonging to the jurisdiction of a constable, he shall receive the same fee as constables unless otherwise provided by law."

Defendant's counsel contend that the proper ministerial officer to execute writs issued by a justice of the peace is the constable of the ward, borough or township in which the justice resides and has his office. To this we may add, the constable of the place where the writs are to be executed; that as such constable is bound to execute the writs directed to him, such services more properly belong to the jurisdiction of a constable and are therefore within the provision quoted above.

No case was cited where that provision had been construed, neither have I been able to find one. By both analogy and practice, however, the constable is the proper ministerial officer of a justice of the peace. The justice may issue both subpœnas and warrants to persons other than constables. They may even issue them to private individuals, but it would seem that such service more properly belonged to the jurisdiction of a constable.

"A justice of the peace in a criminal case may authorize any person whom he pleases to be his officer, but it is advisable to direct his process to the constable of the place where it is to be executed, because no other constable or a fortiori or a private person can be compelled to execute it." Com. ex rel. Simpson *v.* Keeper of Prisons, 1 Ashmeade 183. The facts on which the foregoing was predicated were: Simpson, the person to whom Justice James Enue directed the warrant and who executed it by arresting the person named therein and conveying her forcibly before Enue, was himself arrested on a charge of assault and battery for executing the warrant. The justice who issued the warrant for his arrest committed him because he supposed that not being a lawful officer, he had no authority to make the arrest, and for the further reason that he supposed Enue had no legal right to authorize him to make the arrest. President Judge King, in disposing of the case, said: "The question discussed and to be decided is whether a justice of the peace has the legal right to authorize a citizen to execute a criminal warrant of arrest, or whether on all occasions his processes must be directed to and executed by a constable." (Having no statutory provisions on the subject of arrests in criminal cases, we are left at liberty to deter-

mine this question by the rules and doctrines of the common law.) The authorities from the year books down to the most recent and approved text writers flow in one uniform course and all agree that a justice of the peace in a criminal case may authorize any person whom he pleases to be his officer. All, however, considered that it is better to direct his process to the constable of the place where it is to be executed, and this because no other constable nor private person can be compelled to execute it. Strong as this position stands on authority, it derives equal sanctity from its practical usefulness and propriety. While the above does not decide the question of fees involved, it does lay down the practice that the constable who must serve the process is more properly the officer having jurisdiction. "While it is better practice to address a warrant of arrest to a constable, it is lawful to direct such process to a private individual." Com. *v.* Baird, 21 Pa. C. C. 488. The above was predicated on the following facts: Cooper, a railroad policeman, arrested Hartman on a warrant directed to him by a justice. Hartman sued out a writ of habeas corpus, taking the ground that Cooper could not legally arrest him because he was not a constable. In disposing of the writ, the court said:

"First. Had Cooper been but a private citizen and not even a policeman, the magistrate had the right to issue a warrant to him as a private citizen.

"Second. The better course to follow is to issue a warrant to a constable, if such officer is accessible, but it is lawful to direct it to one who is not a constable.

"Third. If he shall be satisfied that a warrant ought to issue, let it issue forthwith and be put into the hands of the constable or some other trusty person.

"Fourth. The warrant may be directed to some indifferent person by name who is not an officer, but no private person can be compelled to execute it."

The above is a quotation from Archbold's Crim. Prac. Vol. I, page 109.

"The constable is the proper ministerial officer to a justice of the peace and bound to execute his lawful warrants, and therefore where a statute authorizes a justice to convict a person of any crime and to levy the penalty, etc., without saying to whom the warrant is for that purpose to be directed, the constable is the officer to execute the warrant and must obey it." McKinney's Justice, Vol. I, page 151.

"When a legal warrant is directed to a proper ministerial

officer he is bound to receive it, and it must be immediately executed by him, and if he refuse, neglect or delay to serve it, he is punishable by indictment." Ibid, 188.

From the above quotations it appears that a constable is the proper ministerial officer to a justice of the peace, and that when a legal warrant is issued to him, he must execute it. It follows, therefore, that the services set forth in the bill of items attached to the case stated, are more properly within the jurisdiction of a constable. They further show that the constable must execute warrants directed him, though the justice may for reasons satisfactory to himself, direct his warrants to any officer or to a private person, who may or may not serve them. The statute in question lays no additional duty on a sheriff as to warrants directed to him by a justice. It simply provides that if he performs services more properly belonging to the jurisdiction of a constable, he shall receive constable's fees unless otherwise provided by law. The act of 1901 and the act of 1911 relate exclusively to the fees of sheriffs, and both contain the above quoted provision. It is to be presumed that the legislature had in mind the fact that justices had authority to direct warrants to a sheriff and also that the sheriff had authority to execute them when so directed. To avoid discrimination in favor of the sheriff by allowing him to charge higher fees than were allowed to constables or private persons for like services, it is presumed, the above provision was put in both acts. No equitable reason can be given for allowing a sheriff higher fees than is allowed any other person for like service. Such discrimination can be avoided by giving effect to the provision quoted. Equality of pay for the same service should be the rule unless some positive statute compels discrimination. If the justice had directed the warrant to his proper ministerial officer, a constable, the latter would have been entitled to less than the sheriff was claiming. Why should he receive more than the constable? By the provision quoted, the legislature said he should not, if regard be had to the words used.

In McAllister *v.* Armstrong County, 9 Pa. Super. Ct. 423, President Judge Rice said: "A constable cannot be compelled to serve a subpœna issued from the office of the prothonotary or of the clerk of the quarter sessions for the attendance of witnesses at court. He may do so, as indeed any private citizen may, but for such service he is paid not according to the act of May 23, 1893, P. L. 117 (an act regulating the fees of constables), but according to the sheriff's fee bill. He is en-

titled to the fee which the sheriff or any person acting in his stead is entitled to."

While constables' fees are regulated by statute, the statute regulating them only applies to fees earned in executing writs and processes issued by justices of the peace, but when serving writs more properly belonging to the jurisdiction of a sheriff, he is entitled to sheriff's fees.

In O'Leary *v.* Northumberland County, 24 Pa. Super. Ct. 24, Judge Beaver said: "The act of June 11, 1901, P. L. 663, fixes the fees to be charged by the sheriff for serving a subpœna. It does not, however, confer any exclusive right upon him to make such service. If service is made by any other person recognized as a proper person to make it, compensation can be claimed as is usual in such cases according to the fees provided by law for any officer who is recognized or designated as a person qualified to make the service."

In this case the district attorney employed a constable to serve subpœnas in commonwealth cases. The court held that the constable was entitled to sheriff's fees for serving them. These two cases show that if the person who performed the services was a proper person to perform them, he was entitled to the same fees as the proper ministerial officer would have been had he performed them. We have seen that the constable is the proper but not the exclusive ministerial officer of a justice of the peace. The same may be said of the sheriff as to criminal courts of record by both practice and analogy.

From the authorities cited, from equitable rules, and in view of the provision in both acts, the conclusion is irresistible that if a constable performs services that more properly belong to the jurisdiction of a sheriff, he receives sheriff's fees, and if a sheriff performs services that more properly belong to the jurisdiction of a constable, he is entitled to constable's fees. This secures equal compensation for the same services, no matter who renders them. This is fair, equitable and always to be secured if possible, and is evidently what the legislature had in mind when this provision was enacted in the law of 1901 and 1911.

It follows from the reasoning and the authorities cited, that judgment should be entered for the plaintiff in accordance with item three of the case stated, that is to say:

First. The plaintiff is entitled to receive fees and compensation for services rendered under the act of 1901.

Second. He is entitled to receive only the fees and compen-

sation as fixed by law for constables on writs issued by justices of the peace and directed to him.

Third. He is entitled to receive from the defendant a fee in every criminal case on the docket of the oyer and terminer and quarter sessions.

And now, Sept. 28, 1914, after argument and due consideration had, judgment is rendered in favor of the plaintiff and against the defendant for $382.59 with interest from this date, and it is further ordered that the prothonotary enter the judgment aforesaid unless within thirty days after notice to the defendant or its attorneys of record, exceptions be filed.

From R. K. Young, Esq., Wellsboro, Pa.

State Constabulary.

Criminal procedure—Certificates of arrest issued by state police—Act of April 9, 1915, P. L. 76.

An officer is required to furnish the certificate referred to in the act of April 9, 1915, P. L. 76, only when he has the prisoner in charge, and when the giving of such certificate would not imperil the arrest or tend to permit an escape. In other words, he is required to honor such an application only when made at a proper time and place.

When the officer has issued one certificate he has performed the duty imposed upon him by the statute.

Request of Captain George F. Lamb, deputy superintendent state police, for opinion.

HARGEST, Deputy Attorney-General, Oct. 1, 1915.—Your favor addressed to the attorney-general was duly received. You ask to be advised:

First. Whether under § 1 of the act of April 9, 1915, P. L. 76, it is the duty of an officer to furnish the certificate mentioned in said act after he has delivered the prisoner to the custody of a jailer or warden.

Second. Whether, when a single certificate has been furnished, the duty under the law has been discharged.

You call attention to the fact that, in cases of strikes or riots, a number of persons, intending to interfere with the officers of the law, might line themselves up and demand certificates, thereby keeping an officer engaged in furnishing certificates and prevent the performance of his duty in suppressing a riot, and where a number of arrests had been made, as is frequently the case, an entire detachment of police might be

thus handicapped and harassed in the performance of their duty.

Section 1 of the act referred to provides "that upon the arrest of any person, with or without a warrant, in this commonwealth, charged with crime, in order to preserve and protect his, her or their rights, and to facilitate the entry of bail for his, her or their appearance before a magistrate, coroner, judge, or the court of quarter sessions, and oyer and terminer, it shall be the duty of the sheriff, coroner, constable, police, or other official making the arrest, or having charge of the prisoners or prisoner, upon application made therefor either by counsel or a citizen, to issue, without cost to the applicant, a certificate stating the name of the prisoner or prisoners, and the charge upon which he, she or they have been arrested and imprisoned, and the amount of bail demanded, if the same has been fixed, so that bail may be entered as authorized by law."

Section 2 of the said act makes it a penalty if any person so required "refuse to issue a certificate as specified in § 1, immediately upon demand therefor."

This statute, like all other statutes, must be construed according to its reason and spirit. The object of it, as stated in the statute itself, is "to facilitate the entry of bail" for a prisoner, and to that end to secure a certificate "stating the name of the prisoner and the charge upon which he has been arrested."

Your first inquiry is: Who is required to issue the certificate?

The language of the act is that "it shall be the duty of the sheriff, constable, police or any other officer making the arrest, or having charge of the prisoner or prisoners, upon application" to issue such certificate.

Reading this language strictly it might indicate that any person who has made an arrest, even after he has delivered the prisoner into custody, and without reference to the time which has elapsed between the arrest and the delivery over to the jailer, may at any time, upon demand, be required to immediately give a certificate. This would be an unreasonable requirement. An officer may have delivered over the prisoner and may also have surrendered or disposed of his warrant, and not have the information upon which to issue the certificate required.

The certificate is to be issued "immediately upon demand." The evident intention of the legislature was that the officer having charge of the prisoner, at the time of the demand, shall

be required to make the certificate. There would be no reason to require an officer who had arrested a prisoner to make the certificate, after he had delivered the prisoner into the custody of a warden or jailer.

Therefore, answering your first inquiry, I am of opinion that an officer is only required to furnish the certificate referred to in the act of assembly when he has the prisoner in charge, and when the giving of such certificate would not imperil the arrest or tend to permit an escape. In other words he is only required to honor such an application when made at a proper time and place.

Second. The act of assembly in § 1 requires the officer, upon application, to issue a certificate, and in § 2 the penalty is imposed for failure "to issue a certificate." It would be unreasonable, and not within the intention of the legislature, to so construe this act that repeated certificates for the same prisoner might be demanded. One certificate would carry out the purpose of the act, namely, "to facilitate the entry of bail," as well as a dozen.

Therefore, answering your second inquiry, I advise you that when the officer has issued one certificate he has performed the duty imposed upon him by the statute.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Stoner *v.* Stoner.

Wills—Devise—Words and phrases—Life estate.

Prima facie the word "children" is a word of purchase, and unless there be something in the will which indicates that it is used in some other than the ordinary sense, which is that of personal description, not of limitation, it must be so construed.

The following devise: "I give, devise and bequeath my farm . . . unto Michael M. Stoner and Morris Stoner, for and during the terms of their natural lives, and after their decease I give, devise and bequeath one half part thereof to the children of Michael Stoner and their heirs forever, and the remaining one half thereof to the children of Morris Stoner and their heirs forever," was held to give only life estates to Michael M. Stoner and Morris Stoner, with remainder to their children in fee simple, the word "heirs" following the word "children" being used only to define the extent of the estate given to the children.

Case stated. C. P. Dauphin Co. Sept. T., 1915, No. 479.

A. R. Walter and *H. F. Eshelman*, for plaintiffs.
Robert Fox, for defendants.

KUNKEL, P. J., Jan. 27, 1916.—The devise is in the following words: "I give, devise and bequeath my farm . . . unto Michael M. Stoner and Morris Stoner, for and during the terms of their natural lives, and after their decease I give, devise and bequeath one half part thereof to the children of Michael Stoner and their heirs forever, and the remaining one half thereof to the children of Morris Stoner and their heirs forever." The plaintiffs contend that under this devise they took a fee simple estate in the farm, that the devise to them and at their decease to their children created in them an estate tail, which by virtue of the act of 1855 became an estate in fee simple. Prima facie the word "children" is a word of purchase, and unless there be something in the will which indicates that it was used in some other than the ordinary sense, which is that of personal description, not of limitation, it must be so construed. Guthrie's Appeal, 37 Pa. 1; Shields *v.* Aitken, 236 Pa. 6. We have carefully examined the will and do not find anything in it, nor has anything been pointed out to us, that indicates that the word "children" was to have any other than its presumptive meaning, nor is there any intention disclosed that the children of the devisees should take directly from their parents and not under the will. Keim's Appeal, 125 Pa. 480. Hence the rule in Shelley's Case has no application, and Michael and Morris Stoner took but life estates in the land devised.

Our attention has been called to the case of Sechler *v.* Eshleman, 222 Pa. 35, as ruling the present case. In that case the devise was made by the testator to his four nieces, and from and immediately after the decease of each niece the undivided one fourth devised to her was devised "unto her children and their heirs and assigns forever." But that was not all that the will contained. In the latter part thereof it was provided that "the devises hereinbefore made to the children" of the nieces "shall embrace and include the issue of any of such deceased child or children, and such issue taking such part or portion thereof as his, her or their deceased parent or parents would have taken had he, she or they been living." It was held, following the cases of Pifer *v.* Locke, 205 Pa. 616; Simpson *v.* Reed, 205 Pa. 53; and McKee *v.* McKinley, 33 Pa. 92, that the nieces took an estate in tail, which the statute of 1855 resolved into a fee simple. It must be observed that in each one of the cases followed there was found in the will containing the devise evidence that the testator did not use the word "children" in its ordinary sense, and in Sechler *v.*

Eshleman the devise was substantially the same as that in Pifer *v.* Locke and McKee *v.* McKinley. In Simpson *v.* Reed the language of the devise was: "I give, devise and bequeath to my daughter one fifth part or share of all my real estate for life only, remainder after her death to her child or children in fee; but if my said daughter at the time of her decease has neither husband, child or children she may also dispose of her said part or share of said real estate as she sees proper." It was there held that the first taker took an estate in fee tail general, which the act of April 27, 1855, enlarged into a fee; and Dean, J., conceding that the case was a close one, said "that the words 'heirs' and 'children' were used by the testator interchangeably, and further that the words 'child' and 'children,' as used by the testator in the fourth clause, taken in connection with the twelfth clause of the will, described and applied to a class, legally lineal descendants of his daughter, the same as if he had used the words heirs of her body."

That case followed McKee *v.* McKinley, where the devise was "to my daughter Caroline, for her sole and separate use during her lifetime; after her death to her children, if any surviving, or issue of such children, and in case of no children or issue of children then to return to my relations or lawful heirs"; where it was held that the daughter took an estate in fee under the rule, "If the remainder is to persons standing in the relation of heirs, general or special, of the tenant for life, the law presumes them to take as heirs unless it unequivocally appears that individuals other than persons who are to take simply as heirs are intended." But this rule was denied and doubt cast upon McKee *v.* McKinley as authority in Guthrie's Appeal, 37 Pa. 16 and 22. In Dodson *v.* Ball, 60 Pa. 492, Agnew, J., commenting upon the rule, said, referring to what Strong, J., said in Guthrie's Appeal on the subject, that "he was clearly right, for undoubtely upon the terms of the wills in those cases the opposite presumption was true, the words being those of purchase and not of limitation." We are not convinced that the present case is ruled by Sechler *v.* Eshleman and the cases therein cited, to which we have made reference, but on the contrary by the following cases, where the doctrine is affirmed that the word "children" is not a word of limitation but of personal description, that there must be an express warrant to construe it to mean heirs of the body under the hand of the author of the gift, that the intention to use it as a word of limitation, contrary to its natural import, must be rendered clear by the words of the grantor or testator himself. Guth-

rie's Appeal, 37 Pa. 9; Oyster *v.* Oyster, 100 Pa. 538; Shields *v.* Aitken, 236 Pa. 6. In Affolter *v.* May, 115 Pa. 54, the testator directed that his farm be divided into four equal parts and devised one part to each of his four daughters, naming them. He further devised, "The property devised to my daughters do, at their death, all and singular go to my daughters' children"; and it was held that each daughter took one of the four parts in severalty for life and her children took the remainder. Trunkey, J., speaking for the court, said:

"In Guthrie's Appeal, 37 Pa. 9, the principles applicable to the construction of this will are fully discussed, and it was said that children is as certainly a word of purchase as 'heirs of the body' are words of limitation, and that it is as difficult to elevate the word children into a word of limitation, as it is to convert 'heirs of the body' into words of personal description. And Justice Strong further remarked: 'It is not denied, that the word children may be used by a testator as a nomen collectivum, signifying 'heirs of the body,' but I have found no case in which it has been held to have been so used, unless the testator has also employed the words 'heirs of the body' or 'issue,' as descriptive of the same objects. Nothing less appears to be sufficient to repel the presumption that the testator did not intend a limitation by the use of this word of purchase.' The fact that the remainder-men were the same persons as would have inherited the estate, was said not to be indicative of the testator's purpose that they should not take as purchasers." In Manning *v.* Bader, 224 Pa. 575, the devise was "to the wife of my deceased son the lot where I am now living. After her decease the lot shall go to her children." In this case it was said: "Prima facie the word 'children' is a word of purchase and not of limitation, and standing alone without qualification it must be given its ordinary meaning. It will not be construed as a word of limitation unless there is found in the will an intention so to use it. That the first taker had no children when the will was made or when it went into effect does not warrant such a construction when the gift to the children is not immediate but by way of remainder."

The authorities there cited are Cote *v.* VonBonnhorst, 41 Pa. 243; Curtis *v.* Longstreth, 44 Pa. 297; Keim's Appeal, 125 Pa. 480; Lancaster *v.* Flowers, 198 Pa. 614. Accordingly it was held that there was nothing in the will that indicated an intention on the part of the testator to use the word "children" as a word of limitation. In Shields *v.* Aitken, 236 Pa. 6, where the testatrix gave to her son and her daughter all

her estate "for and during their natural lives in equal parts, share and share alike, and at the death of him or her as aforesaid to their children (my grandchildren) i. e., the share devised to my so to go to his children, and the share of my daughter to go to her children, share and share alike, their heirs and assigns forever," it was held that the son and daughter took estates for life with remainder to their children, the word "children" being used as a word of purchase and not of limitation. Potter, J., who wrote the opinion in that case, after referring to Guthrie's Appeal, supra, and Oyster *v.* Oyster, 100 Pa. 538, adopts the language of Sterrett, J., in Keim's Appeal, 125 Pa. 487: "The general rule undoubtedly is, that under a devise to one for life with remainder to his children, the first taker has no freehold of inheritance."

Aside from the fact that there is nothing in the will before us to show that the testator used the word "children" as a word of limitation, the devise of the farm is to the plaintiffs for their lives and at their decease one half thereof to the children of the one and the other one half to the children of the other. The devise to the children does not take effect until after the death of the plaintiffs, that is, until after the death of the survivor, evidencing the intention of the testator that the remainder should be to the children as purchasers and as taking not directly from their parents but from the testator. As was said in Jones et al. *v.* Cable, 114 Pa. 586, where the devise was, "I give and bequeath unto my two sons, John and Edward Cable, all my farm after my death to them as long as they do live, and after their death to their children." "Our construction of this will is that John and Edward took a life estate, with remainder to their children as purchasers, upon the death of the survivor. It is plain that this was the intention of the testator, for the devise over to the children does not take effect until after 'their' death, which evidently means the death of the survivor."

We are of opinion that the plaintiffs in this case took but life estates in the farm devised, with remainder to their children in fee simple, the word "heirs" following the word "children" being used in the will only to define the extent of the estate given to the children. Hoover *v.* Strauss, 215 Pa. 130. They are not, therefore, able to convey a fee simple title.

Wherefore, in accordance with the terms of the cast stated, judgment is directed to be entered against the plaintiffs and in favor of the defendants.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Elliott *v.* Prudential Insurance Co.

Insurance — Proof of death — Letters of administration — Evidence.

Letters of administration on the estate of an insured are not in themselves sufficient proof of death, where the policy provides that it is payable only upon due proof being made of the death of the insured.

Rule for judgment n. o. v. C. P. No. 3, Philadelphia Co. Dec. T., 1913, No. 211.

Samuel Scoville, Jr., for plaintiff.
Frederick J. Shoyer, for defendant.

FERGUSON, J., Dec. 21, 1915.—The plaintiff in this action is the beneficiary named in a life insurance policy issued by the defendant on the life of William Joseph Norris. The amount claimed was payable upon due proof being made of the death of the insured. The only proof offered was the letters of administration granted by the register of wills. A verdict was rendered for the plaintiff, and defendant asks for judgment notwithstanding the verdict.

Presumably the plaintiff was unable by direct evidence to prove the fact of death, for no such proof was attempted. May she, by the device of securing letters of administration, supply the deficiency in proof in this regard? That is the question raised by this record.

We have examined many decisions cited by counsel, all of which quote Greenleaf on Evidence, §550, to the effect that letters of administration are prima facie evidence of the death of the person on whose estate they are granted. With few exceptions, all these decisions are in controversies in which an administrator was a party to the action or at some period had appeared as a party in proceedings affecting the title to the real estate of his decedent. In such cases the grant of letters is prima facie evidence of death, which become conclusive in the absence of countervailing proof. The reason for this is plain. The administrator stands in the place of the person on whose estate letters were granted. He is authorized by the decree to assert every right legally vested in his decedent. No one may validly impeach that authority except for fraud in the procurement of the letters. So far as the rem—the right to administer—is concerned, all parties or privies are concluded. A different question is submitted when it is sought by this decree to bind a stranger neither interested in the estate nor having a claim antagonistic to it. It has always been held in

this state that a stranger without notice is not concluded by a decree in a matter to which he is not a party. It is unnecessary to cite authorities to sustain this statement. The only decisions in Pennsylvania to which our attention has been called are Cunningham *v.* Smith, 70 Pa. 450 (1872), which was an action by an administrator to recover money due the decedent, and McCormick *v.* Skelly, 201 Pa. 184 (1902), in which there had been a sale of land of a decedent on a judgment against his administrator. In the first case it was held that the letters were prima facie evidence of death, although the court called attention to the fact that the fact of death was not an issue in the case. In the latter case the title of the plaintiff in ejectment depended on a sheriff's deed for land of a decedent sold on a judgment against his administrator. The letters were held to be evidence of death intestate, and, the children not having been brought in, their interests were not divested by the sale. In both these cases the administrator appeared as the representative of the estate of his intestate. No one could question the effect of the letters as proof of death. Especially was this so in the latter case, where the plaintiff's title depended upon the fact of death intestate as evidenced by the judgment against an administrator.

In the case at bar the plaintiff claims not as administrator, but as an individual. The defendant is obliged to pay her the face of the policy upon proof of death. The defendant was not a party to the proceedings before the register and could not have been heard if it had appeared. We fail to see how the defendant is concluded by the grant of letters. In this we follow the decision in Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238 (1875), in which the value of letters of administration as evidence of death is discussed, and in which it is held that, between strangers, the letters are not even prima facie evidence. The opinion in that case criticises the general statement of the law as expressed in 1 Greenleaf Ev., §550, and doubts the accuracy of the conclusions of the author from the English decisions he cites.

To the same effect is Carroll *v.* Carroll, 60 N. Y. 121 (1875), in which it is held that letters testamentary are only evidence in proceedings arising out of the will or where parties claim under or are connected with it. In that case a widow brought suit for dower, and proof of death being essential, it was held that letters testamentary in such a proceeding were not evidence of the death of her husband.

The Supreme Court of Iowa, in Tisdale *v.* Connecticut

Mutual Life Ins. Co., 26 Iowa 170 (1868), has held the contrary view in an action upon the same facts and growing out of the alleged death of the same person involved in the case of Mutual Benefit Life Ins. Co. *v.* Tisdale, 91 U. S. 238. The reasoning, however, is not so convincing as that of the decision in the federal court.

We conclude, therefore, that in this action the letters of administration are not prima facie evidence of death. There being no other evidence, judgment must be entered for the defendant.

Tax Settlement Procedure.

Taxation—Settlement of public accounts—Petition for resettlement of tax—Action of state treasurer and auditor-general—Procedure under acts of March 30, 1811, P. L. 145, and April 9, 1913, P. L. 48.

The petition for a resettlement of state tax may be brought to the attention of the state treasurer just as the report and other papers relating thereto are brought to his attention in making an original settlement.

A resettlement of a public account requires the action of the state treasurer as well as the auditor-general.

The action of both state officers is necessary even though a resettlement be refused, in order that, in case of disagreement, the account, vouchers and all other papers may be laid before the governor for a decision in accordance with § 5, of act of 1811, just as in the case of an original settlement.

Request of A. W. Powell, auditor-general for opinion.

HARGEST, Deputy attorney-General, Oct. 22, 1915.—Your favor of recent date addressed to the attorney-general concerning the interpretation of the act entitled "An act regulating appeals from tax and other public accounts settlements of the fiscal officers of the commonwealth," approved April 9, 1913, P. L. 48, is at hand.

You ask, first, does the act require the facts in said petition filed prior to appeal to be called to the attention of the auditor-general and the state treasurer?

Section 2 of said act provides: "On any appeal from a tax or other public accounts settlement of the fiscal officers of the commonwealth, no facts shall be admitted in evidence that were not brought to the attention of said fiscal officers in the report filed, or in an application under oath for resettlement, prior to said appeal, etc."

The facts, of course, must be brought to the attention of the state treasurer as well as the auditor-general, but that does not mean that separate reports or separate petitions for resettlement must be filed both in the office of the state treasurer and the auditor-general. The reports are filed in the office of the auditor-general only. The petition for resettlement should be filed there also.

The act of March 30, 1811, P. L. 145, which authorizes the settlement of public accounts, provides, in § 3, "that when any public account is examined and adjusted, entered in the books of the office and signed by the auditor-general, it shall be submitted, together with the vouchers and all other papers and information appurtenant thereto, to the state treasurer for his revision and approbation."

Therefore, the petition for a resettlement may be brought to the attention of the state treasurer just as the report and other papers relating thereto are brought to his attention in making an original settlement.

Your second inquiry is: "Does § 2 of the said act require the action of both the auditor-general and the state treasurer upon all petitions presented to the fiscal officers whether the prayer therein be granted or refused?"

The section of the act just quoted provides "that when any public account is examined and adjusted, it shall be submitted . . . to the state treasurer for his revision and approbation."

It requires the action of the state treasurer to make a settlement of a public account. His revision and approbation are also required for a resettlement.

The act of April 9, 1913, provides for facts to be "brought to the attention of said fiscal officers" in an application under oath for resettlement.

I am, therefore, of opinion that it requires also the action of the state treasurer upon a petition for resettlement even though the resettlement be refused because upon such petition for a resettlement the state treasurer and the auditor-general might not agree and it would be the duty "to lay the account and vouchers and all other papers appurtenant thereto, before the governor" for his decision, as provided by § 5 of the act of March 30, 1811, P. L. 145, as in the case of an original settlement.

I return the form which you have presented to be used in case a resettlement is refused, with the approval of this department.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Farmers and Merchants National Bank, of Mt. Morris *v.* McClernan.

Promissory notes—Affidavit of defence—Averments based upon information and belief—Insolvency—Negotiable instrument law—Contemporaneous parol agreement to affect the liability of accommodation maker.

In a suit by a bona fide holder in due course against the accommodation maker, in the absence of averments of fraud, accident or mistake, it is no defence to set up a contemporaneous parol agreement, the effect of which nullifies the note.

In a suit by bona fide holder in due course on a note against the accommodation maker, it is no defence, to set up that the accommodation maker, to the knowledge of the lending bank was induced to sign the note for the accommodation of the payee to enable the lending bank to make a loan to the payee in excess of the amount allowed by law. Such facts cannot relieve the accommodation maker from payment.

Failure to present the note at maturity to the accommodation maker, will not discharge his obligation to pay the note. The bona fide holder in due course is not required to made demand, on the maker, at maturity for payment, since the maker is primarily liable.

An affidavit of defence to an action, by a bona fide holder, in due course, against the maker of an accommodation note, in which the averments and matters of defence are made on information and belief, is insufficient, unless the affidavit of defence specifically states facts which show fraud, accident or mistake, and a rule for want of a sufficient affidavit of defence will be made absolute.

Rule for judgment for want of sufficient affidavit of defence. C. P. Greene Co. March T., 1916, No. 49.

William J. Kyle, of Kyle & Reinhart, for plaintiff.

W. C. Montgomery, of Crago & Montgomery, for defendant.

RAY, P. J., March 4, 1916.—The plaintiff brought this action Dec. 16, 1915, on a promissory note, which note reads as follows:

"Uniontown, Pa., Sept. 19, 1914. Six months after date I promise to pay to the order of I. W. Semans $3,000 at the First National Bank, Uniontown, Pa. Without defalcation for value received.

"(Signed) T. J. McClernan."

On this note were two indorsements: First, "Protest and notice of protest waived. (Signed) I. W. Semans, F. M. Semans, Jr."; and, second, "Payment guaranteed. Protest, demand and notice of non-payment waived. (Signed) F. M. Semans, Jr."

The plaintiff in its statement, filed the same day suit was

brought, alleges, inter alia, that the said note, indorsed as above stated, was delivered to it by the said indorsers, for value, in due course and before maturity, and without notice or knowledge of any defect or infirmity therein, and that it thereby became the bona fide holder of the said note; and, further, that neither the said note or any part thereof was paid to the plaintiff at maturity, although payment thereof had been duly demanded, and that neither payment of the said note, nor any part thereof had been made to the plaintiff since maturity, and that suit was brought to recover the full amount of the same, with interest.

The defendant, Jan. 8, 1916, filed his affidavit of defence, embraced in nineteen paragraphs. In the first paragraph he "denies that the said bank took the note in suit without any notice or knowledge of any defect or infirmity therein, at least so far as the same applies to the defendant, for reasons hereinafter fully and at length set forth, and demands proof."

In the second paragraph he "denies that demand was made upon him for payment of said note at maturity, or that he is or ever was under any obligation whatever to the plaintiff bank to make payment thereof, for the reasons hereinafter more fully and at large set forth, and demands proof of these facts."

In paragraphs three to sixteen, inclusive, of the affidavit of defence, the defendant sets forth the reasons upon which he relies to establish three several contentions, and which contentions, if established, he maintains are sufficient in law to move the court to discharge the rule for judgment for want of a sufficient affidavit of defence. The three contentions are these: (1) That the plaintiff bank took the note in suit with knowledge of a defect or infirmity therein; (2) that no demand was made upon him for payment of said note at maturity; and (3) that he was never under any obligation to pay the said note to the plaintiff bank because of a contemporaneous agreement entered into at the time the note in suit was executed, whereby the plaintiff agreed and understood that he never was to pay the same, or any part thereof.

The defendant admits that he signed the note in suit; that he signed it as accommodation maker, for the accommodation of his personal friend, I. W. Semans, the payee in said note; that he has never paid the said note, or any part thereof; that he signed it for the express purpose of enabling the payee therein to have it discounted by the plaintiff bank. Wherein, then, under these facts, admitted by the defendant himself,

exists the "defect or infirmity" in the said note, of which he alleges the plaintiff bank had knowledge, or notice?

The negotiable instrument act of May 16, 1901, P. L. 194, § 59, provides:

"Every holder is deemed, prima facie, to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Who is the holder of a promissory note "in due course"? Section 52 of the act above referred to declares:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That it is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

The plaintiff, in its statement, avers that it is a holder "in due course," having complied with every statutory requirement in becoming the owner and holder of the said note. The defendant, in his affidavit of defence, admits that the plaintiff bank in taking the said note complied with all the foregoing statutory requirements except the fourth; that it took it with notice of informity in the instrument, or defect in the title of the person negotiating it. The facts, circumstances, and conditions upon which the defendant relies to establish such notice of infirmity and defect of title are set forth in paragraphs three to sixteen, inclusive, of his affidavit of defence. Briefly summarized he alleges in these several paragraphs:

That I. W. Semans, the payee in the note in suit, desired to make a loan from the plaintiff bank of $3,000, and that some person or persons "to this defendant not certainly known" made application to the plaintiff bank to loan said Semans the said sum of money on his (Semans) individual promissory note, in form similar to the one in suit; that the said Semans had already borrowed from the said bank, which held his promissory notes therefor, a sum equal to the legal limit the

bank was allowed to loan to any one person; that the said bank expressed a willingness to make the loan if the matter could be so arranged as to avoid the appearance of making an excessive loan, and suggested that F. M. Semans make the note and deliver it to I. W. Semans who would endorse and deliver it to the bank; that for some reason unknown to defendant, I. W. Semans declined to ask F. M. Semans to become maker of the note, but offered to have the same secured by the endorsement of F. M. Semans and guaranteed by him, which arrangement was satisfactory to the bank; that the representatives of the said Semans and the officers of the said bank, because of defendant's well-known friendliness to both Semans and the bank, agreed that the defendant should be requested to assist in consummating the transaction by becoming the maker of the proposed note; that all the foregoing matters were explained to the defendant, but by whom he does not state, and further that the security desired by the bank had been arranged for and that he was not to be held as a responsible party on the note; that at time of signing the said note he was led to believe, and did believe, that he was doing so for the accommodation of both I. W. Semans and the plaintiff bank; that he received no consideration for becoming maker of the said note; and that the bank parted with nothing of value because thereof, all of which facts he alleged were known to the bank, its officers or agents; that he did sign the note in suit, and that subsequently it came into the custody of the plaintiff bank for value; that the loan was not made because defendant was maker of the said note, but wholly on the responsibility of the said I. W. and F. M. Semans; that the plaintiff bank, as he has since been informed, procured him to become maker of the said note that it might make a loan to Semans in excess of the amount allowed by law, and contrary to public policy and that, therefore, he is not now liable on the said note; that the proceeds of said note were by said bank either placed to the credit of said Semans, or transmitted to him or his agents, no part thereof having been handled by the defendant; that the said note was not presented for payment at maturity, at the place designated, and that the plaintiff bank did not regard him as liable thereon in any event; that waivers of demand, protest, and notice were placed on said note after same had been signed by the defendant, and at the instance of the plaintiff bank.

The defendant is an accommodation maker of the note in suit. By reference to his affidavit of defence it will appear that

nearly all the averments therein are made on information and belief. Whether on information of Semans, or his representative, or of the bank, or some one of its officers, or agents, is not stated. The information on which the averments, many of them, were made, may have come to the defendant long after he became accommodation maker of the note in suit. If so, unless he could predicate upon that information fraud, accident, or mistake, which he has not done, he could not now avail himself of it. We are of opinion that the affidavit of defence is not sufficiently certain, specific, and circumstantial. In the case of Superior Nat. Bank *v.* Stadelman, 153 Pa. 634, the Supreme Court held: "The affidavit should state the facts specifically, and with sufficient detail to enable the court to say whether or not they amount to a defence." Citing Kaufman *v.* Iron Co., 105 Pa. 537; Noble *v.* Kreuzkamp, 111 Pa. 68; Sanders *v.* Sharp, 153 Pa. 555.

It was further held in the same case: "In an action by the indorsers of a promissory note against the maker, an affidavit of defence setting forth that there was no consideration for the note, that plaintiff had notice of that fact, and that plaintiff paid no money to this defendant for the note, is insufficient, as the facts alleged are entirely consistent with plaintiff being a holder for value, through a prior indorser, of an accommodation note.

"In such a case an averment that the payee was an officer of the bank (plaintiff) and 'had notice of the entire transaction,' without stating what the transaction was, is a nullity, as are also the further averments that the bank by its officers accepted the note without any liability on the part of the maker, and that the maker was discharged from liability by the plaintiff. It is uncertain whether these are meant to be averments of facts or inferences of law from particular facts not set forth; and such uncertainty is fatal to the sufficiency of the affidavit."

In National Bank, Etc., *v.* Dick, 22 Pa. Super Ct. 445, a case similar in its facts to the present one, and in which there was a rule for judgment for want of a sufficient affidavit of defence, the court held: "The making of an accommodation note is a loan of the maker's credit, with no restriction on its use. In this state, for half a century, at least, this principle has stood unquestioned. Lord *v.* Ocean Bank, 20 Pa. 384; Carpenter *v.* National Bank of the Republic, 106 Pa. 170; Hart *v.* United States Trust Co., 118 Pa. 565; National Union Bank *v.* Todd, 132 Pa. 312; Penn Safe Deposit, Etc., Co. *v.*

Kennedy, 175 Pa. 160. Hence in an action on such note, by an indorsee for value before maturity, want of consideration, even though known to the indorsee on receiving the note, is no defence. And while under certain well defined conditions, a written instrument may be reformed by parol evidence, this is only as to matters omitted through fraud, accident or mistake, since the purpose of reformation is to mould the contract in conformity with the intention of the parties. It does not extend to matters which the parties have designedly omitted. Nor can the legal effect of a written instrument be defeated by a contemporaneous parol provision in absolute contradiction of its essential terms. Revocation is not reformation. A written contract must be sustained, against a parol stipulation, purposely omitted, which is in effect a rescission. Martin *v.* Berens, 67 Pa. 459; Commercial Nat. Bank *v.* Henninger, 105 Pa. 496; Clarke *v.* Allen, 132 Pa. 40; Ziegler *v.* McFarland, 147 Pa. 607; Union Storage Co. *v.* Speck, 194 Pa. 126."

In Diffenbacher's Est., 31 Pa. Super. Ct. 35, Henderson, J., delivering the opinion of the court, said: "Knowledge by a plaintiff who is a holder for value that the defendant is an accommodation maker does not give the latter the rights of a surety or change his liability from what it would be as a maker for value. Delaware Co. Trust, Etc., *v.* Haser, 199 Pa. 17."

Ketchner *v.* Steffler, 64 P. L. J. 43, was a rule for judgment for want of a sufficient affidavit of defence. In that case the facts and circumstances relied on by the defendant, as set out in his affidavit of defence, were much stronger than the facts and circumstances relied on by the defendant in this case. Also they were set forth more directly and specifically than in the present case. In his opinion, filed Dec. 17, 1915, Judge Evans said:

"This is an absolute acknowledgment of indebtedness stating that it is for money loaned with an agreement to pay it without notice, with interest at six per cent. from Oct. 1, 1909. The defendant desires to offer a contemporaneous parol agreement to the effect that this was no obligation at all on the part of the person who signed it, it was not intended to be, but was to be used for some purpose, not definitely stated what, to get money by a scheme devised by plaintiff from some place in Switzerland. This is not an attempt to vary a written instrument by contemporaneous parol agreement or inducement, but an attempt to nullify a written instrument by contemporaneous parol agreement. I do not think the courts have gone that

far in admitting evidence in contemporaneous parol agreements."

In Penn Safe Deposit & Trust Co. *v.* Stetson, 175 Pa. 160, the Supreme Court held: "An accommodation note is a loan of the credit of the maker to payee, which he may use as fully and with the same effect as to the maker as he could use a note given for full consideration. It is no defence for the maker of such a note when sued by the indorser to aver the character of the note or knowledge of its character by the indorsee." Lord *v.* The Ocean Bank, 20 Pa. 384; Moore *v.* Baird, 30 Pa. 138; Miller *v.* Pollock, 99 Pa. 202; Philler *v.* Patterson, 168 Pa. 468.

The fact that no demand was made upon the defendant for the payment of the note in suit at maturity cannot avail him. Being the maker of the said note the holder thereof for value was not required to make demand on him for payment at maturity. In the language of the Supreme Court, in the case of Delaware Co. Trust, Etc., *v.* Haser, supra: "As he chose to be introduced into the world by the name and in the character of maker, he must be content to pass through, in all its stages, under the name, and he cannot, at his pleasure, cast it off, and deny it to any who has given credit to the paper on his assumed name and character." The negotiable instrument act, May 16, 1901, P. L. 194, § 70, provides: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument." Failure to present the paper at maturity to the person primarily liable thereon does not discharge his obligation. Dewees *v.* Middle States Coal & Iron Co., 248 Pa. 202; Diffenbacher's Est., 31 Pa. Super. Ct. 35; Umstad *v.* McNamara, 59 Pa. Super. Ct. 598.

Neither is the fact, if it be a fact, that the plaintiff bank made loans to I. W. Semans, payee in the note in suit, in excess of the amount a national bank is allowed to loan to any one person, a matter of defence for the defendant in this case. The question has been frequently raised before both the federal courts, and the appellate courts of this state, and their decisions are uniform to the effect that such fact cannot relieve the maker of a note from payment of the same. It was so held in the following: Union Gold Mining Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. Sup. Ct. 640; Shoemaker *v.* The Nat. Mech. Bank, 2 Abb. U. S. Cir. Ct. 416; Stewart *v.* Nat. Union Bank of Maryland, 2 Abb. U. S. Cir. Ct. 424.

In the case of Stephens *v.* Monongahela Nat. Bank, 88 Pa. 157, taken up on an appeal from this court, it was held: Sec-

tion 5200 of the revised statutes of the United States, declares 'the total liabilities to any association of any person, or of any company, corporation or firm, for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one tenth part of the amount of the capital stock of such association actually paid in.' Held that it was not error to reject an offer to prove an agreement to violate this section, and that the loans in pursuance of it were in excess of the authority and power of the bank to make."

In the seventeenth paragraph of the affidavit of defence the defendant sets out the fact that the plaintiff bank, early in the year 1915, was closed by the comptroller of the currency, and a receiver was appointed, and that shortly after his appointment he notified him of the circumstances under which the note in suit was given, and that he did not regard himself as in any way liable to the bank on the said note; and in the eighteenth paragraph he alleges that after the reorganization and reopening of the same for business, he notified the bank, or its officers and agents, "that he would refuse to be held chargeable on account of said note, and that the bank must look to the said I. W. Semans and F. M. Semans, Jr., in accordance with its original understanding and agreement"; and in the nineteenth paragraph he avers that the plaintiff bank, notwithstanding the fact that it had been closed by direction of the comptroller of the currency, and was subsequently reorganized and reopened for business, now holds the note in suit "under the same terms, stipulations and conditions as on the date of delivery."

These three paragraphs raise no additional question that need be discussed. All the matters therein contained were taken into consideration in passing upon the general proposition of defence, (3) that defendant was never under any obligation to pay the note in suit because of the alleged contemporaneous agreement entered into at the time he executed the same.

ORDER.

And now, March 4, 1916, in accordance with the views expressed in the foregoing opinion, the rule in this case on the defendant to show cause why judgment should not be entered against him for a want of a sufficient affidavit of defence is hereby made absolute.

From S. M. Williamson, Esq., Waynesburg, Pa.

Streib *v.* Tyler.

Statutes—Repeal—Acts of June 12, 1913, P. L. 476, and June 27, 1913, P. L. 568—Plumbing inspector in cities of the third class.

The act of June 12, 1913, P. L. 476, relating to the appointment of a plumbing inspector in cities of the third class is not repealed by the act of June 27, 1913, P. L. 568.

Petition for mandamus. C. P. Lawrence Co. Sept. T., 1915, No. 11.

Charles E. Mehard and *A. W. Gardner,* for relator.
James A. Gardner, city solicitor, for respondent.

PRATHER, P. J., 30th judicial district, specially presiding.—Petitioner complains that pursuant to the provisions of the act of June 12, 1913, P. L. 476, he was duly appointed plumbing inspector for the city of New Castle, on May 18, 1915, by Walter V. Tyler, the then mayor of said city; that petitioner gave written notice of said appointment to Walter V. Tyler, Bes L. Lusk, A. Judson Barnett, Joseph Gilmore and David G. Ramsey, defendants, as city council; that "said defendants, members of and composing the council of the city of New Castle, have not fixed the salary or compensation of your petitioner nor made any appropriation for the payment of the same, but have wholly failed, neglected and refused to pass the proper ordinances for the said purpose and have simply referred the aforesaid written notice and request of your petitioner to the 'committee of the whole' where it now remains without having been considered and acted upon."

It also appears that on May 28, 1915, an ordinance was proposed for the appointment of a plumbing inspector by the city council.

It is complained that said city council has failed and refused to make any provision for the payment of petitioner's services as plumbing inspector, and that said council is undertaking to create the office of plumbing inspector for the purpose of annulling his appointment as aforesaid. Wherefore, he prays that a writ of alternative mandamus issue to require council to make proper provision for the payment of his salary.

In answer thereto, respondents admit the facts alleged, and aver that the provisions of the act of June 12, 1913, P. L. 476, under which petitioner claims his appointment, is repealed and superseded by the act of June 27, 1913, P. L. 568, known as the Clark act.

To this answer, the relator demurs and prays for judgment.

Our jurisdiction being conceded, and the form of action not being questioned, the sole contention is whether the act of June 12, 1913, P. L. 476, is repealed and superseded by the act of June 27, 1913, P. L. 568.

Section two of the former act provides, inter alia: "The mayor of said cities is hereby authorized and required to appoint a competent person as plumbing inspector, whose duty it shall be to supervise, superintend and inspect all plumbing and house drainage in conformity with the provisions of this act. And the several cities are hereby authorized and required to make proper provision for the payment of the salary of the said plumbing inspector, as provided by law."

Among the powers granted to council in such cities by Art. v, Sec. 3, Clause 13, of the latter act, we find the following: "Every city of the third class . . . shall have power . . . to create any office, public board, or department which they may deem necessary for the good government and interest of the city; to prescribe the powers thereof, and to regulate and prescribe the terms, duties and compensation of all such officers, and of all officers who are members of any public board of any department so created."

The city solicitor, as counsel for respondents, makes the proposition that the powers referred to in clause 13 are broad enough to include the creation of the office of plumbing inspector, and as the Clark act was intended to furnish a complete system of law relative to the government of cities of the third class, that the former act is repealed as inconsistent therewith.

In considering this proposition, it is important to notice that the former act was passed for the definite purpose of creating "the office of plumbing inspector," which the legislatures of 1901 and 1909 mistakenly assumed to have been already created.

The legislative mind is clearly disclosed by the preamble to the act of June 12, 1913, as follows:

"Whereas, there is no provision for the appointment and payment of a plumbing inspector in second and third class cities of this commonwealth; and

"Whereas, the act of June 7, 1901, P. L. 493, and the act of May 14, 1909, P. L. 840, pertaining to the business or work of plumbing or house drainage have been held constitutional by the highest courts of this state, and are practically without force or effect without such a provision; and

"Whereas, the courts of this state have held that 'the real trouble in the administration of this act of assembly is that in its passage the legislature assumed it to be a fact that the office of plumbing inspector existed in all cities of the third class, when it did not'; now, therefore," etc.

Then follows the text of the act, covering nearly five pages, describing and defining the duties of plumbing inspector.

We have then the office of plumbing inspector first created by the act of June 12, 1913, its duties clearly defined, and the appointment of such officer by the mayor made mandatory.

This act is followed by the Clark act of June 27, 1913, which makes no mention of such an office or department. Clearly, the council under this latter act, is not required to create such an office or appoint an inspector. To follow the contention of respondents, the appointment of a plumbing inspector rests with them, and its creation or non-creation is the subject of councilmanic discretion.

Again, the act of June 12, 1913, not only requires the mayor to appoint such officer and the city to make proper provision for the payment of his salary, but it carefully describes and defines his duties.

If this act is superseded by the act of June 27, 1913, then the legislative attempt to create such office and to define its duties has miscarried, simply because the Clark act gave to councils in cities of the third class the authority in their discretion "to create any office . . . or department which they may deem necessary for the good government and interest of the city."

The fact that the legislatures in 1901 and 1909 both assumed such office existed, and the legislature of 1913, after a solemn preamble, confessing its former erroneous assumption, created the office of plumbing inspector and commanded the mayor to appoint him, is persuasive of a well-settled legislative intent, not that such office might be created by councils, but that it was then created by legislative act. All of which impel the conclusion that the implied discretionary powers lodged in the council to create some office are not inconsistent with, nor do they repeal the mandatory provisions of an earlier act of the same legislature, creating a particular office, and requiring the appointment of a particular officer.

If any part of the earlier act is repealed, it is all repealed. We then would have all the duties of said office prescribed by the legislature set at naught.

Our attention is called to the fact that cities of the third

class, through their boards of health, possessed the power to create the office of plumbing inspector under the act of May 23, 1889, P. L. 277, and its amending act of May 16, 1901, P. L. 224. This is conceded, but it is observable that the act of 1889 says: "The councils . . . may by ordinance create a board of health." The whole import of this language is that it vests in the city a discretionary power to create a board of health, which in turn might create a plumbing inspector.

Taken all together, the trend of the legislative mind with reference to this office has been to substitute for the discretion and implied power lodged in the council to provide such an office, an office created by the legislature, and an absolute and imperative duty upon the part of the mayor to appoint the officer.

Com. *v.* Heller, 219 Pa. 65, and Com. *v.* Elbert, 244 Pa. 535, are cited to the effect that the act of June 12, 1913, might be considered operative until superseded by an act of council creating the office of plumbing inspector. But we do not find any evidence of a legislative intent that the Clark act should either repeal or supersede the former act; in fact, we think the presumptions are to the contrary. Therefore, we are of the opinion that the act of June 12, 1913, creates the office of plumbing inspector and controls his appointment.

In Goodwin *v.* Bradford City Council, 248 Pa. 453, the Supreme Court, having before them the Clark act of June 27, 1913, and the act of July 24, 1913, P. L. 960, with reference to the appointment of inspectors of weights and measures, said:

"Among the duties or powers given to council by Art. v, Sec. 3, Clause 31, of this act is the authority to enact ordinances, 'to regulate the weighing and measuring of every commodity sold in the city in all cases not otherwise provided for by law.' A later act passed at the same session of the legislature and approved July 24, 1913, P. L. 960, amended the act of May 11, 1911, P. L. 275, by providing that the mayors of the cities of the second and third classes and the several boards of county commissioners, shall respectively appoint one or more competent persons as inspectors of weights and measures in the respective county or city, whose salary was not to be less than $1,000 per annum. . . ."

"Under the legislation as it now stands it is clearly the duty of the mayor of the city to appoint an inspector for the city alone in the absence of a joint appointment by him with the county commissioners. Council has no voice whatever in the making of this appointment, but when made it is their duty

to adopt an ordinance fixing the compensation of the appointee, which the act of 1913 provides shall not be less than $1,000 per annum and to make an appropriation to pay the same."

The propositions involved in the case cited and the one at bar are so identical that the law announced in Goodwin *v.* Bradford City Council, supra, seems clearly to rule the case under consideration.

In the clause of the Clark act, the powers delegated to council with reference to regulating weights and measures contains the qualifying words, "in all cases not otherwise provided for by law." There is no suggestion in the opinion cited that it turned upon these words, nor do we think there is any room for inference that it did.

Inasmuch as the respondents, the city council of New Castle, claim the right to create the office of plumbing inspector by virtue of an implied authority growing out of the words in Clause 13 of Sec. 2 of Art. v of the Clark act, to-wit, the authority "to creat any office," we may supply in connection therewith the qualifying words quoted from clause 31, "in all cases not otherwise provided for by law." What is the effect of adding these words to this clause? In our judgment, nothing at all, for the simple reason that the legislature considered them there, though unexpressed.

The repealing clause in the Clark act could have no effect upon the act of June 12, 1913, for the reason that the enumerated powers delegated to council do not refer to the office of plumbing inspector or its creation. The two acts are not, therefore, in conflict in themselves.

In accordance with the foregoing, our conclusion is that a peremptory writ should issue.

ORDER.

Now, March —, 1916, this matter came on to be heard upon petition of the relator, return to the alternative writ of mandamus, and demurrer thereto by the relator, and after argument of counsel and upon due consideration thereof, a peremptory writ of mandamus is awarded as prayed for, and the respondents, the council of the city of New Castle, are commanded to make proper provision for the payment of the salary of the relator as plumbing inspector, by enacting the necessary ordinance as provided by law.

It is further ordered that the city of New Castle pay the costs of this proceeding.

From J. D. Roberts, Esq., Meadville, Pa.

Milgram *v.* Glazer.

Landlord and tenant — Lease — Waiver of appeal — Parol lease.

A waiver of an appeal in a lease in writing does not apply to a case where an appeal has been taken from a judgment of a justice of the peace that the lessee should deliver possession of the premises to the lessor, where the lessee claims possession under a subsequent parol lease containing new and different provisions.

Rule to strike off appeal. C. P. No. 5, Philadelphia Co. Dec. T., 1915, No. 480.

Palmer Watson, for rule; *Adolph Eichholz,* contra.

PER CURIAM, Jan. 19, 1916.—The facts in this case appear from the petition and answer of record.

The plaintiff agent having obtained judgment before Joseph Coward, magistrate of court No. 3, Nov. 8, 1915, in the proceedings for the possession of premises No. 1800 South 20th street, the magistrate found that the complaint was in all respects just and true, and entered judgment against the lessee, the defendant, that he should forthwith deliver actual possession of the premises to the lessor, the plaintiff, and also for all costs, amounting to $4.85. This judgment was entered on No. 15, 1915.

On Nov. 16, 1915, the defendant filed his affidavit and appeal, entering security in the sum of $768, "conditioned for all rent accrued or that may accrue, all costs up to the final determination of this suit, and that the defendant will prosecute this appeal with effect."

The plaintiff obtained from this court a rule to show cause why the appeal should not be stricken from the records, averring that "the lessee waives all rights of appeal from, on writ of error or certiorari, or any judgment, order or decree that may be entered against him by any court or magistrate for rent, damage, possession or otherwise, and it is expressly agreed that execution for possession or otherwise may issue upon any judgment immediately upon the entry thereof."

The defendant answered the petition of the plaintiff, and admitted that a written lease between himself and the plaintiff, dated Nov. 1, 1912, had been offered in evidence before the magistrate, and that it contained the above waiver of appeal.

Defendant, however, claimed the right to continue in possession of said premises, "not under the written lease in ques-

tion, but under a verbal lease, entered into between the plaintiff and the defendant on or about Jan. 25, 1915, under the following circumstances, to-wit: On or about Jan. 25, 1915, the defendant verbally informed the plaintiff that he, the defendant, was able to purchase another place of business, to which he, the defendant, would move as soon as he could obtain possession; the defendant further stating to the plaintiff that it was possible that he might have to take it subject to a lease of two years, beginning some time in the month of December, 1914, the exact date of which the defendant did not know. The defendant then and there inquired of the plaintiff whether he, the said plaintiff, was willing to permit the defendant to remain in the said premises, from month to month, at a rental of $32 per month until the month of December, 1916, when defendant could, at the latest, obtain possession of the new property, in the event of his purchasing it, with the understanding that, if the defendant would obtain possession sooner, the defendant would vacate plaintiff's premises at such time as possession would be obtained. The defendant explained to the plaintiff that he, the defendant, had paid the plaintiff $600 in the year 1912 for the good-will of a cigar and stationery store, theretofore conducted by the plaintiff himself in said premises, and that, upon defendant's vacation, he, the plaintiff, would have the advantage of the good-will for which he had once been paid, the business being still in a prosperous condition.

"The plaintiff then and there also verbally agreed that he, the defendant, might remain in possession of the said premises from the termination of his written lease, to-wit, Nov. 1, 1915, from month to month, until the defendant obtained possession, not later than the month of December, 1916, of the premises that he might purchase.

"That upon the faith of this verbal letting by the plaintiff to the defendant, the plaintiff, on Jan. 26, 1915, obtained a contract for the purchase of the premises No. 1801 South 20th street, subject to a lease terminating Dec. 1, 1916."

In the opinion of the court the case of Lippincott *v.* Cooper, 19 W. N. C. 130, varies from the present case because there were no special facts averred which would preclude the lessor from claiming the waiver.

Cawley *v.* Bohan, 120 Pa. 295, also differs from the present case; first, because it was a suit before a justice against the maker of a note waiving the right of appeal; the defendant appeared and denied his signature. At a subsequent hearing the defendant did not appear, and there was proof of the execu-

tion of the note, and, therefore, it was held the defendant was not entitled to an appeal from the judgment.

Meyer *v.* Graham, 58 Pa. Super. Ct. 537, also differs from the present case in that it does not set up special facts which are averred in the present case which might preclude the lessor from claiming the waiver.

Rovno *v.* Lorentz, 32 Pa. Super. Ct. 162, would appear to be an authority in support of the defendant's contention in the present case, because it was held "if there were any special facts which would preclude the plaintiff from claiming the waiver, the defendant had an opportunity to show them in response to a rule to show cause why the appeal should not be struck off, citing Pritchard *v.* Denton, 8 Watts 371. In this latter case it was said by Justice Sergeant: "At the same time, it is very possible that a party might make out a special case, which should entitle him to an appeal, notwithstanding such a stipulation as the present one; in the same manner as where a judgment is entered by warrant of attorney, the court will, notwithstanding, open it and let the party into a defence under certain special circumstances."

In the case now before the court, as we have already found, there was no denial of the execution of the original lease, but there was very specifically set out a verbal lease entered into between the parties several years after the execution of the written lease, in which case the waiver of appeal in the written lease could not affect the terms of a subsequent verbal lease.

In Lesh *v.* Meminger, 17 D. R. 841, it was held "that a provision in a promissory note, not under seal, waiving the right to appeal, will not prevent the maker from appealing from a judgment rendered upon a defence not in existence at the time the note was signed, as the statute of limitations bars the action."

In Peters *v.* Dalton, No. 1, 27 Pa. Super. Ct. 285, would appear to be very much like the one now before the court, the syllabus reading: "A waiver of right of appeal in a lease does not apply to an appeal from a judgment of a justice of the peace where the controversy before the justice was as to the existence of a new contract by which the tenant agreed to pay an increased rental."

Judge Beaver, in rendering the opinion of the court, said, that "the question before the magistrate was not so much the amount of rental due under the lease, which was in evidence before him, but . . . had the plaintiff made a new lease."

As to that question he said: "It seems to us very clear that

the plaintiff had never waived the right of appeal. The undertaking, if made, was an entirely new one, as to which he had made no waiver of any kind. It was said in Kerlin *v.* Russell, 1 Pitts. L. J. 82, O. S., in an opinion by Chief Justice Black: 'When a party creates an obligation in a mere civil transaction, not forbidden by any statute or rule of public policy, if he knows the facts on which his defence is based, may, for a good consideration, agree that he will abide by the decision of an inferior tribunal, and such agreement will bind him. It will certainly not do to say a waiver will cut off the right to a legal and constitutional trial of a defence which arises subsequently. If a note containing such a stipulation should be paid by the maker, he is not to be bound forever by the judgment of a justice who decides that he shall pay it again.'"

The defence set up by the defendant in this case arose subsequently to the date of the lease, and the rule to strike off the appeal must be discharged.

Street Railway Nuisance.

Road law—Occupancy of state highway by street railway company — Maintaining nuisance — Remedy therefor — Procedure.

Irrespective of any agreement on the part of a street railway company to improve its road bed in view of changing conditions, the state can compel the company to pave its tracks with a pavement reasonably corresponding with that adopted by the state, when the state undertakes to pave or improve the road.

Any act on the part of supervisors of a township in granting permission to a street railway company to occupy a road which tends to narrow the road, or to render its use, for its entire width as laid out, by the public dangerous or impassable is ultra vires.

Any time the state highway department sees fit a street railway company may be compelled to place its tracks at the grade adopted by the highway department, and to pave between them and to the edge of the ties on either side, with pavement conforming to that adopted by the department.

A street railway company which violates its agreement with a municipality by narrowing the road and maintaining tracks above the level of the roadway, endangering the traveling public, maintains a public nuisance for which it can be indicted.

Aside from any agreement it is indictable at common law for maintaining such nuisance.

For its abuse of its powers and usurpation of public rights, an action in quo warranto will lie.

To make it conform to the lawful conditions under which it took

a portion of the road for its tracks, an action in equity may be maintained.

Request of Robert J. Cunningham, state highway commissioner, for opinion.

DAVIS, Deputy Attorney-General, Jan. 6, 1916.—This department is in receipt of your communication of Dec. 23, 1915. The matter which you present is that of a street railway company occupying a road which is now a part of the state highway system. It appears that this company occupies the road under the grant of township supervisors and the nature of its occupancy is such that the road has been narrowed so that the part opened and in use by the public is less than that to which the road was originally opened. You also state that the street railway company, in occupying this road, maintain their tracks above the level of the roadway, so that that portion of the road occupied by it cannot be used and traveled over with safety by the public.

It further appears that certain conditions imposed by the supervisors in their original grant have been left unperformed by the street car company; in some instances on their claiming releases from such conditions and in other instances on the grounds of the impossibility of their performance.

Your inquiry is as to the rights of a street railway company so occupying the public road, and the remedies available to the commonwealth where such occupancy narrows the road or otherwise amounts to a public nuisance.

The legal aspect presented is not so much that of the rights of this company and the township, but the company and the commonwealth. It is Hornbook law that in this state local political divisions, whether municipal or quasi-municipal, hold their streets and roads merely as public trustees, not for the citizens only, but for all the inhabitants of the commonwealth. Except in so far as constitutional limitations prohibit, the legislature may, therefore, modify, abridge or enlarge their use without the consent, or even against the will of such divisions. City of Harrisburg *v.* Railway Co., 1 Pearson 298.

By the act of May 14, 1889, which is merely a reënactment of the constitutional provision of 1874, no street railway may locate its tracks upon any street or road without the consent of the local authorities. The right of local authorities to grant such permission is different in the case of townships than that of boroughs or cities. In the latter the municipal corporation has, aside from the rights of the commonwealth,

almost exclusive jurisdiction over its streets. They may extend or abridge them, widen or narrow them, and any property-owner injured may look only to such municipality. In townships, however, while the supervisors or other township officers are the local authorities referred to in the Constitution of 1874, and act of 1889, yet they do not have the control possessed by municipalities. As stated by Justice Williams in Penna. R. R. Co. *v.* Montgomery County Pass. Ry., 167 Pa. 62.

"Cities and boroughs possess the necessary power over their streets to enable them to authorize their use by a street railway. Townships do not possess municipal powers, and under existing laws their control over the public roads is limited."

Township supervisors can lay out, abandon or alter township roads only under the direction of the court of quarter sessions, and not under their own discretion or initiative. When a road is once established, whether it has in the first instance been one laid out under the order of the court, or is a prescriptive road covered by the act of April 21, 1846, P. L. 416, the rights and powers of supervisors in themselves to alter its width, length or location, have been repeatedly denied by the courts of this state.

As stated in McMurtrie *v.* Stewart, 21 Pa. 322: "When the order to open is executed by the supervisors, the whole width of it is to be taken as devoted to the public use, and though it may not at first be entirely cleared out, that may be done afterwards. When a track has once been made on which the public can pass, the power to make another location is gone."

Again, in Furniss *v.* Furniss, 29 Pa. 15, it is held: "No agreement between supervisors and owners of land through which a public road passes can give validity to a change of the route of such road differing from that reported by the viewers. The authority under the order to open a road is exhausted by the action of those to whom it is directed."

The foregoing cases are cited in support of the position which we take, namely, that the supervisors were without power to enter into any valid agreement, which in its effect narrowed or limited the portion of this road which could be used by the public.

Any political subdivision, that is townships, boroughs or cities, when granting permission to street railways to occupy their roads or streets, may impose such conditions as they see fit. Allegheny *v.* Millville, Etc., St. Ry. Co., 159 Pa. 411.

As stated in Plymouth Twp. *v.* Chestnut Hill & Norristown

Ry., 168 Pa. 181: "The railway company must take such consent upon such conditions as the local authorities may impose, or not at all."

In the present case the consent in the first instance was given on condition that, with the exception of a small portion of the road, there was to be a sixteen-foot clear roadway, and in addition the company was to take care of all slides, and to keep the drains open at all times. The company has maintained a position that aside from the agreements these conditions were impossible of fulfillment, particularly as to the width of roadway. Their attitude is that in maintaining it to the designated width they would be compelled to retain dangerous curves, and keep the track in dangerous proximity to the west bank. This contention is disposed of in the case of Com. *v.* Erie & Northeast R. R. Co., 27 Pa. 339, in which the court said:

"If the powers given to the corporators cannot be executed without disregarding the restrictions with which they are coupled, they cannot be executed at all. A prohibition, exception, or reservation in a charter, must therefore stand in full force, though it destroy or make nugatory all the powers given to the company." Again: "Municipal consent to the occupation of the streets of a municipality by a railroad company upon condition, and the condition broken, is no consent at all." Mill Creek Twp. *v.* Erie Rapid Transit Co., 216 Pa. 132.

By the subsequent agreements entered into the supervisors attempted to give away public rights, and the company, consistent with its uniform course, attempted to free itself of its obligations. The duty of this company to maintain the whole of the road, including the portions occupied by its tracks, fit for public travel is discussed later. Such duty, however, under the common law and its franchise, is no less than the duties discussed in the case of Snow et al. *v.* Deerfield Twp., 78 Pa. 181. In that case a railroad which constructed its tracks on a public road was obligated under the act of Feb. 19, 1849, to construct a new road. The township authorities attempted to release the railroad company from this obligation in consideration of the payment of a sum of money to the township. The court in discussing the case, said:

"It was an agreement by the township wholly to release the railroad company from all responsibility and liability for the construction and repair of this and all other roads made necessary by the obstructions, or occupancy, or injury caused by the building of the railroad, and to perform this duty on the part

of the township. Now, clearly this was a contract beyond the scope of the powers of the commissioners who made the agreement on behalf of the township. They could not release the railroad company from its public duty and its liability to the public for neglect or nonperformance of the duty. The whole contract was ultra vires, and compelled the township to assume a liability to the public which was specially imposed by law upon the railroad company."

Aside from all duties imposed on this street railway company in its franchise to maintain its tracks in condition so that the public might use them, and to preserve the width and condition of the balance of the road, it has long been recognized as the common law in this state that such duty is inseparable from the use of a public highway.

The whole attitude of this company has been one of indifference to the effect which the presence of their railway has on the balance of the road. As stated in Com. *v.* Erie & Northeast R. R. Co., supra: "If, for instance, the railroad be made above the level of the street, they must grade the rest of the street also, if that will make it better for public accommodation. They cannot say to the city authorities, We have destroyed your street, and rendered it impassable; but we have not impeded its free use, because you can restore it again to a tolerable condition, at your own expense. Neither does it make any difference whether it be a main thoroughfare or an unimportant by-street, for this act of incorporation protects all alike."

The portion of the act referred to read as follows: "The said railroad shall be so constructed as not to obstruct or impede the free use of any public road, street, lane or bridge, now laid out, opened or built."

The requirement in that act was no greater than the common law duty upon street railway companies to preserve the streets they occupy in fit condition for public use.

In the case of Reading *v.* United Traction Co., 215 Pa. 250, the rule is stated: "The municipality, as the agent of the state, has charge of the streets, that it must maintain and keep them in proper repair, and when the state permits this charge, as to a portion of a street, to be committed to another, it must be understood as imposing upon such party the responsibility that formerly rested upon the municipality, unless in the grant, or in the municipal consent thereto, of the right to use a portion of the street, such responsibility is expressly withheld and its imposition continued upon the municipality."

It will be noted here that to relieve a street railway company from this duty it must be expressly stated in the grant. Again in the same case: "It is recognized with substantial uniformity, that a railway company, whether general or passenger, is bound to keep the portions of streets occupied by its right of way in good condition, even in the absence of any express contract or statutory direction to that effect."

In the case of Harrisburg *v.* Railway Co., supra, the court, commenting upon the effect of the act of 1861, said: "But the act of 1861 gave the virtual use of a portion of each of those streets to the railroad company. True, the public have certain limited rights on the track of the road. It is required to be made at grade with the street, and therefore may be passed over at pleasure. Many vehicles travel upon its rails, but must give way at all times and under all circumstances to the cars of the company, which has measurably an exclusive enjoyment of so much of the public street. Who, then, must keep that portion of the street so occupied in repair in the absence of all statutory provision? As we conceive, it must be done by the railroad company. From the very nature of the enjoyment, the duty devolves upon it. The legislature has taken the control of that portion of the highway from the city authorities and given it to another corporation, to be used in a method peculiar to itself. All of the streets not so occupied must be kept in repair by the city. If the track of the railroad company becomes so deep and ponderous that it cannot be crossed with safety, the company may be indicted."

In the present case the company has denied its liability to continue any improvements which it undertook to make in the first instance. Its attitude has also negatived its intention to improve its roadbed in view of changing conditions. It can be stated here as a positive legal conclusion that irrespective of any agreement on its part to do so, when the state undertakes to pave or improve this road it can compel this company to pave its tracks with a pavement reasonably corresponding with that adopted by the state. Reading *v.* Union Traction Co., 202 Pa. 571.

In this case the court quotes from Justice Mitchell's opinion in Philadelphia *v.* Street Pass. Ry. Co., 169 Pa. 269: "The duty to repair, where it exists, extends to the replacement of an old pavement by a new one of different and improved kind . . . the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate functions."

In the Reading case the court uses an expression which is very appropriate to this phase of the present case: "Certainly no contract was made between the city and the company designated to stand as an obstacle in the path of progress, corporate or municipal."

In conclusion I beg to advise you:

First. That any act on the part of the supervisors of this township which tended to narrow this road, or to render its use, for its entire width as laid out, by the public dangerous or impassable was ultra vires.

Second. The present company is undoubtedly occupying this road in disregard of the conditions under which permission to occupy it was granted.

Third. At any time that the state highway department sees fit it may be compelled to place its tracks at the grade adopted by the highway department, and to pave between them and to the edge of the ties on either side, with pavement conforming to that adopted by the state highway department.

Fourth. In its present manner of maintaining its tracks it is maintaining a public nuisance.

For the latter offense this company can be indicted. For its abuse of its powers and usurpation of public rights an action in quo warranto would lie against it. To make it conform to the lawful conditions under which it took a portion of this road for its tracks an action in equity may be maintained against it.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Brajkovic *v.* Brajkovic.

Divorce—Notice of hearing—Desertion—Defences.

The rule of the Dauphin county court which provides for the mailing of notice of the time and place of hearing in divorce does not require proof of its receipt.

Where at the utmost fifteen days were required for the newspaper containing such notice to reach the respondent's post office address, which gave respondent more than a month's time to appear in person or by counsel to make defence, the court is not warranted in finding that a fraud had been practiced.

Where the respondent left his wife in the United States and absented himself from her for eighteen years, during which time he contributed nothing to her support; and where libelant testifies that he left against her protest; but respondent testifies that he left with her consent; other witnesses testifying as to the circumstances under which he left and his previous behavior towards her; and the court

finds the weight of the evidence to be with the libelant, the court will not open the case and rehear the same to reach the same conclusion.

Libelant's conduct, e. g., adultery, after the penitential period has expired, constitutes no defence to a proceeding for divorce.

The fact that libelant furnished the money for the return of the respondent to this country after the proceeding in divorce was heard was of no significance, in view of the uncontradicted evidence that she did not thereafter live or cohabit with him, but on the contrary emphatically refused when he appeared.

Rule to vacate decree of divorce. C. P. Dauphin Co. March T., 1911, No. 28.

F. B. Wickersham and *O. G. Wickersham,* for libelant.

J. C. Nissley and *P. C. Moyer,* for respondent.

KUNKEL, P. J., Nov. 4, 1915.—This is a rule to vacate the decree in divorce made in the above stated case, and the grounds upon which the vacation is asked are that the marked copy of the newspaper containing the notice to the respondent of the time and place of the hearing was purposely mailed to the wrong address, that the respondent did not desert the libelant as alleged in the libel, and that the libelant committed adultery with one of the witnesses, who, it is alleged, alienated her affections from her husband.

As to the first ground, we have carefully examined the testimony submitted and are not able to find that the notice of the hearing was misdirected. The newspaper containing the published notice of the time and place of hearing was directed to Prekreski Lovic, No. 12, Post Office Vivodina, Croatia, Hungary, Europe. It is contended that this was not the respondent's last post office address, but that his last post office address was Doljani Lovic, No. 12, Vivodina. It appears that letters addressed to Prekreski Lovic and Doljani Lovic went to the general post office at Vivodina. These two hamlets are not more than a half hour's walk apart. It also appears by the weight of the evidence that the respondent lived in Prekreski Lovic, No. 12, with his son, and the documentary evidence shows that written communications mailed to that address to the son reached their destination. This objection, therefore, to the validity of the decree is not sustained. The objection that the respondent did not actually receive the notice cannot avail, if that were the fact. However, several of the witnesses testified that the marked copy of the newspaper containing the notice was received by the respondent, and that he had it translated and understood what the notice meant, but

this he denies. Besides, a reputable member of the bar testified that the marked copy of the newspaper containing the notice was received by the respondent, and that he had it translated and understood what the notice meant, but this he denies. Besides, a reputable member of the bar testified that he communicated the fact of the pendency of the proceeding in divorce to certain persons who purported to represent the respondent in another matter. He also appeared in court when the case was set down for trial in June, although he was not the attorney of record, and moved for a continuance of the hearing, which was granted. Whether the respondent actually received the notice is immaterial. The rule of court which provides for the mailing of the notice does not require proof of its receipt, but directs that a marked copy of each issue of the newspaper containing the notice shall be mailed postpaid to the last known post office address of the opposite party. This was done in the present case. A copy of the newspaper containing the notice was first mailed on Sept. 6, 1913. The hearing was had on Oct. 27, 1913. At the hearing we were in some doubt whether there was enough time allowed between the date of sending the notice and the date of the hearing for the respondent to receive it, but reference to the testimony taken at that time shows that at the utmost fifteen days were required for the newspaper containing the notice to reach the respondent's post office address. This gave him more than a month's time to appear in person or by counsel to make defence if he so desired. Under the circumstances we would not be warranted in finding that a fraud had been practiced and in vacating the decree of divorce for that reason.

The denial on the part of the respondent that he willfully and maliciously deserted the libelant comes rather late at this time. Nevertheless, we have examined the testimony, that upon which the original decree was based as well as that which has been submitted to us on this rule. The respondent left his wife in this country and absented himself from her for eighteen years. During this time he contributed nothing to her support. She testified at the hearing that he left against her wish and protest, going to the old country and taking with him their three-year-old son. The respondent testifies now that he left with her acquiescence and consent. Other witnesses testified touching the circumstances under which he left and his previous behavior toward her. The weight of the evidence, we think, is with her. If we opened the case and reheard it we would reach this conclusion.

As to the averment that the libelant committed adultery with the witness Fursich, little need be said. We are not satisfied this averment is made out, but even if it were, the adultery is alleged to have been committed ten years after the desertion took place. Her right to a divorce accrued after willful and malicious desertion without reasonable cause for two years. Her conduct after the penitential period expired constitutes no defence to the proceeding for a divorce. Ristine *v.* Ristine, 4 Rawle 459; Mendenhall *v.* Mendenhall, 12 Pa. Super. Ct. 290; Fay *v.* Fay, 27 Pa. Super. Ct. 328.

The fact that libelant furnished the money for the return of the respondent to this country after the proceeding in divorce was heard is of no significance, in view of the uncontradicted evidence that she did not thereafter live or cohabit with him, but on the contrary emphatically refused to do so when he appeared. She furnished the money to bring her son, whom she had not seen for eighteen years, and his family to this country, and states as a reason for paying the respondent's passage here her belief that her son would or could not come unless the respondent came also. The fact remains that there was no resumption of the marriage relation between them.

None of the grounds upon which the vacation of the decree is asked has been sustained. Wherefore the rule is discharged.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Buck's Estate.

Lunacy—Weak-minded persons—Sale of real estate—Payment of debts—Conversion—Acts of June 13, 1836, P. L. 589; June 25, 1895, P. L. 300, and May 28, 1907, P. L. 292.

Where the real estate of a weak-minded person is sold under the act of May 28, 1907, P. L. 292, for the payment of debts, the surplus after the payment of the debts, will remain real estate to be distributed as such upon the death of the weak-minded person, by the orphans' court. The character of such surplus is not affected by any order of the court of common pleas.

Exceptions to adjudication. O. C. Philadelphia Co. April T., 1914, No. 533.

E. Cooper Shapley, for the exceptions filed on behalf of Lizzie M. Buck.

W. S. Roney, contra.

GUMMEY, J., Feb. 18, 1916.—Two sets of exceptions were filed to the adjudication in this estate; those filed by S. Trainer Buck and C. Percy Buck were filed for the purpose of correcting errors in figures apparent upon the face of the record, and are sustained.

The other exceptions were filed on behalf of testator's widow, and the question raised is whether money and securities which appear in the account are to be distributed as personal property or as real estate—if as personalty, the widow takes one half thereof absolutely, and if as realty, an estate for life only.

In 1909, Daniel H. Buck, then in his right mind, made his last will.

In June, 1912, he was declared to be weak-minded by decree of court of common pleas No. 1, of Philadelphia county, as of June term, 1912, No. 609, and a guardian for him was appointed.

In 1913, by authority of the court of common pleas, the guardian sold certain parcels of his ward's real estate, and subsequently, in 1914, Daniel H. Buck died without any change having occurred in his mental condition, and after his death an account of the proceeds of the real estate so sold was filed by the guardian in the court of common pleas, and thereupon, by decree of that court entered March 26, 1914, the account was confirmed and the guardian directed to pay the balance of cash there shown and to deliver the securities in his hands to the executors of the will of Daniel H. Buck, deceased. It is the fund so received which is the subject of the present controversy.

The petitions which the guardian presented for leave to sell the real estate do not refer specifically to any act of assembly, but it is evident the guardian was proceeding under the act of May 28, 1907, P. L. 292.

The act of May 28, 1907, P. L. 292, does not provide how the proceeds from the sale of a feeble-minded person's land shall be held, and in this respect is like the lunacy act of June 13, 1836, P. L. 589; and in a case arising after that act (Lloyd *v.* Hart, 2 Pa. 473), where a lunatic's land had been sold, the same question was raised which is now here presented, and Chief Justice Gibson, in holding that the sale did not work a conversion, said: "Adverting, then, to what we may suppose would have been done had it been presented to the legislature for special provision, we cannot think that power to convert beyond the exigencies of the occasion would have been conferred, since, had it not been for those exigencies, the legislature would have conferred no power at all. The power was to be

exercised, not for the sake of conversion merely, but for a purpose beyond it; and beyond the accomplishment of such a purpose it is not to be supported. . . . From these it appears that the equitable character of the property, when legally converted, depends on the will of the devisor, collected from the purpose to be answered by it; but the committee had, in this instance, no will to exercise, or power to convert, as a devisor has, for motives of mere caprice, or for any motive at all not authorized by the statute. The sale was for maintenance of the lunatic and payment of his debts; consequently, what remained when that was accomplished retained the interest of real estate."

Lloyd *v.* Hart, 2 Pa. 473, has never been reversed; distribution was made as thereby directed (see Hart's Appeal, 8 Pa. 32), and, in our opinion, it rules the case before us. It is true that the act of 1836 does not, like the act of 1907, provide for a sale, "where it is for the interest and advantage of the said ward that the same shall be sold," but limits its application to sales for the payment of a lunatic's debts and for the support and maintenance of himself and his family; but the reasoning applied to sales by virtue of the act of 1836 applies equally well to sales under the act of 1907; and this was recognized by the legislature when it provided that a guardian appointed under the act of 1907 "shall have precisely the same powers and be subject to the same duties as a committee in lunacy in the state of Pennsylvania," and by our Supreme Court in construing the former act of June 25, 1895, P. L. 300, relating to feeble-minded persons, holding, in Hoffman's Est., 209 Pa. 357, that that act was in pari materia with the lunacy acts and should be construed upon the same general lines.

In reaching our conclusion we have not considered it necessary to discuss those cases which hold that the proceeds from the sale of a minor's real estate are to be distributed as money; the distinction is (as illustrated by Dyer *v.* Cornell, 4 Pa. 359; Pennell's Appeal, 20 Pa. 515, and subsequent cases) that upon a sale of a minor's interest in land, the proceeds thereof vest in the person entitled to it, to-wit, the minor, and, therefore, in his hands, are to be treated as money, and upon his death pass to his personal representatives as personalty; in the case, however, of a lunatic, "the committee is but the receiver of the court, from which he derives his powers, and the fund, when it comes into his hands, is a trust fund as much in custodia legis as if deposited in bank to its credit, or locked up in the strong box of the court, under the care of its officers" (Justice Clark in Wheatland's Appeal, 125 Pa. 38); and the importance of

maintaining, so far as possible, the estate of a lunatic or feeble-minded person in the condition in which it was before the committee or guardian was appointed is evident, not only because to hold otherwise might change the course of descent, but also because the act of 1907 provides in terms that if the afflicted person shall regain ability to care for his or her own property, the court shall so decree and shall discharge the guardian, "and thereupon the said person shall be, so far as the care of his or her property or person shall be concerned for the future, the same as if the proceedings against him or her had never been taken."

Nor do we agree with the exceptant that the fund should be distributed as money because so awarded the testator's executor by the court of common pleas, as that court was without jurisdiction to do more than ascertain the balance remaining after the payment of the debts lawfully contracted by the guardian, and direct payment of the balance to the personal representative of the deceased lunatic for accounting and distribution in the orphans' court. This was expressly decided in Frankenfield's Appeal, 11 W. N. C. 373, in which a decree entered by a court of common pleas, distributing the estate of a deceased lunatic, was set aside because made without authority, Justice Green saying: "The decree of distribution, however, cannot be sustained. It was entirely without authority, as the court of common pleas has no jurisdiction to distribute the estate of deceased persons. The fund can be paid to the legal representative of the deceased lunatic, whenever such a person shall be duly appointed, and he can make distribution according to law. This subject was not presented to the attention of the court below."

The exceptions filed on behalf of Lizzie M. Buck are dismissed.

Civic Club of Harrisburg *v.* Central Trust Co. of New York.

Wills—Devise to unincorporated association—Charitable gift—Purpose of.

Testator devised to the Civic Club of Harrisburg in fee "for use as a clubhouse and property," and in case it is sold or ceases to be the club's the proceeds shall constitute a fund, the income of which shall be applied forever "for the general purposes of civic progress and public improvements for which said club was organized and is or may be maintained." Held, that such devise was a charitable gift.

Such devise is a good public charitable gift and its purpose is not

so vague and indefinite as to be incapable of being administered or so general as to admit the use of the property's purposes not charitable.

The court is not restricted in determining the intention of the devisor to the will alone; the objects and operations of the association to which the gift is made are to be considered.

The purposes of a club, "to increase the public interest in all matters relating to good citizenship and to promote a better social order," is neither vague nor indefinite; especially when the by-laws recite specific aims.

A devise to an unincorporated association is void at law, but such a devise is not permitted to fail if it be for a charitable or religious use.

A devise to an association for religious purposes, unincorporated at the testator's death, but since incorporated, is good in Pennsylvania.

Assumpsit. C. P. Dauphin Co. Jan. T., 1915, No. 751.

J. F. Weiss, for plaintiff; *M. W. Jacobs,* for defendant.

KUNKEL, P. J., April 10, 1916.—This is an action brought by the Civic Club of Harrisburg, the plaintiff, against the defendant, Frank Payne, to recover rent due from him for the premises No. 612 North Front street, formerly owned by Mrs. Virginia Hammond Fleming, deceased. On his admitting his liability, but alleging that the rent was also claimed by the Central Trust Company of New York, trustee under the will of Mrs. Fleming, that company was permitted to be substituted as the defendant for the purpose of making defence. Accordingly an issue was framed between the plaintiff and trust company to try their respective rights to the rent in question. By agreement the issue was submitted to the court for trial without a jury, pursuant to the act of April 22, 1874, P. L. 109. The facts are not in dispute and may be stated as follows:

FACTS.

1. The Civic Club of Harrisburg, an unincorporated association, was organized in 1898, its object being, as set forth in its constitution, "to increase the public interests in all matters relating to good citizenship and to promote a better social order." Its membership was composed of active, honorary and life members. It was supported by, and the expenses necessary to carry on its work paid out of, the annual dues of the active and honorary members and out of voluntary contributions. For the better execution of its object it was divided into de-

partments, representing different lines of work, municipal, educational and outdoor. The duties of the municipal department were to examine into the aims and functions of municipal government, the practical workings of the municipal government of the city of Harrisburg, into the problem of public health and social reform, and from time to time to report upon the same and to suggest measures for their improvement and to cooperate in carrying them out. The duties of the educational department were to examine into the requirements of public education in the city of Harrisburg from time to time and report upon the same and upon national educational movements, and to suggest measures for improvement and to coöperate in carrying them out. The duties of the outdoor department were to study and encourage forestry improvement interest in the city of Harrisburg and vicinity with the view to enhance the beauty of the city parks and public places and to create an interest in the preservation of our forests and from time to time suggest measures of improvement, and to coöperate in carrying them out.

2. The activities of the club consisted in advocating cleaner and better streets; in securing the passage of ordinances prohibiting the throwing of waste paper on and spitting on the streets; in placing pictures in the schools and establishing leagues of good citizenship among the scholars for the purpose of arousing a greater interest in Harrisburg and a greater knowledge of the city, meetings being held in the schools by the members of the Civic Club with the children; in establishing play grounds in and about the school houses; in establishing school gardens where the scholars cultivated and raised flowers and vegetables; in offering prizes for the best planting in back yards, so that they might be clean and ornamental and so as to create interest among the scholars or children in the planting and beautifying of the city; in censoring the moving pictures in theaters; in efforts to get rid of the fly by offering prizes for the largest number destroyed; in efforts to get rid of the caterpillars and destructive insects by destroying the eggs; in establishing traveling libraries in the state and in the engine houses and schoolhouses of the city; in advocacy and in efforts to establish a branch of domestic science in the public schools; in the planting of trees and shrubbery around the schoolhouses and in the city; in securing prominent persons to lecture on subjects relating to good citizenship and to civic improvement; and in general in doing those things that conduce to a better social order and to an improved civic condi-

tion. Among the lesser or incidental activities, letters were sent to congress by the club in regard to the Page-Wilson agricultural bill, and to senators and representatives in the Pennsylvania legislature, asking their support for the Walnut child labor and women's labor bills, industrial home for women, billboards, audubon society, Stine non-support bill and appropriation to State College.

3. Mrs. Fleming was one of the organizers of the Civic Club of Harrisburg, unincorporated, and an active member thereof during her life. She was familiar with its objects and was deeply interested in its work. On June 15, 1914, she died seized of the lot or piece of ground, with dwelling-house thereon erected, situate in the Fourth ward of the city of Harrisburg, known and numbered as 612 North Front street, and leaving a last will and testament, dated July 9, 1912, admitted to probate in the surrogate's court of New York county, state of New York, on Aug. 27, 1914, wherein she provided, inter alia, as follows, to wit: "4. I give and devise the house now numbered 612 North Front street, known as 'Overlook,' in said city of Harrisburg, together with the lot appurtenant thereto, which was inherited by me from my deceased husband, William Reynolds Fleming, to the Civic Club of said city of Harrisburg, to have and to hold the same absolutely forever in fee to said Club, a corporation, for use as a club house and property; this devise being made as a memorial to and in fulfillment of a desire expressed by my said husband, because of the great interest taken by him in all matters of civic progress and public improvements in said city of Harrisburg. In case at any time it shall be deemed expedient by said club to sell said house and lot, or in case the same should for any reason ever cease to be the property of said club, I direct that the money or other proceeds received by said club for said house and lot shall be held as a trust fund to be known as the William Reynolds Fleming Trust Fund, the principal whereof is to be kept intact and safely invested and reinvested, and the rents, profits, interest and other income received and collected and applied forever for the general purposes of civic progress and public improvements for which said club was organized and is or may be maintained, and I give and bequeath the said Civic Club the sum of $1,000 for the purpose of erecting upon said house a suitable tablet or plate, appropriately inscribed to indicate the devise of said house and lot to said club as a memorial of my said husband, William Reynolds Fleming."

4. The will further provided, in the first paragraph of article

5 thereof, as follows: "5. All the rest, residue and remainder of my estate and properties, real and personal, of every kind whatsoever, of which I may die seized or possessed or to which I may be in any way entitled at the time of my death, including the legacy of $15,000 hereinbefore in subdivision J of article 2 hereof made to Henry Sanderson, in case he shall not survive me, and all other legacies and devises hereinbefore made, but which may have lapsed or become void because of the decease before my death of the legatees or any other reason, I give and devise the income to the Central Trust Company of New York, to have and to hold the same as trustee nevertheless and in trust for the following uses and purposes, that is to say," etc.

5. On June 6, 1914, Mrs. Fleming leased the property 612 North Front street to Frank Payne, the defendant, for the term of one year, from Aug. 1, 1914, to Aug. 1, 1915, at the monthly rent of $129.17, payable in advance.

6. The Civic Club of Harrisburg, the unincorporated association, was incorporated by the court of common pleas of Dauphin county on Oct. 6, 1914, under the name and style of "The Civic Club of Harrisburg, Pennsylvania." The corporation has the same object as that of the unincorporated association and is engaged in the same work.

7. Thus incorporated, it demanded of Frank Payne, the lessee, the rent of the property for the months of December, 1914, and January, 1915, claiming that it was the owner of the premises and entitled to the rent falling due subsequently to the death of Mrs. Fleming, the amount thereof being $258.34. On his failure to pay, it brought this action against him to recover the rent.

8. The Central Trust Company of New York, trustee under the will of Mrs. Fleming, deceased, also made a claim for the rent, asserting that the devise to the Civic Club of Harrisburg, unincorporated, was void, and that it was therefore entitled to the rent by virtue of the first paragraph of article 5 of the will heretofore quoted, whereupon it was permitted to make defence against the claim of the plaintiff and the issue heretofore stated was framed.

DISCUSSION.

The right of the plaintiff, the Civic Club of Harrisburg, to the rent of the property devised depends upon the validity of the devise contained in the fourth paragraph of Mrs. Fleming's will. The property is devised to the Civic Club of Harrisburg in fee "for use as a club house and property," and in case it is

sold or ceases to be the club's, the proceeds shall constitute a fund, the income of which shall be applied forever "for the general purposes of civic progress and public improvements for which said club was organized and is or may be maintained." It is clear that the intention of the testatrix was to devote the property to the uses and purposes of the club. That the devise is a charitable gift in the contemplation of the law can admit of no doubt. It takes its character from the character of the club, Evangelical Association, 35 Pa. 36, as well as from the purpose stated in the will. The object and activities of the club show that it was engaged in a service to the residents of Harrisburg. To educate the public in principles of good citizenship, so as to promote better municipal conditions, to suggest and to coöperate in carrying out measures designed to make the city more healthful, more moral, more comfortable and more beautiful as a place to live in, and to teach and encourage the residents to be interested in matters that conduce to this end, are great public services. The application of money and property to such purposes is manifestly a public charity, and an association dedicated to such a work is a public charitable institution. The testatrix was familiar with the work of the club and clearly intended that her property, and its proceeds when sold, should be dedicated forever to the work in which the club was engaged.

But we do not understand that it is seriously disputed that the devise is a charitable gift. It is objected, however, that the purpose of the gift is vague and indefinite, and that therefore the gift is void. This proposition is attempted to be sustained by reference to the language of the devise, which declares that if the property be sold the proceeds shall be held as a trust fund, and directs that the interest and income thereof shall be applied forever "to the general purposes of civic progress and public improvements," the argument being that these purposes are too indefinite and vague, and for that reason the devise is invalid. But we are not restricted in determining the intention of the devisor to the will alone. In order to determine whether the gift is good we must see what are the objects and operations of the association to which the gift is made. Carter *v.* Green, The Jurist, Vol. III, 905. By the devise itself the testatrix explains what she means by the phrase, "the general purposes of civic progress and public improvements," for she adds, "for which said club (that is, the Civic Club of Harrisburg) was organized and is or may be maintained." The phrase is her own characterization of the

object and activities of the club, which, as we have seen, were "to increase the public interest in all matters relating to good citizenship and to promote a better social order." This purpose, it seems to us, is neither vague nor indefinite. It evidently means to increase the public interest in good citizenship, so as to promote a better social order, or to promote a better social order by increasing the public interest in matters relating to good citizenship. And the meaning of social order is clear. It is the order of society or the condition of society, in the present case more particularly the condition or order of that body of society composed of the residents of the city of Harrisburg. The plain object of the club therefore is to increase the public interest or the interest of the people of Harrisburg in matters relating to good citizenship and thereby promote better municipal or civic conditions therein. Such an object is as definite as was sustained In re Scowcroft, Chan. Div., 1898, p. 638, where the devise was of a building used as a village club and reading room "to be maintained for the furtherance of conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing"; or as was sustained in Wrexham Corporation *v.* Tamplin, 28 L. T. 761, "for the use or benefit of a borough town, or of the inhabitants, or of the institutions in the borough"; or "to charitable and deserving objects," as was sustained In re Stone *v.* Attorney-General, 54 L. J., ch. 613; or as was upheld in Nightingale *v.* Goulburn, 5 Hare 489, where the bequest was "to the queen's chancellor of the exchequer for the time being, to be by him appropriated to the benefit and advantage of my beloved country, Great Britain." The purpose of the club is more specifically defined in its by-laws and is, as stated, to examine into the aims and functions of municipal government and the practical operation of the municipal government of the city of Harrisburg, and into the problem of public health and social reform; to examine into the subject of public education of the city of Harrisburg and familiarize itself with national educational movements, for the purpose of suggesting measures for improvement among the city schools; and to study and encourage forestry improvement interest in the city, for the purpose of beautifying the public parks and public places; and in all these directions to suggest measures of improvement and to coöperate in carrying them out. These objects, thus specifically stated, contribute to the general object of promoting a better social order and fall within the scope of the work for which the Civic Club was organized and is maintained. They

are educational in their character and are of public benefit. We are therefore of the opinion that the devise is a good public charitable gift, and that its purpose is not so vague and indefinite as to be incapable of being administered or so general as to admit the use of the property for purposes not charitable.

The objection touching the lesser or incidental activity of the club in advocating certain legislation relating to child and woman labor, audubon society, industrial home for women, billboards, Stine non-support and appropriation to State College, is without force. It is true it was said in Jackson *v.* Phillips et al., 96 Allen 571, that a charity is a gift to be applied consistently with existing laws, but we do not think that case has any application. There it was held that a bequest to be expended to secure the passage of laws granting women, whether married or unmarried, the right to vote and hold office, to hold, manage and devise property, and all other civil rights enjoyed by men, could not be maintained as a charity; but that is quite different from that which was done by the Civic Club of Harrisburg. The bills which it undertook to advocate, so far as appears, had for their objects, not changes in the Constitution, or in our frame of government, as was so in the case referred to, but concerned legislation which related to the improvement and betterment of the social order.

It is true that a devise to an unincorporated association is void at law, but such a devise is not permitted to fail if it be for a charitable or religious use. The beneficiaries are the real owners. In the present instance the people of Harrisburg are the beneficiaries. The devise is given for their benefit, and it does not fail because the association to which it is made is incapable at law of taking it. The trust may be committed to the association to be administered. Accordingly it has been settled by our courts that a devise to an association for religious purposes, unincorporated at the testator's death but since incorporated, is good in this state. Zimmerman *v.* Anders, 6 W. & S. 218; Witman *v.* Lex, 17 S. & R. 88; Frazier *v.* St. Luke's Church, 147 Pa. 256.

The testatrix has donated her property to a public use as a memorial to and in fulfillment of the expressed desire of her deceased husband, from whom she received it. She has given it as a club house, where the Civic Club may meet for the transaction of its business, for discussion, for conference and for planning measures for the improvement of the municipal or civic conditions of the city, and we see no substantial objection against sustaining her gift.

CONCLUSIONS.

For the considerations above stated we conclude:

1. That the devise to the Civic Club of Harrisburg, unincorporated, is a valid charitable gift.

2. That the Civic Club of Harrisburg is capable of taking and holding the property devised for the purposes for which the testatrix intended it to be used.

3. That the Civic Club of Harrisburg, now incorporated, plaintiff in this case, is entitled to the rent in dispute.

Wherefore, judgment is directed to be entered on the issue in favor of the plaintiff, the Civic Club of Harrisburg, and against the defendant, the Central Trust Company of New York, trustee, unless exceptions be filed within the time limited by law.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Kieffer.

Criminal law—Trial for jury—Summary conviction—Act of May 6, 1909, P. L. 443.

There is nothing in the constitutional guarantee relating to trial by jury to prevent the legislature from creating a new offense and prescribing the mode of ascertaining the guilt of those who are charged with it.

The characterization of the offense, created by the act of May 6, 1909, P. L. 443, as a misdemeanor does not afford a trial by jury, especially when the statute itself makes express provision for a trial otherwise than by indictment.

Rule for jury trial. Q. S. Dauphin Co. June Sess., 1914, No. 115.

M. R. Metzger and *M. E. Stroup,* district attorney, for commonwealth.

Fox & Geyer, for defendant.

KUNKEL, P. J., Nov. 29, 1915.—The defendant's claim that he has the right to be tried by a jury for the offense of which he was convicted before the justice of the peace is not well founded. The Constitution provides that "trial by jury shall be as heretofore, and the right thereof remain inviolate." The offense with which the defendant was charged is a new offense, created by the act of May 6, 1909, P. L. 443, and it is well settled that there is nothing in the constitutional guarantee to prevent the legislature from creating a new offense and pre-

scribing the mode of ascertaining the guilt of those who are charged with it. Van Swartow *v.* Com., 24 Pa. 131. The mode prescribed in the present statute is trial before an alderman, a magistrate or a justice of the peace.

There is no significance to be attached to the fact that the statute declares that the violation of its provisions shall be a misdemeanor. Such characterization does not necessarily afford a trial by jury. The word "misdemeanor" may embrace other offenses, as well as those triable by indictment, depending upon the sense in which it is used. So the word "crime" was held, in Com. *v.* Shields, 50 Pa. Super. Ct. 194, to cover offenses for which justices of the peace might summarily convict. The question in all cases is, what is the legislative meaning of the word, and this is to be ascertained from the subject, the context and other particular circumstances. That the word was not used in the sense of an indictable offense in the statute before us appears from the express provision for a trial otherwise than by indictment, and also from its use in § 4 interchangeably with the word "offense."

Wherefore the rule taken to direct the district attorney to prepare and submit a bill to the grand jury, so that if a true bill be found the defendant may be tried by a jury, is discharged.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Boesch.

Criminal law—Non-support—Separation agreement.

Articles of separation voluntarily entered into by husband and wife, and not providing reasonable maintenance in the opinion of the court, will not prevent an order for maintenance in the absence of proof of actual deception.

Petition to vacate order for wife's support. Q. S. Dauphin Co. Jan. Sess., 1915, No. 195.

W. H. Earnest and *Logan & Logan,* for petition.
M. E. Stroup, district attorney, and *W. J. Carter,* contra.

McCarrell, J., July 3, 1915.—The defendant married Mary A. Horner, June 11, 1914. He was fifty-eight and she was fifty years of age. Soon thereafter they were living together on a York county farm leased by the defendant. The merriment of the marriage bells, however, soon vanished and on Sept. 25, 1914, they entered into articles of separation by

which they agreed to live separately and apart from each other, and he agreed to pay her, and did pay her, the sum of $100. Just before the actual separation he gave her $30 additional and she returned to him the wedding ring. She returned to Harrisburg, and on Oct. 9, 1914, began this prosecution to secure maintenance from her husband. The suggestion is made that this court has no jurisdiction, because the defendant resides in York county. This suggestion was not seriously pressed and could not have succeeded. The defendant had wooed and won the wife in Dauphin county, and when she returned here she had the right to invoke the aid of the courts to enforce her legal rights. On Jan. 25, 1915, after full hearing, the court directed the defendant to pay $2 per week for the support and maintenance of his wife, and to give security in the sum of $200 to comply with the order. On March 8, 1915, defendant presented his petition for vacation of the order of maintenance because of the articles of separation and the provisions thereby made for his wife's maintenance.

We were of opinion at the hearing that the articles of separation did not provide a reasonable and proper sum for the maintenance of the wife, and therefore made the order above referred to in accordance with Com. *v.* Smith, 200 Pa. 363. The defendant in his petition to vacate the order does not allege that the provisions made in the articles of separation were reasonably sufficient for the proper maintenance of his wife. He relies apparently upon the fact that the articles of separation were signed by his wife without any fraud or deception practiced by him. The articles of separation were apparently voluntarily entered into by the parties, and no proof has been submitted of any actual deception practiced by either party. Our sole inquiry is whether by the articles of separation the defendant has made a reasonable and proper provision for the maintenance of his wife. We cannot regard the amount paid in pursuance of this agreement as a reasonable provision for the wife's maintenance. After the hearing of the testimony we made what we then regarded and what we now regard as a very moderate order for the wife's maintenance.

After careful consideration of the articles of separation and all the facts and circumstances connected therewith we are not inclined either to vacate or modify the order made for the support of defendant's wife. The petition to vacate the order is therefore dismissed at the defendant's costs.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Chantmerle *v.* Chantmerle.

Divorce—Indignities to person—Testimony—Allegations in libel—Service of notice by attorney for libelant.

Where a divorce is asked for on the ground of indignities to the person, the necessity of the withdrawal from the house and family of the respondent is one of the incidents of this charge, and where the testimony of libelant shows that she did not leave her husband but that he left her, and there is no indication in her testimony that his conduct towards her was such as she felt would justify her leaving him, a divorce will be refused.

The acceptance of service of the notice of the hearing before the master by the attorney for libelant is not the proper practice.

In divorce. C. P. Allegheny Co. Oct. T., 1915, No. 327.

S. H. Huselton, for libelant.

EVANS, J., Jan. 7, 1916.—The grounds for divorce as set forth in the libel are that the respondent "offered such indignities to the person of this libelant as to render her condition intolerable and life burdensome, and by such cruel and barbarous treatment endangered her life, thereby forcing her to withdraw from his home and family." The necessity of the withdrawal from the house and family of the respondent is one of the incidents of indignities to the person. We might so consider the allegation of the libel, although it is not very aptly stated. The master is of the opinion that the testimony shows sufficient acts on the part of the respondent to justify his finding that he did offer such indignities to the person of the libelant as to justify the granting of the divorce. I sincerely doubt the finding of that fact. The statements of facts on the part of the libelant are very loose, indefinite, and usually made after very leading questions on the part of her counsel. But, however that may be, a decree in divorce cannot be granted in this case for the reason that on the testimony of the libelant herself she did not leave her husband but he left her. There was no indication on her part at the time of the separation that she intended to leave him; there is no indication in her testimony that his conduct toward her was such as she felt would justify her leaving him; and, as I stated, her own testimony is that she came home from work, and they were living together, without any intent on her part to leave him, and that he had left the common abode and went to his mother's and never came back. There is another thing to which attention ought to be called in this case; the notice of the master's hearing was served on the respondent by the attorney for the libelant. We have had occasion heretofore to disprove of such

acts on the part of counsel for libelant. We have refused the divorce because the attorney for the libelant acting as a notary public had taken the affidavit to the libel. The service of the notice of the master's hearing by attorney for libelant is not the proper practice, but our refusal to grant this divorce is for another reason.

And now, Jan. 7, 1916, decree in divorce in the above entiled case is refused.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Blakiston's Estate.

Taxation—Collateral inheritance tax—Bequest by donee—Power—Husband and wife—Act of May 6, 1887, P. L. 79.

Where a wife in the exercise of a power under her father's will, bequeaths property in which she had a life estate under the will to her husband, such property is subject to the collateral inheritance tax.

Exceptions to adjudication. O. C. Philadelphia Co. Jan. T., 1912, No. 136.

George G. Cookman and *A. W. Horton,* for exceptants.
William O. Armstrong, for accountant.

LAMORELLE, J., March 10, 1916.—Charles Blakiston died Sept. 6, 1888.

By the third item of his will he gave to his trustee, The Fidelity Insurance, Trust & Safe Deposit Company, a fund of $15,000 for the benefit of his wife, Harriet C. Blakiston, directing his trustee to pay unto his wife the net income thereof, and, upon her death, to transfer and deliver the trust estate to such persons, in such shares and for such uses, as she by her last will and testament should direct, limit and appoint, and, in default of such appointment, he gave the trust estate to her right heirs.

Upon the audit of the account of the executors, as shown by the adjudication of the late Judge Hanna, filed Oct. 18, 1889, there was awarded to The Fidelity Insurance, Trust & Safe Deposit Company, under the above clauses of the will, as trustee of Harriet C. Blakiston, cash and securities amounting to $15,000.

Harriet C. Blakiston died Jan. 14, 1895, having first made a will, whereby she gave and bequeathed to The Fidelity Insurance, Trust & Safe Deposit Company the sum of $15,000

now held by such company for her use and benefit during her life under the provisions of her husband's will, in trust to pay the net income and interest to her daughter, Fannie E. Blakiston, into her own hands for her sole and separate use, free from liability from the debts, contracts and engagements of any husband and also from her own debts, contracts or anticipation, and, upon the death of the daughter, in trust to transfer and deliver the said trust estate to such persons and in such shares and for such uses as the daughter should by her last will limit, direct and appoint, and, in default of such appointment, to the right heirs of her said daughter.

The Fidelity Insurance, Trust & Safe Deposit Company duly filed its account of said trust estate, and by the adjudication filed Feb. 6, 1895, the fund of $15,000 was directed to be retained by the Fidelity Insurance, Trust & Safe Deposit Company for the purposes of the above described trust created by the will of Harriet C. Blakiston.

Fannie E. Blakiston, daughter of Charles Blakiston and Harriet C. Blakiston, intermarried with Herbert Guy Kribs, Nov. 4, 1902, and died Nov. 30, 1910, having first made a will, whereby, after directing the payment of her just debts and making sundry pecuniary bequests, she stated that it was her intention by this her will to exercise and carry into full and complete effect all and every power of appointment and direction given by the will of her mother, Harriet B. Blakiston; and she gave and bequeathed to Fidelity Trust Company (formerly known as The Fidelity Insurance, Trust & Safe Deposit Company) the fund of $15,000 held by such company for her use and benefit during her life under the provisions of her mother's will, in trust to pay the net income and interest thereof to Susan Aidelman, her nurse, during her natural life, and, upon her decease, then in trust to transfer, pay and deliver the principal of the trust fund to her husband, Herbert Guy Kribs, free and discharged from all and every trust.

Fidelity Trust Company thereupon filed its second account of the trust, which account was audited by Judge Gummey, Feb. 9, 1911. From the adjudication filed March 8, 1911, it appeared that Fannie E. Blakiston Kribs, Susan Aidelman and Herbert Guy Kribs were all alive at the time of the death of the original testator, Charles Blakiston, and that, therefore, the appointment by the wife was not transgressive of the rule against perpetuities. Gray on Perp., § 521. It also appeared that, after the making of her will, Fannie E. Blakiston Kribs gave birth to a child, Francis Blakiston Kribs, and because of

the birth of this child, and the further fact that it was not mentioned in the will of the mother, the then auditing judge was of opinion that the appointment was effective as to one half of the trust fund only and that the bequest in favor of Susan Aidelman should abate one half. He thereupon awarded one half of the trust estate to the guardian of the estate of Francis Blakiston Kribs, and the other one half to Fidelity Trust Company to be held in trust to pay the net income therefrom to Susan Aidelman for life, with remainder to Herbert Guy Kribs, in accordance with the appointment made by the will of Fannie Blakiston Kribs.

Susan Aidelman died Sept. 16, 1915. Fidelity Trust Company thereupon filed its third account of the fund theretofore awarded by the adjudication of Judge Gummey, and the then auditing judge (Dallett, P. J.) awarded the fund, being one half of the original trust estate of $15,000, to Herbert Guy Kribs, under the will of Fannie Blakiston Kribs, subject to the payment of collateral inheritance tax, in that the estate passed as that of Charles Blakiston and the son-in-law was not within the exempt class.

To the allowance of collateral inheritance tax exceptions are filed, and thus the question comes before the court.

Whether the theory upon which one half of the trust fund of $15,000 was awarded to the after-born child is in harmony with the weight of authority is of no moment, so far as the present contention is concerned. The only persons affected by the ruling in the prior adjudication were Susan Aidelman and Herbert Guy Kribs, and they, by filing no exceptions, have acquiesced in the decree of the then auditing judge.

The commonwealth, however, is clearly within its rights in now claiming that the one half distributable to the husband is liable for collateral inheritance tax under the act of May 6, 1887, P. L. 79. Section 3 provides: "In all cases where there has been or shall be a devise, descent or bequest to collateral relatives or strangers liable to collateral inheritance tax, to take effect in possession, or come into actual enjoyment after the expiration of one or more life estates, or a period of years, the tax on such estate shall not be payable nor interest begin to run thereon, until the person or persons liable for the same shall come into actual possession of such estate by the termination of the estate for life or years, and the tax shall be assessed upon the value of the estate at the time the right of possession accrues to the owner as aforesaid"; and that the fund now before the court passes as the property of the donor of the

power is settled by Lawrence's Est., 136 Pa. 354; Boyd's Est., No. 1, 199 Pa. 487, and Huddy's Est., 236 Pa. 276.

The exceptions are accordingly dismissed, and the adjudication is confirmed absolutely.

Brownlee *v.* Brownlee.

Divorce—Service—Acceptance of—Residence.

A divorce will be refused where the respondent accepted service of the notice of the hearing before a master. Every step in a divorce proceeding must be adverse and the acceptance of service will be taken as evidence of collusion.

A divorce will be refused where the evidence shows that the libelant had not resided in the state of Pennsylvania for one year immediately prior to the filing of the libel in divorce, as provided by the act of March 15, 1815, 6 Sm. L. 286.

In divorce. C. P. Allegheny Co. April T., 1914, No. 601.

William McDowell, for libelant.

EVANS, J., Jan. 5, 1916.—There are two reasons why this divorce cannot be granted at the present time; one a defect in the proceedings, and the other a bar to divorce on the libel as filed. We have had occasion many times to call attention to the fact that every step in the proceedings in divorce must be adverse, and that the acceptance of service of either the subpœna or the master's notice of the hearing would be taken as evidence of collusion. The respondent accepted service of the notice of the master of his hearing in this case, and for that reason the proceedings following that were irregular. But that is not important in this case for the reason that the evidence shows that the libelant had not resided in the state of Pennsylvania for one year immediately prior to the filing of his libel in divorce. Section 11 of the act of March 15, 1815, 6 Sm. L. 286, provides: "And be it further enacted by the authority aforesaid, that no person shall be entitled to a divorce from the bond of matrimony by virtue of this act who is not a citizen of this state, and who shall not have resided therein at least one whole year previous to the filing of his or her petition or libel."

From the evidence, this libelant had resided in the state of Minnesota for about a year and a half, but only to months in this state prior to the filing of his libel in divorce.

And now, Jan. 5, 1916, the libel in the above entitled case is dismissed. From Thomas Ewing, Esq., Pittsburgh, Pa.

Ott *v.* Pennsylvania Railroad Co.

Ejectment—Rule to show cause—Framing issue to settle title—Acts of May 7, 1889, P. L. 102; June 10, 1893, P. L. 415, and April 16, 1903, P. L. 212.

Under the act of May 7, 1889, P. L. 102, as amended by act of April 16, 1903, P. L. 212, the petitioner must show that he is in actual and exclusive possession of the premises for which he desires the respondent to bring an action of ejectment.

The act of June 10, 1893, P. L. 415, gives a remedy when there is a dispute as to title and possession, and provides for the granting of a rule to show cause why an issue shall not be framed between the parties to settle and determine their respective rights and titles in and to the land.

Under the amended act of 1889, the court decides the fact of possession as a required preliminary to the exercise of the power granted by said act. Under the act of 1893, the merits of the respective claims or titles of the parties go to trial on the issue, which is framed according to the circumstances to reach the real controversy.

Petitioners claimed title to and possession of a certain tract of land. The respondent denied the title and possession, alleging that O., under whom the petitioners claimed, by indenture dated and recorded in 1893, had granted to the S. C. R. Co. and its assigns said tract for railroad purposes with the right to entire and exclusive possession; said indenture contemplating concurrent possession by O. and the company, but stipulating that no user or possession by O. should affect the right or title of the company or its assigns. The petitioners prayed for a rule on respondent to bring an action of ejectment under the act of 1889, as amended by the act of 1903. Held, that said acts did not apply, but that relief might be sought under the act of 1893, by amendment of petition.

Rule to show cause why an action of ejectment should not be brought. C. P. Dauphin Co. June T., 1915, No. 405.

M. W. Jacobs, for petitioners.
Bergner & Cunningham, for respondent.

McCarrell, J., May 31, 1916.—The petitioners claim title to and possession of a tract of land containing 7.01 acres, situated in Susquehanna township, this county, as heirs at law of Leander N. Ott, in whom the petitioners allege the title was vested at the time of his decease, Feb. 8, 1897. The respondent in its answer denies the title and possession of the petitioners as set out in their petition, and alleges that Leander N. Ott, under whom they claim, by a writing under his hand and seal dated Jan. 30, 1893, recorded at Harrisburg in Miscellaneous Book B, Vol. II, page 359, granted to the Southern Central Railway Company the said tract of land for railroad purposes, and that said writing grants to said railway company, its successors and assigns, the right to the entire and

exclusive possession of said premises. The writing also contemplates concurrent possession between Leander N. Ott and the railway company, and stipulates that no user, occupation or possession of the premises by him for any length of time whatever shall in any manner affect the right or title of the railway company, its successors and assigns. The respondent claims that the petitioners have no such possession under claim of title as entitles them to maintain any proceeding under the act of March 8, 1889, P. L. 102, as amended by the act of April 16, 1903, P. L. 212. It has been decided that under this act the petitioner must show that he is in actual and exclusive possession of the premises for which he desires the respondent to bring an action of ejectment. Titus *v.* Bindley, 210 Pa. 121; Fearl *v.* Johnstown, 216 Pa. 205. In the latter case Chief Justice Mitchell, at page 207, thus construes and applies the acts of March 8, 1889, and June 10, 1893:

"The language of the act of 1889, as amended by the act of April 16, 1903, P. L. 212, is 'whenever any person not being in possession thereof shall claim or have an apparent interest in or title to real estate, it shall be lawful for any person in possession thereof claiming title to the same, to make application to the court.' On the appearance of these two facts, the possession by plaintiff and the claim of title by the other party, without more, the rule is to be granted to bring ejectment or show cause why it should not be done. The statute does not appear to contemplate any dispute as to present possession, and has certainly made no express provision for it. It would not be straining the act very far to hold if necessary that as the fact of possession is a required preliminary to the exercise of the power granted, the court ex necessitate must decide it or the grant would be nugatory. But there is no necessity to resort to that construction, however allowable."

The act of June 10, 1893, P. L. 415, gives a remedy when there is a dispute as to title and possession, and provides for the granting of a "rule to show cause why an issue shall not be framed between the parties to settle and determine their respective rights and titles in and to said land." Speaking of this act, Chief Justice Mitchell in the case last cited states, on page 208:

"Where there is a substantial contest as to the fact of present possession, or the evidence leaves this fact in doubt, the act of 1893 provides the more appropriate and effective procedure. On the hearing of the rule the court is to frame the

issue according to the circumstances to reach the real controversy. At this stage of the case the court goes no further, the merits of the respective claims or titles of the parties go to trial on the issue."

We are therefore of opinion that the petitioners are not entitled to relief under the act of March 8, 1889, as amended by the act of April 16, 1903. We therefore decline to make the pending rule absolute, without prejudice to the right of the petitioners, if they desire so to do, to amend their petition and request relief under the act of June 10, 1893, P. L. 415.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Krell *v.* Sitler.

Public officers—Tax collector—Delivery of duplicates to successor in office—Vacancy in office—Act of July 2, 1895, P. L. 434.

There is no statute of the commonwealth of Pennsylvania making it a duty of one tax collector to surrender to his successor duplicates in his possession as tax collector.

The "vacancy" meant by the act of July 2, 1895, P. L. 434, in the office of tax collector "from neglect or refusal of any person elected to perform the duties of the office," does not operate backward and vacate or nullify the warrants which a collector holds to collect taxes when the vacancy takes place. It simply deprives him of the right to receive duplicates which have not yet been delivered to him, and which but for the vacating of his office, he would be entitled to receive.

Petition for mandamus. C. P. Schuylkill Co. March T., 1916, No. 109.

F. P. Krebs and *John F. Whalen,* for plaintiff.
J. O. Ulrich, for defendant.

KOCH, J., March 6, 1916.—The purpose of this proceeding is to compel the delivery of tax duplicates for the years 1913, 1914 and 1915 by Clinton E. Sitler or B. A. Sitler to George M. Krell, but no service was made on Clinton E. Sitler or accepted for him, although his name appears in the caption as sole respondent here. However, Clinton E. Sitler filed an answer on Jan. 24, 1916, and that makes him properly a party to this particular suit. A similar proceeding was also brought against him to March term, 1916, No. 283, but the disposition of this case will make any extended discussion of that case unnecessary hereafter.

Clinton E. Sitler was the tax collector of the borough of Tamaqua for the years 1913, 1914 and 1915, and as such received all duplicates for said year. Some time in the latter half of 1915 he disappeared, and certain petitions were presented to our court of quarter sessions of the peace, praying us to appoint a tax collector for said borough. Nine of the sureties on Sitler's bond presented one petition asking us "to appoint George M. Krell to the office of tax collector of said borough of Tamaqua to fill the vacancy of C. E. Sitler, delinquent collector." Another petition represented "that a vacancy exists in the office of tax collector for said borough because of the long-continued absence of C. E. Sitler, the regularly elected tax collector, and his neglect to perform the duties of his office," and the petitioners prayed "that Wallace A. Sitler may be appointed to fill the said vacancy." This petition was numerously signed by "citizens and residents of the borough of Tamaqua." We understand that Wallace A. Sitler is the father of Clinton E. Sitler, and is also one of his bondsmen. A third petition, also numerously signed, prayed for the appointment of "John H. Ichter, tax collector of the said borough of Tamaqua, vice Clinton E. Sitler, delinquent." We later received a petition of four of the sureties who signed Krell's petition, in which they expressed their desire to withdraw their names from the petition of George Krell, and prayed for the appointment of "Wallace A. Sitler, collector of taxes, to fill the vacancy in such office." Three of said petitions were supported by affidavits. The first of said petitions was filed on Nov. 1, 1915, and on Nov. 29, 1915, George M. Krell was appointed by the court of quarter sessions of the peace after a conference of most of the sureties, together with all members of the court and counsel representing some of the petitioners. The appointment reads as follows: "And now, Nov. 29, 1915, George M. Krell is hereby appointed tax collector for the borough of Tamaqua." During all that month of November no one appeared for Clinton E. Sitler, and as far as the court was concerned the whereabouts of Clinton E. Sitler was then unknown. On Dec. 20, 1915, Krell presented his petition in the case before us, setting forth that Clinton E. Sitler was tax collector of the borough of Tamaqua and as such had in his possession the tax duplicates of the county, borough and school district for the years 1913, 1914 and 1915, and other books, papers, effects and moneys belonging to the said office of collector; that by a decree of this "court made on Nov. 29, 1915, it was adjudged and decreed that there was

a vacancy in the office of tax collector in said borough of Tamaqua by reason of the delinquency of the said Clinton E. Sitler"; that Krell, the petitioner, "was appointed to fill the vacancy for the unexpired term"; that he made demand upon Sitler or his agent for the delivery of the books and papers aforesaid, but delivery was refused, by reason whereof the "petitioner is unable to enter upon the duties of his office and has suffered great damage for which there is no adequate legal remedy." A mandamus was prayed for, and one of my colleagues made an order intended to reach "Clinton E. Sitler or his agent, B. A. Sitler." Service of said order was accepted for B. A. Sitler by his attorney. No service was made on Clinton E. Sitler. Both respondents having neglected to make answer to the petition, a rule was issued on them on Jan. 17, 1916, "to show cause why an attachment should not issue for contempt of court." Said B. A. Sitler filed an answer to said rule, under oath, on Jan. 24, 1916, in which answer he states that he had been appointed in writing by Clinton E. Sitler as "his deputy to collect and receive the school tax for said district for" the year 1915, and that on Dec. 20, 1915, he delivered to Krell all tax duplicates for the years 1913, 1914 and 1915, "stubs containing the name and amount of school tax paid for the year 1915, bills for unpaid taxes for the years 1913, 1914 and 1915, and $72.40 in cash." He also states that his appointment as deputy was revoked on Dec. 26, 1915.

Clinton E. Sitler also filed an answer under oath on Jan. 24, 1916, in which answer he avers:

"1. That he had no knowledge of the presentation of a petition alleging a vacancy in the office of tax collector of the borough of Tamaqua, nor of the order of court appointing George M. Krell tax collector for said borough, nor of the order upon him to deliver to said George M. Krell, the tax duplicates, books, papers and money in his office, nor of the delivery thereof to said George M. Krell, until Dec. 26, 1915.

"2. That B. A. Sitler was not his agent for any purpose, excepting as deputy collector of school tax for said borough for the year 1915, which appointment he revoked on Dec. 26, 1915.

"3. That the deponent has not resigned nor vacated the office of tax collector of the borough of Tamaqua, and as such is responsible to his sureties as provided by law, and his liability cannot be ascertained until his books and accounts have been audited and settled by the borough and school auditors, and for the purpose of such audit and settlement he must re-

tain full possession of all books, papers and money in his possession.

"4. The deponent has not been guilty of contempt, and alleges the foregoing reasons for his dismissal with costs."

On March 1, 1916, B. A. Sitler filed a "motion to dismiss the proceedings." He sets out in his motion eleven reasons to sustain it. On the matter contained in his answer, the same not being traversed or denied, B. A. Sitler would be entitled to be relieved from further proceeding in the case, but, as he moves that the proceeding be dismissed, we feel ourselves called upon to consider the motion. His eighth reason in support of his motion is that "no law of the commonwealth makes it a duty of one tax collector to surrender to his successor any money, books or papers in his possession as tax collector."

This raises the vital question in the case.

Under the provisions of the act of June 6, 1893, P. L. 333, tax collectors are elected for a term of three years. They must give bond annually, to be approved by the court. The act of June 25, 1885, P. L. 187, empowers the courts of quarter sessions to fill all vacancies in said office. The act of July 2, 1895, P. L. 434, provides that "if any vacancy shall take place in the office of tax collector . . . from the neglect or refusal of any person elected to perform the duties of the office, or by death, resignation or otherwise, the court of quarter sessions of the proper county, upon petition of the town council or any citizen who is a resident of said borough, township, ward, setting forth the fact that a vacancy does exist, shall appoint a suitable person to fill said vacancy for the full or unexpired term."

The right of Sitler to hold the office prior to the fall of 1915 was unquestioned. He could not have received the duplicates referred to had he not been in office when they were issued for the years 1913, 1914 and 1915, nor without giving a bond annually, approved by the court, conditioned that he should "well and truly pay over, or account for according to law, the whole amount of taxes charged and assessed in the duplicate which shall be delivered to him." Act of May 8, 1909, P. L. 474.

The act of 1909 is amendatory of the act of 1895, in which it was provided that the condition of the bond should be "that the said collector shall well and truly collect and pay over," etc.

"Every person appointed or elected collector of school taxes in any school district of the second, third or fourth class in this

commonwealth, in addition to any bonds that he may now be required by law to give and before receiving his tax duplicate and warrant to collect said school taxes, shall furnish to the school district a proper bond, in an amount to be fixed by the board of school directors, with such surety or sureties as it may approve, conditioned upon the faithful performance of his duties as such tax collector." School code of May 16, 1911, P. L. 342, § 550.

A tax collector appointed or elected in any borough school district "may deputize in writing one or more suitable deputy tax collectors, who when so deputized shall be authorized to collect the school taxes in like manner and with like authority as the tax collector appointing them; provided, that any tax collector appointing any deputy collector shall be responsible for, and account to the board of school directors for, all taxes collected by said deputy." Ibid, § 548.

By the act of April 15, 1834, P. L. 519, deputy tax collectors may be appointed by tax collectors, but the collector and his sureties are made responsible for the acts of the deputy. 4 Purdon 4671, Plac. 296.

"The executors or administrators of any deceased tax collector . . . shall have the same powers until the end of two years from the date of the warrant to enforce the collection of unpaid taxes as the collector would have if living." Act of March 26, 1867, P. L. 45. And such executors or administrators "may employ a suitable person to act for them in the execution of the warrant, with all the powers possessed by the deceased collector." Ibid.

"If any collector who shall have taken upon himself the duties of his office shall fail to perform such duties, he shall forfeit a sum not exceeding $40, to be recovered by the county or township, as the case may be, as debts of a like amount are recoverable: provided, that the sureties of a collector shall, notwithstanding such proceedings against him, remain liable, according to the condition of their bond." 4 Purdon 4672, Plac. 300.

An act approved July 9, A. D. 1897, P. L. 242, provides "that any tax collector failing to comply with the requirements of this act shall be deemed guilty of misdemeanor, and upon conviction thereof shall be sentenced to pay a fine not exceeding $100." This act requires tax collectors of the several boroughs and townships to make monthly returns of the taxes collected by them and the amount outstanding upon their respective duplicates to the several authorities legally authorized

to receive the said taxes, and to borough councils, and to pay over monthly the amounts so collected by them.

Warrants of tax collectors are effectual for two years for the collection of taxes. 4 Purdon 4677, Plac. 303. And during that period tax collectors may distrain for taxes, and even imprison delinquents. Numerous acts have been passed from time to time extending the time within which tax collectors might exercise the authority given them in their warrants to collect the taxes in their duplicates.

"In all cases where taxes are due and unpaid to any collector, after the expiration of his warrant, when such collector has not been legally exonerated therefrom, every such collector or person, his executors, administrators or any of them, is . . . declared to have full right and power to sue for and recover the same, with interest thereon, after the expiration of his warrant aforesaid, from all and every person and persons, bodies politic and corporate, owing the same, as other debts of like amount are now by law recoverable." Act of April 11, 1848, P. L. 524.

We have referred to the foregoing acts because when taken together they manifest to us the idea of a personal obligation from the collector to the community, with most ample means at the collector's command to meet that obligation promptly. His liability and obligation are to account for all the taxes charged in his duplicates, and upon his failure so to do his sureties must save the community from loss of taxes, irrespective of whether or not such loss result from the collector's negligence, carelessness, misfeasance or malfeasance in office. It has been the uniform practice of collectors of taxes to retain all their duplicates after the expiration of their term of office. I personally know a tax collector, now out of office for several years, who holds thirteen duplicates. He made settlement long ago for all taxes, but he never collected all. What he did not collect belongs to him by virtue of his settlement. Why should the executors or administrators of a deceased tax collector be authorized to execute the warrants of such a collector if the duplicates are to pass to such collector's successor in office?

The "vacancy" meant by the act of 1895, where the same takes place "from neglect or refusal of any person elected to perform the duties of the office," does not operate backward and vacate or nullify the warrants which a collector holds to collect taxes when the vacancy takes place. It simply deprives him of the right to receive duplicates which have not yet been

delivered to him, and which, but for the vacating of his office, he would be entitled to receive. He remains responsible for all the taxes or the whole amount of taxes charged and assessed in the duplicate which has been delivered to him, for such is the condition of his bond by which he and his sureties are firmly bound. To declare the office of a collector vacant is not to release him or his sureties to any extent whatever. They still remain bound for all the taxes charged in the duplicate. How could we compel the respondents to deliver the duplicates of Clinton E. Sitler to the petitioner without at the same time releasing to some extent, at least, the bondsmen of Clinton E. Sitler?

"A tax collector who has received a pulicate for school taxes under the act of June 25, 1885, P. L. 187, is liable for the whole amount of the duplicate remaining unpaid and unexonerated after three months from the time the collector receives the corrected duplicate, as provided by the act of April 15, 1834, P. L. 518." Com. v. Stambaugh, 164 Pa. 437. The case just cited also holds that the office of tax collector is not vacant until the court declares it to be so.

It was held in Com. v. Ferrell, 17 Pa. C. C. 263, that where a tax collector was elected for a term of three years and qualified and gave bond and received the duplicate for school taxes in the same year in which he was elected, he was bound for the whole amount of taxes charged and assessed in that duplicate, and was obliged to account therefor, and that he could not relieve either himself or his surety by resigning and delivering his duplicate to his successor. It continued to be his duty to collect the taxes remaining uncollected in his duplicate, notwithstanding the fact that he had resigned his office. But in Com. v. Connor, 207 Pa. 263, where the treasurer of Allegheny county appointed Connor a collector of delinquent taxes in August, 1902, it was held by the Supreme Court that Connor's predecessor was in no danger; that "however direct and absolute the charge of the amount of the tax duplicate to him under the statute, his responsibility attaches by reason of his occupancy of the office of collector, and will cease when that passes to his successor." In that case, however, both Connor and his predecessor held an appointive office and were subject to removal at the pleasure of the county treasurer, and, notwithstanding that case, we take the law to be that after a borough or township collector of taxes is elected and qualifies and receives the duplicate he is bound to account for all taxes that are charged in the duplicate; in other words, by filing his

bond and accepting the duplicate he assumes the liability to the borough or township of all taxes charged in the duplicate, and he is obliged to account for them, less his commission, and excepting such as are exonerated or stricken off by proper authority afterwards.

We think it is entirely clear that B. A. Sitler's motion should be granted, and therefore the proceedings are dismissed and the petitioner is ordered to pay the costs.

From M. M. Burke, Esq., Shenandoah, Pa.

Stewart *v.* First Mortgage Guarantee and Trust Co.

Practice (C. P.)—Affidavit of defence—Action ex delicto —Act of May 14, 1915, P. L. 483.

In an action of assumpsit against a trust company, trustee under a corporate mortgage to recover damages resulting from the negligence of the defendant in permitting a mortgage to be falsely represented as a first lien, no affidavit of defence will be required as the action is in fact ex delicto.

Rule for judgment for want of a sufficient affidavit of defence. C. P. No. 5, Philadelphia Co. June T., 1912, No. 456.

Francis H. Thole and *Francis F. Eastlack, Jr.*, for plaintiff.
Johnson & Gilkyson, for defendant.

MARTIN, P. J., Sept. 27, 1915.—A statement of claim was filed, alleging that plaintiff purchased two bonds of the Atlas, Pocohontas Coal Company, secured by a mortgage executed to The First Mortgage Guarantee & Trust Company as trustee; that by the terms of the mortgage the Atlas, Pocohontas Coal Company covenanted with the trustee that the mortgaged property was free and clear of incumbrances of every nature having priority over the mortgage; that each of the bonds was endorsed, "Six per cent. first mortgage gold bonds"; that a trustee's certificate endorsed upon the bond certified that it was one of the series of bonds referred to in the deed of trust mentioned in the bond. The statement further alleges that plaintiff purchased the bonds from the Atlas, Pocohontas Coal Company, believing them to be a first lien upon the mortgaged property, but subsequently learned there were other incumbrances prior in lien to the mortgage and that the mortgage was not a first lien. It is alleged that this fact was known, or should have been known, to the defendant when the bonds

were certified and delivered to the Atlas, Pocohontas Coal Company for sale; that the bonds are in default and unpaid, and that prior liens to the mortgage given to secure the bonds, absorbed the assets of the company and rendered the bonds worthless, "wherefore plaintiff avers that by reason of the deceit, carelessness and supine negligence, misrepresentations of defendant hereinbefore stated, said plaintiff is damaged and claims of the defendant the sum of $200 with interest." There was attached to the statement a copy of a bond and of the mortgage.

No affidavit of defence was filed, but defendant stated under the oath of the president, that he had been advised by counsel, believes, and therefore avers, that the cause of action set forth in the plaintiff's statement of claim is not of such character as to require defendant to file an affidavit of defence.

No demurrer or other pleading was filed in the case.

It is unnecessary to enter into the merits of the controversy at this time, further than to determine whether plaintiff is entitled to judgment for want of a sufficient affidavit of defence.

While the action was commenced by a writ of assumpsit, the statement of claim alleges that it was by reason of the deceit, carelessness, supine negligence and misrepresentations of defendant that plaintiff was damaged. The language employed by Chief Justice Green in the case of Corry *v.* Penna. R. R. Co., 194 Pa. 516, was quoted by President Judge Rice in the opinion in the case of Coyle *v.* Schrull, 49 Pa. Super. Ct. 386-388: "We think an examination of the act of May 25, 1887, P. L. 271, clearly shows that it was the intent of the legislature to confine the remedy by judgment for want of an affidavit of defence to actions ex contractu alone, as they were before the act was passed, and not to extend this remedy to actions ex delicto, or in their nature ex delicto. . . . It seems to us quite clear that it was intended to limit the actions of assumpsit for which judgment may be asked for want of an affidavit of defence to such only as were founded upon contract alone. There is nothing in the language of either section which contemplates cases in which the cause of action may be ex delicto, or of a mixed character, containing an element of contract and an element of tort."

The act of May 14, 1915, P. L. 483, abolishing demurrers and permitting defendant to raise questions of law in the affidavit of defence without answering the averments of fact in the statement of claim, does not go into effect until Jan. 1, 1916. Rule discharged.

Farmers' Produce Co.'s Receivers *v.* Roop.

Corporations—Subscription to stock—Act of agent—Equity.

An affidavit of defence, which avers that the defendant signed the written application for stock, left it with his associates to be delivered on condition that each of them would also subscribe for an equal amount and that they failed to subscribe, is insufficient, when the defendant fails to disclaim that he knew the application had been delivered, and does not aver that the company knew that his subscription was conditional or that he made any attempt to disaffirm it, but left more than three years elapse when the company became insolvent and the right of creditors intervened.

Where a loss is suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong rather than by a stranger.

In such case where the agent exceeded his authority, the principal should have disaffirmed his act within a reasonable time or at least before the conduct of others was influenced by his apparent relation to the company as a stockholder.

It is manifestly inequitable to allow the defendant to repudiate his subscription after, by his silence or inaction, he has permitted others, regarding it as security for their claims, to become creditors of the company.

Motion for judgment for want of a sufficient affidavit of defence. March T., 1915, No. 379.

W. H. Earnest and *G. L. Reed,* for plaintiffs.
D. L. Kaufman, for defendant.

KUNKEL, P. J., Dec. 2, 1915.—The defendant avers in his supplemental affidavit of defence that although he signed the written application for the stock, he left it with his associates to be delivered to the company or its promoters, on the condition that each of them also would subscribe for an equal amount. This he avers they failed to do. Consequently he contends that the delivery of his application was without authority and the contract of subscription was ineffective to bind him. He does not, however, disclaim that he knew his application had been delivered, nor does he aver that the company knew that his subscription was conditional or that he made any attempt to disaffirm it. In the meantime more than three years have elapsed and the company has become insolvent and the rights of creditors have intervened. Under these circumstances we think the defendant is estopped from disaffirming now the act of his associates. If they exceeded their authority he should have disaffirmed their act within a reasonable time or at least before the conduct of others was in-

fluenced by his apparent relation to the company as a stockholder. The capital stock of the company contributed or agreed to be contributed constituted a fund charged with the payment of the corporate debts. It would be manifestly inequitable to allow the defendant to repudiate his subscription after by his silence or inaction he has permitted others regarding it as security for their claims to become creditors of the company.

Moreover, the doctrine is well settled that where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong rather than by a stranger. The defendant entrusted his application to his associates for delivery to the company. If they delivered it without observing the condition which he had attached to its delivery and of which the company was not advised, and loss is to follow, he must bear the loss. We are of the opinion that the defence set up is insufficient to prevent judgment.

Accordingly, judgment is directed to be entered in favor of the plaintiffs and against the defendant for $100, with interest from Sept. 22, 1914, the amount to be liquidated by the prothonotary.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth v. Mountain.

Justice of the peace—Appeals—Certiorari—Abuse of children—Criminal law.

The act of March 20, 1810, 5 Sm. L. 161, and its supplements, under which writs of certiorari may be taken without special allowance, relate to civil actions only.

A special allowance from the court of common pleas must be had for a writ of certiorari to a justice of the peace in a summary conviction proceeding carried on in the name of the commonwealth and involving penalties of fine and imprisonment, which in its nature and effect is a criminal proceeding, and where an application for such special allowance is made a proper ground for it must be shown to the court, otherwise in most cases the writ would be used for purposes of delay.

If by inadvertence or otherwise the writ has been allowed by the court without any sufficient legal ground having been shown to warrant a reversal of the judgment of the justice the writ on motion should be quashed.

The act of June 11, 1879, P. L. 142, authorizing a justice of the peace to try and dispose of the case of a person accused of cruelly ill-

treating, abusing, or inflicting unnecessary cruel punishment upon any infant or minor child, is not in that respect unconstitutional, on the ground that it deprives the defendant of a jury trial.

Motion to quash writ of certiorari. C. P. Fayette Co. March T., 1914, No. 185.

Lackey, Spurgeon & Lackey, for commonwealth.
H. G. May and *Sterling, Higbee & Matthews,* for defendant.

VAN SWEARINGEN, P. J., May 9, 1916.—On Dec. 10, 1913, the defendant, Iva Mountain, a school teacher of Springfield township, in this county, whipped a sixteen-year-old son of the prosecutor, who attended the Pritts School, of which the defendant was the teacher. While whipping the boy with a stick which she held in one hand, the defendant held in her other hand a red-hot poker with which to prevent the boy from resisting or attacking her.

On Dec. 11, 1913, before a justice of the peace of Springfield township, the boy's father made an information against the defendant charging her with "cruelty to a minor," under the act of June 11, 1879, P. L. 142, § 1 of which provides that any person who shall cruelly ill-treat, abuse, or inflict unnecessary cruel punishment upon any infant or minor child, shall be guilty of a misdemeanor, and upon conviction thereof before any justice of the peace, alderman, or court of record, shall be fined by such justice, alderman, or court of record, not less than $10 nor more than $50 for each offense. The defendant was tried before the justice in a summary way, and was convicted of the offense charged against her, and was fined $10 by the justice, who ordered and decreed also that in default of the payment of the fine, together with the costs of the proceeding, the defendant should be committed to the county jail for a period of sixty days, under the provisions of § 11 of the act cited. The defendant refused to pay the fine and costs, and a commitment was issued, and the defendant was brought to jail.

On the following day counsel for the defendant presented a petition to the court and secured a special allowance for a writ of certiorari to bring up the record of the justice for review by the court of common pleas. Special bail was given by the defendant and she was released from custody pending the final determination of the case.

The ground for the certiorari laid in the petition for the writ was that "the defendant is in no manner or form guilty

of the said charge, that the trial before the justice was irregular and unlawful in many respects, particularly in this, that the only act of assembly in force and effect in the commonwealth of Pennsylvania providing for the punishment of such an offense is that of June 11, 1879, P. L. 142, which makes the said offense a misdemeanor which is triable exclusively in the court of quarter sessions, that the only jurisdiction which the justice had in the premises was, if he found the charge sustained by the evidence, to bind the defendant over to answer at the next court of quarter sessions, and that the act of the justice in attempting to try the case and inflict a fine and imprisonment upon the defendant was without his jurisdiction and wholly void."

The writ of certiorari, with the certified record of the justice thereto attached, was returned to and filed in the prothonotary's office on March 2, 1914, and notice thereof on the same day was accepted by the commonwealth's counsel. No exceptions to the record of the justice were filed within five days after notice of the return of the writ to the prothonotary's office as is required by the rule of court, and no exceptions ever yet have been filed. On Feb. 24, 1914, counsel for the commonwealth filed a motion to quash the writ of certiorari, alleging in support of the motion, inter alia, that the petition upon which the writ was issued did not set forth any good and sufficient reason for the issuance of the writ. On March 17, 1914, judgment of non pros was entered by the prothonotary under rule of court on præcipe of the commonwealth's counsel "for failure on the part of the plaintiff in error to file exceptions within five days after notice of the return of the writ of certiorari." On April 1, 1914, alleging that the failure to file said exceptions was due wholly to the oversight of her counsel, the defendant took a rule on the commonwealth to show cause why the judgment of non pros should not be stricken off. The case never was called to the attention of the court for argument until a few days ago, when arguments were heard on the rule to strike off the judgment of non pros and on the motion to quash the writ of certiorari.

We are of opinion that the motion to quash the writ must be sustained. And when the writ is quashed, all the proceedings subsequent thereto will fall, and the judgment of non pros and the rule to strike off the same will become unimportant and require no consideration. We base our decision in quashing the writ on the ground that the petition for the writ did not disclose any sufficient legal reason why it should

be issued. The only reason alleged in the petition was that the case was triable exclusively in the court of quarter sessions and that a justice of the peace was without jurisdiction to try the case and impose the penalties prescribed by the act of assembly under which the proceeding was instituted. We considered that question very recently, in Com. *v.* Sutton, 44 Pa. C. C. 53, where we sustained the jurisdiction of a justice of the peace to try and dispose of a case just like this under this act of assembly, and we followed that ruling in the similar case of Com. *v.* Huey, at December term, 1914, No. 446, decided at the same time. Section 1 of the act cited makes a violation of any of its provisions a misdemeanor, and specifically provides that any person convicted thereof before any justice of the peace shall be fined by such justice as therein prescribed, and § 11 of the act authorizes the justice to commit the offender to the county prison in default of payment of the fine imposed, together with the costs of the proceeding, and for the reasons stated in the Sutton case we think the act in those respects is not unconstitutional, as contended by defendant's counsel. Therefore the ground laid in the defendant's petition was not sufficient for a special allowance of a writ of certiorari for bringing up the record of the justice of the peace for review by the court of common pleas.

The act of March 20, 1810, 5 Sm. L. 161, and its supplements, under which writs of certiorari may be taken without special allowance, relate to civil actions only. Caughey *v.* Pittsburgh, 12 S. & R. 53; Com. *v.* Betts, 76 Pa. 465. A special allowance from the court of common pleas must be had for a writ of certiorari to a justice of the peace in a summary conviction proceeding carried on in the name of the commonwealth and involving penalties of fine and imprisonment, which in its nature and effect is a criminal proceeding, and where an application for such special allowance is made a proper ground for it must be shown to the court, otherwise in most cases the writ would be used for purposes of delay. Com. *v.* Antone, 22 Pa. Super. Ct. 412. See also Com. ex rel. *v.* Butler, 39 Pa. Super. Ct. 125; Com. *v.* Shields, 50 Pa. Super Ct. 194. If by inadvertance or otherwise the writ has been allowed by the court without any sufficient legal ground having been shown to warrant a reversal of the judgment of the justice the writ on motion should be quashed.

And now, May 9, 1916, for the reasons set forth in the opinion herewith filed, the writ of certiorari is quashed.

From D. W. McDonald, Esq., Uniontown, Pa.

Tresca *v.* Tresca.

Divorce—Desertion—Subpœna—Premature issuance of.

Where a divorce is sought on the ground of desertion, and it appears that the alleged desertion took place within six months of the time the parties separated, a divorce will be refused as the defect is statutory and more than an irregularity in the proceeding.

In divorce. C. P. Allegheny Co. July T., 1913, No. 1602.

Jacob Margolis, for libelant; no appearance for respondent.

SWEARINGEN, J., March 14, 1916.—This case came upon the argument list and was submitted to the court upon the master's report. He recommended that a decree of divorce be granted.

The record shows that the libel was filed on May 22, 1913, and an order was then made that a subpœna be awarded, returnable to the first Monday of July, 1913. The allegation in the libel is that the respondent deserted the libelant on March 9, 1913. It therefore appears that the libel was prematurely filed. How this happened to be overlooked by the court we cannot recall, as it appears that the writer of this opinion signed the order awarding the subpœna. The record shows that the respondent was not served personally. It does appear that the alias subpœna was not returned until after the publication of notice required by law. This, however, may be but a mere irregularity. We are only calling attention to the same for the purpose of noting the carelessness which appears in this record. The question then arises whether or not the respondent was properly in court, for the purposes of this case. The statute provides that, where a desertion has occurred, the injured party may present his or her libel not less than six months after the alleged desertion, and that no decree shall be entered until more than two years has elapsed since the date of the desertion. In this case it appears that the libel was presented and the subpœna awarded much less than six months after the date of the alleged desertion. This being a statutory proceeding, the requirements thereof must be strictly observed, especially when there has been no personal service upon the respondent. Therefore, we are of opinion that the presentation of the libel before the expiration of the six months' period is more than a mere irregularity; it is fatal to the libelant's case.

We have read the testimony that was taken, and we are

obliged to say that it is quite unsatisfactory. The libelant in her testimony undertakes to show that probably the alleged desertion occurred long prior to the time named in the libel. But the testimony as to the alleged desertion is quite meager. It does appear that these parties separated, but it is not made clear just when this occurred. Besides, it is far from certain that the desertion was willful and malicious within the meaning of the statute. There is too much uncertainty in this testimony to justify the granting of a decree in divorce.

Accordingly, the decree for which the libelant prayed must be refused.

Starr's Estate.

Taxation—Collateral inheritance tax—Contingent estate—Wills.

Where a testator devises real estate to a son for life, with remainder to his issue, and the son dies without issue, a daughter who died in the brother's lifetime is an heir at law of the mother, entitled to a share in the real estate; the time being determined as of the date of the mother's death; but such daughter is not seized or possessed of such share within the meaning of the act of May 6, 1887, P. L. 79, as to make her share subject to the collateral tax.

Exceptions to adjudication. O. C. Philadelphia Co. Jan. T., 1911, No. 674.

William Linton, for commonwealth and exceptions.
Walter C. Longstreth, contra.

GEST, J., Nov. 26, 1915.—The mother of the decedent died in 1879, having devised certain ground rents to a son for his life with remainder, according to the recital of the will furnished us, to his issue. There being no remainder over in default of issue, and the son having died in 1914 without issue, there resulted, according to our decisions, an intestacy in favor of testator's heirs-at-law, of whom the decedent was one, the time being determined as of the date of her mother's death. Buzby's Appeal, 61 Pa. 111; Stewart's Est., 147 Pa. 383; Bell's Est., 147 Pa. 389; Gorgas's Est., 248 Pa. 343. In partition proceedings the personal representative of the decedent who died pending the life estate received her share of the ground rents, and the commonwealth claims collateral inheritance tax thereon under the recent decision of the Superior Court in Gelm's Est., not yet reported, and consequently not called to

the attention of the auditing judge. In that case the testator devised his estate to his wife for her life or widowhood and directed that on her death or remarriage the estate should be divided among his four children nominatim. One of these children died pending the life estate without issue, so that his estate passed collaterally to his brothers and sisters. The Superior Court held that the estate in remainder of this deceased son was subject to tax, and this decision is urged upon us as not only ruling this case, but as overruling the prior decisions of this court in Swann's Est., 12 Pa. C. C. 135; Matthiessen's Est., 35 Pa. C. C. 580, and Gebhard's Est., 20 D. R. 529.

The facts, however, are different. The opinion of the Superior Court proceeds upon the ground that the remainder was vested, as it undoubtedly was; but in this case the will of Mrs. Longstreth, the decedent's mother, devised the estate, after the life estate to her son, to her son's issue. Until the death of that son it could not be determined whether he would leave issue or not, and while, according to some definitions, the interest of the decedent might be termed vested subject to a divesting contingency, or simply contingent, see Buzby's Appeal, 61 Pa. 111, yet the criterion is whether the decedent, in the language of the act of assembly, died "seized or possessed" of the estate. We can readily understand how the decedent in Gelm's Estate may be said to have been thus seized or possessed, for his interest was merely postponed until his mother's death, an event sure to occur; but, as we would construe the language of the act, the decedent in the present case before the court cannot be said to have died "seized or possessed" of an estate that depended upon the future death of her brother without leaving issue. This whole question was elaborately discussed by this court in Swann's Est., 12 Pa. C. C. 135; Matthiessen's Est., 35 Pa. C. C. 580, and Gebhard's Est., 20 D. R. 529, above mentioned, and need not be considered at length. Even if some expressions in the opinions in these cases may have gone further than their actual facts required, we think that the distinction above made is sound, for in none was the estate from which the tax was claimed a vested estate such as appears in Gelm's Est., 61 Pa. Super. Ct. 228.

It will be noticed that in Gelm's Estate, Judge Miller, of Allegheny county, whose decision was affirmed by the Superior Court, distinguished Swann's Estate and Matthiessen's Estate on the ground that the estates therein sought to be taxed

were contingent, and the opinion of President Judge Hawkins, in Nixon's Est., 53 Pitts. L. J. 117, accords with this distinction.

We therefore prefer to adhere to the doctrine of the previous decisions of this court until we are advised that the scope of the ruling of the Superior Court in Gelm's Estate is broader than it appears to be.

The exceptions are dismissed.

Famous *v.* Troup.

Statute of limitations—Pleading.

When the statute of limitations has been neither pleaded nor offered as a defence at the trial, it is too late to assign the same as a ground for a new trial.

Motion for new trial. C. P. Dauphin Co. Jan. T., 1914, No. 728.

J. G. Hotz, for plaintiff.
Fox & Geyer, for defendant.

KUNKEL, P. J., May 22, 1916.—The question presented in this case was whether the defendant agreed to allow the plaintiff commissions on the sales which were made by him. The plaintiff's testimony supported the contract and was in part corroborated by his wife. It was, however, contradicted by the defendant and was also adversely affected by the plaintiff's failure to make an earlier demand for payment. The credibility of the witnesses and the weight to be given the evidence affecting the integrity of the claim were questions peculiarly for the jury, and we are not satisfied that we should interfere with their finding.

The statute of limitations was neither pleaded nor was it offered as a defence at the trial. It now comes too late, and cannot be assigned as a ground for a new trial. Besides, it appears to be conceded that the commissions on three of the sales were not barred by the statute. Support for the amount of the verdict may readily be found in the evidence relating to the value of these sales and of the services rendered.

The motion for a new trial is overruled and judgment is directed to be entered on the verdict upon payment of the jury fee.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Eicher *v.* Eicher.

Divorce—Practice (C. P.)—Jurisdiction of court.

The act of April 26, 1905, P. L. 309, providing that where a cause of divorce shall arise while a husband and wife shall be resident in different counties proceedings in divorce may be instituted and prosecuted in either county, does not give jurisdiction to the court of a county in which a respondent is residing at the time proceedings are instituted therein, when at the time the cause of divorce arose the parties were living together in another county, and the cause of divorce arose in the county of their common domicil, in which county the libelant, who is the husband, has continued to maintain a well established residence, and the respondent has not appeared in the proceedings.

Divorce. C. P. Fayette Co. March T., 1916, No. 671.

John Duggan, Jr., for libelant.

VAN SWEARINGEN, P. J., May 9, 1916.—A decree of divorce in this case must be refused for the reason that this court is without jurisdiction to grant it. The divorce is sought on grounds of desertion. The libel sets forth that the residence of the libelant is at Scottdale, in Westmoreland county, where, the libel alleges, the desertion occurred on Jan. 11, 1913. In his testimony before the master the libelant states that the respondent left him when they were living together at Scottdale, on the date mentioned, and the master has found that to be a fact. The record shows that ever since the desertion occurred the libelant has resided at Scottdale, and that he is residing there now. After leaving her husband, the respondent came to Fayette county, where the subpœna was served on her, but she has not appeared in the proceeding.

It is provided in § 2 of the act of March 13, 1815, 6 Sm. L. 286, that a libelant in divorce shall present his or her petition to the judges of the court of common pleas of the county wherein he or she resides. It is contended by the libelant's counsel, and the master has found, that we have jurisdiction of this case by virtue of the act of April 26, 1905, P. L. 309, which provides that "where a husband and wife shall be resident in different counties of this commonwealth, and while they are so severally resident a cause of divorce shall arise, the injured husband or wife may, at his or her option, institute and prosecute proceedings in divorce either in the county of his or her own residence, or in the county wherein the offending husband or wife shall be resident and the cause of divorce shall have arisen."

But this husband and wife were not severally resident in

different counties when this cause of divorce arose. They were living together in the same county, and the cause of divorce arose in the county of their common domicil. Thereafter the wife came to Fayette county, and the husband continued to reside in Westmoreland county. The provisions of the act of assembly quoted are not applicable to this case. There has been no appearance by the respondent. The application is by the husband, who, it is conceded, has a well-established residence in Westmoreland county. The proceeding should have been instituted in that county.

And now, May 9, 1916, for the reasons stated in the opinion herewith filed, a decree of divorce is refused and the libel is dismissed. From D. W. McDonald, Esq., Uniontown, Pa.

Ruthenian Greek Catholic Church of St. Nicholas Charter.

Corporations—Confusion of names—Charter.

An application for a charter for a corporation with the name "Ruthenian Greek Catholic Church of St. Nicholas, of Herminie, Pennsylvania," will be refused where it appears there is another corporation in the same village with the name "St. Nicholas Russian Orthodox Greek Catholic Church" on account of similarity of names and the consequent confusion which might arise therefrom.

Application for charter and exceptions thereto on account of the similarity in name to another corporation in the same village. C. P. Westmoreland Co. Nov. T., 1915, No. 661.

P. K. Shaner, for petitioners.
Walkinshaw & Walkinshaw, for exceptants.

COPELAND, P. J., April 21, 1916.—This application for a charter for the Ruthenian Greek Catholic Church of St. Nicholas, of Herminie, Pennsylvania, is in regular form and complies with all the requirements of § 2 of the act of April 29, 1874, and the several supplements thereto. Publication of the application has been made as required by the act; it is within the purposes named in the first class of corporations specified in § 2 of said act, and the application would be approved if it were not for the fact that the name being so nearly like the name of the St. Nicholas Russian Orthodox Greek Catholic Church, we fear, to approve this certificate of incorporation, great annoyance would result from a confusion of names. The fact that both churches would be known as the St. Nicholas Church, and in the same village, we think would lead to great confusion and annoyance in connection with tele-

phone messages, mail, etc., of the two organizations. There are many cases in this state refusing incorporation under somewhat similar circumstances as this, but it is only necessary to quote a few.

In First Presbyterian Church of Harrisburg, 2 Grant 240, the application for a charter in that name was refused because the chief justice knew of the existence of the "English Presbyterian Church of Harrisburg," and he thought that each would be known as the Presbyterian Church of Harrisburg, leading to confusion. While this case would probably not now be so decided, the underlying idea has governed the courts. A charter to the "Grand Lodge of the Independent Order Sons of Progress" was refused on exceptions filed by the "Grand Lodge of the Order Sons of Progress." Judge Arnold disposing of the case in the brief sentence: "But the word 'Independent' is simply descriptive. The true name is 'Sons of Progress,' 14 W. N. C. 31. So here the word 'Improved' is simply descriptive and the names of the two organizations are practically identical."

In Polish National Catholic Church of St. Francis, 31 Pa. Super. Ct. 87, and Philadelphia Lying-in Charity *v.* Maternity Hospital, 29 Pa. Super Ct. 420, the Superior Court would not interfere with the discretion of the lower court, but approved the refusal of the charters. In the first case the objecting corporation's name was the St. Francis Roman Catholic Church, that of the applicant the Polish National Catholic Church of St. Francis. In the other the proposed name was "The Central Maternity and Hospital for Women," and that of the exceptant, "The Maternity Hospital." The court said: "The similarity of the name to that of another corporation having its hospital in the vicinity was a matter eminently proper for consideration by the court to whose sound legal discretion the application was addressed."

"St. Francis" were the prominent distinguishing words in each of the churches, and "Benevolent and Protective Order of Elks" are such here.

We think these authorities are sufficient to warrant us in sustaining the exceptions, the gist of the complaint of the exceptants being that a confusion would result.

And now, to-wit, April 21, 1916, after full hearing and due consideration, it is ordered, adjudged and decreed that the exceptions are sustained and the approval of the certificate of incorporation is withheld.

From Wm. S. Rial, Esq., Greensburg, Pa.

Smith's Case.

Feme sole trader—Petition for—Evidence as to support and offers of support.

The petition to be declared a feme sole trader will be granted where the evidence is that the petitioner's husband neither contributed nor offered to contribute to the wife's support after the separation, and the wife positively denies receiving any contributions or offers of support. Had she refused any such contributions or offers, she would not be entitled to a decree.

Petition to be declared a feme sole trader. C. P. Allegheny Co. April T., 1916, No. 1124, Docket "D,"

Ache & Wassell, for petitioner.
J. Merrill Wright and *W. L. McConegly,* for respondent.

CARNAHAN, J., March 9, 1916.—From the testimony taken in open court, it appears that the petitioner left her husband in 1913. During the past year, and ever since the separation, the husband has not contributed to the support of the wife. If he were not able to contribute anything toward her support, and because of his inability to contribute he failed to do so, the petitioner would not be entitled to the decree which she asks. It does not appear, however, that his failure to so contribute, or even offer to contribute something toward her support, was because of want of financial ability. It appears, on the contrary, that he was able to contribute something. Had he offered to contribute and failed to make good his offer, because of a refusal on her part to accept anything, the petitioner would not be entitled to a decree. The respondent claims that he did make an offer within a year last past to contribute to the support of the wife, and that she refused to accept the offer. It is not claimed that he personally made the offer to her, but it is claimed that he made it through his attorney over the telephone. From the testimony of said attorney, it is not clear that the petitioner was given to understand, in so many words, that the respondent had authorized and instructed him to make the offer. The petitioner denies that she had any offer of support from her husband, either from him personally or by his attorney.

Inasmuch as the petitioner refused to live with her husband, and because of such refusal the parties have been separated, it devolves upon the petitioner to give some satisfactory reason for her action in causing the separation. She says that because of his treatment of her she was a nervous wreck. It

would have been more satisfactory if the reasons for her action were given more in detail, but neither the direct examination nor the cross-examination was calculated to develop the facts in this respect. Under the circumstances, we are of opinion that the reason given is sufficient to justify her conduct.

The respondent claims that the act of May 28, 1915, under which this petition is filed, is unconstitutional inasmuch as its title does not sufficiently indicate the purpose of the act; and further, that assuming it to be constitutional, the petitioner has not brought herself within its provisions. We are of opinion that the act is constitutional so far as this petition and the testimony in support of it are concerned, and that she has brought herself within the provisions of it. She is therefore entitled to a decree as prayed for.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Leith *v.* Bauder.

Sheriff's sale—Schedule of distribution—Exceptions—Act of June 4, 1901, P. L. 357.

Where exceptions have been filed to a sheriff's return, made under the provisions of the act of June 4, 1901, P. L. 357, and in accordance with the rule of court, the court has power to hear and determine the same without ordering the money to be paid into court.

Sheriff's schedule of distribution and exceptions thereto. C. P. Northampton Co. Sept. T., 1915, No. 34.

Smith, Paff & Laub and *R. N. Koplin,* for the plaintiff.
Russell C. Mauch, for the defendant.

STEWART, P. J., Feb. 7, 1916.—Exceptions were filed to a sheriff's schedule of distribution. Application has been made to us to dispose of the same. The learned counsel for the defendant objects that we have no authority to hear the matter until the money realized from the sale has been paid into court.

The act of June 4, 1901, P. L. 357, § 1, is as follows: "When real estate shall be sold by virtue of any writ of execution issued from any court in this commonwealth, it shall be lawful for the sheriff to report to said court a schedule of distribution of the proceeds of said sale, according to the list of liens on the property sold, as certified to him from the record by the proper officers, which schedule and list of liens shall attach to his return of said writ; whereupon, the said return shall

be read in open court, on some day during the term to be fixed by order of the court; and if the said distribution shall not be questioned or disputed within such reasonable time as may be fixed by the court, it shall be final and conclusive, and the sheriff shall proceed to pay out, in accordance therewith, the money mentioned in his return; but if exception to the sheriff's return be made by any person interested therein, within such time, the court shall proceed to hear and determine the same, as now provided by law in case of disputes as to the distribution of the proceeds of sheriff's sales." That act is an exact copy of the special act of April 10, 1862, P. L. 364, for Allegheny county. In Semple *v.* Semple, 193 Pa. 630, it was held: "The courts have no authority to decree distribution of a fund not within their grasp, without the assent of the parties in interest."

In that opinion Justice Dean said: "The acts of June 16, 1836, and June 28, 1871, the general acts on the subject, gave to the courts no power to revise the sheriff's distribution made out of court before the return of his writ; the special act of April 10, 1862, for Allegheny county, afterwards extended to Schuylkill and Lehigh counties, did confer a power of revision of the sheriff's schedule of distribution on the courts of common pleas of those counties." Here we have direct judicial authority that as soon as the special act for Allegheny county became general throughout the state, upon exceptions being filed, we could revise the sheriff's schedule. The law as declared in Semple *v.* Semple, supra, is no longer the law of this commonwealth. Section 212½ of our court rules, adopted May 1, 1905, fixes the time when the return should be read in court. It is as follows: "Whenever the sheriff makes a special return, reporting a schedule of distribution to lien creditors under the provisions of act of assembly, June 4, 1901, P. L. 357, the same shall be read in open court at the usual time for acknowledgment of sheriff's deeds; and if no exceptions be filed to said return and schedule of distribution, within ten days thereafter, the same shall be deemed confirmed as final and conclusive by virtue of this rule without further order."

If the sheriff's return is in accordance with the list of liens certified to him and it is confirmed, he is protected in his payments. Campbell *v.* McCleary, 166 Pa. 1. If exceptions to his schedule are sustained, it will be corrected, and payment made, according to the corrected schedule, will protect him. There is no use of adding to the expense by compelling the payment of money into court. It is unquestioned that under the

prior acts, we have power to appoint an auditor. The exceptions in the present case are not frivolous, and raise questions that are proper for determination. We shall not discuss them separately. While some of them raise legal questions, others must be determined after evidence has been heard. The whole matter is one for an auditor.

And now, Feb. 7, 1916, the schedule of distribution, as made by the sheriff of Northampton county, under the above writ, together with the exceptions thereto, are referred to David M. Bachman, as auditor, to examine and pass on the same, and if necessary, to correct the said schedule in accordance with the law and the evidence.

From H. D. Maxwell, Esq., Easton, Pa.

Blakely Borough *v.* Gilinsky.

Boroughs—Police power—Constitutional law—Cemeteries—Fines.

An ordinance of a borough council prohibiting burial in a cemetery within borough limits is a valid exercise of the police power, there being other cemeteries available, and is constitutional. A fine of $50 is not excessive for a violation of the ordinance.

Appeal from summary conviction. Q. S. Lackawanna Co. April Sess., 1915, No. 66.

Houck & Benjamin, for plaintiff.
D. J. Reedy, for defendant.

EDWARDS, P. J., Jan. 24, 1916.—The testimony in this case was taken before a stenographer and has been submitted to the court for its consideration.

The evidence establishes the following facts:

1. On April 14, 1914, P. L. Walsh, by articles of agreement, sold to a church congregation in the borough of Olyphant a certain tract of land located in the borough of Blakely, and comprising about four and one quarter acres of land. Subsequently on June 15, 1914, a deed for said land was made to Bishop Hoban as trustee for the Olyphant church.

2. The purpose of the church in acquiring said land was to establish a cemetery for the use of the members of said church and their families. The cemetery was consecrated on May 23, 1914, by Father Novak, and on the same day the body of one person was buried in the cemetery. Between the dates of

April 22 and June 3, 1914, sixty members of the said church congregation had purchased from the church lots in the cemetery, and up to January, 1915, about twenty persons had been buried therein.

3. In April or May, 1914, some of the property holders residing in the vicinity of the proposed cemetery appeared before the borough council of Blakely and objected to the establishment of another cemetery within the borough limits. The matter was investigated by a committee of the council, and the result was the passage of the borough ordinance of June 8, 1914, which is in evidence.

4. In the ordinance the description of the borough territory in which the establishment of cemeteries is prohibited is given as within certain well recognized general lines, the river for instance being one of the lines. The description includes the four and one quarter acres of land deeded as aforesaid, but it excepts the plots of ground in which three cemeteries are already established and in use in the borough. The description is sufficiently accurate.

5. The defendant, Joseph Gilinsky, an undertaker, made a burial in the prohibited territory, was arrested, and fined $50, and appealed to the court.

CONCLUSIONS OF LAW.

1. Under the borough act of 1851, the borough has the power to enact ordinances, inter alia, "to prohibit within the borough the burial or interment of deceased persons, or within such partial limits within the same, as they may from time to time prescribe, and to regulate the depth of graves,"

Incidentally, although having no bearing on the merits of the present controversy, we state that under the borough code of 1915, boroughs have the same power, viz.: "To prohibit within their limits, or within any described territory within such limits, the burial or interment of deceased persons," etc.

2. The ordinance under consideration does not violate the constitutional provision that no man can be "deprived of his property unless by the judgment of his peers or the law of the land." Defendant claims that the interests of the sixty or more lot owners in the proposed cemetery are impaired, and that the owners cannot be deprived of their rights of property by a borough ordinance.

The power existing in the legislature to regulate the burial of the dead may be delegated by the legislature to municipalities. If the power has been so delegated, municipalities may,

by ordinance, establish such regulations concerning the manner of digging graves, their depth, and the interment of dead bodies as are reasonable in their character and necessary for the protection of the public health and welfare. They may even prohibit future burials in existing cemeteries or the establishment of new cemeteries within specified portions of their corporate limits. The power when thus possessed is a continuing power which may be exercised by the municipality from time to time as the public health and welfare may require. The purchaser of a lot in a cemetery, though under a deed absolute in form, does not take any title to the soil. He acquires only a privilege or license to make interments in the lot purchased, exclusively of others, so long as the ground remains a cemetery. Such privilege or license is subject to the police power of the state, in the exercise of which not only future interments may be prohibited, but the remains of persons theretofore interred may be removed.

The foregoing is a fair statement of the text law applicable to the question now under consideration.

Authorities in Pennsylvania enunciate the same doctrine. In the case of Kincaid's Appeal, 66 Pa. 411, a Methodist church purchased certain land in the city of Pittsburgh for a graveyard. The church laid it out as a burial ground and sold lots. It was used for a cemetery for many years. It was improved by the lot holders at a cost of many thousand dollars. The plaintiffs in the action were the owners of certain lots. An act of the legislature was passed in 1867, P. L. 1234, providing, inter alia, that after the passage of the act it should be unlawful to make interments in this particular burying ground. The Supreme Court, passing on this case, said: "Every right from an absolute ownership down to a mere easement is purchased and held subject to a restriction that it shall be so exercised as not to injure others. Though at the time it may be remote, the purchaser is bound to know at his peril that it may become otherwise and that it must yield to laws for the suppression of nuisances. If conditions or covenants appropriating land to some particular use, could prevent the legislature from afterwards declaring that use unlawful, legislative powers necessary to the comfort and preservation of populous communities might be frittered away to insignificance. So the holder of a burial lot, by the passage of a law making interments unlawful, loses such use of the lot, yet he has no claim for compensation, for it cannot be said in any sense that his property has been taken for public use."

The decision in the foregoing case is not disturbed by that of Craig *v.* First Presbyterian Church, 88 Pa. 42, notwithstanding the interesting and vigorous dissenting opinion of Chief Justice Agnew.

3. The ordinance passed by the borough of Blakely is not unreasonable in its provisions; nor is it discriminatory in any particular. It is a valid exercise of the legislative power vested by law in the borough.

The borough has already within its limits three cemeteries, and it cannot be said that the prohibition to establish a fourth cemetery is unjust, unreasonable, or an abuse of power.

4. The appellant's objections to the ordinance on constitutional grounds are not sustained.

5. The fine of $50 imposed on the defendant is not excessive.

Now, Jan. 24, 1916, the appeal in this case is dismissed with costs.

From Wm. Jenkins Wilcox, Esq., Scranton, Pa.

Mahaney *v.* Mahaney.

Divorce—Return—Service of subpœna—Master—Act of March 13, 1815.

A divorce will be refused where personal service was had on respondent within fifteen days of return day, and no appearance having been entered for respondent, a master was appointed and hearing held during the term to which the subpœna was returnable.

In divorce. C. P. Allegheny Co. Oct. T., 1915, No. 992.

L. B. D. Reese, for libelant.

Per Curiam, Jan. 12, 1916.—The subpœna in the above entitled case was issued returnable to the first Monday of October, 1915, which was October 4, and the sheriff returned the subpœna on October 6, stating that he had served the same on the respondent on September 24. On November 13, on motion of libelant's counsel, the court appointed Joseph McDonald as master, who fixed December 15 as the day for hearing and so notified the respondent.

The act of March 13, 1815, Purdon's Digest, page 1238, § 18, provides that "upon due proof, at the return of the said subpœna, that the same shall have been served personally on the said party, wherever found, or that a copy had been given to him or her, fifteen days before the return of the same, the said court shall and may make such preparatory rules and

orders in the cause, that the same may be brought to a hearing and determined at the term to which the process may be returnable."

This subpœna returned to the first Monday of October was served on September 24, ten days before the return-day. This court has held that while that service is good, yet the court may not proceed at the term to which the subpœna was returnable without the appearance of the respondent. To that effect was also the ruling in Moyer *v.* Moyer, 3 D. R. 239. The appointment of the master and his hearings in pursuance thereof were therefore premature, and for that reason the divorce cannot be granted at this time.

And now, Jan. 12, 1916, this divorce is refused and the record returned to the master, Joseph McDonald, to be proceeded with.

Hurst *v.* Gusi.

Mechanic's liens—Amendment after statutory period—Name of owner—Act of June 4, 1901, P. L. 431.

A mechanic's lien filed against the husband as owner of the property cannot be amended after the statutory period so as to include the wife as a defendant with her husband for the purpose of binding their joint interest.

The provisions of the mechanic's lien law of 1901 are mandatory; compliance with them is a condition precedent to the right to file a lien.

The mechanic's lien must be self-sustaining and unless it sets forth when and how service of notice of the intention to file the lien was made upon the owner it is not self-sustaining.

Rule to amend lien by joining the name of Theresa Gusi, wife of Luigi Gusi, as defendant. C. P. Dauphin Co. M. L. D. "D," No. 154.

J. C. Nissley and *P. S. Moyer,* for plaintiff.
A. H. Hull, for defendant.

KUNKEL, P. J., Jan. 27, 1916.—This claim was filed against Luigi Gusi, the defendant, as the owner of the property upon which the building to which the labor and materials were furnished was erected, while as a matter of fact his wife, Theresa Gusi, was joint owner with him, the title to the property being in the names of himself and wife. We are now asked by the plaintiff, the subcontractor, to permit the proceeding to be amended so as to make the wife a defendant therein with

her husband, for the purpose of binding her interest in the property.

The act of June 4, 1901, P. L. 431, requires a claim of this kind to be filed, to become a lien upon the owner's property, within six months after the time when the agreement for the work done or materials furnished was completed, and that notice of the intention to file the lien and that the same has been filed be given to the owner. The statutory period within which the claim could have been made a lien has expired, and, of course, the notices required by the statute cannot be given to the wife. It is too late, therefore, to subject her interest to the lien of the claim. To permit her to be named as an owner would be in disregard of these essential provisions of the statute.

Even if it be true that by her conduct she ratified the act of her husband in building on the property of which she was the joint owner, or that she failed to repudiate the work that was done thereon, and thus under § 4 of the statute her interest in the property became liable to a lien for the claim, nevertheless in such case the lien could be secured only by observing the requirements of the statute referred to. Miller *v.* Fitz, 41 Pa. Super. Ct. 582.

The proposed amendment does not fall within § 51, which authorizes the court to permit amendments. The offer is to add to the proceeding a new party defendant as owner. It is in effect an attempt to subject an owner's property to a mechanic's lien after the time has elapsed for filing the claim and without complying with the statutory requirements. This cannot be done. The provisions of the statute are mandatory. Compliance with them is a condition precedent to the right to file a lien. Wolf *v.* P. R. R. Co., 29 Pa. Super. Ct. 439; McVey *v.* Kaufmann, 223 Pa. 125; Knelly *v.* Horwarth, 208 Pa. 487.

Moreover, merely to add the name of the wife as an owner would not avail to bind her interest in the property. The mechanic's lien must be self-sustaining and unless it sets forth when and how service of notice of the intention to file the lien was made upon the owner it is not self-sustaining. Bametzrieder *v.* Canevin, 44 Pa. Super. Ct. 18. As the notice was not served in the present case upon the wife, there is, necessarily, no mention in the lien of the time and manner of the service of notice upon her. Wherefore the rule to amend is discharged and the amendment is not allowed.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Harrisburg *v.* Rineard.

Road law—Streets—Paving of—Assessments for curbing—Act of March 19, 1903, P. L. 41.

A strip of land lying betwen low water mark of the Susquehanna river and the western line of that part of the street which was paved was held and owned by Harrisburg city for public park purposes. The city assessed certain private property owners abutting on the eastern side of the street, for the paving and curbing in front of the property forming the western boundary of the street. Held, that said assessments were made without authority and cannot be sustained.

Case stated. C. P. Dauphin Co. Sept. T., 1914, Nos. 202, 203 and 204.

D. S. Seitz, city solicitor, for plaintiff.
G. R. Barnett, for defendants.

KUNKEL, P. J., April 22, 1916.—At the time the paving and curbing of Front street was finished and the assessment to pay the cost thereof was made, the strip of land lying between low water mark of the Susequehanna river and the western line of that part of the street which was paved, was held and owned by the city for public park purposes. But whether Front street was bounded on the western side at low water mark by the river or by the public park, the result of this litigation must be the same. If the western boundary line was the Susequehanna river, the street was bounded on the west by the property of the commonwealth; if the western boundary line was the public park, it was bounded by the property of the city of Harrisburg. In either event the street was bounded on the west by non-assessable property. Section 3, act of March 19, 1903, P. L. 41; Pittsburgh *v.* Sterrett Subdistrict School, 204 Pa. 635. This character of property was expressly excepted out of the assessment which was authorized to be made to pay the cost of paving and curbing the street. The ordinance authorized the cost of paving and curbing to be apportioned among all the property fronting along both sides of the street "except the cost and expense of paving and curbing in front of non-assessable properties." Ordinance No. 32, approved Oct. 31, 1911, and Ordinance No. 78, approved March 19, 1906.

There was therefore no authority to make an assessment which would include the cost of the paving and curbing along or in front of the river or the park. That part of the cost of

the improvement was assumed by the city itself, § 3, Ordinance No. 78, and Ordinance No. 1, file of common council, session of 1910, as it had the power to do. Act of March 30, 1903, P. L. 116.

The assessments against the defendants, so far as they represent the cost of the paving and curbing in front of the property forming the western boundary of Front street, were made without authority and cannot be sustained.

Wherefore, in accordance with the terms of the cases stated, judgments are directed to be entered against the city and in favor of the respective defendants.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Fryer's Estate.

Lunacy—Support of insane—State hospital—Discretion of court—Act of June 1, 1915, P. L. 661.

An allowance for the support of an insane person out of such person's estate, in a state hospital for the insane, is within the sound discretion of the court having jurisdiction over the estate.

Petition for payment of maintenance to commonwealth. C. P. No. 5, Philadelphia Co. June T., 1910, No. 2830.

J. H. Naylor, for petition; *F. S. Cantrell, Jr.,* contra.

MARTIN, P. J., March 27, 1916.—A petition was presented on behalf of the commonwealth, averring that George B. Fryer was admitted as an indigent patient to the state hospital for the insane for the southeastern district of Pennsylvania on June 21, 1909, where he still remains; that there has been expended by the commonwealth, from June 21, 1909, to Sept. 1, 1915, for his maintenance the sum of $784.82; that William G. Lees was duly appointed guardian on July 22, 1910. The petition prayed the court to make an order under the terms of the act of June 1, 1915, P. L. 661, for payment to the commonwealth of the claim for maintenance.

No answer was filed, but a letter was addressed to the deputy attorney-general, signed by the guardian, stating that he had made expenditures on behalf of the patient, paid for his support at the hospital in compliance with the order of court, and that there remained a balance in his hands of $238.40.

It was said in Ward's Est., 41 Pa. C. C. 207; Insanity is

only a disease affecting the mind as other diseases affect the body. If expenses have been paid by another, the right to reimbursement accrues in accordance with the familiar doctrine that no one can evade the performance of a duty imposed by law through unwillingness or temporary inability to fulfill it, and will be bound to indemnify those who undertake that duty for him. This principle is especially obvious when the custody or maintenance of an insane person is involved, for this is a matter of grave public concern. Woodward on Law of Quasi-Contracts, § 195, et seq.

In Thomas's Est., 24 D. R. 31, 34, it was held that "the obligation arose because of the services bestowed for the benefit of the lunatic. A lunatic's estate is liable for necessaries furnished in good faith. LaRue *v.* Gilkyson, 4 Pa. 375. . . . Because there is no specific remedy provided for its collection does not discharge the obligation to pay." Section 1 of the act of June 1, 1915, P. L. 661, declares, whenever any person is maintained as an inmate of an institution of the commonwealth at the expense of the commonwealth, the property of such person shall be liable for such maintenance, provides a method of procedure, and enacts that the court "shall have power, upon the application of the attorney-general, to make an order for the payment of maintenance to the commonwealth upon the trustee, committee or guardian," but places no limitation upon the discretion exercised by the court.

The care of the persons and estates of those who are non compos mentis are special subjects in relation to which the several courts of common pleas are expressly invested with the jurisdiction and powers of a court of chancery. The lunatic is in effect the ward of the court, and his estate is in custodia legis. Shaffer *v.* List, 114 Pa. 486, 488, 489. The expenditures of the committee for support of the lunatic and contracts made by the committee are all under the supervision of the court. The law places those matters in the discretion of the court. This discretion should not be surrendered by the court to any other tribunal. Equitable Trust Co. *v.* Garis, 190 Pa. 544, 552.

The court having, in the exercise of discretion, made an order on the guardian for the payment of $100 to the commonwealth on account of the claim, deems it inadvisable at the present time to direct further payments from this small estate, and upon the payment of the sum of $100 on account of the indebtedness to the commonwealth, in accordance with the order made Feb. 11, 1916, the rule will be discharged.

Hammill *v.* Hammill.

Divorce—Desertion—Service—Jurisdiction.

Service of a subpœna in divorce made beyond the limits of the state is wholly void and of no effect. The moment the sheriff carries a writ beyond the state line it becomes a mere scrap of paper. When respondent undertakes to accept service of the writ beyond the confines of the state, she simply acknowledges that she had knowledge of the writ having issued.

Divorce. C. P. Franklin Co. April T., 1915, No. 30.

William S. Hoerner, for libelant.

GILLAN, P. J., May 23, 1916.—The husband, libelant, presents his libel alleging as a cause for divorce, desertion. The master recommends a divorce. The allegation found in the libel is that on Nov. 14, 1911, respondent willfully and maliciously deserted him. The master reports that the allegation of the libel is true, that is, that on Nov. 14, 1911, respondent did willfully and maliciously desert him. It is our duty under the law to examine the matter de novo and determine from the evidence whether or not the allegations of the libel have been sustained by the evidence. Middleton *v.* Middleton, 187 Pa. 612.

Desertion is defined as "the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew suspended cohabitation without justification either in the consent or the wrongful conduct of the other. There must be an intent to desert willfully and maliciously persisted in without cause for the statutory period." Brown on Divorce, page 142.

"Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in, without cause, for two years." Ingersoll *v.* Ingersoll, 49 Pa. 251; Middleton *v.* Middleton, 187 Pa. 619.

"Courts ought never to sever the marriage contract, but where the application is made in sincerity and truth, for the causes set forth, and no other, and fully sustained by the testimony." Angier *v.* Angier, 63 Pa. 450.

"Never ought divorces to be easily obtained, for marriage is the most sacred of human relations, and should never be dissolved without clear proof of imperious reasons." Richards *v.* Richards, 37 Pa. 225.

Keeping in mind the definition of desertion as above set

forth, as well as the manner in which courts should proceed in divorce proceedings, let us examine the evidence. The only evidence offered on the subject of desertion was the libelant himself and his mother. From them we learn that the libelant, Howard R. Hammill, and Minnie V. Stouffer were married on Aug. 8, 1910. For about one month after their marriage they lived together at the house of the wife's mother. Then until April 1, 1911, they lived with the family of libelant's father. They then moved to the house close by known as the Zentmyer property. There they kept house and lived together until Oct. 1, 1911, when they returned to his father's home, occupied a room there and boarded with the father. The libelant testifying, says that on Oct. 14, 1911, respondent went to visit her mother who lived about four miles distant, taken there by libelant's mother. The libelant went to see his wife on the following Sunday. The account of what occurred on that day as given in the words of the libelant is as follows:

"Q. When next did you see your wife? A. I next saw her the Sunday after she left; I went to see her at her mother's home. Q. Just where did you see her? A. At the yard gate. Q. Did you go in? A. No, sir. Q. What took place between you? A. I asked her to come home with me. She said her mother was sick and she could not come until she was better. She told me when she was ready to come Milford Berger would bring her."

On Nov. 18, 1911, she wrote a note to her husband, which he received and of which the following is a copy:

"Greencastle, Pa., Nov. 10, 1911.

"Dear Howard:

"I will drop you a few lines to let you know that I am well, and hope that you are the same, as I have not seen you for so long. I guess I will be out Thurs., if she is better. Don't rent until I see how it will go when I come out. Don't depend on me coming out Thursday. If I do, Milford will bring me out, so don't get mad at that.

"From Minnie."

Milford Berger did drive her to her home, but it does not appear how long she remained there. Her husband did not see her on that occasion. She got some of her clothing. This Berger was a boy about twenty years of age, who lived with libelant's mother. About a week later libelant again saw his wife. The account of his visit in his own words is as follows:

"Q. When next did you see your wife? A. About a week later. Q. Where was that? A. I went to her mother's home. Q. Did you see her? A. Yes, sir; at the yard gate. Q. What took place? A. We had a little conversation; I asked her to come back; she refused. Q. Tell us what words she used. A. Well, it was a good while ago, I may not be able to tell just exactly. Q. Tell us as near as you can. A. I asked her if she intended to come back; she said, no, she would not come."

Libelant's mother testified that when respondent left she said she was going on a visit. She saw respondent when she came in the evening with Berger. Not a word was said about her not returning. The mother testified as follows:

"Q. When next did you see her? A. When my son and I went to her home. Q. Where did you see her? A. She came out to the gate. Q. What took place? A. She said she would not come back."

This is all the evidence on the subject of her desertion. It does not carry to the mind of the court the conviction that this supports the allegation of the libel that there was a willful and malicious desertion with the intention not to return. The allegation of the libelant is that the desertion took place on Nov. 14, 1911. There is not a word in the evidence as to any occurrence on that date. According to the evidence she went on a visit to her mother on October 14. On November 11 she wrote a letter to her husband, which certainly manifested no intention of not returning. On the Sunday following October 14 he saw her at the yard gate at her mother's house, and, when he asked her to come home with him, she replied she could not go because her mother was sick, and that when she was ready to come Milford Berger would bring her.

It is not as though they were housekeeping and her presence at her home was absolutely necessary. They were boarding and a wife cannot be convicted of desertion because, on visiting her mother, she finds her sick and stays a while to take care of her, especially if she is neglecting no household duties at home.

He again visited her, whether before or after November 11, the date of her letter, does not appear. He again met her at the yard gate. When pressed by his counsel to give the words of his conversation he said, "I asked her if she intended to come back, and she said no, she would not come." Not a word beyond this. Was he asking her to come back to live with him or simply asking her to end her visit? In as important

a matter as the severance of the marriage ties the court should be informed. There is no testimony as to what the libelant did after that, as to his household effects or his home. At this time libelant's mother was with him; her account of what occurred is even more meager than that of her son. She had driven respondent to her home. It looks very much as though this was a preconcerted plan to have the mother present as a witness preparatory to a divorce proceeding. This is strengthened by the course of proceeding in this application for divorce. The respondent, at the beginning of this proceeding, lived at Hagerstown, Maryland. There, on Feb. 19, 1915, she accepted service of the writ. The service itself does not show that it was done in Maryland, but it was stated by counsel for libelant at the argument at bar that it was in Maryland. In addition the sheriff himself makes this return, the acceptance of service being in these words:

"February 19, 1915. I hereby accept service of the within writ.

"Witness: Isaac S. Long. Minnie V. Hammill."

The return being in these words:

"February 19, 1915. Served the within subpœna in divorce by having the within named Minnie V. Hammill accept service of the within writ in the presence of Isaac S. Long, who appears as a witness to the acceptance of service. (See above.)

So answers George Walker, Sheriff.
By Rob't W. Walker, Deputy Sheriff."

This return is sworn to. Not only this but the respondent in Maryland accepts service of the time and place of the sitting of the master. It is provided by our rules of court as follows: "Every master in divorce shall give five days' notice in writing of the time of presentation of his report in court to counsel of respective parties and such parties who shall have appeared before the master personally and without counsel, a copy of which notice shall be attached to the appendix to the report. Notice to parties may be by mail." Notwithstanding the respondent had not appeared before the master in person or by counsel, we find her accepting service of this notice. There seems to have been on the part of respondent an eager willingness to accelerate the proceeding. It looks much like collusion. We cannot concur with the master in his finding that the allegations of the libel were sustained by the evidence. For this reason the divorce must be refused; not for this reason alone, however. The divorce must be refused for another

reason. We do not have jurisdiction of the person of the respondent. Service of a subpœna in divorce made beyond the limits of the state is wholly void and of no effect. The moment the sheriff carries a writ beyond the state line it becomes a mere scrap of paper. When respondent undertakes to accept service of the writ beyond the confines of the state, she simply acknowledges that she had knowledge of the writ having issued. The letter of counsel giving her that information would have the same effect. The subpœna in divorce issued from this court is not a subpœna in divorce when it reaches outside the state. That an attempted service beyond the state is a mere nullity is clearly held in Ralston's Appeal, 93 Pa. 133. We do not want to be misunderstood, but, owing to certain practices which we observe in this court of sending the writ beyond the state to have it accepted, we want to clearly say that we hold any such acceptance as that to be void, and we will not, until advised by an appellate court that we are in error, grant any divorce under such circumstances, and this because we do not have jurisdiction of the person.

Still further it is provided by our rules of court, rule 109, as follows: "The subpœna shall be served by the sheriff upon a respondent who is within the county. Where the respondent's known residence is in another county of this state, the sheriff shall deputize the sheriff of such county to serve the subpœna; and service of the subpœna, by whomsoever made, shall be proved by affidavit of the person making the service, which must show the time, place and manner of service, and that the person served is the respondent named in the subpœna, and his means of knowing the fact." It will be observed that there is nothing in this acceptance of service or in the return to inform us that the person accepting service is the person named in the subpœna. As was said by Judge Stewart in Bittinger *v.* Bittinger, 4 Dist. 443. "Here service is accepted beyond the state by some one representing herself to be the person named in the subpœna. Whether she is or not, the court has no means of knowing, and can have none. No one vouches for her identity with the respondent named. Nothing about the paper is authenticated in any way."

For the several reasons given in this opinion, any one of which is sufficient on which to found a decree, the divorce is refused.

Now, May 23, 1916, the libel is dismissed at the cost of the libelant.

From Irvin C. Elder, Esq., Chambersburg, Pa.

Waite *v.* Montour County.

Costs—Sheriff's costs—Expenses of assistant in removing prisoner from county jail to penitentiary—Act of June 20, 1911, P. L. 1072—Constitutional law.

A sheriff is not entitled to be paid expenses for his assistant in removing a prisoner from a county jail to a penitentiary under § 1 of the act of June 20, 1911, P. L. 1072, in that said act is unconstitutional.

A sheriff, however, is entitled to compensation under § 1 of the act of July 11, 1901, P. L. 663, for transporting a prisoner from a county jail to a penitentiary, viz.: for transportation of such prisoner at the rate of six cents per mile for each mile such prisoner travels in addition to necessary help and expenses.

Amicable action and case stated to determine the liability of the county to the sheriff for the expenses of his assistant in removing a prisoner from a county jail to a penitentiary. C. P. Montour Co. June T., 1916, No. 33.

EVANS, P. J., June 5, 1916.—The question involved in this case is whether the plaintiff, the sheriff of Montour county, is entitled to be paid expenses for his assistant in removing Lewis Smoyer from the county jail to the Eastern Penitentiary at Philadelphia under § 1 of the act of June 20, 1911, P. L. 1072. The issue is a narrow one. The sheriff and the county commissioners have agreed "that the actual time occupied by the assistant who accompanied the sheriff was two days and three hundred and twenty-four miles actually traveled; that if the court be of the opinion that the amount due plaintiff, if anything, for said assistant is regulated by act of 1911, then judgment to be entered for the plaintiff for the sum of $24.44, being at the rate of $2.50 per day and three hundred and twenty-four miles necessarily traveled."

The act of June 20, 1911, P. L. 1072, in undertaking to fix the fees to be charged by sheriffs in counties having a population of less than one hundred and fifty thousand has been declared unconstitutional as offending against Art. III, Sec. 7, of the Constitution, being within the constitutional prohibition of local legislation regulating the affairs of counties. Morrison *v.* Bachert, 112 Pa. 322; Jones *v.* Chester County, 21 D. R. 742; Hochard *v.* Somerset County., 22 D. R. 751; Glass *v.* Northumberland County, 22 D. R. 753; Meyers *v.* Northampton County, 22 D. R. 757; Kradel *v.* Butler County, 24 D. R. 106; Renno *v.* Juniata County, 42 Pa. Super. Ct. 671.

Under the admitted facts and terms of the case stated judg-

ment cannot be entered for the plaintiff for $24.44. Neither are we permitted to enter judgment for the plaintiff under the admitted facts and terms stated for any other definite amount.

The sheriff, however, is entitled to compensation under § 1 of the act of July 11, 1901, P. L. 663, for transporting Smoyer from the county jail to the penitentiary, viz.: for transportation of the prisoner at the rate of six cents per mile for each mile the prisoner travels in addition to necessary help and expenses.

And now June 3, 1916, judgment is entered for the defendant.

From Edward Sayre Gearhart, Danville, Pa.

Sonnik *v.* Sonnik.

Divorce—Service of subpœna—Jurisdiction.

Any attempt of service by the sheriff beyond the state is null and of no effect.

Divorce should never be granted where the respondent, even within the county, waives service of the writ. Waiver of service by a non-resident of the state, especially when such waiver is executed in the foreign state, is a nullity.

Divorce. C. P. Franklin Co. April T., 1915, No. 191.

William Alexander, for libelant.

GILLAN, P. J., May 23, 1916.—The libelant alleges as ground for divorce willful and malicious desertion. Accepting the testimony as correct, and we have no reason to doubt it, the allegations of the libel are true. A divorce, however, cannot be granted simply on the testimony. Every requirement of the law with reference to procedure must be complied with. Divorce ought not to be easily obtained. It is an adverse proceeding. In this case we do not have jurisdiction of the person of respondent because she has not been properly served. She was in another state and there undertook to accept service of the subpœna. As was said by this court, Stewart, J., in Bittinger *v.* Bittinger, 4 Dist. 442: "There has been no service of the subpœna on the respondent such as the law requires. Her acceptance of service, filed with the master and appended to his report, is by no means the equivalent, on the contrary, it is what the law condemns, regarding it as evidence of collu-

sion between the parties." She could not accept service of the writ beyond the limits of the state because, when the subpœna passed beyond the limits of the state, it had no longer the efficacy of a writ of this court, but was a mere scrap of paper. Not only is an attempt made here to have the respondent accept service of the writ, but an attempt of service by the sheriff. On the back of the writ we find the following:

"April 5, 1915. I, M. Grace Sonnik, hereby admit that I am the within named respondent, and waive service of the within subpœna in divorce a. v. m., and enter my appearance in the same.

Witness: Isaac S. Long. M. Grace Sonnik."

"April 5, 1915. I, George Walker, sheriff, do make the following return to the within subpœna in divorce: that M. Grace Sonnik, the within named respondent, waived service of the within subpœna in divorce a. v. m., and entered her appearance in the same. (See above.)

So answers George Walker, Sheriff.

Per Robt. W. Walker, Dep. Sheriff."

Not only was any attempt of service by the sheriff null and of no effect (Ralston's Appeal, 93 Pa. 133), but the sheriff had no business to carry the writ beyond the state. The deputy sheriff is called to testify in the case; he testifies as follows: "I live in Chambersburg. I was deputy sheriff of Franklin county on April 5, 1915, and personally served the subpœna on M. Grace Sonnik where she lived in Williamsport, Pennsylvania; that was on April 5, 1915." He far exceeded his duty when he did this. Our rules of court, rule 109, provide as follows: "The subpœna shall be served by the sheriff upon a respondent who is within the county. Where the respondent's known residence is in another county of this state, the sheriff shall deputize the sheriff of such county to serve the subpœna; and service of the subpœna, by whomsoever made, shall be proved by affidavit of the person making the service, which must show the time, place and manner of service, and that the person served is the respondent named in the subpœna, and his means of knowing the fact."

It is the sheriff's business to follow this rule of court. The act of assembly provides how service shall be had when the respondent cannot be found within the county. It is the duty of the sheriff to follow the act of assembly. The service of the subpœna must comply with the act of assembly and consistent rules of court. Fackner *v.* Fackner, 9 Dist. 739. Actual

personal service or its statutory equivalent is necessary. Bittinger *v.* Bittinger, 4 Dist. 441. Divorce should never be granted where the respondent, even within the county, waives service of the writ. Waiver of service by a non-resident of the state, especially when such waiver is executed in the foreign state, is a nullity. We will not, until advised by an appellate court that we are in error, grant any divorce under such circumstances. We are without jurisdiction and therefore the divorce is refused.

Now, May 23, 1916, libel is dismissed at the cost of libelant.

From Irvin C. Elder, Esq., Chambersburg, Pa.

Bucci *v.* Pavone.

Contracts—Sale of business—Agreement not to compete—Injunction.

B. purchased a bakery from P., paying $600 for the tangible property and $850 for the good will. By a written agreement P. promised not to open a bake shop near the place purchased, as long as B. operated his bakery. Soon thereafter, P. was instrumental in having M. start a bakery business, in which he, P., had some interest, to the injury of B's. business. B. thereupon petitioned for an injunction, which was allowed.

Motion to continue preliminary injunction. C. P. Dauphin Co. Equity Docket, No. 547.

W. H. Earnest and *G. L. Reed,* for plaintiff.

G. H. Moyer, W. J. Carter and *A. H. Hull,* for defendant.

McCarrell, J., Jan. 27, 1916.—On Aug. 20, 1913, the plaintiff purchased a building constructed for the purpose of carrying on the bakery business, together with its contents, from the defendant for the sum of $1,450. The tangible property was valued at $600 and the business and good-will at $850. At the time this purchase was made and the money paid, the defendant agreed in writing that he would not open or start a bake shop at the quarry property of W. T. Bradley, near the town of Palmyra, as long as plaintiff operated the bakery purchased by him from the defendant. About eighteen months thereafter, or late in the year 1914 or early in 1915, a bakery or bake shop was established within a short distance of the plaintiff's bakery, and at this new bakery the defendant,

Pavone, was employed in taking orders and making sales and delivery of bread. The wagons were marked with the name of Carmine deMichelle, who claimed that the business belonged to him. He leased from the defendant, Pavone, a room in a building owned by Pavone, together with ground outside the building on which the bake shop was established. He also boarded with Pavone, the defendant, who knew the purpose for which deMichelle procured the lease. deMichelle testified that he alone furnished the money with which to construct and equip the bakery and procure the necessary outfit for conducting the business, that he never before had been at or near the Bradley quarry, and that he came a short time before the bakery was established from New York. This was contradicted by a number of witnesses, who testified that deMichelle had been employed at Pavone's bakery some time prior to the sale of the old bakery to Bucci, that he knew Pavone well, and was a practical baker. He leased the room from Pavone, the defendant, and established the bakery on ground which was leased from the defendant. Although Pavone, the defendant, and deMichelle, the alleged owner of the new bakery, both testified that Pavone had no interest in the bakery or the business carried on thereat, we are not satisfied that this is the exact truth. That the parties were acquainted for a considerable time prior to the starting of the bakery seems to be clearly established. That deMichelle boards with Pavone and obtained the ground on which to construct the bakery by lease from Pavone, and that Pavone was employed by deMichelle to drive his delivery wagon as soon as the bakery was ready for operation, along with the other facts in the case, indicate that Pavone has some interest in the business established and being carried on by deMichelle, and that Pavone's conduct in being employed by deMichelle in the bakery business as driver of the sales and delivery wagon is a violation of the spirit if not the letter of the agreement between the plaintiff and the defendant. He is procuring some of plaintiff's customers and is diverting the trade from his bakery. He received from plaintiff $850 for this trade and good-will, and to permit him to continue this conduct would be a violation of the agreement and against equity and good conscience.

We are of opinion therefore that the preliminary injunction should be continued and an order to that effect may be drawn and presented for signature. If the parties do not desire to take further testimony and wish the hearing on the motion

to continue the preliminary injunction to be regarded as the final hearing of the case, a decree may now be prepared making the preliminary injunction perpetual at the cost of the defendant.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth v. Vollmer.

Automobiles—Motor cycle—Speed—Danger signal—Act of July 7, 1913, P. L. 672—Summary conviction.

A summary conviction before a justice of the peace for violating the act of July 7, 1913, P. L. 672, relating to the speed of motor vehicles, will not be sustained where the complaint does not aver that a "danger: run slow," sign had been erected in the borough within the limits of which the commission of the offense was charged, and the evidence was not clear, that the defendant ran his motorcycle at a greater speed than twenty-four miles an hour.

Appeal from summary conviction for violating automobile laws. Q. S. Lancaster Co. Nov. Sess., 1915, No. 40.

S. R. Zimmerman, for appeal.
John M. Groff, district attorney, for commonwealth.

HASSLER, J., Jan. 15, 1916.—This is an appeal by the defendant from a summary conviction by a justice of the peace for an alleged violation of § 14 of the act of July 7, 1913, P. L. 672. This section, so far as it concerns us here, is as follows: "No person shall operate a motor vehicle on the public highways of this state recklessly, or at a rate of speed greater than is reasonable and proper. . . . But no person shall drive a motor vehicle at a rate of speed exceeding one mile in two and a half minutes; . . . provided that the local authorities having charge of any of the highways may, in dangerous or built-up sections, place signs marked 'danger: run slow,' in letters not less than five inches in height. Said signs to be placed at right angles to, and plainly legible from, the highway, and facing the traffic, the speed of which is to be reduced; and at those places the speed limit shall not exceed a rate of a mile in four minutes, for a distance beyond said sign of not more than one fourth of a mile." It further provides that other like signs may be erected with like effect.

The complaint here charges that the defendant did on Oct. 3, 1915, run a motor cycle "on the main street of Marietta borough, Lancaster county, in a reckless manner, and unlawfully exceeded the speed law of July 7, 1913, as it applies to boroughs and built-up sections, by racing on the said street of Marietta borough, said county and state, contrary to the act of assembly, etc." That part of the charge that he ran recklessly can be construed only that he ran at an excessive speed, which is the substantial charge in the complaint. This is the view of the Superior Court in construing a similar act of assembly, in Com. *v.* Moller, 50 Pa. Super. Ct. 366, where it is said: "Recklessly, in the language of the statute, means negligently, in the absence of care under the circumstances, or, in other words, with such speed as would be reasonable and proper, having due regard to the existing circumstances or conditions, to-wit, the width of the street, the traffic thereon, etc." The complaint then only charges that the defendant ran his motor cycle at a rate of speed exceeding that allowed by the act of assembly. This rate of speed is twenty-four miles an hour, unless the borough authorities had posted, "Danger: run slow" signs, as required by the act. The complaint does not allege that such signs were posted, so that no violation of the act in running at a rate of speed greater than is allowed where such signs are posted, is charged in it, and the defendant cannot be tried for exceeding that speed limit. This is ruled by the Superior Court in the same case of Com. *v.* Moller, 50 Pa. Super. Ct. 366, cited above.

The charge in the complaint then is that the defendant ran his motor cycle on the streets of Marietta borough at a speed in excess of twenty-four miles an hour. On the part of the commonwealth one witness testified that he was running at thirty miles an hour in his opinion; two other witnesses for the commonwealth would not place it above fifteen miles an hour. The defendant testified that his motor cycle was broken, or out of order, so that he could not run on high gear, and that the highest speed possible was not in excess of twelve miles an hour. He is corroborated in this by two companions, one of whom did exceed the speed limit and plead guilty to the charge for having done so. All three of these witnesses testified that he was not running at a speed exceeding twelve miles an hour. We are not convinced, that the evidence in this case would justify a conviction of the defendant for violating this section of the act of assembly, and we, therefore, find him not guilty.

First National Bank of Harrisburg *v.* Huntingdon and Clearfield Telephone Co.

Corporations—Bonds—Coupons.

Coupons are but incidents to the corporate bonds to which they are attached, and a pledge of the bonds carries with it all coupons attached thereto.

Suit may be brought upon coupons when detached from the bonds, and it is not necessary to set forth in the statement of claim a copy of the bonds from which they were detached.

Assumpsit upon coupons. C. P. Clearfield Co. Sept. T., 1914, No. 290.

A. H. Woodward, C. H. Backenstoe and *J. F. Weiss,* for plaintiff.

Cole & Hartswick, for defendant.

WHITEHEAD, P. J., 29th judicial district, specially presiding, Feb. 21, 1916.—This case comes before the court upon an agreement of submission under the act of April 22, 1874, P. L. 109.

Plaintiff's action is brought to recover upon ninety coupons of $12.50 each, amounting to $1,125, which coupons were detached from bonds issued by the defendant and numbered 1364 to 1373, inclusive, with interest from the various dates when said coupons became due.

From the evidence produced by the plaintiff and defendant we find the following facts:

1. The First National Bank of Harrisburg, the plaintiff in this case, is and has been for some years last past a national bank doing a banking business in the city of Harrisburg, county of Dauphin, Pennsylvania.

2. The Huntingdon & Clearfield Telephone Company is and has been for some years last past a corporation doing business as a telephone company in Clearfield and other counties in Pennsylvania.

3. The American Union Telephone Company was a corporation doing business in the state of Pennsylvania.

4. The United Telephone & Telegraph Company was a corporation doing business in the state of Pennsylvania.

5. On April 1, 1903, the Huntingdon & Clearfield Telephone Company issued a number of coupon bonds, secured by a mortgage, among which were bonds numbered from 1364 to 1373, inclusive, and from which bonds the coupons sued upon in this case were detached.

6. Some time prior to Feb. 1, 1907, the bonds, from which the coupons sued upon in this case were detached, were pledged by the defendant to the First National Bank of Patton as collateral security for loans, which loans were a part of the floating indebtedness of said defendant.

7. On Feb. 1, 1907, an article of agreement was entered into between the Huntingdon & Clearfield Telephone Company, of the one part, and the American Union Telephone Company, of the other part, under and by virtue of which agreement the American Union Telephone Company became the lessee of the entire physical plant of the lessor for a period of ten years, and in consideration for which lease the lessee agreed to pay a sum equal to the interest upon all its outstanding bonds semi-annually on the days and dates of the maturing coupons connected therewith; also to pay all the interest upon all floating and other indebtedness, and the principal of said floating and other indebtedness during the term of said lease.

8. Prior to Oct. 15, 1908, the American Union Telephone Company paid to the First National Bank of Patton a part of the floating indebtedness of the Huntingdon & Clearfield Telephone Company, and said bank returned the bonds, set out in paragraph 6 above mentioned, to S. R. Caldwell, the treasurer of the Huntingdon & Clearfield Telephone Company.

9. On Oct. 15, 1908, there was due at the First National Bank of Harrisburg, the plaintiff in this case, a note of the United Telephone & Telegraph Company, which note was a renewal of a note, the original of which was for $20,000 or $25,000, and which had been renewed from time to time for a number of years, and which on said date, Oct. 15, 1908, was for the sum of $16,000, and said bank held as collateral security for the payment of said note $25,000 of the United Telephone & Telegraph Company's bonds. On said date the bank demanded payment of this note, but finally agreed with Frank D. Houck, the vice president of the United Telephone & Telegraph Company, and also vice president of the American Union Telephone Company, and S. R. Caldwell, the treasurer of the United Telephone & Telegraph Company, and also treasurer of the Huntingdon & Clearfield Telephone Company, to renew this note for $15,000 if the maker would pay $1,000 and give additional collateral security for $5,000. With this condition said Houck and Caldwell agreed to comply, and they made and delivered a new note for $15,000 payable in four months,

and gave to said bank the same collateral security it had held and the $5,000 of bonds held by S. R. Caldwell, as treasurer of the Huntingdon & Clearfield Telephone Company, as the additional collateral security required.

10. The Huntingdon & Clearfield Telephone Company was not interested in any manner in the renewal of said note, and was not liable in any way for the payment of the same; neither is there any evidence of any authority in either Houck or Caldwell to pledge the bonds of the Huntingdon & Clearfield Telephone Company as collateral security for the debt of the United Telephone & Telegraph Company.

11. At the time of said renewal the bank made no inquiry as to how said bonds of the Huntingdon & Clearfield Telephone Company were held by said Caldwell, or as to what authority either said Houck or Caldwell had to pledge them for collateral security for the debt of another.

12. The said not of $15,000 given on Oct. 15, 1908, to the First National Bank of Harrisburg by the United Telephone & Telegraph Company was renewed from time to time until May 12, 1911, when it was renewed for $10,000, payable in four months, and the same $25,000 of United Telephone & Telegraph Company bonds, and the $5,000 of Huntingdon & Clearfield Telephone Company bonds, which were pledged on Oct. 15, 1908, were continued as collateral security.

13. On Oct. 15, 1908, when the note of $16,000 of the United Telephone & Telegraph Company became due, the note was collectible, and there is no evidence showing that the renewal note of May 12, 1911, and which was due Sept. 12, 1911, could not have been collected from the maker, either on that date or between that date and Dec. 9, 1913.

14. The last renewal note given by the United Telephone & Telegraph Company, and dated May 12, 1911, payable in four months, and for which payment the bonds in question were pledged as collateral, contained a condition setting forth that the pledged collateral security was only to be sold if the note for which they were given as collateral was not paid at maturity.

The maker of said note, the United Telephone & Telegraph Company, is not a party to this issue, and there is no evidence showing that the prerequisite to the sale, namely, the failure of the maker to pay said note at maturity, had occurred, except the fact that the note was still in the plaintiff's possession.

15. The plaintiff knew that it was dealing with a corporation and it should have known that the officers of the corpora-

tion could only bind the corporation by acts within the scope of their authority, and there is no evidence showing that Frank D. Houck and S. R. Caldwell, or either of them, had any authority to deliver the said bonds to the plaintiff, and the plaintiff admits that it made no inquiry as to the right or authority of said parties to transfer or deliver said bonds to the plaintiff, either as collateral security for the debt of a stranger, or for other purposes.

16. Prior to the sale of said bonds by the plaintiff to the plaintiff, the plaintiff had written notice not to sell said bonds, and a request to deliver said bonds to the Huntingdon & Clearfield Telephone Company, but, notwithstanding this notice, the plaintiff proceeded to sale and purchase of the same.

DISCUSSION.

This action was brought to recover judgment for the amount of certain coupons issued by the defendant, and which at the time of bringing this action were in the possession of the plaintiff.

Upon the trial of the case plaintiff offered in evidence the coupons, and rested. Defendant objected to the offer of the various coupons for the following reasons:

1. Because they were not accompanied by the bond.

2. Because the bond would not be evidence unless accompanied by the mortgage.

3. Because plaintiff's statement did not contain a copy of either the bond or the mortgage, nor any reference to the record of the same.

The defendant rested its case entirely upon the allegation that the plaintiff was not a bona fide holder for value of the bonds from which the coupons were detached.

These bonds and the coupons were negotiable instruments and title passed by delivery, unless the party to whom they were delivered knew, or would have known, that the pledgor had no legal right to make the pledge.

The testimony of the plaintiff is positive that it had no knowledge that the United Telephone & Telegraph Company was not the owner of said bonds.

Plaintiff made no inquiry as to the right of the United Telephone & Telegraph Company to pledge said bonds, but I know of no law to compel it to make such inquiry unless there was some circumstances connected with the transaction that should have put a person of ordinary precaution upon inquiry.

Copies of the bonds and coupons filed show them to be the ordinary bonds and coupons of a private corporation, payable to bearer.

In Cochran *v.* Fox Chase Bank, 209 Pa. 34, the court, on page 36, said: "The question involved is, Whether or not the bank, to whom stolen coupon bonds payable to bearer have been pledged as collateral security for a loan by the thief in the ordinary course of business, without notice to the bank of any infirmity in the title, and without any circumstances to put the bank on inquiry, takes a good title thereto as against him from whom they were stolen." And on page 38 the court answers this question as follows: "It is also settled that a bona fide holder of such an instrument for value before maturity, taken in the usual course of business, acquires a good title thereto, even as against him from whom it was stolen. . . . The rule that the bona fide holder of a stolen negotiable security is protected against a claim of the real owner was not even contested by the owner, but it was argued that the bond being that of a private corporation was not negotiable and that the holder took it subject to the equitable right of the real owner. It was held by this court that the law governing the case was that announced in County of Beaver *v.* Armstrong, supra, and that the bona fide holder was protected against the claim of the real owner."

In Beaver County *v.* Armstrong, 44 Pa. 63, the court said: "It is clear then, upon reason and authority, that the coupons which formed the subject-matter of this suit, and the bonds to which they were attached, having been regularly issued by the county of Beaver, are on the footing of negotiable paper, and pass from hand to hand by delivery as the representatives of money. They may circulate together or separately, and suits on the coupons are sustained entirely independent of the bonds to which they were originally annexed. It is therefore of very little consequence whether they are promissory notes, bills, drafts or checks, for they have the same quality of negotiability as either of those instruments, and the holder sues upon them and recovers in his own name."

The evidence of the defendant shows that those bonds were put in circulation by the defendant, as it had pledged them as collateral security for a loan to the First National Bank of Patton.

Mr. Brady, cashier of plaintiff's bank, and the one who acted for the plaintiff when these bonds were accepted, testifies that he had no knowledge of how the bonds came into the

possession of Mr. Houck or Mr. Caldwell; that he knew nothing whatever about the bonds except that at the time he investigated their value.

Mr. Houck testifies upon this phase as follows: "Q. Mr. Brady knew nothing of how you got the Huntingdon & Clearfield Telephone Company bonds? A. Not to my knowledge. Q. Had no notice of anyone having any equity in these bonds? A. Not to my knowledge."

In Cochran *v.* Fox Chase Bank, supra, the court, on page 39, said: "Good faith is defined to be honesty of intention and freedom from knowledge of circumstances which ought to put the holder upon inquiry."

In Second Nat. Bank *v.* Hoffman, 229 Pa. 429, the court said: "A holder in due course of a negotiable promissory note is one who, at the time it was negotiated to him, had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

In this case the plaintiff had accepted from the United Telephone & Telegraph Company renewal notes from time to time in the ordinary course of business, and on Oct. 15, 1908, when the renewal note for $16,000 became due, the bank demanded payment, but after some conversation with Frank D. Houck, vice president of the United Telephone & Telegraph Company, Mr. Brady, the cashier of the plaintiff bank, agreed to renew the note upon condition that a payment be made and additional collateral be given. In consideration of an extension of time the agreement of the bank was accepted, a renewal note for $15,000 given, a payment of $1,000 made on the old note, and the bonds entered in this case pledged as collateral security.

At the time this transaction took place the $16,000 note was collectible, but, because of the agreement above mentioned, an extension of time was granted and a new note with the additional security accepted.

In Muirhead *v.* Kirkpatrick, 21 Pa. 237, the court, on page 242, said: "Consideration is the motive or price of a contract. A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made . . . stipulated forbearance to sue, or extension of time, has always been recognized as a valuable consideration."

In Thompson *v.* Hazelwood S. & T. Co., 234 Pa. 452, the court said: "The law is very liberal in regard to the consideration required to support a pledge. Accordingly it has

been held that such consideration may consist of an extension of time for the payment of a debt without a new consideration."

The case of Second Nat. Bank *v.* Hoffman, 229 Pa. 429, is quite similar to the case at bar, and would seem to rule this case, so far as an extension of time being a valuable consideration.

Counsel for defendant argue that the cases, Royer *v.* Keystone Nat. Bank, 83 Pa. 248; Shaffer *v.* Fowler, 111 Pa. 451, and Muirhead *v.* Kirkpatrick, 21 Pa. 237, hold that one who has taken a negotiable instrument as collateral security for a preëxisting debt is not a holder for value.

This claim is only true in part. The rule laid down in these cases is, that one who had taken a negotiable instrument as security for a preëxisting debt, and has given no other consideration for it, is not a holder for value. These cases differ from the case at bar in that in those cases no other consideration was given, whereas in the case at bar extension of time and additional collateral security were given.

Counsel for defendant also argue that the case of Interstate Securities Co. *v.* Third Nat. Bank, 35 Pa. Super Ct. 277, holds that a person cannot retain negotiable securities which he accepted from an agent of a corporation as a pledge for a debt of a third person. This also is only true in part. The ruling of the court in said case is: A person cannot retain negotiable securities, which he accepts from an agent of a corporation, as a pledge for a debt of a third person, where it appears that he knew that the bonds were the property of the corporation and not the pledgor.

The serious question in this case, and the one upon which the court has spent considerable time, is: Under the evidence offered by the plaintiff could judgment be entered in its favor?

As above stated the action is to recover upon coupons, and the plaintiff showed that it came into possession of said coupons through a pledge of the bonds from which the coupons were detached. The written agreement, the note, by which said bonds were pledged does not mention the coupons, but only pledges the bonds.

If the coupons were not pledged then the plaintiff was not a holder for value, and not being a holder for value could not maintain an action.

After careful consideration of this matter, I am satisfied that the coupons were but incidents to the bonds, and that

therefore the pledge of the bonds carried with it all coupons attached thereto.

The coupon is but a convenient way of providing for the payment of the interest set out in the bond.

In Kenosha City *v.* Lanson, 76 U. S. (Wall) 477-483, Justice Nelson said: "The coupon is not an independent instrument, like a promissory note or a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature."

In Warner *v.* Rising Fawn Iron Co., 3 Woods (U. S.) 514, the court said: "Pledges of bonds payable to bearer, hypothecated to secure a debt, are legal holders, and are entitled to demand payment of coupons which fall due before the maturity of the debt which the bonds were pledged to secure."

Under the law of this state a pledgee of coupon bonds, pledged as collateral security, is not compelled to proceed to secure a complete legal title to said bonds upon maturity of the paper for which the bonds were pledged, but can either, for pledgee's convenience, or in the pledgor's interest, postpone the securing of such title to any reasonable time.

We are therefore satisfied that the plaintiff in this case, under the facts developed, could maintain an action upon the coupons, and that, because of the facts judgment should be entered in its favor.

CONCLUSIONS OF LAW.

1. The bonds of the Huntingdon & Clearfield Telephone Company pledged to the plaintiff were negotiable instruments payable to bearer, and title thereto passed by delivery.

2. The coupons attached to said bonds circulate independently of the bonds when detached, and title thereto would pass by delivery.

3. Coupons payable to bearer are presumed to belong to the person in whose possession they are.

4. Suit may be maintained upon the coupons when detached from the bonds, and it is not necessary to set forth in the statement when suit is brought upon the coupons alone, a copy of the bonds from which they were detached.

5. Said bonds being negotiable instruments, one who acquires them for value in due course, holds the same free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce

the payment of the same for the full amount thereof against the parties liable thereon.

6. A holder of a negotiable instrument taken in due course is one who has taken it in good faith for value and without notice of any infirmity, and free from any knowledge of circumstances which ought to have put the holder on inquiry.

7. The bonds of the Huntingdon & Clearfield Telephone & Telegraph Company were pledged to the plaintiff as additional collateral security, and the $1,000 payment in cash was made to the plaintiff by the defendant in order to secure more time to the United Telephone & Telegraph Company for the payment of the balance due on the $16,000 note, due on the date when said bonds were pledged. This transaction was a benefit to the United Telephone & Telegraph Company, and put the holder to some trouble, and as the plaintiff had no knowledge whatever of any infirmity in said instruments, the bonds taken as collateral security, and nothing to put in upon inquiry, it became a holder in due course and for value.

8. No sufficient, competent evidence was offered upon the part of the defendant to show that the plaintiff was not the holder and owner of the coupons sued upon, and therefore it follows that judgment should be entered in favor of the plaintiff and against the defendant for the amount of the coupons offered in evidence, with interest upon the same from the various dates when due.

9. The coupons offered in evidence number from 1 to 80, inclusive, and are for $12.50 each.

Counsel for plaintiff and defendant have filed with the court requests for findings of fact and conclusions of law, which requests have been answered and are attached hereto and made a part of this decision.

And now, to-wit, Feb. 21, 1916, it is ordered and directed that the foregoing findings of fact, discussion and conclusions of law be filed in the office of the prothonotary of the above county, who is hereby directed to forthwith give notice to the parties or their attorneys of record of such filing, as provided by the act of April 22, 1874, P. L. 109, and if no exception be filed thereto within thirty days after service of such notice, judgment be entered thereon by the prothonotary in favor of the plaintiff, the First National Bank of Harrisburg, and against the defendant, the Huntingdon & Clearfield Telephone Company, for the sum of $1,372.50, being the sum of the coupons offered in evidence with interest thereon to this date.

From Wm. Russell Deemer, Esq., Williamsport, Pa.

Columbia & Montour Electric Co. *v.* North Branch Transit Co.

Street railways—Maintenance and operation—Powers and duties of receivers—Mode of legal procedure in default of the payment of interest on mortgage bonds.

Although courts have the inherent power to authorize the issuing of receiver's certificates and to make them a first lien under some circumstances, yet such power should be exercised carefully and with caution and with due regard for the rights of bondholders.

It is the primary duty of receivers to make such repairs as are necessary to keep the property and equipment of street railways in a safe and proper condition to serve the public.

If such receivers cannot operate such railways so that within a reasonable time the payment of interest on the bonds cannot be resumed, the properties should be sold for the benefit of the bondholders.

Petition of the receiver of the North Branch Transit Company for an order authorizing him to issue receiver's certificates and to make the same a first lien on the property of the said company with priority over existing liens thereon; said certificates to be used to raise money to be expended for the making of repairs and improvements to the said property as indicated in the exhibit attached to said petition. Sur rule. C. P. Columbia Co. Dec. T., 1915, No. 1, in equity.

Fred Ikeler, for receiver.

Charles H. Bergner, for Commonwealth Trust Company, and for committee of first mortgage bondholders.

Roscoe R. Koch, for bondholders' committee of Danville & Bloomsburg Street Railway Company.

EVANS, P. J., Sept. 4, 1916.—This matter comes before the court on petition of the receiver of the North Branch Transit Company for an order authorizing him to issue receiver's certificates to the amount of $62,000, and to make the same a first lien with priority over existing mortgages, and to be used to raise money to be expended for the making of repairs and improvements as indicated in the exhibit attached to the petition; an answer filed thereto by Commonwealth Trust Company, trustee in a first mortgage on all the property of the North Branch Transit Company, formerly owned by the Columbia & Montour Electric Street Railway Company; an answer filed by the Easton Trust Company, trustee in a first mortgage on all the property of the North Branch Transit Company, formerly owned by the Danville & Bloomsburg Electric Railway Company; an answer filed by the owners of

bonds secured by the first mortgage on all that part of the property of the North Branch Transit Company, formerly owned by the Danville & Bloomsburg Electric Railway Company; and testimony taken before the court on the hearing of the receiver's petition.

If the receiver is permitted to issue the certificates it is proposed to make repairs and improvements on the Berwick and Cattawissa divisions of the North Branch Transit Company to the extent of $56,600, and on the Danville division thereof to the extent of $5,400.

In the answers it is averred:

(a) That the average earnings of the transit company for the last two fiscal years show that there will not be sufficient money to pay the principal of $62,000 of receiver's certificates with interest at 6 per cent., within the period of three years without considering the prior charge of interest on the funded debt secured by first lien mortgages;

(b) That the court has no right or authority to displace first lien securities by making receiver's certificates a first lien on the property of the North Branch Transit Company, and that the making of such certificates a first lien will greatly depreciate the security of the bonds secured by the first mortgages and reduce their value and be a distinct breach of the mortgage contracts;

(c) And that the Danville division of the transit company is in good condition and can be properly, economically and safely operated without making any substantial improvements or repairs, from current income and revenue.

The testimony shows that the gross operating receipts of the North Branch Transit Company for the year ending July 1, 1914, were $105,786.54, and for the year ending July 1, 1915, $94,334.61; that at the time the receiver took charge there was cash on hand to the amount of $1,098.21; that the gross operating receipts under the management of the receiver for the period of eight months and two days from Sept. 29, 1915, to June 1, 1916, were $72,612.97, and that the gross operating expenses during that time were $62,639.27. Included in this latter amount were five items aggregating $13,015.91; construction work, $4,245.07; supplies and materials purchased, $5,181.91 (part on hand); commonwealth taxes, $2,565.60; insurance on equipment and car barns, $478.77; and damage claims paid, $544.56.

The testimony further shows that the receiver had cash on hand as of June 1, 1916, being current income and revenue

from operation to the amount of $11,071.91, notwithstanding the fact that during said period construction work and supplies and materials costing in the aggregate $9,426.94 were paid for and included in the gross operating expenses of $62,639.27.

Assuming that the earnings of the company for the months of June, July, August and September, usually the best months of the year, will average with the eight months ending June 1, 1916, and that the operating expenses will be no greater, the receiver will have on hand cash as of Oct. 1, 1916, approximately $16,500 from which repairs, improvements and rehabilitations can be made. The most urgent, within the discretion of the receiver, being first made.

There is no doubt but what the court has power to authorize the issuing of receiver's certificates and make them a first lien under some circumstances, but the power should be exercised carefully and with caution and consideration for the rights of bondholders. Wood *v.* Trust & Safe Deposit Co., 128 U. S. 416; Fosdick *v.* Schall, 99 U. S. 235; Union Trust Co. *v.* Midland R. R. Co., 117 U. S. 434; Wood on Railroads, Vol. 3, par. 483a.

It is the duty of the receiver to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Undoubtedly a number of the repairs, improvements, rehabilitations, the receiver would make if permitted to issue certificates to the amount of $62,000 should be made. It is imperative that some of them should be made promptly. But under the circumstances should they all be made at once? We scarcely think so. To make them would make for physical betterment and increased operating efficiency of the road. Some of the more important repairs, improvements, rehabilitations can easily be made from current income and revenue.

On the part of the bondholders it is conceded that the road and its structures should be kept in a safe and proper condition to serve the public, but contended that certificates should not be allowed to be issued for the purpose of raising money for making such repairs and improvements, rehabilitations, as street railways of the highest standard and degree of efficiency usually make, but that the road should be kept and maintained in the same physical condition which was satisfactory to the owners, prior to the receiver's appointment, providing the road and its structures are in a safe and proper condition to operate and serve the public. With this contention we quite agree.

The testimony discloses that the receiver can keep and maintain the road in at least as good and probably in a very much better physical condition, from current income and revenue, than it was in prior to his appointment, and that with the repairs, improvements, rehabilitations, that can and should be made from current income and revenue the road and its structures will be in a safe and proper condition to operate and serve the public.

The interest on the underlying bonds amounts to $25,050 annually. Default has been made in payment of the same. The Columbia & Montour Electric Street Railway Company and the Danville & Bloomsburg Electric Railway Company were separate and distinct corporations. In 1911 they were merged and the name changed to the North Branch Transit Company. Since that time they have been operated as one company. As a result of the merger the property of the Danville & Bloomsburg Company has been greatly impoverished and the property of the Columbia & Montour Company correspondingly benefited.

If the receiver cannot operate the road so that within a reasonable time the payment of interest on the bonds cannot be resumed, the property should be sold for the benefit of the bondholders.

In the opinion of the court the prayer of the petition should be refused and the rule discharged.

And now, Sept. 4, 1916, the prayer of the petition is refused and the rule discharged.

From Edward Sayre Gearhart, Esq., Danville, Pa.

Gray *v.* Knighton.

Principal and agent—Selling agent—Evidence.

An employé of a selling agent signed a printed form of contract with the firm name of the selling agent and his own name on a line on which was printed the word "seller." The contract read in part, "The Kansas Milling and Export Company of Kansas City, Mo., sell and E. R. Gray of Coatesville, Pa., buy the following articles." In a suit against the selling agent for breach of the contract it was held that the words of the contract disclosed the seller and the omission of the word agent after the signature of the selling agent did not create any personal liability on the part of the selling agent.

Sur defendants' motions for new trial and judgment n. o. v. C. P. No. 4, Philadelphia Co. June T., 1915, No. 717.

James Hay Simms, for motions.
Joseph G. Denny, Jr., contra.

CARR, J., March 30, 1916.—Upon March 19, 1914, the plaintiff bought two hundred and five barrels of Integrity flour. They were not delivered to him, and in September, 1914, he bought other flour and this suit was brought to recover the sum of $338.25, being the difference in the contract price and that which he was obliged to pay in September. The plaintiff was a baker residing in Coatesville, Pa., and the defendants, as the plaintiff knew, were brokers of flour and did not run mills, and had their place of business in New York City, and Holt was their salesman. They were the eastern representatives for certain territory of the Kansas Milling & Export Company, Kansas City, Mo. Upon a printed form supplied by that company, Holt, the defendants' salesman, received from the plaintiff an order, upon the back of which certain conditions were printed governing the sale and part of the contract therefor. The order was as follows: "Uniform Sales Contract No. March 19, 1914. The Kansas Milling & Export Company of Kansas City, Mo., sell and E. R. Gray, of Coatesville, Pa., buy the following articles upon the terms and conditions stated below and on the back hereof. Time of contract shipment August delivered P. R. R. Terms sight or sight draft with bill of lading attached, through Coatesville National Bank of Coatesville, Pa. Millers National Federation Differentials as shown on the back hereof govern. Amt. 205: Brand Integrity:— Pkg., Cotton, Price 4.15 subject to confirmation. E. R. Gray, buyer. Samuel Knighton & Son, seller, T. M. Holt."

Instead of bringing suit against the Kansas Milling & Export Company, the plaintiff brought this suit against the defendants, Knighton & Son. The plaintiff testified that in the transaction he did not know anyone but the defendants and he did not notice that the contract read in the name of the Kansas Milling & Export Company. He also testified that during the month of August, 1914, he gave no shipping instructions to the defendants, and two questions upon this motion for judgment n. o. v. arise: Whether under the written order or contract the defendants are liable, and whether the plaintiff under its terms, having failed to give shipping directions, the cancellation was properly made by the defendants in September of that year. In Clark *v.* Skyles, on Agency, page 1224, it is said that whether or not an agent has obligated his own credit or bound himself personally in any particular case, depends upon the intention of the parties as determined from the facts and circumstances surrounding that case. If

the contract is a written one, it is ordinarily a question of law to be determined by the court.

This was not the case of an agent acting for an undisclosed principal, for the words of the contract are, the Kansas Milling & Export Company of Kansas City, Mo., sell, and E. R. Gray, of Coatesville, Pa., buy. Gray knew that Knighton & Son were not millers, but brokers. When he signed the contract as buyer the Kansas Milling & Export Company was the only party stated as a seller. The contractual words of the order or contract must control. That the Kansas Milling & Export Company was the principal and seller was plainly disclosed, and presumably Gray signed the order before the signature Knighton & Son, T. M. Holt, was made, and the omission of the word agent in that signature does not change the principal that when a person acts and contracts validly as the agent of another who is known as the principal, his acts and contracts within the scope of his authority, are considered the acts and contracts of the principal and involve no personal liability on the part of the agent.

Moreover, the other ground raised by the defendants' contention will also support this motion for judgment n. o. v. The plaintiff admits that he never sent shipping instructions, and his claim is that he was not compelled to do so under the terms of the order or contract; but the printed conditions upon the back of the order do not support his contention for a provision is made for goods that are not ordered out within sixty days from the date of the contract or within the contract shipment period, and the seller under the terms of the contract shall have no less than fourteen days from the receipt of shipping instructions to satisfy the same, and these provisions clearly show that the intention of the parties to the contract or order was that shipping instructions should be given by the buyer, both for his protection and also that of the seller.

The motion for a new trial is dismissed and for judgment n. o. v. is granted.

Berger *v.* Helms.

Malicious prosecution—Probable cause—Evidence.

Where the defendant in an action for malicious prosecution proves that he acted, in causing the arrest of the plaintiff, on information given by his wife, and he also sent his son to investigate, and the report received corroborated his wife, and the plaintiff does not dispute the above efforts to learn the truth, the question of probable cause is for the court, and it should not be submitted to a jury.

[Berger v. Helms.]

Action for malicious prosecution. Motion by defendant for judgment n. o. v. C. P. Northampton Co. Sept. T., 1914, No. 31.

Smith, Paff & Laub and *Thomas D. Danner,* for plaintiff.
Asher Seip and *R. S. Siegel,* for defendant.

STEWART, P. J., April 10, 1916.—This is a motion by the defendant to enter judgment non obstante veredicto. We do not think that the defendant can complain of our instructions to the jury. We said to them substantially that in an action for malicious prosecution, a plaintiff in order to recover must show both want of probable cause and malice. Malice may be inferred from want of cause, but mere want of probable cause will not establish legal malice to be declared by the court. If there is probable cause, it matters not that the prosecutor was actuated by malice. The lawful discharge of the defendant in the prosecution by the examining magistrate is prima facie evidence of want of probable cause, and the burden of proof that there was probable cause, as a general rule, is then cast upon the defendant in the action. We said malice in law exists where an act is done wrongfully and designedly by one person to the injury of another. These instructions are amply fortified by the authorities, but the difficult question in this case is whether we should have submitted the question of probable cause to the jury, or decided it as a matter of law. All the reasons in support of this motion except the last one are to the effect that we should have decided this as a matter of law. A very careful examination of many cases upon this subject has shown us the difficulties which confronted judges on the trial of this class of cases. We shall not burden this opinion by referring at length to many cases, but we are of opinion that the cases herein cited rule the present case. The general rule is well stated in Robitzek *v.* Daum, 220 Pa. 61, as follows: "To support an action for malicious prosecution the plaintiff must show want of probable cause. While it is exclusively the province of the jury to pass upon the testimony and ascertain the facts, it is the duty of the court to say, as a matter of law, whether the facts established do or do not amount to probable cause. What is probable cause and whether it exists under an admitted or clearly established state of facts is a question of law for the court. In an action for malicious prosecution the question is not whether the person charged with a crime was guilty, but what were the indi-

cations of his guilt. The test is the belief of the prosecutor in the existence of probable cause, based on reasonable grounds. The question does not depend upon the actual state of facts in the case, but upon the honest and reasonable belief of the prosecutor. It is a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the accused party is guilty of the offense." The facts of that case are very similar to the present case. On page 64 Justice Elkin said as follows: "The learned court below at the conclusion of the testimony directed the jury to return a verdict for defendant because plaintiff had failed to show want of probable cause. A motion for a new trial was filed, and after full consideration was refused on the ground that the undisputed evidence showed probable cause for the institution of the prosecution. It is a close case and not entirely free from doubt, but on the whole we think the conclusion reached by the court below was the correct one. If the defendant, on information received from his wife, believed that the folding bed and its contents, including the blankets and pillow, had been purchased at the sale under proceedings for distress, and had been delivered into the possession of his wife, as her or his property; and that plaintiff had come into his yard and carried away the whole or part of the goods which belonged to him in such a manner as to indicate a suspicion of theft or an intention to steal, there can be no doubt that within the meaning of the law he had probable cause for making an information charging larceny. The probable cause did not depend upon these facts being absolutely true, the test being, did he honestly believe them to be true at the time he made the information and was the belief based on reasonable grounds? We think the testimony produced at the trial was sufficient to justify the court in holding that under the established facts the defendant acted in the honest belief that plaintiff was guilty of the offense, and that the burden resting upon her in this case to show want of probable cause had not been met."

In Roessing *v.* Pittsburgh Rys. Co., 226 Pa. 523, the authorities are collected by Justice Potter. In that case the criminal charge was based upon the reports of five men as to a conductor's failure to ring up fares. The reports were made to the company's employment agent. The lower court submitted the question to a jury. The Supreme Court said: "It is difficult to conceive of circumstances which would constitute more reasonable grounds of suspicion, or would be more

likely to lead a reasonable and prudent man to believe in the guilt of the plaintiff. In fact, it is hard to understand how any reasonable man could avoid the conclusion, that the circumstances shown were strong indications of the guilt of the accused person. If such circumstances as those here detailed were not sufficient to justify the defendant in invoking the protection of the law, through the criminal courts, then the hope of any such protection is a vain thing. The trial judge erred in not pronouncing upon the facts. He should have given binding instructions for the defendant upon the ground that probable cause for the prosecution was clearly shown, by the uncontradicted evidence in the case."

In the late case of Gow *v.* Adams Express Co., 61 Pa. Super. Ct. 115, the doctrine of above cases was applied to a case where the facts as to investigation were similar to the facts of the present case. The lower court submitted the question to a jury, and afterwards entered judgment for defendant, and he was affirmed in his action by the Superior Court. In the present case the facts are not controverted that Mr. Helms acted upon information given him by his wife, that she saw the plaintiff take one of the Helms' chickens under circumstances which would make her guilty of larceny. Mrs. Helms testified that she went to the plaintiff's house and saw the Plymouth Rock feathers outside of the door, and that the chicken was being cooked, and Mr. Helms testified, and his son corroborated him, that he sent the boy over that same day, and that the boy found the same facts in the Berger house. It is true that the plaintiff gave an account of how she got possession of the chicken, and the verdict of the jury establishes the fact that her version of the matter is correct, but the plaintiff does not dispute the correctness of the reports made by Mrs. Helms and her son to him. In fact the very nature of her version of the matter is a corroboration of Mr. Helms' story, except as to the one fact, that the plaintiff claims she purchased the chicken. Remembering that we are not to try the actual fact, to-wit, the plaintiff's guilt, but whether the prosecutor believes she is guilty, and whether his belief was based on reasonable grounds, how can it be said in view of the undisputed testimony, that he acted unreasonably?

As Judge Haymaker said in Gow *v.* Adams Express Co., supra, there is no rule to require the prosecutor to prove that "he exhausted every possible means of discovering the guilt of the party accused before he is justified in making a charge." If the present case was one for a jury, the only matter that

we could logically submit to them, would be, "do you believe that Mr. and Mrs. Helms and their son were telling the truth?" The sole question of credibility upon a state of facts not disputed, would be the only thing for the jury. Such a submission is not according to the authorities. Where there is no dispute about the facts, the question of probable cause is one of law. The last reason refers to malice. There is no use to discuss this cause. What we have decided on the subject of probable cause ends the case. While the verdict of the jury was very small, it is not the business of a judge to consider the amount of the verdict, when it would be contrary to the authorities to allow it to stand. The decisions of the higher courts are binding upon us, and must be followed without any exception, whether the amount is large or small.

And now, April 10, 1916, motion for judgment non obstante veredicto is granted, and judgment is directed to be entered on the verdict in favor of the defendant upon payment of the jury fee, and the evidence taken upon the trial is certified and filed and made part of the record.

From H. D. Maxwell, Esq., Easton, Pa.

Chapman *v.* Vandergrift Borough.

Boroughs—Borough act of May 14, 1915, P. L. 312—Creation of borough offices in contravention of act of assembly—Appeal of person aggrieved by passage of borough ordinance to next court of quarter sessions.

Where, by a borough ordinance, council is authorized to elect an officer to be known as "borough manager," who, subject to the direction and approval of council, shall have direct supervision over the various departments of a borough, and who shall see that orders and regulations of council as applied to the different departments are strictly enforced, and that proper discipline is maintained and observed by all employés of the borough, with power to purchase all materials, tools and supplies, employ and discharge laborers and mechanics in different departments, on appeal by a person aggrieved by such ordinance and appointment thereunder to the court of quarter sessions, it was held that such an ordinance and an appointment of a borough manager thereunder was an attempt to remodel the frame of municipal government provided by the legislature for boroughs by providing by such an ordinance for the delegation of powers specifically given to corporate officials to what is called in the ordinance a "borough manager," an officer not contemplated by any statute, and is abortive and void of legal effect.

Whatever authority the council of a borough may be invested with by the general discretionary power under the law to appoint such other officers as it may deem expedient, there is no necessary implica-

tion that, in exercising that discretion, it may by ordinance transfer to an ordinance—created official duties that were by statute devolved upon officials whose functions in the scheme of a borough government were provided for by the paramount law enacted by the legislature.

The next court of quarter sessions to which application must be made "by any person aggrieved in consequence of any ordinance, regulation, or act done," is not the court next following the passage of the ordinance, but the court next following its going into effect.

Rule to show cause why an ordinance of the borough of Vandergrift providing for the election of a borough manager should not be vacated, and the appointment thereunder set aside. Q. S. Westmoreland Co. Feb. T., 1916, No. 2.

J. Hilary Keenan, for rule; *R. D. Noel,* contra.

McConnell, J., May 1, 1916.—On Nov. 9, 1915, there was approved by the burgess of Vandergrift an ordinance entitled, "An ordinance authorizing the creation of the office of borough manager of Vandergrift borough, Westmoreland county, Pennsylvania, defining his duties, tenure of office and fixing his compensation."

Section 1 reads as follows: " Sec. 1. That the council may elect an officer to be known as 'borough manager,' who, subject to the direction and approval of the council, shall have direct supervision over the various departments of Vandergrift borough, and shall see that all orders and regulations of the council as applied to the different departments are strictly enforced, and that proper discipline is maintained and observed by all employés of the borough. He shall also have reasonable power to attend to the business of said departments without specific instructions of council, and shall perform appropriate duties, from time to time, as he may be required; said officer shall be elected for a term of one year, provided that the first term shall be from the first Monday of January, 1916, to the first Monday of January, 1917, and he shall be paid the sum of $1,800 per year."

The various departments over which he is to exercise control are then enumerated, and, in paragraph (d) of § 2, we find this: "All materials, tools and supplies shall be purchased on his order. He shall keep an actual list of all borough property; and an accurate account of all expenditures in the departments mentioned, and shall make a yearly report, at the end of each year, as well as the monthly report aforesaid. He shall employ laborers and mechanics in the different depart-

ments mentioned, and discharge the same for incompetency, or insubordination, or for other reasons. He shall meet with the council, and shall have the right to be heard on any question pertaining to any of the departments aforesaid, but shall not vote thereon. He shall give a lawful bond to the borough in the sum of $1,000, with two or more sureties, or one trust or bonding company, to be approved by town council."

The ordinance is set out at length in Exhibit "A" of the complaint, and, therefore, need not herein be further set out in detail. On its face, this ordinance looks like an attempt, by the municipal authorities, to create an office not known to or defined by any statute under which the borough is supposed to be controlled. The title to the ordinance specifically declares that the creation of an office is the contemplated purpose of the ordinance, and the detailed provisions thereof are ancillary to the effecting of such a purpose. "An office is a public station or employment conferred by the appointment of government. The term embodies the ideas of tenure, duration, emolument and duties." United States *v.* Hartwell, 6 Wallace 385, per Justice Swayne. "Where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded a public officer." Bradford *v.* Justices, etc., 33 Ga. 336. "Where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public fuctions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office." State *v.* Brennan, 20 N. E. (Ohio) 503. "A 'public office' is a right, authority, and duty created and conferred by law, by which an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public. It implies a delegation of a portion of the sovereign power to and possession of it by the person filling that office. The source of the public office is found in the sovereign authority, speaking through constitution and statute, and the creations of the sovereign power cannot, in the absence of delegated authority, create one." State *v.* Mackie, 74 Atl. 759.

It is contended by respondents that inasmuch as a borough, under the general borough act of May 14, 1915, P. L. 312,

Chap. 7, Art. 1, Sec. 6, paragraph VI, may "appoint a solicitor, one or two street commissioners, and such other officers as it may deem necessary," that, by necessary implication, it has authority to create by ordinance the office of borough manager and appoint a competent person to said office. It is a question to be herein determined whether that position is legally correct. At present we must consider some matters incidental thereto. Assuming the competency of the borough authorities to enact the ordinance above referred to, and testing the functions, he is by the ordinance authorized to perform, L. S. Anderson, who has been appointed borough manager by council, according to authorities above cited, holds a "public office." The distinction between an "office" and an "employment" has been thus expressed: "Where an employment or a duty is a continuing one, defined by rules prescribed by law, and not by contract, such a charge or employment is an office. A duty or employment arising out of a contract and dependent for its duration and extent upon the terms of such contract is not an office. And again in distinguishing between these terms, it has been said that an office differs from an employment, in that the former implies a delegation of a portion of the sovereign power to, and the possession of it by the persons filling the office." 23 Ency. Law 324.

When a borough enacts an ordinance, it is exercising, or attempting to exercise, legislative power, and the authority for so doing must come from the Constitution and the laws of the commonwealth. "An ordinance is the product of legislative power conferred upon the municipality. One essential to its validity is that it shall not conflict with the law of the state." 28 Cyc. 290. "The powers of a municipal corporation are limited to (1) those expressly granted; (2) those necessary or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair and reasonable doubt as to the existence of a power is resolved by the courts against its existence in the corporation, and therefore denied." Ledy *v.* Kite, 192 Pa. 268. "All the powers of a corporation are derived from the law and its charter, and no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers." 1 Dillon's Mun. Corp., 4th ed., § 317. When this power is conferred, it is not, in its scope, necessarily coextensive with the state's own broad power to legislate, but is usually confined to either designated topics, or to subjects of legislation incidental to

and useful for the accomplishment of the limited purposes for which the municipality was erected. Of course, an ordinance that would conflict with a charter, or a general incorporating act, or—for that matter—with any other law of the commonwealth, designed to control municipal authority, would be an invalid ordinance, and necessarily null and void. "A municipal charter, in whatever form, is a statute of the state, and the organic law of the corporation. It gives the municipality its power to enact by-laws, just as the federal Constitution gives the congress its power of legislation; and it is too plain for argument that the by-laws must not contravene the constitution of the corporation. Any municipal ordinance in conflict with the charter is null and void. And so also is an ordinance outside of the charter powers, and persons assuming to act under its provisions will not receive protection from the courts." 28 Cyc. pp. 365, 366. This being true, in determining whether or not an ordinance is a valid exercise of legislative power, we are required to look, not simply at what the borough attempted to do, but also at whether its law-making power, in enacting the ordinance, has transcended the legal limits set for it by the paramount authority of the commonwealth. "Generally the courts have recognized as a truism that what a municipality has no power to do it has not done merely because it tried to do it, and have accordingly refused to give effect to ultra vires contracts." 28 Cyc. 279.

This bill being filed by a taxpayer, emphasis is necessarily laid on the pecuniary consequences imposed on taxpayers from the making of a contract with a borough manager, to pay him the annual salary of $1,800 for performing the duties of the office which the ordinance has undertaken to create, and which he has undertaken to fill. If the ordinance could not create such an office, the borough officers could not make a contract whereby the taxpayers of the borough would be annually obliged to pay the incumbent of the supposed office $1,800 for discharging the duties of it. "A municipal corporation cannot, in the absence of express authority, create an office, define its duties, appoint an incumbent, and invest him with the powers of a municipal officer." 20 Ency. Law 1145. That is precisely what this municipal corporation attempted to do in the enactment of this ordinance and in taking action under it. In the case of Hoboken *v.* Harrison, 30 N. J. L. 73, suit had been brought on what upon its face purported to be the official bond of Harrison, as "collector of assessments for street improvements." The other defendants were the sureties on the

bond. Breaches of the obligation of the bond were assigned, and the defendants demurred to the declaration. Chief Justice Whelpley, on page 75, among other things, said:

"The principle ground relied upon by the defendants is, that the ordinance creating the office of collector of assessments is extra vires, no such power being conferred by the charter, which did not create the office. The powers of a municipal corporation are derived from its charter. It cannot, without express authority from the charter, create an office, define its duties, and appoint an incumbent, and clothe him with the powers of a municipal officer. A collector of assessments for street improvements of the city of Hoboken is not such a subordinate officer as is contemplated in the act concerning corporations. It is manifest from the whole charter that it was the legislative intention itself to create all the offices, and designate the officers to be elected or chosen by the city, or the city authorities, and to regulate the mode of appointment." After reciting the provisions of the charter as to what officers should be elected, and as to what the duties of council were, and what subordinate officers council had power to appoint, Chief Justice Whelpley, page 76, says: "It would be in gross contravention of a charter which provides for a treasurer, a collector of taxes, and a collector of arrears of taxes, to be elected by the people for one year, to hold that the common council might appoint, as they did in this case, a collector of assessments, to hold for an indefinite period. . . . If the ordinance passed June 30, 1858, is to be regarded as creating a new office, which, without doubt, was its design, it was beyond the power of the common council, and for that purpose void."

In a Connecticut case, State ex rel Stage *v.* Mackie, 82 Conn. 398, 74 Atl. 759, it was decided that "the source of public office is found in the sovereign authority, speaking through constitution and statute, and the creations of the sovereign power cannot, in the absence of delegated authority, create one." A "public office" is a right, authority, and duty created and conferred by law, by which an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. It implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office. In that case the charter had provided that the board of aldermen might provide by ordinance for the appointment of a building inspector and to prescribe his duties, but did not, either

expressly or impliedly, grant the power to create the office of "deputy building inspector." It was held that the right to provide for the appointment of an officer did not imply the right to provide for substitutes and alternates ad libitum. In the course of the opinion, page 761, this is said:

"The charter provision giving the board power to provide for the appointment or election of employés, and to prescribe their duties and compensation, was also inadequate as a conferment of authority to create public officers, to provide for the choice of incumbents, and to endow those incumbents with portions of the sovereign power at pleasure. This provision was limited in its application to employés, and its language was chosen to clearly indicate that fact. It is scarcely conceivable that the state should have delegated to one of its creations its sovereign power, in any such wholesale way, as to enable the latter to create such offices as it pleased, and attach to them the exercise of such portions of the sovereign power as it pleased and thus surrender to its creature its power of direction and dictation, and the charter provisions referred to was too carefully guarded in its language to give countenance to such a contention."

In the case of Benjamin *v.* Webster, 100 Ind. 15, the general act under which the city of Indianapolis was incorporated had provided that the chief engineer should have superintendence of the fire department of the city, and provided that he should see that all apparatus for the extinguishment of fires be kept in proper order, and that from time to time, he should make report to the common council as to the condition of the same, etc." The statute also imposed certain express duties on council as a body. The council without any express statutory authority for doing so, attempted by ordinance to create what was denominated a "fire board," and to invest such board with some of the powers and duties which the statute had imposed upon the city engineer and upon council. It was decided by the Supreme Court of that state as follows: "The common council of a city incorporated under the general law of this state for the incorporation of cities, is not authorized to pass ordinances which contravene the express provisions and the clear implications of the statute under which the city is incorporated. The creation of a 'fire board' is unauthorized, and is impliedly forbidden by the statute; and the attempt by ordinance to invest such fire board with powers and duties which the statute imposed upon the common council, or upon the chief engineer of the fire department, and which could not

be delegated, is a palpable violation of the statute, and therefore invalid and void."

The title to the general borough act of May 14, 1915, P. L. 312, is, "An act providing a system of government for boroughs, and revising, amending and consolidating the law relating to boroughs." Both the title and the express provisions of the act plainly indicate a general system for incorporating and governing the boroughs of the commonwealth. It provides for a council, burgess, high constable, auditors, and in some situations a controller, and defines the powers and duties of each of these officers. It expressly provides in Chap. v, Art. 1, Sec. 2, page 332, "The powers of the borough shall be vested in the corporate officers." Who are they?

"A municipal officer is one who holds for a time a permanent municipal position of trust and responsibility, with definite municipal powers, duties and privileges." 28 Cyc. 399. This borough act is designed by the legislature for general application, and a distribution of powers and duties is thereby made among the officials expressly provided for, and under the frame of municipal government thus provided for a "borough manager" finds no place. The plain design of the legislature is to provide a definite system for the autonomy of municipal corporations of that rank in general. It was not the intention of the law-making power, that one borough incorporated under the act, or subject to its provisions, should perform its functions through the instrumentality of one set of municipal agents, while another one, governed by the same law, should perform its functions, distributed in a different mode, through the instrumentality of other municipal agents, unknown and unnamed in the first case. It was not the intention of the legislature to put it in the power of a borough to, by ordinance, so alter the distribution of conferred powers that the statutory functions of the officers designated in the statute should be superseded or materially modified. The statutory scheme of municipal government was complete when it left the law-making power, and it is no more subject to change by an ordinance than the Constitution of the United States would be subject to change by an act of congress." Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws which shall cede away control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." I Dillon's Mun. Corp. § 97. "A city's legislative authority cannot be construed as conferring

upon it power to enlarge, diminish or vary in any substantial manner its municipal functions by ordinance." Jefferson City *v.* Courtmire, 9 Mo. 692. "All the powers of a corporation are derived from the law and its charter, and no ordinance or by-law of a corporation can enlarge, diminish or vary its powers." 1 Dillon's Mun. Corp. 4th ed., § 317.

Among the duties imposed by the borough act on the burgess is the following: "It shall be the duty of the burgess: To preserve order in the borough, to enforce the ordinances and regulations, to hear complaints, to remove nuisances, and to exact a faithful performance of the duties of the officers appointed." Chap. 7, Art. II, Sec. 11, p. 395. Among the duties prescribed for the "borough manager" by the ordinance are that he "shall see that all orders and regulations of the council as applied to the different departments, are strictly enforced and that proper discipline is maintained and observed by all employés of the borough. He shall also have reasonable power to attend to the business of said departments, without instructions of council, and shall perform duties, from time to time, as he may be required," etc. Section 1. These are executive duties comprehended by the statute among the official duties of the burgess, a sworn officer, but the ordinance seeks to transfer them along with other powers to a "borough manager"—an unsworn (so far as the ordinance goes)—officer, and one unknown to the statute, and by it given no powers whatever. Other duties that the statute imposed on officers designated therein, are by the ordinance sought to be devolved upon the "borough manager."

In clause "d" of paragraph 5 of respondent's answer is the following: "The defendants deny that the powers and duties of said borough manager as defined in said ordinance is a delegation of the authority, rights, and duties of any officer of said borough, and allege that the said ordinance combines the usual offices of street commission and borough engineer, together with his duties in relation to the sewer system and garbage disposal plant of said borough." But whence comes the authority to the borough by ordinance to transfer the usual functions of these officials, known, defined and recognized by the governing statute, to a "borough manager," an officer not provided for by the legislature in prescribing the framework of municipal government?

In clause "c" of paragraph 5 of defendant's answer, the alleged warrant for the enactment of the ordinance and for the making of the appointment, is thus expressed: "That un-

der the act of May 14, 1915, P. L. 312, known as 'The general borough act,' Chap. VII, Art. I, Sec. 6, paragraph VI, the said council of Vandergrift borough has express authority in their discretion to 'appoint a solicitor, one or two street commissioners, and such other officers as it shall deem necessary,' and by necessary implication they have authority to create by ordinance the office of borough manager, and appoint a competent person to said office." But whatever authority the council may be invested with by the general discretionary power to appoint such other officers as it may deem expedient, there is no necessary implication that in exercising that discretion it may by ordinance transfer to an ordinance-created official duties that were by statute devolved upon officials whose functions in the scheme of a borough government were provided for by the paramount law enacted by the legislature. If it was by the officials deemed necessary that the duties of street commissioner be performed, the paramount law would require that they be performed by a street commissioner or street commissioners, rather than by some official created by an ordinance. In so far as the paramount law has spoken, it should be obeyed, and its provisions should not be superseded or displaced to any extent by something "just as good," solely devised by the municipality itself. It is assumed by counsel for the defendant that it is discretionary with it, whether street commissioners be appointed or not. It is nowhere stated in the papers that there are no street commissioners. In view of the fact that the present borough has but recently been created by the merger of two boroughs, the probability is that there are, in fact, now two street commissioners—for the borough code provides for the continuance of both of the preëxisting commissioners in office in that conjunction of circumstances. But it is not clear whether the discretion of council is to be exercised upon the question of whether there shall or shall not be a street commissioner, or whether it is upon the question of whether there shall be one or two. Sec. 7, Chap. VII, Art. VI, page 402, is consistent with the view that that discretion authorized is upon the question of the number of commissioners. But however that may be, the general authority to appoint other officers will not warrant the transfer of the duties of a statutory official to an official created merely by ordinance. The general power to appoint is subject to that limitation. A borough engineer is not named in the general borough act as an officer; yet the possibility of such an officer being created by ordinance is in the act contemplated. Sec. 2, Chap. VI,

Art. x, page 358. There are other duties assigned by the act to the municipality which have not been therein assigned to any particular corporate officer. As a means of executing these duties assigned to the municipality in general, it may be convenient to appoint by ordinance officers or employés other than the corporate officers—and for some such situation this general power of appointing other officers was by the statute conferred on the borough. But it was not contemplated where the statute itself had provided officials for certain purposes that by an ordinance they should be superseded by ordinances and their duties transferred to others. "Another and very important limitation which rests upon municipal powers is that they shall be executed by the municipalty itself, or by such agencies as the statute has pointed out." Cooley's Con. Lim. p. 292. "Public powers and trusts are incapable of delegation." Dillon's Mun. Corp. 4th ed., § 96. "The city council authorized to direct the work to be done on a street improvement cannot delegate the authority conferred upon it by a general resolution giving power to the superintendent of streets, to cause the same to be done." Birdsall *v.* Clark, 73 N. Y. 73. "The rule is plain, then, that the legislative powers of a municipal corporation cannot be vicariously exercised." Am. & Eng. Ency. 1042, 1043.

This ordinance attempts to assign to a "borough manager" duties that by the general borough act belonged to officials named therein. Of course, there are some duties of a ministerial and mechanical character, requiring no discretion or judgment that may be delegated for execution to others. But the substantial difficulty in this case does not make it necessary for us to go into a minute analysis of the precise character of the powers belonging to the burgess, the council, the street commissioner, and the controller, that this ordinance attempts to transfer to an ordinance-created officer; for it is the effect of this comprehensive transfer, in its totality, that is violative of the spirit of the law. Give this ordinance effect as it is written, and the borough of Vandergrift will exercise its functions in a manner that will differentiate it from every other borough under the same act—and the thing that will give it abnormal and differentiating characteristics is the ordinance. The spirit of the law is that boroughs in general shall be uniform in their scheme of government. What was said in Re Pittsburgh, 138 Pa. 401, at page 430, can, with equal appropriateness, be said in this case: "A statute authorizing the city council of cities to create new departments in the city government, and define

their powers, cannot be sustained. The legislature must settle the government for each class of cities, and it must be uniform, and no city can change the number of or the distribution of the powers among the departments into which the government is cast by the legislature. If this were not so no two cities in the same class would long retain the same form of municipal government, and general legislation for the class would, on many subjects, become impossible." If the borough of Vandergrift by ordinance can shear off a portion of the functions that the statute had specifically devolved upon the various corporate officers named therein, and collect these functions, and place them in the hand of an official unknown to the statute, the municipal authority will no longer remain in the corporate officers—as the statute prescribes, but will in part, at least, be committed to the control of a person alien to it. If Vandergrift can do this, every other borough in the commonwealth can make the same or a different distribution of corporate powers, and the result will then be that where uniformity in municipal goverenment, and in the functions to be performed by corporate officials was by the statute designed, the lack of these intended characteristics will become manifest, and the statutory purpose will be thereby subverted. Neither the borough of Vandergrift, nor any other borough has legal power to thus mar the design of borough government provided by the legislature. The ambitious aim of the ordinance is manifested by the proposed name of the new official, "borough manager." It was a controlling, managing power that was designed by the ordinance, regardless of how it would affect the prescribed functions of the "borough managers" that the statute itself had provided—for borough managers are precisely what the corporate officers designated in the general borough act are designed to be.

In the case of Pinney *v.* Brown, 60 Conn. 164, *22* Atl. 430, an attempt was made by the selectmen of the town to create the office of "town agent," an office not designated or defined by law. The Supreme Court of that state decided that this could not be done. "There being no statute creating the office, and defining the duties of 'town agent,' such an officer cannot be appointed by the selectmen in virtue of their general powers." Neither can the council through an ordinance provide for and appoint a "borough manager," under the general power to appoint other officers. That power of appointment must be exercised under the limitation that corporate officers provided for by the act of assembly cannot be

wholly or partially displaced, and their designated corporate functions, wholly or partially, transferred to an officer not known to the law so that corporate control would no longer remain where the law had placed it, viz., in the corporate officers. Chief Justice Andrews, in the case just referred to, among other things said: "There is no statute that provides for any such office in a town as town agent; nor is there any statute that defines any duty to be performed by such an officer. Undoubtedly a town, like any other corporation, may appoint an agent for any proper purpose. Possibly a town might appoint an agent to perform any or all duties usually performed by the selectmen, except such as are specifically imposed on the selectmen by the Constitution, or by some statute. But the selectmen, being themselves agents cannot appoint another or one of themselves to be an agent for their own town. That rule of law governs, which is found in the maxim delegata potestas, non potest delegari." In the case of Benjamin *v.* Webster, 100 Ind. 15, already referred to, the court said: "The creation of a 'fire board' is unauthorized and is impliedly forbidden by the statute; and the attempt by ordinance to invest such fire board with powers and duties which the statute imposed upon the common council, or upon the chief engineer of the fire department, and which could not be delegated is a palpable violation of the statute, and therefore invalid and void." "An act of a municipal corporation done in an attempt to exercise power not possessed by it, is void." Wimer *v.* Worth Twp., 104 Pa. 317.

The attempt to remodel the frame of municipal government provided by the legislature for boroughs, by providing in an ordinance for the delegation of powers specifically given to corporate officials to what is called "a borough manager," an officer not contemplated by any statute, is abortive and void of legal effect. Our own case of Pittsburgh's Petition, 138 Pa. 401, is, in itself, sufficient authority for this conclusion. "The governing body of a municipal corporation is not at liberty to delegate to a committee, or an officer or agent, governmental, legislative, or discretionary functions confided to it by the legislature of the state, in the absence of express authority for such delegation." 20 Ency. 1217. The powers sought to be delegated by ordinance in the wholesale way attempted here, are governmental, some of them discretionary, and there is no express authority for such delegation. The attempt here is to transfer governmental powers from designated corporate agents, to a donee, who by the governing statute has

been in no wise identified with the authorized governing agency of the borough. This cannot be done consistently with the spirit or letter of the law. Dillon, in his work on Municipal Corporations, § 329, says: "The rule that a municipal corporation can pass no ordinance which conflicts with its charter or any general statute in force and applicable to the corporation, has been before stated. Not only so, but it cannot in virtue of its incidental power to pass by laws, or under any general grant of that authority, adopt by-laws which infringe the spirit, or are repugnant to the policy of the state, as declared in its general legislation." The borough of Vandergrift has transcended the limits of the law in this respect by enacting the ordinance complained about.

A word about procedure: This bill is filed by Walter Chapman, who avers as the basis of his right to file it:

"That he is a citizen of the United States of America and of the state of Pennsylvania; that he is a resident of the borough of Vandergrift, county of Westmoreland and state of Pennsylvania. That he is an owner of property and a taxpayer in the said borough of Vandergrift. That he has been aggrieved in consequence of the passage of an ordinance, entitled," etc. The general borough act of 1915, Sec. 9, of Art. I, Chap. 7, p. 393, provides as follows: "Complaint may be made to the next court of quarter sessions upon entering into recognizance, with sufficient security, to prosecute the same with effect and for the payment of costs, by any person aggrieved in consequence of any ordinance, regulation or act done, or purporting to be done, in virtue of this act, and the determination and order of the court thereon shall be conclusive."

The complainant has complied with the provisions in regard to the bond. Is he "a party aggrieved in consequence" of the ordinance? Whatever the rule may be in a few other states, there can be no doubt but that in this state the affected liability of a taxpayer is such a special interest as entitled him to be heard, when an allegel illegal expenditure of public funds is proposed and contracted for by the borough officials. He is a person whose pecuniary interests are affected by the unauthorized action, and he is therefore "a party aggrieved." "The interest of a taxpayer where money is to be raised by taxation or expended from the treasury, entitles him to test in equity the validity of the law which proposes the taxation or expenditure." Page *v.* Allen, 58 Pa. 338; Pittsburgh's Appeal, 79 Pa. 317, 324; Wolff Chemical Co. *v.* Phila., 217 Pa. 215. "The invasion of his pecuniary interests is the special

injury that gives him standing to maintain a bill. This is the reason recognized and stated as the ground for permitting any party to object to an illegal diversion or misappropriation of public funds." 2 High on Inj., § 1298. This petition was presented to the court of quarter sessions on Feb. 2, 1916. The ordinance was approved on Nov. 9, 1915, but the term of the borough manager, according to § 1 of the ordinance, would not commence until the first Monday of January, 1916, and on Jan. 3, 1916, the borough manager's bond was approved by council and he thereupon assumed the duties of his alleged office. As long as the borough had proceeded no further than to pass an ordinance, and done nothing under it, it might be debatable whether complainant would be a party aggrieved in consequence of the ordinance. If proceedings were to go no further than the ordinance, it would cost complainant nothing; but if money were withdrawn from the treasury to pay the salary, or if a contract with a borough manager was concluded, and he had entered upon his term of office which would obligate the borough to pay money from the treasury, a taxpayer would be aggrieved in consequence of the ordinance. "The passage of ordinances by the common council of a city, which do not confer rights or authority, are harmless until steps are taken to make them available. And it would seem that a common council cannot be enjoined from passing such ordinances." Chicago *v.* Evans, 24 Ill. 52.

The petition of the complainant, presented on Feb. 2, 1916, was presented to the next court of quarter sessions next succeeding the borough manager's qualifying himself to act under the terms of the borough ordinance. Did the taxpayer make "complaint to the next term of court of quarter sessions," within the meaning of the act, or should complaint have been made to the November term of court, in order to be in time? According to the section the complaint is to be made, not by reason of the mere enactment of an ordinance, but it is to be made "by any person aggrieved in consequence of any ordinance, regulation, or act done, or purporting to be done in virtue of the act." The ordinance must take the form of action before it entails consequences which will have the effect of aggrieving a taxpayer. To be aggrieved is to have suffered loss or injury, to be damnified. "The complaint must be made to 'the next court of quarter sessions of the proper county.' The 'next court' is not the court next following the passage of the ordinance, but the court next following its going into effect." 1 Trickett Bor. Law, § 108, p. 135. When an ordi-

nance creating a borough manager and fixing his salary, and a contract pursuant thereto has been entered into by the borough with an incumbent, who has entered upon his term of office, the matter has reached a stage in consequence of the ordinance and the act done under it that is capable of aggrieving a taxpayer, by the obligation it thus places on the borough treasury. This complaint was presented to the next court of quarter sessions after that stage had been reached, and is therefore in time.

Although the form of the question now before the court, as defined in the pleadings, is only a rule to show cause, yet we have been asked by counsel, if it possibly can be done, to avoid the taking of testimony on points in dispute, and to finally dispose of the case on the uncontroverted facts. The discussion given above is confined to the uncontroverted facts, and in accordance with the desire of the parties, a final judgment is entered in the case.

And now, May 1, 1916, upon due consideration, the rule granted Feb. 2, 1916, is now made absolute, the ordinance complained of is declared illegal and void, and the appointment of L. G. Anderson as borough manager, pursuant to said void ordinance, is set aside for lack of legal authority in the borough to make it. The respondent borough is directed to pay the costs. From William S. Rial, Esq., Greensburg, Pa.

Waynesboro Alley.

Road law—Boroughs—Act of May 14, 1915, P. L. 312—Streets—Ordinance—Notice.

Article iv, Sec. 2, ch. 6, of the act of May 14, 1915, P. L. 312, provides that "ten days' notice of the contemplated improvement shall be given by the borough, by not less than ten handbills posted on the line of the proposed improvement, and in such notice shall be designated a time and place where objections thereto shall be heard" is merely directory and the omission of such notice does not invalidate the proceeding.

Rule on property owners to show cause why viewers should not be appointed to assess damages. Answer. C. P. Franklin Co. Vol. H, page 332.

John W. Hoke, for borough.
Walter & Gillan, for respondent.

GILLAN, J., July 25, 1916.—On Nov. 23, 1915, a petition signed by the burgess and the president of town council of the borough of Waynesboro was presented, setting forth that in

pursuance of the acts of assembly regulating boroughs, the said burgess and town council did duly and legally pass an ordinance laying out and ordaining a certain public alley in said borough; that C. E. Besore was said to be the owner of a certain piece of land through which said alley passed; and praying the court to appoint viewers to view and assess damages or benefits occasioned by the laying out of the alley.

Upon the presentation of the petition we, at the instance of said C. E. Besore, presented a rule on him to show cause why the prayer of the petition should not be granted. The respondent, answering the rule, says that this proceeding is taken under ch. 6, Art. IV, of the borough code of May 14, 1915, P. L. 15, pp. 312-344; that no such notice was given prior to the introduction and passage of said ordinance as required by said code, "but that ten days' notice was given by handbills posted on the line of the proposed improvements after the passage and publication of said ordinance. The said ordinance was passed and published in accordance with Art. IV, Sec. 3, ch. 6, of the said borough code."

No replication has been filed; therefore the matters set forth in the answer must be taken as true. Counsel for the borough contend that no notice was necessary prior to the passage of the ordinance; that notice in accordance with Art. IV, Sec. 3, ch. 6, of said borough code was all that was necessary. Counsel for respondent contends that the act of assembly requires that notice be given prior to the consideration of the ordinance. If this matter under this act of assembly has been adjudicated by any court, it has not been called to our attention; nor have we been able to find any such adjudication. The provisions of the act of 1915, as it relates to the matter under consideration, are as follows:

CHAPTER 6, ARTICLE IV.

Section 1. Boroughs may survey, lay out, open, widen straighten, extend, or vacate streets, lanes, alleys, and courts, or parts thereof, without petition of property owners.

Section 2. Ten days' notice of the contemplated improvement shall be given by the borough, by not less than ten handbills posted on the line of the proposed improvement, and in such notice shall be designated a time and place where objections thereto shall be heard.

Section 3. Any ordinance authorizing the exercise of any power conferred by § 1 of this article shall be adopted by the affirmative vote of three fourths of the whole number of coun-

cilmen, and shall be approved by the burgess. No such ordinance shall be finally adopted until the expiration of twenty-eight days from the date of its introduction, and, in the meantime, copies thereof shall be published in such one or more of the newspapers of the borough, once a week for three consecutive weeks, immediately following the introduction thereof. In case no newspaper shall be published in the borough, then in one newspaper published in the county.

The notice given of the passage of this ordinance was as follows:

NOTICE.

Notice is hereby given that pursuant to an ordinance duly advertised according to law and passed by the town council of the borough of Waynesboro at a regular meeting held on Sept. 2, 1915, and approved by the burgess of said borough on Sept. 2, 1915, the borough of Waynesboro will lay out and open a public alley twelve feet in width as follows: Beginning at a point on the east curb line of North Grant street, thence north sixty-one (61°) degrees thirty-five (35′) minutes west two hundred and twenty-four and six-tenths (224.6) feet to a point at intersection of first alley west of Grant street; thence by bearing, one hundred and sixty-two (162) feet to a point on the east line of the land of C. E. Besore; thence by same bearing across the land of said C. E. Besore, ninety-seven (97) feet to the west line of the land of said C. E. Besore; thence, by same bearing, one hundred and sixty-six (166) feet to the east curb line of North Franklin street.

The town council will sit for the purpose of hearing objections thereto at the council room on Thursday evening, October 7, between 7.30 and 9.30 P. M.

By order of council.

A. Stover Fitz, Secretary.

The requirements as to notice of the act of 1915 above cited are identical with the act of July 12, 1897, P. L. 246, amending the eighth clause of § 3 of the act of April 3, 1851, P. L. 323. While the act of 1897 is repealed by the act of 1915, yet the requirements of the two acts being the same, we must be governed in our interpretation of the act of 1915 by the interpretation of the act of 1897 as made by our courts. The requirements of the act of 1851 were to give due and personal notice to all persons resident within the borough directly interested therein of any proposition to fix or change the roads, streets, etc., and to designate a time and place where they shall be heard in relation thereto. As amended by the act of

1897 it is that at least ten days' notice by not less than ten handbills posted on the line of the proposed improvements, etc., and in such notice to designate a time and place where objections thereto shall be heard. That the notice provided by Art. IV, Sec. 2, ch. 6, of the act of 1915 was not given is not only apparent from the pleading but admitted on the argument. That it should have been given, thereby saving a lot of trouble, is not open to dispute. The published notice given, as copied above, is not a substitute for it. The only question is whether such notice was essential to the validity of the ordinance. The answer to this question must be found in the answer to another question and that is: Is the provision of this section mandatory or merely directory? If merely directory, the omission is not fatal; if mandatory, it is fatal. We think the question is one not free from difficulty.

Counsel for the borough has offered us no brief. Counsel for respondent relies on Taylor Avenue, 146 Pa. 638; and In re Apple Street, 6 Dist. Rep. 63; and Gay and West Street, Parksburg, 7 Pa. C. C. 217. Whether any of these, except 6 Dist. Rep. 63, sustain his contention is, to say the least, doubtful. It is hard to understand why the notice provided for in Art. IV, Sec. 2, ch. 6, should, in view of § 3, be given. It is also hard to understand why the legislature should have provided for it, if they did not deem it necessary. We are of the opinion, however, upon the weight of authority, that this provision is merely directory; that the omission of the notice is not fatal to the validity of the ordinance. "The eighth clause of § 3 of the general borough law (P. L. of 1851, page 323) requiring notice to be given of a proposition to fix or change the roads, streets, etc., of a borough is merely directory, and the omission to give the notice does not invalidate the proceeding. Pittsburgh *v.* Coursin, 74 Pa. 400." White *v.* McKeesport Boro., 101 Pa. 394.

Judge Ewing, in Com. *v.* Beaver Boro., 171 Pa. 563, uses this language: "In opening of Taylor Avenue, 146 Pa. 638, the court below holds, inter alia, as follows: 'I am of the opinion that personal notice of the ordinance at least must be given, and also of any proposition to fix, regulate, etc., the roads and streets of the borough to all persons directly interested therein.' There were other irregularities in the proceedings. The proceedings were set aside and on appeal to the Supreme Court judgment was affirmed without any opinion filed or reference to the opinion of the court below, although White *v.* McKeesport was cited by appellant's counsel. The

judgment might have been affirmed on other grounds." This case was affirmed by the Supreme Court on the opinion filed by Judge Ewing.

In Penna. R. R. Co. *v.* Street Rwy., 176 Pa. 559, we find this language: "But the notice required by the provisions of the act of 1851 is directory only. This was decided both before and since the entry of the judgment in the Taylor Avenue case, in 146 Pa. 638. This fully appears from the following cases: Sec. —, paragraph 8, of the act of April 3, 1851, pl. 323, making it the duty of the borough officers to give due and personal notice to all persons resident in the borough directly interested therein of any proposition to fix or change the roads, streets, lanes, etc., or in the grading or regulation thereof, and to designate a time and place when they shall be heard in relation thereto, is merely directory and an omission of such notice does not invalidate the proceedings. Com. *v.* Beaver Boro., 171 Pa. 542; White *v.* McKeesport, 101 Pa. 400. Therefore if it was decided in 146 Pa. 638 (and this not entirely clear) that the notice described in the act of 1851 was essential to the validity of the ordinance, that decision has been overruled and the decision in White *v.* McKeesport is still the law."

Now, July 25, 1916, rule is made absolute, and Linn Harbaugh, James Sweney and L. E. Oyler are appointed viewers for the purposes mentioned in the petition to meet upon the premises on Aug. 17, 1916, at 11.00 A. M., and view the same and the premises affected thereby, first giving notice of the time of their first meeting as provided by Art. II, Sec. 4, ch. 6, of the act of May 14, 1915.

From Irvin C. Elder, Esq., Chambersburg, Pa.

Commonwealth *v.* Fusarini.

Criminal law—Banks and banking—Private banking—Act of June 19, 1911, P. L. 1060—Statutes.

The exceptions contained in § 8 of the private banking act of June 19, 1911, P. L. 1060, need not be negatived in an indictment for violations of §§ 1 and 3 of the act.

Where the enacting clause of a statute contains an exception which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception be omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. But where the exception is so entirely separable from the language defining the offense that the ingredients constituting the offense may be clearly and accurately defined without any reference to the

exception, such exception is not a constituent part of the offense and need not be negatived, but is a matter of defence to be pleaded or given in evidence by the accused.

The mere fact that an exception is contained in that part of the statute containing the enactment, or that an exception be introduced into the enacting clause by way of reference, as by the use of such words as "except as hereinafter provided," or other words of similar import, does not require the exception to be negatived. The question is whether the exception is so incorporated with and made a part of the enactment as to constitute a part of the definition or description of the offense inseparable from it. It is the nature of the exception and not its location that determines the question. An exception in a subsequent section of a statute may be so clearly connected with the description of an offense contained in a preceding section as to require the exception to be negatived, while matter in the enacting clause may be so independent of the description of the offense as not to require negation.

After words of general prohibition in a statute, whatever comes in by way of proviso or exception need not be negatived, but must be set up by the accused. It is immaterial whether the proviso or exception be contained in the enacting or in a subsequent clause, if it follow a general prohibition. But if there be no words of general prohibition in the description of the offense, leaving the prohibition limited, then it must be alleged and made to appear affirmatively that the thing prohibited has been done. An exception or proviso which merely withdraws a case from the operation of a preceding general prohibition need not be negatived.

The term "enacting clause" should be construed to mean all parts of the statute which create and define the offense, whether in one or more sections or acts.

While there is a technical distinction between an exception and a proviso, in most cases the distinction is wholly disregarded, the words being used as if they were of the same significance.

Motion to quash indictment. Q. S. Fayette Co. Dec. Sess., 1915, No. 206.

S. Ray Shelby and *S. John Morrow,* district attorney, for commonwealth.

A. E. Jones and *D. W. Henderson,* for defendant.

VAN SWEARINGEN, P. J., July 3, 1916.—The defendant is indicted for violating the provisions of the private banking act of June 19, 1911, P. L. 1060, and the motion before us is to quash the bill of indictment. The indictment contains two counts, one under § 1 of the act and the other under § 3, and the motion to quash is on the ground that neither of the counts charges an indictable offense. The specific contention of the defendant is that the enacting clauses of the statute contain exceptions which must be negatived in an indictment under the act, and that because the exceptions are not negatived in this indictment the indictment is bad. The subject of negativing exceptions in bills of indictment for statutory offenses seems never to have been before the appellate courts of Penn-

sylvania, and has been considered but little by the lower courts of this state, although there are hundreds of decisions in the books from other jurisdictions. Many of the decisions seemingly are in direct conflict with one another, but the best considered cases yield a product of well-fixed principles when seriously studied and rightly understood.

Where the enacting clause of a statute contains an exception which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception be omitted, an indictment founded upon the statute must allege enough to show that the accused is not within the exception. But where the exception is so entirely separable from the language defining the offense that the ingredients constituting the offense may be clearly and accurately defined without any reference to the exception, such exception is not a constituent part of the offense and need not be negatived, but is a matter of defence to be pleaded or given in evidence by the accused. It is a mistake to suppose that the words "enacting clause" or "clause defining the offense" mean the section of the statute in which the offense is defined, as contradistinguished from a subsequent section containing an exception. The real question is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description thereof. Doubtless there is a technical distinction between an exception and a proviso, as an exception ought to be of that which otherwise would be included in the category from which it is excepted, and the office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation, but in many cases the distinction is wholly disregarded, the words being used as if they were of the same signification. United States *v.* Cook, 84 U. S. 538. To the same effect see Packer *v.* People (Colo.), 57 Pac. Rep. 1087.

"The term 'enacting clause' should be construed to mean all parts of the statute which create and define the offense, whether in one or more sections or acts." State *v.* Bevins, 70 Vt. 574, 41 Atl. Rep. 655; State *v.* Seifert (Wash.), 118 Pac. Rep. 746. "The exception must be a constituent or an ingredient of the offense declared by the statute, in order to require that it shall be negatived by the indictment." Territory *v.* Burns, 6 Mont. 72, 9 Pac. Rep. 432. "It is only when the exception

in a penal statute is so incorporated in or with the enacting clause of such statute as to constitute a material part of the definition or description of the offense that it need be negatived in the information." Smythe *v.* State (Okla. App.), 101 Pac. Rep. 611. "Where a statute creating an offense contains exceptions negativing guilt, such exceptions must be pleaded in the indictment when they are a part of the statutory definition of the offense; but where they do not define the crime they need not be pleaded nor proved, but are purely matters of affirmative defence." State *v.* De Groat, 259 Mo. 364, 168 S. W. Rep. 702. "The test is whether the exception is so incorporated with the enactment as to constitute a material part of the definition or description of the offense." State. *v.* Carruth (Vt.), 81 Atl. Rep. 922.

In Com. *v.* Hart, 11 Cushing (Mass.) 130, it was said by Justice Metcalf: "There is a middle class of cases, namely, where the exception is not, in express terms, introduced into the enacting clause, but only by reference to some subsequent or prior clause, or to some other statute. As when the words 'except as hereinafter mentioned' or other words referring to matter out of the enacting clause, are used. The rule in these cases is, that all circumstances of exemption and modification, whether applying to the offense or to the person, which are incorporated by reference with the enacting clause, must be distinctly negatived." Undoubtedly that statement greatly influenced the decision of the court in Com. *v.* Shelly, 2 Kulp (Pa.) 300, where it was quoted at length and followed, and it seems to have been recognized as good law in Com. *v.* Wickert, 19 Pa. C. C. 251, 6 Pa. Dist. R. 387; Com. *v.* Willis, 20 Pa. Dist. R. 482; Com. *v.* Rohrman, 20 Pa. Dist. R. 610. But the statement is characterized as mere dicta, inconsistent with subsequent adjudications of the court of which Justice Metcalf was a member, in which he concurred, and was expressly disapproved by that court in the later case of Com. *v.* Jennings, 121 Mass. 47, where after reviewing the authorities, Chief Justice Gray said: "It appears to us to be established, by a great preponderance of authority, that when an exception is not stated in the enacting clause otherwise than by referring to other provisions of the statute, it need not be negatived, unless necessary to a complete definition of the offense."

In the Massachusetts case last cited the indictment was for polygamy, under § 4 of an act which provided that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife,

in this state, shall, except in the cases mentioned in the following section, be deemed guilty of polygamy, and be punished" by fine and imprisonment. The next section of the act declared that "the provision of the preceding section shall not extend to any person whose husband or wife has been continually beyond the sea, or has voluntarily withdrawn from the other and remained absent for the space of seven years together, the party marrying again not knowing the other to be living within that time, nor to any person legally divorced from the bonds of matrimony and not the guilty cause of such divorce." The indictment averred that at the time of the second marriage the first wife still was living, and that the husband had not been divorced from her, but did not negative the other exception; and in holding that it need not do so the court said: "The case appears to us to fall within what Justice Metcalf, in the closing paragraph of the opinion in Com. *v.* Hart, above cited, called an elementary principle of pleading: 'It is not necessary to allege matter which would come more properly from the other side; that is, it is not necessary to anticipate the adverse party's answer, and forestall his defence or reply. It is only when the matter is such that the affirmation or denial of it is essential to the apparent or prima facie right of the party pleading, that it must be affirmed or denied by him in the first instance.' Our conclusion is supported by well considered judgments of the highest courts of Vermont and New York, under enactments not distinguishable in their terms from the statute now before us. State *v.* Abby, 29 Vt. 60; Fleming *v.* People, 27 N. Y. 329."

In the opinion of the court in State *v.* Abbey, 29 Vt. 60, appears the following statement: "In saying that an exception must be negatived when made in the enacting clause, reference is not made to sections of the statute, as they are divided in the act; nor is it meant, that, because the exception is contained in the section containing the enactment, it must for that reason be negatived. That is not the meaning of the rule. The question is whether the exception is so incorporated with, and becomes a part of the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. It is the nature of the exception and not its location which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except' as they may be used in the statute. In either case the

only inquiry arises whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated it should be negatived, otherwise it is a matter of defence." It is said further in that opinion: "Cases excepted from the act necessarily do not define, qualify, or in any way affect the provisions of the enacting clause. It is a statutory provision overriding the whole act, and to those cases the act does not extend. In such cases exceptions need not be negatived, but are to be treated as matters of defence, and are to be relied upon by the respondent as such." The rule adopted in the Vermont case is stated and followed in Territory *v.* Scott, 2 Dak. 212, 6 N. W. Rep. 435; Johnson *v.* People (Colo.), 80 Pac. Rep. 133; People *v.* Priestley (Cal.), 118 Pac. Rep. 965; Ex parte Hornef, 154 Cal. 355, 97 Pac. Rep. 891, where it is given as the accepted rule; and in many other cases.

In Territory *v.* Scott, 2 Dak. 212, 6 N. W. Rep. 435, the statement of Justice Metcalf in Com. *v.* Hart, 11 Cushing 130, to the effect that all exceptions introduced into the enacting clause of a statute even by mere reference must be negatived in an indictment under the act is criticised in the following language by the Dakota court: "The necessity, in such cases, of negativing the exceptions in the indictment cannot arise from the mere fact that a reference to the excepted cases is made in the section containing the enacting clause. There is no greater reason in that rule than in saying that the exceptions of a statute must, in all cases, be negatived because they are placed in the section containing the enacting clause, as they may be divided in the act, a rule discarded by elementary authors as well as by adjudicated cases. The same rule should govern this class of cases which governs others, and the exceptions should be negatived only where they are descriptive of the offense, or define it; but, where they afford matter of excuse merely, they are to be relied upon in defence." In Com. *v.* Hill, 5 Gratt. (Va.), 682, it was said by the court: "It is not necessary to allege in an indictment that the defendant is not within the benefit of the provisos of the statute, though the purview should expressly notice them, as by saying that none shall do the act prohibited, except in cases thereinafter excepted." In Com. *v.* Young, 21 Pa. Dist. R. 548, on an indictment for a violation of the pure food law of May 13, 1909, P. L. 520, it was said by Judge Criswell, of Venango county: "A mere reference in the purview of an act to a pro-

viso, as in the act now under consideration, by such language as 'except as hereinafter provided' does not render a negativing of the exception necessary."

In Fleming *v.* People, 27 N. Y. 329, it is given as the correct rule that "there is no need to allege in an indictment that the defendant is not within the benefit of the provisos of the statute whereon it is founded, and this even as to those statutes which in their purview expressly take notice of the provisos, as by saying none shall do the thing prohibited, otherwise than in such special cases as are expressed in the act," and that "it is not necessary to allege that the defendant is not within the benefit of the provisos of the statute, though the purview should expressly notice them, as by saying that none shall do the act prohibited, except in the cases thereinafter excepted." It is said in DeGraff *v.* State (Okla. App.), 103 Pac. Rep. 538: "It is clear that the nature of the exception, rather than its location, must determine the question as to whether or not it must be negatived in the information or indictment. This is decisive of the question." In State *v.* Barrett (Ind.), 87 N. E. Rep. 7, it is said: "The negative of all provisos, exceptions, or exemptions, in the enacting clause, which are affirmative elements in the offense, must be averred; but if the defence is defined without the proviso or exception, and even though in the same section with the enacting clause or clause creating the offense, it does not require negation."

In 22 Cyc. 344, it is said: "It is necessary to negative an exception or proviso contained in a statute defining an offense where it forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted. Where, however, the exception or proviso is separable from the description, and is not an ingredient thereof, it need not be noticed in the accusation, being a matter of defence. As the rule is frequently stated, an exception in the enacting clause must be pleaded, but an exception in a subsequent clause or statute is matter of defence to be shown by the accused. But this is not an accurate statement, since the rule is to be determined, not by the position of the exception or proviso, but by its nature as constituting an element of the description of the offense. An exception in a subsequent section or statute may be so clearly connected with the description contained in a preceding section that it must be negatived; and, conversely, matter in the enacting clause may be so independent of the description that it will form a matter of defence." It is said further there that

"while it has been held that a reference from the enacting clause to a clause containing the proviso will demand that the latter be negatived," citing Com. *v.* Hart, 11 Cushing 130, and Com. *v.* Shelly, 2 Kulp 300, "such rule has not been generally followed, and a reference will not render it imperative to negative a proviso not a portion of the description." Citing State *v.* Doepke, 68 Mo. 208; State *v.* O'Gorman, 68 Mo. 179; State *v.* Abbey, 29 Vt. 60.

In State *v.* O'Gorman, 68 Mo. 179, it was held that where a statute required the clerks of courts, at the end of each year, to file a statement of the fees and emoluments received during the year, and made it a misdemeanor to fail to comply with that requirement, but excepted certain cases from the operation of the act, an indictment under the act need not show that the case was one of those excepted. In discussing the contention that the indictment should have negatived the exceptions, Judge Henry said: "The opinion of the court in the case of Com. *v.* Hart, 11 Cushing 130, sustains this view, but the question was not directly involved in that case, and in support of the position the court only referred to two English cases. To the contrary is Chitty, 1st Crim, Law, 283, 284. Bishop in his work on criminal procedure says the doctrine laid down by Chitty is that which is generally followed in the United States." Judge Henry then cited with approval the case of State *v.* Abbey, 29 Vt. 60. In State *v.* Doepke, 68 Mo. 208, where the defendant was indicted for stealing a rosewood coffin, and it was contended that certain exceptions in the statute should have been negatived, the ruling in State *v.* O'Gorman was followed, the opinions in the two cases having been written by the same judge at the same term of court. To these two cases may be added the decision of the same court three years later, in State *v.* O'Brien, 74 Mo. 549, in which it was said by Judge Hough: "Whenever an exception is contained in the section defining an offense, and constitutes a part of the description of the offense sought to be charged, the indictment must negative the exception, otherwise no offense is charged. But where, as in the case at bar, the section which defines the offense contains a proviso exempting a class therein referred to from the operation of the statute, it is unnecessary to negative the proviso, but the exemption therein contained must be insisted on by way of defence by the party accused." And the latter case was cited and followed by the same court in State *v.* Doerring, 194 Mo. 398, 92 S. W. Rep. 489.

It is said in 22 Cyc. 346: "A proviso which withdraws a case from the operation of the statute need not be negatived." It was said by Judge Ellsworth, of the Supreme Court of Errors of Connecticut, in State *v.* Miller, 24 Conn. 522: "The rule, as everywhere laid down, is that after words of general prohibition, whatever comes in by way of proviso, or exception, need not be negatived by the pleader, but must be set up by the accused. In this view it is immaterial whether the proviso, or exception, be contained in the enacting or subsequent sections, if it only follow a general prohibition; but if there be no general words of prohibition in the description of the offense, that is, the clause which describes and forbids the act intended to be prohibited, then it is only a limited prohibition, and the prosecutor must allege in the complaint the circumstances necessary to show that the things prohibited has been done." That case was under a statute enacting that no person should manufacture or sell intoxicating liquors, "except as hereinafter provided," and containing exceptions in subsequent sections.

In State *v.* Reilly, 95 Atl. Rep. 1005, Justice Bergen of the Supreme Court of New Jersey cited with approval the above-quoted statement of Judge Ellsworth, and adopted it as the law applicable to an exception withdrawing a certain class of persons from the operation of a preceding general prohibition. Other authorities to the same effect are State *v.* Powers, 25 Conn. 48; State *v.* McGee, 88 Conn. 353, 91 Atl. Rep. 270; Hale *v.* State, 58 Ohio St. 676, 51 N. E. Rep. 154; Krowenstrot *v.* State, 15 Ohio Cir. Ct. 73; Vincent *v.* State, 31 Ohio Cir. Ct. 343; Kitchens *v.* State, 116 Ga. 847, 43 S. E. Rep. 256; Blocker *v.* State, 12 Ga. App. 81, 76 S. E. Rep. 784; Langan *v.* People, 32 Colo. 414, 76 Pac. Rep. 1048; Fitch *v.* People (Colo.), 100 Pac. Rep. 1132; Koike *v.* People, 57 Colo. 414, 142 Pac. Rep. 415; State *v.* Norman, 13 N. C. 226; State *v.* Burton, 138 N. C. 577, 50 S. E. Rep. 215; State *v.* Connor, 142 N. C. 701, 55 S. E. Rep. 787; State *v.* Moore, 166 N. C. 284, 81 S. E. Rep. 294; State *v.* Goulden, 134 N. C. 746, 47 S. E. Rep. 450; State *v.* Long, 143 N. C. 670, 57 S. E. Rep. 349; State *v.* Hicks, 143 N. C. 689, 57 S. E. Rep. 441; State *v.* Stapp, 29 Iowa 551; State *v.* Curley, 33 Iowa 359; State *v.* Kendig, 133 Iowa 164, 110 N. W. Rep. 463; Stearns *v.* State, 81 Md. 341, 32 Atl. Rep. 282; Kiefer *v.* State, 87 Md. 562, 40 Atl. Rep. 377; State *v.* Knowles, 90 Md. 646, 45 Atl. Rep. 877; Parker *v.* State, 99 Md. 201, 57 Atl. Rep. 677; State *v.* Jenkins, 124 Md. 376, 92 Atl. Rep.

773; Weber *v.* State (Md.), 81 Atl. Rep. 606; People *v.* Butler, 268 Ill. 635, 109 N. E. Rep. 677; People *v.* Doschio, 157 Ill. App. 51; State *v.* Smith, 233 Mo. 242, 135 S. W. Rep. 465, 33 L. R. A. (N. S.) 179; State *v.* Humfeld, 182 Mo. App. 639, 166 S. W. Rep. 331; State *v.* Saak (Mo. App), 182 S. W. Rep. 1074; Eason *v.* State (Tex. Cr. App.), 154 S. W. Rep. 1196; Brown *v.* State (Tex. Cr. App.), 168 S. W. Rep. 861; Dankworth *v.* State (Tex. Cr. App.), 136 S. W. Rep. 788; Slack *v.* State (Tex. Cr. App.), 136 S. W. Rep. 1073; Doyle *v.* State (Tex. Cr. App.), 143 S. W. Rep. 630; Malone *v.* State, 179 Ind. 184, 100 N. E. Rep. 567; State *v.* Seeling, 126 Minn. 386, 148 N. W. Rep. 458; People *v.* Schultz, 134 N. Y. Sup. 293; State *v.* Flanagan, 25 R. I. 371, 55 Atl. Rep. 876; State *v.* Heffernan, 28 R. I. 477, 68 Atl. Rep. 364; Ex parte Davis (Nev.), 110 Pac. Rep. 1131; State *v.* Slover (La.), 54 So. Rep. 942; Bennett *v.* State (Miss.), 56 So. Rep. 777; Kopke *v.* People, 43 Mich. 41, 4 N. W. Rep. 551; Butler *v.* Perry (Fla.), 66 So. Rep. 150; State *v.* Snodgrass (Kan.), 152 Pac. Rep. 624.

With the foregoing principles of law in mind the motion before us may be disposed of without difficulty.

Section 1 of the act under which the indictment is drawn provides: "That, except as provided in § 8, no individual, partnership, or unincorporated association, shall hereafter engage, directly or indirectly, in the business of receiving deposits of money for safekeeping or for the purpose of transmission to another, or for any other purpose, without having first obtained from a board, consisting of the state treasurer, the secretary of the commonwealth, and the commissioner of banking, a license to engage in such business." Section 3, so far as applicable to this case, provides: "Any person, partnership, or unincorporated association, carrying on the business specified in § 1, without having obtained from the board a license therefor, or who, without such license, shall on any sign, letterhead, advertisement, or publication of any kind, use the word 'banking,' or any equivalent term, in any language, in connection with any business whatsoever, shall be guilty of a misdemeanor, and be punished as hereinafter provided."

Section 8 of the act provides: "The foregoing provisions shall not apply (1) to any corporation authorized to do business under the provisions of the banking laws of the commonwealth, to any corporation authorized to receive deposits under the laws of this commonwealth, nor to any association organized under the national banking act; nor (2) to any hotel-

keeper who shall receive money for safekeeping from a guest; nor (3) to any express company or telegraph company receiving money for transmission, provided such company is not engaged directly or indirectly in the sale of steamship tickets; nor (4) to any individual, partnership, or unincorporated association, who would otherwise be required to comply with the provisions of this act, who shall file with the commissioner of banking a bond, in the sum of $100,000, approved by the board as to form and sufficiency for the purpose, and conditioned as in § 1 prescribed, where the business is conducted in a city of the first or second class; and, if conducted elsewhere in the state, such bond shall be in the sum of $50,000; or, in lieu thereof, money or securities, approved by the commissioner of banking, of the same amounts; nor (5) to any individual, partnership, or incorporated association licensed under the laws of this commonwealth to do a brokerage business, holding a membership in a lawfully incorporated brokerage exchange, and doing only such banking as shall be incidental to such brokerage business; nor (6) to any person, firm, partnership, or unincorporated association, now engaged in business as private bankers, when such person, firm, partnership, or unincorporated association, and his or their predecessor, predecessors, or one or more of the members in such private banking institution, continuously and in the same locality, have conducted the business of private banking for a period of seven (7) years prior to the approval of this act, and such banking institution is not engaged in the sale, as agent or otherwise, of railroad or steamship tickets."

The bill of indictment alleges (1) that at the county aforesaid, and within the jurisdiction of this court, the defendant, H. Fusarini, on Dec. 6, 1915, "being then and there an individual, unlawfully, willfully and maliciously, did engage directly and indirectly in the business of receiving deposits of money for safekeeping and for the purpose of transmission to another person and persons, and for another purpose to the grand inquest unknown, without having first obtained a license from a board consisting of the state treasurer, the secretary of the commonwealth, and the banking commissioner, permitting him, the said H. Fusarini, so to do;" and (2) "that the said H. Fusarini, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully and willfully, without having first obtained from a board consisting of the state treasurer, the secretary of the commonwealth, and the commissioner of banking, a license permitting

him, the said H. Fusarini, to engage in the business of receiving deposit of money as a banker, and for the purpose of transmission to others, did use upon a sign, letterhead, advertisement, and another publication to the grand inquest unknown, the word 'banking' and its equivalent, in connection with the business of him, the said H. Fusarini, as a banker;" in each case, "contrary to the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania."

The bill does not negative any of the exceptions contained in § 8 of the act, and we are of opinion that it is not necessary that it should do so. The corporations mentioned in the exceptions would not come within the prohibitory clauses of the act, and as to them § 8 must be considered as merely for the purpose of excluding any ground of misinterpretation of the other portions of the act. The exceptions are not brought into § 3 of the act by reference as they are brought into § 1, but even if they had been, they would not need to be negatived in either of the counts in the indictment. The exceptions constitute no part of the description of either of the offenses charged. The clauses of the act describing the offenses, or acts forbidden, are composed of words of general prohibition, and are followed in an entirely different part of the act by a designation of the persons, firms, partnerships, associations, companies and corporations to which the general prohibitory clauses of the act shall not apply. That being true, the mere fact that reference is made to the exceptions in one of the prohibitory clauses is not sufficient, in our opinion, under the authorities cited, to require the exceptions to be negatived in the bill of indictment. The exceptions, following words of general prohibition, merely withdraw certain cases from the operation of the statute.

There is a line of cases which hold that where the subject-matter of the exceptions is peculiarly within the knowledge of the accused, such exceptions must be relied on wholly as a matter of defence, and that in such cases it is not necessary that the exceptions be negatived in the indictment or that the negative be proved by the prosecution at the trial, but we have not found it necessary to invoke the aid of those rulings in reaching a conclusion in this case.

And now, July 3, 1916, for the reasons set forth in the opinion herewith filed, the motion to quash the indictment is overruled and dismissed.

From D. W. McDonald, Esq., Uniontown, Pa.

Commonwealth, ex rel. Attorney-General *v.* Tradesmen's Trust Co.

Practice (C. P.)—Review of Supreme Court decree by inferior tribunal—Equity.

After a decision by the Supreme Court a bill of review cannot be entertained in the court from which the appeal is taken.

At the hearing before the auditors the plaintiffs submitted all the testimony which they desired to offer to sustain their right to a preference. They were fully heard by the auditors, by the court and by the Supreme Court. The conclusion of the auditors was affirmed by the Supreme Court. Plaintiffs petitioned for a rehearing, contending that certain testimony, which had been overlooked, manifestly showed a mistake of law and fact on the face of the record. Held, That the court below was powerless to grant further relief.

Bill asking for a review of decree of distribution. C. P. Dauphin Co. Commonwealth Docket, 1911, No. 219.

E. Spencer Miller, for plaintiffs.
Paxson Deeter, for defendant.

McCARRELL, J., June 12, 1916.—The plaintiffs, Franklin Spencer Edmonds and Charles I. Cronin, filed this bill in the above-entitled case, and as a part of the proceedings taken therein, against Percy M. Chandler, receiver of the Tradesmen's Trust Company, asking for a review of the decree of distribution made to them as creditors of said trust company. The company was dissolved Oct. 11, 1911, and a receiver duly appointed. As his accounts were filed they were referred to auditors, in pursuance of the act of 1909, for audit and distribution. These plaintiffs presented their claim, asserting that they had the right to preference over other creditors, because their claim was secured by an arrangement between the Tradesmen's Trust Company and one John Megraw, who was interested in a building operation in West Philadelphia, and had arranged with the trust company to finance the building operation, and had given as security for the moneys needed for that purpose ground rents and mortgages resting upon the various lots of ground included within the limits of the building operation. The plaintiffs became the purchasers of certain of these mortgages and ground rents. The agreement between Megraw and the trust company provided in substance orally that the funds received from the sale of ground rents and mortgages should be a trust fund in the hands of the trust company to secure the trust company for its advances of money and the protection of the securities which were to be sold by the trust company for the purpose of raising funds to complete the build-

ing operation. The building operation had not been completed at the time the trust company was dissolved in October, 1911, and these plaintiffs presented to the auditors appointed to make distribution of the money in the hands of the receiver their claim for the mortgages and ground rents which they had purchased and requested a preference over the general creditors in the distribution of the funds in the hands of the receiver because of the agreement to treat the proceeds of the ground rents and mortgages as a trust fund. The plaintiffs offered no special testimony for the purpose of showing their right to a preference, but the auditors examined fully into the matter and heard testimony upon the subject at various dates. They decided that no trust fund had been created, that the money received from sale of ground rents and mortgages covering the Megraw operation had been mixed with the general funds of the company and were a part of its general assets, and therefore refused to allow the plaintiffs a preference, but did allow them their proper percentage from the general fund. Exceptions were taken to the report of the auditors, which exceptions were overruled by this court and an appeal was taken to the Supreme Court by the plaintiffs, resulting in the affirmance of our decree of distribution. This opinion affirming our decree was delivered July 3, 1915. The present bill for a review was filed Oct. 19, 1915. An answer has been filed by the receiver and the matter is now before us for decision.

The plaintiffs contend that the testimony of Howard P. Page, quoted in part in their bill, shows a manifest mistake of law and of fact upon the face of the record, and that they are therefore entitled to a review. Their contention is that the testimony of Page shows that a trust fund was in existence covering the proceeds of the ground rents and mortgages connected with the Megraw operation, out of which the plaintiffs were entitled to be paid in preference to other creditors. This testimony was taken April 26, 1912, pp. 1492-1496, auditors' notes of testimony. No request was made to the auditors or to this court, based upon this testimony, for a specific finding that this testimony showed the existence of a trust fund, such as the plaintiffs asserted was established for their protection. No exception was taken to the auditors' finding specifically upon that ground, and no application was made either to the auditors or to this court for permission to file exceptions nunc pro tunc. That these plaintiffs knew of the existence of this testimony or by the exercise of reasonable diligence could have known of the same prior to the filing of

the auditors' report is reasonably certain. They were present by their counsel at the morning session of the auditors' meeting April 26, 1912. After the matter has been decided by the court of last resort are they entitled now to maintain a bill of review for the purpose of correcting the alleged mistake? This question has been considered by our appellate courts quite frequently. In Dennison *v.* Goehring, 6 Pa. 402, the plaintiffs had filed a bill, setting out that a trust was created for the benefit of one of the plaintiffs, A final decree was pronounced in favor of the plaintiffs and the defendant appealed to the Supreme Court. After hearing in the Supreme Court the decree of the court below was affirmed. Afterwards the defendant brought his bill of review in the lower court for alleged error in law appearing in the body of the decree. The lower court dismissed the bill of review, and from this decree of dismissal an appeal was taken. Justice Bell, page 403, uses the following language: "Thus, the only question presented for determination is, whether a bill of review for errors on the face of the record can be entertained in an inferior tribunal, after final decree of this court on appeal, affirming the decree appealed from."

Numerous decisions upon this subject are then referred to, and at page 405 appears the following: "These decisions are consonant with reason, and the rule they establish is absolutely necessary to prevent the confusion and mistake which would flow from practically transposing the relative positions of our courts—superior and inferior—an inconvenience which the occasional correction of mistake in a comparatively few cases would not compensate."

To the same effect is George's Appeal, 12 Pa. 260; also Felty *v.* Calhoun, 147 Pa. 27. The case of Ricketts *v.* Capwell, 241 Pa. 138, is in accordance with the other decisions, and holds that after a decision by the Supreme Court a bill of review cannot be entertained in the court from which the appeal was taken. The plaintiffs before the auditors and in this court asserted that they were entitled to a preference. The burden was therefore upon them to show by what authority they had this preference. Solicitors' Loan & Trust Co., 3 Pa. Super. Ct. 244. The auditors had before them the testimony of Mr. Page, pp. 1492-1496, upon the basis of which the right to this bill of review is based, and they had also other testimony upon the same subject, particularly the testimony of Lewis K. Brooks, former treasurer of the company. He testified distinctly and positively that the moneys received by

the Tradesmen's Trust Company were mingled with its own funds and became a part of the general assets. Referring to accounts which the trust company had with certain banks, which accounts were marked "Title Department," Mr. Brooks testified as follows (page 8 of receiver's answer):

"Q. Then do I understand that the purpose of having those title department accounts was not to keep trust funds which would go through the title department, separate and apart from the general funds of the company?

"A. No, it was not. That was hoped to arrive at some day, but that was not the intention when those accounts opened, nor were those accounts run for that purpose.

"Q. Then do I understand that the title department accounts which you have just been speaking of, in those accounts funds which belonged to other people who had transactions through the title department, were not deposited there for the purpose of keeping those funds intact and separate and apart from the funds of the company?

"A. No, they were not." (See pp. 8, 9, 10 of the receiver's answer.)

The testimony of Mr. Brooks upon this subject was clear and distinct and positive, and on that the auditors found that the funds received by the trust company from the securities connected with the Megraw operation had been mingled with the general funds of the company, and that no funds had been earmarked as belonging to a trust for the holders of these securities. The testimony of Howard Page, upon whom the plaintiffs now rely and which was taken long before the appeal to the Supreme Court was taken, does not, in our opinion, show that the testimony of Mr. Brooks is incorrect. It seems to be in entire harmony with it. See pp. 1495-1496. Mr. Page speaks of the account of the trust company with the Corn Exchange National Bank and with the Fourth Street National Bank. These accounts were both in the name of the Tradesmen's Trust Company, and showed that the banks respectively were indebted to the Tradesmen's Trust Company, title department, in the sums appearing in the respective accounts. Neither account, however, shows that the funds referred to therein was designated as a trust fund for the holders of the Megraw securities, or in any way indicated that the accounts showed anything else than the indebtedness of the banks to the trust company. The funds referred to in these accounts were not earmarked, and no one could tell therefrom that they were anything else than a statement of the money due from each bank

respectively to the trust company. Mr. Page undertakes to analyze and examine the deposits and ascertain from what source moneys credited therein were derived. He said:

"By analyzing the balances I find various points that they would transfer from this special deposit to the general deposit of the company certain sums of money in the most cases even amounts of $10,000, $15,000 or $25,000, indicating the amounts deposited in this account, and checking from the last deposit made I find that eight items, the last deposits which were made aggregating $13,658.49, which consisted of the proceeds of the sale of six ground rents."

There does not appear from any testimony to have been anything upon the books of the bank to indicate the source from which the money deposited came, and as already stated, the accounts in these respective banks were not marked as trust funds for the Megraw securities or any other particular securities. The testimony of Mr. Page seems to be consistent with the testimony of Mr. Brooks that these deposits were to the general credit of the trust company, and that the funds were mingled with other funds, so that they were apparently a part of the general assets of the trust company. At page 1496, Mr. Page testified: "I might say that all of the checks drawn upon the title department funds were made payable to the Tradesmen's Trust Company, and redeposited in their general funds."

This is in exact harmony with the testimony of Mr. Brooks. See pp. 9 and 10 of answer. At the time of the hearing before the auditors, the plaintiffs submitted all the testimony which they desired to offer to sustain their right to a preference. They were fully heard upon this subject by the auditors, by this court and by the Supreme Court. The auditors had before them all the testimony, both of Mr. Brooks and Mr. Page. Mr. Page was a certified public accountant, employed by the receiver to examine the books of the trust company, and he was called to testify before the auditors as to whether the receiver had charged himself in the account with all the money received by him for the trust company. He had never been an officer of the trust company. Mr. Brooks, the treasurer of the company, testified positively that no trust fund had ever been created or set aside, although the company expected to do so in the future. The auditors considered all this testimony and concluded that "the moneys received by the trust company were mingled with its own funds and became a part of the general assets. Appellants have failed to identify the funds in such manner as to entitle them to follow and claim

it as a trust fund to the exclusion of other creditors."

This conclusion has been affirmed by the Supreme Court in opinion of Justice Frazer in Appeal of Cronin et al., July 3, 1915.

We are not satisfied that this conclusion reached by the Supreme Court works any injustice to the plaintiffs. We are of opinion that they are not now entitled to a bill of review. An appeal to this court for a rehearing on the ground of the alleged after-discovered evidence necessarily must have been refused for the evidence suggested as after-discovered, was already on the record and plaintiffs must be conclusively presumed to have known of its existence. Now after the whole matter has been considered and decided by our court of last resort, we are powerless to grant further relief. There are perhaps a thousand creditors of the Tradesmen's Trust Company whose claims are being held up because of the proceedings for the distribution of the funds in the hands of the receiver, and to permit the filing of the bill of review at this late date under the circumstances existing would be without precedent and would unnecessarily and improperly interfere with the rights of other creditors, who are not made parties to the proposed bill of review.

After carefully considering all the matters which have been brought to our attention, it is ordered, adjudged and decreed that the present bill of plaintiffs, presented as a bill of review, be and the same is now dismissed at their costs.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Thompson's Receivership.

Receivers—Private individual—Equity—Practice (C. P.)—Parties.

The appointment of receivers for the estate of an individual is legal, where the equities of the case are such as to require it, under § 13 of the act of June 16, 1836, P. L. 784, giving to the courts of common pleas of Pennsylvania the powers and jurisdiction of courts of chancery, so far as relates to: "(5) The prevention and restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals."

The general rule is, in the absence of statutory provision, that only judgment creditors are entitled to the appointment of receivers for the estate of their debtor. But that is because, until judgment, there is no legal adjudication that the defendant is indebted to the claimant; and until after judgment and the return of an execution unsatisfied a creditor cannot be said to have exhausted his remedy at law. The

fact that a claimant is not a judgment creditor is a matter to be set up by the defendant. It is a defence that may be waived; and if waived by the defendant, as by the filing of an answer admitting the truth of the allegations of a claimant's bill, it cannot be taken advantage of by other creditors.

A decree of the court appointing receivers and restraining creditors from issuing executions on judgments obtained on simple promissory notes, without leave of the court first obtained, is not an impairment of the obligations of contracts. It is but a suspension of remedy, and the time during which the suspension may continue is a matter within the legal discretion of the court under the equities of the case.

It is not the practice in cases of this kind to make all creditors parties to the bill, where the creditors are so numerous and widely scattered as to make it impracticable if not impossible to ascertain all of them and make them parties. Notice to creditors before the appointment of receivers is necessary only when there is a rule of court requiring it.

After receivers have been appointed on a bill filed by unsecured creditors, the privilege of intervening, by another creditor of the same class, is not a matter of right, but is within the legal discretion of the court. Unless some equity is shown in favor thereof, the privilege will be refused.

Rule to show cause why petitioning creditor should not be permitted to intervene pro suo interesee, and motion for modification of court's decree so as to permit petitioner to have execution on judgment. C. P. Fayette Co. In equity, No. 744.

Charles A. Tuit and *H. S. Dumbauld,* for rule and motion.
Samuel Untermyer, J. M. Freeman and *W. J. Sturgis,* for plaintiff creditors in bill.

VAN SWEARINGEN, P. J., Aug. 1, 1916.—The question now for decision in this case is whether or not the appointment of the receivers was valid. The receivers were appointed on a bill in equity filed by two of the unsecured creditors of the defendant, an individual, and the question before us is raised by another of the unsecured creditors, who has filed a petition and taken a rule on the plaintiffs and the defendant in the bill, and on the defendant's receivers, to show cause why the petitioner should not be permitted to intervene in the proceeding pro suo interesse. With the petition there was filed a motion by petitioner's counsel for a modification of the court's decree, entered in connection with the appointment of the receivers, so as to allow the petitioner to have execution on a judgment recovered against the defendant since the receivers were appointed, and to proceed thereon with a sale of so much of the defendant's property as may be necessary to satisfy the execution.

The bill upon which the receivers were appointed alleged,

in substance, that the defendant was indebted to the plaintiff, Fuller Hogsett, in the sum of $90,000, and to the plaintiff, David L. Durr, in the sum of $400,000, which indebtedness was evidenced by simple promissory notes; that the defendant had no counter-claims or set-offs thereto, and was not entitled to any deductions of any kind whatsoever; that said indebtedness was wholly unsecured, and that the defendant, while having ample equitable assets, was without ready money with which to pay said indebtedness; that the assets of the defendant, consisting of more than one hundred thousand acres of undeveloped coal, three thousand acres of surface lands, stocks and bonds in coal companies, rolling mill plant sites, residence and business properties, and other real and personal estate, in Pennsylvania and elsewhere, were of a fair market value of $70,000,000, and that the defendant's indebtedness was about $22,000,000, of which $7,000,000, including the indebtedness of the plaintiffs, was unsecured, and $15,000,000 was secured by mortgage or pledge of practically all of the defendant's property, leaving nothing but equities, or surplus values over and above the amount of the secured indebtedness, out of which the indebtedness of the plaintiffs and other unsecured creditors could be paid, and out of which equities the plaintiffs could not by executions at law realize payment of their claims; that in many instances the defendant was associated with other persons who owned undivided interests in the tracts of coal, parts of which were owned by the defendant, such persons so associated with the defendant as holders of undivided interests in said coal tracts numbering more than four hundred; that the defendant already was in default in the payment of interest on a part of his obligations for which his assets were mortgaged or pledged, that he did not have the ready money with which to pay the same, and that he would be unable to meet the interest on other obligations rapidly maturing; that suits had been brought and judgments recovered against the defendant by certain of his creditors, and that executions thereon were threatened, and that the situation was such that there was great danger that the assets of the defendant would be sold at great sacrifice, resulting in the loss and destruction of his equities therein, which constituted the only source of payment of the claims of the plaintiffs and other unsecured creditors, unless the court by injunction should restrain said sales and appoint receivers to take charge of the assets of said estate and administer the same so that they might be sold without unnecessary sacrifice or loss, in the interest and for the benefit

of all of the defendant's creditors; that owing to the character of the defendant's assets, consisting mainly of coal properties, the large acreage and the enormous value thereof, and to the general depressed financial conditions then existing, it was difficult then to sell or dispose of said assets, and that at forced or summary sales enormous loss and sacrifice thereof would result, contrary to equity and justice and prejudicial to the rights of the plaintiffs and other unsecured creditors of the defendant, and that, owing to the enormous amount of indebtedness for which said assets were pledged, it would be impossible for the plaintiffs to raise sufficient money to protect themselves by redeeming the same, but that if the assets of the estate could be conserved and saved from sacrifice and sold subject to the order of the court, which could be done without prejudice or damage to the secured creditors, they would, within a reasonable time, bring sufficient money to pay all of the defendant's debts, with interest, and leave a considerable sum in addition thereto; that said equities, or surplus values over and above the amount of the secured indebtedness of the defendant, if properly conserved and saved from sacrifice, were more than sufficient to pay all of said unsecured indebtedness, being of the value of $48,000,000. The defendant, in an answer filed with the bill, admitted all of these allegations to be true.

The bill prayed for an injunction enjoining and restraining the defendant's creditors, and other persons holding any of his assets, from selling or disposing of the same, except subject to the orders of the court, and for the appointment of receivers to take charge of all of the defendant's property, and to manage and dispose of it, under orders of the court, free from the interference of creditors, and that at such reasonable time as might appear proper the court would order a sale of the defendant's assets, or of so much of his property as might appear to be necessary, and direct the application of the proceeds thereof to the payment, first, of the indebtedness for which said assets were pledged, and thereafter to the payment of the indebtedness of the unsecured creditors. On Jan. 19, 1915, we appointed the receivers, in accordance with the prayer of the bill, and by decree, inter alia, enjoined and restrained all the creditors of the defendant from bringing, and also from further prosecuting, suits or actions at law or in equity against the defendant, from entering judgments, and from issuing executions or attachments against the defendant, or any of his property in the hands of his receivers, without leave of court first obtained. On Oct. 19, 1915, for the reasons stated in an

opinion then filed, we vacated and revoked that part of our former decree enjoining and restraining the defendant's creditors from entering actions at law or suits in equity and prosecuting the same to judgment. Hogsett *v.* Thompson, 43 Pa. C. C. 672; 63 P. L. J. 616. Thereafter, Elizabeth Kremer, administratrix of the estate of Albert C. Kremer, deceased, the petitioner now before us, recovered a judgment against the defendant for the sum of $3,698.98, being a balance due on a simple promissory note given by the defendant to the said Albert C. Kremer, in his lifetime for the sum of $4,000, dated Feb. 10, 1913, and payable in one year from that date. In an answer to the rule taken by the petitioner it is made to appear that there are nearly two thousand creditors of the defendant, about one fourth of them being secured creditors and the other three fourths having no security whatever for their claims. Practically all of the unsecured creditors have recovered judgments against the defendant. It develops now that the unsecured indebtedness of the defendant amounts to more than $13,000,000, instead of $7,000,000, as thought by the plaintiffs at the time the bill was filed.

The petitioner does not attempt to show any equitable reason for her desire to have execution on her judgment, but stands squarely on what she alleges to be her legal rights. She avers that the decree of the court appointing the receivers was null and void. If that be true, then we must grant to all the other unsecured creditors of the defendant the same privilege demanded by this petitioner, with the result that this vast estate, worth more than twice the amount of the defendant's total indebtedness, must be sacrificed and sold for an amount probably not equal to the secured indebtedness, and made to produce nothing whatever for the creditors whose claims are unsecured. But is it true? We are of opinion that it is not. The contentions of the petitioner are, in substances, (1) that courts of equity in Pennsylvania have no jurisdiction to appoint receivers for the estates of individuals; (2) that in any case only judgment creditors can maintain a bill for the appointment of receivers; (3) that the decree of the court appointing these receivers and restraining the petitioner from having execution on her judgment constituted a suspension of the statutory remedies for the enforcement of the legal obligations of petitioner's contract for an indefinite and therefore for an unreasonable period of time, and was an impairment of the obligation of petitioner's contract with the defendant, contrary to her constitutional rights; and (4) that

the petitioner was not made a party to the proceeding, and was without notice thereof, and should be permitted now to intervene for the purpose of protecting and enforcing her legal and constitutional privileges.

1. It was in the English court of chancery that the remedy by appointment of receivers had its origin. The remedy was the exercise of a power in aid of a proceeding in equity, and grew out of the inherent powers of a court of chancery to afford relief where the remedies to be obtained in the courts of ordinary jurisdiction were inadequate. Power *v.* Grogan, 232 Pa. 387. It was from the example of the early courts of the Romans that there grew up the high court of chancery in England, as the exponent of the conscience of the king. We have no separate courts of chancery in Pennsylvania, but equitable jurisdiction is administered through our courts of common pleas. Equity is a well recognized branch of our Pennsylvania jurisprudence intended to reach those specially meritorious cases which could not otherwise escape the strict and unbending rules of law. It is that which, appealing especially to the conscience of the court, permits the court to administer that relief in exceptional cases which could not be extended were the general and fixed rules of law to be strictly enforced. Blackstone says equity is the correction of that wherein the law by reason of its universality is deficient. Broadly speaking, equity is a part of the law, but the equitable justice administered in courts of chancery is different from the legal justice administered in courts of law.

It may be conceded, as contended by the petitioner, that courts of equity in Pennsylvania do not possess the general powers of a court of chancery, but only such equitable powers as have been conferred upon them by statute. Pitcairn *v.* Pitcairn, 201 Pa. 368, and cases there cited. By § 13 of the act of June 16, 1836, P. L. 784, relative to the city and county of Philadelphia, and extended to the other counties of the state by the act of Feb. 14, 1857, P. L. 39, there was given to the courts of common pleas of Pennsylvania the powers and jurisdiction of courts of chancery, so far as relates to: "(V) The prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interest of the community, or the rights of individuals." Notwithstanding it was said by Justice Sergeant, in the early case of Gilder *v.* Merwin, 6 Wharton 522, that "we would not be justified in enlarging our jurisdiction beyond the plain and obvious meaning of the legislature," it has been stated re-

peatedly in a long line of cases since that time that the equitable jurisdiction conferred by the statute is a valuable and indispensable one and ought to be extended by every interpretation of which the words are susceptible, as the exercise of the jurisdiction is found to be necessary to the furtherance of justice in a great variety of instances in which the principles and practice of the courts of law fail to afford adequate relief. Wesley Church *v.* Moore, 10 Pa. 273; Kirkpatrick *v.* McDonald, 11 Pa. 387; Yard *v.* Patton, 13 Pa. 278; Gump's Appeal, 65 Pa. 476; Mortland *v.* Mortland, 151 Pa. 593; Wagner *v.* Fehr, 211 Pa. 435. In Gass's Appeal, 73 Pa. 39, it was said by Justice Agnew: "The disposition of this court has been not to deal with these equity powers in a narrow spirit, but to make them serve all the purposes of justice to which they can be made applicable." The cases hold that the equitable jurisdiction to restrain "acts contrary to law" under the statute includes also acts contrary to equity, inasmuch as equity in a general sense is a part of the law. Stockdale *v.* Ullery, 37 Pa. 486; Lyon's Appeal, 61 Pa. 15; O'Hara *v.* Stack, 90 Pa. 477. The question before us then is whether or not the step which the petitioner now desires to take, and which we have restrained, that is, the issuance of an execution on her judgment, to be followed by a sale of sufficient of the defendant's property to satisfy the execution, and by a flood of executions by other creditors, resulting as it probably would in the absolute waste and destruction of all the equities of this estate, is an act which may be restrained by a court of equity as being contrary to law or equity and prejudicial to the rights of individuals. It may be conceded that it is not, technically speaking, an act contrary to law, but it certainly would be an act contrary to equity, under the facts of this case, and it certainly would be prejudicial to the rights of all the other unsecured creditors of this defendant. Never have we seen a case, in the books, at the bar, or on the bench, where an act of this character, if unrestrained, apparently would be more prejudicial to the rights of other individuals than the act now proposed by this petitioner. The question must be determined by the equities of the case, and not upon abstract principles of law.

The other unsecured creditors of this defendant not only have an interest in the equities of this estate, or surplus values over and above the amount of the secured indebtedness, but they have an equitable right to have those equities conserved and protected from sacrifice for their benefit. That principle

was recognized in Sage *v.* Memphis & Little Rock R. R. Co., 125 U. S. 361, where a receiver of a railroad company was appointed at the suit of an unsecured creditor for the purpose of preserving assets from being sacrificed by execution sales, and where, in speaking of the appointment of the receiver, it was said by Justice Harlan: "This was done because in the opinion of the court the appointment of a receiver was necessary to protect the plaintiff's interests and rights." In reference to that case it is said in Bispham's Equity (8th ed.), § 527, p. 735: "That was a case in which the bill alleged that the property of the company was so heavily mortgaged that if the plaintiff should attempt to enforce payment of his debt by seizure and sale on execution, there would be no bidders at more than a nominal amount, whereas, if the property were placed in the hands of a receiver a surplus for the payment of the plaintiff's debt would result. It was held that these averments were sufficient to give the court the jurisdiction claimed, and that the facts of the case justified its exercise." In the Metropolitan Rwy. Receivership, 208 U. S. 90, which was before the court on petitions to intervene and rules to vacate the receivership, it was said by Justice Peckham, in speaking of the appointment of the receivers: "There are cases—and the one in question seems a very strong instance—where, in order to preserve the property for all interests, it is a necessity to resort to such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims. We have no doubt, if unnecessary delays shall take place, the court would listen to an application by any creditor, upon due notice to the receivers, for orders requiring the closing of the trust as soon as might be reasonably proper, or else vacating the orders appointing the receivers. The rules are discharged and the petitions dismissed." The bill filed by the plaintiffs in the present case is in the nature of a creditors' bill, which is a well recognized subject of equity jurisdiction in Pennsylvania. In 12 Cyc. 49, it is said: "It is a well established practice to appoint a receiver of the defendant's property in aid of a creditor's bill. Such appointment is discretionary with the court, and is usually made as a matter of course where the property is in danger of waste."

In Kuhn *v.* Martin, 26 N. J. Eq. 60, there was a creditor's

bill with a prayer for the appointment of a receiver to sell, under the direction of the court, a lot of oyster beds, and the oysters therein, situate in Amboy Bay, in New Jersey. The beds were advertised for sale on execution, together with the right to take oysters therefrom or to plant them thereon. There was no information as to how many oysters were in the beds, but it was known that they were of great value. The court said that to sell the oysters with the beds, without knowledge as to the quantity which might reasonably be expected to be found there, would be to sacrifice the property. The court said further: "In view of the peculiar character of the property, and the sacrifice which appears to be inevitable in case of sale by the sheriff, it is the duty of the court to take charge of and sell it. Besides, it is liable to depreciate and should be protected. It can be sold to the best advantage under the direction of this court. A receiver will therefore be appointed. There are other judgment creditors whose lien is subsequent to that of the complainant. Their interest may be protected here." In Ross & Gauss *v.* Bevan, 10 Md. 466, the plaintiffs recovered judgments against one of the defendants, on which judgments executions were issued and levies made upon certain store goods. The other defendant undertook to take the goods on a chattel mortgage to prevent a sale thereof to satisfy the judgments. It was alleged by the plaintiffs that the goods were worth more than enough to pay the mortgage, and that the debtor had no other property out of which the judgments could be satisfied. The lower court restrained the mortgagee from taking the property, and appointed a receiver. The court of appeals in affirming the action of the lower court said the bill undoubtedly made a good case.

In each of the last two cases cited the appointment of the receiver was for the estate of an individual. There are many other cases in the books where receivers for the estates of individuals have been appointed, but the questions at issue in those two cases were similar to those in the case at bar. The petitioner here contends that there is no specific statutory authority in Pennsylvania for the appointment of receivers for the estates of individuals. That is true. But neither is there any specific statutory authority for the appointment of receivers for the estates of corporations. And yet the petitioner concedes, or at least does not deny, that if the owner of the estate now under consideration were a corporation, and the conditions were the same, a court of equity would have jurisdiction to appoint receivers. By § 13 of the act of June 16,

1836, P. L. 784, it is provided that the several courts of common pleas "shall have the jurisdiction and powers of a court of chancery so far as relates to the supervision and control of all corporations other than those of a municipal character, and unincorporated societies or associations, and partnerships." Nothing is said in the statute about the appointment of receivers, yet "it is too late at this day to challenge the general authority of a Pennsylvania court in equity to appoint receivers for a financially embarrassed corporation." Blum Bros. *v.* Girard National Bank, 248 Pa. 148. In such cases the appointment of receivers is but an incident to the jurisdiction of the court, and is one of the methods by which the jurisdiction is exercised. So, also, in our opinion, if the allegations of a bill against an individual show such conditions as to give a court of equity jurisdiction over his estate, the court may appoint receivers for the estate as a means of carrying its jurisdiction into effect. "A receiver is the officer, the executive hand, of a court of equity. His duty is to protect and preserve, for the benefit of all persons ultimately entitled to it, an estate over which the court has found it necessary to extend its care." Schwartz *v.* Keystone Oil Co., 153 Pa. 283. We are of opinion that on the allegations contained in this bill, which were admitted by the defendant to be true, this court had jurisdiction to exercise the powers of a court of chancery over this estate, even though its owner was an individual, and to enter the decree that was made appointing receivers.

2. It is contended by the petitioner that because the plaintiffs in the bill were not judgment creditors of the defendant at the time the bill was filed, and had no liens on the defendant's property, there was a want of competent parties plaintiff, and that for that reason the proceedings on the bill cannot be sustained. In support of that proposition counsel cite High on Receivers (4th ed.), § 406, p. 590; Slover *v.* Coal Creek Coal Co. (Tenn.), 68 L. R. A. 852. The general rule is, in the absence of statutory provision, that a general creditor before judgment is not entitled to an injunction or the appointment of receivers against his debtor upon whose property he has acquired no lien. But that is because, until judgment, there is no legal adjudication that the defendant is indebted to the claimant, and until after judgment and the return of an execution unsatisfied a creditor cannot be said to have exhausted his remedy at law. The fact that a claimant is not a judgment creditor is a matter to be set up by the defendant. It is a defense that may be waived: and if waived by the de-

fendant, it cannot be taken advantage of by other creditors. Hollins *v.* Brierfield Coal & Iron Co., 150 U. S. 371; Grand Trunk Rwy. Co. *v.* Central Vermont R. R. Co., 85 Fed. Rep. 87; Enos *v.* New York & O. R. Co., 103 Fed. Rep. 47; Penna. Steel Co. *v.* New York City Rwy. Co., 157 Fed. Rep. 440; s. c. again in 198 Fed. Rep. 721; Metropolitan Rwy. Receivership, 208 U. S. 90. See also Case *v.* New Orleans & Carrollton R. R. Co., 101 U. S. 688. The case of Artman *v.* Giles, 155 Pa. 409, cited by counsel for the petitioner, was not a proceeding for the appointment of receivers, and is not applicable to this case. In the case at bar the plaintiffs alleged in their bill, inter alia, that they were contract creditors of the defendant in the amounts therein stated. The defendant by answer filed admitted the allegations of the bill to be true, and expressly consented to the appointment of receivers. The petitioner, therefore, has no standing to question the legality of the appointment of the receivers on the ground that at the time the bill was filed the plaintiffs were not judgment creditors of the defendant. There is no allegation in the petition of any unlawful purpose in the filing of the bill, and the case cannot be affected by the statement of the court in Texas & Pacific Rwy. Co. *v.* Gay (Tex.), 26 S. W. Rep. 599, cited by petitioner's counsel, that "when a receiver is appointed by agreement between the parties to a suit in order to accomplish a purpose not lawful in itself, the receiver must be considered the agent of the owner of the property."

3. The decree of the court appointing the receivers and restraining the petitioner from issuing execution on her judgment without leave of the court first obtained was not an impairment of the obligation of petitioner's contract with the defendant. The only effect of our restraining order was to postpone for a time the collection of petitioner's debt by execution and sale of defendant's property. In the case of a naked promise to pay a sum of money at a particular day, time is not of the essence of the contract, for the reason that delay admits of adequate compensation ascertained by law in the payment of interest. Remington *v.* Irwin, 14 Pa. 143; Decamp *v.* Feay, 5 S. & R. 323. As long ago as 1844, in Chadwick, *v.* Moore, 8 W. & S. 49, it was held by the Supreme Court of Pennsylvania, in an opinion written by Chief Justice Gibson, that a statute which suspends for a reasonable time execution of a judgment on a previous contract is not an impairment of the obligation of the contract. A number of years later, in Huntzinger *v.* Brock, 3 Grant 243, Justice Strong in

announcing the same principle said: "This is the doctrine of Chadwick *v.* Moore, 8 W. & S. 49, and we are not now ready to depart from it." And it never has been departed from. In Breitenbach *v.* Bush, 44 Pa. 313, it was held that § 4 of the act of April 18, 1861, P. L. 409, which enacted that no civil process should issue or be enforced against any person mustered into the service of the state or of the United States, during the term for which he should engage in such service, nor until thirty days after his discharge therefrom, and providing that the operation of all statutes of limitation should be suspended upon all claims against such person during such term, was not unconstitutional. The court held that the act applied to all forms of execution as well as to original and mesne process, and in the course of the opinion it was said by Justice Woodward: "We have often said that stay laws, exemption laws, and limitation laws, are ordinarily constitutional, though applied to existing and prior contracts, and we have followed the distinction which prevails in the Supreme Court of the United States, between the obligation of the contract and the remedies furnished by law for enforcing the obligation. We understand the rule to be that whilst the legislature may not impair the obligation they may modify the remedy. The legislature cannot impair the obligation of any contract, but a suspension of remedies for a definite and reasonable time does not transcend the legislative faculty, because it impairs not the obligation of the contract." To the same effect are Coxe's Executor *v.* Martin, 44 Pa. 322; Thompson *v.* Buckley, 3 W. N. C. 560; Weist *v.* Wuller, 210 Pa. 143; Long's Appeal, 87 Pa. 114; Alton's Est., 220 Pa. 258; Oshkosh Waterworks Co. *v.* City of Oshkosh, 187 U. S. 437. There is nothing contrary to this in Galey *v.* Guffey, 248 Pa. 523, which merely holds, in accordance with the earlier cases, that where the parties contract concerning the remedy, the remedy becomes part of the obligation of the contract and cannot be affected either by legislative act or judicial decree.

In Thompson *v.* McCleary, 159 Pa. 189, it was said that after the possession of property has passed into the hands of receivers, such possession will not be interfered with by a judgment confessed and execution issued thereon. It is said in 8 Cyc. 1015, on authority of the many cases there cited: "Execution pertains to the remedy, and the manner of levying it may be modified by legislative act. Statutes thus modifying the mode of levying, whether enlarging or restricting a creditor's right, are constitutional." If this were not true

what would become of the national bankruptcy statutes now in force, the many insolvent acts, and our laws relative to the settlement of decedents' estates?

The cases hold that a suspension of remedies by act of the legislature must be for a definite and reasonable time. A distinction is to be observed between a suspension of remedies by act of the legislature and a suspension by a decree of a court of equity. Only at the time the act is passed can the legislature fix the time during which the suspension shall continue, but it is possible for a court of equity at any time to terminate or extend the period of suspension as conditions develop. In an equitable proceeding like that now before us it would be impossible, with any degree of satisfaction to the court or in justice to the parties interested, to determine definitely at the time the restraining order is made just how long it shall continue. A period of time then fixed might be too long or too short, depending entirely upon the developments in the proceeding. The continuance of the time must be left largely to the legal discretion of the court having the matter in charge. In our decree in the present case we restrained executions "without leave of this court first obtained." Under that order an application for leave to have execution may be made by any creditor at any time, and can be disposed of then as conditions warrant. We are of opinion that neither our decree, nor what we have said here, is in conflict with the spirit of the decisions in Bunn, Raiguel & Co. *v.* Gorgas, 41 Pa. 441, and Penrose *v.* Erie Canal Co., 56 Pa. 46, cited by petitioner's counsel.

It is contended by the petitioner that an injunction will not lie merely to prevent the collection of a valid debt, citing Gilder *v.* Merwin, 6 Wharton 522; Winch's Appeal, 61 Pa. 424; Pairpoint Mfg. Co., *v.* Phila. Optical & Watch Co.. 161 Pa. 17; Hoopes & Townsend Co. *v.* Ebel, 37 Pa. Super. Ct. 459. To which may be added Bell *v.* R. D. Wood & Co., 181 Pa. 175. The petitioner's proposition of law ordinarily is correct. "But when the process of the law is being used against right and justice to the injury of another, the right of the latter to invoke the intervention of a court of equity cannot be doubted." Natalie Anthracite Coal Co. *v.* Ryon, 188 Pa. 138. "A receiver will not be appointed or an injunction granted for the mere purpose of delaying a creditor in the pursuit of an action to recover a debt, when it is apparent that there is nothing more in the case than a desire to accomplish that end, or when no good, general purpose would be

served by the interference of a court of equity. In such instances all parties are left to their ordinary remedies at law. But many of our decisions recognize the right of a court of equity, in a proper case, to appoint receivers for a financially embarrassed trading corporation, and, if it proves insolvent, to distribute the assets for the benefit of creditors and others ultimately entitled thereto." Blum Bros. *v.* Girard Nat. Bank, 248 Pa. 148. It was said further in that case that "when the receivers are designated the assets of the corporation pass into the custody of the law to the same extent as in the case of a decedent's estate."

In Bispham's Equity (8th ed.), § 578, p. 783, it is said: "Receivers are now appointed not only where the dissolution of a company is contemplated, but also where the object is to relieve the corporation, temporarily, from the pressure of current obligations in order that its business may be thereafter continued. Railroad and other corporations are now placed under the protection of a receivership in not a few cases where there has been no default upon the interest on bonded obligations, but simply an inability to meet ordinary and unsecured debts. This is done in times of financial disturbance when collections are difficult and money cannot readily be had and the assistance of a court of equity is sought, not by hostile creditors with a view of winding up the company, but by friendly creditors with the assent of the corporation itself, in order that its assets may not be sacrificed by executions, and so that its value as a going concern may be preserved. The equity upon which the jurisdiction of the court is based, in such cases, is plainly different from that upon which it rests in ordinary cases of receiverships, and the exercise of this power by courts of chancery is a striking illustration of the progress which is being made, one might almost say, day by day in this branch of the law. What limits are to be placed upon this exercise of chancery powers, and whether and to what extent the jurisdiction in question is to be exercised in favor of ordinary partnerships and of individuals, as well as on behalf of corporations and joint stock associations, are questions of great importance, and which have not, it is believed, been settled by courts of last resort."

If receivers may be appointed and restraining orders made without constitutional violation in order that the assets of a corporation may not be sacrificed by execution, it is difficult to see why the same may not be done without the violation of any constitutional provision in the protection of the equi-

able rights of the unsecured creditors of an individual against an execution for which no equitable reason has been shown in a case like the one now before us. In no decided case and in no text-book has any distinction been attempted to be drawn between the granting of restraining orders and the appointment of receivers in the estates of corporations and in those of individuals. It is more common to appoint receivers for estates of corporations than for estates of individuals, due to the fact that so large a part of the business of the country is conducted through corporations, which often have big assets and enormous debts. But the fact that it is unusual to appoint receivers for the estate of an individual is no reason why it should not be done in a proper case where large assets can be saved from sacrifice in no other manner and the equitable rights of unsecured creditors can be protected in no other way.

4. It was not required that the petitioner be made a party to the bill. It never has been the practice in cases of this kind to make all the creditors parties to the bill where the creditors are so numerous and widely scattered as to make it impracticable if not impossible to ascertain all of them and make them parties. Neither was there any rule at the time this bill was filed requiring notice to be given to all creditors before receivers should be appointed. The privilege of intervening in a case like this is not one of right, and this petitioner has shown no equity entitling her to such privilege. She alleges no equity whatever entitling her to have execution on her judgment at this time, under the circumstances of this case, unless it be the allegations that "the estate of the said defendant is rapidly being consumed by interest and taxes, the collateral securities of the said J. V. Thompson are being and have been sold at a sacrifice, attachments are being issued in other jurisdictions, and the restraining of your petitioner from issuing executions or attachments or any other writ for the collection of the judgment aforesaid may result in the estate of which she is the administratrix suffering irreparable loss." All of these allegations are specifically and positively denied by answer filed, and no evidence has been offered in support of the petitioner's averments. It is alleged in the answer to the rule that the receivers duly qualified in accordance with the order of the court appointing them, that they gave the bond required by the court at the time of their appointment, that they have taken possession and control of all of the assets of the defendant, so far as the same have come to their knowledge, that they are conserving the same and are proceeding and endeavor-

ing to sell the property as rapidly as possible in accordance with the order of the court, so that the proceeds thereof may be applied to the claim of the petitioner and the claims of the other creditors legally entitled thereto, and that to permit the assets of the estate to be sold by the sheriff, or in other summary proceedings, would result in an unnecessary sacrifice thereof and in a great loss to the unsecured creditors. The answer restates all the material allegations of the bill, and asserts the continuance of the conditions existing at the time the bill was filed. The answer alleges that since the filing of the bill fourteen hundred and sixty-five in number of the defendant's unsecured creditors, including the plaintiffs, have secured judgments on their claims, to an aggregate amount of $13,795,213.15.

It appears further by the answer that on or about Jan. 31, 1916, a committee composed of five leading business men and lawyers of the community was formed on behalf of the defendant's creditors, which committee had and has for its purpose the reorganization and adjustment of the defendant's affairs and the protection of his creditors both secured and unsecured; that this committee appointed depositaries in Uniontown and Pittsburgh for the purpose of securing the deposit of all of the claims of the unsecured creditors of the defendant in accordance with a deposit agreement between the committee and the creditors; that unsecured claims aggregating $13,580,785.36, amounting to ninety-eight per cent. of all the unsecured claims of creditors, have been deposited with the committee under the deposit agreement; that the committee has been and is now actively engaged in the work for which it was organized; and that the granting of the prayer of this petitioner would prevent the committee from carrying out its plans for the rehabilitation of the defendant's properties and the protection of his creditors, including this petitioner, and would cause great loss and confusion in the administration of the estate.

None of the matters of fact alleged in the bill, or in the answer to the rule, are traversed or denied by the petitioner. We must take the facts to be as therein made to appear. We can conceive of no injury that can come to this petitioner for the present by reason of not being permitted to have execution on her judgment, while we can see enormous loss to all of the unsecured creditors, including the petitioner, as the result of the granting to the petitioner of the privilege for which she prays. The controversy is not between debtor and credit-

ors. It is a contest between one unsecured creditor and all the other creditors of that class. There is no application of any secured creditor before the court for leave to proceed with a sale of any of the defendant's property. The receivers of the defendant's estate were not appointed to carry on the defendant's business, but to convert his assets into money as soon as they reasonably could do so, without sacrifice, for the payment of his debts. The restraint of this petitioner at this time is but the application of the doctrine laid down in Wunderle *v.* Ellis, 212 Pa. 618, that "where a party asserting a legal right can be fully secured in it and at the same time the interests of another in the subject-matter can be protected from impending injury" a court of equity will act. Two of the unsecured creditors of the defendant are the plaintiffs in the bill. There is no allegation that they, or those representing them, are not doing all that can be done in the interest of all of the unsecured creditors. So far as made to appear nothing more could or would be done by this petitioner if allowed to intervene.

And now, Aug. 1, 1916, upon and after due consideration, and for the reasons set forth in the opinion herewith filed, the rule to show cause why the petitioner should not be permitted to intervene in this proceeding pro suo interesse is discharged, and the motion for modification of the court's decree now in force is refused.

From D. W. McDonald, Esq., Uniontown, Pa.

Crane *v.* Paradise Township.

Road law—Payment of damages by township—Monroe county—Acts of April 22, 1858, P. L. 464, and March 24, 1859, P. L. 233.

The road act of April 22, 1858, P. L. 464, providing for the payment of road damages by townships and boroughs in Northampton county, extended to Monroe county by the act of March 24, 1859, P. L. 233, is constitutional, and will be applied where the parties have followed the method of procedure provided by the act.

Case stated. C. P. Monroe Co. May T., 1915, No. 13.

J. H. Shull, for plaintiff.
Eilenberger & Huffman, for defendant.

STAPLES, P. J., May 27, 1916.—The following facts were agreed to by the parties in this case:

1. On Sept. 28, 1914, reviewers were appointed by the court of quarter sessions of the peace of Monroe county, Pennsylvania, to review a certain road in Paradise township, in the county of Monroe and state of Pennsylvania, and, if there were occasion for such road, to lay out the same, procure releases of damage from the parties through whose land the road was laid out, and, if unsuccessful in procuring such releases, to assess damages to the persons who owned the land traversed by said road.

2. The board of reviewers reported that they found occasion for the road asked for, and laid out a road extending, inter alia, through improved and unimproved lands of Helena Williams, and assessed as her damages therefor the sum of $125.

3. The lands known as the lands of Helena Williams, and traversed by the aforesaid road, are wholly within the township of Paradise.

4. The report of the reviewers was confirmed nisi on Dec. 16, 1914, and confirmed absolutely Feb. 10, 1915.

5. The damages awarded have not been paid.

6. The award of damages so as aforesaid made, was, through error, made to Helena Williams, instead of to Alice M. Crane, the actual owner of the premises traversed by the said road. These proceedings shall be considered and disposed of as though the said Alice M. Crane had, in the first instance been named and considered as the owner of the said premises and as though the said award had, in the first instance, been made to her.

7. The said Alice M. Crane, on March 5, 1915, filed her appeal in the court of common pleas of Monroe county, Pennsylvania, to No. 13 of May term, 1915, from the decree of the court confirming the report of said reviewers and the award of damages therein made, and this case stated is based thereon and has been adopted as the method of procedure instead of trial by jury, the facts being undisputed.

From the above agreement of facts, it was understood between the parties that instead of a trial by jury on appeal, the court should decide the question of law and upon the same authority give judgment in favor of the plaintiff for $125 or in favor of the defendant, the township of Paradise, thus avoiding the costs of a trial by jury. The question of law raised was whether the plaintiff was entitled to damages from the defendant by reason of the act of April 22, 1858, P. L. 464, applying to Northampton county.

"Section 2. That hereafter all assessments for damages aris-

ing from the opening of any public road, or roads, in the county of Northampton, shall be paid by the respective townships or boroughs in which the same may be located; and the supervisors, or members of the town council of said townships or boroughs, are hereby authorized to levy a tax for the payment of such awards, or damages, after the same shall have been affirmed by the court of quarter sessions."

And as extended to Monroe county by act of March 24, 1859, P. L. 233, as follows, viz.:

"Section 1. Be it enacted by the senate, etc., that the provision of an act concerning the appointment of road viewers and road damages in Northampton county, passed April 22, 1858, be and the same is hereby extended to the county of Monroe."

There was never any question about the liability of the township in the county of Monroe for damages in proceedings of this kind, provided the statutes were complied with, with reference to the same. The only case in which we can find that there was any resistance to the payment of damages by the township was in that of Wagner *v.* Salzburg Twp., 132 Pa. 636. But when that case is carefully examined it appears clearly that the result of the decision was the failure of the plaintiff in not pursuing his proper remedy.

"Neither the commonwealth nor any municipality through whose territory a public road passes, is liable to land-owners for damages sustained by them through the exercise of the state's power of eminent domain in the laying out and opening of the road, until made so by legal enactment, Feree *v.* Meily, 3 Y. 153; and when a statute gives to land-owners a specific remedy for the recovery of such damages, that remedy must be pursued."

The proper remedy to have been pursued by Wagner was the taking of an appeal from the award of no damages or by a review in which the question of damages would have been submitted to the subsequent board of jurors. There have been statutes passed from time to time providing for a method of procedure in cases of this kind, but they have always provided a board of jurors for assessment of damages and either exceptions or appeal to their award for the owner of the lands taken. Originally these damages were directed by statute to be paid by the county and later it was provided that any assessment of the amount of damages, should be paid by the township in which the road was to be laid out. Northampton and Monroe counties come under this latter provision, and we have been

unable to find any decision held that the same was unconstitutional, but we hold collection could be made if the proper procedure were followed. In the present case, the proper procedure was followed and an appeal was taken according to statute and if it were followed out, there is no reason why, if the damages were established by proof, the plaintiff would not be entitled to recover. Both parties have agreed to this aforesaid method and that is by case stated.

And now, May 27, 1916, in accordance with the aforegoing opinion, judgment is entered in favor of the plaintiff, Alice M. Crane, and against the defendant, the township of Paradise in the sum of $125, and to have the same effect as though there had been a verdict of the jury on said appeal.

From C. C. Shull, Esq., Stroudsburg, Pa.

Commonwealth *v.* Garovitz.

Certiorari—Quarter sessions—Jurisdiction.

The courts of quarter sessions have no authority to issue writs of certiorari.

Certiorari. C. P. Fayette Co. June Sess., 1914, No. 2.

S. R. Goldsmith, for defendant.

VAN SWEARINGEN, P. J., June 20, 1916.—The question for decision in this case is whether or not a writ of certiorari to a justice of the peace may issue from the court of quarter sessions. The defendant was tried before a justice of the peace on a charge of disorderly conduct. He was found not guilty of the offense, but the justice imposed the costs on him, which he paid under protest in order to escape being sent to jail. Alleging that the proceeding before the justice was illegal and without authority of law the defendant's counsel caused a writ of certiorari to be issued from the court of quarter sessions, and the record of the justice is before us for review.

We are of opinion that the court of quarter sessions was without authority to issue the writ, and that the certiorari should be quashed. By §§ 11 and 13 of the act of May 22, 1722, 1 Sm. L. 131, the judges of the Supreme Court were authorized to issue writs of certiorari to, and review the proceedings had before, the justices of the peace of the different counties. The Constitutions of 1790 and 1838 gave to the judges of the courts of common pleas like powers possessed

by the judges of the Supreme Court to issue writs of certiorari to justices of the peace. Art. v, Sec. 10, of the Constitution of 1874 provides: "The judges of the courts of common pleas, within their respective counties, shall have power to issue writs of certiorari to justices of the peace and other inferior courts not of record, and to cause their proceedings to be brought before them, and right and justice to be done."

Nowhere do we find any authority given to the courts of quarter sessions to issue writs of certiorari. No constitutional provision, act of assembly, or decision of any court, supporting such authority, has been cited by counsel. On the contrary it has been expressly held that the provision of the Constitution of 1874, above quoted, is the only authority existing in Pennsylvania for the issuing of writs of certiorari to inferior courts, excepting that possessed by the Supreme Court, and that the courts of quarter sessions do not have authority to issue such writs. Evans *v.* Com., 5 Pa. C. C. 362.

And now, June 20, 1916, for the reasons stated in the opinion herewith filed, the writ of certiorari is quashed.

From D. W. McDonald, Esq., Uniontown, Pa.

Summary Hearings.

Criminal law—Summary conviction—Discharge by habeas corpus—Retrial—Procedure—Acts of May 22, 1889, P. L. 1, and May 1, 1909, P. L. 353.

Where, in a summary proceeding, a defendant is convicted and thereafter the conviction is reversed, the matter presented involves either, first, the jurisdiction; second, the procedure; or third, the substance of the prosecution.

Former jeopardy is improperly applied to a summary conviction.

Former jeopardy is applicable only to felonies, and in Pennsylvania is strictly applied only to crimes, the punishment of which is capital.

By analogy, the courts uniformly extend the general principles of former jeopardy to all criminal and penal actions under which the defendant might be sentenced to imprisonment if convicted.

Defendants were arrested on an information drawn under the act of May 1, 1909, P. L. 353; after a summary hearing they were found guilty and sentenced. Thereupon on habeas corpus proceedings they were released, in that the prosecution should have been instituted under the act of May 22, 1889, P. L. 1, under which act the facts could not have sustained a conviction. Held, that the defendants could be rearrested under an information charging them with the violation of the proper act.

In summary proceedings where the defendant is convicted, and, prior to having served his sentence, the sentence is reversed, or the defendant discharged on habeas corpus, he may be rearrested and retried, where

[Summary Hearings.]

1. The justice or other trial officer had no jurisdiction.

2. The information was not sufficient to sustain a conviction.

3. Such reversal or discharge was occasioned by improper procedure such as an insufficient record or transcript, etc.

The first and second reasons are also sufficient to justify a rearrest and retrial of the defendant even where the defendant on a hearing was acquitted.

Where an information is sufficient and the procedure otherwise is correct, the record or transcript may in most instances be amended as to formal defects.

Request of Hon. N. R. Buller, commissioner of fisheries, for opinion.

DAVIS, Deputy Attorney-General, Dec. 14, 1915.—This department is in receipt of your inquiry of Nov. 29, 1915. In this you state that certain defendants in Wayne county were arrested on an information drawn under the act of May 1, 1909, P. L. 353; after a summary hearing they were found guilty and sentenced. Thereafter, on habeas corpus proceedings, they were released in that the prosecution should have been instituted under the act of May 22, 1889, P. L. 1. In other words, the facts, if fully developed at the hearing, were not sufficient to sustain a conviction under the act, with the violation of which the defendants were charged.

You ask if after a judgment in a summary proceeding a defendant is discharged on appeal or by writ of habeas corpus, whether he may again be arrested and summarily tried upon the same facts.

Where, in a summary proceeding, a defendant is convicted and thereafter the conviction is reversed, the matter presented involves either, first, the jurisdiction; second, the procedure; or third, the substance of the prosecution.

The doctrine of former jeopardy is often improperly applied to such actions. Former jeopardy is only applicable to felonies, and in this state is strictly applied only to crimes the punishment of which is capital. By analogy, however, the courts uniformly extend the general principles of former jeopardy to all criminal and penal actions under which the defendant might be sentenced to imprisonment, if convicted. There are no well-marked rules for applying the doctrine so adopted. In order, therefore, to properly inform you it is necessary to cite cases under which the plea of former acquittal or conviction has been held to be inapplicable.

Summary convictions are principally distinguished from the ordinary criminal action in that the former are triable by a

justice of the peace or other proper official on an information made by the prosecutor, while the latter are triable before a court and jury of twelve upon an indictment found by a grand jury.

While there is a marked paucity of decisions or other authority on the effect of former acquittal or conviction in summary proceedings, yet the decisions bearing on such a plea in the trial of misdemeanors may be readily applied to summary convictions by likening the indictment in the former to the information in the latter.

As stated in 12 Cyc. 278: "The accused is estopped to plead a prior conviction where his conviction has been reversed for error on an appeal or writ of error brought by himself, although he has served a part of his term of imprisonment."

This rule was followed in the case of Penna. *v.* Huffman, Addison 140. In this case the defendant was charged in the indictment with having forged a receipt, for the use of "Hugh Brison." On the trial of the case the receipt offered in evidence showed the man's name to be "Hugh Prison." The defendant was convicted of forging the name of "Hugh Prison," but on motion the judgment was arrested. Thereafter a new indictment was returned, in which the name was properly spelled. The defendant pled former conviction. The court in overruling the plea stated:

"On the merits, Huffman has been convicted of a forgery, though not of the forgery stated in the indictment on which he was tried. On the former indictment and verdict, no judgment could be given, because the verdict did not find the offense laid in the indictment; and because that indictment for forging the note stated in it, could be no bar to another indictment, for forging the note given in evidence. The error is apparent on the record. And to say now, that this is an indictment for the same offense would be, in fact, saying, that we ought to have given judgment on the former indictment."

This case is referred to in Sadler on Criminal Procedure in Pennsylvania, page 336, in which the rule is stated: "The former conviction must have been upon an indictment sufficient to sustain the judgment."

In the case of Com. *v.* Zepp, 3 Clark 255, a defendant was tried on an indictment charging him with violation, in 1840, of an act which was not passed until 1842, and defendant was acquitted. Thereafter a new indictment was returned giving the correct date of the offense as 1845. The defendant's plea of former acquittal was overruled for the reason that the first

indictment was not sufficient to have sustained a conviction.

In the case of Com. *v.* Allen, 24 Pa. C. C. 65, it was held that where a defendant is discharged on an insufficient indictment the law has not had its end, and that he may again be indicted and tried.

Again in the case of Com. *v.* Eagles et al., 7 W. N. C. 324, it was held: "To support the plea of autrefois acquit, in an indictment for larceny, the defendant must show affirmatively that in the former trial his liberty was in legal jeopardy. If it appear that the court had no jurisdiction; or that there was clear error, which would necessarily have required a reversal of the sentence on a writ of error; or that an act of assembly under which the defendant was tried was clearly and palpably unconstitutional, the plea of former trial and acquittal is not maintainable in bar of a second indictment in the quarter sessions for the same offense."

In considering the last excerpt, however, it must be borne in mind that any error which would justify a retrial after acquittal, must be more than an error of procedure. If the justice had jurisdiction and the information was directed to the proper act of assembly and sufficient to sustain a conviction, rearrest and trial after acquittal would be only justified by the clearest error or fraud and collusion in the prosecution.

In the case which you present, I would advise that the defendants may be rearrested under an information charging them with the violation of the proper act. It would be well if you would call to the attention of this department the particulars in each case in which a rearrest and retrial is thought necessary, but for your general guidance in this matter would advise that in summary proceedings where the defendant is convicted and prior to having served his sentence the sentence is reversed, or the defendant discharged on habeas corpus, he may be rearrested and retried, where

1. The justice or other trial officer had no jurisdiction.
2. The information was not sufficient to sustain a conviction.
3. Such reversal or discharge was occasioned by improper procedure such as an insufficient record or transcript, etc.

The first and second reasons are also sufficient to justify a rearrest and retrial of the defendant even where the defendant on the hearing was acquitted.

Where an information is sufficient, and the procedure otherwise correct, the record or transcript may in most instances be amended as to formal defects.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Forbes to Use *v.* Continental Hotel.

Execution—Sale of personalty by sheriff—Payment of fund into court—Landlord and tenant.

Where a sheriff sells personal property under two writs and the fund is insufficient to pay the two executions, and also the landlord's claim, a rule to pay the money into court will be made absolute.

Rule by sheriff to pay money into court. C. P. No. 2, Philadelphia Co. Sept. T., 1914, No. 2897.

George S. Russell, solicitor for sheriff, for rule.

James Collins Jones, for plaintiff, and *William Charles Brown,* for McCanna & Fraser Co., contra.

BARRATT, P. J., March 28, 1916.—This matter has been before us so frequently that, in order to understand the record, we deem it necessary to briefly indicate our views. On April 28, 1915, the sheriff levied upon all the wines, liquors and glassware in the Continental Hotel, Ninth and Chestnut streets, Philadelphia, under a fieri facias issued in this case upon a judgment for $3,147.55. The goods were removed to a storage warehouse by the sheriff. Subsequently, on May 17, 1915, the sheriff levied upon the same goods under another writ of fieri facias in the case of McCanna & Fraser Co. *v.* Continental Hotel Co., Inc., upon a judgment for $2,734.88 obtained in this court, C. P. No. 2, September term, 1913, No. 3644. On June 15, 1915, the goods were sold by the sheriff for $2,155.50, an amount insufficient to pay the two executions and the landlord's claim of $31,834.89 for rent. On June 17, 1915, the McCanna & Fraser Company, one of the claimants to this fund, obtained a rule to show cause why the fund realized by the sheriff should not be paid into court. This we heard, considered and discharged on July 27, 1915. On Oct. 25, 1915, the same claimant entered another rule to show cause why the fund should not be paid into court, which was also discharged by us, after consideration, Nov. 5, 1915.

We allowed an exception to our ruling Nov. 11, 1915, and the matter was heard by the Supreme Court, and that court, by Stewart, J., on March 5, 1916, said in affirming our judgment: "What we decide is that the sheriff was a necessary party to the proceeding, and it not appearing that he was served in any way with notice the rule was properly discharged." McCanna & Fraser Co., Inc., *v.* Continental Hotel Co., Inc.,

Supreme Court, Stewart, J., 252 Pa. 482. The sheriff has obtained this present rule and asks leave to pay this money into court.

It has been the practice for many years to permit the sheriff to pay money realized upon the sale of personal property into court where he shows facts which render it unsafe for him to undertake the distribution of the fund, and especially where there are conflicting claims. Mathiews *v.* Webster, 7 W. N. C. 81 (1879), Thayer, P. J.; Geisel *v.* Jones, 7 W. N. C. 82 (1879), Thayer, P. J.; Lynch *v.* English, 4 Del. Co. Reps. 481 (1891), Clayton, P. J.; Kirk *v.* Ruckholdt, 7 W. N. C. 81 (1879), Thayer, P. J.

And this meets with the approval of the Supreme Court in the above appeal involving the identical fund which the sheriff still has in his hands. While, as Justice Stewart points out, "the sheriff has an undoubted right to make the appropriation himself if he chooses to take the risk," yet the sheriff, by this rule, asks to be relieved of the responsibility of deciding which of the claimants is entitled to the fund and have it distributed by the court.

There are two executions and a landlord who claim the fund, and, under the facts as shown by the record and stated at bar, with conflicting claims, we agree with the sheriff it would not be safe for him to assume the responsibility of distribution. The sheriff's rule to pay the money into court is made absolute.

Commonwealth *v.* American District Telegraph Co.

Taxation—Gross receipts—Telegraph company defined—Acts of April 29, 1874, P. L. 74; May 1, 1876, P. L. 90; June 7, 1879, and June 1, 1889, P. L. 420.

A company, which has been incorporated as a telegraph company, is a telegraph company, such as was intended to be covered by the provisions of the revenue act of June 1, 1889, supplementary to the taxing act of 1879.

A business consisting in transmitting and receiving information by signals over or through wires by means of electric currents, denominated manual fire alarm and patrol signal service and combination night alarm and fire alarm service, is telegraph business.

The employment of a watchman to patrol customers' premises, and transmitting information by him to the central office by means of electrical appliances and signals, is auxiliary to such business and necessarily a part of it.

[Commonwealth v. American District Telegraph Co.]

Supervising and inspecting subscribers' electrical appliances may not be part of such telegraph business.

Appeal from settlement of tax on gross receipts. C. P. Dauphin Co. Com. Docket, 1913, No. 30.

F. S. Brown, attorney-general, *W. M. Hargest,* deputy attorney-general, for commonwealth.
Olmsted & Stamm, for defendant.

KUNKEL, P. J., July 24, 1916.—The defendant company appealed from the settlement made against it for the tax on its gross receipts for the six months ending Dec. 30, 1912. By agreement the appeal was tried without a jury.

Two questions are presented: (1) Whether the defendant company is a telegraph company; and (2) whether the business which it did is telegraph business.

The defendant is a corporation of this state incorporated under the act of April 29, 1874, P. L. 74, and the supplementary act of May 1, 1876, P. L. 90. Therefore what was said by this court in Com. *v.* Penna. Tel. Co., 18 Phila. 589, is applicable. In discussing the question whether a telephone company incorporated under those acts was a telegraph company and taxable as such under the taxing act of 1879, Simonton, J., said: "The act (that is, the act of 1876) is 'relative to the incorporation and powers of telegraph companies only'; and hence, when defendant claims to derive its existence and powers from this act, it thereby necessarily admits itself to be a telegraph company within the scope and intent of these words as used by the legislature in this act at least. But if this be so we cannot decide that the same company is not within the purview of the same terms when used by the legislature in the tax act of 1879. We are on the contrary forced to the conclusion that when a tax was imposed upon 'every telegraph company' it was intended to apply to all companies which could lawfully come into existence under the act which authorized the creation of telegraph companies only." Accordingly we hold that the defendant company having been incorporated as a telegraph company, is a telegraph company, such as was intended to be covered by the provisions of the act of June 1, 1889, under which the present tax is claimed, and which is supplementary to the taxing act of 1879 referred to in the foregoing quotation.

During the period covered by this settlement, the defendant's business was that of operating a fire alarm and signal

service system. On Jan. 31, 1913, a tax of $247.61 was settled against it on gross receipts of $30,951.18, made up as follows: From manual fire alarm and patrol signal service and combination night alarm and fire alarm service, $26,678.39; from automatic fire alarm and sprinkler supervisory service, $3,251.09; from installation fees, $764.00; and from miscellaneous receipts, $257.68.

The manual fire alarm and patrol signal service and combination night alarm and fire alarm service consisted in transmitting and receiving information through signals conveyed by means of electrical apparatus installed by the company on its customers' premises and connected by wires with its central office. Notice was thus transmitted to its central office in the case of fire either by watchmen employed by the defendant company, or by watchmen employed by the customers, and thence by means of a similar apparatus in turn transmitted by the company to the public fire houses. The electrical appliances were used also for the purpose of checking up the watchmen by registering at the central office their attendance upon their duties.

The revenue from the automatic fire alarm and sprinkler supervisory service was received from the regular inspection of the automatic fire alarms and sprinklers in use by the company's subscribers. The receipts from installation were charges made for installing signal service in the different branches of the company's business. The item of miscellaneous receipts consisted of sums derived from the sale of sundry material and from fees charged against the subscribers for looking after the delinquency of their night watchmen. In this item was included also certain receipts accruing from the thermometer service installed in the cold storage plant of Boggs & Buhl, of Pittsburgh. The defendant company had the supervision of that service and kept watch over the thermometer, giving Boggs & Buhl notice when the temperature rose above a certain degree. These are the facts as we find them.

DISCUSSION.

The tax is claimed under the provisions of § 23 of the act of June 1, 1889, P. L. 420, which reads as follows: ". . . every telephone or telegraph company incorporated under the laws of this state or any other state of the United States and doing business in this commonwealth . . . shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of the said corporation . . . received from . . .

telegraph, telephone . . . business done wholly within this state. . . ." The tax was settled against the defendant on the theory that the business in which it was engaged was telegraph business. The defendant, however, takes issue with the commonwealth, and claims that the business was not telegraph business, and that the receipts therefrom were not subject to the tax. The second question presented, therefore, is, as we have already said, Was the business done by the company telegraph business? As has been seen, its business consisted in transmitting and receiving information by signals over or through wires by means of electric currents. "The term telegraph is sufficiently broad and comprehensive to include any apparatus for transmitting messages by means of electric currents and signals, or by means of a wire whether the communication is made by electricity or not, and in the construction of statutory provisions it has repeatedly been held to include the telephone. . . . Telegraph in common parlance is generally understood as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity." 37 Cyc. 1606 and note; 27 Am. & Eng. Encyc. Law, 1001-1002. The lexicographers' definition of telegraph is: "An apparatus for transmitting intelligible messages to a distance." Cent. Dicy. "An apparatus or a process for communicating rapidly between distant points especially by means of preconcerted visible signals representing words or ideas, or by means of words and signs transmitted by electromagnetism." Bouv. Law Dicy. See also Com. *v.* Penna. Tel. Co., supra; Hocket *v.* State, 105 Ind. 250; and Attorney-General *v.* Edison Tel. Co. of London, 6 Q. B. Div. 244.

In the light of these definitions we must conclude that that part of the defendant's business denominated manual fire alarm and patrol signal service and combination night alarm and fire alarm service was telegraph business. In the case where it employed a watchman to patrol its customer's premises, it transmitted information by him to its central office by means of electrical appliances and signals; and in the case where the customer employed the watchman it received information by the same means. The installation of the service was purely auxiliary to the business and necessarily a part of it.

The evidence submitted with respect to the other items of settlement which are charged with the tax is very indefinite. The service rendered with respect to the automatic fire alarm and sprinkler used by the company's subscribers is stated to be that of inspection or supervision. Whether the automatic

fire alarm and sprinkler were in any wise connected by electrical appliances with the company's central office does not appear. All that does appear is that the company inspected and supervised the appliances, which may have been, so far as the evidence shows, entirely independent of any communication with the company's office. We are not prepared, therefore, to hold that this supervisory service was telegraph business.

The miscellaneous receipts appear to have come from several sources: from the sale of material, from looking after the delinquency of the watchmen, and from the thermometer service installed in the cold storage plant. It may be that the thermometer service was telegraph business, but the tax on such business cannot be ascertained, as we have no evidence to distinguish receipts from that service from receipts which were derived from the other sources mentioned, and which do not seem to have accrued from telegraph business.

CONCLUSION.

Wherefore we conclude:

(1) That the manual fire alarm and patrol signal service and combination night alarm and fire alarm service was telegraph business within the meaning of the act of June 1, 1889, P. L. 420.

(2) That the receipts derived from such business and the installation of such service were properly chargeable with the eight mills tax imposed by that act.

(3) The commonwealth is entitled to recover as follows:

From manual fire alarm and patrol signal service and combination night alarm and fire alarm service		$26,678.39
From installation fees		764.00
		$27,442.39
Tax at the rate of eight mills	$219.54	
Interest from April 1, 1913	42.80	
Attorney-general's commission	10.97	
	$273.31	

For which sum judgment is directed to be entered in favor of the commonwealth and against the defendant, unless exception be filed within the time limited by law.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Porter's Estate.

Executors and administrators—Trusts and trustees—Commissions—Act of March 17, 1864, P. L. 53.

Where an attorney has been allowed commissions as executor he will not be allowed commissions on the principal as trustee, although the testator by her will has given him a pecuniary legacy which she states "shall be in addition to five per cent. commissions as executor in settlement of my estate."

Exceptions to adjudication. O. C. Philadelphia Co. Jan. T., 1912, No. 586.

The twenty-third clause of the will provided: "I give and bequeath unto John D. Baltz, my attorney, the sum of $2,000 if he be living at the time of my decease, as a mark of appreciation for the personal care and attention given my estate, and his kindness to me, which shall be in addition to 5 per cent. commission as executor in the settlement of my estate."

John P. Baltz, p. p., for exceptions; *I. H. Mirkil*, contra.

GUMMEY, J., Dec. 24, 1915.—This trust having terminated, the trustee argues that the will itself authorizes the payment to him of commissions on principal, notwithstanding the fact that he has previously received commissions thereon as executor, and that, therefore, he is not bound by the provisions of the act of March 17, 1864, § 1, P. L. 53, which states in terms that where the same person is both executor and trustee, he shall not receive more than one commission on principal.

We do not, however, so construe the will. When the testatrix gave to the exceptant, as executor, a sum of money, coupled with the provision that her gift should be "in addition to 5 per cent. commission as executor," it is evident that by this provision she only expressed her desire and expectation that her executor, as executor, should receive commissions on principal at 5 per cent., and that the pecuniary legacy which she gave him should not be construed as a gift in lieu thereof. As both the legacy and the commissions were allowed the trustee at the audit of his account as executor (including commissions on the principal of the trust fund now before us), he is not entitled to any further commissions thereon. See Horwitz's Est., 7 D. R. 179 (20 Pa. C. C. 616); Milliken's Est., 36 Pa. C. C. 187.

The exceptions are dismissed.

Martin *v.* Lowinite Manufacturing Co.

Equity—Injunction—Explosives.

An injunction will not be granted to restrain the erection and construction of a plant for the manufacture of lowinite and dynamite, where the court finds that the location of the plant and the proposed manner of its operation are such that when so operated at such location the plant will not be unduly dangerous to life or property and will not constitute a nuisance.

Bill for injunction. C. P. Fayette Co. In Equity, No. 780.

D. M. Hertzog and *George B. Jeffries,* for plaintiffs.
W. G. Negley and *George D. Howell,* for defendant.

VAN SWEARINGEN, P. J., July 11, 1916.—Upon a bill alleging that the defendant was about to erect a plant for the storage of nitroglycerine and the manufacture and storage of gun powder and other high explosives so near to their dwelling houses as to greatly endanger the lives of the plaintiffs and the members of their families, we granted a preliminary injunction restraining the defendant from proceeding with the erection of its proposed plant until hearing and further order of the court. In an answer filed the defendant denied that it was its purpose to erect a plant for the storage of nitroglycerine or for the manufacture or storage of gun powder, but alleged that at the time the injunction was served it was engaged in the erection and construction of a plant for the manufacture of permissible explosives and dynamite, staple articles of commercial value, at a place and in a manner not dangerous to the plaintiffs, or members of their families, or others. A large amount of testimony was taken, from which, together with the bill and answer, and a personal visit to and careful inspection of the premises in company with counsel, we find the material facts to be as follows:

1. Jasper Martin, one of the plaintiffs, heretofore was the owner of a tract of land in Dunbar township containing about two hundred and sixty-three acres, individual portions of which he later conveyed by deed or otherwise to Jasper M. Darnell, Dennis I. Martin and Charles N. Martin, the other three plaintiffs; and the four plaintiffs named, at the time of the filing of the bill in this case, with their famlies, were living on the parts of said land owned by them respectively.

2. The defendant is the owner of forty-seven and one-half acres of land in Dunbar township immediately adjoining the lands of the plaintiffs, upon which it has commenced the erec-

tion and construction of a plant for the manufacture of lowinite, dynamite, and other permissible explosives, that is, such explosives as under the mining laws of Pennsylvania are permitted to be used in blasting down coal in the mines, producing less flame in process of explosion than black powder, and not so likely to reach gas and coal dust in the mines, such as shatter the coal in place rather than tend to lift or upheave it as does black powder, including a sweet glycerine tank or acid building, a nitroglycerine building, a mixing house, cartridge or shell rooms, casing houses, packing houses, storage houses for materials and supplies, storage magazine, an engine and boiler house, tramways and trackage, and other structures.

3. The sweet glycerine tank, or acid building, being one of the nearest of the defendant's buildings to the lands of the plaintiffs, from which measurements were made as shown in the evidence, is eleven hundred and fifty feet from Jasper Martin's residence, seven hundred and seventy feet from his barn, and nine hundred and fifty feet from a tenant house on his land; it is eight hundred and forty-three feet from Jasper M. Darnell's residence, and eight hundred and ninety feet from his barn; it is eleven hundred and ninety-five feet from the residence of Dennis I. Martin, and fourteen hundred and forty-three feet from the residence of Charles N. Martin. It is forty-seven hundred and eighty-five feet from the Pechin schoolhouse, thirty-nine hundred and fifty-three feet from the Hennessey schoolhouse, three thousand and forty feet from the Snuff Hill public road, thirty-five hundred feet from the trolley lines of the West Penn Railways Company, thirty-five hundred and sixty-five feet from the Baltimore & Ohio Railroad Company's tracks, and thirty-six hundred and forty-three feet from the tracks of the Pennsylvania Railroad Company. It is twenty-three hundred and sixty feet from the nearest dwelling house other than those of the plaintiffs already mentioned.

4. The defendant's plant is located in a wild and isolated ravine, at the foot of the mountains, between two high hills. The land surrounding the plant is rough and uncultivated. Large portions of the hillsides above the plant are covered with timber and thick underbrush. Above the plant the hills are precipitous and rocky. The buildings of the plant which will contain explosives will be erected against one of the hills, in excavations in the hillsides made for that purpose, surrounded on three sides with natural barriers of earth and rock,

with the open or exposed side of each building facing across the ravine directly away from the dwelling houses of the plaintiffs, which are above and back from the plant, and will be at elevations from one hundred and seventy-five to two hundred feet below the elevations of the dwelling houses. The buildings containing explosives will be erected at different elevations each from the others on the hillside and at reasonably safe distances apart so that each will be protected from the others, and the buildings not containing explosives will be located at such elevations and reasonably safe distances from those containing explosives as to be protected from them. It is not the purpose of the defendant to manufacture black powder at this plant.

5. Nitroglycerine is the chief explosive ingredient contained in the products proposed to be manufactured by the defendant. Dynamite is produced by combinations of nitroglycerine, wood pulp, corn meal, nitrate of soda, nitrate of potassium, charcoal, nitrocellulose, nitronapthalia, dinitrobenzo, trinitrotoluene, carbonate of lime, zinc oxide, and other ingredients, and lowinite is a product of nitroglycerine combined with other chemical substances under different formulas. The greatest quantity of nitroglycerine proposed to be kept in the nitroglycerine building at any one time is one thousand pounds. The nitroglycerine will be nitrated in the nitroglycerine building, flowed by gravitation under protection to the mixing house, there mixed with the dry and absorbent substances entering into the finished product with wooden rakes protected by rubber tips into a gelatine, which is less explosive than the pure nitroglycerine, and the gelatine then will be conveyed to the cartridge or shell rooms in five hundred pound batches, where it will be pressed into the cartridges with rubber-tipped sticks, after which the cartridges will be placed in boxes and sent to the storage magazine, which is to have a maximum capacity of sixty thousand pounds.

6. Fayette county, and its surrounding territory, is a district in which the leading industries require and consume large quantities of permissible explosives such as the defendant proposes to manufacture.

7. Defendant's plant, when completed and operated as it now is proposed by the defendant to complete and operate it, will not be unduly dangerous to life or property and will not constitute a nuisance. Danger from explosions will not be imminent or certain, but will be doubtful, eventual and contingent.

Our conclusion of law is, therefore, that the plaintiffs are not entitled to the injunction for which they pray.

And now, July 11, 1916, a permanent injunction is refused, the preliminary injunction heretofore awarded is dissolved, and it is ordered that the plaintiffs pay the court costs of this proceeding, each side to pay the costs of its own witnesses; this decree to be entered nisi according to rule.

From D. W. McDonald, Esq., Uniontown, Pa.

Bossard's Estate.

Decedents' estates—Claims against—Surgical operation—Subrogation.

Where a surgical operation is performed upon a person in his last illness, and it appears that the mother-in-law of the decedent paid for the operation under a promise on the part of the decedent to repay her, and that the operation could not have been performed unless payment to the surgeons had been thus arranged, the mother-in-law is entitled to subrogation as a preferred creditor, as against the general creditors of the decedent.

Exceptions to auditor's report. O. C. Monroe Co.

A. R. Brittain, for exceptions; *C. C. Shull,* contra.

STAPLES, P. J., May 8, 1916.—On July 30 or 31, 1913, Mrs. Anna J. Bossard, wife of said John M. Bossard, on account of the said John M. Bossard's serious and severe illness, took him to New York to consult a physician, and the visit was made suddenly on account of Mr. Bossard's condition. Upon reaching New York, they went to the home of Mrs. Bossard's mother, Mrs. Anna Kirschner, at Richmond Hill, Long Island, and the next day doctors were seen and consulted with and as the result thereof it was determined that it was necessary to perform an operation upon the said John M. Bossard. The expenses of this operation would be $400 and also a charge by the hospital for operating room and care of decedent until his removal to the home of his mother-in-law, the said Mrs. Anna Kirschner. Bossard did not have the money necessary to perform the operation and pay the expenses, and Mrs. Anna Kirschner told him that she would pay the money and look after him, and by reason of this very kindness upon her part Mr. Bossard was operated upon on Aug. 8, 1913, at the Jewish Hospital of Brooklyn by Drs. Wm. Linder and Albert E. Mucklow. Mr. Bossard stayed

in the hospital until Sept. 5, 1913, and then went to the home of his mother-in-law, Mrs. Anna Kirschner, and stayed there until Sept. 13, 1913, and then was removed to his own home, where he died on Dec. —, 1913.

There was no question but that the operation was necessary and the evidence supports the finding of the auditor that the operation performed was during Mr. Bossard's last illness. If Mrs. Anna Kirschner had not paid these bills of the two doctors and the expenses in the hospital, it would have been proper for the executrix to have paid them, as preferred debts, being incurred in the last illness of the decedent. The trouble was, as is patent to anyone, that the expenses of this operation had to be either secured or provided for, before it was undertaken by the surgeons. Mrs. Kirschner, out of the kindness of her heart, knowing that Mr. Bossard had not sufficient funds with him to pay for such expenses, told this sick man that she would look after him, which she did. Dr. Linder stated that it was necessary to have an immediate operation upon Mr. Bossard, and it was very fortunate for Mr. Bossard that he had a friend in this great time of need; and it further appears that these arrangements were made with the doctors when Mr. Bossard and Mrs. Kirschner went to see him about the operation. Mr. Bossard told Mrs. Kirschner that he would repay her. There was an assignment of these claims made by Mrs. Anna Kirschner to her, but not at the time when the actual payments were made and which Mrs. Kirschner had held herself responsible for. Under one of the general rules covering subrogation of claims, we are inclined to the opinion that Mrs. Kirschner stood in the shoes of these creditors and that the executrix was justified in making the payment to her as she did.

"The right to substitution is founded upon the mere principal of equity and benevolence and not necessarily upon either privity or contract between the parties." Kyner *v.* Kyner, 6 Watts. 221.

"Subrogation is founded on principles of equity and benevolence and may be decreed where no contract exists, but not in favor of a mere volunteer who pays the debt of another without any duty moral or otherwise." Hoover *v.* Epler, 52 Pa. 522.

Benevolence is the disposition to seek the well-being or comfort of others and a desire to alleviate suffering or permit happiness. In the present case, Mr. Bossard was a very sick man. He was taken over ninety miles to the city of New York for the purpose of ascertaining what could be done for him. Ex-

pert surgeons stated that there must be an immediate operation and stated their prices, and Mr. Bossard had only $15 or $20 with him, therefore no such funds as were necessary. Mrs. Anna Kirschner said she would help him and arrange with the surgeons for the operation. The operation was performed and she paid the operation expenses and Bossard promised to pay her for what she expended. It was no volunteer payment and the necessities of the case demanded an operation. The necessities of the case demanded either a payment of the money or arrangement for payment of it. Mrs. Anna Kirschner stepped into the breach and did a benevolent act which either had to be done or Bossard's health and life put in peril. To our mind, this was such a benevolence as entitled Mrs. Kirschner to subrogation and it is well expressed in one of the cases cited by one of counsel opposing the subrogation, viz.:

In France's Appeal, 75 Pa. 220, the widow of the deceased paid certain moneys for the deceased, which payments, I gather from the opinion, were made after the death of her husband. The Supreme Court held in that case, that while the expenses paid by her for services which were incurred before her husband's death were not preferred, yet in the same case it held that the payments made by the widow for funeral expenses of her husband were preferred payments and they did it upon these grounds.

"It is true, the executor, by virtue of his trust, was charged with the burial of the testator, yet wills are generally, and I think very properly not read, nor the contents communicated to the executor until the funeral obsequies are ended. The necessary rites of humanity require prompt action." If this be true, how much more do the claims of humanity demand such action like that of Mrs. Anna Kirschner, performed in this case? If it be right to look after the dead, how much more so is it to look after and alleviate the sufferings of the living? Mrs. Kirschner was not compelled legally to make these payments, but as the mother-in-law with this poor man in her house, she was compelled by the instincts of humanity in her own heart to arrange for and pay these expenses, and surely she was entitled to subrogation for the amount so expended by her.

And now, May 8, 1916, in accordance with the foregoing opinion, the first, second and third exceptions to the report of the auditor are sustained, although according to our view of the matter the amount of the surcharge in the third exception

should be $447.85 instead of $323.19, and the report is referred back to the auditor and he is directed to strike off said surcharge of $447.85 and allow said credits as claimed for by the executrix and to make a new distribution on the rest of the total amount for distribution as found by him less $447.85.

From C. C. Shull, Esq., Stroudsburg, Pa.

Hardin *v.* Maust.

Contract—Master and servant—Engaging in business.

A permanent injunction will be awarded restraining a defendant from engaging in a certain business in violation of an agreement on his part, upon sufficient consideration, not to engage in or carry on said business for a limited time and within a limited territory, where the court finds that after such agreement the defendant pretends to be employed by others as a foreman and general manager of a like business, but that such pretended employment is but a mere subterfuge resorted to by all the parties thereto in an attempt to protect the defendant from the consequences of an intentional violation on his part of his contract with the plaintiff, and that the defendant actually has violated his said contract by engaging again in said business.

Bill for injunction. C. P. Fayette Co. In Equity, No. 800.

John Duggan, Jr., for plaintiff; *A. C. Hagan*, for defendant.

VAN SWEARINGEN, P. J., July 3, 1916.—A preliminary injunction in this case was awarded restraining the defendant, either in his own name or under the name of the Uniontown Moving Company, from engaging in or carrying on the business of raising and moving houses and other buildings within the limits of this county, and the case is before us now upon final hearing. From the bill, answer and proofs we find the material facts of the case to be as follows:

1. Prior to Feb. 18, 1915, the defendant, John H. Maust, was engaged in the business of raising and moving houses and buildings, having his residence and principal place of business in Uniontown, Fayette county. On or about the date mentioned he sold his business, materials, equipment and tools to the plaintiff, Hugh R. Hardin, for the price or sum of $500, and agreed with the plaintiff that he would not engage in said business again in Fayette county for a period of at least eight years.

2. Upon the date mentioned an instrument of writing, the

subject and substances of which was a part of the consideration of the contract between the parties, of which the following is a copy, was executed by the defendant and delivered to the plaintiff:

"This is to certify that, having sold my moving outfit to H. R. Hardin, of Uniontown, Fayette county, I do hereby agree not to enter into the moving business, that is the raising and moving of houses and buildings, for a period of not less than eight nor more than ten years, in the above county.

"Signed this 18th day of February, 1916.

"(Signed) JOHN H. MAUST [SEAL.]"

3. Thereafter the defendant again engaged in the business of raising and moving houses and buildings, in violation of the terms of his contract with the plaintiff, and continued therein until the time of the awarding of the preliminary injunction in this case.

4. The defendant pretends to have been employed, since entering into the contract with the plaintiff, merely as foreman and general manager for the Uniontown Moving Company, an alleged partnership composed of James M. Maust, a son, and Pearl Maust, a daughter, of the defendant, formed soon after the date of the contract between the plaintiff and defendant, but admittedly without written articles of copartnership or anything else to show a bona fide and legal existence.

5. James M. Maust is a clerk in the office of the Monongehela Railroad Company at Masontown, and lives in that town, and Pearl Maust runs a small store in Uniontown, where she lives with her father, the defendant, and the alleged formation and subsequent business engagements of the Uniontown Moving Company and the pretended employment of the defendant by that company as its foreman and general manager was a mere subterfuge resorted to by all the parties thereto in an attempt to protect the defendant from the consequences of an intentional violation on his part of his contract with the plainitff.

6. The defendant in reality has violated his contract with the plaintiff, in that he has engaged again in the business of raising and moving houses and buildings within the county of Fayette, and has continued to do so until restrained by preliminary injunction, to the continuous injury and damage of the plaintiff.

There is no doubt, in our opinion, as to the legality of the defendant's contract with the plaintiff. To some extent it may be said that it restrains trade. But it is limited both as to

space and time, and is reasonable in its nature. When such is the case a contract of this nature will be upheld. Monongahela River Consolidated Coal & Coke Co. *v.* Jutte, 210 Pa. 288. We therefore reach the following conclusions of law:

1. The contract between the plaintiff and defendant should be enforced.

2. The violation of the terms of the contract by the defendant should be restrained by injunction.

And now, July 3, 1916, for the reasons stated in the opinion herewith filed, the preliminary injunction heretofore awarded is made permanent, and it is ordered that the defendant pay the costs of this proceeding; this decree to be entered nisi according to rule. From D. W. McDonald, Esq., Uniontown, Pa.

Commonwealth *v.* Reimel.

Game law—Act of April 21, 1915, P. L. 146—Constitutional law.

Where it appears that the defendant shipped venison by parcel post from one place to another in the same county, the act is made unlawful by the act of April 21, 1915, P. L. 146, § 8.

The game of a state is the property of the state, and it may enact laws to protect the game even though the laws may affect the parcel post system of the country which is under federal control by the Constitution of the United States.

Certiorari to an alderman of the city of Easton. C. P. Northampton Co. Feb. T., 1916, No. 50.

R. E. James, Jr., for the commonwealth.
E. J. & J. W. Fox, for the defendant.

STEWART, P. J., June 5, 1916.—The defendant in this case was convicted before an alderman of the violation of the provisions of § 8 of the act approved April 21, 1915, P. L. 146. It appeared that the defendant shipped some venison on Dec. 17, 1915, by parcel post from the borough of Portland to Easton, both places being in this county. The exceptions filed were to the effect that the record did not show that he had violated any law of this state; that it was not an offense to ship game from one place to another when both were in the same county; and that the act was unconstitutional because it was in conflict with the federal Constitution which gave congress the power to legislate with respect to post offices and post roads. The title of the state act is "An act to provide for the better protection and preservation of game, game quad-

rupeds, and game-birds in Pennsylvania, and prescribing penalties for violation of its several provisions."

Section 8 is as follows: "It shall be unlawful for any person in this commonwealth to ship game of any description by parcel post, or to ship by express, or as freight or baggage, or by common carrier of any description, any bird or animal, or part thereof, commonly known as game, killed in this commonwealth; or for any common carrier in this commonwealth to transport game of any kind, from one county to another county in this commonwealth, excepting where such game is accompanied by the owner thereof," etc. If we read this section as punctuated, there is no difficulty about it; but it is contended by the learned counsel for the defendant that we must disregard the semi-colon after the word "commonwealth" and before the words "or for"; that the act being penal in nature must be strictly construed; and that from its terms it was intended to apply only to the shipping of game or transferring of game from one county to another county.

In Starck *v.* Insurance Co., 134 Pa. 45, on page 52 it is said: "The condition in question is not as clearly expressed as it might have been, and its meaning is further obscured by the omission of a comma after the words 'such policy.' Formerly, it was unusual to punctuate legislative acts and deeds, but in construing them the courts always read them with such stops as gave effect to the whole. 4 I. R. 65. It is well settled that neither punctuation nor the absence of points is to be seriously regarded in the construction of statutes."

In Abbott's Est., 198 Pa. 493, it is said: "Punctuation is an uncertain aid in the interpretation of written instruments, and is to be resorted to only when other means fail. Gyger's Est., 65 Pa. 311."

Perhaps the best statement of the matter is that by President Judge Mitchell, in Wetmore *v.* Wetmore, 17 Pa. C. C. 11, as follows: "Punctuation is no part of a statute. Courts should punctuate only to promote the manifest intent of the legislature in construing its acts. Where that intention is obscure or doubtful they may not only punctuate, but may transpose clauses or phrases to make the meaning clear. Yet, unless the following of the grammatical construction of a statute will obviously pervert the plain legislative intent, it should be adhered to in construing statutes susceptible of more than one construction."

Having these authorities in mind, we think this § 8, in the first place, refers to the shipper. He cannot ship game in any

way. The word "ship" means to transport without the company of the shipper. The next thought of the legislature is to make it unlawful for common carriers to transport game from one county to another except where the game is accompanied by the owner upon the same train, and then only under certain restrictions mentioned in the act. That it was the legislative intent to distinguish between the shipper and the common carrier appears also in the wording of the end of the section which provides for the penalty. That reads as follows: "Each and every person who shall transport, or attempt to transport, a game animal or game-bird of any description, or part thereof, contrary to any provision of this section, shall be liable to a penalty equal in amount to the penalty imposed by this act for the killing such animal or bird during the close season; and each and every person, acting for himself, or for another, or as the agent of a common carrier, who shall knowingly or negligently receive game for transportation contrary to the provisions of this act, shall be liable to a penalty of $25 for each offense." As the venison in suit was shipped by parcel post, the provisions of the act referring to common carriers, and the exception as to the game being accompanied by the owner do not apply. Any shipment of game by parcel post, even in the same county, is unlawful. The other reason urged is that the act is in conflict with the twenty-sixth paragraph of Art. 1, Sec. 8, of the Federal Constitution which gives congress power to establish post offices and post roads. It is undoubtedly true that this power places the regulation of the entire postal system of the country in congress, and that congress alone shall designate what shall be carried in the mails and what excluded. That states can exercise much authority over railroads even when it may interfere with the mails, is seen by a study of cases like Gladson *v.* Minn., 166 U. S. 427, and Illinois C. R. Co. *v.* Ill., 163 U. S. 142.

We must, therefore, consider whether the object of the state statute is a direct interference with the Fedral Constitution, or an indirect interference. If it is the latter; is it not unconstitutional. We may concede that the federal statute of Aug. 24, 1912, makes the matter carried by parcel post, mail matter within the purview of the federal provision, but an examination of the decisions of the Supreme Court of the United States shows that the game of a state is a favored object of the police power of the state.

In Geer *v.* Conn., 161 U. S. 519, we have an elaborate discussion from the very earliest times of the right of property

in game. Mr. Justice White reviews the subject with the greatest thoroughness, and while two eminent justices of the Supreme Court did not sit in that case, and two equally eminent justices dissented from his opinion, yet he has so conclusively shown the right of the state to protect its game even if interstate commerce may be remotely and indirectly affected thereby, that there can be no doubt of the right of the state to protect its game by the present act, even if the receipts of the post office department may be remotely and indirectly affected. We have not quoted at length from this opinion because it must be read and studied in its entirety, but we feel confident that it rules the present case against the contention of the defendant. That case was cited with approval in the very late case of New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31, and Mr. Justice Day cites with approval the oleomargarine cases of Plumley *v.* Mass., 155 U. S. 461, and Schollenberger *v.* Penna., 171 U. S. 1, and sums up the distinction existing as follows: "In the case at bar the interference with foreign commerce is only incidental, and not the direct purpose of the enactment for the protection of the food supply and the domestic game of the state."

It would unduly prolong this opinion to refer to the oleomargarine cases like Powell *v.* Com., 114 Pa. 265, which was affirmed by the Supreme Court of the United States in 127 U. S. 678, and which have been before our state Supreme and Superior Courts in various forms many times; but it might be well to refer to the opinion of Judge Orlady in Com. *v.* McComb, 39 Pa. Super. Ct. 411, which was affirmed by the Supreme Court in 227 Pa. 377. In that case Judge Orlady takes the same view as to the paramount authority of the state over its game, as expressed by Mr. Justice White.

In conclusion we must have in mind the spirit with which we approach the decision of a constitutional question, so well set forth in Buffalo Branch M. F. C. *v.* Breitinger, 250 Pa. 225, by President Judge Martin of Philadelphia county, whose opinion was approved by the Supreme Court, as follows: "Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void."

And now, June 5, 1916, all the exceptions are dismissed, and the judgment of the alderman is affirmed at the costs of the defendant.

From H. D. Maxwell, Esq., Easton, Pa.

Maize *v.* Maize.

Divorce—Voluntary separation for stated period—Desertion.

Where a husband and wife agree to a temporary separation of a year for the very best of reasons and absolutely necessary under the circumstances, it is not necessary for the wife, after the lapse of a year, to make her way to the place where the husband is living to demand support from her husband; and, after the statutory period has elapsed, the wife will be granted a divorce on the ground of desertion.

In divorce. Sur master's report and exceptions thereto ex parte libelant. C. P. Allegheny Co. April T., 1915, No. 2096.

Weil & Thorp, for libelant.
John G. Harmon and *Charles H. Kline,* for respondent.

SHAFER, P. J., March 23, 1916.—The master has made full findings of fact in this case, and they seem to be supported by the evidence and, in fact, are not controverted by the parties. The only question in the case is: What view is to be taken of the legal effect of the facts as found by the master and shown by the evidence? The master has expressed the opinion that these facts do not constitute a wilful desertion on the part of the husband, but on the contrary show a separation by mutual agreement, and has therefore recommended that the libel be dismissed; to which the libelant has excepted.

The evidence shows, and it is found by the master, that the respondent treated his wife very badly, principally on account of his hard drinking, during the most of their married life, and gave her very little support. In fact, it might be a question whether this treatment did not constitute a ground of divorce itself, considering the social standing of the parties, who are educated people; and this is claimed by the libelant to amount to a constructive desertion on his part. We are of opinion, however, that it is not necessary to pass upon this matter as, according to our view of the case, there was an actual desertion.

In the winter of 1913 the respondent drank so much that he was affected with delirium tremens and had to remain in the hospital for a considerable time, and was not a fit person for his wife to live with. The libelant testified that she "told Mr. Maize that as his traveling position was so indefinite and he had promise of a permanent position within about a year, I thought it would be wiser for me to remain with my parents until he stopped drinking," and that he agreed that that was

right and promised to stop drinking and to send her money. She thereupon remained with her children at the house of her parents, where she still is. Some occasional correspondence took place between the parties up until April, 1914, after which no communication passed between them. In June, 1914, he left this county and went to Bloomsburg, where he had formerly lived, to the house of his parents. After that time he never contributed anything to the support of his wife and children, never furnished any home, never came to see his wife and children, and did not stop drinking.

We are of opinion that after a temporary separation such as this, agreed to by the parties for the very best of reasons and absolutely necessary under the circumstances, it was not necessary for the wife, after the lapse of the year which they had spoken of, to make her way to Bloomsburg to demand support from her husband. If the law is as contended for by respondent, all that a man who proposes to desert his wife would need to do would be to get her to agree to go away from the house for a few days or months, and then never come back.

We are, therefore, of opinion that the exceptions must be sustained and that the libelant is entitled to a divorce for willful and malicious desertion.

Let a decree be drawn accordingly.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Commonwealth *v.* Davis.

Automobiles—Summary conviction—Act of July 7, 1913, P. L. 672—Indictment.

Where a person charged with violating the automobile act of July 7, 1913, P. L. 672, waives a hearing before a justice of the peace and secures a trial by jury, the proceeding before the court is a summary conviction, of which a grand jury has no jurisdiction.

Rule to strike off the imposition of costs on the prosecutor by the grand jury in C. P. Delaware Co. June Sess., 1916, No. 58.

W. S. Sykes, for rule.

BROOMALL, J., Sept. 18, 1916.—This proceeding was commenced before a magistrate by a complaint of D. Harvey Sykes, that the defendant had violated § 7 of the act of July

7, 1913, P. L. 672, commonly known as the automobile law. By this act a violation of § 7 is not made a misdemeanor, but is to be proceeded with by way of summary conviction. The defendant waived a hearing and was bound over to appear at court, whereupon an indictment was presented to the grand jury, who ignored the bill and imposed the costs on the prosecutor, D. Harvey Sykes. This rule has been taken to set aside this action of the grand jury. The grand jury had no jurisdiction in this case. The powers of the grand jury extend only to questions of crime. 17 Am. & Eng. Encyc., p. 1278. When a proceeding of summary conviction under this act comes into court, by a waiver of hearing and a demand of a trial by jury under § 21 of the act, it is still a proceeding of summary conviction, of which a grand jury has no jurisdiction, but under the statute it is triable by a jury, who sit as the magistrate would have done, had there been no waiver. It follows that the rule to set aside the imposition of costs must be made absolute.

Commonwealth *v.* Dollar Savings Bank.

Escheat—Bank deposits—Payment to commonwealth—Collection by depositor—Constitutionality of act of April 17, 1872, P. L. 62—Jurisdiction of court under act of June 15, 1911, P. L. 974.

The statute of April 17, 1872, P. L. 62, directs every savings institution or savings bank to report to the auditor-general the deposits in its possession unclaimed for thirty years, and to pay them over to the state treasurer, to be held by the commonwealth and returned to the owner upon his establishing his right to the same.

Said statute protects the savings institution or bank from any liability to the depositor in case of payment, by providing that no action or suit shall be brought or maintained by the depositor or his legal representatives against it for the deposit, and by making the receipt of the state treasurer therefor a full and sufficient discharge to it from any further liability to the depositor.

Said statute is an exercise by the commonwealth of the power to establish presumptions of abandonment after the lapse of reasonable time, and to take into its custody abandoned property for the purpose of conserving it for the owner.

Said statute does not violate the constitutional provisions touching the taking of property without due process of law or the taking and applying of private property to public use without authority of law or without just compensation being first made or secured.

Nor does said statute violate the constitutional inhibition against the payment of money out of the state treasury except upon appropriations made by law and on the warrant of the proper officers pursuant thereto.

[Commonwealth v. Dollar Savings Bank.]

The provision prescribing a limitation of time, within which an action may be brought against a corporation, is not such a statute of limitations strictly so called, as was intended to be avoided by Art. III, Sec. 21, of the Constituton, but rather an enactment for the protection of the bank against liability after it has paid over the deposit to the state treasurer.

The deposits paid over under the act of 1872 to the state treasurer may not now be escheatable in the strict sense of the word, but may be said to be liable to escheat. Such property is expressly made the subject of recovery by the commonwealth by the act of June 15, 1911, P. L. 974.

Aside from the statute, the court has jurisdiction over such case, as in all cases where money is payable and its recovery sought.

Motion for judgment for want of a sufficient affidavit of defence. C. P. Dauphin Co. Sept. T., 1914, No. 296.

J. C. Bell, attorney-general, *Wm. J. Swope* and *Fox & Geyer,* for commonwealth.

J. A. Stranahan, for defendant.

KUNKEL, P. J., June 22, 1916.—This action is brought by the commonwealth to recover certain sums of money deposited with the defendant bank and unclaimed for thirty years. The question presented is that of the validity of the act of April 17, 1872, P. L. 62, and comes before us on a motion for judgment for want of a sufficient affidavit of defence. The act of 1872 provides in § 2, "That where any depositor with any saving fund, savings institution or savings bank whatsoever, or his legal representatives, shall omit to make any demand for the amount deposited by him, or for any part thereof, for the space of thirty years after the last deposit or payment was made by or to him, or his said representatives, no action or suit shall thereafter be brought or maintained by him or them, for the amount of such deposit, against such corporation, but the same shall be paid over instead to the state treasurer for the use of the state: . . . And provided, That it shall be lawful for such depositor or his legal representatives, at any time after the amount of his deposit shall have been paid over into the treasury of the commonwealth as aforesaid, to institute and prosecute an action of debt therefor, against the state treasurer for the time being, in the court of common pleas for Dauphin county; and on the recovery of judgment in such action, it shall be lawful for the court to issue thereon a writ, commanding such state treasurer, or his successor in office, to cause the amount thereof, with costs, but without interest, to be paid to the party entitled in the judgment, out of any unappropriated moneys in the hands of the state treasurer, or if

there be no such money unappropriated, then out of the first moneys that shall be received by him, and to enforce obedience to such writ by attachment, as is provided by law, in respect to actions against counties and townships;" and in § 3: "It shall be the duty of the treasurer or cashier of every incorporated saving fund institution or bank in this commonwealth, on or before the first day of November, in each year after the present, to make returns to the auditor-general of the amount of all such unclaimed deposits as referred to in the previous section of this act, with the names and residences of the depositors, so far as known, and before the first day of January, then next ensuing, pay over the amounts so returned to the state treasurer, whose receipt therefor shall be a full and sufficient discharge to such saving fund institution or bank from any further liability to any such depositor."

This statute in short directs every savings institution or savings bank to report to the auditor-general the deposits in its possession unclaimed for thirty years and to pay them over to the state treasurer, to be held by the commonwealth and returned to the owner upon his establishing his right to the same. It protects the savings institution or bank from any liability to the depositor in case of payment by providing that no action or suit shall be brought or maintained by the depositor or his legal representatives against it for the deposit, and by making the receipt of the state treasurer therefor a full and sufficient discharge to it from any further liability to the depositor.

The failure of the owner of property or of his legal representatives to do any act with respect to it for a period of thirty years indicating ownership over it, gives rise to the presumption that it has been abandoned; and it is settled that the state has the power to establish presumptions of abandonment after the lapse of reasonable time and to take into its custody abandoned property for the purpose of conserving it for the owner. Cunnius *v.* Reading School Dist., 206 Pa. 469, affirmed 198 U. S. 458; Nelson *v.* Blinn, 197 Mass. 279; Provident Savings Inst. *v.* Malone, 221 U. S. 660. The statute in question is an exercise by the commonwealth of this power.

The specific grounds of defence to a recovery in the present case are: (1) that the statute violates the Fourteenth Amendment to the Constitution of the United States and Art. I, Sec. 10, of the Constitution of this state, in that it deprives a person of property without due process of law (2) that it is contrary to Art. III, Sec. 16, of the Constitution of this state, in that it attempts to authorize the payment of moneys by the

state treasurer without special appropriation; (3) that it violates Art. III, Sec. 21, of the Constitution of this state, in that it prescribes a limitation of time within which an action may be brought against a corporation different from the general laws regulating actions against natural persons. We state these objections in the inverse order in which they were presented to us.

The first two objections we do not think the defendant has any standing to raise. They affect the rights of the depositor or of the owner of the property which the commonwealth takes into its possession under the act of 1872, and in no wise concern the defendant. In Cooley on Constitutional Limitations, 7th ed., p. 232, it is said, "A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it." And in Lampasas *v.* Bell, 180 U. S. 276, it is said: "The objection to the constitutionality of the statue must be made by one having the right to make it, not by a stranger to its grievance. To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only therefore our courts of justice are called upon to interpose." Wellington Petitioner, 16 Pick. 87, 96. The same doctrine is laid down in Plymouth Coal Co. *v.* Penna., 232 U. S. 544, and in the authorities there cited.

But we are not persuaded, even if the objection could be heard out of the mouth of the defendant, that the statute is in violation of the constitutional provisions touching the taking of property without due process of law or the taking and applying of private property to public use without authority of law or without just compensation being first made or secured. There is no attempt on the part of the commonwealth to deprive the owners of the deposits of their property. The manifest purpose of the act is to take the deposits out of the possession of the savings bank and to place them in the possession of the commonwealth, not for its use in the sense of depriving the owners of them, but for custody and care and subject to the owners' rights. As was said in Attorney-General *v.* Provident Inst. for Savings, 201 Mass. 27, which was afterwards affirmed in Provident Savings Inst. *v.* Malone, 221 U. S. 660, where a statute passed to accomplish a purpose similar to that of the act of 1872 was under consideration: "There is nothing unconstitutional in the disposition made of it (the property) under the statute. It is to be held and used

by the treasurer and receiver general according to law, but all the time in recognition of the rights of the owner and of the necessity of repaying it to him, with interest, when he establishes his lawful right thereto. The commonwealth under the statute becomes a kind of trustee for the owner. The security of the owner is ample." It follows therefore that these constitutional provisions, which it is contended the statute of 1872 violates, have no application.

However, if it be suggested that the deposits are to be returned to the owners without interest and to that extent they would be deprived of their property, the answer is that it does not appear that the deposits sued for were bearing interest. But if they were, this constitutional objection cannot be raised by the defendant bank. Provident Savings Inst. *v.* Malone, 221 U. S. 660.

Nor are we satisfied that the statute violates the constitutional inhibition against the payment of money out of the state treasury except upon appropriations made by law and on the warrant of the proper officers pursuant thereto. Art. III, Sec. 16, of the Constitution. In Com. ex rel. *v.* Powell, 249 Pa. 144, it was said, referring to this section, this requirement "simply means that the public funds are not to be expended in any way except as directed by the law-making power." However, as we have already said, the provision of the statute for the repayment of the deposits to those entitled to them in no wise affects the rights of the savings bank. It cannot therefore make the provision the subject of complaint.

The objection that the statute prescribes a limitation of time, within which an action may be brought against a corporation, different from the general laws regulating actions against natural persons, may be raised by the defendant bank only so far as it may be affected by the unconstitutionality of the provision. The defendant's position is, that if the protective provision is unconstitutional objection may be raised by the depositor at any time, and, if sustained, its liability for the deposit to the depositor remains. We do not look upon this provision of the statute as a statute of limitations strictly so called, such as was intended to be avoided by Art. III, Sec. 21, of the Constitution, but rather as an enactment for the protection of the savings bank against liability after it has paid over the deposit to the state treasurer. The statute takes away the remedy of the depositor against the bank and substitutes for it the remedy against the state treasurer and the commonwealth which has received the deposit. But be that as it may,

the other provision in the statute amply protects the savings bank. In § 2 it is provided that the state treasurer's receipt shall be a full and sufficient discharge of the savings bank from any further liability to the depositor. Both provisions, the one which takes away from the depositor his right of action against the savings bank and the other, which declares the receipt of the state treasurer a complete discharge from liability, were intended to protect the savings bank. So even if the first provision for its protection be avoided by the section of the Constitution referred to, it still has full protection in the effect which the statute directs shall be given to the receipt of the state treasurer.

It is suggested further that this action cannot be maintained. According to the statement which has been filed, it is brought by virtue of the provisions of the act of June 15, 1911, P. L. 974. The title is, "To provide for the better collection of money and taxes due the commonwealth, and property belonging to, or liable to escheat to, the same," and provides in § 1, "That the auditor-general, at his discretion, shall have authority to cause to be commenced, in the name of the commonwealth, in any court of the commonwealth having jurisdiction, any appropriate suit at law or in equity, by action of assumpsit or otherwise, for any money or taxes due the commonwealth, or property belonging to, or liable to escheat to, the same." The present action is brought to recover moneys deposited with the defendant and unclaimed for thirty years. Property that has not been claimed for so long a period of time, either by the original owner or by his heirs or legal representatives, may well be said to be liable to escheat. The death of the owner without heirs would make it liable to escheat, and the failure by any one to make claim for it would naturally give rise, after such a lapse of time, to the presumption of the death of the owner and of the rightful claimants, in accordance with the legal presumption of death. "Liable to escheat" in the statute refers to a future probable escheat. The deposits paid over under the act of 1872 to the state treasurer may not now be escheatable in the strict sense of the word, but under all the circumstances may be said to be liable to escheat. Such property is expressly made the subject of recovery by the commonwealth by the act of 1911.

Aside from the statute we can see no reason why this case does not come within the general jurisdiction of this court, as do all cases where money is payable and its recovery sought. This court certainly has jurisdiction of the subject-matter;

and it acquired jurisdiction over the defendant by service and by its appearance. "Jurisdiction over any individual corporation depends . . . not on the purpose sought by the writ, but on getting the particular defendant in court. It is a matter of service or appearance." Com. ex rel. *v.* Order of Solon, 166 Pa. 33. Here the defendant was served, appeared and filed its affidavit of defence.

As there is no dispute that the defendant is a mutual savings fund society, not having capital stock represented by shares, and has in its possession the following deposits: Elizabeth Barth, $236.08; John Jordan, $16.34; Annie Leech, $28.73; Philipina Seiler, $41.83; James B. Gregory, $101.07; Alexander McKim, $805.48; Mary J. Bruce, $30.51; Henry Wilson, $70.06; Samuel Pierce, $58.18; Carl Kochler, $83; William Horsely, $295.19; Anna Gibson, $388.69; amounting to $2,757.16, for which no demand has been made by the depositors or their legal representatives for a period of thirty years after the last deposit or payment was made by or to them, or their legal representatives, and such period of thirty years elapsed prior to Nov. 1, 1913, whereby the deposits became payable by the defendant bank to the state treasurer under the act of April 17, 1872, therefore, in accordance with the motion of the commonwealth, judgment is directed to be entered in its favor and against the defendant for the sum of $2,757.16, for want of a sufficient affidavit of defence. For the recovery of the balance of the claim, which is in dispute, the cause may proceed.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Throckmorton's Executors *v.* The Lancaster & Southern Street Railway Co.

Electric railway—Sale by receiver—Mortgage—Lien of—Discharge of.

The court will not order the sale of the property, rights and franchises of an electric railway company on petition of its receivers discharged from the lien of a mortgage given to a trustee which contains stipulations as to the manner of its foreclosure by the trustee at the request of the holders of one third of the bonds, where the trustee objects to such order through a majority of the bondholders' consent.

The power to displace liens is at all times a drastic one, and should never be exercised when doubt arises as to whether or not the power

exists, and even then with a scrupulous attention to the rights of all the parties concerned.

Rule for order of sale to sell the property, etc., of the Lancaster & Southern Street Railway Company, free and clear of the mortgage upon the same. C. P. Lancaster Co. Equity Docket, No. 6, p. 129.

O. S. Schaeffer, F. Lyman Windolph, Appel & Appel, Coyle & Keller, Samuel J. Henderson and *Conlen, Brinton & Acker,* for rule.

Dickson, Beitler & McCouch, contra.

LANDIS, P. J., May 11, 1916.—The Lancaster & Southern Street Railway Company is a public service corporation, and, by virtue of its charter, it has constructed and has operated by electric power a railway in the county of Lancaster, extending from Pequea on the Susquehanna river, a distance of seven and three-tenths miles. Its authorized capital stock is $100,000, which was divided into two thousand shares of the par value of $50 each. On June 1, 1911, this company executed to the Provident Life and Trust Company, of the city of Philadelphia, as trustee, a mortgage, which it is conceded is a first mortgage on the rights, property and franchises of the said company, to secure the payment of certain bonds issued and to be issued on the faith of the same. There are now outstanding bonds which were issued by virtue of the mortgage to the amount of $109,000. The mortgage matures on June 1, 1941; but no interest has been paid upon any of the bonds since June 1, 1915. The plaintiffs, who are the owners of stock or bonds of the said corporation, or both, on Feb. 16, 1916, filed their bill, alleging, inter alia, that the company was insolvent, and praying for the appointment of a receiver. On Feb. 17, 1916, this court appointed John H. Myers and John M. Groff, receivers, and on April 29, 1916, these receivers presented their petition, asking that an order should issue to them, directing the sale of the property, rights, privileges and franchises of the said corporation, free and clear of the above named mortgage. The questions now before the court are: First, whether the court has the power to make such an order; and secondly, whether, if that right exists, it should, under the circumstances, be exercised.

Accompanying the petition is the assent of certain holders of outstanding bonds secured by the mortgage to the amount of

$93,000. The remaining bondholders have not assented to these proceedings, though they are not at present, in person, before us contesting. The trustee in the mortgage has, however, filed an answer, and it thereby insists that neither the holders of the outstanding bonds nor it as trustee have consented to the sale of the property by the receivers, and it protests that such a sale can only properly be had through the exercise of the powers contained in the mortgage. It also avers that no notice has ever been given to it, under Art. v, Sec. 14, of the mortgage, and that no indemnity has ever been tendered to it; but that it has, nevertheless, given notice to the Lancaster & Southern Street Railway Company, under the provisions of Art. v, Sec. 1, of the mortgage, of the default in the payment of the bonds, and that it is now in a position, under the terms of the mortgage, to declare all the bonds secured thereby due and payable, and to proceed, in accordance with the terms thereof, to sell the mortgaged premises at public sale after due advertisement, and it avers its willingness so to do upon the request of the requisite number of bondholders, accompanied by an offer of indemnity, as provided by the terms of the mortgage.

In The Fidelity Title & Trust Co. *v.* The Schenley Park & Highlands Ry. Co., 189 Pa. 363, Mr. Justice Green said: "It must be conceded, of course, that in Pennsylvania, in all ordinary sales of real estate by force of judicial proceedings, all liens are divested except first mortgages under the act of 1830 and 1867. See also act of May 8, 1901, P. L. 141. But the franchises of a corporation are not real estate, and when these were in the hands of receivers, a different system became applicable to their treatment when general equity powers were conferred upon our common pleas courts." The acts referred to, however, as conferring equity powers upon the Supreme Court and courts of common pleas, relate solely to the foreclosing of mortgages; whereas, in this case, no application for such a purpose is before us. We are asked to discharge the lien of the mortgage, without the consent of the parties, who, under its terms, are secured by it, by granting to the receivers an order for the sale of the property clear of the mortgage. It is admitted by the learned counsel that they have been unable to find any case decided by the courts of Pennsylvania exactly in point, and in Beach on Receivers, § 732, it is stated as a familiar rule that "liens upon property held by a receiver are not divested by virtue of a sale made by him." In Alderson on Receivers, § 602, it is also said: "Liens upon prop-

erty held by a receiver are not divested by virtue of a sale made by him. If the order of sale make no mention of such prior liens, or of incumbrances of any kind, the sale passes the title to the property as it is in the receiver, and subject to whatever incumbrances or liens there may be existing upon it. A purchaser may, therefore, question either the validity of the liens or the amount due thereunder. The receiver can sell only the interest which he has in the property. Thus it has been held that the lien of a mortgage given by a firm to one who was not a party to an action, subsequently brought, in which a receiver was appointed over its affairs, cannot be divested by a sale of the mortgaged property, made by the receiver by authority of the court."

The case of First Nat. Bank of Cleveland *v.* Shedd, 121 U. S. 74, seems to us to confirm, instead of being adverse to, this view. In that case, there were two suits for the foreclosure of two mortgages of an insolvent railway, which suits had, by amendments and cross bills, become practically consolidated. The two sets of trustees, acting in harmony and in good faith and with the approbation of the holders of a majority of the bonds issued under each mortgage, procured the entry of a decree which ordered a speedy sale by them of all the property covered by either or both mortgages. The trustees moved the court for leave to sell the mortgaged premises under their deeds of trust, and the court below held that the mortgage trustee should be permitted to exercise their powers of sale under the direction of the court, and this decree was affirmed. The right of a receiver to sell and discharge a mortgage, notwithstanding its provisions showing the manner of foreclosure, was not involved in that case.

Nor do we think that the sales of real estate by trustees in bankruptcy are at all analogous. In Collier on Bankruptcy, 8th ed., p. 835, it is said: "The subject of sales is largely controlled either by rules or by the order of the court in each case. Here, the present law differs materially from that of 1867. The latter, especially after the amendments of 1874, regulated sales with much particularity." And on page 838, it is said: "Sales free of incumbrances were authorized by the statute of 1867. The present law has no such provision. This has cast doubt on the power of the court to authorize such a sale. The cases are quite uniform, however, in declaring that such sales can be authorized, and by the referee as well as by the judge. But they should not be ordered where it does not appear that they will be to the advantage of the

bankrupt's estate, as where there is no equity of redemption, or a state court has already been invoked to foreclose the lien." Then, too, the cases referred to as sustaining this doctrine are none of them such as have been decided by the courts of last resort, and are, therefore, not conclusive upon the subject.

A reference to the mortgage will show that its provisions are full and comprehensive. It provides that, in case default shall be made in the payment of the bonds or interest for a period of thirty days after the same shall become due and written notice thereof shall be given to the company from the trustee or from the holders of one third of the amount of bonds, then the trustee may, if so requested by the holders of one third of the bonds, declare the principal of all the bonds secured thereby to be due and payable; that if default shall be made by the company, such as would give the trustee the right to declare the principal of all of the bonds secured thereby to be immediately due and payable, whether or not the principal of said bonds shall have become due, by declaration or otherwise, the company, upon demand of the trustee, shall and will forthwith surrender to the trustee the actual possession, and the trustee shall be entitled forthwith, with or without process of law, to enter into and upon and take possession of the property, and it shall hold and use the same, subject to the lien of the instrument, controlling, managing and operating, by its superintendents, managers, receivers, servants and other agents and attorneys, the said property with the appurtenances, and conducting the business and operations thereof, and exercising the franchises appurtenant thereto; that the principal of the bonds secured thereby having become due at maturity or otherwise, the trustee, in its discretion, may take possession, or shall, if so required in writing by the holders of one third in amount of the bonds then outstanding and unpaid, proceed to sell the property; that no holder of any bond or coupon secured thereby shall have the right to institute any suit, action or proceeding in equity or at law, for the foreclosure of the instrument, or for the execution of any trust thereunder, or for the appointment of a receiver, or for any other remedy thereunder, unless such bondholder previously shall have given to the trustee written notice of such default and of the continuance thereof, as therein provided, or unless the holders of one third in amount of the bonds secured thereby and then outstanding shall have made written request to the trustee and shall have offered to it a reasonable opportunity

either to proceed to exercise the powers thereby granted or to institute such action, suit or proceedings in its own name and the trustee shall have refused or neglected so to do, or unless also they shall have offered to the trustee adequate security and indemnity against the cost, expenses and liabilities to be incurred therein or thereby, and such notification, request and offer of indemnity are thereby declared in every such case at the option of the trustee to be conditions precedent to the execution of the powers and trusts of the instrument, and to any action for foreclosure, or for the appointment of a receiver, or for any other remedy thereunder; that the Trustee, or any other trustee thereafter appointed, may be removed at any time by an instrument or concurrent instruments in writing, signed by the holders of not less than two thirds in amount of the bonds secured thereby and then outstanding; and that, in case at any time the trustee or any trustee thereafter appointed shall resign or shall be removed or otherwise become incapable of acting, a successor may be appointed by the holders of a majority in amount of the bonds secured thereby and then outstanding, by an instrument or concurrent instruments signed by such bondholders, or by their attorneys-in-fact, duly authorized.

It will be observed that the plaintiffs, holding or represent- as they do more than two thirds of the bonds outstanding, have complete control of the situation. If the present trustee is unsatisfactory, they can remove it and appoint another in its place, and they can appoint those who are now acting as receivers and who are now making the application, if they see fit, to accomplish this very object. It seems to us that the method thus pursued would be quite as expeditious and equally economical for the bondholders as if the property should be sold under an order of sale. Then, too, the power to convey a good title in pursuance of the mortgage is not doubtful; whereas, as we have intimated above, the rights taken by the purchaser under such an order of sale may be questioned. In addition, the power to displace liens is at all times a drastic one and should never be exercised when doubt arises as to whether or not the power exists, and, even then, with a scrupulous attention to the rights of all the parties concerned.

Under the facts as they have been presented, we do not think that this order should be granted, and the rule, for the reasons given, is discharged.

Rule discharged.

From William N. Appel, Esq., Lancaster, Pa.

Hendricks *v.* Philadelphia & Reading Railway Co.

Railroads—Negligence—Fire from sparks—Contributory negligence—Non-suit.

In an action by a railroad company to recover damages caused by fire alleged to have been started by sparks from a locomotive, the burden is upon the plaintiff to prove that the defendant was negligent in one or more of five ways, to wit: (a) in failing to use an approved spark arrester on its engines; (b) in failing to keep such spark arrester in proper repair; (c) in using fuel whose sparks could not be successfully arrested by the device on the engine; (d) in the manner of operating the engine; (e) in permitting inflammable matter to accumulate on its right of way where sparks necessarily and unavoidably emitted from a smoke stack of the engine, or hot coal dropped from the fire box might fall and ignite such inflammable matter and thence communicate the fire to the property outside of the company's right of way.

If the plaintiff fails to make such proof, or if it appears that he was guilty of contributory negligence in making no effort to stop the fire after he knew that it had started, he will be non-suited.

Motion to strike off non-suit. C. P. Schuylkill Co. Jan. T., 1911, No. 262.

Joseph W. Moyer, for plaintiff.
John F. Whalen, for defendant.

Koch, J., March 6, 1916.—The plaintiff owns three adjoining tracts of land, situate in the township of East Brunswick, in this county, upon which growing timber stood in the month of March, 1910. The defendant operates a steam railroad near or adjacent to said lands. The plaintiff claims that the defendant, through sparks emitted from its passing engines, set fire to his woods in the month of March, 1910, and thus damnified him to the extent of about $3,000. At the conclusion of the plaintiff's testimony, we directed a compulsory nonsuit, upon the defendant's motion.

The plaintiff offered a deed to show his ownership of two of said tracts of land prior to the time of the fires, and it was admitted in evidence. The one tract therein described contains one hundred and three acres and fifty perches, more or less, and the other contains eighty-nine acres, more or less. Plaintiff next offered a deed to show his ownership of a third tract containing eighty-five acres and forty-two perches. This deed was dated April 30, 1910, and its admission was objected to because the fire had occurred on March, 25 and 29, 1910. We sustained the objection. It appeared, however, later in the

case that Hendricks obtained from the owner of the land at the time of the fires his claim for the damages done by the fires.

On the morning of Good Friday, March 25, 1910, Hendricks put his cows in a certain meadow, but when he looked for them after dinner they were gone. He says: "I went up on the Lehigh Railroad on the bank and looked for my cows; went up towards the arch above the house. I heard the train after dinner, quarter after one or half past, between a quarter after one and half past; when I heard her whistling coming up towards Ringgold; whistled very loud; I suspected something. I looked around towards the tower. . . . I looked a little while. . . . I saw the smoke coming up over the hill. . . . I knew he had set the woods afire. . . . I went after the cows then. I seen the smoke getting thicker and thicker up over the hill. I got one of the cows and took that home. I went to get the other cow. . . . When I got down to the hill I could see down through the gap. I seen the whole streak of the smoke rising up. . . . One stream of fire went right up over the middle of my mountain tract, which I call the mountain tract, over the Blue Mountain. Went very rapid; a pretty hard wind blowing. I went over the hill over half a mile, got my cows and had trouble getting them home. Very nice day." The tract the witness thus refers to is the first of the three above mentioned. Hendricks further said: "After I got the cows home I went up the straight line right up through my meadow; went along William Nester's fence through the woods. . . . I went down to the railroad. I examined the place. I seen where the place was set afire, right alongside the railroad; had a bank about ten or twelve feet wide; cinder; right below that cinder bank some piles of sills; I saw paper, grass and such stuff accumulated there; not very big; I saw where it had catched fire and went just 'A' shaped, like that, into other grass, where it was very close to where the fire had started. It went through from there, went right up the hill and over my tract. That was only a narrow stream, the first, going both ways right and left."

The fire was still burning when he got there. It was not on his land. The wind blew from west to east and the fire spread right and left. The fire ran east from near the telegraph tower. The following question and answer, in the course of the plaintiff's examination as a witness, have an important bearing here, to wit: "Q. How soon after you heard the whistle blowing and the train going north did

you get to that point? A. A couple of hours; two or three hours."

The witness added to his answer, "I knew it was no use; the fire was too strong," but these words were struck out of his answer on defendant's objection and motion.

On cross-examination the plaintiff said: "I was delayed a good bit by Mr. Nester calling me up at his home and said the fire was going across the mountain, so I knew it was no use to be in a hurry." Hendricks claimed that the fire started ten to twelve feet down over the cinder bank and fifteen to thirty yards north of the tower between two piles of railroad sills or ties, which might have been ten to fifteen feet apart, and that it went out on an "A" shape. The witness had not seen the fire start there and his evidence is of mixed fact and opinion. When he got on the ground there was a fire below the tower, as well as on the north of it, and the two burning towards each other. There was fire all along the railroad curve. The railroad has a pretty heavy grade going north.

A fire occurred on March 29, 1910, on the second tract above mentioned. The plaintiff was not at home at the time, but he examined the ground the next day. He got home about 4.15 P. M. on the day of the fire. He saw the fire burn, however, on his way home on the same day that it started. It was then burning along his fence. It burned over forty or fifty acres of his land. It was sprout land and some heavy timber. "Q. You got home on the twenty-ninth of March. Did you go down to the railroad to make an examination to see? A. Not till the next day; I did not get away; I had business that evening. I could not get away." He said the fire had burned ten or fifteen feet from the railroad about half a mile north of the tower. He did not go on the land to see how much had been burned over before March 29, 1910. He says on page 43 of the testimony: "That first fire started on Good Friday, burned all Saturday. . . . Saturday night came over on the farm side; then it was Sunday, and Monday I had other business; I was at a sale. And then was Tuesday the second fire came. Burned the balance that was left. I did not have any time to go over to see how much the first fire had burned." He could not tell how many acres were burned by each of the respective fires, on March 25 and 29, 1910.

On page 44 this examination occurs: "Q. What efforts did you make to put the fire out? A. Put a regiment of soldiers there and they could not have done anything to put that fire

out. Q. What did you do? A. I seen that it was useless to do anything. Q. What did you do? A. I went down to see how the fire was. Q. Did you do anything? A. No. Q. Did you get anybody to help you to put it out? A. No, it was wild over the mountain. (Question repeated.) A. No."

A certain meadow tract lay between the plaintiff's first tract and the sill piles where evidences of fire were seen by the plaintiff, and the distance across Miller's land to the plaintiff's land is not less than three hundred yards. The eighty-nine acre tract goes to the railroad. Being asked concerning the second fire, "And when you came home you saw the fire," the plaintiff replied: "I saw a little fire over there yet, it burned itself out. Still there was here and there fire." He claims he saw the first fire only a couple of minutes after he heard the engine whistle and was then a half or three-quarters of a mile from the fire. His cows had gone up the railroad toward New Ringgold and he went after them. He was then sixty-four years old and not in very good health. When he went to the fire it was then a mile over the mountain. "The wind took the fire along as if it was on horseback." He claimed his condition of health was not such as would enable him to run down there at that time and exert himself, to put the fire out.

W. K. Weidman was called as a witness for the plaintiff. He works for the defendant on the sand siding; reports trains as they pass; is the telegrapher there. Asked about the fire of March 25, he said: "It started between two and three hundred feet, it was burning between two and three hundred feet from the railroad in towards the railroad, about three hundred yards above the telegraph office. Q. Burned in two or three hundred feet? A. Burned in, coming in towards the railroad. Q. Towards the railroad? A. Yes." It was between one and two o'clock in the afternoon. "It was between two hundred and three hundred feet burning towards the railroad, I seen it. . . . The only fire I seen was the fire burning towards the railroad." It was in the woods. "Q. Did it continue to burn towards the railroad? A. Yes, sir. Q. How close did it come toward the railroad? A. It was burning pretty close till I had to leave. I went away; got relieved. Q. When you say pretty close how close do you mean? A. About forty or fifty feet." The fire was in the woods burning toward the brick yard. "Q. You do not know where the fire started? A. No." His hours for work were from 8.00 A. M. until 4.00 P. M. "Q. I understood you said when you left to go home it was within

about forty feet? A. About forty feet, yes, sir, when I first seen it. The fire did not come up to the sill piles." A passenger train passed at 1.17 P. M. going north; a coal train was on the siding to let the passenger train pass. Weidman saw the fire about five minutes after the passenger train went by. He cannot tell whether the fire started at the railroad or not. The train went thirty or thirty-five miles per hour up grade and was one minute late. It was the only fire he saw that day. He was relieved from duty about an hour after the train passed. The fire that he saw on March 25, 1910, was two hundred or three hundred feet from the railroad, in the woods. On March 29, 1910, he saw no fire at all. The watch box is on the right side of the railroad, going north; that is, on the same side with the land and fires in question were. The track is straight by the watch box for several hundred yards. When Weidman went off duty, which was sometime before Hendricks got there, the fire had burned to within about forty or fifty yards of the railroad. He still holds the same position. He stated that no grass could grow where the sills were piled or between the sill piles, because it is all cinder there. The watch box, watch tower, telegraph office and signal tower are evidently all one and the same thing, but differently named by witnesses. We have quoted extensively from the two chief witnesses, although there may be useless repetition. There is no doubt that some damage was done to the plaintiff's property.

We do not think error was committed in granting a compulsory non-suit. The only ground upon which the plaintiff can recover is by proof, either positive or circumstantial, that the defendant was negligent at the time the fires occurred, and that such negligence was the cause of the fires.

Steam railroads cannot be operated without fire in their locomotives, and the mere fact that some of that fire is necessarily emitted or purposely removed at times is not sufficient to charge the company with negligence, even though the emission or removal of fire from the engine may ignite property along the railroad. Sparks will fly out of the smoke stack and the fire box must be freed from ashes and cinder.

In Phila. & Reading R. R. Co. *v.* Schultz, 93 Pa. 341, the Supreme Court said:

"It is indeed true, that a locomotive cannot be run without fire; that human ingenuity has not as yet devised any contrivance which will wholly arrest sparks; so, if these, now so

important vehicles, are to be run at all, more or less damage in the way of fire, must result from them. Therefore, the rule of law is, and must be, that if reasonable precautions are taken in providing them with those appliances which are deemed best for the prevention of such damage, the company or persons using them, cannot be made liable though they fire every rod of the country through which they run. In accordance with this now so well established rule of law, we have but recently held, that the mere fact of the firing of a property will not, of itself, prove negligence, where it is shown that approved spark-arresters were in use. Jennings *v.* The Railroad Co., ante, p. 337."

"And all engines, whether provided with spark arresters or not, emit sparks. The mere existence of a fire along the line of the road caused by the sparks from the company's engine, is not enough to fasten upon the company the charge either of negligence or want of skill. Phila., etc., R. R. Co. *v.* Yeiser, 8 Pa. 368." Henderson *v.* Railroad Co., 144 Pa. 461.

A non-suit was entered and sustained in American Ice Co. *v.* Penna. R. R. Co., 224 Pa. 439. Mr. Justice Elkin, speaking for the court, said:

"The fire is alleged to have been caused by sparks negligently emitted from the locomotives of the appellee company. The general rule is that negligence is never presumed, it must be affirmatively proven. There is nothing in the present case to justify a departure from this well-settled and wholesome rule. There is no direct evidence to show that the railroad company caused the fire. Not a single witness testified that he had seen any sparks negligently or otherwise emitted from locomotives of appellee at or near the time of the fire, nor was any locomotive identified as being near the building when the fire started. Indeed, there is no testimony to show how, or exactly where, the fire started, or from what cause it originated. It is all guess or conjecture."

In view of Hendricks' testimony it could be only a guess or conjecture as to the cause of either of the fires, and it could be only a guess or a conjecture as to how much was destroyed by each of the fires.

The company could have been negligent in one or more of five ways, to wit: (a) In failing to use an approved spark arrester on its engines; (b) in failing to keep such spark arresters in proper repair; (c) in using fuel whose sparks could not be successfully arrested by the device on the engine; (d) in the manner of operating the engines; (e) in permitting in-

flammable matter to accumulate on its right of way where sparks necessarily and unavoidably emitted from a smoke stack of the engine, or hot coal dropped from the fire box might fall and ignite such inflammable matter and thence communicate the fire to the property outside of the company's right of way. But plaintiff must prove negligence in at least one of those respects, and must also further prove that because of such negligence the fires in question were started.

Now, there is not a scintilla of evidence that the engines of the defendant company were not provided with approved spark arresters or the proper repair of such arresters was lacking, or that improper fuel was used or that the engines were improperly operated; nor did the plaintiff show that any inflammable matter had accumulated on the defendant's right of way for such length of time as would affect the defendant with notice of its existence. The grass, leaves and paper which the plaintiff claims he found burned between the two sill piles may have been landed there by the wind that was blowing on that day, and but a few minutes before they became ignited.

Taking the testimony of Weidman, who said repeatedly that the fire was more than two hundred feet east of the railroad, in the woods, burning towards the railroad when he first saw it, or the single statement that it was only forty or fifty feet from the railroad, burning towards the railroad, when he first saw the fire, is not of itself enough to convict the railroad company with negligence, notwithstanding the fact that one of its engines passed there a short time before. As I understand the law, the evidence should be stronger than that to allow one man to take money out of another man's pocket.

The cases of Waagener *v.* Phila. & Reading Ry. Co., 235 Pa. 559; Thomas *v.* New York, Chicago & St. Louis R. R. Co., 182 Pa. 538; Van Steuben *v.* Central R. R. of N. J., 178 Pa. 367; Badman *v.* Penna. R. R. Co., 42 Pa. Super. Ct. 531; Elder Twp. School Dist. *v.* Penna. R. R. Co., 26 Pa. Super. Ct. 112, and Stephenson *v.* Penna. R. R. Co., 20 Pa. Super. Ct. 157, to which counsel for the plaintiff has called our attention, do not, separately or taken together, show that the plaintiff was entitled to have the causes of these two fires submitted to the jury.

But there is another reason why the compulsory non-suit should not be stricken off. The plaintiff is clearly guilty of contributory negligence in his utter failure to make some effort

towards the extinguishment of the first fire, as well as towards the extinguishment of the second fire. One needs only to read the evidence of the plaintiff to be convinced of such neglect. He failed equally to ascertain and show how much of his land had been burned over by each of the respective fires. How can anybody else estimate the damage done by either fire, without knowing what damage was actually done on the land? It is not permissible to submit even one guess to a jury, let alone the submission of two guesses.

On the question of the plaintiff's contributory negligence the case of Hunter *v.* Penna. R. R. Co., 45 Pa. Super. Ct. 476, is clear and conclusive. Two suits were brought against the same company by two Hunters, one by J. H. Hunter, reported at 468 of the same book, in which a verdict for the plaintiff was sustained. The other suit was brought by Nelson V. Hunter, in which a judgment in favor of the plaintiff was reversed, without a venire. Justice Morrison says, on page 471:

"The cases are practically alike in all respects, except as to the contributory negligence of Nelson *v.* Hunter, and we will dispose of that question by a separate opinion filed in the appeal in his case at No. 106, October term, 1910. In all other respects this opinion which will be filed in the John H. Hunter case is intended to apply to both cases."

John H. Hunter was permitted to collect his verdict for $875, whereas Nelson V. Hunter was refused any remedy whatever, because "he saw the fire soon after it started on defendant's right of way on the morning of Oct. 12, 1908, and he did not make the slightest effort to extinguish it or to induce anybody else to extinguish it, until the 14th, the day the damage was done to his property. His excuse for not extinguishing the fire, or attempting so to do, was that on October 12 he was driving a young team and could not leave them. . . . We think a jury ought not to have been allowed to draw any other inference from his conduct than that of contributory negligence, and the court erred in not directing a verdict in favor of the defendant on that ground. This should have been done on plaintiff's own testimony. Even though some one else is guilty of negligence in allowing a fire to start, a man cannot stand idly by and allow it to spread to his property and destroy it, without making a reasonable effort to put it out." (Page 477.)

The motion to strike off the compulsory non-suit is overruled.

Commonwealth *v.* Stearn.

Constitutional law—Right of free speech—Public meetings —Permits—City of Philadelphia—Act of June 1, 1885, P. L. 37.

Under Art. II, Sec. 1, of the act of June 1, 1885, P. L. 37, the police department of the city of Philadelphia has the power to make a rule that any one desiring to speak on the plaza of the city hall must first procure a permit from the department of public works. If a person refuses to do so, holds a public meeting of a disorderly character and does not abstain from speaking after warning from the police, he may be convicted of breach of the peace and disorderly conduct.

Appeal from sentence of a magistrate. Q. S. Philadelphia Co.

A. B. Gordon Davis and *Paul DeMoll,* for appellant.
Samuel P. Rotan, district attorney, *Franklin E. Barr,* assistant district attorney, and *Harry Felix,* contra.

ROGERS, J., Sept. 7, 1916.—This is an appeal from the sentence of a magistrate for breach of the peace and disorderly conduct. Defendant paid the fine and costs imposed, amounting to $7.50, under protest. He refused at his hearing to make any defence to the charges against him.

On Sunday evening, June 18, in the year 1916, about nine o'clock, at the northeast corner of city hall, defendant climbed over a railing on to a coping and assembled a crowd of about one hundred to one hundred and fifty people on the plaza of that part of the city hall, obstructing the peaceable passage of pedestrians and causing a general disturbance of the peace.

This appeal was heard on July 14, 1916. A number of witnesses testified. From the evidence the court is convinced that the appeal should be dismissed.

The proofs are ample that defendant caused, by his behavior, disorders, and was guilty of unbecoming conduct, tending to disturb the peace and good order of the community.

Defendant did not receive a permit from the department of public works to conduct the meeting, as provided by the rules of that department. When informed by the city hall guards, (police officers) that meetings were not allowed to be held without a permit, and then requested to desist, he refused to do so, defied the officers, created disorder and demanded that he be taken into custody.

Defendant had been in the habit of holding many meetings on the city hall plaza at this particular point, always on Sunday evenings. He assembled disorderly crowds, and, as a result, blocked the entire pavement and interfered with the passage of people going to and from the Pennsylvania railroad and the Reading terminal stations. The meetings interfered with the use of the square and plaza as a breathing place for women and children of the neighborhood.

We find many of these meetings, so called, had been noisy and boisterous, and "continued until two and three o'clock in the morning." Defendant, who organized and conducted these affairs, as a rule, departed shortly after midnight.

The department of public safety received many letters of complaint as to the disorderly character of these meetings, some signed and some anonymous. Complaint was also made by the city hall guards. The director of public safety, therefore, requested the department of public works to refuse a permit for meetings in or about the city hall, and especially for the Sabbath Day.

The testimony discloses the fact that the appellant was followed about by a disorderly crowd of men and boys called and known as the "nut social." At one of the meetings, held on a Sunday evening a short time prior to his arrest upon this charge, defendant went into the crowd, took hold of the arm of a lady and insisted upon her mounting the coping of city hall plaza to make a speech. She declined to do so.

Defendant's contention is that his arrest and conviction was in violation of the Constitution of Pennsylvania, Art. 1, Sec. 7, which provides: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."

And, further (Ib.), Art. 1, Sec. 20, which provides: "The citizens have a right in a peaceable manner to assemble together for their common good."

We agree with defendant's proposition that free speech is an essential sine qua non of a free state, but we must also be aware that living in a free state requires a deference to its laws. Many persons seem to consider that the right to "the free communication of thoughts and opinions" means that any person at any time, place or under any circumstances, may take his or her place at any point in the streets or public buildings and discourse upon any subject, regardless of the rights, peace and happiness of others. In our opinion, the Constitution of Penn-

sylvania does not mean that this can be done, nor does Art. 1, Sec. 20, mean that such an assemblage may congregate in the street, unless those who desire to assemble or communicate respect the laws, rules and regulations, without which they themselves might be inconvenienced.

In the city of Philadelphia, with its population of almost one million and three-quarters of people, it is vain to say that upon the public highways, or in or about public buildings, any person may, without regard to the peace and happiness of others in the enjoyment of the highways, proceed to incite the feelings of a disorderly crowd, and still be within his legal rights as guaranteed by the Constitution of the United States and the Constitution of the state of Pennsylvania. In our opinion the Constitution of the State of Pennsylvania, Art. 1, Sec. 7, means nothing of the kind, nor does Art. 1, Sec. 20, mean that such an assemblage may occupy the streets of the municipality. The right to communicate thought and to assemble is in no way abridged by asking those who desire to assemble and communicate to respect certain rules and regulations, without which they themselves might be inconvenienced. Defendant cannot be heard to complain if the department of public works and the bureau of police, acting each in its judgment for the benefit of the community, ask him to comply with a regulation, which is not a special regulation as to him, but affects all alike. If he objects to the regulation and denies the right or the power of the state and the city to make such a regulation, he can obtain an adjudication of the question by applying to the courts.

The act of assembly of May 9, 1889, § 1, P. L. 139, provides: "From and after the passage of this act, it shall be unlawful for any persons to cause any outcry or disorder, or be guilty of any indecent or unbecoming conduct tending to disturb the peace and good order which shall prevail in the said county court-houses and jails, or to willfully or carelessly defile, deface or injure the floors, walls or any portion of said building, or fences or railings surrounding the same, or the carpets, furniture or other articles or things used in or about said buildings, belonging to the said several counties, by cutting, breaking or otherwise."

The city hall and plaza, being public property, come under the department of public works, and are under the supervision of the bureau of city property, which is a division of the department of public works.

The charter of Philadelphia, Art. II, Sec. 1, act of June 1,

1885, P. L. 37, provides as follows: "Each department shall have power to prescribe rules and regulations, not inconsistent with any law or ordinance, or with the provisions of Art. I hereof, for its own government, regulating the conduct of its officers, clerks and employés, the distribution and performance of its business, and the custody, use and preservation of its books, records, papers and property under its control."

The department of public works, under the authority given it by Art. II, Sec. 1, of the act of assembly of 1885, has the authority to make rules and regulations concerning the use of city hall and the surrounding plaza for the public generally.

The questions raised before the court may be divided into two phases:

1. Is a summary conviction sustainable when defendant, without a permit from the proper authorities, did assemble a disorderly crowd and proceed to make a speech, and inviting strangers to do the same, thereby causing disorder and disturbance tending to disturb the peace and good order which should prevail in or near the court-house, when he had been requested to stop and refused to do so?

2. Is the ruling of the police department reasonable in demanding that a permit be obtained from the department of public works for permission to speak on city hall plaza?

That the police bureau has the right to regulate or prohibit meetings upon the public highways is undoubted.

In Barker *v.* Com., 19 Pa. 412 (1852), opinion by Lewis, J., the court said: "The streets are common highways, designed for the use of the public in passing and repassing, and in such temporary occupancy as are incidental to the exercise of these rights or necessarily connected with them. No one has a right to obstruct a public street by collecting therein a large assemblage of men and boys for the purpose of addressing them in 'violent, loud and indecent language.' The common highways were designed for no such purpose. If the purposes of the meeting be lawful, a suitable place can be obtained for it, without obstructing the public in their undoubted right of passing along their own highway. The liberty of speech does not require that the clear legal rights of the whole community shall be violated. The freedom of the press is as well deserving protection as the liberty of speech; but no one, in his wild enthusiasm in favor of the former, has claimed the right to establish printing presses in the public streets. One of Hoe's printing presses would certainly be as effectual in collecting

a crowd as the indecent and violent harangues described in this indictment. The nuisance, in the one case, would be quite respectable in its nature and objects compared with the demoralizing character of the other. But both are prohibited by law as infractions of the public right of passage."

In Com. *v.* Remmel, 31 Pitts. L. J. 125 (1900), in the construction of an ordinance of the city of Pittsburgh, which provided that persons desiring to use the city streets for parades, etc., should give twenty-four hours' notice to the superintendent of police, who shall have power, subject to the approval of the director of public works, to designate to such processions what and how much of the streets they may occupy, etc., and that any person violating the provisions of this ordinance shall be punished by a fine, held: (1) That it was within the power of the city councils to pass such an ordinance; (2) that such an ordinance is reasonable.

In Com. *v.* Abrahams, 156 Mass. 57 (1892), the statute gave a department of the city of Boston the right to make rules and regulations for the government of public parks, etc. The department made a rule prohibiting public orations and meetings in the parks, and it was there decided that the rule was reasonable and valid in that it was to conserve the parks for the public generally, and not for that of a few citizens.

Under Art. XIX, of the bill of rights of that commonwealth, which permits the assemblage to consult, etc., the right of free speech was held not to have been infringed, nor was the fourteenth amendment of the Constitution of the United States.

In Com. *v.* Plaisted, 148 Mass. 375, the police board of Boston adopted a rule requiring itinerant musicians using the streets or public places to obtain a license, for which they must pay a fee. A member of the Salvation Army playing a cornet, marching down the street, but not creating an actual disturbance, was arrested because he had no license. The rule was sustained, and the fact that the gathering was of a religious nature did not protect the defendant.

The city of Detroit, by its charter, was given power to control and regulate the use of the streets, alleys and public grounds and places within the city. An ordinance was passed forbidding public speeches within a half mile circle of the city hall without obtaining a permit. This was held to be perfectly valid exercise of the power given the city and did not take away the right of free speech. Love *v.* Judge of Recorder's Court, etc., 128 Mich: 545.

In VanArsdale *v.* Laverty, 69 Pa. 103 (1871), we have not the same question raised, but one which involves the bill of rights, namely, the right to petition. Laverty was a school teacher. The defendant filed a petition with the school board, praying that Laverty be not reappointed as teacher. As a result of this petition the plaintiff was not reappointed. He brought a suit for damages against the defendants, the signers of the petition, and the court held that the right of petition is not so sacred that private purposes and motives of the petitioners may not be inquired into, and, if the motive is purely one of malice, the citizen making such petition is not protected and he is liable in damages to the parties injured by his malicious petition.

The leading case on the question of "freedom of speech" is that commonly known as the "Boston common case," in Com. *v.* Davis, 162 Mass. 510 (1895). Defendant made a speech in Boston "common" contrary to an ordinance prohibiting same without permit from the mayor. Opinion by Oliver Wendell Holmes, J.: "This is not an infringement of the right of free speech. The power of the legislature is just as great over the 'common' as over every other park or public square, and it can forbid absolutely or conditionally public speaking in a highway or public park, and doing so is no more an infringement of the rights of the public than for the owner of a public house to forbid it in his house. When no proprietary rights intervene, the legislature may end the right of the public to enter a public place by putting an end to its dedication for public uses; so, also, it may take the lesser step of limiting it to certain purposes. Since the legislature can do this, it can authorize the city to do it, and when done by the city under given authority is as binding as if done by the legislature."

Upon appeal, the decision of the court was affirmed by the Supreme Court of the United States in Davis *v.* Massachusetts, 167 U. S. 43 (1897).

In the opinion of the court, from the evidence produced, defendant was properly convicted and sentenced by the magistrate. The meetings organized and conducted by appellant "tended to disturb the peace and good order which shall prevail in the county court-house." Further, that the department of public works, in charge of city hall and its plaza under the charter of Philadelphia, is required to grant permits to individuals before public meetings may be held on the same.

The appeal of the defendant is, therefore, dismissed and the sentence of the magistrate is affirmed.

Brown *v.* Cohen.

Execution—Feigned issue—Title to personal property—Award of issue.

In a proceeding to try title to personal property the claimant must show a good prima facie title against the execution debtor to be entitled to an issue.

Where there is a dispute respecting the facts or the inferences to be drawn from them, the issue must be awarded; the court cannot pass upon the merits of the claim.

Where a claimant avers that she purchased the property from the execution debtor prior to the levy, and paid for the same, but does not allege that the property was delivered to her or that there was any change in its possession as a consequence of such purchase she fails to show a title which is good against the plaintiff in the execution.

Rule for an issue. C. P. Dauphin Co. Jan T., 1915, No. 501.

Jackson & Jackson, for plaintiff.
R. Rosenberg, for defendant.

KUNKEL, P. J., Oct. 19, 1915.—The property levied on by the sheriff was found on the premises and in the possession of the defendants. The claimant avers that she purchased it from the defendant, Louis Cohen, some ten months prior to the time of the levy, paying him therefore the sum of $300. Neither in her original answer nor in her amended answer, however, does she allege that the property was delivered to her in pursuance of her purchase or that there was any change in its possession as a consequence thereof. The sale to her, in order to be effective against creditors, must have been accompanied by a change of possession or delivery. In the absence of any averment of delivery, it cannot be said that the claimant avers a good prima facie title against the plaintiff, the execution creditor. The court therefore would not be justified in granting an issue and thus putting the parties to the expense of a trial. Tygard's Appeal, 7 Pa. Super. Ct. 388.

In a proceeding of this kind the claimant must show a good prima facie title against the execution creditor. Of course, if there be any dispute respecting the facts or the inferences to be drawn from them, the issue must be awarded; for the court cannot pass upon the merits of the claim. In Book *v.* Sharpe, 189 Pa. 44, it was said: "The court is not to inquire into the merits of the respective claims further than to see that they are not merely colorable, frivolous or collusive, but may

be the bases of bona fide suits." But where there is no dispute of fact and the question of title is one merely of law, and the court is of the opinion that under the circumstances of a particular case, having in view the averments contained in the claimant's answer to the rule for an issue, that the claim cannot prevail, it would be idle to grant an issue. Com. *v.* Burns, 14 Pa. Super. Ct. 248; Gillespie *v.* Agnew, 22 Pa. Super. Ct. 557. We are of the opinion that in the present case the averments in the answer to the rule do not show a title to the property which is good against the plaintiff in the execution.

Accordingly, the rule for an issue is discharged.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

B. F. Sturtevant Co. *v.* Regan & Hormell.

Practice (C. P.)—Act of May 14, 1915, P. L. 483—Bill of particulars.

Under the provisions of the practice act of 1915, P. L. 483, a bill of particulars is no longer necessary.

Rule to discharge rule for bill of particulars. C. P. Washington Co. Feb. T., 1916, No. 2545. Appearance docket.

Morris, Walker & Allen and *W. R. Dennison,* for plaintiff.
H. E. Fergus, for defendant.

IRWIN, J., Oct. 3, 1916.—This is a rule issued upon the plaintiff to show cause why the plaintiff's rule upon the defendant for a bill of particulars should not be discharged. The case is an action of assumpsit under the practice act of 1915, the plaintiff's statement having been filed on Jan. 22, 1916, and the affidavit of defence having been filed on March 1, 1916. The ground on which the rule on the defendant for a bill of particulars is resisted is that the necessity for furnishing a bill of particulars has been obviated by the new practice act.

Under the old common law practice, a bill of particulars was not a matter of right in all actions of assumpsit. The general rule relating to the duty to file a bill of particulars when called upon is stated in Vol. I, Troubat & Haley's Practice, 6th ed., page 636, as follows: "If the plaintiff's declaration be not sufficiently explicit in disclosing the particulars of the demand, it is the right of the defendant to call upon his adversary to furnish a bill of particulars. This is pecul-

iarly proper in actions of assumpsit, or debt for goods sold and delivered, for work and labor done, etc., since, from the general manner in which the plaintiff is allowed to declare, the defendant cannot be apprised of the items which constitute the demand. But a bill of particulars is only demandable of right when the action is based on a specific contract. A bill of particulars will not be ordered when the items of damage are peculiarly within the defendant's own knowledge."

This last statement, of course, relates to a demand upon the plaintiff for a bill of particulars. The necessity for a bill of particulars under the old practice arose from the general manner in which the plaintiff was permitted by the common law pleadings to state his case, and from the further fact that, unless otherwise provided by rule, a defendant upon the trial of a case, was not limited in his proof to the facts set forth in his affidavit of defence, and hence, in order that the plaintiff might be fully advised as to the entire defence and have an opportunity to prepare to rebut it, it was his privilege to call upon the defendant for a bill of particulars.

Rule 16, § 80, of our own rules of court, provides as follows: "A rule may be entered as of course on either party to any action to furnish a bill of particulars, and on failure to comply with such rule for twenty days after notice thereof to the party, or his attorney, the court may enter judgment against the party in default. The plaintiff's bill of particulars shall contain a full, direct and concise statement of his cause of action, and the defendant's a similar statement of the grounds of defence."

Section 81 provides that "on the trial neither party shall be permitted to give evidence of facts outside of his bill of particulars." Then follows § 82, which provides as follows: "If a plaintiff, on filing a statement of his claim under the rules relating to affidavits of defence, shall wish to avoid being ruled to furnish a bill of particulars, he shall endorse upon his said statement the words, 'bill of particulars,' and he shall not thereafter be required to furnish an additional bill. The same rule mutatis mutandis shall apply to defendants." It will be observed that by this section of our rule all that a defendant had to do to avoid the necessity of furnishing a bill of particulars was to mark his affidavit of defence "bill of particulars," and thereafter no rule could be properly issued upon him to furnish a bill of particulars.

Under the practice act of May 14, 1915, P. L. 483, it is provided in § 2 that "the pleadings shall consist of plaintiff's

statement of claim, the defendant's affidavit of defence, and, where a set-off or counter claim is pleaded, the plaintiff's reply thereto." Section 5, "Every pleading shall contain, and contain only, a statement in a concise and summary form of the material facts on which the party pleading relies for his claim, or defence, as the case may be." Section 16, "Neither party shall be permitted at the trial to make any defence which is not set forth in the affidavit of defence, or the plaintiff's reply, as the case may be."

This act has done precisely what our rule of court provided for. Under our rules, as we have shown, where the affidavit of defence is marked "bill of particulars," no rule can issue upon the defendant, requiring him to furnish a bill of particulars. The practice act stamps every affidavit of defence as a bill of particulars by providing that neither party shall be permitted at the trial to make any defence which is not set forth in the affidavit of defence or plaintiff's reply.

Section 8 of the act provides that "it shall not be sufficient for a defendant in his affidavit of defence to deny generally the allegations of the statement of claim, or for a plaintiff, in his reply, to deny generally the allegations of a set-off or counter claim; but each party shall answer specifically each allegation of fact of which he does not admit the truth." Section 21 provides that "the court upon motion may strike from the record a pleading which does not conform to the provisions of this act, and may allow an amendment or a new pleading to be filed upon such terms as it may direct." Under the provisions of this act a bill of particulars is no longer necessary. Under the old practice a defendant never was required to set forth in his bill of particulars the evidence by which he expected to sustain the averments therein contained. Under the practice act he is required to answer specifically every averment of the plaintiff's statement that he does not admit to be true, and if he fails so to answer the averments of the plaintiff's statement his affidavit of defence may be stricken from the record and he given an opportunity to file an affidavit of defence in compliance with the provisions of the act. What would it avail the plaintiff to obtain a bill of particulars from the defendant when, by the very terms of the act, the defendant is limited in his proofs to the facts averred in his affidavit of defence?

And now, Oct. 3, 1916, the rule upon the defendant to furnish a bill of particulars is discharged.

From R. W. Parkinson, Jr., Esq., Washington, Pa.

Green *v.* Knight of Joseph Building and Loan Association.

Equity—Jurisdiction—Satisfaction of mortgage—Adequate remedy at law—Acts of April 3, 1851, P. L. 868 and June 7, 1907, P. L. 440.

A bill in equity will not lie to compel the satisfaction of a mortgage. The remedy at law provided by the act of April 3, 1851, P. L. 868, is sufficient and exclusive.

The court will not, under the act of June 7, 1907, P. L. 440, certify to the law side of the court a bill in equity to compel the satisfaction of a mortgage, where the bill contains no averment of a willingness to pay the money into court, as required by the act of April 3, 1851, P. L. 868.

Bill to procure satisfaction of mortgage. C. P. No. 1, Philadelphia Co. June T., 1915, No. 3033, in equity.

Abram Peterzell, for plaintiff; *Joseph Moss,* for defendant.

SHOEMAKER, J., Oct. 9, 1915.—This case was heard on Sept. 30, 1915, before a judge sitting as a chancellor. From the pleadings and evidence I find the following

FACTS.

1. That on June 6, 1914, the plaintiff, Bernard Green, was the owner in fee of premises situate on the northeast corner of Pierce street and west side of Twenty-first street, fifty-seven feet from the south side of Reed street, Nos. 2245 and 2247 Pierce street, and Nos. 1407, 1409 and 1411 Point Breeze avenue, in the city of Philadelphia.

2. That some time prior to June 6, 1914, plaintiff, through one Jacob Keisler, who was a real estate broker and secretary of the defendant association, negotiated a mortgage loan in the sum of $3,500 from the defendant, and on June 6, 1914, executed and delivered to defendant his bond for $3,500 and a mortgage of the premises described in the first finding of fact, to secure the same, which mortgage was recorded at Philadelphia in mortgage book E. L. T., No. 559, page 23, etc., and plaintiff agreed to pay Keisler for his services in obtaining the loan.

3. That the defendant made the loan upon the condition that certain alterations and changes should be made by plaintiff in the buildings described in the mortgage, and pending their completion the sum of $500 of the loan of $3,500 should be retained by the defendant, and on July 28, 1914, a settlement between the plaintiff and defendant was made under this condition.

4. That about Oct. 6, 1914, the president of the defendant association, Mr. Schlarenca, met the plaintiff and Keisler in Keisler's office, No. 412 South Fifth street, when Keisler, in the presence of plaintiff, told Schlarenca that the alterations to plaintiff's building had been made and that plaintiff was entitled to the $500 retained, and Schlarenca, relying upon Keisler's statement, then directed the said sum to be paid to plaintiff, and plaintiff told the said Schlarenca to give the check to Keisler for plaintiff.

5. That at a meeting of the board of directors of defendant association, held Jan. 27, 1915, plaintiff demanded the $500 that was to be held until the alterations to the buildings were made, and was then told by defendant's officers that the balance of $500 so retained had been paid by a check of defendant drawn to plaintiff's order, and that said check purported to bear the endorsement of plaintiff, and had been paid by defendant's bank.

6. That plaintiff claimed that the endorsement on said check of his name is a forgery, and that Jacob Keisler, the secretary of the defendant association, who has since absconded, was the forger. That plaintiff knew nothing of said check; that he never authorized any one to endorse his name, nor had he any knowledge of the existence of said check until informed by defendant on Jan. 27, 1915. These averments of plaintiff the defendant denies, but qualifies its denial by averring that it has no knowledge whether the alleged endorsement is a forgery or that plaintiff was ignorant of any or all of the circumstances of the transaction, or whether Keisler had no authority from plaintiff to make the said endorsement, and demands proof, if material.

7. The defendant admitted that Keisler was its secretary on Oct. 6, 1914, and averred that he is the same person who was plaintiff's agent and broker in the loan transaction, and if plaintiff suffered any loss, that it was caused by his acts or omissions in enabling Keisler to commit or perpetrate the alleged fraud or forgery, and defendant was wholly ignorant in the premises.

8. That plaintiff offered, on June 23, 1915, to repay defendant in satisfaction of said bond and mortgage the sum of $3,000, plus all accrued dues, interest and fines to the date of satisfaction, claiming credit for all dues and interest to which plaintiff shall be entitled at that date, which defendant declined. No legal tender has ever been made by plaintiff to defendant of said sum.

9. That the above offer was repeated in the bill filed in this case.

10. That plaintiff expended the sum of $38 in securing another loan of $3,500 to pay off defendant's, but was unable to consummate the transaction because of defendant's refusal to satisfy its mortgage except upon the basis of a loan of $3,500.

11. That plaintiff brought, and there is now pending in the municipal court, an action which is undetermined, wherein the plaintiff therein and herein seeks to recover from the defendant therein and herein the balance alleged to be due on said mortgage loan, to wit, $500. Said action is of March term, 1915, No. 512.

12. The defendant, in the answer filed, averred that it had been advised by counsel that plaintiff had a full, complete, adequate and convenient remedy at law, and upon the completion of the taking of the testimony, counsel for defendant moved that the bill be dismissed because the plaintiff had an adequate remedy at law.

DISCUSSION.

Section 2, of the act of June 7, 1907, P. L. 440, provides that "If a demurrer or answer be filed, averring that the suit should have been brought at law, that issue shall be decided in limine before a hearing of the cause upon the merits. . . . If the court shall decide that the suit should have been brought at law, it shall certify the cause to the law side of the court, at the costs of plaintiff, and no further proceedings shall be had at the instance of the plaintiff until these costs are paid, except that he may appeal from the order made."

The act of April 3, 1851, § 14, P. L. 868, provides that "the mortgagors in any mortgage . . . shall have the right, upon application to the court of common pleas of the county where the land mortgaged . . . is situated, by bill or petition setting forth the facts, to pay into court the amount of money claimed by the said mortgagee . . . under the mortgage. . . . stating, if any, objections to the claim of such mortgagee. . . . and the court, upon the payment of said amount claimed into court, shall order and decree that satisfaction shall be entered upon said mortgage, . . . and the court shall proceed to hear and determine the objections to the payment of any part of the money in court as right and justice shall belong, and shall decree accordingly."

In Keyser *v.* Cosmopolitan Savings & Loan Assn., 8 D. R.

708, Judge Shafer, of Allegheny county, held that "a bill in equity will not lie to procure the satisfaction of a mortgage, as the remedy provided by this act is adequate and appears to be exclusive."

And it is well settled law that where a statute creates a right or liability, or imposes a duty, and a specific remedy is given by statute, it is exclusive and must be pursued, and equity has no jurisdiction. Act of March 21, 1806, 4 Sm. Laws 326; Pittsburgh and A. Drove Yard Co.'s Appeal, 123 Pa. 250; Ayers *v.* Ayers, 8 D. R. 734; Curren *v.* Delano, 235 Pa. 478; Brotzman's Appeal, 119 Pa. 645.

CONCLUSIONS OF LAW.

1. That the defendant having an adequate remedy at law under the act of April 3, 1851, P. L. 868, that remedy is exclusive and equity has no jurisdiction in this case.

2. The bill filed in this case not having the material essential required by the act of April 3, 1851, P. L. 868, namely, the willingness to pay into court the amount of money claimed of the mortgagee, it would not avail plaintiff anything to certify the same to the law side of the court.

The bill is, therefore, dismissed.

Pearson *v.* Hoovler.

Vendor and vendee—Purchase money mortgage—Priority of liens.

A purchase money mortgage, executed when a deed is delivered and duly recorded takes precedence of a prior judgment obtained to secure a loan with which to make a cash payment for the land purchased.

Exception to auditor's report. C. P. Mercer Co. June T., 1915, No. 22.

V. L. Johnson, for use plaintiff.
W. J. Whieldon, for Belle A. Jack.

McCAUGHEY, P. J., Oct. 16, 1916.—On Dec. 15, 1910, Johnson Pearson entered into an article of agreement with John F. Hoovler, agreeing to convey eighty-seven acres of land, situate in Jefferson township, Mercer county, Pennsylvania, for a consideration of $2,600, $100 in hand paid and the bal-

ance on April 1, 1911, at which time deed was to be delivered.

The vendee defaulted in payment on April 1, 1911, and on May 16, 1911, in consideration of a payment of $300, George Pearson, the executor of Johnson Pearson, extended the time of payment of balance until Dec. 1, 1911.

On May 25, 1912, George Pearson, executor of Johnson Pearson, executed and delivered a deed for said land to John F. Hoovler and Charles H. Hoovler, and the same was recorded on May 28, 1912.

On May 27, 1912, John F. Hoovler and Charles H. Hoovler executetd and delivered a mortgage for $1,800 to George Pearson, being the balance due for said land, which was recorded on May 28, 1912, the same day as the deed was recorded. The mortgage was afterwards assigned by George Pearson, executor, to Mary J. Pringle. The land described in the article of agreement, as also the deed and mortgage, was sold by writ issued by the said Mary J. Pringle, and purchased by her at sheriff's sale for the sum of $1,610.

On May 17, 1911, Belle A. Jack obtained a judgment in the court of common pleas of Mercer county against John F. Hoovler and Charles H. Hoovler, the money for which this judgment was obtained being the money paid to George Pearson on May 16, 1911.

The sheriff, in making distribution of the proceeds of the sale, allowed the claim of Belle A. Jack. Exception was filed to this distribution and an auditor was appointed to make distribution of the money in the hands of the sheriff. The learned auditor distributed to Mary J. Pringle the sum of $493.95, the amount of the Belle A. Jack judgment. W. J. Whieldon, attorney for Belle A. Jack, has filed the following exception to the report of the auditor:

"The auditor erred in sustaining the exception of Mary J. Pringle as filed to the distribution of the sheriff of Mercer county, Pennsylvania, of the sum of $493.95, to Miss Belle A. Jack on her judgment at No. 236 April term, 1911, in the said court of common pleas of Mercer county, Pennsylvania, and in distributing the said amount to the said Mary J. Pringle on her judgment above referred to."

There is no question but that the mortgage given by John F. Hoovler and Charles H. Hoovler to George Pearson at the time the deed was delivered was for the balance of purchase-money and that it was recorded within the proper time, having been recorded on the same day as the deed. There is no question but that the $300 borrowed by John F. Hoovler and

Charles H. Hoovler from Belle A. Jack, and for which judgment was obtained, was the same money paid to George Pearson on May 16, 1911.

The sole question for our consideration is: Does a purchase-money mortgage, executed when deed is delivered, take precedence of a prior judgment obtained to secure a loan with which to make a cash payment?

The lien of a vendor for unpaid purchase-money is favored by the law. When the vendor relinquishes possession he is rightfully entitled to full consideration. His rights should have protection until the consideration has been fully satisfied, and should have a preference in this regard over all others. This the law gives him. Where a deed is delivered conveying real estate and a balance remains unpaid, the law provides a procedure where the claim of the vendor takes precedence over all others. A mortgage given for the unpaid balance simultaneously with a deed for the same, and as a part of the same transaction, takes precedence of all existing and subsequent claims and liens against the vendee to the land sold.

A purchaser who receives a deed, and as part of the same transaction delivers a mortgage to the vendor for part of the purchase-money, has, so far as the mortgage is concerned, only such a temporary interest that the purchase-money mortgage must be superior to all conveyances or encumbrances. Any act on the part of the purchaser cannot deprive the vendor of this interest. In order that it may be lost to him his acquiescence is necessary.

It is contended by the learned counsel for the exceptant that because George Pearson, the vendor, knew that the $300 borrowed from Belle A. Jack was the payment made to him, the judgment obtained for said amount against John F. Hoovler and Charles H. Hoovler would become a purchase-money lien. Admitting that he did have such knowledge, would that change the relationship existing between the vendor and the vendee, or in what way would this affect the interest the vendor had in the property conveyed? He would relinquish no existing rights. What security the vendees were giving Miss Jack was not known to him. It might have been other real estate. It might have been the name of some responsible person. He desired to receive the money, without any regard as to where the vendees might obtain it. One hundred dollars only had been paid to him on the purchase price, and it was but natural that he would want to diminish the balance yet due for his own protection. If the amount paid to him would

continue as a lien superior to or equal to his own he would gain nothing by the payment. True he would have had the use of the $300, but another would have obtained a standing superior or equal to his own against a property valued at $2,600 with liens aggregating $2,500. He relinquished no rights which he had in the property at this time, and which would continue until the entire amount was paid to him, and Belle A. Jack could gain nothing except through him.

We cannot see that Belle A. Jack's judgment had any better standing on account of the fact that the money loaned by her to the Hoovlers had been used in making a cash payment on this property than if said money had been expended for other purposes. When George Pearson had reached the time when the priority of lien was needed he still had his right, and by using proper diligence when the deed was executed and delivered he retained it.

"Where money is advanced to buy land, the party advancing it may, in some instances, be entitled to be subrogated to the rights of the vendor, but this can never be so when it would result in defeating the vendor's lien for the unpaid purchase-money." Brower *v.* Witmeyer et al., 22 N. E. Rep. 975.

As we understand the law, a vendor of real estate has no occasion to examine the records for encumbrances created prior to his conveyance. At that time he has the power of creating a lien to secure himself for unpaid purchase-money.

The priority of the mortgage of George Pearson, executor, and assigned by him to Mary J. Pringle, was not lost by John F. Hoovler and Charles H. Hoovler allowing the judgment of Belle A. Jack to be entered.

The learned counsel for the exceptant has cited the case of Lynch *v.* Nobel and Dearth, 2 Penrose & Watts, 101. This case, we think, does not apply to the one under consideration, for the reason that there were two separate transactions and the vendor in the first had no part in the second.

We are unable to discover anything in the findings of the learned auditor to warrant us in reversing his conclusions, and the exception to his report is therefore dismissed.

And now, Oct. 16, 1916, this cause came on to be heard on exception to the auditor's report, and was argued by counsel, whereupon, after due consideration, and for the reasons stated in the foregoing opinion, said exception is hereby dismissed, and the auditor's report is now confirmed absolutely.

From W. G. Barker, Esq., Mercer, Pa.

Richey *v.* Maurer.

Justice of the peace—Act of May 14, 1915, P. L. 483—Appeal from justice of the peace—Pleadings—Jurisdiction of common pleas—Practice.

A proceeding on an appeal from a justice of the peace begins de novo in the common pleas when entered there, and it is thenceforth to be conducted under the practice act of May 14, 1915, P. L. 483.

Appeal from justice of the peace. C. P. Schuylkill Co. March T., 1915, No. 270. Plaintiff's statement of claim, rule to strike off statement for want of jurisdiction, and demurrer to rule.

BECHTEL, P. J., Oct. 9, 1916.—This case is an appeal from a justice of the peace in an action in assumpsit. A declaration was filed March 20, 1915, which does not conform to the requirements of the practice act of 1915. Thereupon a rule was granted to strike off the plaintiff's statement, to which rule counsel for the plaintiff filed a demurrer. Counsel for the plaintiff contends that the first section of the practice act limits its operation to actions of assumpsit and trespass, except actions for libel and slander brought in any court of common pleas. Counsel contends further that as this action was brought before a justice of the peace, it is not an action brought in any court of common pleas within the meaning of the act, but that the court of common pleas has only appellate jurisdiction; hence that the act does not apply.

We cannot agree with this contention. There is no doubt in our mind that the practice act was passed for the purpose of establishing uniform system of practice in the actions mentioned in the several courts of the commonwealth. There can be no doubt that the appeal from the justice brings the action into the court of common pleas. In our opinion, there are several ways of bringing actions into the court of common pleas. One may be by præcipe filed in the proper office and another by an appeal from the justice of the peace, on which appeal the cause is heard de novo. This being so, we think it too plain for argument, that this cause is governed by the act of 1915, supra.

And now, Oct. 9, 1916, the demurrer to the rule filed in this case is herewith overruled, the rule is made absolute, the plaintiff's statement is herewith stricken from the record and the plaintiff is given ten days from this date in which to file a supplementary statement.

National Bank Reports.

Escheats—Report to auditor-general by banks—Act of June 7, 1915, P. L. 878.

The act of June 7, 1915, P. L. 878, relating to escheats of deposits of money and property, and to dividends and profits, applies to national banks with the same force and effect as to other institutions.

The state, as the sovereign, has the right to determine how long a time shall elapse before property within its confines, or which belong to its citizens, and has no known owner, shall escheat to it.

Request of A. W. Powell, auditor-general, for opinion.

HARGEST, Deputy Attorney-General, Dec. 27, 1915.—You have requested an opinion as to whether the act of June 7, 1915, P. L. 878, relating to escheats of money or property, applies to national banks with the same force and effect as to other banking institutions.

That act provides "that every person, bank, safe-deposit company, trust company and corporation, organized or doing business under the laws of Pennsylvania, except mutual saving-fund societies not having a capital stock represented by shares, which receives or has received deposits of moneys, shall make a report to the auditor-general, under oath, in the month of January of each year hereafter, of such deposits of money which shall have not been increased or decreased, or, if not increased or decreased, on which interest shall not have been credited in the passbook, at the request of the depositor, within fourteen or more consecutive years next preceding the first day of said month."

It also requires a report from all banks and other corporations of all dividends declared and not paid for three or more consecutive years.

And in § 7 provides for escheats of deposits which have not been increased or decreased or which shall not have been credited with interest in the pass book at the request of the depositor for seventeen years, and for the escheat of dividends or profits which shall remain unpaid for six years.

The act contains complete machinery for carrying out the escheat and also for the payment back to the persons or legal representatives, if found, after such escheat has been effected.

Escheat is the method by which the title to property vests in the sovereign for want of heirs of the owner. It is a part of the common law of England and it was adopted particularly in those colonies known as proprietary, of which Pennsylvania

was one. It is not only part of the common law of Pennsylvania, but has been part of the statute law since Sept. 29, 1787.

The sovereignty over land and other property within the domain of the states has never been surrendered to the federal government, and therefore property including bank deposits, which happen to be in the possession of a national bank which is created by, and operates under, a franchise given by federal statute, if escheated at all must be escheated to the state. The act applies to every bank "organized and doing business under the laws of this commonwealth." It has been suggested that this language does not include national banks. I do not think the suggestion is tenable. National banks are not organized under the laws of the commonwealth and are not doing business under the laws of the commonwealth, in so far as the right to do business is concerned, but in a broader sense they are doing business under the laws of the commonwealth.

This is clearly pointed out by Justice Miller in the case of First Nat. Bank *v.* Kentucky, 9 Wall. 353; 19 L. Ed. 701, wherein he says, page 362: "The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the state which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

The evident intention of the legislature in the passage of the act of 1915, was to include all banks, and I am of opinion that the language used includes national banks.

A deposit in a national bank is not the property of the federal government, or of the bank, but is the property of the depositor. The bank is merely a stakeholder or trustee. When the depositor dies the deposit passes to his estate and to his heirs or legatees. If he dies without heirs or legatees a national bank would acquire no more rights to the deposit than any other bank.

The state, as the sovereign, has the right to determine how long a time shall elapse before property within its confines or which belonged to its citizens, and has no known owner, shall escheat to it, and a national bank, doing business within the state of Pennsylvania, is upon precisely the same basis with reference to that determination, as any other banking institution or corporation.

I, therefore, advise you that the act of June 7, 1915, P. L. 878, relating to escheats of deposits of money and property and to dividends and profits, applies to national banks with the same force and effect as to other institutions.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Wolfe's Estate.

Wills—Construction of—Income—Life estate.

Where there is no gift of the corpus of a fund, but a gift of the income only, expressly limited to the life of the legatee, there the legatee is not entitled to the corpus of the fund, but only to the income thereof for life, notwithstanding that there is no gift over of the corpus of the fund and no intervention of a trustee.

Intestacy—Trustee.

Where there is no gift of the corpus of the fund, but a gift of the income only, limited to the life of the legatee, and said legatee is the sole heir at law of the testatrix, he takes the corpus of the fund under the intestate law. There is no necessity for the intervention of a trustee.

Adjudication. O. C. Washington Co. Feb. T., 1915, No. 37. Adm. accounts.

Howard W. Hughes, for executor.
Harry A. Jones, for legatee and heir at law.

IRWIN, J., Oct. 21, 1916.—Sarah Rebecca Wolfe died in December, 1913, testate, leaving an only child, Clarence M. Wolfe, of Chicago, Illinois, as her sole heir at law. Her last will and testament, dated Sept. 23, 1911, was duly probated before the register of wills in and for Washington county, Pennsylvania, on Jan. 6, 1914, and is recorded in Will Book 27, page 301. In and by her last will and testament she appointed George O. Jones, executor, who has duly qualified and proceeded to the discharge of the trust imposed upon him. The

said executor filed an account of his said administration on Dec. 31, 1914, to No. 37 February term, 1915, A. A., showing a balance in his hands for distribution amounting to $8,400. Of this balance, $3,500 is in government bonds and $4,900 is on deposit in the Real Estate Trust Company of Washington, Pa., and is evidenced by a certificate of deposit. It was the desire of all parties in interest that the court would distribute the fund in the hands of the executor and avoid the necessity for the appointment of an auditor. The will of Sarah Rebecca Wolfe is as follows:

"Sept 23 1911
Washington Penna Was Co.

Will of Sarah Rebecca Wolfe of Washington Wash Co Pa being of sound mind to make this my last will & testament and I direck that my body be interred in the Family lot in the Cemetry. I dispose the same as follows first I direck my funeral expences be paid, as soon after my cecease as posible then, to my niece Blanche Myers of 504 East Charles St Bucyrus, Ohio, 500.00 $ hundred $ to Wilbert Fisher 6414 Pollard St. Los Angeles California 500.00 hundred $ to my brother John wife, Mrs Minnie Butts of 121 Winslow 1106 Pemberton St. Brighton Height, N Side Pittsburgh, Penna. and her mother Mrs Thom Messner of Allegheny Pa, to nots that is for 12 hundred $ and the interest of 20 years which amount is two thousand in all, to my son Clarence M. Wolfe who lives at 3239 West Madison St. Chicago Ill. 3000 Three Thousand to bye a house for his self. then he is to have interest on the money as long as he lives and the interest on the Government Bonds which is Three Thousand and Five Hundred the bonds not to be sold

George O. Jones of Washington Pa to take charge of this will and settle up, I have no debts

Sarah Rebecca Wolfe
of Washington Pa

My circifitis of dispotes ar in the
Real Estate Trust Co at Wash Penna"

The question to be determined is whether or not the balance in the hands of the executor is to be paid to Clarence M. Wolfe, or whether the executor will retain the funds in his hands and pay the interest thereof to the said Clarence M. Wolfe during his lifetime. The case turns upon the construction of the clause in the will which reads as follows, after be-

queathing $3,000 to her son Clarence M. Wolfe to buy a house, "then he is to have interest on the money as long as he lives and the interest on the government bonds." There are three lines of cases with reference to the bequest of personal estate which it is well to keep in mind or we will become confused in the study of cases. One is that where there is a bequest of the corpus of a personal estate to one for life without any gift over and without any intervention of a trustee, the legatee takes the corpus of the estate absolutely. Merkel's Appeal, 109 Pa. 235; Smith's Appeal, 23 Pa. 9; Brownfield's Est., 8 Watts 465; Silknitter's Appeal, 45 Pa. 365; Groves Est., 58 Pa. 429; Sprouls's Appeal, 105 Pa. 438; Heppenstall's Appeal, 144 Pa. 259; Lininger's Appeal, 110 Pa. 398; Gold's Est., 133 Pa. 495; Drennan's Appeal, 118 Pa. 176, 188.

The second is, that where there is no bequest of the corpus of the fund, but there is a bequest of the income of the fund, without limitation as to time, without any gift over and without the intervention of a trustee, in such case the legatee takes the fund absolutely. Garret *v.* Rex, 6 Watts 14; Campbell *v.* Gilbert, 6 Wharton 72; VanRensalaer *v.* Dunkin, 24 Pa. 252; Millard's Appeal, 87 Pa. 457; Robert's Appeal, 59 Pa. 70; Pa. Co. for Ins., etc., Co.'s Appeal, 83 Pa. 312.

The third is, that where there is no gift of the corpus of the fund, but a gift of the income only, expressly limited to the life of the legatee, or where there is otherwise a manifest intent, apparent in the will to sever the income from the corpus of the fund and to give the income only to the legatee for life, there the legatee is not entitled to the corpus of the fund, but only to the income thereof for life, notwithstanding that there is no gift over of the corpus of the fund and no intervention of a trustee. Ritter's Est., 148 Pa. 577; Bentley *v.* Kauffman, 86 Pa. 99; Kreb's Appeal, 184 Pa. 222; Dull's Est., 217 Pa. 358; Sieber's Appeal, 9 Atl. Repts 863; Sheaffer's Appeal, 8 Pa. 38.

In Ritter's Appeal, 148 Pa. 577, the court below, in an opinion which was affirmed by the Supreme Court, in referring to the bequest in that case, said: "The words, 'during her natural life,' in clause eleven of the will, restrains the payment of interest on the principal sum named to a particular duration of time, to wit: the life of Louisa Shissler. Such restraint being in respect to the time of the payment of interest, is evidence of a particular intention that the legatee has but a life interest. Eichelberger's Est., 135 Pa. 160; Sheets's Est., 52 Pa. 257."

In the will of Sarah Rebecca Wolfe she gives her son Clarence M. Wolfe $3,000 absolutely with which to purchase a house for himself. She then follows with the clause in question, which reads, "Then he is to have interest on the money as long as he lives and the interest on the Government Bonds which is Three Thousand and Five Hundred the bonds not to be sold." It seems clear that she intended to sever the income from the principal of the government bonds. She directed that the government bond should not be sold. That meant that they were to be held in tact and the interest only paid to her son during his lifetime. He is given no part of the principal of either the money on deposit in the Real Estate Trust Company or in the government bonds, but his interest is limited by the terms of the will expressly to the income and the duration of the payment of the income to said son is limited to the period of his natural life, because we think the words, "as long as he lives," applies to the payment of the interest on the government bonds as well as to the payment of the interest on the money.

After a careful examination of the will we are convinced that it falls within the third line of cases to which we have referred, and is governed by Ritter's Est., 148 Pa. 577, and kindred cases, and that Clarence M. Wolfe is entitled only to the income of the $8,400 under the terms of his mother's will.

The question now arises, what shall be done with the principal. As we view this will Sarah Rebecca Wolfe died intestate as to the corpus of the fund in the hands of the executor and if there was any other person than Clarence M. Wolfe interested in that fund then George O. Jones, as her executor, would continue to hold that fund and pay the income thereof to Clarence M. Wolfe during his lifetime. This is expressly ruled in Ritter's Estate, supra. But Clarence M. Wolfe is the only son and sole heir at law of Sarah Rebecca Wolfe, hence he takes the corpus of this fund under the intestate law. There is therefore no necessity for the intervention of a trustee. He is entitled under the will to the income of the fund for life; he is entitled under the intestate law to the corpus of the fund. Hence he is now entitled to receive the whole of the fund absolutely.

We are satisfied, upon reflection, that the testimony which was introduced at the trial, relating to the mental condition of Clarence M. Wolfe at the time the will was written is irrelevant and immaterial, and we have wholly disregarded it in the consideration of the case.

And now, Oct. 21, 1916, this cause came on to be heard and was argued by counsel, whereupon, after due consideration thereof the whole of the balance in hands of the executor as shown by his account is awarded absolutely to Clarence M. Wolfe, and the executor is ordered and directed to pay over to the said Clarence M. Wolfe, upon receiving proper vouchers therefor, the balance in his hands as shown by his account, after paying the costs of advertising the audit, to wit, the advertisement in the Washington News, $2.20, the advertisement in the Washington Observer, $2.60, and the costs of the clerk of courts.

From R. W. Parkinson, Jr., Esq., Washington, Pa.

Commonwealth *v.* Horovitz.

Criminal law—False pretenses—Horse deal.

An indictment for obtaining money by false pretense will lie against one who, knowingly and designedly, and with intent to cheat and defraud, induces another to purchase a horse and pay the purchase price thereof, by falsely representing the horse to be sound.

Motion in arrest of judgment. Q. S. Fayette Co. Sept. Sess., 1916, No. 221.

M. A. Shapira, for motion.
S. Ray Shelby and *S. J. Morrow,* district attorney, for commonwealth.

VAN SWEARINGEN, P. J., Oct. 18, 1916.—At the trial of this case a motion to quash the indictment was made, on the ground that no indictable offense was charged. We overruled the motion, and the defendant was convicted, whereupon a motion in arrest of judgment was filed, based upon the same ground urged in support of the motion to quash the indictment.

The defendant was indicted for false pretense. The indictment alleges that the defendant, Abe Horovitz, on Sept. 4, 1916, at the county of Fayette, and within the jurisdiction of this court, "unlawfully devising and intending to cheat and defraud Samuel Schwartz, of his goods, moneys, chattels and property, did then and there unlawfully, falsely and designedly, pretend to the said Samuel Schwartz that a certain gray horse was then and there sound, whereas in truth and in fact

the said gray horse was not then and there sound, which said pretense and pretenses he, the said Abe Horovitz, well knew to be false when made as aforesaid by him; by color and means of which false pretense and pretenses he, the said Abe Horovitz, did then and there unlawfully and fraudulently obtain from the said Samuel Schwartz, $150, lawful money of the United States of America, of the goods, moneys, chattels and property of the said Samuel Schwartz, with the intent then and there to cheat and defraud the said Samuel Schwartz of the same."

Section 111 of the act of March 31, 1860, P. L. 382, provides that if any person shall by any false pretense obtain from any other person any chattel, money or valuable security, with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor. The punishment of the offender is to be by indictment. In order to bring a case within the statute three things must coexist: (1) a false pretense as to an existing fact, made with knowledge of its falsity; (2) an intent thereby to cheat and defraud; (3) an obtaining of property thereby. All of these matters are properly alleged in the indictment now under consideration, and all of them were sufficiently proved at the trial. In our charge we instructed the jury that before convicting the defendant they should find that the representation by the defendant that the horse was sound was false, that at the time the representation was made the defendant knew it was false, that it was made by the defendant with the intent thereby to cheat and defraud the prosecutor, and that the prosecutor acted on the faith of the representation and was induced thereby to part with his money.

In Com. *v.* Hoover, 6 Lanc. Law Rev. 129, a demurrer to an indictment such as this was sustained by the court of quarter session of Lancaster county, and that decision was followed by one of the judges of this court in Com. *v.* Chamberlain, at No. 159 September sessions, 1903. But in the later case of Com. *v.* Hinden, 37 Pa. C. C. 47; 19 Dist. R. 718, the Lancaster county court, as then constituted, refused to quash a similar indictment, which action conforms to our judgment in the matter. To the same effect is Com. *v.* Sebring, 1 D. R. 163.

And now, Oct. 18, 1916, the motion in arrest of judgment is overruled and dismissed.

From D. W. McDonald, Esq., Uniontown, Pa.

Carbaugh *v.* Carbaugh.

Divorce—Petition to vacate decree—Duress—Perjury—Influence of husband.

A petition by the wife to have vacated a decree in divorce granted her for cruel and barbarous treatment and indignities to her person on the part of her husband will be refused, where petitioner alleged that the averments in the libel and evidence offered to support the libel were false, and that she had been induced to prosecute the divorce proceedings at the instance of her husband; it further appearing that in her efforts to have the decree vacated she failed to prove any specific acts or utterances on his part which deprived her of the exercise of her own free will.

Where there is no scintilla of evidence submitted which would indicate that she in any way or manner attempted to ascertain from any source whatever the truth of the husband's statements alleged to have been made to her on the faith of which she proceeded to secure a divorce, and she admits that she and her son committed perjury in all the legal requirements that resulted in her obtaining the decree in divorce, and yielded to the importunities of a wicked husband, but there is not sufficient evidence that she did so either by means of physical force or duress or of absolute mental subordination to the irresistible influence of the husband, and voluntarily acquiesced in his entreaties, thus colluding with him to commit perjury by asserting in her libel that the same was filed without any collusion between them, she cannot later be heard to take advantage of her own wrong, and relief will be denied.

In divorce. Petition of plaintiff to vacate decree of divorce granted to her. C. P. Allegheny Co. July T., 1915, No. 1790.

Scott & Purdy and *Eckles & Conrad,* for libelant.
J. H. W. Simpson, for respondent.

COHEN, J., Aug. 8, 1916.—On March 6, 1916, the petitioner in this case presented her petition, praying the vacation of a decree in divorce obtained by her against her husband, Albert Carbaugh. Her libel in divorce was filed on May 24, 1915. It charged her husband with cruel and barbarous treatment and indignities to her person, and prayed for a decree divorcing her and separating her from the bonds of matrimony entered into with the husband. Her petition alleges that she and her son, Thomas, appeared before the master in divorce on Aug. 23, 1916, and testified in support of said charges, and that the master subsequently filed his report, recommending that a decree in divorce a vinculo matrimonii be granted, separating the libelant and the respondent from the bonds of matrimony; and that on Sept. 11, 1915, a decree divorcing her from the respondent on the grounds set forth in the libel was duly entered of record.

The petition further alleged that the averments in said libel filed by her, and that the testimony given by her and her son, were not true, but were wholly false, and that during the time libelant and respondent lived together the said respondent was always a kind and affectionate husband and never abused or mistreated her. She further alleged that she was induced and persuaded to apply for the said divorce by means of fraud, deceit, threats and intimidation on the part of her said husband, who by means of said fraud, deceit and intimidation caused her to believe that such a course was necessary in order that she and her two sons should not be disgraced. She further alleges that on March 6, 1915, respondent received a Black Hand letter, containing threats to blow up her home where she resided and to kill the petitioner, which greatly frightened her and caused her to become a nervous wreck, and that the writing in said letter indicated that of a female hand. That at the time of receiving such Black Hand letter respondent told petitioner that he had received another Black Hand letter in the month of February, 1915. She further alleged that she now believes that her said husband was responsible for the sending of said letters and that the same was the beginning of a deep-laid plot on his part for the purpose of getting released from the bond of matrimony with the petitioner. That she was greatly frightened and nervous as a result of said letters and respondent insisted on her leaving him and going to her mother's home at Sharpsville, Pa., which she did on or about March 13, 1915, and her son, Edward, at that time went to the home of his brother, Clarence, respondent remaining in the family home. That she remained away about four weeks when respondent wrote to her to return which she did; and on the evening that petitioner returned she suggested to respondent that they get rooms where they could reside. Whereupon respondent told her that he was in serious trouble with a twenty-year-old girl, and that he had represented himself to her as being a single man; that the girl and her people had given him until June 9, 1915, to make up his mind as to what he was going to do about it, and that they were demanding $2,000 to fix the matter up.

That he had paid the girl's married sister to get her to talk to her father about a settlement, and that they claimed that they wanted to show him up. Respondent then proposed to the petitioner that they break up housekeeping and sell part of their furniture and store the rest, and that petitioner

go home to her mother until June. This she did, respondent going with her and staying three days. Subsequently respondent wrote to petitioner to meet him at Sharon on a Saturday in the month of May, 1915, and not to bring any one with her. She further alleges that when they met at Sharon respondent said he could do nothing with the girl's father; that he (respondent) had asked the girl's father's permission to bring his wife to talk to him, and that the father had refused. Respondent then told petitioner that he had consulted a lawyer, and that the lawyer said that there was but one thing that could be done, and that was for petitioner to apply for a divorce, and that if the trouble with the girl could be settled before the decree was granted, the divorce suit could be withdrawn, and if not, then after the divorce was granted they could go to some other place, get remarried, and live together as before. That if she did not get a divorce, he would be compelled to serve time, or be sent to jail.

That respondent also stated to her that he had a notion to kill himself and end it all. That he had written the night before to his brother and mother that he intended to kill himself, and also told his attorney that he would kill himself and end it all; that the attorney told him not to do so, as it would disgrace his wife and children. Then he insisted that petitioner apply for a divorce and told her if she did he would never cause her any further worry. She further alleged in her petition that as a result of receiving said Black Hand letters and because of the deceit, fraud and misrepresentation of her said husband, and because of said threats and intimidation and because of the disgrace to which herself and family might be subjected, she was induced to consent to make application for a divorce on the ground aforesaid. That she had no reason to suspect her husband of fraud, deceit and misrepresentation, that she relied upon the truth of the statements made to her, and that relying upon said statements and representations, in her weakened condition resulting from respondent's malicious and wrongful conduct, she was induced and beguiled into swearing falsely to said libel in divorce and to the testimony taken in support of said libel. That in addition to the petitioner swearing falsely, respondent, through fraud, deceit, misrepresentation and intimidation induced, persuaded and procured his son to swear falsely in said proceedings in order that said divorce might be granted.

That she was instructed by her husband where to go and secure a lawyer to represent her in the divorce proceedings and

what to say to him. That she went to the lawyer as directed and told the lawyer what had been told to her by her husband. That during the time the divorce proceeding was pending respondent frequently wrote letters to her, expressing his great love for her and telling her how glad he was to receive her letters, and that after the granting of the decree in divorce respondent ceased writing to the petitioner. When she subsequently met him he walked away and refused to talk to her. She further alleged that the statements contained in her libel as to the cruel and barbarous treatment and the indignities to her person on the part of respondent, and the testimony taken in support of the same, were false. That she was induced, persuaded and procured to make such statements through the fraud, deceit, trickery, misrepresentation and intimidation of her husband, and that said decree in divorce was obtained through collusion. By reason of these facts petitioner prayed for a rule to show cause why the said decree entered on Sept. 11, 1915, should not be vacated and set aside, which petition so presented by the said libelant was duly sworn to by her.

Whereupon the court granted a rule on respondent to show cause why said decree in divorce should not be vacated and set aside, to which petition the respondent filed an answer, substantially denying all the facts alleged by the petition and averring that the petitioner knew that the statements contained in her libel were practically true, and that respondent's treatment of her as so alleged was brought on by reason of the wrongful acts of the petitioner. He further said that he had no knowledge of what took place before the master in said divorce proceedings, and that although notice was served upon him he was not present at the hearing nor has he read the testimony or been informed what was testified to.

All of the testimony taken before the commissioner so appointed was taken under objection, except that part of the testimony of Louise M. Carbaugh and Thomas Carbaugh with relation to the charge of collusion. It was contended by defendant's counsel that the matters developed by all the other testimony so taken have been settled by a solemn decree of this court, granting the petitioner the divorce she sought to obtain. The fundamental questions, therefore, involved herein are, first: Was the petitioner—Lucy Carbaugh—guilty of collusion in the matter of obtaining the said decree of divorce? If she was, there follows the other important question: Can she now take advantage of her own wrong?

The bulk of the testimony tended to establish that the parties had always lived together peacefully and happily. The respondent, although present at this hearing, did not present himself as a witness to contradict the allegations of these several witnesses, or to sustain his answer to the petition. He produced, however, four witnesses, two of whom were the lawyers who had charge of the proceedings, and who merely testified to vindicate themselves from a most unjust aspersion which had been cast upon them by the petitioner, insinuating their knowledge of collusion between the husband and the wife in order to secure the divorce. Their testimony fully vindicated them from such a charge. The other two witnesses merely had reference to the Black Hand letters referred to in her petition.

The respondent, not having chosen to testify, was called by the petitioner as for cross-examination. He was shown some twenty-seven letters which had been addressed to the petitioner by him and sent to Sharpsville during the pendency of the divorce, which letters all seemed to indicate that they had lived peacefully and happily and were replete with devotion and affection on his part toward petitioner and which, in a slight degree, fortified the petitioner in this case, and to that extent seemed to corroborate petitioner, but is no mitigation of her perjury in the absence of proof of fraud, as alleged.

There is no question in this case as to the power of the court to vacate a decree founded on fraud granted at a previous term. Sturgeon on Divorce, 342. We are referred by petitioner's counsel to the following cases: Keeseman *v.* Keeseman, 2 Pearson 187; Allen *v.* McClelland, 12 Pa. 328; Boyd's Appeal, 38 Pa. 241; Nickerson *v.* Nickerson, 16 Phila. 157; but each of these cases indicate facts far different from those incident to the case at bar.

In the case at bar the libelant is asking to have the decree which was granted at her request set aside, upon the ground, as indicated in petitioner's counsel's brief, that although she was the party seeking the decree in divorce, yet in reality and in substance she was not the party who applied for the divorce, but that it was her husband, acting through her, who was the real libelant, which fact, however, when applied to the evidence in this case, fails to appear. We concede counsel's position that where a man exercises his influence to so great an extent as to dominate the will of his wife, so that his will is substituted in place of her will, that the result of such action brought about by undue influence, is not, in reality, her act,

but only her act in form, but is the act of the husband exercising the undue influence; yet we fail to find, as stated above, such conditions in the proof submitted herein.

Petitioner's counsel also cites Phillips *v.* Chase, 203 Mass. 556, and Dennis *v.* Harris, 143 N. W. 343, which decisions, however, are fully sustained by the facts disclosed therein, which is not so in the case at bar.

The nearest parallel case to the one at bar that can be found is the late case of Henderson *v.* Henderson, 156 N. W. R. 245, in the Supreme Court of North Dakota. In that case plaintiff, the wife, agreed with her husband that she should obtain a divorce in the mistaken belief, induced by her husband, that this was necessary to enable her to testify in a criminal action wherein he was charged with embezzlement, and it was agreed after the end of this action, and other criminal proceedings, the husband should remarry her. In accordance with this agreement the wife deceived her attorneys and the trial judge, as in this case at bar, and obtained the divorce. Her husband, however, married another woman; the wife secured from the trial judge an order to show cause why the decree of divorce should not be set aside, averring in her petition that prior to the institution of the divorce proceedings her husband had told her that he had been married before and had not secured a divorce and that the former wife was making trouble for him, and that her husband had been arrested upon the charge of embezzlement and that she would not be allowed to testify in his behalf, and that for these reasons he had requested her to obtain a divorce so that he might avoid a possible charge of bigamy preferred by his first wife, and in order that she (the plaintiff) might testify as a witness upon the trial wherein he was charged with embezzlement. She further alleged that her husband represented to her that if she would secure the divorce and aid him, in meeting the criminal charges successfully, he would remarry her, and that relying on this promise and not upon any desire for a divorce, the proceedings had been instituted wherein she had obtained the said divorce.

She alleged further that in pursuance of this agreement she had deceived her attorneys as well as the court, as was done here, and had represented to them that she desired such a decree, when in truth and in fact she wished only to aid her husband in his trouble, and that notwithstanding the husband's promise to remarry, he had married another woman. The trial court entered an order setting aside, vacating and can-

celling the decree in divorce, defendant appealed and, although there were other questions involved in the case pertaining to the mode of service of notice of the application to vacate the decree, nevertheless the court based its decision upon the merits of the case only, saying, "that whatever was her motive she did really desire a divorce and obtained it. To be sure she relied upon the promises of the husband to remarry her after his difficulties had been met, but it was not until she had learned that her husband did not intend to keep his promise that she found any fault with the decree that had been entered against her. It is evident that she cannot, after the remarriage of her husband, reopen the judgment which she herself obtained," citing Karren *v.* Karren, supra, wherein it was held that "a woman who consented to a decree of divorce against her to enable her husband to obtain a grant of property cannot, after husband had married another woman, have the decree annulled, although in consideration of her consent he promised to remarry her after the grant was procured and the decree was obtained by suppression of facts and false testimony."

As a general rule the party obtaining a divorce decree will not be relieved therefrom upon his application to set it aside upon the broad principle that having induced the court to render the judgment he is estopped from afterwards attacking it, except, of course, for fraud upon himself, mistake or surprise. "Plaintiff can claim neither surprise nor mistake, and the fraud practiced upon her was not of the kind of which she could take advantage." This language precisely applies to the case at bar.

In the case of Olmsted *v.* Olmsted, 41 Minn. 297, the husband had secured his wife's signature to a paper by fraud. The wife did not know the nature of the paper until months later, when she found that she had in truth signed and verified a complaint for a divorce, which the husband had taken before a lawyer and had a suit carried on in her name without her knowledge. In that case the fraud practiced upon the wife was a substantial fraud.

We find the general rule prevailing is as set forth in 14 Cyc. 271, namely, that "the party in whose favor a divorce is granted cannot ordinarily have it set aside unless the divorce suit was instituted without the knowledge or consent of the plaintiff." To the same effect are the following citations, supporting our final conclusion in this case:

Simmons *v.* Simmons, 47 Mich. 253: "Where a wife had

obtained a divorce on a sworn bill containing the usual allegation that there was no collusion, a subsequent bill filed by her to set aside the decree on the ground that it was procured by collusion was properly dismissed, in the absence of any showing that she had been defrauded."

Adams *v.* Adams, 51 N. H. 397: "If both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment."

Green *v.* Green, 68 Mass. 362: "In Carlisle *v.* Carlisle, 96 Mich. 128, 55 N. W. 673, it is said arguendo that a decree cannot be avoided by a party guilty of fraud, nor can one who obtains a divorce and accepts its benefits afterwards question the jurisdiction of the court granting it."

"In Simmons *v.* Simmons, 47 Mich. 253, 10 N. W. 360, the complainant in a divorce action filed a bill to set aside the decree, alleging that it was procured by collusion with her husband, while in her original bill for a divorce, there was a sworn allegation that it was not founded on any collusion, agreement or understanding whatever. The court held that without this sworn allegation in her bill of complaint it would not have been entertained, and, having thus given the court jurisdiction and permitted the case to proceed to a final decree, she could not then be permitted to take advantage of her own wrong. In the language of the court: 'Indeed, the whole matter was simply a shameless bargain, and whether right or wrong, she must now abide by it.' "

We cannot better express our views in this case than to repeat the language of the court in the cited case of Henderson *v.* Henderson: "There is nothing in the record that reflects any credit upon the husband, but that is not the issue. The wife concedes that she was willing to aid him in those unlawful purposes, that she was willing to obtain a divorce in her belief that that was necessary so that she might testify upon his behalf, and she was willing to have this divorce entered and run her chances of remarriage. The divorce was not obtained by any fraud practiced upon her. She went into the suit with her eyes wide open, relying upon the promise of defendant that he would remarry her. After he had broken his promise, failing to recognize her subsequently to the granting of the decree in divorce, she for the first time attacked the decree which she herself had obtained. Under these circumstances she has no standing in a court of equity. As all of those things appeared upon her original application for relief, her application should have been denied."

The court then proceeded to enter a decree reversing the action of the court below and reinstating the decree of divorce as originally granted.

The case at bar is much stronger against petitioner than in Henderson *v.* Henderson. There is nothing to disclose that the wife committed perjury in that case save as to the allegation of non-collusion in the libel, but in the case at bar she specifically admits that both she and her son, the only witnesses in the divorce proceeding, perjured themselves before the master in divorce, as she had done before in swearing to the libel. She thereby admits attempting to deceive her own counsel as well as the court, thus prostituting the sanctity of the law in subordination to her own reckless indifference. The case discloses no proof of such substantial fraud or personal duress practiced on her by the respondent as contended for by petitioner's counsel, as would justify the granting of her petition. No acts of violence are disclosed, nor such a course of treatment as would establish an overpowering dominion on the part of the husband over her mental forces, such as to destroy her power of resistance, all of which conditions, however, do appear in the cases cited by petitioner's counsel, supra.

A studied review of this petition and testimony taken thereunder gives no indication of mental subservience of a character sufficient to establish that she was dominated by a power she could not control. While she asserts these conditions in her petition, the testimony taken fails to indicate any action on the husband's part to establish her allegations, save her mere statement.

From the evidence submitted it appears that she simply yielded to the persuasion of a husband who, if properly characterized by her statements, was devoid of all moral sentiment, provided we could rely on her statements, which is impossible in view of her being a self-convicted perjurer of her own choice. She has failed to prove any specific acts or utterances on his part which deprived her of the exercise of her own free will. There is no scintilla of evidence submitted which would indicate that she in any way or manner attempted to ascertain from any source whatever the truth of the husband's statements alleged to have been made to her on the faith of which she proceeded to secure a divorce. She admits that she and her son committed perjury in all the legal requirements that resulted in her obtaining the decree in divorce. She may have yielded to the importunities of a wicked husband, but there is not sufficient evidence that she did so either by means of phys-

ical force or duress or of absolute mental subordination to the irresistible influence of the husband. If her story be true, she voluntarily acquiesced in his entreaties, thus colluding with him to commit perjury by asserting in her libel that the same was filed without any collusion between them. Although the petition alleges she committed perjury under duress, we fail to gather from the testimony therein any overt act of overpowering control on the part of respondent, absolutely compelling her to resort to the infamous method resorted to in obtaining her decree of divorce, or any sufficient evidence of any act on his part which so beclouded and mastered her mind as to have subjected her to his complete control with no power to evade or resist his unholy request, in which event there possibly would be no ground for considering the prayer to vacate the decree.

Doubtless a fraud has been practiced on the court by her which would justify a vacation of said decree if the testimony to sustain the petition be true. We are induced, however, to find, after a careful analysis of all the evidence, that the statements contained in her petition to vacate the decree are not correct. She, therefore, cannot now take advantage of her own wrong even though her husband is thereby, unfortunately for her—it may be—relieved from his liability to support her hereafter as a consequence of that decree. She has placed herself by her own volition in a compromising position from which there is no escape, compelled as she must be to bear the burden she knowingly assumed in the perpetration of an alleged fraud perhaps sufficiently wicked in itself to justify the court in setting aside the decree of divorce, if believed, but which, under all the circumstances of this case, must be permitted to stand, notwithstanding her testimony in support of her petition tended to contradict the testimony submitted in behalf of her libel praying for a divorce; and for the further reason that the important testimony upon the credit of which the decree in divorce was granted was that of herself and her son, which testimony she now attempts to contradict and to declare false and perjured, but which under all the circumstances must stand as res adjudicata.

The question arises whether she perjured herself in the original proceedings in divorce or whether she is now perjuring in this attempt to vacate that decree. We incline to the belief, after a studious review of all the testimony, that her testimony originally given to sustain the libel in divorce was a nearer correct version of her married life than her testimony in sup-

port of this petition. Therefore, in view of this, and all the other recited conditions and in the absence of proof of substantial and positive fraud, as alleged by her, and because, too, of her failure to establish the total absence of will-power on her part by reason of the superior and absolute dominion of her husband over her mind, amounting, as she alleges, to duress, the prayer of her petition must be refused.

That petitioner has thus far escaped the penalty of her unconscionable conduct may be some compensation to her for the unfortunate predicament in which she has succeeded in placing herself, by having accomplished her purpose of being divorced from a husband with whom she now says she lived so happily.

In view of the foregoing we are compelled to dismiss the petition and refuse its prayer for the vacation of the decree in divorce as prayed for.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Commonwealth Insurance Agency *v.* Opperman.

Contracts—Surety bond—Right of agent of principal to sue.

The defendant agreed in writing to pay the Maryland Casualty Company an annual premium for acting as surety on a certain bond. The plaintiff was the agent of the casualty company in making the contract, and was to pay the premium collected from the defendant to the casualty less commission for services. The first premium was thus paid, and the plaintiff brought action against the defendant for the second premium, which it had paid to the casualty company, on the ground that it had a beneficial interest in the performance of the contract in the way of commission out of said premium. Held, that the plaintiff could not maintain the action.

In such case where the contract was to pay, not to the plaintiff, but to the casualty company, and the plaintiff was not a party thereto in any sense, either for itself or the casualty company, the rule does not apply, that when an agent makes a contract in his own name, though for a disclosed principal, and has a beneficial interest in its performance, he may maintain an action thereon in his own name.

In such case the suggestion that the plaintiff has already paid the premium to the casualty company under its arrangement with that company cannot aid in sustaining its contention to recover.

Motion for judgment non obstante veredicto. C. P. Dauphin Co. Jan. T., 1913, No. 838.

J. J. Conklin, for plaintiff.
Jackson & Jackson and *C. H. Backenstoe,* for defendant.

[Commonwealth Insurance Agency v. Opperman.]

KUNKEL, P. J., Sept. 27, 1915.—The question presented is whether the plaintiff can maintain this action against the defendants. The action is founded on a certain contract in writing, the parties to which are the Maryland casualty company and the defendants. By its terms the defendants agreed to pay to the casualty company an annual premium of $450 for acting as surety on their contract with the city of Harrisburg, for the performance of certain public work. The contract was effected through the agency of the plaintiff, who was the representative of the casualty company. Under an arrangement between the plaintiff and the casualty company the plaintiff was to pay the premium to that company, less a certain commission which it was entitled to retain for its services. The first premium was paid by the defendants to the plaintiff, and this action is brought for the second premium, which is alleged to be due and payable and which the plaintiff paid to the casualty company. The ground on which the plaintiff claims to be entitled to maintain the action is that it has a beneficial interest in the performance of the contract, that interest being its right to a part of the premium as commissions for services in securing the contract. At the trial of the case objection was made by the defendants to the right of the plaintiff to maintain the action. The objection was overruled, testimony was taken, and there being no dispute as to the facts the jury was directed to return a verdict for the amount of the premium in favor of the plaintiff, subject to the question of its right to recover.

The plaintiff relies in support of its contention upon the case of Steamboat Co. *v.* Atkins & Co., 22 Pa. 522, which was an action against the steamboat company for the loss of goods which the steamboat company had agreed with the plaintiff to deliver in good order to the consignee. The action was brought in the name of the plaintiff for his own use and for the use of the consignee. An examination of the case shows that the contract was made with the plaintiff, that the goods shipped were in his possession and that the previous freight charges had been paid by him. The case is not in point. The action here does not purport to be based upon a contract made by the defendants with the plaintiff. The contract is in writing and the parties thereto are the casualty company and the defendants. The contract was to pay, not to the plaintiff, but to the casualty company. It is true that the contract was effected through the instrumentality of the plaintiff, but was not with the plaintiff. The plaintiff was not a party thereto

in any sense, either for itself or for the casualty company. It is quite clear, therefore, that this case does not come within the rule that when an agent makes a contract in his own name, though for a disclosed principal, and has a beneficial interest in its performance, he may maintain an action thereon in his own name. The plaintiff here is neither a nominal nor substantial party to the contract in suit.

The suggestion that the plaintiff has already paid the premium to the casualty company under its arrangement with that company cannot aid in sustaining its contention to recover in this case. If the defendants procured the plaintiff to pay the premium or assented to such payment in their behalf, they may have made themselves liable to the plaintiff for moneys laid out and expended, but this action is not based upon any such implied contract.

We are of the opinion that the plaintiff cannot maintain the action. The motion for judgment non obstante veredicto is sustained and accordingly judgment is directed to be entered in favor of the defendants non obstante veredicto upon payment of the jury fee.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Dupont.

Criminal law—Larceny—Return of grand jury—Costs.

No such offense as "larceny by bailee" is created by § 108 of the act of March 31, 1860, P. L. 382. The offense created is larceny.

A return of the grand jury in such a case, where the bill is ignored, finding that the property alleged to have been stolen is less than $10 and imposing the costs on the prosecutor, will be sustained, under the provisions of § 1 of the act of May 25, 1897, P. L. 89.

Motion to set aside part of grand jury's return. Q. S. Fayette Co. Sept. Sess., 1916, No. 135.

George Patterson, for motion.
S. J. Morrow, district attorney, for commonwealth.

VAN SWEARINGEN, P. J., Oct. 18, 1916.—The indictment in this case charged the defendant with what was designated on the back of the bill as "larceny by bailee." The grand jury, finding the value of the property alleged to have been

stolen to be less than $10, ignored the bill and directed that the prosecutor pay the costs, under the provisions of § 1 of the act of May 25, 1897 P. L. 89. Private counsel for the prosecutor then filed a motion asking the court to set aside that part of the return of the grand jury finding the value of the property in question to be less than $10 and imposing the costs on the prosecutor, contending that the section of the act cited is not to be construed as applicable to cases of "larceny by bailee." It is true the statute covers only prosecutions and indictments for larceny, but "larceny by bailee" is a species of larceny.

Section 108 of the act of March 31, 1860, P. L. 382 provides: "If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or to the use of any other person, except the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny, and punished as is provided in cases of larceny of like property." No such offense as "larceny by bailee" is created by the statute. The offense created is larceny. The use of the words "larceny by bailee" on the back of a bill of indictment is but a common form of expression intended to designate a certain kind of larceny, and cannot be held to take the offense out of the class of offenses to which it belongs.

And now, Oct. 18, 1916, the motion to set aside that part of the return of the grand jury finding the value of the property alleged to have been stolen to be less than $10 and imposing the costs on the prosecutor is refused.

From D. W. McDonald, Esq., Uniontown, Pa.

Commonwealth ex rel. *v.* Powell, Auditor-General.

Pension law—Widows maintenance—Procedure to prove death of husband—Procedure.

There is nothing in the act of June 18, 1915, P. L. 1038, providing for the support of certain widows, which limits the evidence of the husband's death to direct evidence or to the production of the record of a judicial proceeding establishing the fact of death.

The trustees of the mothers' assistant fund are constituted a tribunal to determine, inter alia, the fact of a husband's death; which fact may be shown either by witnesses, who saw the dead body, or by testimony that the person has been unheard of for seven years or more.

[Commonwealth ex rel. v. Powell, Auditor-General.]

Mandamus. C. P. Dauphin Co. Commonwealth docket, 1915, No. 40.

Ira J. Williams, for relator.

F. S. Brown, attorney-general and *J. L. Kun,* deputy attorney-general, for respondents.

KUNKEL, P. J., Sept. 16, 1916.—The duty of carrying into effect the provisions of the act of June 18, 1915, P. L. 1038, is committed to the trustees authorized to be appointed thereunder. The purpose of the act is to provide monthly payments to women whose husbands are dead or permanently insane, and who have children under sixteen years of age, for the partial support of the children in their own homes. The act expressly declares that the monthly payments shall be approved by the trustees. Thus it is quite clear that the distribution of the fund appropriated is to be made by the trustees, and they are constituted a tribunal to pass upon the question whether monthly payments shall be made when applications are presented. The duty to approve, with which they are charged, involves the determination of the facts necessary to establish the claim of an applicant.

These facts are: the marriage of the claimant, the decease of her husband, or his permanent confinement in an institution for the insane, the number of the children, their ages, the good repute of the claimant, and that she is poor and dependent upon her own efforts for support, her character and ability, and that for the decent maintenance of her children in her own home the monthly payments are necessary. All these are facts which the trustees must find in order to justify an allowance for support. Why the fact of death any more than the other facts should be required to be adjudicated first in some judicial proceeding, as suggested by the counsel for the defendant, we are unable to understand. One of the facts to be established, as we have already said is that the husband of the applicant is dead. Out of the character of the evidence submitted to establish that fact in this case has arisen the present controversy. The evidence before the trustees on the question of the death was that the husband had been absent and unheard of for ten years. From this evidence the trustees found that he was dead, approved the application, and allowed support to the applicant. The auditor-general, the defendant, refused to draw his warrant for the award because there was no proof of actual death by direct evidence.

In this state, as well as in other states, the death of a person may be shown in two ways: either by witnesses who saw the person killed or saw his body with life extinct, or by testimony to the effect that the person had been absent and unheard of for seven years or more. Evidence that a person has been absent and unheard of for seven years or more raises the presumption that the person is dead, and if not refuted is just as effectual in all cases involving the question of death as proof of death by direct evidence. Because of the difficulty in many instances to prove death by direct evidence, the presumption referred to was adopted. As was said by Gibson, C. J., in Burr *v.* Sim, 4 Whar. 150: "Not only convenience but necessity calls for a definite rule to produce certainty of result in the determination of facts which must be passed upon without proof, and such can be obtained only from the doctrine of presumptions, which however arbitrary is indispensable, and when found in the ordinary course of events, productive of results which usually accord with the truth. There is nothing so frequently unattended with the ordinary means of proof and yet so essential to the determination of a right as the time of an individual's death."

Accordingly in that case, and in Bradley *v.* Bradley, 4 Whar. 173, it was held that the life of an absent person of whom nothing is known expired at the end of seven years from the time that he was last known to be alive. There is no reason why this means of proof should not be permitted to be resorted to in a case like the present one, where the death of a person is a fact to be established, just as it is permitted to be done in all other instances where the fact or time of death is in question. We cannot agree with the defendant that the trustees are authorized to allow support only in case the death of the husband is conclusively shown by direct evidence or by producing the record of a judicial proceeding establishing the fact of death. There is nothing in the statute that limits the evidence to that suggested. We are of opinion that the fact of death is open to the ordinary and recognized means of proof.

Wherefore, in accordance with the terms of the case stated, judgment is directed to be entered in favor of the plaintiff and against the defendant, and a peremptory writ of mandamus will issue on motion therefor.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Frank's Petition.

Married women—Feme sole trader—Failure of husband to support wife—Acts of Feb. 22, 1718, 1 Sm. L. 99; May 4, 1855, P. L. 430 and May 28, 1915, P. L. 639.

A petition of a married woman to be declared a feme sole trader will be granted where it appears that the husband without excuse, and while earning wages, has not contributed anything to the support of his wife during the two years preceding the filing of the petition; that the parties had lived separate during such period; and that the wife had supported herself from the earnings of her own industry.

In re petition of Clara M. Frank to be declared a feme sole trader. C. P. Cumberland Co. Feb. T., 1916, No. 57.

G. Wilson Swartz, for petitioner.

Conrad Hambleton, A. J. H. Frank and *M. J. Cotter,* for respondent.

SADLER, P. J., July 14, 1916.—Clara M. Frank presented her petition to the court of common pleas of Cumberland county on Feb. 28, 1916, praying that she might be declared a feme sole trader, having lived separate and apart from her husband for more than one year previous thereto, and averring that for said period of time and longer her husband had failed to support the petitioner, who had maintained herself by her own industry, and by the income from her separate estate. A rule was granted, and notice duly given to the respondent. An answer was filed, and a reply thereto, and a hearing had on April 18, 1916. The parties, and their witnesses, were heard in detail, and a record of nearly three hundred typewritten pages was the result. Certain requests for findings of fact were presented on behalf of the petitioner. The first seven correctly state the facts, and are affirmed. They are as follows:

1. That Clara M. Frank, the petitioner, is a resident and citizen of the borough of Carlisle, said county and state, and has resided therein for a number of years last past.

2. That the said Clara M. Frank on Feb. 14, 1867, was married to Theron N. Frank named in the petition for said decree.

3. That the said husband and wife have three children, all of whom are over the age of twenty-one years, and all of whom are maintaining themselves.

4. That said petitioner and her husband have lived separate

and apart for more than one year prior to Feb. 28, 1916, and that they have since said date continued to live separate and apart.

5. That all marital relations between petitioner and her husband have ceased for more than two years last past.

6. That the said Theron N. Frank for more than two years prior to Feb. 28, 1916, did not support or contribute to the support of his wife, and has not since supported her.

7. That petitioner has supported and maintained herself by her own industry for more than two years last past and by the income derived from her separate estate, and without any contribution or assistance whatever from her said husband.

The eighth request for finding of fact is "that since said separation the said Theron N. Frank has not contributed toward the support of petitioner." This is a correct statement of the testimony, if the time referred to therein is that fixed in the petition presented in this case. If, however, reference is had to the time of the separation of the husband and wife, which occurred in Philadelphia many years ago, it could not be affirmed. There is evidence of small contributions of support as late as 1912, and an indefinite statement appears in the testimony, from which it might be inferred that subsequently, but more than two years prior to the filing of the petition, sums of money, not in excess of $1, or some postage stamps, had been forwarded by the respondent. The court finds generally the following facts:

1. Clara M. Frank was married on Feb. 14, 1867. Three children were born. Until 1893 the husband and wife resided in Carlisle. In that year the husband took up a residence in the city of Philadelphia. A short time thereafter, in 1895, the wife moved to that city, and resided for about eight months in the family of her husband. Dissatisfied with the surroundings, and averring inadequacy of support furnished herself and daughters, she returned to Carlisle. At infrequent intervals until 1908, the petitioner boarded in Philadelphia, and apparently resumed marital relations. Dissatisfaction with the support furnished on each of these brief visits resulted in a return to Carlisle.

2. The two daughters of the petitioner resided with the mother in the borough of Carlisle, and were educated by her. Subsequently, the one was married, and the other became practically self-supporting, having secured a position as teacher of a school. At intervals, she resided with the mother in Carlisle.

3. After 1908, the relations between the husband and wife

seem definitely to have ceased, the wife residing in Carlisle, and supporting herself by her own industry, and by the income from her separate estate. The husband resided in Philadelphia with his son. During this period he had no direct communication with his wife, neither seeing her, nor writing to her. Such information as he secured concerning his wife was derived from communications between his son and daughters. During the serious illness of his wife, in February of 1915, of which he was informed, he made no effort to communicate with her.

4. From 1895 until 1914, the earnings of the husband averaged about $9 per week. After that time, until 1916, his earnings were $4 to $5 per week, and beginning with Jan. 1, 1916, they were $55 per month.

5. For the sixteen years from 1897 to 1912, inclusive, the respondent furnished for the support of the petitioner $346.75 or slightly less than $22 per year. For 1906 and 1909 nothing was furnished, and after 1912, no sum was forwarded for support. On March 7, 1916, a week after the institution of the present proceedings, but before the service of the papers on the respondent by the sheriff, he did forward a check for $10, which was returned. In addition to these sums, the respondent paid to Emma Adams for board of the family in Philadelphia, for the years 1901, 1902, 1903 and 1904, the sum of $100. In addition the respondent gave to his one daughter, Gertrude, from 1898 to 1902, inclusive, the sum of $25, and to the second daughter, Cyrille, from 1899 to 1915, inclusive, the sum of $204; the respondent also stating that at various times he had sent to his wife a $1 bill, or some postage stamps, but not within the last two years. It also appeared that six or eight years before the filing of the petition, the respondent had paid two or three small bills for the petitioner in Carlisle.

6. There was no evidence offered which would excuse the respondent for his entire failure to furnish any support to his wife after 1912. Though his earnings were not large, he showed no disposition to assist in any way, even at the time of the serious illness of the petitioner.

7. There was a neglect to support the petitioner within the meaning of the act of May 28, 1915.

CONCLUSION OF LAW.

The petitioner has presented the following request for conclusion of law: "That the petitioner is entitled to an order

and decree declaring her a feme sole trader, as provided by the act of assembly, approved May 28, 1915, P. L. 639."

The same is affirmed.

The petitioner applies in this case for a certificate as a feme sole trader, and bases her demand upon the failure of her husband to furnish her support for more than one year prior to the presentation of the same.

The act of Feb. 22, 1718, 1 Smith's Laws 99, makes the first legislative provision for feme sole traders, in permitting the grant of the certificate where the husband had gone to sea, leaving the wife to secure her own livelihood. The power of the courts was extended by the act of May 4, 1855, which provides that "whensoever any husband from drunkenness, profligacy, or other cause, shall neglect, or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured by a feme sole trader, under the act of Feb. 22, 1718." Act, May 4, 1855, P. L. 430. The immunity granted to the wife was still further extended by the act of May 28, 1915, P. L. 639, which directs "that whenever a man and wife live apart and separate for one year or more, and all marital relations between them have ceased, and the husband, for one year or more has not supported his wife, nor their child or children, if any they have, from the time of the separation of the husband and wife, and the wife and child, or children, if any there are, are maintained either by the wife, by the joint efforts of the wife and children, by the children, or from the income of the wife's separate estate, then, in such case, the wife may petition the court of common pleas of the county in which she resides to be decreed a feme sole trader."

This legislation was evidently intended to broaden the privileges of the wife, and to give to her rights which could not be obtained under the provisions of the act of 1855, and has been declared to be constitutional. In Re. Petition to be Declared Feme Sole Trader, 64 Pitts. 333. It would appear that its passage was due to a refusal of the Schuylkill county court to grant a certificate upon the application of a wife, because of her inability to show a willful desertion, or neglect to support. After the approval of this act, a second application was presented to the same court, and the decree granted. Hoedt's Petition, 43 Pa. C. C. 459. If this legislation is to be construed strictly, and the wife be granted the certificate upon proof alone of separation, and neglect to support, and upon proof of the support by herself of the family, irrespective

of the question of willfulness in the conduct of the husband, then clearly, the petitioner in this case is entitled to a certificate. That there was a separation for a year or more; that the marital relations between the parties had ceased; that the husband had not supported the wife and children for one year; that the wife had supported herself from her separate estate, and from the earnings of her own industry, cannot be disputed, and if the proper interpretation of the act is that a decree is to be entered upon the proof of these facts, then undoubtedly the petitioner is entitled to a decree. Hoedt's Petition, supra.

But it is urgently contended by counsel for the respondent, that this act is to be read by the courts, as was the act of 1855, so as to make necessary proof that the conduct of the husband was willful, and that unless it appears that the neglect to support was intentional, and inexcusable, then no decree can be entered. We believe that under the facts of this case, the decree should be entered, even if this construction be placed upon the legislation. This makes necessary a consideration of the proof required to justify a decree under the act of 1855. The cases discussing the rights of the wife, under this legislation, are found in decisions dealing infrequently with direct applications for certificates; Cole's Case, 230 Pa. 160, but are largely decisions in cases in which the husband elected to take against the will of the wife, or the independent acts of the wife performed without securing a formal certificate, were in question.

Under the act of 1855, the certificate could be granted where the husband had been guilty of desertion, and where this was shown, the burden was upon the husband to show that his act was reasonable and lawful, since there was a presumption that it was willful and malicious. But proof of these facts would prevent the wife from claiming the benefits of the act. Weller *v.* Weller, 213 Pa. 265. But desertion was not the only cause provided for. If there was neglect or refusal to provide for the wife, she likewise became entitled to the rights and privileges secured to a feme sole trader. Shaw's Est., 54 Pa. Super Ct. 544. Even in such case, the husband was excused, if from the testimony it appeared that the failure to support was not willful or intentional, but excusable by reason of inability to earn on account of physical disability, or otherwise. Ardin *v.* Udderzook, 1 Chester 142; King *v.* Thompson, 87 Pa. 365; Ellison *v.* Anderson, 110 Pa. 486. But in such cases, it must appear that the failure to support was without fault of the husband. In Re Petition to be Declared Feme

Sole Trader, 64 Pitts. 333 (under the act of May 28, 1915). And the support must appear to have been voluntarily offered by the husband. Kvist's Est., 64 Pitts. L. J. 233; Kauffman's Est., 23 D. R. 701. And it is not a sufficient excuse for failure to offer the support, that the wife has some separate estate, or that she is earning good wages, or is able to support herself. Hilker's Est., 22 W. N. C. 148. For the wife is not bound to earn the support for herself and family. Ellison *v.* Anderson, supra. It is the duty of the husband to furnish a reasonable and competent livelihood, according to his circumstances. Ellison *v.* Anderson, supra, page 494. And though some support be given, if not in an amount to come up to this measure, it will not prevent the request. Weikert's Est., 63 Pitts. 265; Ardin *v.* Udderzook, supra.

Assuming that the proper construction of the act of 1915 is to permit the granting of the decree only where there is separation, and the non-support is willful, and assuming that no decree can be entered where the failure to support is excusable by reason of inability to earn, yet we cannot but come to the conclusion in the present case that the petitioner is entitled to a certificate granting to her the rights and privileges of a feme sole trader. The husband was earning, according to his own statements, an average of $9 per week, from 1897 to 1914, and during that period furnished to his wife for her support an average of less than $22 a year. In addition he furnished certain small sums to his daughters, as set forth in the findings of fact. And it further appears that in 1906 and 1908, and from 1913 until the time of the filing of the petition, he sent to his wife nothing at all. It is true that on the day service was made of the petition, he forwarded a check for $10, the first for more than two years, but this contribution was subsequent to the filing of the petition, and we do not think can affect the rights of the parties. Certainly, it cannot be said that the husband contributed in accordance with his means, when he made no offer to furnish any support to the wife for more than two years prior to the filing of her petition, while he was earning on an average at least $5 per week; nor does the testimony show that the respondent was solicitous of the welfare of the wife, who was supporting herself by her own industry, as well as the income from her separate estate, when it appears that he has not written to her or communicated with her for six or seven years, and failed even to write to her when informed of her serious illness, a year before the date of the present proceeding.

Viewing then the act of 1915, either as requiring proof of willfulness, or as dispensing with this requirement, the evidence clearly shows that the wife is entitled to have her petition granted, and it will be so ordered.

And now, July 14, 1916, on consideration of the foregoing petition of the said Clara M. Frank, and the evidence in support thereof, the court being satisfied that the said Clara M. Frank, and her husband, Theron N. Frank, are now and have been, living separate and apart for one year, or more; that the said Theron N. Frank has not supported nor contributed toward the support of his wife, for the said period and longer, and that his wife, Clara M. Frank, has supported and maintained herself upon and from her own estate, and by her own industry, the court does hereby order and decree that the said Clara M. Frank shall be, and hereby is declared a feme sole trader, under the act of May 28, 1915, P. L. 639; and that her property, real and personal, however acquired, shall be subject to her free and absolute disposal during life, or by will, without any liability to be interfered with, or obtained by her husband, Theron N. Frank, and in case of intestacy, shall go to her next of kin, as if he were previously dead, as provided by said act.

Tomko *v.* Union Township.

Request for binding instructions—Motion for judgment, n. o. v.—Practice.

When upon the trial of a cause counsel makes no request that a verdict be directed for his client and the record does not disclose such request, he is not entitled to a rule for judgment n. o. v.

Action for injuries sustained by team going from road over an embankment. Application by defendant for rule for judgment, n. o. v. C. P. Schuylkill Co. July T., 1916, Nos. 41 and 42.

W. B. Durkin, for plaintiff; *C. C. Breisch,* for defendant.

BECHTEL, P. J., Oct. 16, 1916.—These two cases were tried together and resulted in a verdict for the plaintiffs. Counsel for the defendant asked the court to enter judgment n. o. v.

An inspection of the record discloses the fact that there was no point put to the court asking the direction of a verdict for the defendant. Counsel for the defendant thereupon asked

the court for permission to file such a point at this date and directed the same shall be entered on the record nunc protunc.

We do not feel that we should do this. During the trial, court suggested to the counsel for the defendant that if he would put such a point to the court, the legal questions involved in the case might be argued at greater length on motion for judgment n. o. v. This was not done at that time and we do not think that it would be fair either to the plaintiff or the court to grant the relief prayed for by counsel for the defendant. There is no other motion before us to dispose of.

And now, Oct. 16, 1916, a rule for judgment n. o. v. is herewith refused, and the prothonotary is directed to enter judgment sur verdict.

McCleary et ux. *v.* Wilkins.

Affidavit of defence—Statement—Act of May 25, 1887, P. L. 271.

To entitle the plaintiff to judgment for want of a sufficient affidavit of defence, the statement of his demand under the act of May 25, 1887, P. L. 272, must be self-sustaining; that is to say, it must set forth in clear and precise terms a good cause of action, by which is meant such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim.

Assumpsit—Writ of inquiry—Practice—Insufficient statement.

Unless a statement in assumpsit shows amounts by which a judgment can be liquidated without a writ of inquiry, a rule for judgment for want of a sufficient affidavit of defence will be discharged.

Motion for judgment for want of sufficient affidavit of defence. C. P. Washington Co. May T., 1914, No. 26.

Olan Yarnall and *R. H. Meloy,* for plaintiffs.

Charles E. Phillips and *R. W. Parkinson, Jr.*, for defendants, cited the following: That the statement is insufficient to support a judgment for want of a sufficient affidavit of defence. Bill Posting Sign Co. *v.* Jermon, 27 Pa. Super. Ct. 171; Tourison *v.* Engard, 30 Pa. Super. Ct. 179; Krug *v.* Snyder, 32 Pa. C. C. 33; Creighton *v.* Safe Co., 10 D. R. 600.

IRWIN, J., Oct. 11, 1916.—The plaintiffs in their statement allege that on April 24, 1912, F. H. Wilkins, the defendant,

conveyed to them by deed of general warranty a certain lot of ground known as lot No. 57 in the plan of lots of the West Side Land Company, situate in East Pike Run township, Washington county, Pennsylvania, for the consideration of $300. They further allege that at the time said conveyance was made the defendant did not have a clear title to the said lot, but that the Greensboro Natural Gas Company had acquired a right of way over said lot of ground to lay and maintain a gas line and that the Brownsville Water Company had acquired the right to lay and maintain water lines over said lot, and that the borough of West Brownsville had acquired the right to lay and maintain a sewer over said lot, and further that they had no notice at the time they purchased said lot of these rights of way described in the statement. They further aver that they had made demand of the defendant to return the purchase-money and take back the title to the lot, but that he had refused to do so and had refused to reimburse the plaintiffs for the loss sustained by them by reason of the warranty in said deed. They averred that they had been damaged to the extent of $300, to recover which the suit was brought.

The affidavit of defence denies that either the Greensboro Natural Gas Company, the Brownsville Water Company, or the borough of West Brownsville had acquired any right in said lot of ground prior to the conveyance to the plaintiffs, and avers that if they, or either of them, are occupying said lot of ground for the purposes set forth in the plaintiff's statement it is not done under any claim of right.

We cannot tell from an examination of the plaintiffs' statement whether the action is to recover back the purchase-money under a rescission of the contract, or whether the plaintiffs have elected to retain the title and have sued for the damages, claiming that the lot was wholly valueless, and that the amount of the purchase-money was the amount of the damage. If the plaintiffs have elected to rescind the contract and have sued to recover the purchase-money paid, then the statement is defective in that they do not aver an offer to surrender the possession of the lot to the defendant before bringing suit. It is a well settled rule of law that where a vendee seeks to rescind the contract and recover back the purchase-money on the ground of a failure of the title, he must tender possession to the vendor. 39 Cyc. 2052; Wright *v.* Wright, 12 Pa. C. C. 238. If the plaintiffs have elected to retain the title and are suing to recover the purchase-money as the measure of dam-

ages, they have failed to aver in their statement that the lot was wholly valueless. We do not think the plaintiffs are in position to ask for judgment against the defendant for want of a sufficient affidavit of defence.

"To entitle the plaintiff to judgment for want of an affidavit of defence, or for want of a sufficient affidavit of defence, the statement of his demand under the act of May 25, 1887, P. L. 272, must be self-sustaining, that is to say, it must set forth in clear and precise terms a good cause of action, by which is meant such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim." Tourison *v.* Engard, 30 Pa. Super. Ct. 179.

"In both a statement of claim and an affidavit of defence, facts must be stated, which if proved as set forth, are sufficient to sustain the action in the one case, or the defence in the other. A defendant is not required either to plead or reply by affidavit of defence to an insufficient statement of claim." Bill Posting Sign Co. *v.* Jermon, 27 Pa. Super. Ct. 171. "Unless a statement in assumpsit shows amounts by which a judgment can be liquidated without a writ of inquiry, a rule for judgment for want of a sufficient affidavit of defence will be discharged." Creighton *v.* National Safe Co., 10 D. R. 600.

If the plaintiffs were to go to trial and prove every averment contained in the statement it would not follow that they would be entitled to recover the sum of $300. They do aver that they were unable to use the lot, but it does not follow that because they were unable to use the lot for the purposes for which they bought it that it has no value for any purpose, that is to say no market value, and their statement does not aver that it is without any value whatever. If the action is to be treated as an election to retain the title, then the measure of the damages is the difference between the market value of the lot at the time of the conveyance and the price which plaintiffs paid for it, and even if we were to direct judgment to be entered for want of a sufficient affidavit of defence, it would necessitate an inquiry and the taking of testimony in order to determine the amount which the plaintiff was entitled to recover.

The affidavit of defence is not drawn with the particularity with which such pleading should be prepared. It neither affirms nor denies that the Greensboro Natural Gas Company, the Brownsville Water Company, or the borough of West Brownsville was in possession of the lot of ground at the time of the conveyance, nor does it attempt to explain how or why

they were in possession, if they were in possession, at the time of the conveyance, but for the reasons already pointed out we cannot grant a judgment for want of a sufficient affidavit of defence.

And now, Oct. 11, 1916, this cause came on to be heard on motion of the plaintiffs for judgment for want of a sufficient affidavit of defence, and was argued by counsel, whereupon, after due consideration thereof, the motion for judgment for want of a sufficient affidavit of defence is discharged.

From R. W. Parkinson, Jr., Esq., Washington, Pa.

Commonwealth *v.* Thomas.

Trusts and trustees—Spendthrift trust—Support of wife—Act of April 15, 1913, P. L. 72—Constitutional law.

Rule for judgment. C. P. No. 4, Philadelphia Co. June T., 1915, No. 4777.

The act of April 15, 1913, P. L. 72, which authorizes the court of quarter sessions to make an order upon a husband who is the beneficiary of a spendthrift for the support of his wife or children by an attachment execution, does not apply to a trust created before the date of the act. If the act should be construed so as to apply to a trust created before the date of the act, the act would be unconstitutional under Art. 1, Secs. 10 and 17 of the Constitution of the United States.

Under the act the writ of attachment execution must issue from the court which made the order for support; it cannot isue from the court of common pleas upon a judgment entered in that court in a suit on a bond given by a beneficiary to secure performance of an order of support made by the court of quarter sessions.

S. P. Rotan, district attorney, and *F. E. Barr,* assistant district attorney, for plaintiff.

E. M. Vail, for defendant; *Wayne P. Rambo,* for garnishee.

AUDENRIED, P. J., Aug. 1, 1916.—Judgment was entered here in favor of the commonwealth for $500 on a bond to it by the defendant, which was conditioned that he comply with an order of the court of quarter sessions of the peace of Philadelphia county, requiring him to pay the sum of $3 per week for the maintenance of his wife and children whom he had deserted and left chargeable to that county. A writ of attachment execution was issued on this judgment and served upon the Fidelity Trust Company. The court is now asked to adjudge upon its answers to the plaintiff's interrogatories that

the garnishee has in its possession property belonging to the defendant which is subject to the attachment.

It appears by the answers of the Fidelity Trust Company that, as trustee under the will of Elizabeth P. Hopple, who died in the year 1910, it holds sundry investments, aggregating $4,900 (less an overdraft of $55.35 paid out before service of the attachment), together with income amounting to $23.75 accrued therefrom since 1913, in which the defendant is interested. The clause in the will by which the trust fund was created reads as follows:

"Item:—I give and bequeath unto the Fidelity Trust Company the sum of Five thousand dollars ($5000) in trust nevertheless, to invest the same and keep the same invested, to collect interest and income therefrom and after deducting charges and expenses to pay the net income therefrom arising, quarterly to my nephew, Woodford Hopple Thomas, for and during all the term of his natural life, upon his receipt only, the principal of said estate and income thereof not to be liable to or for his contracts or debts, or to execution or attachment at the suit of any creditor of Woodford Hopple Thomas, but to be absolutely free from the same, and the said Woodford Hopple Thomas to have no power to sell, assign or encumber either the principal or income of said bequest or to anticipate the income. And further I authorize the said trustee to pay to the said Woodford Hopple Thomas such part or portion of the principal of said sum as shall in the judgment and discretion of the said trustee be necessary or proper for the proper support and maintenance of the said Woodford Hopple Thomas, or in case of sickness or other emergency; my said Trustee shall not be liable to any person or persons for the exercise or non-exercise of the discretion so given by me, and said Trustee shall not be called upon by any person to give any reason for the payment or non-payment of any portion or all of the said sum to said Woodford Hopple Thomas, and the power and discretion so given to the said Trustee shall not, under any circumstances, give said Woodford Hopple Thomas the right to demand said principal or any portion thereof, and from and immediately after the death of the said Woodford Hopple Thomas then to pay the said sum of Five thousand dollars ($5000) or such part thereof as shall remain in the hands of the said Trustees unto such children as he shall leave surviving him."

It is conceded on behalf of the commonwealth that as the law formerly stood neither the principal nor the income of this

trust fund could be reached by the creditors of the defendant, no matter how their claims arose; but it is earnestly contended that the income of the estate has, by the act of April 15, 1913, P. L. 72, been made subject to attachment for the purpose of enforcing compliance with the order for the maintenance of the defendant's wife and children.

This act amends the act of April 13, 1867, P. L. 78, § 2 of which, as amended, now provides: "And to further enforce the compliance with the said order, the court may issue the appropriate writ of execution against any property, real or personal, belonging to the defendant, and its writ of attachment execution against any money or property to which he may be in any way entitled, whether under what is known as a spendthrift trust or otherwise."

It would be a sufficient ground for discharging the commonwealth's rule that the process against the garnishee was sued out from the court of common pleas and not from the court of quarter sessions of the peace.

If the act of April 15, 1913, P. L. 72, is of any effect whatever to subject to the claim for payments required from a husband for the support of his wife and children the money to which he may be entitled under a spendthrift trust, that object can be attained only by following particularly the procedure that the legislature has pointed out for that purpose.

Jurisdiction in cases of desertion and non-support was formerly vested by law in the court of quarter sessions. The instrument provided by the act of 1915 as the means for reaching money in the hands of a fiduciary under a spendthrift trust is a writ of attachment execution issued by that court. The act of July 12, 1913, P. L. 711, vests in the municipal court of Philadelphia exclusive jurisdiction in such cases thereafter instituted in this county, and provides that its procedure therein shall be the same as that in similar proceedings prosecuted in the court of quarter sessions of the peace.

The court of common pleas can no more issue an attachment that would be effective in such a case than it can confirm a warrant of seizure under the act of March 31, 1812, 5 Sm. Laws 391, or under the act if April 13, 1867, P. L. 78, make an order for the support of a wife deserted by her husband and left to become a charge on the county. The proceeding here resorted to by the commonwealth is not one contemplated by the amendment of 1913 above quoted.

To seize the income enjoyed by the defendant under his aunt's will, if that can be touched at all, resort should have been

had to the instrumentalities of the municipal court, had the order on the defendant for the maintenance of his wife and children been made there; but, since that order was made by the court of quarter sessions, the only available writ efficacious for the purpose is one issued by the latter court.

There is, however, another and more radical reason why this rule should be discharged.

The right of the legislature to make any property owned by a husband who has deserted his wife and children applicable through legal process to their maintenance is, of course, not to be questioned; but it is his property only that may be so appropriated.

To take the property of another for such a purpose, except in the ordinary course of taxation, is beyond even the transcendent power of an act of assembly. Such a step finds no justification as an exercise of the commonwealth's right of eminent domain, since that is confined to cases where the taking of private property is for public purposes and is subject to the condition that just compensation shall be made for what is taken.

When property is bequeathed to a trustee with directions to pay its income to a certain person for his life, but the beneficiary is given no right of control over the property, the testator may absolutely exclude from participation in the income all persons other than the cestui que trust named in his will. When so excluded, even the creditors of the beneficiary cannot lay hands on the income limited to him. This rule is too well established in the law of Pennsylvania to require the citation of authorities in its support.

If the reason for this condition of things were found in a mere exemption conferred by law on the cestui que trust or his property to protect him from the consequences of his improvidence, it would be possible for the legislature to change the position of his creditors and his family for the better, since an exemption may be abolished by the power that created it.

It is not, however, for that reason that those to whom the beneficiary under such a trust is indebted cannot succeed in reaching money received by the trustee for payment to him. They can seize nothing because, so far as creditors and all others are concerned, the testator has given him nothing.

The property embraced in the trust belonged originally to the testatrix. It was hers to do with as she pleased. She was under no obligation to bequeath it for the benefit of any par-

ticular person. The right to bequeath it to any one selected implied the right to say by whom it should not be received. Since she might have withheld her gift altogether, the law permitted her to impose on it the condition that none shall participate in it except the person named by her. So far as concerns those shut out from the benefits of the trust, the beneficiary is entitled to nothing until the income actually reaches his hands.

To apply the property of one who has by will created such a trust to a purpose entirely different from that intended by her and in direct conflict with her expressed wishes would be to make a new will for her. This neither the judicial branch of our government nor its legislative branch has been authorized by the people to do. It would be nothing less than confiscation.

To the extent, at least, that it attempts to deal with so-called spendthrift trusts created before its adoption, by appropriating to the support of the wife and children deserted by a beneficiary thereunder property which does not belong to him and which must, therefore, belong to some other person, the act under consideration offends against Art. I, Sec. 10, of the Constitution of Pennsylvania. In so far, moreover, as it interferes with the performance of the duties assumed by the trustees under such trusts it violates § 17 of the same article, as well as Art. I, Sec. 10, of the Constitution of the United States, by impairing the obligation of the contract into which they have entered. It must, therefore, be held that this statute has no bearing on the rights of the parties to the case before the court.

The rule for judgment is discharged.

Pine Grove Township School District.

School law—Eminent domain—School code—Withdrawal of proceedings to take land.

In proceedings for the taking of land for school purposes under the act of April 9, 1867, P. L. 307, where there has been no actual or permanent taking of the land, the petitioners may withdraw all proceedings at any time before final confirmation of the report of viewers.

This rule still applies since the passage of the act of May 18, 1911, known as the school code.

Rule to withdraw proceedings for the taking of land for school purposes. C. P. Warren Co. Dec. T., 1916, No. 11.

[Pine Grove Township School District.]

Earle MacDonald, for the rule; *D. U. Arird,* contra.

HINCKLEY, P. J., Nov. 27, 1916.—Upon Sept. 11, 1916, the school directors of Pine Grove township filed their petition in this court setting forth that the school district had by resolution adopted by said board upon Sept. 6, 1916, determined that certain real estate was required for school purposes.

The petition further set forth that because of the inability to agree with the owner of the land "so as aforesaid taken and occupied by said" district they desired the damages to be ascertained and asked for the appointment of viewers to estimate and determine the damages, if any, etc. Whereupon viewers were appointed.

Upon Oct. 16, 1916, the school district presented a further petition setting forth the above facts and that the board of viewers met upon Sept. 26, 1916, and concluded to make a report estimating the damages at $1,250; that the said land had not been entered upon or occupied by said school district further than to stake off the same prior to the passage of the resolution by said board that possession of said land be taken; that the school board after due deliberation conluded that the damages fixed by said viewers were excessive and more than the school district could afford or should be called upon to pay for the occupation of said land and therefore by a resolution adopted Sept. 28, 1916, the said board of school directors had declared their intention to vacate and abandon said land for school purposes so that the same may remain to the use of the owner, James Sumner, attaching a copy of the resolution so adopted and the petitioners asked for leave to withdraw these proceedings upon the payment of the costs by the said school district, whereupon a rule to show cause was granted.

Testimony has been taken to show and it was fully established by the said testimony and stipulation made, that the school district had never taken any actual possession of the premises but that the owner thereof, James Sumner, had at all times been in actual possession and occupancy and that his possession had not been disturbed by the school district.

The report of the viewers appointed has not yet been filed in this court.

The case of Funk's Administrators *v.* Waynesboro School Dis., 18 W. N. C. 447, cited by the counsel for this rule, seems to be upon all fours with this case.

It was there held that in proceedings for the taking of land

for school purposes under the act of April 9, 1867, P. L. 307, where there has been no actual or permanent taking of the land the petitioners may withdraw all proceedings at any time before final confirmation of the report of viewers.

The above case is decisive of this case unless as contended by the counsel for the respondent that under the school code a different rule now prevails.

It is contended on the part of the respondent that when the school district had proceeded by resolution, as set forth in their petition, and had staked off the land the school district had acquired an absolute title in fee simple to the premises under the provisions of §§ 607 and 609 of the school code. In other words, under the school code, the district now obtains the title in fee simple to premises taken under the provisions of the code for school purposes instead of an easement as formerly under the act of 1867 and that when the school district has adopted the necessary resolution and has taken even a paper possession the title has then passed from the owner of the land to the school district.

We do not think that the school code is clear in this respect and there is no definite provision contained in it which fixes the time when the title should pass to the district under these proceedings.

This same question, however, was raised and discussed in the case of Wood *v.* State Hospital, 164 Pa. 159, in a proceeding under a similar statute relating to the condemnation of land for state hospital purposes.

The State Hospital at Warren, Pa., had instituted a proceeding to acquire additional land under the act of May 6, 1891, P. L. 43. This act gave the board of trustees power to enter upon and take land by proceedings similar to those provided by the school code and the act provided that a fee simple title to all lands thus acquired should vest in the trustees of the State Hospital. In the foregoing case the trustees secured the appointment of viewers by the court and damages had been awarded to the land owner and the trustees of the hospital thereupon obtained a rule for leave to discontinue the condemnation proceedings.

The court below found that the trustees "have not merely formally entered upon the land and marked off and designated its boundaries but that" they have actually entered upon and occupied the land in question.

What is said by the court below (the late Judge Charles H. Noyes of this district) is pertinent here and we quote in part:

"It seems clear that the trustees may reserve their final action until the amount of the owners' compensation is ascertained provided they do not permit a final judgment to be entered thereon. But it is equally clear that there is nothing in the law which makes it obligatory upon them to await the final settlement of the damages before devoting the land to public use. . . .

"If in addition to the actual possession and occupation buildings had been pulled down, meadows plowed up, or the character of the premises otherwise materially changed, there would be no doubt that the proceedings could not be abandoned. . . .

"Inasmuch as the commonwealth has the option to take the land irrevocably at once, or to wait until the damages have been ascertained before so doing, a reasonable regard for the rights of the citizens requires us to hold that actual possession and occupation for the public use and under the right of eminent domain vests the title in the state and fixes the right of the owner to compensation."

The Supreme Court affirmed the rulings of the court below saying, "Whenever it clearly appears, as it does in this case, that there has been such an actual taking under the power of eminent domain as invests the donee of the power with title and gives to the landowner a vested right to compensation, the former should not be permitted to discontinue without the consent of the latter."

It will thus be seen that the proceedings may be discontinued unless such actual occupation and use of the premises had been made as above indicated or unless final judgment had been entered for the damages.

In this case no final judgment having been entered for the payment of the damages and no actual possession or occupation of the premises having been made by the school district it is now the right of the school district to recede and withdraw from these proceedings and the premises be thereupon freed from any claim of the school district.

This principle is referred to in Franklin Street, 14 Pa. Super. Ct. 403.

The rule to show cause is hereby made absolute and all costs made in the proceedings including a reasonable attorney fee to respondents' attorney to be paid by Pine Grove township school district.

From Edward Lindsey, Esq., Warren, Pa.

Enders *v.* Dauphin County Poor Directors.

Poor laws—Trespass—Liability of public charity for tort.

The directors of the poor (of Dauphin county) are public officials charged with the disbursements of public moneys for the support of the poor, and can have no funds out of which to pay damages for a tort; therefore a recovery would be to no purpose.

The funds of a public charity may not be diverted to pay damages for torts charged against it.

Motion for judgment n. o. v. C. P. Dauphin Co. March T., 1914, No. 389.

H. H. Matter, for plaintiff.
B. F. Nead and *E. M. Biddle,* for defendants.

KUNKEL, P. J.—The defendant moves for judgment notwithstanding the verdict. It is a corporation, so constituted by the act of March 28, 1806, 4 Smith Laws 341, for the purpose of caring for and supporting the poor of Dauphin county. That such a corporation is a public charity is settled. Armstrong County *v.* Overseers, 2 Monaghan 316; Cumru Twp. *v.* Directors of the Poor, 112 Pa. 264. That the funds of a public charity may not be diverted to pay damages for torts charged against it is also settled. Fire Ins. Patrol *v.* Boyd, 120 Pa. 624; Gable *v.* Sisters of St. Francis, 227 Pa. 254. As was said in the latter case, the doctrine that a public charity cannot be made liable for its torts rests fundamentally on the fact that such liability, if allowed, would lead inevitably to a diversion of the trust funds from the trust's purpose.

The directors of the poor are public officials charged with the disbursement of public moneys for the support of the poor, and as the defendant can have no funds out of which to pay damages such as are claimed by the plaintiff in this case, a recovery would be to no purpose. Sproat *v.* Directors of the Poor, 145 Pa. 598. The funds which are supplied the defendant come from the county commissioners, who are directed to raise them by taxation or otherwise, and pay them over to defendant's treasurer, for the care and maintenance of the poor. Its other receipts are small and purely incidental to the administration of the trust. In view of the doctrine stated, we sustain the motion for judgment.

Accordingly judgment is directed to be entered in favor of the defendant n. o. v.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Russ *v.* Gross.

Contracts—Promise to pay the debt of another—Consideration—Statute of frauds.

Where there is no evidence of any original undertaking on the part of the defendant, and the alleged verbal promise manifestly relates to the debt of another, such promise is void under the statute of frauds, because not in writing; especially where no consideration is shown moving either from the plaintiff or the original debtor to the defendant.

Motion for a new trial. C. P. Dauphin Co. Jan. T., 1912, No. 630.

S. S. Leiby, for plaintiff; *C. H. Bergner,* for defendant.

McCarrell, J., Sept. 12, 1916.—The plaintiff claimed to recover from defendant upon his alleged verbal guarantee of $300 as rent for one year of two rooms in the Russ Building, Harrisburg, Pa. The plaintiff had leased these rooms in writing to the commonwealth band. The lease was not offered in evidence at the trial because it was apparently lost. The oral testimony as to the term covered by the lease is not entirely clear, but it is reasonably certain that the term began Dec. 1, 1906, at a rental of $250 per annum for four months, and for one year thereafter at $300 per annum. There was no written renewal of the lease, but the lessee continued to occupy the premises until November, 1912. (See testimony, pages 6 and 7.) This occupancy must be conclusively presumed to have been under the written lease, as no other arrangement for occupancy appears to have been made. According to the testimony of Mr. Etter (page 7) the defendant, in the early part of November, 1907, voluntarily, and without any request said to him, as the plaintiff's agent, "George, you don't need to worry about the rent for the band, I am going to pay it for a year," . . . "he simply said I am going to pay the rent for the band room for a year." Mr. Russ, the plaintiff, testified (page 11) that the defendant at some date which he could not fix, came to him and said, "William, don't worry about the rent. I am going to pay the commonwealth band for one year myself. I told him I thanked him, and will tell Etter about it." He also says that at a later date, which he does not fix, he told Etter about it, and Etter said, "Yes, Mr. Gross told me the same thing."

Even if these promises were made, which the defendant denies, there is no evidence of any consideration whatever to

support the alleged promise. Russ did not give, or agree to give Gross anything of value whatever. The band was not released from any part of its obligation to pay rent. No notice whatever appears to have been given to Gross that Russ was relying upon his alleged undertaking to pay a year's rent. The only subject of conversation between plaintiff, or his agent, and the defendant was rent accrued and to accrue under the contract between the plaintiff and the commonwealth band. The defendant was not a party to it in any way. The indebtedness, or rent, was a debt of the band and not of Gross, the defendant. Any promise to pay such debt, in excess of $20 not in writing was and is void under our statute of frauds and perjuries. This is settled law.

In Shoemaker *v.* King, 40 Pa. 107: "A firm sold out their partnership effects to another, who agreed verbally to pay the firm debts. One of the firm creditors sued the purchaser for his debt, relying on the contract of sale, without showing that he was a party to it. Held, that he could not recover, for the agreement upon which the action was brought was not in writing and signed by the party to be charged therewith, as required by the act of April 26, 1855. Though such a contract is valid between immediate parties to it, it is void as a contract in favor of the creditors of the parties, unless they, as a part of the arrangement, give up their original claims and accept the new contract instead. Without this it is void, when expressly made to the creditors, and therefore it cannot be implied as made to them. While the old debt remains, the new contract cannot be substituted, but is only a collateral one—a promise to pay another's debt, which is forbidden by the statute, as a cause of action."

In Riegelman *v.* Focht, 141 Pa. 380, it is held: "A parol promise by a third person, that if the promisee will forbear eviction of his tenant for non-payment of rent, and permit the tenant to occupy the premises for the remainder of the term, the promisor will pay the rent, is within the operation of the statute of frauds and perjuries and unenforceable. Section 1, act of April 26, 1855, P. L. 308."

To the same effect is Maule *v.* Bucknell, 50 Pa. 39. The case of Nugent *v.* Wolfe, 111 Pa. 471, referred to by the learned counsel for plaintiff, clearly recognizes the foregoing principles.

It seems clear to us that here there is no evidence of any original undertaking on the part of the defendant; the alleged verbal promise manifestly related to the debt of another,

viz.: the commonwealth band. Even if made it is void under our statute of April 26, 1855, because not in writing. Besides no consideration whatever has been shown, moving either from the plaintiff, or the commonwealth band to the defendant, and his promise, even if made is "nudum pactum."

After careful consideration we are satisfied that we should have sustained defendant's motion for a compulsory non-suit, and that the instruction to render a verdict in favor of the defendant was properly given. The motion for a new trial is therefore overruled, and it is ordered that judgment be entered upon the verdict upon payment of the jury fee.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Hostaiter *v.* Hostaiter.

Divorce—Residence of libelant—Jurisdiction.

A divorce will not be granted to a wife where it appears that she never resided in the state down to a date within thirteen months before filing her libel, that the respondent never resided in the state, that the marriage and causes of divorce occurred outside the state, that the libelant while residing in the state was supported by her mother, but neither the mother nor any of libelant's friends or relatives lived in the state, and that libelant could give no reason why she came into Pennsylvania to live.

Master's report in divorce. C. P. No. 3, Philadelphia Co. June T., 1915, No. 337, in divorce.

Charles S. Wesley, for libelant.

Davis, J., May 15, 1916.—The libel in this case was filed May 24, 1915, alleging as ground for divorce desertion, indignities to the person and cruel and barbarous treatment. It was further averred that the libelant was a resident of the state of Pennsylvania and city of Philadelphia, and had resided therein for more than one year previous to the filing of the libel.

The libelant was born in New York city, resided there continuously and was married there in 1907. After the marriage the libelant and respondent went to Fremont, Ohio, to live, remained there about four months and returned to New York city, where they continued to reside together until the separation, which is alleged to have occurred February, 1913. The libelant came to Philadelphia April 12, 1914. She has no occupation, is supported by her mother, has no relatives in the

city of Philadelphia; she testified that she knew no one in Philadelphia. In answer to the question, "Why did you come to this city?" Her answer was, "I don't know." The libelant's mother resides in the city of New York and the libelant makes frequent visits to her mother in that city. The last known residence of the respondent was Westfield, in the state of New York, where he resided with his parents.

Section 11 of the act of March 13, 1815, 6 Sm. Laws 286, provides: "No person shall be entitled to a divorce from the bond of matrimony by virtue of this act who is not a resident of this state and who shall not have resided therein one whole year previous to the filing of his or her petition or libel." Section 2 of the act of May 8, 1854, P. L. 644, provides: 'The word citizen, used in § 11 of the said act (act of March 13, 1815, 6 Sm. Laws 286), shall not be so construed as to exclude any party who shall for one year have had a bona fide residence within this commonwealth previous to the filing of his or her libel." Under these statutes the libelant must be a bona fide resident of the state for one year prior to the filing of the libel. It is a significant fact that the libelant testified that she came to Philadelphia on April 12, 1914, to make this city her residence, and that on May 24, 1915, one year and one month thereafter, she filed her libel in divorce. The legislature of this state, with extreme liberality, has extended the jurisdiction in divorce and the requirements of residence. It, therefore, places upon the court the duty of carefully inquiring into the bona fides not only of the alleged ground for divorce, but of the residence of the libelant. While the causes for divorce have been increased and the jurisdiction extended, the requirements of residence for the term of one year previous to the filing of the libel have not been changed.

In Heath *v.* Heath, 44 Pa. Super. Ct. 118 (Oct. 19, 1910), it was said: "The foundation of the jurisdiction in divorce proceedings is mainly the act of March 13, 1815, 6 Sm. Laws 286. Section 11 of that statute provided that the benefit of the legislation should be denied a libelant 'who is not a citizen of this state and who has not resided therein at least one whole year previous to the filing of his or her petition or libel.' Under that statute, a libelant must be both a citizen and a resident of the state. Even if it is assumed that this rule has by subsequent statutes been so modified as to confer jurisdiction upon the courts to grant relief to a libelant who, while not technically a citizen of the state, has actually resided within the state one whole year previous to the filing of his or her

petition or libel, the burden is still upon the libelant to prove the jurisdictional fact of residence. Section 2 of the act of March 13, 1815, 6 Sm. Laws 286, requires that the libel be exhibited 'to the judges of the court of common pleas of the proper county where the injured party resides.' There can be no question as to the time when this jurisdictional fact of residence is to be determined. The party must reside within the county at the time the libel is presented, when he or she seeks to obtain a divorce from a respondent who has no residence within this commonwealth. Sections 2 and 11 of this statute, both of which deal with the fact of residence as related to jurisdiction, must be so construed as to bring them into harmony. The manifest intention of the legislature was that the libelant must reside in the state at the time the libel is presented and must have so resided for at least one whole year immediately before such filing. A mere temporary absence during the year, when the permanent bona fide residence within the state remained unchanged, would not defeat the right, but the period of such bona fide residence within the State must include the time of the filing of the libel and the whole of the previous year. When a party is technically a resident of the state and is absent for a cause and under circumstances which do not involve a loss of such citizenship, an entirely different question is presented, which in this case it is not necessary to consider. The burden was upon this libelant to show that her place of residence was within the commonwealth at the time she filed her libel and during the entire year immediately preceding."

Masters should inquire into the bona fides of the residence of the libelant. No matter how meritorious the grounds upon which the action is founded, in the absence of bona fide residence for one whole year as required by the acts referred to, this court is without jurisdiction. "Where there is no jurisdiction, there is no authority to pronounce judgment, and consequently a judgment so entered is so but in form and similitude, and has no substance, force or authority." Miltimore *v.* Miltimore, 40 Pa. 151.

"No matter how expressed, consent of the parties, even with the consent of the court added, cannot give the court jurisdiction of a libelant in divorce based on the allegations of cruel and barbarous treatment or of indignities to the person unless the libelant shall have resided in the state at least one whole year previous to the filing of his or her petition or libel. This prerequisite is not in the nature of a personal privilege or

safeguard which the respondent may waive, or the court, in its discretion, dispense with." English *v.* English, 19 Pa. Super. Ct. 586.

The liberality of the laws of the state of Pennsylvania relating to divorce cannot be taken advantage of by residents of other jurisdictions to obtain a divorce in this state upon grounds not recognized as a cause in the jurisdiction of the marital domicile. The evidence in this case fails to convince us that the libelant was a bone fide resident of this state and county for one whole year immediately preceding the filing of her petition. We are, therefore, of opinion that this court is without jurisdiction.

There was no testimony offered in support of the second and third allegations in the libel—indignities to the person and cruel and barbarous treatment.

It is unnecessary to review the testimony in support of the causes alleged in the libel. The findings of the master are disapproved and the libel is dismissed.

Hartley Township Poor District *v.* Adams Township Poor District.

Poor law—Order of removal—Pauper—Evidence.

A man will not be adjudged a pauper where the evidence shows that he was forty-nine years old, in good health, living in the country, able to work and with plenty of work about him; that his son, aged twenty-four also worked, that his wife was in good health, that both wife and son did not ask for assistance, and that the order of relief was issued at the instance of the alleged pauper's landlord, for the latter's protection.

Citation for order of removal. Q. S. Union Co. Sept. T., 1915, No. 1.

Cloyd Steininger, for petitioners.
M. I. Potter, for respondents.

JOHNSON, J., June 12, 1916.—This case arises on a petition of the overseers of the poor of Hartley township, Union county, for a citation on the overseers of the poor of Adams township, Snyder county, to show cause why an order should not issue for the removal of John Druckamiller from said Hartley township to said Adams township.

From the evidence in this case two questions arise: First, whether or not John Druckamiller, now residing in Hartley township, is a pauper, or likely to become a pauper. And, sec-

ondly, if a pauper, or likely to become a pauper, whether his settlement is Hartley township or Adams township.

First, is Druckamiller a pauper or likely to become one? We think the evidence fails to show Druckamiller to be a pauper or likely to become one. It is undisputed that the last aid given to Druckamiller by Adams township was on March 28, 1914, over a year prior to the last order of relief on March 31, 1915, and this last order of relief was not issued at the instance or request of Druckamiller, but of Elmer H. Keister, in whose building Druckamiller lived as tenant. Mr. Milton Catherman testified that he supposed this order was gotten out to protect Keister, the landlord. He further testified that Druckamiller "worked whenever he got work," and that he never asked the overseers of Hartley township for help. Leroy E. Yeagel, witness for the petitioners on cross-examination, testified: "Q. Mr. Yeagel, Mr. Druckamiller had been dealing at your store during all these years of 1913, 1914 and 1915? A. Yes, sir. Q. Had he paid his bills in 1913? A. He had by giving him work to work it out. Q. And in 1914? A. Yes, by work. Q. And in 1915? A. Some he paid in cash and some by giving him work. Q. At any rate, he paid his bills either by cash or work? A. Yes, sir. Q. He bought other goods from you besides those furnished by Adams township, didn't he? A. Yes, but not while the township was giving him help. Q. I say he bought other goods from you besides those the township paid for—besides those Adams township paid for? A. Yes, I said he did; but he made no effort whatever to do anything to support himself while the township was giving him help. . . . Q. He has been well and healthy, hasn't he? A. To the best of my knowledge."

D. R. Pursley, witness for the petitioners, testified on cross-examination: "Q. You didn't furnish anything after March 25, 1914? A. March 25, 1914, was the last stuff I gave. Q. Why not after that? A. I don't remember whether Shawver told me not to give him any more, or whether he didn't come back. It kind of runs in my mind that Shawver told me not to give him anything more."

J. T. Shawver, overseer of Adams township, for respondents, testified as follows: "Q. Why didn't you pay for any further support for Druckamiller to either Pursley or Yeagel after March 25, 1914? A. Because he didn't ask for any support. . . . Q. After you found out Druckamiller didn't need any more help, what did you do? A. After I found out he didn't need any more, I stopped it, and that is what I did every

year. Q. Then, as I understand, you didn't furnish any more stuff after that? A. No, sir. Q. From 1914 on, then, did you furnish him with any help? A. No, sir."

John Druckamiller, for respondents, testified: "Q. How old are you? A. Forty-nine. Q. How has your health been during the last three or four years? A. My health? Q. Yes, have you been healthy or not? A. Yes, I was healthy. Q. Have you been working during any of this time? A. Yes, sir. Q. What at? A. Oh, at different things. Q. What? A. Well, I unloaded coal for Yeagel, and worked around with the farmers. Q. How much did you get a day? A. $1.25 and $1.50. Q. Have you been busy most of the time or not? A. Part of the time. Q. What has been the condition of your family supplies in that time, did you need any assistance or not? A. No, sir. Q. Did you know an order of relief was taken out for you? A. No, sir. . . . Q. Didn't any body say anything to you about it? A. Why, no, they didn't, not right away. Q. How many people have been in your family for the last several years? A. Why, three. Q. Three children, do you mean? A. Yes, sir. Q. And yourself? A. Yes, sir. Q. And your wife? A. Yes, sir. Q. Five? A. Yes, sir. Q. Do you have one boy at home? A. Yes, sir. Q. How old is he? A. Twenty-four. Q. Is he working or not? A. Why, he is working, yes, sir. Q. What at? A. Among the farmers some, and he worked on the railroads some too. . . . Q. Do you have enough to eat and wear? A. Yes, sir. Q. Have you had for some time? A. Yes, sir. Q. Then you don't need any necessaries for your family? A. No, sir. Q. You have been well and healthy? A. Yes, sir. Q. How much can you earn in a day? A. $1.50. Q. Has your boy been helping to support you and your family? A. Yes, sir. Q. Your boy lives with you and is a part of your family? A. Yes, sure. Now I have a good job at $2 a day. Q. Where? A. At Milton. Q. How much can your boy earn a day? A. $1.50. Q. Every day? A. Yes, sir." Cross-examination: "Q. You wont ask the township to help you? No, sir. Q. You think you can take care of your self? A. Yes, sir, my boy can give help enough. Q. Is your wife healthy? A. Yes, sir." By Mr. Potter, attorney for respondents: "Q. Don't you want to be on the township? A. No, sir, I don't. Q. You don't want the township to furnish you with any more stuff? A. No, I don't. Q. You say your health is good? A. Yes. Q. Is your wife healthy? A. Yes. Q. Is your boy healthy and able to work? A. Yes, sir."

Mrs. John Druckamiller testified as follows: "Q. During the years of 1914 and 1915, did you people need help from the overseers? A. No. Q. Did you ask for any? A. No, sir. . . . Q. You say you are able to take care of yourselves? A. Yes. Q. Is your husband working? A. Yes, my husband is working. Q. Where? A. At Milton. Q. How much does he get a day? A. Why, $1.50. Q. Is your boy working? A. Yes, sir. Q. Right along? A. Uh-uh. Q. How much does he get a day? A. $1.50." By Mr. Potter: "Q. Did you know you were getting help from the township? A. No."

Charles Druckamiller, for respondents, testified: "Q. How much do you make a day? A. $1.50 and $1.25. Q. Did your father work too? A. Yes, sir. Q. What did he get a day? A. $1.50 and $1.25. Q. Does he help to support the family? A. Yes, sir. Q. Are you working now? A. Yes, sir. Q. Is your father working now? A. Yes, sir. Q. Where? A. At Milton. Q. Do you people need help from the township? A. No, sir. Q. Did you need any last March, March 31, 1915? A. No, sir. Q. Is it necessary for you people to be on the township? A. No, sir. Q. Did you ever ask for help? A. No, sir. Q. Has your health been good? A. Yes, sir. Q. Has your father's health been good? A. Yes, sir. Q. Has your mother's health been good? A. She gets sick headache some times, but outside of that she is pretty well. Q. State whether or not you can get along without help from the township? A. Yes, sir." Cross-examination: "Q. You are just as busy as you can be all the time, aren't you? A. I'm always busy when I can get work." By the court: "Can you get plenty of work now? A. Yes, sir."

Here we have John Druckamiller, forty-nine years of age, in good health, living in the country, able to work and with plenty of work about him. Nor does the evidence show that he is lazy and unwilling to work. Catherman, overseer, testified that he worked when he could get work. His son is twenty-four years of age, in good health and able to work. The evidence shows that both father and son work whenever work is to be had. And at the time of the hearing John Druckamiller was working at Milton, and, according to his testimony, receiving $2 a day. The wife is also healthy. John Druckamiller, his wife and son testified that they had never asked for assistance, needed no assistance and do not want to be on the township. Under these circumstances we cannot declare John Druckamiller a pauper or likely to become one. There is no reason why this man cannot support himself and

family now and in the future. As a matter of fact, for over a year prior to the issuing of this citation Druckamiller supported himself and family without assistance. He should be encouraged to support himself and family, and to be industrious and independent and not be encouraged in idleness and to depend on the township for what he is well able to secure for himself.

Since we find that Druckamiller is neither now, nor likely to become a pauper, it is not necessary to decide his legal settlement. The last aid given by Adams township was on March 28, 1914, over a year prior to the last order of relief on March 31, 1915. But in any event, there was a period of nearly a year, if not actually over a year, during which time John Druckamiller asked for no aid, received no aid and needed no aid and was not a pauper and not likely to become one, and we can only order his removal back to Adams township after finding him to be a pauper or likely to become one.

And now, June 12, 1916, the citation is dismissed at the costs of the petitioners.

Keystone Lumber Co. *v.* Spellman.

Wages—Attachment sur-judgment—Acts of April 9, 1872, P. L. 47, and May 12, 1891, P. L. 54.

A claim for wages has no preference as against an attachment sur-judgment. The preference given by the act of April 9, 1872, P. L. 47, as amended by the act of May 12, 1891, P. L. 54, applies only to the proceeds of a judicial sale of property levied upon, or resulting from operation of law.

Case stated. C. P. No. 2, Philadelphia Co. Dec. T., 1915, No. 3883.

Edward Brooks, Jr., for plaintiff.
Sidney L. Krauss, for Robert Dohn et al.
Murdoch Kendrick, for Mark Wilson; *Maurice Rose,* for other claimants.
John P. Connelly, for Gimbel Brothers, garnishees.

BARRATT, P. J., June 28, 1916.—This is a case stated, which raises two questions of law, the important and controlling one being: Have claims for wages any preference against an attachment of money in the hands of defendant's agents? The facts agreed upon are as follows:

1. On Feb. 5, 1916, the plaintiff obtained a judgment against the defendant in this court in this case for $276.22, and issued an attachment sur judgment and summoned Gimbel Brothers, Inc., as garnishees.

2. On Feb. 11, 1916, the plaintiff obtained another judgment for $276.53 against defendant in court of common pleas No. 3, December term, 1915, No. 4184, and summoned the same garnishees.

3. Frank P. Spellman, the defendant, was the owner and manager of an enterprise known as "Spellman's Winter Circus," which exhibited in Philadelphia during the week of Jan. 31 to Feb. 5, 1916, inclusive, at Convention hall, Broad and Allegheny avenue. Tickets were sold at Convention hall and were also on sale at the store of Gimbel Brothers, Inc., Ninth and Market streets, and the money which was attached and subsequently paid into court, as hereinafter set forth, was the proceeds of the sales of tickets sold by said Gimbel Brothers, Inc., and is the money of the defendant, Spellman.

4. Spellman, trading as aforesaid, engaged divers persons as circus performers to perform in said circus during said week, and the parties did perform during said week. The claims of the said performers were duly filed with the sheriff of Philadelphia county, and copies thereof also served upon Gimbel Brothers, Inc., the garnishees.

5. Said Spellman also engaged divers persons to perform services in erecting the chairs, benches, the shifting of scenery, and to perform such other manual labor as is required in connection with the circus. They have filed their claims with the sheriff of Philadelphia county and served copies thereof upon the garnishees.

6. Said Spellman also engaged Mark Wilson to do newspaper work for him. He filed a claim with the sheriff, claiming the sum of $74.80 for salary and expense account due him for newspaper work in advance and during engagement.

7. To the interrogatories in said attachment proceedings Gimbel Brothers, Inc., filed answers, admitting the sum of $668 in cash, being the proceeds of sales of tickets for the winter circus belonging to defendant to be in its hands as garnishees. Rules for judgment on garnishees' answers were entered, and thereupon Gimbel Brothers, Inc., presented a petition for leave to pay said money into court, and said leave was granted, and Gimbel Brothers, Inc., did, on March 2, 1916, pay into court said sum of money.

8. It is agreed by the parties hereto, who are all the parties in interest, that if the court shall be of opinion on the facts that none of the persons claiming to be wage claimants has any preference as against the said attachments sur judgments, then judgment shall be entered on the case stated for the said Keystone Lumber Company, and the court shall order and direct the prothonotary to pay to the said Keystone Lumber Company the amount of said two judgments, with interest on each from the date of entry to the time of payment, and all costs, and to pay any balance which may remain after paying said judgments, with interests and costs as aforesaid, to the defendant, Frank P. Spellman.

If the court shall be of the opinion that any or all of said claimants are entitled to be paid out of the money paid into court in preference and priority to the said judgments, then judgment shall be entered on the case stated in favor of such claimants, and the court shall order and direct the prothonotary to pay to said claimants the amounts of their respective claims, with interest to date of payment, if said fund is sufficient to pay said claims in full, and to pay any balance which may be left after paying such claims as may be entitled to preference and priority as aforesaid to said Keystone Lumber Company on account of its said judgment as aforesaid; and if said fund is insufficient to pay such claims as may be entitled to preference and priority in full, then to order and direct the prothonotary to pay and apportion said fund among such claimants as may be entitled to preference and priority, first deducting the costs to which said prothonotary may be entitled. The parties reserve the right to appeal to the Supreme Court from the judgments and orders entered herein.

The questions of law are: 1. Have claims for wages any preference as against an attachment sur judgment of a debt or deposit of money? 2. Are the claimants here "wage claimants" as designated by the act of April 9, 1872, P. L. 47, as amended by the act of May 12, 1891, P. L. 54?

Claims for wages have no preference as against an attachment execution. The act of April 9, 1872, § 2, P. L. 47, provides as follows: "In all cases of executions, lanlord's warrants, attachments and writs of a similar nature hereafter to be issued, . . . it shall be lawful for such miners . . . to give notice in writing of their claim . . . and the amount thereof to the officers executing either of such writs at any time before the actual sale of the property levied on, and such offi-

cers shall pay to such miners . . . out of the proceeds of sale the amount each is justly and legally entitled to receive, not exceeding $200."

This act has been construed in a number of cases, and the decisions have uniformly been that, under it, wage claims can only be paid by the sheriff out of the proceeds of a sale of the property levied on. In the present case there was no sale of any property. If this preference for wages exists, it must be based upon this statute and its supplement of 1891.

In Wilkinson *v.* Patton, 162 Pa. 12 (1894), it was said in construing the act of May 12, 1891, P. L. 54, that a creditor for wages has no lien on personal property transferred in good faith by an insolvent debtor in payment of his debts. In this case C. rented a mill to N. The lessee became indebted to him for rent, and in settlement thereof transferred to the lessor all personal property on the premises. A month later, N. confessed judgment to some workmen for wages, and the sheriff levied on the personal property which had been transferred to C. A feigned issue was awarded, on the trial of which the judge instructed the jury that, as N. was insolvent, the transfer of the property in payment of the rent claim was subject to the lien of debts for wages. On appeal, the judgment was reversed and a v. d. n. awarded, Justice Fell saying:

"The jury were in effect instructed that the sale by the tenant to the landlord, while not fraudulent in fact or in law, was an act of insolvency, and that the creditors for wages had liens upon the goods sold which could be enforced by a levy under judgments subsequently obtained.

"This places a construction upon the act which we think was not contemplated by the legislature, and which cannot be sustained. It was not intended that there should be a specific lien on the property in the hands of the owner or of the vendee. By a sale or transfer by execution or otherwise on account of the death or insolvency of the employer is meant a sale caused by operation of law by reason of death or insolvency, as a sale by an administrator or executor, by an assignee for the benefit of creditors, or by a receiver, and not a sale by the employer. This construction is indicated by the language of the act, and is in harmony with the settled legal policy of the state. The method provided for the enforcement of the claim for wages is that 'it shall be preferred and first paid out of the proceeds of such sale.' This evidently refers to a sale effected by legal process, where a fund is raised for distribution, and not to a sale made by the owner. Money in the possession of a vendor

of property is not the proceeds of a sale on which a claim can be preferred and first paid."

In Mettfett *v.* Mohn, 171 Pa. 395 (1895), it was held that where a plaintiff and defendant in an execution make a settlement and agree that the writ shall be stayed, wage claimants against the defendant cannot compel the sheriff to make a levy and proceed with the sale, as the wage-earners do not have a a lien, but merely a priority in the distribution of the proceeds of a sale under an execution.

In Pramuk's Appeal, 250 Pa. 45 (1915), a receiver of a company, on filing his account, claimed credit for an item for wages for services rendered prior to the receivership. It was held that he should be surcharged for the wages paid, as this claim was not entitled to a preference. Justice Frazer said: "Had the property been sold by the receiver appointed by the court of common pleas, undoubtedly the wage claimants would have been entitled to preference upon distribution of the fund. The effect of the bankruptcy proceedings in the federal court, however, was to suspend the state court proceedings, under which appellant was appointed receiver, and, instead of a sale, the property was rightly transferred to the trustees in bankruptcy. No fund having been created by sale, the wage claimants must, therefore, await a sale of the property and distribution of the fund realized in the federal court."

These cases are decisive of the question that wage claims are entitled to preference only "out of the proceeds of sale of property." It has been decided, moreover, by the common pleas of Clearfield county that claims for wages under the acts of April 9, 1872, P. L. 47, and May 12, 1891, P. L. 54, have no preference as against an attachment sur judgment of a debt. Citizens' Bank of Big Run *v.* Estabrook et al., 2 Pa. Justices' Law Repr. 197 (1901).

Judge Gordon, in delivering the opinion of the court, said: "Labor claimants are not given a lien upon property, but only upon its proceeds in the custody of the law. Until there has been a conversion of the property into money by sale or transfer, or by operation of law, the rights of labor claimants do not vest. Until such transfer takes place, as by an execution, the execution creditors can defeat the demands of the labor claimants, regardless of their notices, by a stay of the writ."

The policy of our law is that where a fund is to a certain extent the product of labor, that wage claims have the priority over capital claims. This fund is in the hands of the law by virtue of the attachment execution, and although there has been

no sale that would, under the decisions, warrant us in awarding a preference to the wage claimants, yet it would appear that this is an omission that could well be supplied by statute, which all friends of labor would acknowledge was simple justice and fairness. If the attention of the legislature is called to the matter, it can remedy the omission. The duty of the court is to declare the law as we find it in the statutes and decisions of the Supreme Court, not to attempt to make it as we conclude it ought to be by a process of judicial legislation.

Under these decisions, which must be our guide, there having been no sale in this case, none of the persons claiming to be wage claimants has any preference over the attachments.

It is unnecessary, in this view of the law, to consider the second question presented, viz., whether the claimants are "wage claimants" under the act of April 9, 1872, P. L. 47, as amended by the act of May 12, 1891, P. L. 54.

Judgment is thereupon entered on the case stated for the Keystone Lumber Company, plaintiff, and the prothonotary is ordered to pay to the said Keystone Lumber Company the amount of the judgment obtained by the said company in this court, December term, 1915, No. 3883, and in court of common pleas No. 3, December term, 1915, No. 4184, with interest on each from date of entry to the time of payment, with costs; and to pay any balance which may remain after paying said judgment, with interest and costs, to the defendant, Frank P. Spellman.

An exception is granted to any claimant herein who may desire to appeal from this judgment.

Hohenshilt's Estate.

Partition—Charge on land—Liability of purchaser of heir's share at sheriff's sale.

By partition H.'s real estate was divided into five shares, accepted by the heirs, each charged, inter alia, with a dower due to the widow. The share of F. was sold, upon execution against F., to B. subject to the widow's dower. The dower charge on F.'s share was $733.33. The dower charge on other shares accepted by the heirs was less in amount. Held, that the purchaser of F.'s share at sheriff's sale not required to pay to the other heirs their share of the widow's thirds charged upon the premises of F., but only pay to them such amount necessary to equalize in distribution the said shares of the other heirs.

Petition of heirs for rule on purchaser at sheriff's sale to

show cause why he should not be required to pay to them their shares of the widow's thirds charged upon the premises. O. C. Monroe Co. Sept. T., 1916.

Gearhart & Rhodes, for petitioners.
Frank B. Holmes, contra.

STAPLES, P. J., Nov. 20, 1916.—It appears from the undisputed facts in this case that the said Charles Hohenshilt, deceased, left certain real estate, upon which proceedings in partition were had and the same was divided into five purparts, the aggregate value of which amounted to the sum of $8,000, and which was accepted by the heirs, and upon each piece, so accepted, there was charged, inter alia, the dower due to the widow, in order to properly make distribution to the said heirs of their shares in their father's estate; the said shares so taken being somewhat different in value and that so taken by Frank amounting to $66.66 more than the other properties taken by the other heirs.

The claim of the petitioners was that this property, when sold by the sheriff, was sold subject to the widow's dower and that, having been bought by Stuart Bittenbender, the said amount was coming from him to the said Charles A. Hohenshilt, Emma Marsh and Mary E. Leap. We cannot agree with this proposition. The whole charge upon the separate properties was intended for a distribution amongst the several heirs instead of their being obliged to pay the purchase money of the property so taken and accepted by each of them, and then there being a distribution of the cash amongst them.

Under the act of assembly they were permitted to distribute it by charges upon the property, and it was in effect a payment by one to the other. If the amounts had been equal none of the other heirs would be entitled to anything from Stuart Bittenbender, but it appears that the property taken by Frank was accepted by him at a value higher than any of the other properties and that the property taken by Mary E. Leap and Charles Hohenshilt was less than that taken by the others; and from which it would appear that, in order to equalize in distribution, the said shares of the said Mary E. Leap and Charles A. Hohenshilt, there should be paid to them by the said Stuart Bittenbender the following sums, viz.: To Mary E. Leap, $33.33, to Charles A. Hohenshilt, $33.33.

"Under the act of April 7, 1807, where an equal partition of the real estate of a decedent is made among all of his heirs

each taking his purpart subject to a proportionate part of the widow's dower, no one of them has any claim upon the other, on the decease of the widow, for any part of the principal of the widow's thirds, although the purparts may be charged with owelty of partition.

"That clause of the act which provides for a distribution of the principal of the widow's thirds among the heirs at her decease has no application to cases of completed equal partition; it only applies where the estate is divided into fewer parts than there are heirs." Williams *v.* White, 35 Pa. 514.

As bearing upon the same subject, see Smith *v.* Danielson, 45 Super. Ct. 125.

"Where in partition proceedings the decree fixes the principal of the dower at a sum stated, and the whole of the real estate is apportioned among the four children of the decedent in equal shares without any share of the principal of the dower being charged on a particular purpart, the interest of each child in the principal sum is merged in the fee and is paid and extinguished by operation of law." Beck *v.* Schekter, 240 Pa. 596.

In this case the total dower charge was $2,666.66, charged upon the properties of the four children, as follows, Purparts Nos.:

(1)	Mary E. Leap		$633.33
(2)	Charles A. Hohenshilt	$600.00	
(3)	Charles A. Hohenshilt	33.33	
			633.33
(4)	Emma Marsh		666.67
(5)	Frank Hohenshilt		733.33
			$2,666.66

It appears from this that there was due, out of the property awarded to Frank Hohenshilt, the sum of $33.33 to Mary E. Leap, and the sum of $33.33 to Charles A. Hohenshilt in order to equalize their amounts in the distribution made.

And now, Nov. 20, 1916, in accordance with the aforegoing opinion, and upon consideration, it is ordered, adjudged and decreed that there is due the said Mary E. Leap the sum of $33.33 and to Charles A. Hohenshilt the sum of $33.33, being the owelty charged on purpart No. 5 allotted to Frank Hohenshilt in the matter of the partition of the estate of Charles Hohenshilt, deceased, in excess of the amount charged upon the purparts taken by them, the said Mary E. Leap and the said Charles A. Hohenshilt; and, unless the said sums

and costs of this proceeding be paid to the parties entitled thereto within thirty days from the date of this decree, a writ of levari facias shall issue for the collection of said owelty and costs out of said purpart No. 5.

From C. C. Shull, Esq., Stroudsburg, Pa.

Windsor *v.* Windsor.

Divorce—Subpœna—Service of on non-resident—Notice of hearing.

A decree in divorce will be refused where the record shows that respondent accepted service of the notice of the hearing before the master, as such acceptance will be taken as evidence of collusion.

Where the record in a divorce proceeding shows that the subpœna was served upon the respondent, a resident of another state, on the same date on which it was issued, some explanation ought to be offered as to why respondent appeared so conveniently to overcome the presumption of collusion.

In re master's report. C. P. Allegheny Co. Oct. T., 1915, No. 1270.

H. L. Castle, for libelant.

DAVIS, J., Jan. 11, 1916.—An examination of the record in this case discloses that the master gave notice to the respondent in writing of the hearing on Dec. 10, 1915, at three p. m., room 446 Oliver building, Pittsburgh, Pa., and that on said notice is endorsed the following acceptance of service: "And now, to wit, Nov. 26, 1915, I hereby accept service of the above notice of the hearing to be held in the case of Windsor *v.* Windsor for the purpose of taking testimony. (Signed) Mildred Marie Windsor, Hingham, Mass., U. S. A."

This notice of the taking of testimony upon respondent is invalid for the following reason: That respondent has accepted service of the notice of the hearing before the master.

The court has called attention many times to the fact that every step in the proceedings in divorce must be adverse and that acceptance of service of either the subpœna or the master's notice of the hearing would be taken as evidence of collusion.

The record in this case further shows that the subpœna was issued Aug. 31, 1914, and served on the respondent on the same date. The respondent had been a resident of the state of Massachusetts for several years and there appears to be no

explanation why she conveniently appeared in the city of Pittsburgh to be served on the same date as the filing of the libel in divorce. In connection with the acceptance of service by the respondent, when it is evidence of collusion, some explanation ought to be offered as to the fact of service as made in this case.

Decree in divorce is, therefore, refused upon the record as it now stands.

And now, to wit, Jan. 11, 1916, the decree in divorce is refused upon the present condition of the record without prejudice.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Schmidt *v.* Schmidt.

Divorce—Desertion—Misconduct of husband.

On a libel for divorce filed by a wife a decree in favor of the libelant on the ground of desertion, is proper where the evidence shows that the husband and wife were living together at home of libelant's mother; that on one occasion the husband while intoxicated quarreled with his wife, and in attempting to strike her with his fist, missed her and struck her mother and knocked her down, with the result that the mother ordered him from the house; that several days later he left the house with his personal effects; that his wife never saw him nor heard from him thereafter; that she gave no cause for him to leave her; that she always acted toward him as a kind and dutiful wife; and that he had never made any offer to provide her with a home.

Exceptions to master's report. C. P. No. 2, Philadelphia Co. March T., 1916, No. 108, in divorce a. v. m.

Erwin Sturm, for libelant; *Thomas Lanard,* for respondent.

ROGERS, J., July 31, 1916.—This is an action in divorce on the ground of willful and malicious desertion. Exceptions were filed on behalf of the libelant.

The supplemental report of the master presents the same conclusion as the original. The master reports that in his opinion "the evidence produced in support of the averments in the libel is insufficient in law to warrant a decree of divorce. He, therefore, concludes that as a legal proposition the libelant has not made out a case bringing her within the statute to enable the court to enter a decree of divorce a. v. m., and further recommends that the divorce should not be granted, and that the libel should be dismissed."

The master does not quote any legal authority in support of his findings.

In Howe *v.* Howe, 16 Pa. Super. Ct. 193, the court said: "It is not good practice for the court of common pleas to dismiss exceptions to a master's report in a suit for divorce, and confirm his findings without any discussion of the evidence, of the conclusions of fact, or of his application of the law to the facts as found by him."

In Edgar *v.* Edgar, 23 Pa. Super. Ct. 220, it was held: "The opinion of the master is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its judgment as to the weight of the evidence or his legal conclusions. It was not intended that the court should abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon one of its officers."

We have examined the evidence, together with the original and supplemental reports of the master, with great care. If the evidence of the libelant and her witnesses, who were present when the respondent left the house, is believed (and they are uncontradicted), then the desertion was without cause.

The libelant and respondent were married in Philadelphia on Jan. 21, 1911. After the marriage libelant continued to live at the home of her mother, for the reason that respondent failed to provide one for her. The respondent visited libelant on Saturday and Sunday evenings only, until April 20, 1911, when the respondent went to live with libelant at the home of her mother. He continued to live there until July 15, 1911, the date of the alleged desertion. It appears from the evidence that he came home on that day in an intoxicated condition and asked his mother-in-law where his wife was. She informed him that she was in the bathroom. He went to that room and engaged in a quarrel with his wife. His mother-in-law, upon hearing this, went to see what the trouble was. As she stepped into the bathroom, respondent struck her in the face with his clenched fist, knocking her down. It appears that respondent struck at his wife, and that she dodged the blow and her mother received it. Respondent continued at the time of this occurrence to abuse libelant and her mother. Respondent was ordered from the house by his mother-in-law in consequence of the disturbance he created. Several days later he sent a man for his trunk and effects and moved them from the house. Libelant testified she has not seen or heard from the respondent since July 15, 1911. That he has not com-

municated with her, provided for her support, or at any time made an offer to provide her with a home. From the evidence it appears that libelant gave the respondent no cause for deserting her, as she always acted towards him as a kind and dutiful wife. In this the libelant was corroborated by two witnesses.

Respondent was represented by counsel but offered no testimony.

We are of opinion that from these facts the case of wilful and malicious desertion without cause or consent on the part of the libelant is made out against the respondent.

"Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in, without cause, for two years. The guilty intent is manifested when, without cause or consent, either party withdraws from the residence of the other." Ingersoll *v.* Ingersoll, 49 Pa. 249; VanDyke *v.* VanDyke, 135 Pa. 459; Whelan *v.* Whelan, 183 Pa. 293; Middleton *v.* Middleton, 187 Pa. 612; Howe *v.* Howe, 16 Pa. Super. Ct. 198.

"What constitutes a sufficient legal cause justifying desertion is that which will entitle the party so separating him or herself to a divorce." Butler *v.* Butler, 1 Parsons 329; Detrick's Appeal, 117 Pa. 452.

"Where a husband or wife abandons the home and family of the other, without a just cause for a divorce from such party, and remains away from his or her habitation without the consent of the other party for and during the space of two years, he or she is guilty of wilful and malicious desertion without sufficient reasonable cause." Sturgeon on Divorce, 95, § 186.

If the desertion of the respondent was not malicious, he should have offered to make and support a home for his wife. In the case at bar respondent never provided a home for libelant, nor did he at any time offer to do so.

In Ball *v.* Ball, 23 Pa. C. C. 307, Sulzberger, P. J., said: "A home in the meaning of the law is a place where husband and wife may live in the enjoyment of each other's society and rear their offspring." Also, LeGrand *v.* LeGrand, 24 D. R. 244, opinion by Martin, P. J.

From the evidence in the case we cannot agree with the conclusions of the learned master, and the exceptions on the part of the libelant to the master's report are sustained, and it is ordered that a decree be entered divorcing the libelant from the respondent.

Commonwealth *v.* Julian.

Criminal law—Fornication and bastardy—Seduction—Settlement—Costs.

The settlement of the individual expenses of a woman incident to childbirth does not extinguish the crime of fornication under a promise of marriage, and the district attorney has the right to disregard the settlement and proceed with the prosecution for fornication.

Where a settlement of a misdemeanor is made the defendant in order to escape the greater costs of a trial should move for a nolle prosequi before the trial.

Motion in arrest of judgment. Q. S. Schuylkill Co. Nov. T., 1915, No. 1466.

KOCH, J., Oct. 30, 1916.—The defendant was tried on an indictment charging him with (1) fornication and bastardy and (2) seduction, under promise of marriage. He was convicted of fornication only and now moves in arrest of judgment. No reasons have been filed in support of the motion. On the trial, an attempt was made to prove that a settlement had been effected with the prosecutrix after her child was born and the evidence tends to show that to be a fact. The magistrate's return here shows a prosecution for seduction only, but the district attorney framed a bill of indictment so as to include all ingredients and incidents in the case. Now the defendant contends that as to the seduction and bastardy, he should not be subject to the payment of a fine and the costs, and especially so because the prosecutrix was delivered of the bastard child and the child died before the present case was started, and all expenses of the prosecutrix arising from the birth, maintenance, death and burial of the child had been paid by or for the defendant and her release obtained therefor. But such settlement of her individual expenses did not extinguish the crime of fornication under a promise of marriage, and the district attorney had the right to disregard the settlement and proceed with the case. Com. *v.* Wicks, 2 D. R. 17; Com. *v.* Scott, 7 Pa. Super. Ct. 590.

Where settlement of a misdemeanor is made, the court may "order a nolle prosequi to be entered on the indictment, as the case may require, upon payment of costs"; 1st Purdon's, 1024, plac. 10.

But application for such an order should be made before

trial to escape the greater costs of the trial. No such application was made in this case, and we know of no sufficient reason why the judgment on the verdict should now be arrested.

And now, Oct. 30, 1916, the motion is overruled and the defendant is directed to appear for sentence on Monday, Oct. 30, 1916, at ten o'clock a. m.

Front Street, Harrisburg.

Road law—Widening of street—Report of viewers—Buildings erected on paper streets—Estoppel—Damages—Acts of April 9, 1869, P. L. 71; Jan. 2, 1871, P. L. 1556, and May 16, 1891, P. L. 75.

Exception to the report of viewers in the opening of Front street, Harrisburg, because damages were not allowed for buildings erected on paper streets after the passage of the local act of 1871, P. L. 1556, overruled, since the question could be determined upon the trial of the appeals.

Quære: Is the city estopped from claiming the right to be exempt from damages for improvements erected since the said act of 1871, when the city has taxed the buildings in question, assessed the same for cost of grading, paving and curbing, and issued building permits for the erection and repair of certain buildings.

Exceptions to report of viewers. C. P. Dauphin Co. March T., 1915, No. 287.

G. R. Barnett and *B. F. Nead*, for exceptions.

D. S. Seitz, city solicitor, contra.

McCarrell, J., Sept. 23, 1916.—On Aug. 11, 1914, an ordinance of the city was duly approved for the opening of Front street from Herr street to Calder street and providing for the payment of the cost thereof. This ordinance directs the city solicitor to take the necessary proceedings to have Front street from the south side of Herr street to the north side of Calder street, as marked on the official map of the city, legally opened. In pursuance of this ordinance the city solicitor on Feb. 20, 1915, filed his petition asking for the appointment of viewers to view the premises and ascertain the damage done or to be done and the benefits which have accrued or may accrue by reason of the opening of said street. The official map of the city shows that Front street between the

points named in the ordinance extends to low water mark of the Susquehanna river and was intended to cover all the ground between the eastern line of Front street and said low water mark. The commissioners appointed by the act of April 9, 1869, P. L. 771, made a plan of the city, which was amended and then ratified and confirmed by act of Jan. 2, 1871, P. L. 1556.

On Oct. 15, 1874 (City Digest, page 486) the city of Harrisburg after the passage of the act of May 23, 1874, relating to government of cities of the third class, passed an ordinance approving and ratifying a plan which had been prepared under the direction of said city and which indicated the location of Front street between the points named in the ordinance here in question as being exactly as above stated. There can be no successful dispute as to the location of Front street upon the official map of the city. At the time of the passage of the ordinance of Aug. 11, 1914, all the ground indicated upon the official map for the location of Front street had not been formally thrown open for public use, a portion thereof only along the eastern line of Front street having been used for public purposes. The purpose of the ordinance of Aug. 11, 1914, was to formally and officially throw open to the public for highway purposes all the land indicated by the official map for the location of Front street. Upon this ground some buildings had been erected before the passage of the act and the land had been used for private purposes. Other buildings or improvements were afterwards made. This fact gave rise to claims for damages by the owners of these lands and the buildings and improvements erected thereon.

By the act of Jan. 2, 1871, P. L. 1556, it is provided "that no compensation shall be made or allowed to any person or persons for houses or other buildings erected or built by any person or persons, on any of the avenues, streets, lanes and alleys of the said city (Harrisburg), from and after the said avenues, streets, lanes and alleys shall have been designated by said commissioners or a majority of them."

The viewers appointed were required to ascertain the damages sustained by the several property owners affected by this improvement, as also the benefits accruing to other property owners by reason thereof. In their report they find the total amount of damages sustained to be $105,794; the total benefits assessed against property owners, $43,070.30, and the amount to be paid by the city of Harrisburg, $62,723.70.

[Front Street, Harrisburg.]

Numerous exceptions have been filed to the report of the viewers, which was placed on record Jan. 10, 1916. These exceptions are now before us for consideration. Many of them relate to the form of the report of the viewers, alleging that it is not in accordance with the directions of the act of June 23, 1911, P. L. 1123. This is the act providing for the appointment of a board of viewers in each county, and in § 9 it declares that "it shall be the duty of the board of view appointed in each case to prepare, and file in the proper court, a report which shall set forth, in brief and concise paragraphic form, all findings of fact and conclusions of law, a statement of the amount of damages or benefits assessed, and attach to the said report a plan showing the properties affected. Every report must be concurred in and signed by at least two of the viewers; and no report shall be made unless so concurred in and signed save a report of inability to reach conclusions."

We are of opinion that the report sufficiently complies with the act of assembly. It shows the names of the persons who are found by the viewers to have sustained damages and the names of the persons who are benefited, and the amounts due to or payable by these parties respectively are set out. Accompanying the report of the viewers is a plan, not actually attached thereto, but which can be attached whenever desired. This answers the statutory purpose and we are of opinion that the exception that the plan is not attached to the report ought not to be sustained. The report and the plan returned together by the viewers clearly indicate the location of the improvement and the names of all the parties affected thereby, and we overrule all exceptions to the form of the report.

There are numerous other exceptions which we will consider.

One exception alleges that the ordinance of Aug. 11, 1914, does not authorize the opening of Front street; that the city solicitor is not empowered to direct the opening of streets, and that the ordinance is defective because it does not designate the city official plan to which it refers, nor state where it is kept on file. The act of Jan. 2, 1871, P. L. 1556, approves, ratifies and confirms the plan or draft of the city prepared by the commissioners, and directs that a copy thereof be placed of record in the offices of the prothonotary and the recorder of deeds of Dauphin county and also among the records of the common council of the city. This plan designates for pub-

lic use as a highway Front street between the points named in the ordinance and extending from the eastern line of said street to low water mark of the river as above stated. This, together with the subsequent plan adopted by the city Oct. 15, 1874, constitutes the official plan of the city of Harrisburg. It could be found at all times in the office of the council, and as already stated, there can be no successful dispute as to the location of Front street upon the official map of the city. It was within the power of council to require the opening of said street and designate an official to take the necessary proceedings to have the street officially opened.

The act of June 27, 1915, page 603, defines the duties of the city solicitor and expressly provides that "he shall do all and every professional act incident to the office which he may be lawfully authorized and required to do by the mayor or by any ordinance or resolution of the said council."

Section 3 of the act of Jan. 2, 1871, P. L. 1556, provides "that the council of said city shall have authority to open Front street, in said city, of a uniform width with the portion of it already laid out and graded from State street to Maclay street, . . . and shall proceed from time to time, as it may deem necessary, to open for public use any part or parts thereof, and the same to keep open as other streets and alleys of said city, and to that intent to enter upon such property as may be found within the bounds of said plot, and after record of said plot all buildings thereafter erected, altered or rebuilt shall conform to the said recorded limits; and all lands, buildings now erected and rights existing between the recorded line and the river Susquehanna, at low water mark of the same, shall be taken for said street, and estimated at an appraisement to be made," etc.

The law provides the manner in which the cost of the improvement shall be paid and by whom paid and it was unnecessary to set this out in the ordinance. We are of opinion that the ordinance in question is valid and that it sufficiently authorizes the opening of the street.

The objection that the appointment of viewers was premature and illegal because the petition does not allege any attempt to agree with the property owners cannot be sustained. The act of June 27, 1913, in Art. XIV, of Sec. 5, permits the appointment of viewers where the parties have not agreed upon the amount of damages claimed, and the petition in this case contains this distinct averment. The testimony taken before

the viewers and returned with their report indicates that there was correspondence between the several property owners and the city solicitor in regard to the value of the land. Section 2 of the act of June 27, 1913, P. L. 611, expressly authorizes the viewers to determine the amount of damages as also the amount of benefits caused by the improvement and it was unnecessary to refer to this in the ordinance or in the decree of court appointing the viewers.

It is excepted that the report of the viewers is contradictory and void because it states that "all the abutting property is peculiarly benefited by the improvement in the judgment of the viewers," but does not assess benefits against the owners of property on the western side of Front street. We do not regard the report as contradictory on this subject. They find as a fact that all abutting property is benefited and then proceed to assess benefits against certain properties, which are designated by the name of the owner. This is practically a finding of fact that no properties other than those designated have sustained benefits on account of which a contribution is to be made to the improvement. The viewers have properly concluded that the only abutting property is on the eastern side of the street as directed to be opened. All property west of the line is taken for the improvement.

It is further contended that the report is illegal and void because the note thereto does not state the reason for not allowing damages for buildings erected after Jan. 2, 1871. The viewers doubtless properly took official notice of the act of Jan. 2, 1871, which contains in it the provisions hereinbefore referred to, and we may assume that the reason for not allowing damages for these improvements was because of the prohibition contained in the act of assembly.

It is further suggested that there are several acts of assembly approved Jan. 2, 1871, and that it is uncertain which of the acts are referred to by the viewers. We do not think there is any uncertainty upon this subject. While there may have been different acts of assembly approved upon that date, there is only one act of that date relating to the city of Harrisburg and the inference is quite permissible that the viewers intended to refer to this act particularly, and that it acted because of the provisions which they found contained in this statute.

One of the exceptants owning five adjoining properties complains that a separate assessment of benefits was not made against each property and that but a single assessment cover-

ing the frontage of the whole five was made by the viewers. We can see no objection to ascertaining the benefits in this way. They were fixed by the foot front and the total frontage of Mrs. Melville, the exceptant, upon the street is shown upon the plan and the amount payable because of benefits to this property as a whole is clearly stated. We think this method of assessing is entirely proper and the exception as to this method is overruled.

The exceptants also claim that the report of the viewers and proceedings are premature and illegal, because the city of Harrisburg has filed no bond or bonds to secure payment of damages. The fact that no bond had been filed was presumably known to all of the property owners who submitted their claims to the viewers and it is not alleged that any objection whatever was made because no bond had then been given by the city. These property owners made their claims for damages, offered their testimony and submitted their respective claims to the viewers on the basis of the evidence then offered. Having done this without objection, we do not think they are in position to except that no bond had then been given by the city. The act of June 27, 1913, Art. XIV, Sec. 5, expressly directs that "the city shall tender sufficient security to the parties claiming or entitled to damages."

This act differs from the act of May 16, 1891, P. L. 75, which declares in § 5 that "the municipal corporation may tender sufficient security to the parties claiming or entitled to any damages."

The act of 1913 makes mandatory that which under the act of 1891 was permissible. If objection had been made when this fact was first discovered it doubtless would have been remedied immediately. We think it may be remedied now by an application on the part of the city to tender security as required by the statute.

The only remaining exception which in our opinion requires particular mention is that the viewers erred in not allowing damages for buildings erected after Jan. 2, 1871. The provision of that statute as to the disallowance of claims for such buildings has already been cited herein at length. Substantially the same provision is in the act of 1891. Whether this legislation is constitutional is an important inquiry. All the exceptants have taken appeals from the report of the viewers and necessarily their respective claims must be heard and decided upon these appeals. The allegation is made by the exceptants that the city of Harrisburg is estopped from claiming

the right to be exempt from damages for improvements erected on the west side of Front street since Jan. 2, 1871, for the reason that the city has taxed the property upon which such improvements have been made upon the basis of value as indicated by such improvements, has assessed such property with the cost of grading, paving and curbing said Front street between Herr and Calder streets, and has issued building permits for the erection and repair of said improvements.

All admissible evidence can be offered upon the trial of the appeals, and we decline at the present time to decide the question as to whether the city is liable for the value of the buildings erected after Jan. 2, 1871. That question, as we have already intimated, can be more satisfactorily determined upon the hearing of the several appeals filed by the respective exceptants. Without deciding the question now it may not be out of place to say that while the authorities in other states, including New York and Massachusetts, held that a recovery can be had for such improvements, apparently the Pennsylvania authorities sustain the validity of legislation depriving the property owner of the right to recover for such improvements. Among these authorities will be found Freeman Street, 2 W. & S. 325; Forbes Street, 70 Pa. 125.

Upon the trial of the appeals the date when the several improvements were made can be shown by evidence and all the circumstances connected with the making of the improvements and in the light of all relevant testimony then taken the legal question as to the right of the owners to recover and of the liability of the city for these improvements can be more intelligently determined. If there is any error in the statement of the dimensions of any property in the report of the viewers, it can be corrected upon the hearing of the appeals.

We have considered all the exceptions filed in this report. We have not specifically referred to them by number in all the cases. They are substantially the same in each case and every exception has been carefully considered and is now overruled, with the exception of the one relating to the liability of the city for the value of improvements erected after Jan. 2, 1871, which question can be intelligently and properly determined upon the trial of the several appeals taken by the present exceptants.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Commonwealth *v.* Bomberger.

Food law—Criminal law—Term food includes milk—Act of July 22, 1913, P. L. 928, § 16, milk.

Milk is a food within the letter and purpose of the act of July 22, 1913, § 16, P. L. 928, making it unlawful for any person to remove food from quarantined premises without the written permit of the state live stock sanitary board.

The removal for an entirely innocent purpose can make no difference; the prohibition of the statute is absolute.

Special verdict. Q. S. Dauphin Co. March Sess., 1915, No. 40.

M. E. Stroud, district attorney, for commonwealth.
W. H. Earnest and *E. M. Hershey,* for defendant.

KUNKEL, P. J., Oct. 30, 1916.—Section 16, of the act of assembly of July 22, 1913, P. L. 928, makes it unlawful for any person to remove from the premises quarantined by authority of that act, inter alia, any "hay, straw, grain, fodder or other food," without a special permit in writing from the state live stock sanitary board. The defendants were indicted for violating this section and the jury returned a special verdict in which they find that one, Dr. J. N. Becker, and the defendant Harvey S. Bomberger removed, without a permit, the milk taken from certain cows which were on the quarantined premises; that the other defendant, John Funck, the owner of the premises was present at the time, but that the milk was removed without his consent; that Becker and Bomberger secured the milk and removed it for the purpose of having it analyzed in order to ascertain whether there was present any evidence of foot and mouth disease.

The question presented is whether milk is embraced by the term "or other food" as used in the section referred to. It is suggested by the defendant that "other food" is to be interpreted in the light of the words with which it is associated in the section, and that the rule of ejusdem generis should govern. The words used are "hay, straw, grain, fodder or other food." Whether we view "other food" as defined and limited by the use which may be made of the articles of food specifically named, or as restricted to the class to which they belong, the rule of ejusdem generis cannot apply. "Other food" cannot be interpreted to mean food used by animals

alone because the word "grain" is one of the articles of food mentioned, and is used as a food by man as well as by beast. Nor can it be restricted to articles of food belonging to the class to which those specifically named belong. If so, nothing would be added to the prohibited list, for grain is a collective word and necessarily includes other articles of food belonging to the same class as those specified. As was said in Weiss *v.* Swift & Co., 36 Pa. Super. Ct. 376, "it has been held upon sound reason that when the particular word or words exhaust a whole genus the general term will not be regarded as surplusage but will be construed to refer to a larger class."

Moreover, the rule contended for must be subject, if possible, to the more imperative rule, that such interpretation should be put upon the language of a statute as will effectuate its purpose. The general object of the statute before us was to prevent the spread of transmissible disease among animals and poultry. If the word "food" is given its general and common meaning it would include milk, the product of the animals which were quarantined on the premises in question. The removal of milk from the premises would just as likely spread disease as the removal of any of the other articles of food, especially if the milk be taken from animals under quarantine for a transmissible disease. We think, therefore, to carry out the purpose of the act, the proper interpretation of the words "or other food" requires us to hold that milk, the food which was removed from the quarantined premises, falls within the statutory prohibition. This article of food comes both within the letter and the purpose of the statute.

The special verdict shows that the milk was removed by one Dr. Becker, who was not indicted, and by Harvey S. Bomberger one of the defendants who was at the time in the employ of John Funck the other defendant, but that the latter took no active part in what was done. The facts found by the verdict in no wise implicate him in the offense against the statute. It is true the removal was for an entirely innocent purpose but this can make no difference. The prohibition of the statute is absolute.

In pursuance of the finding of the jury, we direct a verdict of "guilty" on the second count of the indictment to be entered against Harvey S. Bomberger, the defendant, and a verdict of "not guilty" to be entered as to John Funck, the other defendant.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Biesty *v.* Loury.

Attachment execution—Counsel fee for garnishee—Payment out of fund—Acts of April 22, 1863, P. L. 527, and April 29, 1891, P. L. 35.

Under the acts of April 22, 1863, P. L. 527, and April 29, 1891, P. L. 35, a garnishee who has performed his duty in contesting an attachment sur judgment, and against whom a judgment has been obtained, is entitled to a counsel fee out of the balance of the fund remaining in his hands after the judgment against him has been paid.

Rule by garnishee for counsel fees. C. P. No. 2, Philadelphia Co. Dec. T., 1910, No. 5298.

W. Horace Hepburn, for rule; *George W. Reed,* contra.

WESSEL, J., June 13, 1916.—On Feb. 21, 1911, plaintiff entered judgment against defendant, upon which damages were assessed in the sum of $3,833.76. An attachment sur judgment was subsequently issued against the above-named garnishee. Interrogatories, answers, and pleas were duly filed, and the issue thereby raised came on for trial before a jury, which, on March 21, 1916, rendered a verdict in favor of plaintiff and against garnishee in the sum of $964.75. On May 2, 1916, judgment was entered upon the verdict. The garnishee now applies to the court to fix the amount of fees to which its counsel is entitled and to direct out of which fund the same shall be paid.

From the record it appears that on May 2, 1911, Thomas Loury and his wife, Ellen, made a conveyance to the Trust Company of North America of two pieces of real estate, and directed that it, as well as such moneys as might thereafter be added to the corpus of that estate, should be held by the trust company in trust, to collect the rents and income therefrom, pay all taxes and other charges, and pay to Ellen Loury during her lifetime such sums as she should demand, not exceeding $60 per month; that, after her death, $40 per month should, upon his demand, be paid to her husband, Thomas Loury, the defendant above named. The deed contained a spendthrift trust and other provisions unnecessary at this time to mention. The Commercial Trust Company, by due process of law, in August, 1912, took over this estate from the Trust

Company of North America. Ellen Loury died on Dec. 15, 1913.

At the time of the above trial, the garnishee had in its hands to the credit of this trust estate the sum of $1,879.97, as well as certain real estate. The verdict of the jury established that the sum of $964.75 was property which the defendant had, while insolvent, conveyed for the purpose of hindering, delaying, and defrauding his creditors.

It is, therefore, apparent that the garnishee has in its hands, and belonging to this trust estate, sufficient money, not only to satisfy the said judgment against it as garnishee, but also to pay the fees of its counsel in the above attachment proceedings.

While it is true that the right of a garnishee to the allowance of its counsel fees in attachment proceedings is statutory, nevertheless the acts of April 22, 1863, P. L. 527, and April 29, 1891, P. L. 35, are sufficiently broad to authorize the allowance of such fees. Lummis *v.* Land Co., 188 Pa. 27 (1898); Milne *v.* Bucknor, 12 W. N. C. 532 (1883), C. P. No. 2.

In Maule *v.* Boyd, 18 Phila. 326 (1886), the garnishee admitted an indebtedness to the defendant greater than the plaintiff's claim. This court directed that the garnishee's attorney fee should be paid out of the residue of the fund. In Brunswick Co. *v.* Brown, 22 W. N. C. 43 (1887), the court of common pleas No. 4 of this county (in an opinion by Arnold, J.) made a similar order, and the same practice has been followed by the court of common pleas No. 3 of this county in the case of Dobbins *v.* Smith, C. P. No. 3, March term, 1890, No. 11.

It was the duty of the garnishee to use all information in its possession to protect the trust and "contest every inch of ground to prevent a recovery of judgment by the attaching creditor. Scottish Rite, Etc., Aid Ass'n *v.* Union Trust Co., 195 Pa. 45." Mestrezat, J., in Kutz *v.* Nolan, 224 Pa. 262 (1909). That duty it has performed. The verdict of the jury, approved by this court in banc, established the right of the plaintiff to the entire amount represented by that verdict. The trust estate, for the benefit of which garnishee's counsel has acted, should pay for the service rendered.

The rule to show cause why the Commercial Trust Company should not be allowed a counsel fee is made absolute and taxed at $100; the same to be paid out of any moneys now or hereafter in its hands as trustee aforesaid.

Poluskiewicz *v.* Philadelphia & Reading Coal & Iron Co.

Negligence—Compensation act of June 2, 1915, P. L. 736—Appeal from compensation board—Findings of fact—Practice.

In an appeal from the decision of the compensation board based upon findings of fact, the court is without jurisdiction under § 409 of the act of June 2, 1915, P. L. 736; even if this act did confer jurisdiction, the court would then be governed by the rule relative to findings of fact in equity cases.

Appeal by defendant, from decision of workmen's compensation board. C. P. Schuylkill Co. July T., 1916, No. 319.

John F. Whalen, for appeal.

M. A. Kilker and *John J. Moran,* contra.

BECHTEL, P. J., Nov. 13, 1916.—This case comes before us on an appeal taken from the workmen's compensation board by the defendant. The appellant files six exceptions to the decision of the board. These six exceptions involve but one question; whether or not the facts warranted the findings by the referee and the compensation board.

The referee found the facts against the defendant and allowed compensation. The defendant thereupon appealed to the compensation board which sustained the findings of the referee. Defendant then took an appeal to this court. The plaintiff claims that the court has no jurisdiction to reverse the findings of fact made by the referee and the compensation board. Even if we had jurisdiction to revise the findings as made in this case, we feel, in the absence of any express provision in the act of assembly that our actions should be governed by the rules laid down by our higher courts, relative to the findings of fact in equity cases. It is a well settled doctrine that in the absence of fraud or a gross abuse of discretion, the appellate court will not reverse the findings of fact by a chancellor, and it has been held that these findings should be sustained if there be any evidence to justify such action. We would hesitate to go that far with this record.

Section 409 of the compensation act of June 2, 1915, P. L. 736, provides: "A referee's findings of fact shall be final unless the board shall allow an appeal therefrom as hereinafter provided. The board's findings of fact shall in all cases be final. From the referee's decision on any question of law an appeal may be taken to the board and from any decision of the

board on a question of law an appeal may be taken to the courts as herein provided."

Section 419 provides for an appeal by the aggrieved party to the board on two grounds, the second of which is "that the findings of fact and ruling or disallowance of compensation was unwarranted by the evidence," and § 421 defines the powers of the board relative to such appeals. Section 425 provides for the method of hearing appeals taken from the board to the courts, but distinctly limits such appeals to questions on matters of law. We, nowhere in the act, find any express provision authorizing the courts to reverse the findings of fact of the compensation board. It is very significant that the act provides that the board's findings shall be final in all cases and that in the section providing for an appeal to the courts, distinctly states, on questions involving matters of law. We do not think that it was the intention of the legislature to give, nor do we think that the plain language of the act gives, to the court the right to reverse the findings of fact of the compensation board. That is the one question involved in this case.

And now, Nov. 13, 1916, the appeal is dismissed at the cost of the appellant.

York Railways Company.

Corporations—Power of a railway company to hold stock of a light, heat, and power company—Act of July 2, 1901, P. L. 591—Art. XVI, *Sec. 6, and Art.* XVII, *Sec. 5, Constitution.*

The Supreme Court in Com. *v.* New York, etc., R. R. Co., 132 Pa. 607, and 139 Pa. 457, make a clear distinction between control of another company by the holding of a majority of its stock, and the direct holding of title, etc., of the property itself, and thereby engaging in its business.

The York Railways Company has the right to acquire, hold, etc., the stock, bonds, etc., of a light, heat and power company, and by such holding.

(1) It is not engaging in a business other than that expressly authorized by its charter forbidden by Art. XVI, Sec. 6, of the Constitution, and (2) It is not directly or indirectly engaging in any other business than that of common carriers, forbidden by Art. XVII, Sec. 5, of the Constitution.

Request of A. B. Millar, secretary of public service commission, for opinion.

BROWN, Attorney General, March 12, 1915.—In the mat-

ter of the application of the York Railways Company et al., to the Public Service Commission, No. 209, application docket, 1914, for certificates of public convenience, in which you desire an official opinion whether the said application can properly be granted by the commission under the provisions of the Constitution of the state (see letter of William N. Trinkle, to John C. Bell, attorney-general, Jan. 7, 1915), I assume your inquiry to be, whether in view of Art. XVI, Sec. 6, of the Constitution, which is:

"No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business;" and of Art. XVII, Sec. 5, which is: "No incorporated company doing the business of a common carrier shall, directly or indirectly prosecute or engage in mining or manufacturing articles for transportation over its works, nor shall such company directly or indirectly engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length."

The York Railways Company, a street railway company, a Pennsylvania corporation, has the legal right to "purchase, acquire, take and hold the absolute ownership or controlling right, title, and interest in a light, heat, and power company of this or of any other state."

The act of July 2, 1901, P. L. 591, provides:

"Section 1. Be it enacted, etc., that hereafter any corporation, organized for profit, created by general or special laws, may purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, the shares of the capital stock of, or any bonds, securities or evidences of indebtedness created by, any other corporation or corporations of this or any other state, and while the owner of said stock may exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

Section 2. All acts or parts of acts, general or special, inconsistent herewith, be and the same are hereby repealed."

Street railway companies and electric light companies are corporations engaged for profit and hence are included in said act, and the railway company is thereby empowered to purchase and hold the stock of the light, heat, and power com-

pany, "and while owners of the stock may exercise all the rights, powers, and privileges of ownership including the right to vote thereon," unless it is prohibited by the constitutional provisions above cited.

It is held by the Supreme Court in Com. *v.* New York, Etc., R. R. Co., 132 Pa. 607, and 139 Pa. 457: "It must not be forgotten, however, that controlling real estate, by means of the ownership of a majority of the stock of such corporation, is a very different matter from holding the title to such real estate. The one is legalized by the act of 1869; the other is forbidden by the act of 1855."

Article XVII, Sec. 5, of the Constitution, which prohibits an incorporated company doing the business of a common carrier from engaging in any other business than that of a common carrier, and Art. XVI, Sec. 6, which prohibits a corporation from engaging in any business other than that expressly authorized by its charter, do not prevent such an incorporated company from acquiring and holding a controlling interest in the stock, etc., of another company engaged in another business.

The Supreme Court in that case makes a clear distinction between control of another company by the holding of a majority of its stock, and the direct holding of title, etc., of the property itself, and thereby engaging in its business.

The Supreme Court of the United States in Pullman Car Co. *v.* Missouri Pacific Co., 115 U. S. 597, held:

"The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain & Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it,

except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

The distinction drawn in the cases cited appears to be narrow if the prohibitive acts in Com. *v.* New York, Etc., R. R. Co., and the Pullman Company *v.* Missouri Pacific Co. cases had been construed as to the intention of its framers instead of by the letter, but they control the question you have submitted to me, and I therefore advise you that the York Railways Company has the right to acquire, hold, etc., the stock, bonds, etc., of a light, heat, and power company, and that by such acquisition, holding, etc., (1) it is not engaging in a business other than that expressly authorized by its charter forbidden by Art. XVI, Sec. 6, of the Constitution; and, (2) it is not directly or indirectly engaging in any other business than that of common carriers, forbidden by Art. XVII, Sec. 5, of the Constitution.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

Beetem Lumber & Manufacturing Co. *v.* Steger.

Mechanics' lien—Notice of intention to file lien—Sub-contractor.

Where a lumber company has filed a lien against a building for lumber supplied and has named in the lien the owner and another person as the contractor, without serving on the owner of the notice of an intention to file a lien as required by statute, the claimant cannot allege that the contractor named was a mere agent of the owner, if it appears that there was not any contract, express or implied, between the owner and the claimant, and that the only contract for the lumber made was that between the claimant and the person named as contractor.

Sur rule for judgment for want of a sufficient affidavit of defence. C. P. Cumberland Co. Sept. T., 1915, No. 73.

J. W. Wetzel, for plaintiff.
G. Wilson Swartz and *W. J. Carter,* for defendant.

SADLER, P. J., July 11, 1916.—Oscar H. Steger was, and is, the owner of a lot of ground in lower Allen township, Cumberland county. He entered into a contract with one Lawrence Fetrow for the construction of a building thereon.

In turn; Fetrow ordered for use in the proposed structure certain lumber and mill work from the Beetem Lumber and Manufacturing Company. The material purchased was duly furnished by it, and within the time fixed by statute a mechanics' lien was filed against the building, the contract price not having been paid. This lien named Steger as the owner and Fetrow as the contractor. Though notice of the actual filing of the lien was duly given; no notice of the intention to file had been given the owner, as required by the act of 1909, in the case of sub-contractors, it being the contention of the claimant that the lumber company was not to be treated as a sub-contractor, but as a contractor. A scire facias having been issued upon the lien, an affidavit of defence was filed in which this lack of notice is set up, and the contention is now before us on rule for judgment for want of a sufficient affidavit of defence.

The liens given to mechanics are strictly of statutory origin. The claims filed must be self-sustaining, and compliance with all legislative requirements must clearly appear. Wolfe Co. *v.* Penna. R. R. Co., 29 Pa. Super. Ct. 439; Knelly *v.* Horwath, 208 Pa. 487.

Prior to the act of June 4, 1901, notice of the intention to file liens by sub-contractors was required only in the case of alterations and repairs. Act of May 18, 1887, P. L. 118: Best *v.* Baumgardner, 122 Pa. 17; Langenheim *v.* Anschutz-Bradberry Co., 2 Pa. Super. Ct. 285. The act of June 17, 1887, P. L. 413, requiring such action in the case of new constructions had been held to be unconstitutional. Titusville Iron Works *v.* Keystone Oil Co., 122 Pa. 627.

But the act of June 4, 1901, furnished a new system, which was intended as a substitute for all other laws. Getz *v.* Brubaker, 25 Pa. Super. Ct. 303. By § 7 of this act, the sub-contractor was required to give written notice of his intention to file a lien, to the owner, at least a month prior to so acting. This legislation was amended by the act of March 24, 1909, P. L. 65, which provided for a notice for a like period, and regulates the contents thereof, and the manner of service, and it is this legislation which is controlling of the present lien.

The contractor need give no notice. Sinnot *v.* Beard, 14 D. R. 619; but the sub-contractor must comply with the statutory requirements. His failure to give the notice in the form prescribed is fatal to his lien. This has been so frequently decided by our appellate courts as to make extended citation of the authorities useless. Reference need only be

made to those cases in which the materials furnished, and for which the lien was claimed, were of the same character as those for which payment is asked in the present proceeding, and where the relationship of the parties is similar. Herr *v.* Moss Cigar Co., 237 Pa. 232; Breitwieser Lumber Co. *v.* Wyss-Thalman, 51 Pa. Super. Ct. 83; Hart *v.* Lehigh Valley R. R. Co., 41 Pa. Super. Ct. 224. It is frankly admitted that no such notice was given in the present case, but it is insisted that, under the circumstances, no notice was required.

This position rests on the theory that Fetrow was the mere agent of Steger in making the contract with the claimant, and that, therefore, the contract was in reality with the owner, and the claimant, as a result, is not to be treated as a sub-contractor. It is to be noted that the lien is filed against Fetrow as the contractor, and against Steger as the owner.

The act of June 5, 1901, P. L. 434, § 1, defines a contractor as "one who, by contract or agreement, express or implied, with the owner or the one who acts for the owner, plans or superintends the structure or other improvement, or any part thereof; or furnishes labor, skill or superintendence thereto; or supplies or hauls materials, reasonably necessary for and actually used therein; or any or all of them, whether as an architect, superintendent, builder or material man."

It defines the sub-contractor as "one who, by contract or agreement, express or implied, with the contractor or with one who acts for him, superintends the structure or other improvement, or any part thereof; or furnishes labor, skill or superintendence thereto; or supplies or hauls material, reasonably necessary for and actually used therein; or any or all of them, whether as superintendent, builder or material man; excluding, however, architects, and those contracting with material men."

As we apprehend the law, this did not change the relationship of the parties, as held to exist prior to this legislation. The question as to who was a contractor, and who a sub-contractor, had been frequently before the courts, not in determining whether proper notices had been served of the intention to file liens, for none were required, except as noted in the case of alterations and repairs; but in deciding whether the party who had contracted for materials was such a person as could bind the estate for the payment of the claims accruing therefor.

There were three classes of individuals recognized under the earlier acts; the owner, the contractor, called the architect or

builder, and the workman and material man. Harlan *v.* Rand, 27 Pa. 511. The contractor meant a person employed to construct the building, and not a mere workman or material man. Brown *v.* Cowan & Steele, 110 Pa. 588. And he was able to make contracts, and the real estate would be bound for the payment of the purchase money, in the case the contractor failed to pay. Wolf *v.* Batchelder, 56 Pa. 87. It is true that in one sense a builder is the agent of the owner in the purchase of materials, and in fact has been so called in at least one of the earlier mechanics lien acts. Act of June 8, 1891, P. L. 225. But the material man was ordinarily a sub-contractor, who was given his lien, but had no implied power to contract with others, so that the latter could acquire liens binding the property; and that is what is decided by the cases cited by counsel for the claimant, and what is referred to by the exemption noted in the definition of a sub-contractor, as appearing in § 1 of the act of June 4, 1901.

The contractor could buy necessary materials and bind the building, but the one from whom he ordered could not, in turn, secure supplies needed in filling his contract, so as to give the one from whom he purchased a right to a lien. Duff *v.* Hoffman, 63 Pa. 191; Schenck *v.* Uber and Tees, 81 Pa. 31; Owen *v.* Johnson, 174 Pa. 99. It was true that the owner could have more than one contractor, and could give to each of several a separate branch of the work of construction and erection, and in such case each person with whom the owner so dealt was a separate contractor, and not a sub-contractor. Kountz Bros. Co. *v.* Consolidated Ice Co., 28 Pa. Super. Ct. 266; Singerly *v.* Doerr, 62 Pa. 9; Owen *v.* Johnson, supra; Schenck *v.* Uber and Tees, supra. And this is still true, and in case the owner contracts directly for any branch of the work, such person becomes a contractor, and may file a lien as such, without giving notice required of a sub-contractor. Pierce *v.* Rogers, 60 Pa. Super. Ct. 293; Bohem *v.* Seel, 185 Pa. 382. But such direct arrangement must clearly appear. Wharton *v.* Real Estate Investment Co., 180 Pa. 168; Dyer Quarry Co. *v.* Moss Cigar Co., 28 Lanc. Law. Review 25.

In the present case, it not only does not appear that there was any contract, express or implied, between the owner and the claimant, but Fetrow is specifically named in the lien as the contractor, and Steger is named as the owner. Not only may the owner employ different contractors for different branches of work, but it may be that one individual may be both a contractor and sub-contractor as to different parts of

the work on the same building. Sumption *v.* Rogers, 53 Pa. Super. Ct. 109, affirmed in 242 Pa. 348. But there must be a contract between the owner and the individual who furnishes the material, in order to constitute the latter a contractor, so as to be able to file a lien, without giving the preliminary notice of, intention to file. Lee *v.* Burke, 66 Pa. 336; or give to such person the right to file a lumping charge rather than a detailed statement. Lee *v.* Exeter Club, 9 Pa. Super. Ct. 581; Young *v.* Lyman, 9 Pa. 449; Murphy *v.* Bear, 240 Pa. 448.

A careful examination of the authorities leads to the conclusion that the Beetem Lumber and Manufacturing Company, claimant, was a sub-contractor in so far as appears from the record before us, and having failed to give the notice to Steger of its intention to file its claim, as required by the act of March 24, 1909, its lien cannot be enforced, and that the affidavit of defence, setting up this defect, is sufficient.

It was also suggested upon the argument that the lien filed was defective in other respects, and that since it must be self-sustaining, the reasons suggested would prevent the entry of judgment for want of a sufficient affidavit of defence. We are not prepared to say that either of the objections suggested are well founded. The claim itself was not signed, though it was sworn to, and the name of the claimant appeared in the body of the lien. Under such circumstances, the lien has been sustained. Kramer *v.* Spahr, common pleas Cumberland, 1878, cited in 1 Trickett on Liens, 60: Sprecher and Pfeiffer *v.* Single, 4 Lanc. Law Review, 65. Nor are we convinced that it was necesssary to file a copy of the contract. This provision made by sub-division four to § 11 of the act of June 4, 1901, was omitted in the amending act of April 17, 1905, P. L. 172. But the consideration of either of the questions is immaterial, in view of the conclusion reached.

And now, July 11, 1916, the rule for judgment for want of a sufficient affidavit of defence is discharged.

Tionesta Township Road.

Road law—Report of viewers—De facto viewers.

A report of road viewers should be carefully prepared not only as to substance, but also as to form. The facts should be logically and concisely stated, and set out in paragraphs which, for convenience, ought to be numbered. If any question of law has arisen there should also be a careful statement of that question and the disposi-

tion made of it by the viewers. Extraneous matters on detached papers should not be referred to. The request of parties to the viewers are not part of the record, and the viewers need not refer to it; and they need not be attached to the proceedings, but such request should be carefully considered. The evidence of witnesses taken at the hearing need not be reduced to writing.

Where viewers appointed under the act of June 23, 1911, P. L. 1123, continue to act after their term has expired, and the same persons are reappointed, they are during the interval, viewers de facto, and entitled to act in the absence of objection.

Exceptions to report of road viewers. Q. S. Forest Co. May T., 1915, No. 1.

HINCKLEY, P. J.—On May 17, 1915, a petition of sundry citizens was presented to this court asking for the appointment of viewers to vacate a certain road and supply such vacancy by a new road, and upon that day D. W. Clark, surveyor, T. F. Ritchey, attorney-at-law, and John T. Carson were duly appointed viewers to proceed according to law.

The viewers gave the necessary notice to all parties interested and met upon the premises and later held two public hearings at the court house.

These meetings at the court house were attended by numerous parties and a number of witnesses were called for and against the proposed change of the road, and those now objecting were also heard.

Upon Sept. 20, 1915, the report of the viewers was filed in open court and confirmed nisi.

Upon Oct. 11, 1915, the road supervisors and the school directors filed exceptions to and appeals from the report of viewers.

Upon Feb. 28, 1916, the road supervisors presented a petition asking that the appointment of viewers be vacated and the proceedings quashed because the terms of appointment of members of the board of viewers had expired previous to their appointment in this case.

By answer filed it appeared that the court of common pleas of Forest county did upon Sept. 25, 1911, appoint a board of viewers pursuant to the act of June 23, 1911, P. L. 1123, of whom the viewers in this case were members, and that subsequently no other or further appointments or change in the board had been made.

The matters were argued by the counsel upon the record presented by the report and the exceptions and motions.

The first and second exceptions are as follows: 1. The

viewers do not or did not file in the court of quarter sessions of said county, and set forth in brief and concise paragraphic form findings of fact and conclusions of law as required by the act of assembly approved June 23, 1911, § 9. 2. The viewers did not sign and file with their report and make as a part of their report any finding of fact and conclusions of law.

The return of the viewers in this case is somewhat unusual, if not curious, as it not only embraces the report signed by them but contains a reference to certain extraneous papers which appear to be requests for certain specific findings and answers of the viewers to the requests; and also what appears to be a record of the proceedings before them and the typewritten copy of the testimony of witnesses; and also a brief of argument of counsel for the road and copies of requests for findings of fact presented by counsel for the objectors.

The first exception relates rather to the form than the substance of the report.

The act of assembly evidently contemplates, and especially so since one of each board of viewers must be an attorney-at-law, that the report should be carefully prepared not only as to substance but also as to form. The material facts should be contained within it and be briefly and carefully stated so that the court will become fully informed as to the entire situation upon the ground. These facts should be logically and concisely stated and also should be set out methodically in paragraphs which, for convenience, ought to be numbered.

If any question of law has arisen there should also be a careful statement of that question and the disposition made of it by the viewers.

The report, however, in this case is substantially within the direction of the act. While we think the form of the report could be improved by a more careful separation and numbering of the different paragraphs, yet we do not regard this as vital to the report itself.

We should criticise the practice of referring to extraneous matters on detached papers. The better practice and one in accord with the act is to incorporate in the report itself all findings of the relevant facts, and this may, if warranted by the proceedings, include some negative findings in order to make a complete report. The requests of the parties made to the viewers are not part of the record, and the viewers need not refer to them, but, of course, they should carefully consider

them and, if in their opinion necessary, adopt and embrace in their report such suggestions as they deem appropriate and necessary to place all of the facts upon the record.

The requests themselves can properly be entirely omitted and not attached to the proceedings.

The evidence of witnesses taken at the hearing before the viewers is not required to be reduced to writing. There is no provision for its return with the report and it should be omitted.

There is an optional provision in § 8 of the act by which a stenographic report of the proceedings may be kept for the purpose of furnishing interested parties with a copy upon their paying therefor.

Why the brief of one of the counsel is attached to the report is unexplainable.

We think, however, that the copy of the evidence, the brief of the counsel, and the extraneous matters may be treated as surplusage without destroying the report.

The viewers have in the report itself and the draft attached set forth all necessary jurisdictional facts. In addition they refer to their answers to certain written requests presented to them which they attach to their report. While we have indicated the better practice above, we do not feel justified in excluding their findings so made, although examination of these requests and answers does not show, and very material or vital questions raised by or contained in them, and the report itself does not rest upon them.

The first exception is dismissed. Neither do we think the second exception well taken, the viewers need not make separate findings.

The report itself is, or should be, a complete statement of facts of law as we have indicated.

The third exception is that the viewers did not affirm the requests made to them at the hearing by the school directors and the road supervisors.

As we have already stated, the viewers are not required to answer requests for findings. Their duty is well performed when they have carefully examined all requests and have taken them into consideration and have embraced in their report all the findings deemed by them appropriate and necessary under the circumstances of the case.

The third exception is therefore dismissed.

If we were to examine these requests and consider them as reasons now given to set aside the report we would find that

many of them raise questions which are irrelevant in this proceeding, and that some of the requests are answered by the report filed, and that others raise questions of fact which cannot now be inquired into by the court.

Most, if not all, of these requests or exceptions raise questions of fact. These were all evidently very fully discussed before the viewers and were matters wholly within their discretion. We do not review these matters of fact in the absence of any depositions taken as the evidence taken before the viewers is not properly before the court.

The counsel for the exceptants laid considerable emphasis upon the requests relating to the grade, contending that the grade exceeded three degrees, which was in violation of the act of 1897, P. L. 197.

The report of the viewers shows that the grade of the new road does not exceed four degrees at any point, and the grade of the road vacated is from seven to ten and one half degrees. This is all that is before us concerning the grade as we cannot consider the evidence attached to the report nor the statement that D. W. Clark, the surveyor, refused to testify as to the grade. If this was an essential matter, however, we could see no good reason for the refusal of the expert viewer to state all the facts which he learned upon the view, and furthermore to have them set forth in the report.

We may properly infer from the language of the report that at some point the grade is four per cent.

The provisions of the act of June 23, 1897, P. L. 197, § 11, is to the effect that no public road hereafter to be laid out shall be fixed at a higher grade than three degrees except where it shall be deemed impracticable to open and maintain at that or lower grade.

Section 21 of this act provides that the act shall not go into effect until the sum of $1,000,000 has been appropriated by act of assembly or shall have been received in the state treasury from taxes for road purposes to be distributed under the direction of the department of agriculture among the several townships of the state in proportion to the number of miles of public roads in each township.

As suggested in note (C) to paragraph 133, Purdon's Digest, page 4256, it is doubtful whether this act has gone into effect, as the conditions prescribed in the above section were never literally fulfilled. By subsequent legislation most, if not all, of the provisions of this act have been supplied and the act of 1897 in effect repealed. See act of April 12, 1905,

P. L. 142, and discussion of same in opinion of attorney-general, 32 Pa. C. C. 1.

The viewers, however, in this case return that they had in view the best ground, and in the absence of any affirmative evidence to show that it is practicable to lay out the road at a better grade, the report will not be disturbed. Road in Dumore, Twp., 5 Lanc. L. R. 265, affirmed in 2 Atl. Rep. 193; Road in West Lampeter Twp., 19 Lanc. L. R. 70; Road in Hanover Twp. and Ashley Boro., 14 D. R. 778.

It is significant in the last two cases above that there is no reference to the act of 1897, but the exceptions were to a grade in excess of five per cent. as provided by the act of 1836.

A further question was raised in the application of the supervisors of the township and the school district upon Feb. 28, 1916, to vacate the appointment of viewers and quash the proceedings because the terms of the appointment of the board of viewers had expired previous to the appointment of the viewers in this case.

It appears that the court of common pleas of Forest county did upon Sept. 25, 1911, appoint a board of viewers pursuant to the act of June 23, 1911, of whom the viewers in this case were members, and that the board of viewers thus appointed continued to serve as their services required from the date of their appointment, no successors being appointed and no changes being made in the board, and that the said viewers appointed by the court in this case upon May 17, 1915, were three of this board.

It also appears that three viewers thus appointed proceeded regularly, had public hearings in the court house at which those in favor and those opposed were present and presented evidence upon either side, and that arguments were heard by the board of viewers and that the viewers filed their report upon Sept. 20, 1915, and that no objection was raised prior to Feb. 28, 1916.

Under these circumstances we think that the viewers were de facto entitled to act in the absence of objection or any proceeding to vacate the appointment.

We feel bound by the decision in Columbus Twp. Road, 57 Pa. Super. Ct. 516.

There is in Forest county the same rule of court mentioned in that case.

The exceptions to the report of viewers are dismissed and the motion to quash the proceedings is set aside.

From T. F. Ritchey, Esq., Tionesta, Pa.

Commonwealth. *v.* Terry.

Food law—Artificial coloring of vinegar—Distillation of vinegar—Act of May 21, 1901, P. L. 275.

The purpose of the act of May 21, 1901, P. L. 275, is to prevent vinegar, when finally made by the process of distillation, from being artificially colored by the addition of a foreign substance or ingredient for the express purpose of imparting such color. There is nothing in the act which prohibits the sale of vinegar where the color is incidentally imparted to the finished product in the process of manufacturing from the original base.

Charge to jury. Selling, etc., adulterated vinegar. Q. S. Philadelphia Co. Dec. Sess., 1915, No. 311.

John H. Maurer, assistant district attorney, with him *Samuel P. Rotan,* district attorney, for commonwealth.

Frank A. Harrigan, for defendants.

PATTERSON, J., June 6, 1916.—This prosecution is brought under § 2 of the act of May 21, 1901, P. L. 275. The defendants have been charged with exposing for sale and offering for sale "a vinegar made in part from distilled liquor, and which was not then and there free from coloring matter added before, during, or after distillation," and did sell to one William F. Hill "one quart and more of a vinegar made in part from a distilled liquor, and which then and there contained a color other than that imparted to it by the process of distillation."

The evidence for the commonwealth was in substance that an agent for the dairy and food division of the department of agriculture, on or about Aug. 4, 1915, purchased a quart of vinegar from the defendants, trading as the Philadelphia Vinegar Company. Two chemists called by the commonwealth testified that an analysis of the vinegar purchased showed that it contained a coloring matter known as caramel, or burnt sugar.

The defendant's principal witness was a chemist, who testified in substance that he actually made the vinegar, a sample of which the defendants delivered to the agent for the dairy and food division; that said vinegar is made from sugar-house molasses, which is a very dark and viscous substance; that to this is added three parts water, and the liquor is then fermented

by the addition of yeast; that thereafter one third of this fermented molasses is distilled; that the one third distilled molasses is mixed with the two thirds fermented molasses, and then is added some old vinegar, and the entire mix is then placed in what is known as an acetic acid generator, the purpose of adding the old vinegar being to hasten the change from alcohol into acetic acid. The generator is a vat from nine to ten feet in height, with a false bottom within a foot or so of the top, which bottom is perforated. There are air holes or vents in the lower part of the vat, a few inches from the floor. Between the bottom and the false bottom are placed beechwood shavings, and the mix above referred to is permitted to trickle through. In this vat the acetification occurs and the product is finished vinegar, which, as shown by the defendants' sample offered in evidence, is brownish in color. It was further testified by the defendants' chemist that the color in the finished vinegar comes through in process from the original base, to wit, molasses. Another chemist was also called upon behalf of the defendants, and testified substantially to the same effect. There was no attempt on the part of the commonwealth to contradict this evidence.

The act of May 21, 1901, § 2, P. L. 275, provides, inter alia, as follows: "And all vinegar made wholly or in part from distilled liquor shall be branded 'distilled vinegar,' and all such distilled vinegar shall be free from coloring matter added before, during, or after distillation, and from color other than that imparted to it by the process of distillation."

It will be seen at a glance that the purpose of the act is to prevent vinegar, when finally made by the process of distillation, from being artificially colored by the addition of a foreign substance or ingredient for the express purpose of imparting such color. There is nothing in the act that prohibits the sale of vinegar where the color is incidentally imparted to the finished product in the process of manufacturing from the original base.

It is quite clear that in the process of the manufacture of the vinegar involved in this case before us, no coloring matter was "added before, during, or after distillation," and that the vinegar in question is free "from color other than that imparted to it by the process of distillation." It is but fair to state that there has been no evidence produced to indicate that the said vinegar is either impure or unwholesome.

For these reasons, the court is bound to give binding instructions for the defendants, and to direct a verdict of "not guilty."

Loux Creamery Co. *v.* Tice.

Corporations—Officers—Illegal dividends—Receiver—Acts of July 18, 1863, P. L. (1864) 1102, and April 29, 1874, P. L. 73.

Directors of a corporation cannot be held personally liable for illegal dividends declared by them in a suit by a receiver of the company. Such liability can only be enforced against them in a suit by a creditor, who has secured a judgment against the corporation.

Bill in equity. C. P. Lehigh Co. Oct. T., 1915, No. 1.

Frank Jacobs and *M. P. Schantz,* for plaintiff.
George W. Aubrey, Butz & Rupp, Ira T. Erdman and *Calvin E. Arner,* for defendants.

GROMAN, P. J., Oct. 2, 1916.—The receiver of the Loux Creamery Company, a Pennsylvania corporation, filed his bill in equity, alleging that certain unearned dividends were paid by the board of directors from time to time, and that other payments were made negligently and by connivance by the defendants as directors of the corporation.

After taking the testimony of the complainant, the court, under Rule 68 of the equity rules, entered a decree of dismissal without hearing evidence on behalf of the defendants. The plaintiff filed a motion to change the decree dismissing the bill.

The one question going to the marrow of the controversy, if the jurisdiction lies, is, Have the directors of this corporation, in the performance of their duties, exercised reasonable and ordinary care, skill, and diligence in conducting the business of the corporation? If they did, there could be no recovery. During the taking of the testimony, it was conceded that certain of the directors could not be held liable, but an effort was made to bring home liability on the part of Wilson M. Loux, a director, bookkeeper, and manager of the corporation. While an appearance of wrongdoing may be established, this with nothing more, would not be sufficient to establish fraud; that fraud must be proven and cannot be presumed is so evident a legal maxim that a citation of authorities would be superfluous.

It is hardly worth while, however, to pursue the foregoing inquiry any further, as we have legislation in Pennsylvania indicating the procedure to be followed to establish the liability of the officers and directors of a corporation, delinquent in the performance of their duties as such. Sections 41 and 42, of the act of July 18, 1863, P. L. 1102 (1864), read as

follows: "Section 41. No stockholder, or officer in such corporation, shall be held liable for its debts, or contracts, unless a judgment is recorded against it, and the corporation shall neglect, for the space of thirty days after demand made, on execution, to pay the amount due, with the officer's fees, or exhibit to him real or personal estate of the corporation subject to be taken on execution, sufficient to satisfy the same, and the execution shall be returned unsatisfied.

"Section 42. After the execution shall be so returned, the judgment creditor, or any other creditor, may file a bill in equity, in behalf of himself, and all other creditors of the corporation, against it, and all persons who were stockholders therein at the time of the commencement of the suit in which said judgment was recovered, or against all the officers liable for its debts and contracts, for the recovery of the sums due from said corporation, to himself and such other creditors, for which the stockholders or officers may be personally liable, by reason of any act or omission, on its part, or that of its officers, as stated in preceding sections of this act, setting forth the judgment and proceedings thereon, and the grounds upon which it is expected to charge the officers, or stockholders, personally."

The act of April 29, 1874, P. L. 73, § 39, reads as follows: "If the directors of any company declare any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted, so long as they respectively continue in office. Provided, that the amount for which they shall be liable shall not exceed the amount of such dividend, and if any of the directors are absent at the time of making the dividend, or object thereto, at said time, and file the objections in writing with the clerk of the company, they shall be exempted from such liability."

Relative to the matters under consideration, and having the above legislation in mind, it may be illuminating as well as instructive at this time to quote from Childs *v.* Adams, 43 Pa. Super. Ct. 239 (1910): "Where the president and treasurer of a corporation are permitted to control and manage the whole business of a corporation without any interference by the directors or stockholders, and they declare and distribute dividends in good faith out of what they suppose is profits, although the company is in fact insolvent, they cannot be compelled to pay back the sums thus distributed to the corporation

by a bill in equity filed against them by the general receiver of the company. Their only liability is to the creditors who must first have the amount of their indebtedness adjudicated in an action against the corporation, and then file their bill for themselves and other like creditors against the officers who may have made the illegal payments.

"The liabilities of the officers and directors of a corporation specially imposed upon them by the statute, are not assets of the corporation so as to give a general receiver authority to enforce them."

The dismissal of the bill must be sustained for want of jurisdiction.

Now, Oct. 2, 1916, motion to change the decree dismissing the bill in the above cause dismissed.

Evarts *v.* Evarts.

Divorce—Cruel and barbarous treatment—Condonation.

A divorce for cruel and barbarous treatment will be refused where it appears that after a wife had had her husband arrested and put under bond to keep the peace, she lived with him for fifteen months and then left him, but not on account of any indignity to her person or cruel and barbarous treatment, and the evidence for a divorce related to what had occurred before and not after his arrest.

In divorce. C. P. Allegheny Co. Oct. T., 1915, No. 1451.

S. H. Huselton, for libelant.
George L. Sutter, for respondent.

SHAFER, P. J., March 16, 1916.—The libel is for divorce for cruel and barbarous treatment and indignities to the person. The testimony shows conduct on the part of the husband before, sometime in 1913, which would have justified a divorce on these grounds. The wife at that time had him arrested and put under bond to keep the peace and continued to live with him for about fifteen months, during all of which time he was not guilty of any conduct toward her which would justify a divorce. At the end of this time she left him, but not on account of any indignity to her person or any cruel and barbarous treatment. The master has, therefore, recommended that a divorce be refused. In this we think he was right.

For the reasons set out in the master's report the exceptions are overruled and it is ordered that the libel be dismissed.

From Thomas Ewing, Esq., Pittsburgh, Pa.

Commonwealth ex rel., Casey et al., Commissioners of Northampton County *v.* Cunningham, State Highway Commissioner.

Road law—State highways—Taking over roads by state—Maintenance—Discretion of state highway commissioner—Acts of June 14, 1911, P. L. 942, and July 22, 1913, P. L. 915.

The roads under the act of 1911 did not become maintainable, nor do the roads under the act of 1913 become maintainable by the state highway department until they are taken over by the department, and the expense of their care and maintenance is assumed by the department.

The state highway commissioner is required to exercise his judgment on the questions of the time of taking over a road and assuming the expense of its care, of the necessity for repairs and of the time for repairs, and on all other matters involved in the construction and proper maintenance of the highways.

The state highway commissioner cannot be interfered with, nor can his action in anywise be controlled by the court unless it clearly appears that he has abused his discretion.

Mandamus. C. P. Dauphin Co. Com. Docket, 1915, No. 78.

Fox & Geyer, for plaintiffs.
W. H. Keller, deputy attorney-general, for defendant.

KUNKEL, P. J., Nov. 2, 1916.—This is a proceeding brought at the instance of the commissioners of Northampton county to compel the state highway commissioner to construct and maintain, at the expense of the commonwealth, the road in that county leading from Nazareth by Newburg and Hecktown to Bethlehem. The case has been submitted to us by the parties on the demurrer to some of the allegations contained in the return and on the traverse to the others. Trial by jury has been waived. The following facts appear from the pleadings and the evidence:

Prior to July 22, 1913, the road in question was a county road and the expense of maintaining it was required to be borne by Northampton county, under the administration of the county commissioners. On June 1, 1915, and at the time of the commencement of this proceeding, it was in an almost impassable condition, and greatly in need of immediate repairs. By the act of July 22, 1913, P. L. 915, it was adopted as a state highway on June 1, 1915, and was added to the list of roads constituting the system of state highways established by the act of June 14, 1911, P. L. 942, under the title "Route No. 297," that being the number immediately following the last-numbered route mentioned in the act of 1911. However, the

state highway department has not taken over the road or assumed its maintenance or care.

The appropriation for the two fiscal years beginning June 1, 1915, for the maintenance of roads was not sufficient to maintain properly all the roads which belonged to the system of state highways, and for the maintenance of which the state highway department had already become responsible. The moneys appropriated were apportioned to the maintenance, repair, and construction of the highways by the state highway department as equally and uniformly in the several counties of the state as conditions allowed. In making the apportionment and carrying on the work of maintenance, the highway commissioner and the officials under him had regard to the condition in which the highways were found, and the comparative necessity of their repair. Of the moneys appropriated, Northampton county has received or is to receive for the repair and maintenance of the roads of that county, more than its share, whether calculated upon the basis of an equal division between all of the counties or upon the basis of a division in proportion to the mileage of roads therein maintainable by the state highway department.

DISCUSSION.

The act of July 22, 1913, P. L. 915, provides that the various sections of the public roads in the state described therein "shall respectively be adopted June 1, 1915, by the commonwealth as state highways." The effect of this provision, as we understand it, was to introduce those roads at the time stated into the system of state highways established by the act of May 31, 1911, P. L. 468. Among the roads mentioned is the road now in question, designated therein as route No. 297.

Plaintiff contends that when the road was adopted as a state highway it became maintainable thereafter at the expense of the commonwealth, the county from that time being relieved of that burden. If there were nothing more in the act than the provision adopting the road into the system of state highways established by the act of 1911, the contention might have weight, but the act also provides that the roads therein adopted "shall be constructed and maintained at the sole expense of the commonwealth under the provisions of present or future laws governing main state highways." The "present law" referred to evidently was the act of 1911, which established the

state highway department and the system of state highways. It is thus expressly directed that the roads adopted into the system of state highways by the act of July 22, 1913, are to be governed as to their construction and maintenance at the expense of the commonwealth by the provisions of the act of 1911 relating to the construction and maintenance of the roads by the commonwealth belonging to the system under that act. The act of 1911, in § 5 thereof, provides: "The highways designated in this act, as state highways, shall be taken over by the state highway department from the several counties or townships of the state, and when so taken over shall thereafter be constructed, improved and maintained by the state highway department at the expense of the commonwealth. Said highways shall be taken over, in whole or in part from time to time, as circumstances and conditions will permit. . . . The state highway commissioner shall, before taking over any highway under the provisions of this act, give notice in writing to the proper officers of the county or township in which said highway shall lie of his intention so to do, and of the date when the state highway department will assume the maintenance and care thereof. The work of maintenance, repair, and construction of said state highways shall be commenced and carried on as equally and uniformly in the several counties as conditions will allow."

From these provisions it appears that the roads constituting the system of state highways under the act of 1911, were to be maintained at the expense of the commonwealth when the state highway department should take them over and assume their maintenance and care. It is quite clear, therefore, that as the roads under the act of 1911 did not become maintainable by the state highway department merely because of the fact that they belonged to the system of state highways, but only became so when they had been taken over by the department and their care and maintenance assumed, so the roads adopted into the system by the act of 1913 did not become maintainable by the department by the fact of their adoption into the system. They, too, only become maintainable by the commonwealth when taken over by the department and the expense of their care and maintenance assumed. The roads adopted by the act of 1913 are in the same position with respect to their care and maintenance by the commonwealth as those belonging to the system under the act of 1911. As the highway department has not assumed the maintenance of the

road in question, it follows that the highway commissioner is not responsible for its care or the commonwealth liable for the expense of its maintenance. When it has been taken over and its care and maintenance assumed by the highway department will Northampton county be relieved of the expense thereof?

Moreover, the work of constructing, maintaining, and repairing the roads which constitute the system of state highways at the expense of the commonwealth has been entrusted by law to the highway commissioner. He is required, in the performance of his duties, to exercise his judgment on the questions of the time of taking over a road and assuming the expense of its care, of the necessity for repairs and of the time for repairs, and on all other matters involved in the construction and proper maintenance of the highways. He cannot be interfered with nor can his action in anywise be controlled by the court, unless it clearly appears he has abused his discretion. This has not been shown in the present case. On the contrary, it appears he has made the apportionment and distribution of the funds provided for the maintenance and care of the highways, in the manner which the statute directs, that is, he has carried on the work equally and uniformly in the several counties of the state, as conditions allowed. We cannot find any circumstances existing which permitted or required him to take over, in whole or in part, the particular road complained of. The one circumstance of controlling influence which justified his refusal to assume the expense of its maintenance was the lack of funds to carry on the work.

For the reasons stated, judgment is directed to be entered in favor of the defendant and against the plaintiff, unless exceptions be filed within the time limited by law.

From Paul A. Kunkel, Esq., Harrisburg, Pa.

DeMany *v.* Wainer.

Slander — Capias ad satisfaciendum — Arrest — Discharge from arrest—Act of June 1, 1915, P. L. 704.

The act of June 1, 1915, P. L. 704, was intended to and does vest in the court the discretionary power to discharge, or remand for a period not exceeding sixty days from the date of commitment, persons arrested or held on process issued on a judgment obtained in a civil action; but such a person will not be discharged where he merely shows that he has filed a petition, given notice to creditors, produced testimony of his inability to pay the judgment, and that he had not secreted any property with intent to avoid the payment

of the judgment. The words "may discharge" as used in the act are permissive and not mandatory.

Petition and rule to show cause why defendant should not be discharged from imprisonment. C. P. No. 1, Philadelphia Co. Dec. T., 1914, No. 1766.

H. M. Miller, for rule; *L. T. Schlesinger,* contra.

PATTERSON, J., July 11, 1916.—This is a proceeding brought on behalf of the defendant to obtain his discharge from arrest on a capias ad satisfaciendum issued sur judgment on a verdict rendered in favor of the plaintiff and against the defendant in an action for slander.

The defendant relies upon certain conditions of the act of June 1, 1915, P. L. 704. This act, which is entitled, "An act for the discharge of persons arrested or held on process issued on a judgment obtained in civil actions," consists of five sections:

Sections 1, 2, and 3 substantially relate to the procedure necessary to bring the matter before the court.

Section 5 repeals all inconsistent legislation.

Section 4 reads as follows: "Upon the hearing of the rule the petitioner shall be required to answer all questions put to him, and shall produce all books and papers required of him; and if it shall appear to the court that the petitioner is without means or property with which to pay the judgment, and that he has not secreted or assigned any of his property so as to avoid the payment of the judgment, the court may discharge him from arrest in said proceedings; but such discharge shall not in any way affect the judgment entered against him. Any person arrested or held in custody on or by virtue of any process issued on a judgment obtained in any civil action in this commonwealth shall be discharged at the expiration of sixty days from the date of the commitment, if compliance is had with all the requirements of this act and all other acts of assembly relating to insolvency."

It is contended by the defendant that if he complies with the provisions of the act so far as (a) filing a petition; (b) giving notice to other plaintiffs and other creditors; (c) producing testimony of his inability to pay the judgment; (d) producing testimony that he has not secreted any property with intent to avoid the payment of the judgment, he is, ipso facto, entitled to a discharge, and a failure on the part of the court to discharge a defendant under such circumstances "would

be tantamount to an abuse of legal discretion. . . . The word 'may' should be construed as 'shall.'"

As used in statutes, in its ordinary sense, the word "may," is permissive and not mandatory.

We are of opinion that the act of June 1, 1915, P. L. 704, was intended to, and does, vest in the court the discretionary power to discharge or remand for a period not exceeding sixty days from the date of commitment persons arrested or held on process issued on a judgment obtained in a civil action.

The only question before the court at the present time is whether or not the petitioner should be discharged from arrest in view of the fact that he has (a) filed a petition; (b) given notice; (c) produced testimony of his inability to pay the judgment; (d) produced testimony that he has not secreted any property with intent to avoid the payment of the judgment.

We do not think the compliance with these conditions is sufficient, in itself, to warrant his discharge.

The rule is, therefore, discharged, and the petitioner is required to surrender himself within ten days from the filing of this opinion.

Hoffman v. Marker.

Judgment—Satisfaction by court—Dispute as to settlement—Act of March 14, 1876, P. L. 7.

An order of court directing the prothonotary to mark a judgment satisfied, as provided by the act of March 14, 1876, P. L. 7, will not be made where there is any dispute about the fact of settlement.

A plaintiff who accepts in full payment of a judgment cash and a note aggregating less than the full amount of the judgment, is estopped from subsequently claiming the balance.

Petition and rule for entry of satisfaction of judgment. C. P. Delaware Co. June T., 1915, No. 413.

J. DeHaven Ledward and *Jos. H. Hinkson,* for rule.
E. A. Howell, contra.

BROOMALL, J., Oct. 20, 1916.—This judgment was entered on a judgment note, with warrant of attorney, dated Sept. 1, 1915, payable in one day, for $650.

The act of 1876 refers only to a clear case of a paid judgment. If there is any dispute between the parties as to the fact of payment, the act has no application, but in that case the defendant must resort to the remedy of an application to

have the judgment opened and a trial by jury to resolve the disputed facts.

The testimony offered by the defendant tends to show that being indebted to the plaintiff in the sum of $700, for which the plaintiff had judgments of record, and the defendant being about to obtain a loan on mortgage out of which the plaintiff and others were to be paid and plaintiff's judgments satisfied of record, the plaintiff and defendant agreed that the plaintiff would accept $400 in cash and a note for $200 in full payment of the $700 debt. The judgment in this case of $650 was given by the defendant to the plaintiff to secure the above $200 note, as well as another note for $450 given by the defendant to the plaintiff, and it appears that these two notes have been fully paid.

An answer was filed by the plaintiff denying that the judgment was given for the two notes alone, and alleging that the judgment was given on account of a debt of $750 made up by charging the defendant with his debt of $700 and crediting him with $400 cash paid and charging him with the $450 note. At the hearing upon this rule, the plaintiff testified, and therefore his answer must be interpreted by his testimony. He testified that a short time before the note under consideration was given, the defendant proposed to him to pay $600 cash in full settlement of his $700 debt, which he agreed to accept. Afterwards when they met to settle, and when the plaintiff learned that he was not to get $600 in cash, but instead thereof he was to get $400 in cash and a promissory note for $200 dollars, he said to the defendant, that that was not the understanding, and that the defendant said, well it is all right. The plaintiff said to the defendant this does not cover full, and the defendant said, you agreed upon taking $600 for the $700. The plaintiff then accepted the cash $400 and a note for $200. At this stage, the plaintiff's testimony must be considered as verity, but taking it as literally true, the inference is irresistible that the plaintiff accepted the $400 cash and $200 note in full settlement of the $700 claim, and a jury would not be permitted to draw any other inference. When the plaintiff knew that the defendant was paying $400 cash and a note for $200 as a substitute for $600 cash under the agreement, he could not entertain an undisclosed purpose to retain a claim for the remaining $100 on the ground that he was not getting the $600 in cash. The defendant was making the payment in full, and the plaintiff knew he was making payment in full, and the plaintiff accepted the payment and satisfied the judg-

ments, which he held as security for his $700 claim, and accepted a new judgment for the $200 plus his indorsement of defendant's note for $450.

We are, therefore, satisfied that said judgment has been fully paid, and we direct the prothonotary to mark it satisfied of record, and that the plaintiff pay all costs incurred in the premises.

Orzel *v.* Cominsky.

Practice (C. P.) — Capias ad respondendum — Bail — Discharge on common bail.

The entry of bail after an arrest on a capias ad respondendum does not waive the right to a rule to be discharged on common bail.

On a capias ad respondendum, bail is demandable where the affidavit to hold to bail shows a violent-personal battery and injury.

The fact that the defendant in a capias ad respondendum had been previously arrested by the commonwealth for the same alleged wrong, and had given bail, will not relieve him from giving bail in the capias proceedings.

Rule on plaintiff to show cause of action, and why defendant should not be discharged on common bail. C. P. Delaware Co.

Howard E. Hannum, for rule.
W. C. Alexander and *F. B. Rhodes,* contra.

BROOMALL, J., Sept. 18, 1916.—The writ in this case is a capias ad respondendum under which the defendant was arrested. The bail demanded was $750, which was specially allowed by a judge. The defendant gave bail in the sum demanded, and he was discharged from custody. He now takes this rule to show cause of action and why he should not be discharged on common bail.

The entry of bail by the defendant does not waive the right to resort to this rule; Desuian *v.* Zefcak, 22 Pa. C. C. 77; Morrison *v.* Gardner, 15 Phila. 175 [s. c. 39 Legal Intelligencer 22]. It was done in Becker *v.* Goldchild, 9 Pa. Super. Ct. 50. Under the old practice, prior to the passage of the act of June 13, 1836, P. L. 572, Stewart's Purdon, Vol. I, page 246, et seq., a defendant arrested on a capias either gave bail to the sheriff for his appearance, or gave bail to the action. Troubat & Haly's Practice, Vol. I, Part I, page 312. Logically when the defendant had the right either to give bond for his

appearance, or bail to the action, the giving of bail to the action would be a waiver of objections to the action. But this is changed by the act of 1836, which prescribes the only bail to be given is bail to the action. Hence bail to the action being given under compulsion to avoid imprisonment is not to be taken as a waiver of the right to object to the action, or to the liability to arrest, or to the right to hold to bail, or the amount thereof.

The affidavit in this case shows a violent personal injury, and avers damage in the specific amount of $5,000. It sufficiently shows a cause of action entitling the plaintiff to demand bail. It is true that there is a general rule that in actions of trespass, bail is not demandable, because there is no standard by which the damages can be measured. Roberts' Digest, page 87; Carroll *v.* Simons, 27 Pa. C. C. 29. One of the exceptions to this rule is where there has been a violent battery; Moll *v.* Witmer, 11 W. N. C. 498; in which the plaintiff may sometimes swear to damages to a certain amount, and it may be evident from a view of the wounds that considerable damage must have been sustained. In matters of mere tort, bail is not of course, but may be directed by the special order of the judge, or of the whole court. Duffield *v.* Smith, 6 Binney 302. The affidavit here shows a violent battery, and avers a damage of $5,000, and bail was specially allowed by a judge in the sum of $750. The cause of action here is trespass. Under our rule of court, page 20, no bail can be required in actions of trespass vie et armis without an affidavit of the cause of action. Fotterall *v.* Miller, 1 Del. Co. Reps. 286. Nor in such case can bail be demanded over $500 without an allowance of the court or judge.

The defendant objects that he had been previously arrested by the commonwealth for the same alleged wrong, and had given bail for his appearance therein, and that to hold him to bail in this case would be a double arrest and vexatious. Troubat & Haly's Practice, Vol. I, Part I, page 295. But however this might be, if the same person has by process in his own name caused a second arrest, and even then the decision is in the sound discretion of the court, Robinett *v.* Pollard, 2 Miles, 99; Butterworth *v.* White, 2 Miles, 141, yet in this case the former arrest was by the commonwealth for a public wrong, while this arrest was by the plaintiff for a private wrong. We see no such oppression or abuse of process as entitles the defendant to complain of vexation. We therefore discharge defendant's rule.

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By Albert B. Weimer, Esq.

Ex. L. M.
9/4/17